

Law & Courts

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



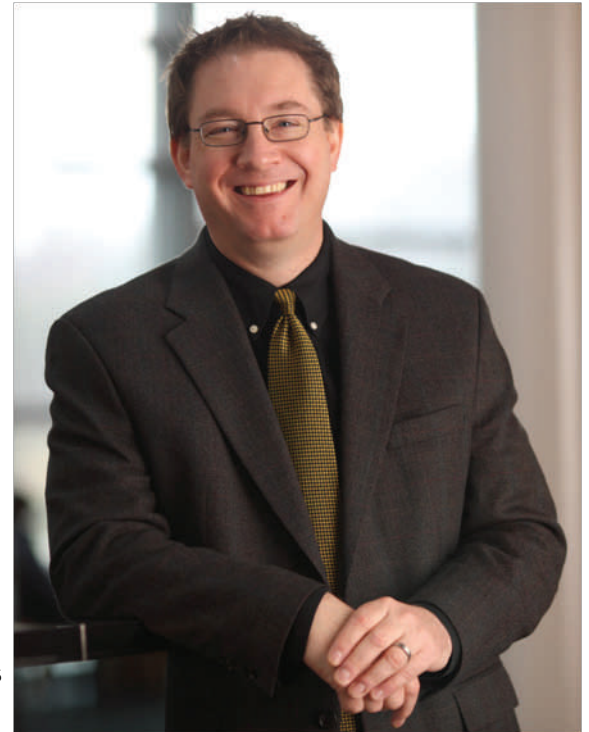
A Letter from the Section Chair: Journals and Publishing On (And In) Law and Courts

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In the last issue of this *Newsletter*, Chair-Elect Wendy Martinek described the results of a recent (July/August 2011) survey of more than 250 members of the APSA's Law and Courts section. That survey asked questions about a number of potentially interesting aspects of our section and our subfield. Following up on my announcement in the previous issue of the *Newsletter* regarding the creation of the *Journal of Law and Courts*, I thought I'd take this opportunity to unpack the data around one of those: publishing.



Inside this issue:

Christopher Zorn, Nancy Maveety, Michael A. Bailey, Clarissa Dias, Michael Fix, Ryan J. Owens, Justin Wedeking, Laura J. Hatcher, Logan Strother, Randolph Burnside, and Books to Watch For

The question of publishing on law and courts raises two competing narratives. On the one hand, my sense is that scholars of law and courts generally resemble the larger discipline: There are "article people" and "book people" (as well as "article departments" and "book departments"), with the difference being more a matter of degree than kind; the former are more likely to be empirical in their outlook and quantitative in their approach, while the latter will consist of larger numbers of normative and critical scholars, and/or individuals engaged in qualitative or mixed-method research; and there is at least a minimal consensus about what constitute the "top" journals and presses. In other words, law and courts "looks like" political science.

On the other hand, I (and I suspect many of you reading this) also have a strong sense that law and courts scholars are, as a rule, more likely to engage in research of a cross- or interdisciplinary nature than are many of our political science colleagues. The reasons for this vary, and might include the nature of the subject matter we study; the incentives to write for an interdisciplinary audience created by (e.g.) the NSF's Law and Social Science program, the Law and Society Association,

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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, Summer, and Fall. 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.

Law and Courts Newsletter

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and the host of other "Law Ands..."; or our tendency to hold professional roles and appointments that traverse disciplinary boundaries. Whatever the reasons, it is clear as an empirical matter that political scientists who focus on law and courts are often found doing work that crosses – and in some cases breaks down – disciplinary boundaries.

I call these two views competing because they point in different directions regarding our choices about the best modes and venues in which to publish our research. To the extent that we are relatively "mainstream," we'd expect to find a high proportion of us working to publish our work in top disciplinary journals and presses (the *American Political Science Review*, say, or Cambridge University Press). But if instead we're more geared toward interdisciplinary work, that fact ought to be reflected in our choices regarding publication outlets. Of course, given the bigness of the law and courts tent, the answer could very well be "we're both," with people arrayed across the disciplinary/interdisciplinary spectrum.

The recent survey of Law and Courts Section members asked a series of questions regarding publishing; here, I focus mostly on those regarding journals. The survey asked, "In your view, what are the top five academic journals for law-and-courts-related scholarship?" In her report in the last issue, Wendy Martinek noted that "63 respondents ranked *American Political Science Review* first and an additional 7 ranked it second (i.e., 70 ranked it either first or second)," while "56 respondents ranked *Law & Society Review* first and an additional 13 ranked it second (i.e., 69 ranked it either first or second)." There was a substantial drop between these two journals and the next tier; 52 individuals has the *American Journal of Political Science* first or second (though only 11 had it in the #1 spot), while the numbers for *Law and Social Inquiry* and the *Journal of Politics* were 29 and 25, respectively. While these results are informative, they leave a number of questions unanswered, and beg a few as well.

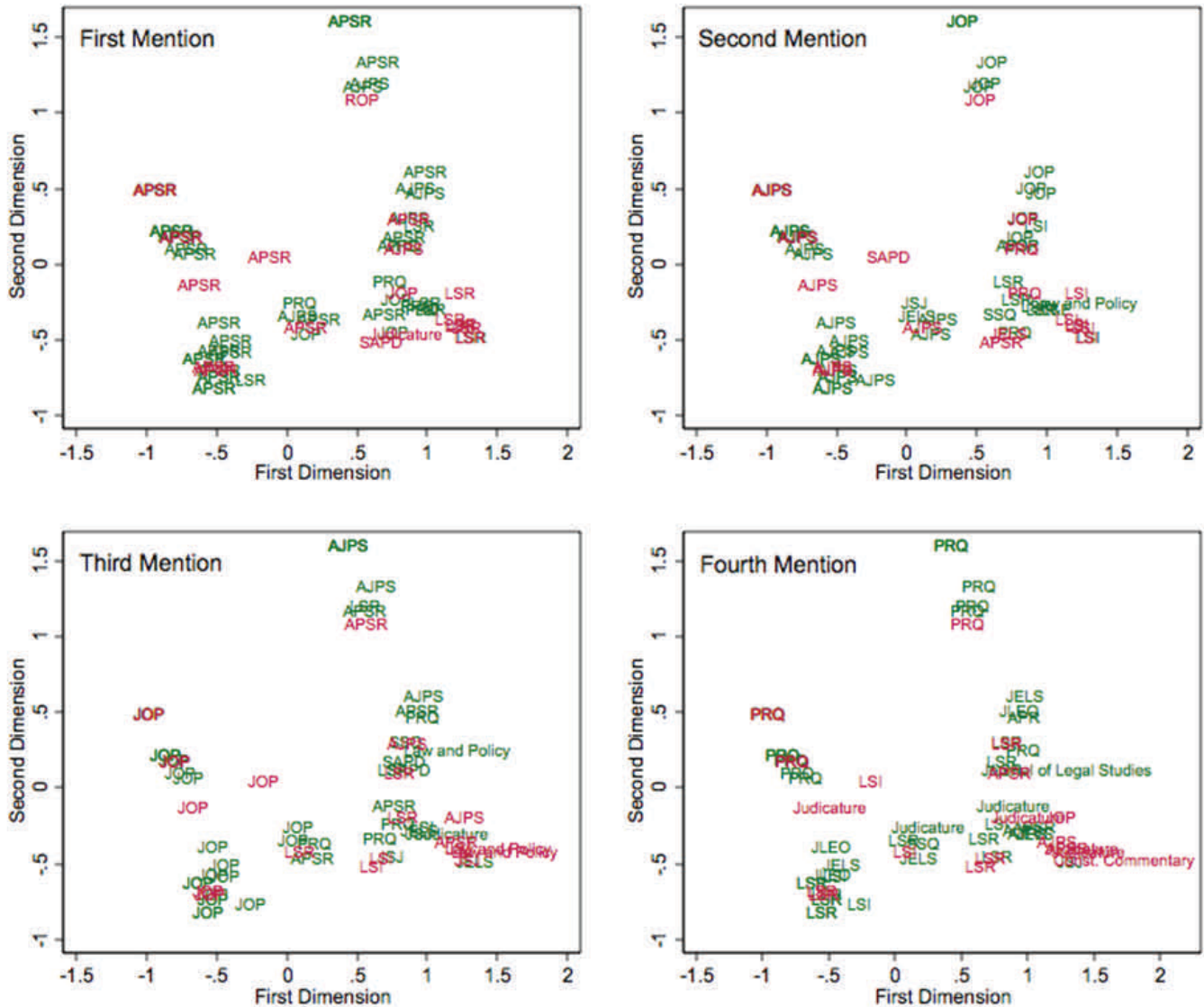
To investigate this further, I considered 24 journals, each of which had more than a handful of appearances on the "Top Five" lists of the survey respondents.¹ I used multidimensional scaling to place each survey respondent in a two-dimensional space on the basis of his or her five responses to the "top five journals" question.² The position of each survey respondent is indicated in the plots in Figure 1. The positions in the space reflect how and to what extent respondents who answered the "top five" question in various ways are similar to other respondents with more or less similar "top five" lists. The locations in the four subplots are identical for each respondent; they differ only by the labels, which indicate the first, second, third, or fourth journal mentioned by each respondent.

(Continued on page 5)

¹ The journals were the APSR, the *American Journal of Political Science*, the *Journal of Politics*, *Law and Society Review*, *Political Research Quarterly*, *American Politics Research*, *Law and Social Inquiry*, *Judicature*, the *Journal of Law, Economics and Organization*, the *Journal of Empirical Legal Studies*, the *Review of Politics*, *Studies in American Political Development*, the *American Journal of Comparative Law*, *Political Science Quarterly*, the *American Journal of International Law*, the *Journal of Legal Studies*, the *Journal of Law and Society*, *Justice System Journal*, *Law and Policy*, *Social Science Quarterly*, the *Journal of Law and Economics*, *Polity*, *Constitutional Commentary*, and *Law and Philosophy*.

² If you want to know all the details of how I did this, send me an e-mail. But they're not all that interesting.

