

Law & Courts

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



A Letter from the Section Chair: Summer Update Christopher Zorn Pennsylvania State University zorn@psu.edu

With spring classes winding down – or, in some cases, having wrapped up weeks ago – I hope everyone is gearing up for a (choose one) relaxing / productive summer. Since the Law and Courts Newsletter is probably not ranked highly on anyone's "beach reading" list, I'll keep my comments here brief.

Inside this issue:

Christopher Zorn, Christina L. Boyd, Herbert M. Kritzer, Denise Keele, Marcus E. Hendershot, Lydia Brashear Tiede, Books to Watch For, Announcements: Barclay and Routledge

At the same time, it's never too early to look forward to the APSA Annual Meeting in New Orleans. Law and Courts section chair Brandon Bartels and Constitutional Law and Jurisprudence section chair Nina Moore have assembled two terrific slates of panels for the meeting, and their heroic efforts deserve our gratitude. Among the panels will be a roundtable marking the contributions of Robert Kagan (UC-Berkeley), this year's winner of the section's Lifetime Achievement Award. That panel will immediately precede the section's business meeting, which will take place on Friday, August 31 at 6:15 p.m. in a location to be determined.

The business meeting itself will also have a number of events of interest to section members. We'll have an update on the *Journal of Law and Courts* from its editor, David Klein, and our representative at the University of Chicago Press, Kari Roane. We'll also hear updates on other matters of section business, including the status of the section website (from Artemus Ward) and the LAW COURT-L listserv (from Wendy Martinek). And we will of course celebrate the winners of this year's section awards.

At the business meeting we will also consider the slate of candidates for section officers, as put forward by the nominating committee. This year's nominating committee – Thomas Keck (chair), Jennifer Bowie, Kevin Quinn, Paul Frymer, and Lisa



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Officers: Law and Courts Section

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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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Conant -- has nominated the following individuals:

Gordon Silverstein (University of Connecticut) -- Chair-Elect

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This year, the section's reception (beginning at 7:30 p.m., immediately following the business meeting) will be co-sponsored by the University of Chicago Press, and will honor the founding of the *Journal of Law and Courts*. I'd encourage all of you to attend what I anticipate to be an interesting and fun event. Our section has a great deal to celebrate and be thankful for.

Symposium: Studying U.S. Trial Courts in Political Science

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As a relative newcomer to the law and courts community, I found myself very interested in an exchange about trial courts and trial court-related research that took place on our law and courts listserv (LAWCOURT-L@LISTSERV.TULANE.EDU) in late August, 2010.¹

Professor Stephen L. Wasby: "If anyone needed a "wake-up call" about the importance of the neglected (federal) district courts and of the role of trial judges, recent events, including one yesterday, should provide that call. . . Let's start paying attention to the courts "where the action is," although, given our continuing fixation on the Supremes, this is probably shouting into a rain barrel."

¹ The messages were sent on August 24, 2010.

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Professor Richard Brisbin: “During a discussion about the literature on state politics and trial courts with a colleague I noticed that I was largely recommending studies that were 15 to 35 years old. It struck me that political scientists have not published much on these courts of late, especially in the general interest journals such as APSR or AJPS. Also, I found that I was recommending studies from scholars in other disciplines. This state of affairs leads me to pose a question to the Law and Courts section members. What do you regard to be the most important books and articles (up to 10 or so) published by scholars in any discipline during the past **ten years** about the politics, operations, procedures, and personnel of state trial courts, limited jurisdiction courts, and specialized jurisdiction courts?”