Figure 1: MDS Positions



The combinations of locations and journals named suggest several things. First, there is generally widespread (in the sense of locationally diverse) mention of the *APSR* as a "top" journal. Moreover, the biggest distinction between the two dimensions is between those listing the *APSR* first, the *AJPS* second, and the *JOP* third, and those who reversed the order in which they mentioned the latter two.

At the same time, the plot shows a distinctive region – indicated by high scores on dimension one, and low scores on dimension two – consisting of more interdisciplinary / "law and society" scholars. These respondents were likely to name the *Law and Society Review* first, *Law and Social Inquiry* second, and a range of other journals (including, most commonly, *Law and Policy* and *Judicature*) third and fourth. In other words, respondents in that region were qualitatively different from the rest in terms of the journals they named.

Of perhaps even greater interest are the correlates of these positions, or the lack thereof. Somewhat surprisingly, respondents' positions on neither dimension correlate significantly with their rank, date of Ph.D., race, or gender,

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or with working in an institution with a graduate program. The sole relevant predictor – and only a moderately important one at that – was the respondent's answer to the question "How would you characterize the primary publication outlet for your work?" Those respondents who answered "Books" were significantly more likely to have higher scores on dimension one and lower scores on dimension two than those who did not. ("Book" respondents are labeled in red in Figure 1, while others appear in green.) This pattern is consistent with a greater focus on books by those individuals who also tend to emphasize publication in interdisciplinary journals. Again, we might speculate on a number of reasons for this pattern; it is likely, for example, that academic presses are more hospitable to work that crosses disciplinary lines than are the more discipline-centric association journals.

More generally, while there are clearly both discipline-centric and interdisciplinary foci in publishing among law and courts scholars, there is little polarization; instead, we find students of law and courts arrayed across the range of positions between the two poles. Moreover, the differences between the two camps cut across institutional, generational, and demographic lines. This is probably not a surprising story, but it should perhaps be a comforting one. So long as scholars of all ages, ranks, and institutional affiliations are engaged in the whole range of work our section does and values, our intellectual future is likely to remain bright.

Studying Courts and Politics: The Beverly Blair Cook Collection of Courthouse Postcards

Nancy Maveety
Tulane University

Writing for a 2005 volume on the judicial branch, Lynn Mather noted in her chapter "Courts in American Popular Culture," that court buildings "reflect society's expectations and ideals and, once constructed, influence the role that courts play in society." (Mather 2005, 237) The attention of law and society scholars to 'law in action' has included attention to the material culture component of courts in American life. (Brigham 2009) Scholars who examine popular images and artifacts of law and courts, including fictional representations in film and television, would suggest that popular culture and law influence one another (Asimow and Mader 2004, 8-9; see also Bergman and Asimow 2006), and that depictions of judges, legal processes and court spaces profoundly impact and reflect what citizens think about the judiciary. Resnik and Curtis's recent and copiously illustrated study of the function of political iconography in the transnational and (trans)historical relationship between courts and democracy affirms the material-ideational connection in the "evolution and changing configurations of places designated courts." (Resnik and Curtis 2011, xv)

Yet "the prestige that a grand [judicial] edifice could bring to a county seat" (Mather 2005, 238) in nineteenth and twentieth century America also suggests that the "*purpose-built structures* that came to be called courthouses" (Resnik and Curtis 2011, xvi [emphasis added]) would have a celebratory if not a touristic purpose in American culture—what Mather labels "the cultural promotion of courthouse architecture" (Mather 2005, 238) and what finds one material expression in the phenomenon of courthouse postcards. While these have been the target of collectors of Americana and the subject of analysis by American Studies scholars of visual cultural artifacts (see e.g. DeBres and Sowers 2009), courthouse postcards and law and courts scholars infrequently intersect.

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Despite the tendency of judicial scholars to focus their attention on decisional and judicial process types of data, there have been some for whom images of courts as artifacts in themselves have been important to contemplate, scrutinize, and collect. (See e.g. Perry 2001; see also Douzinas and Nead 1999) One such scholar is the late Beverly Blair Cook (1927-2008), whose collection of some several hundred historic courthouse postcards makes up part of the Beverly Blair Cook Papers held by the Newcomb Archives of the Nadine Vorhoff Library of the Newcomb College Institute at Tulane University.

Law and courts scholar and "pioneer of judicial behavior" Beverly Blair Cook (Maveety 2003) was known for her work on women judges and her creative use of mixed methods in researching judicial decision making. (Epstein and Mather 2003; Epstein 1995; Mather 1994) But she was also an archivist of her time period, documenting with her collected papers a bibliography of the discipline of political science and a documentary record of the social history and social change in the U.S., particularly with respect to gender and the law. A less well-known part of the aforementioned accomplishments was Prof. Cook's collection of historic courthouse postcards and assembled journal and newspaper articles on the history of the design of the American courthouse. While analysis of material culture is not prevalent in most fields of Political Science,¹ law and courts scholar John Brigham writes persuasively about "the political agency of architecture," noting that the "state apparatus" identified by New Institutionalism includes the symbolic of politics. (Brigham n.d.) As with so many aspects of her academic career, Cook was ahead of her time in appreciating the link between the physical space, the symbolic meaning, and the functional performance of the courthouse and courtroom in U.S. law and politics. Her courthouse postcard collection, which includes items dating back to some of the earliest such cards produced in the U.S., offers a window into this topic and into the engaging scholarship of one of the first and most important women in the field of judicial politics.

This note offers a brief and somewhat introductory exploration and assessment of the collection and its importance. I begin with a history of the origin of Cook's interest in the courthouse, connecting it to themes in her scholarship in the study of law and courts. I then summarize the conference paper version of my analysis of this subject,² which provided a design history of the American courthouse; here, I briefly recount how these style changes enacted the functions of the county and federal courthouses in the political space. My discussion then turns to an examination of the county courthouse as postcard subject and object, with sample illustrations presented that represent the depth, breadth, special concerns, and occasional lively humor of the Cook collection. I conclude, as did the conference paper version, with a reflection as to the value of eclecticism in research on law and courts and a proposal for future uses of the Cook Papers collection.

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¹ "The Politics of the Courthouse: the Cook Collection of Courthouse Postcards," presented to the annual meeting of the Southern Political Science Association, New Orleans, LA, Jan. 12-14, 2012. The paper was part of a thematic panel on The Politics of the Courthouse, that was co-sponsored by the SPSA and the Newcomb College Institute.

² The original questionnaires and tabulations of findings from them can be found in the Cook Papers; several publications by Cook resulted from the data she gathered. See the bibliographies provided in Mather (1994) and Epstein (1995) and Epstein and Mather (2003).

The Courthouse as a Scholarly “Hobby”

Cook’s interest in the courthouse as a space developed out of two lines of her judicial research. The first was her enduring interest in state courts and state political cultures as the latter affected aspects of the judicial process. Her first book *The Judicial Process in California* in 1967 set out themes she would continue to explore in her later work, including attention to state trial and appellate courts as part of both their political and judicial systems. It was in this book that she first engaged in narratively depicting state courts, for California has a rich and varied set of county and federal courthouses around the state that match its historical significance and cultural complexity in its progression from territory to state in the union. When her academic career occasioned her relocation from California to the University of Wisconsin-Milwaukee, Cook made the most of this opportunity and shifted her attention to urban courts and the trial judges of her new state of residence. At the time in her field of Political Science, such attention to courts below the U.S. Supreme Court was a radical explosion of the ‘High Court bias’ that defined and delimited much “public law” scholarship, as it was then termed.

From the outset of her academic studies, Cook had been interested in the socialization of judges in the U.S., as an aspect of the impact of political and legal culture on judicial behavior. (Mather 1994, 77) It was from this concern that her intellectual attention to the selection of women judges developed. However, it is equally clear that as a woman in the male-dominated university professoriate, and as a political scientist working during a time of great social change with respect to the role of women, her attention to women and the law had a personal and a political dimension as well. In any case, her study of women on the state and federal bench was the second line of her research with a courthouse connection—although here we must speculate a bit, and reconstruct from her archived papers the chain of events that led to the collection of courthouse postcards. But in studying women judges and their paths to selection, Cook amassed in the late 1970s a demographic and ethnographic database of women legal professionals, counting them and querying them about their attitudes and experiences.³ This work necessitated regional investigations and some traveling to far-flung judicial sites. (Epstein and Mather 2003, 181) It was in the course of meeting and corresponding with the coterie of women judges during the late 1970s that Cook became more directly exposed to the range of courthouse settings in which state and local (and federal) judges were working.⁴ Over the course of her continuing research on women legal professionals, she encountered some who shared her own personal interest in historical preservation and the cultural and political history of the American West.⁵ Like the women judges she knew, Cook applied this to a focus on architectural preservation and historical analysis of judicial places: courthouses.

³ This research was also foundational in Cook’s participation to help form the first women’s legal professional association, the National Association of Women Judges, which was established in 1979. See Epstein and Mather (2003), pp. 184-5.

⁴ See, for example, the *California Lawyer* clipping on the efforts of Judge Dorothy Nelson of California. Cook Papers, Box 54, folder 3.

⁵ Cook Papers, Box 54, folder 3. *Pacesetter* was published by the Printing Production Shop of Telemation, Inc., a television and videotaping technology company founded in 1959 that became a division of Bell and Howell in 1977, before the entire subsidiary was acquired by a German multinational corporation. That this issue, Vol. 6, No. 4, and its cover came to be in Cook’s possession points so tellingly to her attention to unusual if not unconventional sources in her law and courts research.

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As a professional woman with a family at a time when traditional gender-role expectations allowed little latitude, Cook learned to take advantage of serendipitous research opportunities. As her collection of postcards and courthouse article clippings reveal, family summer vacations with her husband and children were often occasions to visit interesting courthouse sites as part of touring. Original Polaroids of county courthouses and other regional governmental spaces—some with Bev Cook pictured in town squares or on courthouse steps—are interspersed among the printed cards catalogued by state that make up the collection. (See Image 6) Most photographs are labeled and dated, and some date into the 1990s, indicating that Cook's scholarly "hobby" was a sustained one.

Regarding her interest in the subject of courthouse design, it is also worth noting that Cook's entry into the academic profession coincided with the 'courthouse of the future' movement that was aligning itself with the social progressivism as well as the Modernist architectural innovation of the 1960s. This design revolution movement, however admirable, also entailed a rejection and often a demolition of the historic and at times dilapidated courthouse buildings of the nineteenth and early twentieth centuries; the historical preservationist movement in urban and national politics was still decades away. When the Bicentennial spurred celebration of American cultural and political histories, appreciation for restoring historic buildings and preserving America's civic past dovetailed with official commemorations. Cook's postcard collection, which includes many stationery items issued as part of Bicentennial honorary publications, reflects and endorses these trends. Her collection of clippings about courthouse design—historical society notices, newspaper articles on renovations, and scholarly treatments—includes one very telling artifact: the glossy cover of a telecommunications trade periodical from 1973,⁶ with an image of one of the 'courtrooms of the future.' (See Image 1) Not only is the proposed courtroom typically circular (and thus non-hierarchical) in design, but the presiding judge is unusually (but welcomingly) female.

Cook kept this image item, no doubt, because it exemplified all that was best about the ongoing courtroom design revolution of the time: the egalitarian and participatory objectives for the legal process that the re-configured courtrooms of the 1960s and early 1970s purported to enshrine. But existing among Cook's historic courthouse postcards, and as part of the other materials she assembled over her lifetime that document her interest in the politics of the American courthouse, this image of the "modern" aspiration for courts is a potent reminder of Cook's more overarching concern as a citizen and as a scholar: the connection between spaces and politics in general,⁷ and



Image 1: Courtroom of the Future

⁶ With respect to the factor of space, it is not accidental, I do not think, that one of the important variables that Cook associated with a gender-diverse bench was court size, *i.e.* the number of judges serving and/or presiding together on a multi-member court or within a trial court jurisdiction.

⁷ The phrase comes from a 1972 *Judicature* piece appropriately titled "Space Management." Cook Papers, Box 54, folder 3.

the changing relationship between legal spaces and political culture over time.

The American Courthouse: A Design History

A book notice leaflet on *The Courthouse: A Photographic Document* (1978), saved by Cook in her bibliographic file “Court Architecture,” called the courthouse “the most significant single building widely distributed across the country.” (Cook Papers Box 54, folder 3) Its emblematic status was echoed in the exhibit brochure for “Houses of Justice: County Court Architecture Across America,” a Bicentennial- period exhibit of courthouse photographs circulated by the Library of Congress and another, similar item saved by Cook in the same bibliographic file. “Over the last two hundred years,” this brochure solemnly intoned, “the scale, form, and materials of these structures have reflected the prosperity, aspirations, and geographic and cultural diversity of the nation’s people.” As a material artifact of political culture, then, the courthouse is (1) prevalent and thus its designs can be compared temporally and across territorial axes, as well as (2) rich in content that embodies current practices *and* indicates aspirational goals.

To unpack the meaning of the courthouse, and to understand Cook’s interest in its depiction in postcards, we must be mindful of both changing aesthetic fashions as architectural taste *per se* as well as understand political-cultural and political economy arguments about how and why courthouse designs change over the course of American history. Aesthetic preferences are of course not divorced from political and economic forces (Auslander 2009), but architectural styles do have clear temporal moments or periods of use and resonance with the specific functional needs and decorative desires of the time.

Having said this, one should note that the earliest courthouses in America were taverns and public houses, which served the purposes of a non-professionalized bar and its processes. (McNamara 2004) Even in later historical periods, such as the late-nineteenth century on the frontier West, courthouses housed in rustic log cabin structures devoted to mixed commercial and civic use were not uncommon. (Robinson 1983, 20-1) But the more typical early American courthouse—the courthouse of the eighteenth century colonial period—was a town hall, built in a relatively unadorned “strongbox” building style that reflected a plainness borne of material frugality more than anything else, although the stolidity also befitted the buildings’ first role as county archives. (Hitchcock and Seale in Pare 1978, 166-7) It is with the courthouses constructed in the Republican era of the late eighteenth century through the early nineteenth century that form and function and an extravagant material symbolism fully unite and develop. This is the historical period that coincides with the aesthetics of Federal or Georgian style architecture and design. Classically-inspired and symmetrical in proportion, constructed from wood and red brick, and with architectural details such as cupola towers that marked the buildings as official structures, these courthouses were purpose-built to house the judicial office and related documentary auxiliaries. Still, this aesthetic was neither as prominent in scale nor as prevalent in use as the neo-Classical or Greek Revival style that would dominate through the mid-nineteenth century and antebellum period. Neo-Classical or Greek Revival was a much more monumental style that included more literal allusions to Greek and Roman ceremonial buildings, using stone, marble, fluted columns, capitals, elaborate domes, and classical decorations such as friezes. Neo-classical Greek Revival became the design of choice for a federal governmental and state-level building boom in the formative decades of the American republic. A 1976 clipping from *Judicature* in Cook’s court architecture file encapsulates the style’s aspirational appeal and legitimizing message: such Grecian courthouse buildings “express the continuity of the classical ideals of democracy and rule of law now being realized anew by the American republic...to signal to the world the greatness to which it aspired.”

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The symbolism redolent in neo-classical Greek Revivalism meant that this courthouse design would never really be out of fashion (as the Twentieth Century U.S. Supreme Court building aptly attests). Rather, the purity of its aesthetic form would be compromised—or complicated—by the add-on of succeeding waves of taste. From the post-Civil War era through the late nineteenth century and first decade of the twentieth century, various styles were simultaneously in use, as both architects and lawyers clambered and co-conspired to establish and ensconce their respective professions as “respected,” “professions” and, finally, specialized, elite and valued. (McNamara 2004, 82-3) Such a political economy or sociology of the professions perspective need not obscure the plethora of fashionable tastes that messily battled for aesthetic preeminence—from Beaux-Arts Classicism and Second Empire grandeur to Gothic Revival and Italianate romanticism to the heavy opulence of High Victorianism. Courthouses in these styles signaled or reflected several things: the power and prestige of local elites, professional and commercial, to display their wealth and cosmopolitanism in civic building projects (Durrill 2002), the desire to create a grand public space as a testimony to the importance of the court in local government or the county seat in the state economy (Robinson 1983, 79-80), or an effort to expand and remodel the existing courthouse in an “à la mode” way (Davidson in Flanders 2006, 175). The first two objectives frequently coincided with razing the existing and more modest courthouse building; the third, with producing a composite and, at times, unbalanced and unwieldy structure that eccentrically mixed architectural styles and motifs with only partial adaptation to new functional needs. Still, these late nineteenth and turn-of-the-century courthouses were a mark of distinction for the court and the community; many that remain standing (and some that stand no longer) are prevalent among courthouse postcard subjects, in Cook’s collection and in general.

The early decades of the twentieth century produced new architectural tastes more sympathetic and synchronic with the modern age of industry and speed, technology and the machine. This is of course the sleek and geometric style of Art Deco, which intermingled in American civic architecture with the subgenre of Nativism and the celebration of American regional and cultural designs and devices. Art Deco-era judicial structures are almost to a building coincident with or the result of the second great building boom for federal courthouses: the Depression-era, WPA-sponsored public works constructed to stimulate and revitalize the national economy by subsidizing domestic industries and workers, including artists. Counties and states that partook of these funds built new public spaces and reconfigured others; the growing urban character of some county seats led to many “skyscraper courthouse” efforts. These and other Art Deco edifices, as visual evidence of civic self-improvement and economic development, were popular postcard subjects of the period. (Jakle 2003)

By midcentury, Modernism and its severe brand of functionalism ushered in an aesthetic design revolution and a philosophical sea change with respect to the courthouse. Multi-purpose buildings were in, as was design efficiency and economy, sparseness devoid of ornament, and courthouses that were nondescript and even sterile-looking office building complexes. Although Modernist court buildings looked different than their purpose-built predecessors, the mixture of administrative and adjudicative space was a phenomenon that harkened back to the earliest judicial structures in the U.S. (Mather and Peel 2012) What was new was the way that the modern buildings expressed this mix of functions. Modernism as an architectural style was an intellectual if not cerebral response to preceding decades but not, in fact, a spatially or “semiotic-ally” functional one. Avidly utilitarian, Modernist courthouses—“vast, overscaled objects, divorced from their surroundings”—were criticized almost from the time of their erection as “not providing sufficient intellectual expression of the important and complex role of the courts.” The dreary bureaucratic anomie of the modern courthouse’s public spaces (hallways, jurors’ lounges) “often bear an uncomfortable similarity to those in a motor vehicle department or office building”—as a 1976 *Judicature* clipping that Cook saved lamented. (Cook Papers, Box 54, folder 4) Cook’s courthouse clippings from the 1970’s and

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early 1980's pinpointed the era's fascination with the science of space management and absorption in the "rehabilitation potential" of existing historic courthouses,⁸ while also documenting the mounting dismay that American courthouses were neither suitable nor attractive facilities for judicial services.

Courthouse Postcards as Idealized Representations of American Political Development

Not surprisingly, the vast majority of American courthouse postcards—including those in the Cook collection—are of traditionally-adorned public buildings. The opening chapter to the postcard-book essay *Historic Courthouses of the State of New York* offers an explanation, observing that "in the first half of the twentieth century, courthouses and postcards had a sort of heyday," one that has transcended into "evok[ing] a sort of nostalgia." (Rosenblatt 2006, vi) Postcards of courthouses, like place "view cards" in general, are most significant as idealized versions of something—blemishless representational images, or artifacts signifying commemorated status. How the postcard comes to serve as the memento of choice is tied to its story as a repository of cultural knowledge, a repository of evolving ideas about place, culture, and identity, and is a topic I address at length elsewhere. (Maveety 2012) When, how, and why *courthouses* become the subject of the American picture postcard industry is a necessary prelude to an analysis of how Cook's courthouse postcards exemplify the genre and constitute an impressive aggregation of its regional range and various types.