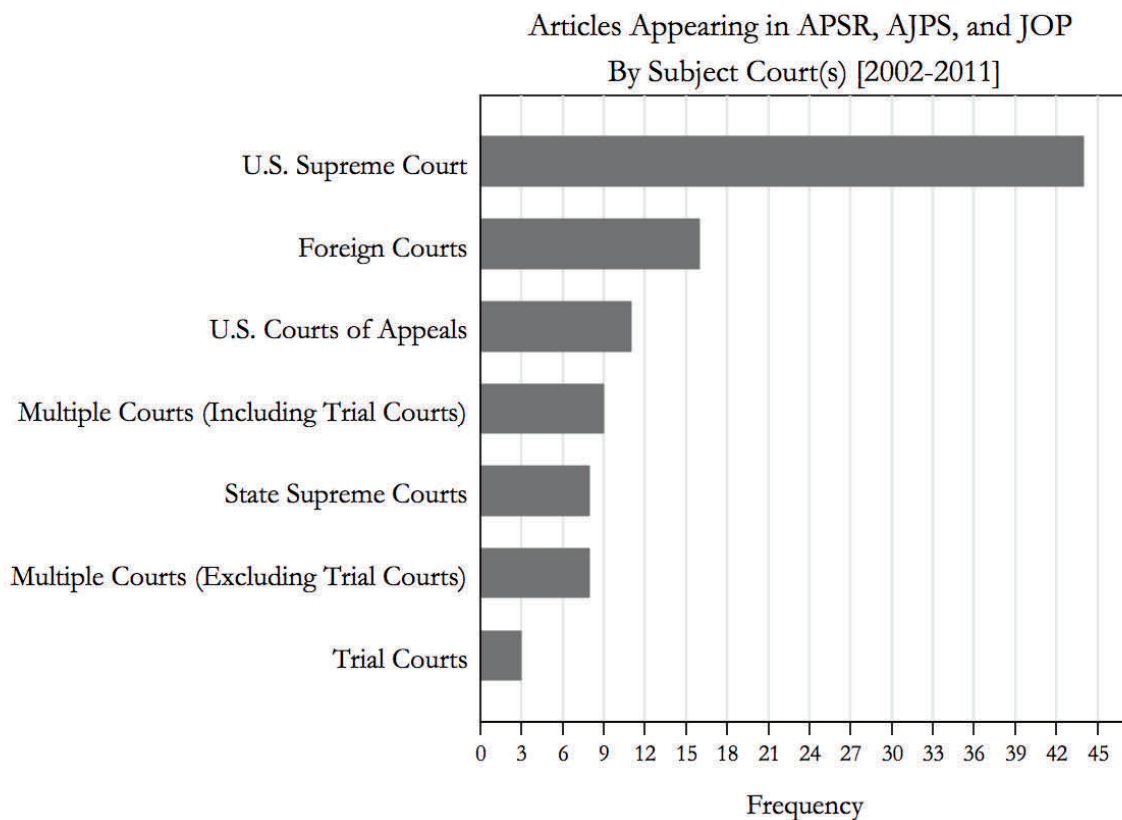
One week later, Brisbin reported back to the listserv with the fruits of his inquiry.² The compiled list of 76 suggested important trial court and non-appellate court publications from 2000-2010 included many fantastic contributions and revealed what many of us already suspected: trial courts are by no means *unstudied*. Research by political scientists, legal academics, economists, sociologists, and others has unearthed very interesting insight into these courts, including, for example, how their actors operate, whether the focus is on judges, juries, lawyers, or parties, how they interact with the judicial hierarchy above them, and how the public perceives them. However, as Brisbin hinted, non-political scientists authored a large percentage of the articles included in his complied list. Additionally, of these 76, only two (less than 3%) appeared in one of the top general interest political science journals.

The perceptions about trial court research reflected in these comments mirrors my own belief about these courts: they remain understudied and underappreciated in political science, particularly compared to their appellate court siblings. To see if these perceptions are reflected in the data, I decided to go straight to the sources. In particular, I have catalogued the court related articles appearing in the “Top-3” general political science journals, *American Political Science Review*, *American Journal of Political Science*, and *Journal of Politics*, over the past 10 years (from 2002 to 2011). The results of this, by court level, are depicted in the following figure.³

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² Professor Brisbin’s follow-up message was sent on August 31, 2010. Professor Brisbin has compiled and posted an excellent bibliography, by law and courts-related subject: http://brisbin.polisci.wvu.edu/bibliography_on_courts__law__and_judicial_politics.