Most studies date the inauguration of the American "picture postcard" with the World's Columbian Exposition held in Chicago in 1893. Quickly, the picture postcard view or "view card" type gained currency, slaking as well as piquing the public appetite for seeing new vistas and sharing hometown sights. The creation of the touristic and the home-town attraction had much in common, in that the picture postcard was the vehicle for both. Local sites of distinction—edifices that characterized or distinguished a place—were especially preferred as ways for communities to 'put themselves on the map.' County courthouses, and the prestige their decorative richness implied, were obvious subjects. The commercial prosperity of the community was often part of the frame, with the courthouse taking in the town square, the downtown, or other aspects of the business district. (See Image 2) And as idealized or paradigmatic representations of (the) place, "postcarding" conferred importance on them.⁹ (Van Laar 2010, 195)

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⁸ GT Photocrom, Arkansas.

⁹ For the obvious reasons that this period coincided with neither the time frame of Cook's active collecting nor that of American postcard production—although contemporary courthouses are still likely to find digital depiction, either on official courthouse websites or through the vehicle of email postcards or "e-cards" available through the latter. See Mather 2005, 238.

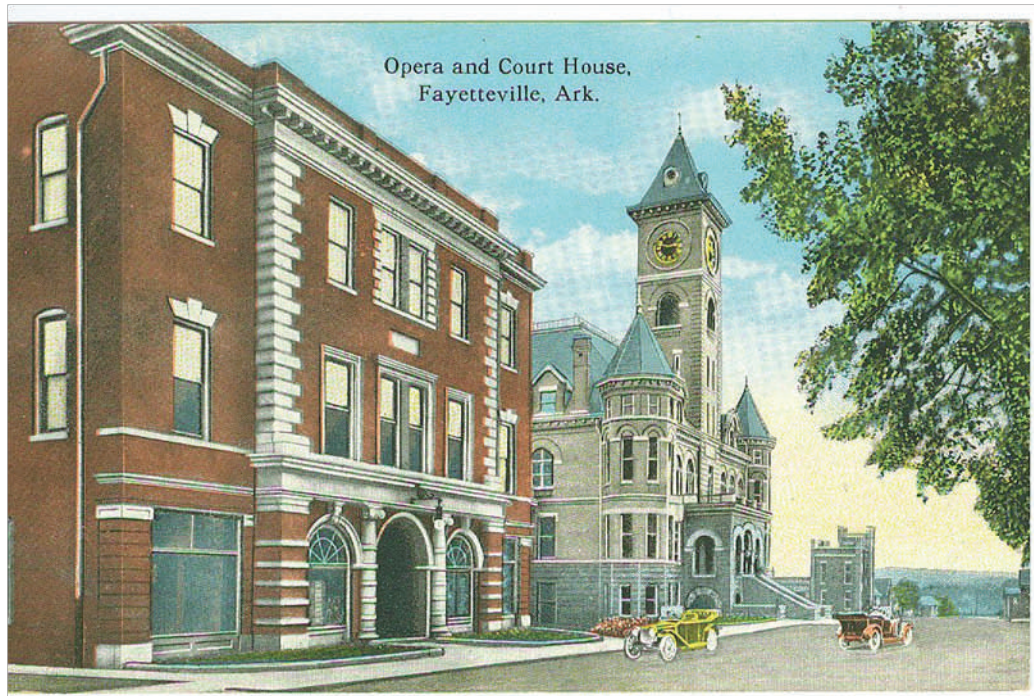


Image 2

From early on, the postcard was something saved as well as sent or exchanged in communication. (Jakle 2003, 27) Postcards as collection items have become an important part of collecting and preserving “Americana:” craft arts and other commonplace material expressions of American social history. Postcards are also frequently acquired and sorted by theme (see Schor 1992)—with courthouse postcards being a noted subcategory of publications detailing postcard collections. Cook’s courthouse postcard collection is neither as focused nor as comprehensive as some; it does not specialize, either on a single state’s courts (e.g. New York) or a single functional level or type of court and attempt to be exhaustive within that category. But it was clearly a collection project informed by scholarship on courthouse design and social history, courthouse design and practical efficiency concerns, and political Americana and the postcard. In addition to depicting state and county courts, Cook’s postcards include those of federal courthouses, post offices, city halls and state capitols, and a few other miscellaneous multi-purpose government buildings. Inventoried and catalogued in the summer of 2011, Cook’s postcards are currently undergoing digitalization and annotation with the aim of the entirety going “live” on the Newcomb Archives webpage in 2012-2013.

Although Cook clearly targeted county courthouses in acquiring her postcards, her collection is not limited to county-level court facilities; rather, she seemed more concerned to assemble all potentially relevant cards she came across. Her cards are organized by state. “Relevance” was, I think, determined both by the depicted building’s governmental and/or quasi-judicial function, or a depicted edifice’s resemblance to one of the dominant style-periods of state and federal courthouse construction. Thus, there is at least one courthouse or other building-view type of postcard from the District of Columbia and each of the fifty states except New Hampshire. The number of cards per state file vary; the deepest state inventories are California, Iowa, and Wisconsin, with thirty or more each.

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More typical are inventories of 5-10 per state, with a few far-flung or states less frequently visited by Cook—such as Hawaii or Maine and Idaho—including two or fewer. In terms of architectural styles, Nativism was a special interest of Cook's, no doubt reflecting her exposure to it during her residence in California. Cook also harbored a special fascination for old-new/then-and-now pairings of courthouse postcards, with these pairs juxtaposing an antique, decommissioned or demolished courthouse with its modern (and often Modern) replacement. There are no "Postmodern" courthouse postcards, representing late 1980's-early 1990's neo-historicist or other more contemporary "high art" design initiatives in courthouse construction.¹⁰ (See Brigham n.d.) Judging by the postmarks and other date indicators on the cards, Cook's collection spans the earliest decades of American postcard production from the first decade of the twentieth century, to recently-issued postcards that were probably generated from old file or stock photos of 'places of interest' within the state. As the heyday of postcards is long past—with antiquarian scholarship suggesting that the touristic view card postcard was in decline by the 1970's, and with contemporary printed postcards shifting in subject matter to aspects of commercial promotion for products and entertainment consumption (Willoughby 1992, 144; 149-51)—it stands to reason that the bulk of Cook's collection is no older than mid-century.

Whatever its value on "Antiques Roadshow," the collection does offer an intriguing look at both the variety of American courthouse designs and the historical variation in postcard types. The first postcard image, Image 2 presented above, is a classic, early twentieth century lithographic drawing-style of postcard image, rendered as a color print on the linen-type paper commonly used from 1930-1945. It is also a classic example of a 'courthouse-in-the-community' townscape scene; in this instance, depicting the opera and courthouse (on the right, with clock tower) of Fayetteville, Arkansas as equally stately next-door neighbors on the town square. (See Image 2) This type of picture postcard was succeeded by photographic print postcard images of landmark courthouses, in the Photochrome production period. The building view card of the Gilded Age, Romanesque-revival courthouse of Pierce County, in Tacoma, Washington, is an apt illustration—as well as being one of a pair of the old vs. new courthouse postcards that Cook assembled. (See Image 3)



Image 3: Distributed by Smith's Scenic Views, Tacoma, WA. Color by Kyle Smith.

As the caption on the back of this postcard reports, "this Monument [sic] to a by-gone era" was razed in 1959, and replaced by a Modern multi-purpose courthouse structure. The Ektachrome photographic postcard that commemorates/documents the latter is more starkly photo-realistic in style and somewhat less aggrandizing of its subject. (See Image 4) The Modern cubicle building is rendered as a less-than-arresting postcard object, lacking the air-brushed and colorized sentimentality applied to its predecessor.

¹⁰ For dating protocols, see North Carolina Postcard Collection, University of North Carolina Chapel Hill, http://www.lib.unc.edu/dc/nc_post/about.php.



Image 4: Published by Ellis Post Card Co., Arlington, WA. Ektachrome by Clifford B. Ellis.

Cook occasionally supplemented her postcard objects with personal photographs of special courthouses, particularly to capture needed then-and-now pairings. One such pair of courthouse images features Tillamook, Oregon's original frontier-era courthouse building and its Depression-era replacement. (See Images 5 and 6) The photographic print postcard image of the former indicates that the structure now houses the Pioneer Museum, and Cook's handwritten notes on the back of the card are all that reveal the strongbox-style structure as the county courthouse from 1906-1932.



Image 5: Anderson Scenic Postcards, Portland, OR 97223. Photo by Mel Anderson.

The 1932 WPA-built courthouse of Tillamook, and its charming Art Deco façade, is represented in Cook's collection by an original Polaroid she hand-labeled for her files.

Though the date of this photograph is unknown, it no doubt occurred during one of Cook's summer sojourns when family vacationing combined with law and courts fieldwork.

The final postcard image presented is the classic example of a touristic view card sold and sent across the U.S. during the Postwar age of mass automobile touring and motorways sight-seeing. It is a retouched photographic print of a scenic attraction in which the site visited looks so beautifully perfect as to be surreal. As a postcard in the Cook collection, it is significant for the inside joke its subject matter provides. The image is titled "Courthouse Rock and Jail Rock:" two red sandstone buttes in Nebraska given names in local lore to evoke the structures the rocks sculpturally resemble. (See Image 7)

That Cook added this landscape postcard to her "courthouse postcards" collection tells us much about her sense of humor, and her affinity for thinking outside of conventional categories—as a collector, and as a scholar. That she saw fit to notice courthouse postcards at all, and to assemble them as an aspect of the study of law and courts, enriches our understanding of the subject (the courthouse) and our appreciation of the object (the postcard).



Image 6

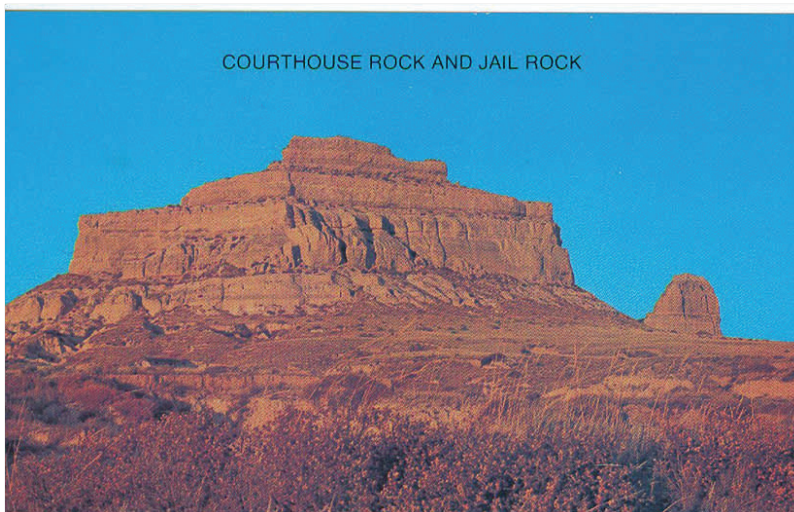


Image 7: Pospeshil Card Service, 1517 W. Second St., Sioux City, IA 51103.

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Conclusion: Law and Courts Research and the Courthouse Postcard

The “quotidian space” and nostalgic appeal of the postcard should not preclude its appreciation as “a radical new invention of the age of such familiar indices of modernization as mass transportation and communication, rising literacy, expanding tourism, [and] new mechanical means of reproduction.” (Schor 1992) Indeed, an interdisciplinary “postcard studies” has emerged as “a crucial part of a longer, more complex history of modernity.” (Mendelson and Prochaska 2010, xix) American courthouse postcards are clearly an important chapter in American political development, and their study tracks the forces of social and commercial modernization that shaped the American polity.

Cook herself appears never to have published on courthouse design questions or written about her collection of courthouse postcards. The subject was for her, it seems, an interesting “political science-y” aside or intellectual diversion into the popular culture of law and courts. Still, what she has left in her papers is a physical depository of material that documents a view of courts in the popular imagination. Her courthouse postcard collection is not only a record of political Americana, but a resource for judicial scholars to draw upon in understanding the ways in which judicial structures have been and are icons of ideals about government, justice, the community, and the nation. The richness of these visual artifacts is undeniable; the purpose to which they can be put, analytically, is more challenging. They raise, as did the scholarship of their collector, the question of how to utilize and to value eclectic methods and materials in traditional academic discourse and disciplines.

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The Court versus Obama Care: An Epic Showdown

Michael A. Bailey

The Supreme Court's March consideration of Obama's Affordable Care Act (ACA) promises to be an epic confrontation. The case highlights almost every facet of the Court's role in the U.S. political system. On a policy level, it pits Democrats against Republicans, conservatives against liberals. At a normative level, the case pits majoritarian views of policymaking against judicial interpretation of the constitution. And, as an added bonus, the case pits the father of the legislation, Barack Obama, against the grandfather of the bill, Mitt Romney.

The case will also have important implications for the Court's reputation. A decision to strike the law would –fairly or not – cement the Court-as-conservative-activists storyline that has arisen in the wake of the *Citizens United* decision. This is hardly an attractive possibility for Chief Justice Roberts who professes to want simply to fade into the background like an umpire at baseball game without controversy. But which does he want more: an apolitical reputation or the end of Obama Care?

If the Court were deciding simply on policy grounds, Obama Care would be in serious trouble. The four solid conservatives on the Court (Justices Thomas, Scalia, Alito and Roberts) are virtually certain to oppose the law on policy grounds. Justice Kennedy – it always comes down to Kennedy – is harder to assess. Using the methods that bridge preferences across Congress and the Courts using congressional position-taking on Court cases (Bailey 2007) and more recent data, Kennedy's ideal point is essentially identical to Senator Murkowski and to the right of Senators Brown, Collins and Snowe, all of whom opposed the Affordable Care Act.

The Court is not, however, on the same ideological wavelength as Congress. Yes, congressional voting is largely one-dimensional (Poole and Rosenthal) and so too is Court voting (Martin and Quinn). But they are not the same one-dimensional spaces. Justices deviate from congressional voting patterns in a number of important ways. One need only look at *Snyder v. Phelps* (2011) to see that the Court doesn't play on quite the same one-dimensional field as Congress. Forty-two senators ranging from Harry Reid to Al Franken to Arlen Specter to Mitch McConnell to Sam Brownback filed an amicus arguing that members of the Westboro Baptist Church who picketed funerals carrying signs saying "Thank God for Dead Soldiers" and worse should be subject to state tort liability. On the Court, only Justice Alito agreed with them. The other eight justices held that the First Amendment shields Westboro from tort liability for its picketing, consistent with modern Court tradition of defending speech. This tradition is not without gaps, but it is widely influential. More than 80 percent of the justices appointed after Justice Brennan have exhibited significant inclination to deviate from the congressional policy space in the direction of favoring free speech (Bailey and Maltzman 2011).

Precedent also explains differences between Court and congressional behavior. Bailey and Maltzman (2011) found that almost 80 percent of the justices appointed between Burger and Alito appointments have been significantly more likely to support precedent than their "ideology" alone would predict. Preliminary analysis of more recent data indicates that Justices Sotomayor and Kagan too support precedent. Justices Thomas and Scalia are prominent exceptions who appear immune from the allure of

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precedent (as were many of the Warren Court stalwarts such as Warren, Marshall, Brennan and Douglas).

The role of precedent is potentially very important for the ACA case. Among those likely to be unsympathetic to the ACA on policy grounds, Kennedy, Alito and Roberts have shown measurable support for precedent. While the appropriate precedents for the case are, of course, contested, one can quite reasonably conclude precedent tilts toward upholding the law. This is the conclusion, for example, of conservative Judge Laurence Silberman who in *Seven Sky v. Holder* (2011) dismissed *Lopez* and *Morrison* cases as relevant precedent and made the case that the *Wickard* and *Raich* precedents are most clearly relevant and support upholding the law. If Silberman is correct or, more precisely, if his interpretation of precedent is persuasive to the justices, this vastly improves the odds of the ACA being upheld.

So what can we expect from the Court? As always, prediction is hard, especially about the future. However, given the justices record of being influenced by precedent and the reading of a respected conservative lower court judge that precedent supports upholding the law, it seems unlikely to Court will strike the law. Given the hit to the Court's reputation that would ensue, it seems even less likely the Court would reject the law. However, the Court is not entirely at the mercy of these influences. They can, if they choose, follow the course suggested by conservative DC Circuit judge Brett Kavanaugh in his dissent in *Seven Sky v. Holder* of putting off consideration of the law by simply invoking the Anti-Injunction Act to put off hearing a challenge until the taxes/fees in the legislation take effect in 2014. This would allow the justices to avoid, for now at least, endorsing an expansive view of the Commerce Clause and give them a chance for being off the hook if Republicans are able to do well enough in the 2012 election to repeal or somehow derail the law.

However the Court rules, though, the outcome of the case will teach us much about policy, politics and the role of the Supreme Court in the U.S. political system.

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Measuring Judicial Independence

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As part of the increasing focus on judicial independence, scholars have developed a variety of measurement instruments to capture the concept. Individually and collectively, these measures have furthered our ability to evaluate theories of judicial independence, yet the substantial variation among these measures presents potential convergent validity issues as the same country's courts can be viewed as highly independent or highly dependent depending upon which measure is utilized. Part of this problem is due to the difficulties of gathering comparative data on this topic. The amount of missing data, particularly in developing countries, is large. Moreover, and perhaps more importantly, there are inherent problems stemming from inconsistencies in the conceptual definitions of the term and between those conceptual definitions and their various operationalizations.

The literature roughly divides judicial independence in three dimensions: autonomy, accountability, and authority. A conceptual definition of judicial independence that focuses solely on autonomy and/or accountability takes into consideration independence of courts and judges *from* external influences. Thus, judges and courts will be minimally influenced by political pressure (autonomy) as well as mechanisms to ensure their performance (accountability) (Garoupa & Ginsburg 2008, 2009; Piana, 2010; Contini and Mohr 2007; Voigt 2008). Conversely, a definition focusing on authority views independence as the ability to act upon something, or the ability of courts and judges to decide a broad range of politically significant issues. Many existing measures of independence follow that conceptual practice and isolate each of those components, thus measuring judicial independence as an indicator of either autonomy (Rosenberg 1991; Becker 1970; Konhauser 2002), accountability (Piana 2010), or authority (Cameron 2002). Yet, those dimensions are intertwined and separating them potentially undermines the complexity of judicial independence as both a concept and a measure.

Existing Measures of Judicial Independence

One common method of measuring judicial independence is to use a dichotomous indicator that denotes whether or not a country's judiciary is independent (Helmke, 2005; Howard & Carey, 2002; Santiso, 2003). While this approach recognizes the importance of accounting for necessary precursors of judicial independence, it limits our ability to examine variation in levels of independence. This issue is illustrated by the fact that more than eighty countries give their judicial institutions broad constitutional guarantees of judicial independence (Hirschl, 2002). In asking whether a judiciary is independent, we might lose the important nuances that countries categorized as non-independent might actually grant their judiciaries some measure of independence while also masking the fact that countries categorized as independent may vary wildly as to the actual degree of independence the courts possess.

Others measures of judicial independence use the frequency of decisions against the government as a proxy (e.g. Helmke, 2005; Iaryczower et al., 2002; Ramseyer & Rasmusen, 2003). Assessing the independence of courts and judges *from* political influences in the manner may overlook the inability of the number of cases decided for and against the government to fully capture the degree of autonomy courts and judges possess (Rosenn 1987). For example, the Chilean courts ruled against the government frequently during the Pinochet régime, but lacked the ability to hear cases in any area of importance to the government.

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Several existing studies recognize that judicial independence is a complex concept consisting of multiple components and derive various indices to reflect this conceptual focus. Most of these indices can be categorized as either *de jure and de facto measures* of judicial independence. *De jure* measures of judicial independence commonly examine constitutions and legal texts, with formal guarantees of judicial independence comprising the indicators (Apodaca, 2003; Cross, 1999; La Porta et al. 2004). Take for instance, Apodaca's (2003) study on the relationship between judicial independence and human rights. In her study, she examines the importance of law and judicial independence in securing human rights in 154 developing and transnational countries. To test the impact of *de jure* independence on violations of human rights, Apodaca constructs an index of constitutional guarantees.¹ Unfortunately, formal indicators often do not conform to reality. In many instances, constitutional safeguards of judicial independence are little more than “parchment barriers.” Additionally, it is important to point out that the majority of these are additive indices, thus they implicitly assume that the components should have an equal impact in the construction of the index measure.