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While the resulting content doesn't inform us about relevant and potentially publishable scholarship that authors chose to direct toward other outlets,⁴ it does provide a great deal of information about what kinds of law and court research is landing in the most salient and well regarded general political science journals. And for purposes of the current symposium, the results regarding trial court research are rather telling. Of the 99 law and courts articles appearing during these 10 years, only three were focused primarily on trial courts. This is, again, only 3%. If we generously include the articles that study multiple courts including trial courts, that number rises to 12 total or 12%.⁵

This symposium provides an opportunity to reflect on where political science research on U.S. trial courts⁶ has been and to examine where it is going next, both of which have implications for why the above figure looks the way it does for the past 10 years and how it might look 10 years from now. To do this, I have asked four members of

⁴ For example, as Wendy Martinek's report in the Fall 2011 Newsletter indicates, many members of the law and courts community also recognize the interdisciplinary journals *Law & Society Review* and *Law & Social Inquiry* as "top 5" outlets for law and courts related scholarship. Wendy Martinek, "Report of the Professionals Committee of the Law and Courts Section," 21(3) *Law and Courts* (Summer 2011): 25-33. This selection sentiment is also well reflected in Bert Kritzer's comments and advice below.

⁵ These "Multiple Courts (Including Trial Courts)" articles often include a hierarchical research design.

⁶ While this symposium focuses almost exclusively on U.S. federal and state trial courts, much of what is discussed can hopefully be extended to many foreign trial courts as well.

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our law and courts community to write about trial courts in a way that reflects their area of expertise. At first glance, the research of Herbert Kritzer, Denise Keele, Marcus Hendershot, and Lydia Tiede might seem more dissimilar than similar, but for the broad topic of U.S. trial courts, each of these scholars has and is continuing to make incredibly creative strides in filling the trial court research gap. In addition, I believe that these four essays do a very nice job of highlighting some of the important themes that lay ahead of us in U.S. trial court research.

There may only be a handful of political scientists associated with trial court research, but one of these is most certainly Bert Kritzer. In “Understanding Trial Courts Means Understanding Lawyers,” Kritzer provides an excellent review of the critical roles that lawyers play throughout the trial court process, from filing through intra-case decision making to appeals. Kritzer also draws on his career-long experiences and success to provide publication and career advice for those interested in studying lawyers and, more generally, trial courts in the future.

Denise Keele writes on “District Court Data Sources: Implications and Opportunities.” Keele’s contribution here builds on one of her larger areas of expertise: collecting data and conducting empirical analysis on civil cases in federal district courts. As she explains, this type of empirical research has only really been feasible over the past few years because of improvements in technology and the increasing availability of electronic court documents. Below, Keele provides an excellent, user-friendly guide to the process and its implications for our future research on these courts.

Marcus Hendershot has conducted some very interesting research in recent years on, broadly speaking, the politics of federal district court judges. This work has included examining district judge appointments and ideology. In “Budging the Bench: The Nuclear Option and Preference Disparity at the District Court Level,” Hendershot brings this work together with mapping technology, the result of which is very interesting insight into how Democrats and Republicans maneuver to gain and maintain political control over the judicial composition of district courts.

Finally, Lydia Tiede, who has authored a number of recent articles on criminal law in U.S. and foreign courts, writes “Disparity in Federal District Court Sentencing.” In it, she highlights the large amount of judicial discretion that rests in sentencing decisions and discusses the resulting (negative) ramifications. As Tiede ably points out, this field is ripe for future research that centrally rests in an area of concern to many political scientists.

As the below symposium contributions of these four scholars indicate, today, perhaps more than ever before, the ongoing work on trial courts within our community is expanding in quantity, scope, method, creativity, and sophistication. These characteristics are certainly necessary, although not sufficient, for helping us to overcome the trial court research appreciation deficiencies present in the figure above.

Many hurdles remain for political science trial court scholars as well, three of which strike me as particularly significant. First, due to limited data availability, state trial courts continue to be very difficult to empirically study on a large scale. This is a shame for many reasons, not the least of which are the missed opportunities to examine both trial judges selected in very different ways and a tremendous number of disposed cases. Similarly, we need to find innovative ways to study critical events in trial courts that are difficult to observe such as plea bargains, settlements, prosecutorial declinations, and unwritten judicial orders. Finally, and perhaps most importantly, we must also keep working to convince our political science colleagues that trial courts are indeed “where the action is” and are otherwise important gate keeping institutions worthy of systematic study in our field.