De jure measures of judicial independence also potentially underestimate the level of independence in some – usually common law – countries whose constitutions do not detail many formal guarantees to their judiciaries but which still have independent and well-functioning courts. For example, the U.S. Constitution in Article III, Section I grants the courts the sole protections of irreducible salary and life tenure, yet we can conclusively say that U.S. courts are independent.

As an alternative to *de jure* measures of judicial independence, scholars have created measures that assess the independence of the judiciary based on observable conditions or actions. Examples of these *de facto* measures of independence include the degree to which constitutional guarantees are exercised (Iaryczower et al., 2002; Ramseyer & Rasmusen, 2003; Rios-Figueroa, 2006), whether analyzing if courts are free from corruption and bribery (Bertelsmann Transformation Index, 2008; Despouy, 2009; Howard & Carey, 2004), or how likely judicial institutions are to protect property rights (Tate and Keith, 2007; Clague, Keefer, Knack, & Olson, 1999). The *de facto* judicial independence measures tend to be drawn from the *de jure* measures, and potentially suffer the same issue when applied to common law nations as discussed above. Since these nations lack descriptive and detailed constitutions *de facto* measures of independence for these countries that mirror formal constitutional indicators will have low score. This is problematic because in much the same way that we cannot conclude that constitutional guarantees automatically grant courts and judges the full exercise of independence, we also cannot confirm that the lack of constitutional guarantees makes courts and judges less independent.

Additional, *de facto* measures of judicial independence also present convergent validity issues. Each new study creates new criteria by which to measure judicial independence and the different measures sometimes yield strikingly different results. Finally, the *de jure* and *de facto* measures of judicial independence are treated in the literature as two unconnected and separate concepts and measures. This limits our ability to address important questions such as the degree to which constitutional provisions help to predict the level of judicial independence courts and judges exercise in practice.

Future Research

An alternative approach to judicial independence is to treat it as a latent variable. Like many concepts in the social sciences, such as democracy, authoritarianism, and economic development, judicial independence cannot be observed directly. With that in mind, we suggest that scholars move from creating new measures of judicial

¹ Specifically, the index includes indicators of whether “judges serve guaranteed terms of office; decisions of judges are subject to political revision; courts have exclusive authority to decide on their own competence; civilian have the right to be tried in ordinary, no military or exceptional, courts; courts are adequately funded; there is a separation of power between the executive and the legislative branches and the judiciary; and, the selection of judges is based on merit” (296).

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independence from scratch and start thinking about patterns of interrelationships among the observable indicators commonly addressed in the extant literature in order to understand and characterize the underlying latent variable. There are numerous methodological advances that enable researchers to achieve that goal. One of such methods is latent structure analysis² (see Lazarsfeld and Henry, 1968).

Latent structure analysis (LSA) comprises several individual methods, including latent class analysis (LCA) and Latent Trait Analysis (LTA). Those methods depend on the type of observed variables (manifest variables) the researcher is using, whether they are binary, categorical, ordered-categorical or interval/continuous variables. They have been largely used in educational testing, ideological disposition, and even marketing research (Smith and Stanley, 1983; Clogg, 1979; Masters, 1985). Despite their potential utility, these techniques remain largely unused in political science generally and in comparative politics specifically. As comparative politics and comparative public law constantly deal with latent variables, such as judicial independence, and judges' ideology/preferences, and democracy, there are myriad applications for which these techniques could be of great use.

The primary advantages of utilizing latent variable models for the study of judicial independence are twofold. First, accounts for the complexity of multifaceted concepts, such as judicial independence. Instead of assuming that each dimension of judicial independence – autonomy, authority, and accountability – occur separately and impact courts and judges during distinct moments, latent structure analysis assumes that they are intertwined and each have some weight in the concept of judicial independence. What these methods do not do is to assume equal weight to each dimension.

Second, and I believe to be one of the most important benefits of these methods is the generalizability of one's findings. Much research in comparative politics and comparative public law focuses on one country (most often because of lack of data) or region (most likely because of lack of interest on other regions), this approach may make it easier to apply our results to a large array of situations or make broader conclusions about the world. LSA allows us to reason inductively to draw broad conclusions and identify general laws (Collins and Lanza 2010), in part by identifying for subtypes of individual cases within countries, or countries within regions, that exhibit similar patterns of characteristics that can allow us to make more broad generalizations.

Additionally, there is a much broader impact on the use of latent structure analysis on the study of judicial independence. First, latent structure analysis might help clarify the concept of judicial independence. With regard to formal definitions of judicial independence, this strategy enables us to create a concept based on relevant observed characteristics that are key to that conceptual definition. Second, a clear understanding of what indicators should make up the concept of *de jure* judicial independence may help us understand the role of formal institutions on democratization, political development, human rights, and a variety of other important topics in comparative politics. Given the important role of constitutional reform in transitions to democracy, understanding *de jure* judicial independence is essential to determining the role of constitutions in states emerging from decades of authoritarian rule. Many claim that problems with countries' political structure are due to poorly written or outdated constitutions. However, if constitutional provisions do not aid in restructuring political institutions, then energy should be saved for rebuilding well-functioning institutions through other means, such as economic and political reforms. Thus, the goals of improving the measure of judicial independence, particularly its formal measure, will help policymakers and promoters of democracy who are considering constitutional design as a way to improve *de facto* judicial independence by providing a clear, empirical answer to the question of whether constitutions – or specific constitutional provisions – matter.

² Used interchangeably with Latent Variable Models (see McCutcheon 1987).

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Some (Potential) Applications of Computer Content Analysis to the Study of Law and Courts

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Over the last decade, a number of technological innovations have allowed scholars of judicial politics to examine topics heretofore unstudied. For example, recent advances in network analysis opened a path for scholars to analyze the growth of Supreme Court precedent over time as well as how those precedents connect with one another (Fowler et al. 2007). Improvements in plagiarism software provided opportunities to determine whether Supreme Court opinions “borrow” language from briefs (Black and Owens forthcoming; Corley 2008) and from lower court opinions (Corley, Collins, and Calvin 2011). And, advances in computational power unblocked avenues to estimate the latent preferences of justices (Bailey 2007; Martin and Quinn 2002). Our goal here is not to analyze all of these important endeavors, though an analysis of them would be useful. Rather, our goal is more modest. We aim to highlight a few important points about an innovation that judicial scholars have recently begun to employ—computer text analysis.

What is Computer Text Analysis and Why Employ it to Examine Legal Text?

To explain what computer text analysis is—and why scholars should consider using it—we begin with its precursor, manual content analysis. Broadly speaking, content analysis is “a research technique for making replicable and valid inferences from texts (or other meaningful matter)” (Krippendorff 2004, 18). The basic starting assumption with manual content analysis is that words used in texts are written with a purpose and meaning, and that we can learn something valuable by extracting the meaning of the rich text by turning it into data. The process of analyzing the content - called “coding” - is carried out by humans, who read the text and translate it using some systemic coding scheme.

Text analysis allows judicial scholars to generate interesting answers to substantively important questions. Many of the questions social scientists address involve large amounts of texts. For example, Court majorities must justify their decisions in writing. As such, nearly everything the Court does—or at least says it does—can be examined using text analysis. Indeed, language modification is precisely the type of nuanced behavior that justices might use to circumvent institutional constraints. Thus, justices’ opinions offer unique insight into whether they use language to protect their policies from institutional scrutiny. Other text-based analyses might focus on the behavior of lawyers, who are taught to use language to frame cases and influence judicial outcomes (Wedeking 2010). Text analysis offers a way to examine these and other interesting topics.

But why employ computer text analysis rather than manual analysis? There are at least three reasons. First, manual content analysis is costly and time consuming, as it can analyze but a limited amount of text. Indeed, Wahlbeck, Spriggs, and Sigelman (2002) contrast the difference between humans and computers nicely: “in fractions of seconds [the computer program] performed calculations that otherwise would have taken thousands of hours” (176). Second, computational approaches provide measures that can be easily and efficiently replicated. One of the hallmarks of social science is the ability to replicate one’s findings. Manual methods generally require analyzing a large sample to test for reliability (intercoder reliability), and typically have agreement scores less than 100 percent. Third, computational analyses are objective to the extent that they rely on steadfast rules. Human-

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-conducted content analysis, on the other hand, requires elaborate coding procedures and fidelity to the codebook to avoid subjective biases. When possible, then, computer-based approaches offer a promising path forward.¹

What Computational Programs Are Available?

Judicial scholars can choose from a wide variety of programs and approaches that perform diverse tasks, ranging from simple approaches that can be done by copying and pasting text into a website, to dictionary-based approaches, to more complicated programs that perform dimensional scaling (i.e., estimating ideal points). We begin with a brief discussion of some simpler approaches, and then move to the more technically complex programs.

Readability Measures

Among the simplest and most user friendly text analysis programs are so-called “readability measures.” In general, these measures examine the level of education one needs to understand a text. Readability scores discriminate among texts to determine what makes some easier to read and interpret than others (DuBay 2004). They offer “quantitative, objective estimates of the difficulty of reading selected prose” (Coleman 2001, 489). The two most common indicators across readability formulas include some measure of word difficulty and a measure of sentence difficulty. The assumption is that texts with more unique or longer words will be harder to read than texts with common or shorter words, and that longer and more complex sentences are generally harder to comprehend than shorter, simpler sentences.

Readability indexes were originally developed by those in the education field to define the appropriate reading level for school text books but, since then, have expanded to examine a host of important legal topics. Coleman and Phung (2010), for example, examine the readability of over 9,000 party briefs spanning over three decades of U.S. Supreme Court decisions and find a “gradual historical trend towards plainer legal writing” (103). Similarly, Coleman (2001, 491) uses readability measures to compare the writings of Justice Cardozo and Lord Denning with their contemporaries, finding “strong empirical support for the widely-held claim that Cardozo and Denning’s judicial opinions are written in a style that is comparatively plain and clear.”