Understanding Trial Courts Means Understanding Lawyers

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Seeking to understand the behavior of government officials and the institutions within which those officials work is a central part of what we do as political scientists. For law and courts scholars this aspect of our scholarship places a central focus on judges and the courts. Understanding government officials also requires that we consider the actors that surround those officials, both internal staff supporting the officials and external groups seeking to influence the officials' decisions. We see this most clearly in the study of parties and interest groups in the context of the legislative and executive branches of government. The influence of interest groups has also been an aspect of research on judicial decision-making (Epstein 1985, 1991, 1993, 1994; Farole 1998; Hansford 2004; O'Connor and Epstein 1983; Olson 1990; Scheppele and Walker 1991; Songer and Sheehan 1993; Songer and Kuersten 1995). Importantly, the research on parties and interest groups goes beyond how they influence the actions of government officials; they are seen as interesting political phenomena beyond their interaction with government officials.

With regards to the courts the attention of political scientists has probably been more focused on the government officials themselves than is true for the other two branches of government. Particularly if one looks at law and courts articles in the mainstream political science journals, one finds an extensive literature on judicial behavior, particularly at the appellate court level. As noted above, this literature does consider the influence of interest groups. There is much less attention directed to the other key external group influencing decision-making in the courts, lawyers (but see McGuire 1993; McGuire 1995; Szmer et al. 2007; Haire et al. 1999; Peppers 2006; Ward and Weiden 2006). There is relatively little attention directed at lawyers as interesting political phenomena in themselves. The most prominent exception is the now fairly extensive literature on cause lawyers, much of it by political scientists (Scheingold and Sarat 2004; Sarat and Scheingold 1998, 2001, 2005; Teles 2008); in a core sense research on cause lawyers combines an interest group element with lawyering.¹ Even with this research, lawyers, who play the role of the primary intermediary in the judicial system, are understudied by political scientists.

The importance of the role of lawyers increases as one moves *down* the judicial hierarchy. At the top of the hierarchy, it is the judges (or justices) who control both the docket and the disposition of cases. Lawyers participate in making decisions about whether to bring cases to the high courts and seek to frame the issues and arguments, but the judges are the dominant actors. Few cases that get to the high courts are disposed of without actions by the judges. At the intermediate appellate level one could argue that lawyers and judges have comparable roles, again with lawyers assisting in the decisions to bring appeals (Barclay 1999) and with many noncriminal cases resolved by settlements before judges act on the appeal. At the trial level, it is largely a lawyers game, with lawyers making decisions about which cases to pursue both on the criminal side (decisions to prosecute) and the civil side (decisions to accept cases on a contingency fee basis) and influencing decisions by clients regarding accepting proposed resolutions through plea offers (Flemming 1986; McIntyre 1987) or settlement (see Kritzer 1998a).

¹ There are the small literatures on "Washington" lawyers (see Horsky 1952; Laumann et al. 1985), and on government lawyers (Horowitz 1977; Olson 1985; Weaver 1977; Kagan 1978; Clayton 1995).

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My own research has been largely focused on the civil side of the justice system, and central to that research has been the activities of lawyers. My research has involved observing lawyers as they present cases to adjudicators (Kritzer 1998b), interviewing lawyers about how they decide which cases to handle and how they choose to handle their cases (Kritzer and Krishnan 1999; Kritzer 2008), surveying lawyers about those kinds of decisions (Kritzer 1997), and observing lawyers in their offices as they go about their day-to-day work (Kritzer 2004, 2006). In this latter aspect of my research, I like to say that I am to lawyers as Diane Fosse is to gorillas, I observe them in their natural habitats—their offices; observing lawyers in court where they are on public display is more akin to observing gorillas on public display in the zoo. This kind of work is not without its difficulties. One has to convince lawyers to allow you to be present in their offices, and those who do agree to allow you to be present may be themselves atypical. You never know exactly how your presence may be influencing what lawyers actually do. Some clients may not want you present when they meet with the lawyer, and hence you may not see some important things that go on. Despite these limitations, the depth of what one can learn by hanging out in the law office greatly exceeds what one can reconstruct through interviews (Kritzer 2002).

I am by no means alone among political scientists in using observation as a means of studying how lawyers go about their work in trial courts. Herbert Jacob, James Eisenstein, Peter Nardulli, and Roy Flemming conducted research on a substantial number of criminal courts in large and medium-sized cities and a central part of their work involved observation (Eisenstein and Jacob 1977; Eisenstein et al. 1988; Nardulli et al. 1988; Flemming et al. 1992). Other early work by political scientists on criminal courts involved substantial amounts of observation often combined with interviewing (Levin 1977; Feeley 1979; Heumann 1978; Mather 1979). However, compared to the number of political scientists who use judicial decisions as the basis of their analysis, the number doing observational work in trial courts is tiny, and it has largely been focused on the criminal courts.

This is not to say that the actions of judges (and juries) are unimportant in understanding what happens in the trial courts. While the number of what we customarily think of as trials may have declined over the last 30 years (see Galanter 2004; Ostrom et al. 2004), judges make many decisions short of determining guilt or liability, or overseeing jury trials that make those determinations. In criminal cases, judges make decisions on evidentiary motions and ultimately impose sentences.² On the civil side at least, the decisions of judges short of trial are important factors in the disposition of many more cases than the very small number that get to trial (Kritzer 1986; Eisenberg and Lanvers 2009), either by directly disposing of cases short of trial (Cecil et al. 2007; Cecil et al. 2011) or by resolving key issues in a way that leads to settlements or other resolutions. However, we do know that the cases in which judges make published decisions, which often become the focus for analysis (Carp and Rowland 1983; Rowland and Carp 1996; Carp et al. 2004), are unrepresentative both of all cases in the trial courts or trial court cases where judges produce written decisions (Olson 1992; Siegelman and Ill 1990; Ashenfelter et al. 1995).³

The importance of lawyers at the trial level arises in significant part in their anticipation of what would happen at trial or as a result of a dispositive motion. As suggested above, some of this involves gatekeeping-like activities of prosecutors (Cole 1970; Albonetti 1987; Frase 1980; Lochner 2002; Utz 1979) and plaintiffs' lawyers in potential

² At least in federal criminal cases, there appears to be an increase in other types of contested evidentiary hearings that usually lead to a judicial decision (see Kritzer 2013). Also, some observers have argued that the development of sentencing guidelines in criminal cases has transferred power from judges to prosecutors (Boerner 1995), although recent court decisions may have shifted power back to judges.

³ See Denise Keele's contribution to this symposium for a discussion of approaches to collecting data on trial court decisions that do not produce written opinions.

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civil cases (Kritzer 1997; Trautner 2006-2007) which keep large numbers of potential cases from being started. Sometimes it is the decision to pursue a case that is important; in his recent book *Flagrant Conduct*, Carpenter (2012) shows how decisions of the prosecutors and defense lawyers created the case that we know as *Lawrence v. Texas*.

Beyond gatekeeping lawyers are central in decisions made as cases are processed. Uncertainty about what would happen at trial or regarding decisions judges will make before trial lead lawyers to counsel clients and make decisions (Sarat and Felstiner 1995; Mather et al. 1995). For example, one case I observed involved a *Daubert* motion to exclude the key expert witness for the plaintiff which if successful would have resulted in summary judgment; while that motion was pending, the parties reached a settlement favorable to the defendant at mediation, and the defense lawyer at least partially attributed the favorable settlement to the risk to the plaintiff that *Daubert* motion would be successful. Beyond anticipating the results of pretrial motions, lawyers frequently counsel clients to accept compromise resolutions rather than insisting on trial. As suggested above, the image of the criminal defense lawyer advising his or her client to accept a plea agreement is a standard part of the criminal justice system (Flemming 1986; McIntyre 1987). As I describe in my work on contingency fee legal practice (Kritzer 1998a), counseling settlement may reflect the economic calculation that given the costs of trial the client will be better off financially by accepting a settlement compared to what would be obtained at a fully successful trial. While there may be other things to be gained by trial (Relis 2007), the fact that the contingency fee arrangement only compensates the lawyer based on the monetary results achieved means that the monetary goals will dominate from the plaintiff's perspective (Kritzer 1987) except in the rare case of a plaintiff willing and able to expend his or her own resources in pursuit of those nonmonetary goals. On the criminal side, there may be no triable issues (Kritzer 2011), and hence there is no benefit from going to trial other than a possible hope that a jury would for some reason return an unexpected, and highly unlikely, verdict of not guilty.