There are a host of readability measures that scholars can employ to determine the readability of text. One of the most frequently employed is the Flesch-Kincaid score, which measures the level of education one would need to understand text, as well as the “reading ease” of the text. Law and Zaring (2010) use the Flesch-Kincaid approach to measure the complexity of federal statutes, in an effort to determine whether the United States Supreme Court is more likely to refer to legislative history when interpreting complex laws.

The Coleman-Liau readability index is an alternative measure. It is a composite score of the length of words contained within a text, measured by the number of characters and the number of sentences within that text. Owens, Wedeking and Wohlfarth (2012) employ the Coleman-Liau index to determine whether the Court authors less readable opinions when facing a hostile Congress. Similarly, Owens and Wohlfarth (2012) use the measure to examine whether lower federal courts treat clear Supreme Court precedent more positively than unclear precedent. A simple online search for “readability measures” will generate a number of additional measures that one can employ toward similar ends.

¹ This is not to say that manual text analysis should be done away with. On the contrary, depending on the type of research question, manual text analysis is still beneficial. For example, Farganis and Wedeking (2011) use manual content analysis to examine the behavior of Supreme Court nominees who testify before the Senate Judiciary Committee. In many cases, computational text analysis begins with supervision from humans via manual text analysis.

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Dictionary-Based Programs

Dictionary-based approaches operate on the assumption that words have specific meanings and belong together in a “dictionary category” that represents their concepts. This grouping process is generally known as lemmatization, which is similar to word stemming. Dictionaries can be built either *a priori* based on a researcher’s theory or through text mining. Ideally, the dictionary contains all of the words associated with the concept, as well as *only* the relevant words.

A popular dictionary-based program, Linguistic Inquiry and Word Count (LIWC) contains over 70 pre-defined categories that scholars can use to examine text. For example, the category labeled “Sad” contains over 100 words such as: agoniz*, alone, cried, depress, depriv*, griev*, isolate*, and many more.² LIWC grew its roots in psychological scholarship. It is not surprising, then, that scholars have employed it to examine texts for psychological concepts like cognitive complexity—i.e., how simple or complex people view the world. For example, Pennebaker and Lay (2002) analyzed whether Rudy Giuliani’s governing style and personality changed over the course of his tenure as mayor of New York, by examining the words he used throughout his press conferences. Pennebaker, Slachter and Chung (2005) examined the words spoken by presidential candidates John Kerry, John Edwards, and Al Gore. As for judicial scholarship, Owens and Wedeking (2011) applied LIWC to examine the words justices use in their opinions, in an effort to generate a measure of the “cognitive complexity” (i.e., clarity) of Supreme Court opinions. The measures suggest, in part, that Justices Scalia and Breyer write the clearest majority opinions, that criminal law opinions tend to be the clearest, and that dissents are always clearer than majority opinions. Similarly, Owens and Wedeking (forthcoming) use LIWC to examine the words spoken and written by Supreme Court nominees to predict whether they will drift ideologically once on the Court. They find that nominees with a high degree of cognitive inconsistency prior to their nominations are more likely to drift ideologically on the Court.

LIWC is one of many dictionary-based programs. An alternative, employed by Black, Treul, Johnson, and Goldman (2011) is the *Dictionary of Affect in Language*, which consists of several categories of words. Black et al. (2011) used that dictionary to gauge the emotional content of justice’s words at oral argument so as to predict their votes.

Dimensional Scaling

Moving to the more complex (but still user friendly) side of things, judicial scholars can take advantage of recent innovations in “Wordscore” and “Wordfish” software to estimate, via text analysis (rather than votes), the ideological preferences of justices and other political actors.

A “Wordscore” approach allows researchers to collect a corpus of texts and compare the words within those texts (Laver, Benoit, and Garry 2003; Benoit and Laver 2003). More specifically, Wordscore is based on the premise that some grouping of texts will use words that are similar to one another while another grouping of texts will use a different set of words. Moreover, the differences between the texts define them, and tell us something important about the authors.

Executing Wordscore is intuitive. Among all the texts, the researcher selects at least two that s/he believes to be the poles (or at least close to the poles). These define the extremes of the policy space and are referred to as reference (i.e., training) texts. The software then examines the words used within those texts as well as the number of

² The asterisk indicates the dictionary will count all variations of the word stem (e.g., “agoniz*” will count: agonize, agonizingly, agonized, and any other variation.)

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times individual words are used in each of the texts (Evans et al. 2007). Once this initial examination is finished, the researcher then analyzes the “virgin texts.” That is, based on the frequency of word usage in the virgin texts, the software will determine the degree to which that virgin text is liberal or conservative, relative to the reference texts and other texts under consideration. The program’s output requires no further interpretation by human coders. McGuire and Vanberg (2005) offer a nice explanation and example of the Wordscore approach and use it to examine the ideological location of First and Fourth Amendment cases on the Supreme Court. Evans et al. (2007) employ Wordscores to classify the ideological direction of legal briefs in *Bakke* (1978) and *Bollinger* (2003) and identify individual words that are the most discriminative of conservative and liberal positions.

While Wordscore offers a number of advantages, it does come with some challenges (Martin and Vanberg 2008a, 2008b; Benoit and Laver 2008; Lowe 2008). For example, by forcing the researcher to select reference texts, the approach assumes the researcher has *ex ante* substantive knowledge about the general ideological placement of the documents. In many instances, this is not (and should not) be a problem. Yet, one can imagine research questions in which a scholar lacks instincts about which texts are more (or less) conservative than others. And if one chooses poorly, the generated results are dubious. A similar problem, but one that also plagues the Wordfish approach, is that language and the meaning of specific words change over time. Thus, if a researcher seeks to examine temporal ideological trends via word usage, the results might be limited.

Given these shortcomings, a second text-based approach to measuring ideology arose in recent years—the Wordfish approach. Wordfish treats ideology as a latent variable, and assumes that a speaker’s ideological position can be discovered via her word choice (Proksch and Slapin 2009). As Proksch, Slapin, and Thies (2010) explain: “The systematic component of this process contains four parameters: document [speaker] positions, document [speaker] fixed effects, word weights (discriminating parameters), and word fixed effects” (6). To paraphrase an example from Proksch and Slapin (2009), this means that if one nominee uses the word “freedom” more frequently than “equality” in a document while another nominee uses the word “equality” more than “freedom” in a similar document, these two words provide information about their ideology on that dimension and discriminate between the nominees.

One advantage of Wordfish is that researchers do not need to define, *a priori*, the ideological space with reference texts. In this sense it is an exploratory program. It assumes the word frequencies are generated by a Poisson distribution. As such, the single dimension extracted, generally assumed to be the primary dimension, is open to interpretation (e.g., to use an analogy, the meaning of the dimension is open to interpretation similar to the meaning of an extracted factor in factor analysis). Thus, the biggest challenge is interpreting the dimension that Wordfish returns. Unfortunately, using Wordfish to examine words over an extended period of time can be problematic for the same reasons as discussed above. To counteract this, Proksch and Slapin (2009) suggest excluding rare words and using only words common to the early and later time periods. Thus far, Wordfish has successfully been used to estimate policy positions of German political parties (Proksch and Slapin 2009), position taking in European Parliamentary speeches (Proksch and Slapin 2010), and Japanese party positions (Proksch, Slapin, and Thies 2010). And as for judicial scholarship, Owens, Tahk, and Wedeking (2012) recently collected the text of speeches, writings, and separate opinions of 43 nominees to the U.S. Supreme Court and employed Wordfish to estimate the ideological preferences of nominees to the Court.

Our goal here was to highlight the reasons why scholars in the Law and Courts field might consider employing computational text analysis, as well as a number of programs that are available, should they opt for that route. Of course, our article barely gets beneath the surface of possibilities. We have largely ignored topic classification programs (with supervised and unsupervised learning) like the one developed by Quinn et al. (2010) to classify legislative speeches by topic, or Hopkins and King’s (2010) supervised learning program that provides estimates of the

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proportion of all texts within a topic category. One program that shows promise is RTextTools, which bundles nine algorithms that “learn” about data to classify text into discrete categories (Jurka et al. 2012). Any of these programs could be applied to the issue topics of Supreme Court opinions. Still, other approaches are computationally intensive and rely heavily on real computer programming language. For example, Bommarito and Katz (2010) analyze the text of the *United States Code* to reveal that it “has grown in its amount of structure, interdependence, and language” (2010, 4195). And Rosenthal and Yoon (2011) cull text from webpages to examine function words used by justices in opinions to look for clerk influence. Put plainly, there are multiple approaches and programs that scholars can employ to examine substantively interesting questions.

The next frontier of judicial scholarship promises to examine the words legal actors use—words in opinions, briefs, speeches, oral arguments, confirmation hearings, and elsewhere. Judicial scholars are blessed with an abundance of textual data. Thankfully, there are a number of tools at our disposal to tap into these data sources. And for those of us interested in quantifying text, or treating “text as data,” these approaches offer considerable excitement.

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Old Man River, the Corps, and Levees: The Meaning of Private Property Rights in a Flood Control System

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I have no idea what my farm is going to look like when the floodwaters recede.[Y]ou learn to live and work with the river. We all know too well that plans don't always go according to plan, especially when Old Man River is involved. It has time after time fooled people who weren't fools.

– Lester Gooden, a plaintiff in *Big Oak Farms v. U.S.*, in an interview on NPR on May 3, 2011, the day after the U.S. Army Corps of Engineers breeched the levee at Birds Point, Missouri.

Over the past several months, we have been exploring the way in which disaster politics and administrative processes produce legal mobilizations, with a particular focus on the way these mobilizations contest the meaning of private property and in locations where the ability to use land for specific purposes depends heavily upon human intervention through drainage and levee systems. How do rights claims concerning private property work to contest the meaning of regulation while simultaneously producing new understandings of ownership in places where land use is highly regulated? What if we add a natural disaster to the mix, and ask how unpredictable events or uncontrollable environmental processes are addressed by both administrative law and the legal understandings of citizens responding to such events? Such questions sit at the nexus between law and policy, administrative law and constitutional protections. They are often overlooked by scholars primarily interested in the U.S. Supreme Court or appellate decisionmaking because they involve local level decisionmaking and disputes most often settled in district courts or by administrative law judges.