There is an important potential role for political scientists to play in the study of lawyers. Sociologists of law who study lawyers tend to do so from the perspective of the sociology of professions which means that they focus on the characteristics of the legal profession and the profession's place in the larger society. Very little work by sociologists looks at what lawyers actually do in their work or how lawyers interact with courts and other governmental institutions. Political scientists who study political actors and political institutions are much more attuned to what it is that the actors actually do and what difference those activities make both for the broader institutions they interact with and for others in society.

A challenge for political scientists studying lawyers and the work of lawyers is finding journal outlets for their work. The mainstream political science journals are unlikely outlets; the law-related work one finds in those journals tends to be of one of three types: decision-making by appellate judges, judicial selection, and public opinion about courts. As Chris Zorn noted in his letter to readers of the last issue of *Law & Courts*, law and courts scholars are split in their publishing preferences between mainstream political science journals and interdisciplinary journals. While some might think of the split as reflecting choices of method (quantitative versus qualitative), it is probably more accurate to view the split in terms of substance with those not focusing on appellate decision-making, judicial selection, or public opinion preferring the interdisciplinary journals. Importantly, I would note that the interdisciplinary journals are probably more likely to publish articles (from both political scientists and other scholars) on appellate decision-making, judicial selection, or public opinion than are the mainstream political science journals likely to publish on trial courts, to say nothing of lawyers and legal practice. Moreover, when political science journals do

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publish articles on trial courts those articles are likely to be either related to judicial decision-making (Epstein and Rowland 1991), or to link trial courts in some way to judicial selection (Huber and Gordon 2004). If one looks at the top political science journals publishing on American politics, among which I would include *APSR*, *AJPS*, and *JOP*, one would not need to turn to one's toes to count the number of articles focused on trial courts published over the last 30 years.⁴

Thus, it is probably true that a political scientist who chooses to focus his or her work on the legal profession or trial courts is going to limit his or her potential publication outlets, and this in turn will have implications for career options. Political science departments, at least those in research institutions, who look to hire a judicial politics specialist usually want someone who will publish in mainstream journals which in turn will tend to exclude a scholar focusing on trial courts or on the role of lawyers in the courts. I had the good fortune to spend 30 years teaching at an institution, the University of Wisconsin, where the political science department had a strong and long tradition of interdisciplinary research and where members of that department were active in the early years of the Law and Society Association. It is not a coincidence that when I eventually moved on from that department it was not to another political science department but to a law school.

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⁴ See Christina Boyd's introduction to this symposium for some data on trial court related articles in these journals over the last decade. Interestingly, there was a flurry of such articles focused on trial courts just over 30 years ago, in the late 1970s and the first years of the 1980s (Gibson 1977, 1978; Cook 1977, 1979; Kritzer 1978, 1979; Rowland and Carp 1980).

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District Court Data Sources: Implications and Opportunities

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Understanding judicial decision-making requires empirical research on all types of judges and all types of decisions. There can be little doubt among law and courts scholars that multi-user databases such as those compiled on the Supreme Court (Spaeth), the Courts of Appeals (Songer, Kuersten and Haire), and the State Supreme Courts (Brace and Hall)¹ have been instrumental in launching countless individual research agendas which have contributed to an ever-increasing sophistication in our knowledge, theory, and approaches to understanding judicial behavior in these courts. Despite the obstacles to data-driven research, especially given the lack of readily available public databases, there has also been substantial scholarship on the United States District Courts (USDC). In this contribution, I explore some of the implications of the data sources utilized for USDC scholarship with a particular focus on the creation and utilization of the federal system entitled "Public Access to Court Electronic Records" (PACER).

The best method of obtaining a representative sample of USDC cases is to examine federal courthouse records (Rowland and Carp 1996; Ashenfelter, Eisenberg, and Schwab 1995). Since this method has historically been time-consuming and expensive, researchers have adopted several strategies for getting data. In the most comprehensive study of the USDC, Rowland and Carp (1996) analyzed nearly 46,000 opinions published in the Federal Supplement, representing over 1500 judges across a 54 year time period. Numerous scholars have followed this approach by searching and obtaining cases published in the electronic databases of Lexis and/or Westlaw to collect USDC judicial opinions and build their own databases. Others (Songer 1988; Swenson 2004) rely on Westlaw and Lexis to locate United States Courts of Appeals (USCA) decisions from which they draw inferences about the district court opinions. Similarly, some have mined the existing publicly available Courts of Appeals Database since it contains some information on the trial court decision that was appealed (see Randazzo 2008).

Thus, almost all existing USDC scholarship tends to rely on published and/or appealed USDC judicial opinions (there are recent exceptions, see Boyd and Hoffman forthcoming; Hoffman, Izenman, and Lidicker 2007; Keele 2009). This is problematic since well over 90 percent (Rowland and Carp 1996) of district court opinions are not

¹ All three datasets are archived and available online from the Judicial Research Initiative (JuRI) at the University of South Carolina.

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designated for publication and numerous studies have found that published and unpublished district court opinions differ in systematic ways (Ringquist and Emmert 1999; Siegelman and Donohue 1990; Songer 1988). Although many unpublished opinions are now accessible through Lexis and Westlaw, the databases still do not contain all or a random sample of unpublished USDC opinions. Similarly, although the USCA possess mandatory jurisdiction in that they must review all appeals, in reality only about 10 to 20 percent of district court opinions are appealed in any given year (Federal Judicial Center 2011). Since the decision to appeal is made by the parties involved, these studies also cannot be considered as drawn from a random or representative sample of district court cases. Though understandable since these are the available data sources, the focus on published and/or appealed USDC cases means that “we have ignored between 90 and 95 percent of all data” (Ringquist and Emmert 1999, 8), and thus may be drawing conclusions regarding judicial behavior that do not accurately describe the motivational forces behind all or even the majority of USDC judicial decisions.

Similarly, the focus on *opinions*, whether published or not, overlooks the institutional context of judicial decision-making on the USDC. Unlike judges in the federal appellate courts, a district court judge may make many decisions of varying types at different points in time in a single case that can result in or contribute to a variety of case outcomes ranging from abandoned, to decided, to settled. Most of these decisions are not accompanied by written reasons explaining the decision, thus the decision is not an “opinion” but rather, it is an “order” and as such it will not appear in Westlaw or Lexis, even as “unpublished” (Kim, Schlanger, Boyd, and Martin 2009). An opinion may in fact be a very rare event at the USDC. One study has found that only 3% of all judicial actions were accompanied by an opinion, and even when purely ministerial orders were excluded, only 17% of judicial orders were accompanied by written reasons (Hoffman, Izenman, and Lidicker 2007).

Whether decisions were made “on the merits” or were “dispositive” or not, these decisions in the form of “orders” to grant or deny all types of motions can have a significant impact on the potential outcome of a case. For example, Boyd and Hoffman (forthcoming) show that motion practice, and whether motions are granted or denied throughout a case, can substantially shape parties’ knowledge about their cases and thereby influence the timing of settlement. Likewise, models of judicial behavior can be applied to more than orders on final decisions, as Buchman (2007) finds that ideology explains trial court judges’ decisions on whether to admit scientific expert testimony. Clearly, a great deal of the substantive legal work may occur in trial court decisions that may or may not be on the merits, are not fully explained (i.e. are not opinions), or in cases not resolved by some sort of adjudication.

These limitations of existing data sources utilized for USDC scholarship, namely that “published opinions are not representative of all opinions; opinions are not representative of all district court decisions; and adjudicated cases are not representative of all filed cases” (Kim, Schlanger, Boyd, and Martin 2009, 97) are perhaps well known to law and court scholars. What seems to be less widespread is knowledge about and utilization of a data source that can provide access to all unpublished opinions, all types of decisions in cases (i.e. orders), and to all cases filed regardless of the type of final outcome. That is, there is a source for easily obtaining courthouse records, the aforementioned best method of obtaining a representative sample of USDC cases. That source is the federal system entitled, “Public Access to Court Electronic Records” (PACER).