In order to explore these issues, we have constructed a two case comparison of flood control and property rights politics in two very different settings: post-Katrina New Orleans and the area known as the Birds Point/New Madrid floodway in southeast Missouri. These two very different places present us with an opportunity to investigate the way in which legally defined flood practices produce a politics of disaster in communities (one urban, one rural), and how the disputes that arise in these contexts eventually lead to court action.

Both locations are part of the Mississippi Levee System, which is maintained by the U.S. Army Corps of Engineers. In the wake of last spring's floods as well as criticisms concerning their operation of the New Orleans levee system, the Corps has requested new legislation for the entire levee system. This policy undertaking is occurring simultaneously with legal mobilizations opposing various elements of the operation of the levee system. While the policy-making process and the Corps role will be interesting to policy scholars, the element of the project that will be most interesting to Law and Courts scholars involves a close analysis of two property rights mobilizations represented in cases filed the Court of Federal Claims: *Big Oak Farms Inc. et al. v. U.S.* (Case No. 11-275L) and *St. Bernard Parrish and the Lower Ninth Ward of the City of New Orleans. v. U.S.* (Case No. 05-1119L).

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These two cases involve litigation that shapes what we are calling “flood practices.” By “flood practices,” we include an array of activities such as the development of flood control plans and flood insurance programs, implementation processes that define where and when levees will be breached, provision of compensation (or lack thereof) for land and homes damaged and/or lost, as well as aid for flood victims in places where no breach occurred. In the case of New Orleans, we add to these practices the management of waterways that can impact the flood control plans during a time of crisis (such as canals or the Mississippi River Gulf Outlet (MRGO), the focus of the litigation in *St. Bernard Parrish*). To what extent, we ask, do the flood control programs themselves provide the basis for rights claims in some instances, while in others provide the basis for resistance against governmental activity?

The two cases are strikingly different. In *Big Oak Farms*, landowners are responding to the operation of the Birds Point/ New Madrid Floodway, created as part of the implementation of the Flood Control Act of 1928. Located in the bootheel region of Missouri, this very rural area was subject to serious flooding in the spring of 2011. On May 2nd, the U.S. Army Corps of Engineers dynamited the fuseplug levee in Birds Point in order to avert waters into the floodway. Ostensibly to protect Cairo, Illinois (a town with a population of 2,500, though at the time of the 1928 legislation it contained a population of over 15,000), the Birds Point/New Madrid floodway is home to 130,000 acres of some of the richest farmland in the U.S. The day after the explosion, a group of landowners in the spillway filed a class action in the Court of Federal Claims alleging, among other things, a Fifth Amendment taking of their land as the result of the activation of the floodway. Their claims are complicated by the existence of easements on at least some of the land that provide flowage rights to the federal government in the event that the floodway must be activated to avert serious flooding in Cairo and other towns down river. However, whether all of the property within the floodway have appropriate easements and the terms of the easements that do exist are both in question in the court case. In studying the mobilization around the breach of the Bird Point New Madrid Levee, we have been focusing our attention on how the meaning of property – particularly the right to use property – was contested by the farmers affected by the levee breach. This legal mobilization project focuses upon the process through which property owners contest the meaning of easements and floodways along the Mississippi River.

Meanwhile, in *St. Bernard Parrish* (also known as the MRGO case), property owners allege that the operation of the Mississippi River Gulf Outlet (MRGO) has resulted in repetitive flooding of their neighborhoods. Further, they contend that the MRGO created a way of delivering water into their neighborhoods during Hurricane Katrina, exacerbating the amount of flooding and damage that would have occurred without the MRGO.

In this case study, we would like to understand how the levee system and the construction of the New Orleans canal system become sites for constituting meaning of private property in an urban setting. Indeed, the MRGO and the Industrial Canal both present us with opportunities to study the historical processes and contemporary ramifications of the use of eminent domain to develop waterways and levees that are currently relied upon for the protection of private property, yet when they fail are also factors in the devastation of people’s land and homes. Using redevelopment legislation and patterns of demolitions in Post-Katrina (but pre-BP Oil Spill) New Orleans as a specific case study, our preliminary research investigated the way the concept “natural disaster” enabled legal changes in eminent domain law in New Orleans as part of the recovery effort. This has led us to be increasingly curious about how eminent domain (and zoning more generally) have been used to reconfigure power relations in Post-Katrina New Orleans. This preliminary research will be published in a special issue of the *Journal of Applied Social Science* in the fall of 2012.

Both court cases featured in our case studies were filed in the Court of Federal Claims, an Article I court with jurisdiction over takings claims made under the Tucker Act. Unlike many constitutional takings cases, these two involve the operation of particular administrative plans implemented within the levee system (though, in the case of the MRGO, the gulf outlet is not considered a part of the flood control protection plans). In both cases, the Army Corps

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of Engineers is the implementing agency, tasked through statute with implementing flood control, levees, dredging, and ensuring the navigability of our rivers. Their role in implementation processes as well as the ways in which citizens subject to their policies react frames much of our investigation.

Through our analysis, we hope to gain some leverage on the slippery proposition made by many legal mobilization scholars: that law operates at the cultural level, and that contests over legal meaning are, themselves, constitutive of social relationships. As Michael McCann wrote in *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, “Authoritative legal forms and relational logics by definition are the products of long evolving historical struggles in which some interests, groups, norms, and arrangements have tended to prevail in relatively systematic fashion” (University of Chicago Press, 1994: 9) With these two cases, our goal is to present a “most different case analysis” that can highlight the ways cultural practices in disparate settings give rise to the meaning of private property.

BOOKS TO WATCH FOR

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Michael A. Bailey (Georgetown University) and **Forrest Maltzman** (George Washington University) have published *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton University Press, 978-0691151052). In it, they address how Supreme Court justices decide their case by looking at the role of law and political factors. They show that law does indeed matter, particularly respect for precedents. There is considerable variation in how these doctrines affect each justice, however, variation due in part to the differing experiences justices have brought to the bench. Bailey and Maltzman also show that politics also constrains justices. In contrast to the view that justices are unconstrained ideologues, this book makes the case that the legal and political systems do in fact place considerable constraints on how justices decide cases.

Justin Buckley Dyer (University of Missouri, Columbia) has published *Natural Law and the Antislavery Constitutional Tradition* (Cambridge University Press, 978-1107013636.) “In *Natural Law and the Antislavery Constitutional Tradition*, Dyer provides a succinct account of the development of American antislavery constitutionalism in the years preceding the Civil War. Within the context of recent revisionist scholarship, Dyer argues that the theoretical foundations of American constitutionalism - which he identifies with principles of natural law - were antagonistic to slavery. Still, the continued existence of slavery in the nineteenth century created a tension between practice and principle. In a series of case studies, Dyer reconstructs the constitutional arguments of prominent anti-slavery thinkers..., who collectively sought to overcome the legacy of slavery by emphasizing the natural law foundations of American constitutionalism. What emerges is an understanding of American constitutional development that challenges traditional narratives of linear progress while highlighting the centrality of natural law to America's greatest constitutional crisis.”

Matthew M.C. Roberts (Ph.D., University of Minnesota) has authored *Oral Argument and Amicus Curiae* (LFB Scholarly Publishing, 978-1-59332-466-7). “Members of the Supreme Court are supposed to base decisions on the law, but often their choices are better explained by political ideology and party loyalty. Roberts sheds light on this problem by looking at a part of the Court's life that has never been systematically studied. Most cases feature extra briefs written by third parties known as *amici curiae*. He examines the rare occasions on which the Court allows these extra groups to participate not just by filing briefs but by appearing before the Court during oral arguments. By tracing how these groups influence the justices' behavior, Roberts presents a strong case that the Court is driven by more than politics.”

Artemus Ward (Northern Illinois University) and **Todd C. Peppers** (Roanoke College and Washington and Lee School of Law) have co-edited *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press, 978-0813932651). Set to be released in April 2012, the book, “written by former law clerks, legal scholars, biographers, historians, and political scientists, [contains] essays [that] tell the fascinating story of clerking at the Supreme Court. In addition to reflecting the personal experiences of the law clerks with their justices, the essays reveal how clerks are chosen, what tasks are assigned to them, and how the institution of clerking has evolved over time, from the first clerks in the late 1800s to the clerks of Justice Ruth Bader Ginsburg and Chief Justice William Rehnquist.”

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Justin Crowe (Williams College) has published *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton University Press, 978-0691152936). The book “uncovers the causes and consequences of judicial institution-building in the United States from the commencement of the new government in 1789 through the close of the twentieth century. Explaining why and how the federal judiciary became an independent, autonomous, and powerful political institution, Justin Crowe moves away from the notion that the judiciary is exceptional in the scheme of American politics, illustrating instead how it is subject to the same architectonic politics as other political institutions.”

Terry Halliday (ABF), **Lucien Karpik** (E'cole des Mines de Paris), and **Malcolm M .Feeley** (UCBerkeley) have a new edited volume coming out in May: *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (New York: Cambridge University Press, 2012). This book explores the divergences in political liberalism in new nations that shared the same colonial heritage. The volume includes eleven original essays on former colonies of the British Empire in South Asia, Africa, and South East Asia that gained independence after World War II, and provides introductory and concluding essays by the editors which present a theory of political liberalism in the post-colony, and explore the conditions under which the legal complex, civil society, and the state shape alternative post-colonial trajectories around political freedom. Among other things, the volume demonstrates the need for scholars of the legal profession and scholars of the judiciary to join forces in ways they have rarely done in the past. One of the book's central findings is the centrality of lawyers in the successful effort to mobilize for political freedom and secure judicially enforceable rights. Where the legal complex is divided or absorbed by the state, there is no chance of political liberalism; where it is robust and united, there is some chance.