Historically, obtaining courthouse records was only possible by the time-consuming task of visiting each of the 94 district court jurisdictions and then any citizen could have free access to inspect records. Note that inspection generally was interpreted to mean that you could take notes on case documents, or you could request a copy of any of the documents for which the court would charge \$0.50 cents per page. Just as technological advances in the electronic databases of Westlaw and Lexis obliterated the need for scholars to get published opinions from the hard copies in law libraries, PACER has made the courthouse record accessible remotely and electronically.

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Most of those tracing the history of PACER date its birth to 1990 with the passage of an appropriations act authorizing the federal judiciary to build a system furnishing remote access to court records to be supported by funds generated by access fees (Martin 2008). Initially those using the system had to retrieve case records on a jurisdictional basis, meaning they had to know which court was involved and go to that court's website, but pressure to expand led the Administrative Office (AO) of the United States Courts to complete a national US Party/Case Index search function by 1997, and then move to a dial up web interface in 1998. At about the same time, the AO moved to an electronic document filing system that expanded the information available from docket entries to also include documents. In 2002, the E-Government Act (the Act)² mandated that court websites provide access to all docketing information, to all case filings made in or converted to digital format (subject to some privacy exceptions), and to the substance of all written opinions issued by the court, regardless of whether such opinions were to be published in the official court reporters. With most of these functionalities already present by 2002, PACER became the official mechanism to comply with the Act.

A docket, for those who may be unfamiliar, is the court record of the case (each case is given a docket number) which includes basic case information, all the parties, lawyers, the judge (and any magistrate judge who heard any portion of the case), and then a chronological timeline and brief description of every event in the case, including every judicial decision (orders and opinions) on every motion made in the case. Thus, by looking at just the docket, researchers can capture all of the critical information and all the decisions in a case. When documents such as the complaint, a settlement agreement or an opinion exist, they can be retrieved by following links from the online docket sheet.

Collecting cases from PACER can be done in a few different ways. Searching by the national party index, the still available original feature of PACER, is the easiest, but it assumes that researchers already know the parties. For example, in my own research I study litigation involving a particular federal agency, so I can simply search by the name of that agency and retrieve all the cases that include the agency as a party to litigation nationwide. While this search function makes a lot of sense for the main users of PACER who are still the lawyers, judges and court personnel, and for researchers who define their study in terms of a particular individual or entity, it does not retrieve a truly representative sample of all cases. Although a researcher can sometimes identify a group of cases through a report function available on PACER, it is important to keep in mind that other than the national (all courts) party search index, PACER is still fundamentally an aggregation of individual court databases. By first selecting a court jurisdiction, the options for case retrieval widen to search functions by the Nature of Suit (NOS) codes, the cause of action, as well as the traditional party name and docket number. These search functions can be modified by several criteria such as date ranges and whether cases are open or closed. Although the time it takes to search each court rather than a national index is not trivial, these operations do allow researchers to collect representative samples of cases. Alternatively, for those scholars perhaps not solely concerned with a representative sample of cases or a particular party, but instead more interested in complete information and comparability between cases that a docket sheet can provide, some researchers first utilize the more powerful and sophisticated search capabilities in the familiar Lexis and/or Westlaw databases and then plug the case docket numbers into PACER to retrieve the full docket sheet. Similarly, for research on any prior collections of cases from other sources, dockets and other documents could easily be found by searching for the party or docket number (note that PACER does not include a search function for F. Supp published case citations).

While dockets are generally available in all courts starting from 1997, and links to documents such as complaints and opinions are generally available beginning in 2005, each of the courts maintains their own records and there are differences in availability over time (each court provides a report giving information on the earliest case in the system). Technically, the E-Government Act mandates that access to a case's docket and documents must only extend one year beyond the termination date, however, to date, PACER data has simply accumulated and every current case is updated each night.

² E-Government Act of 2002, Pub.L. No.107-347

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Just as copies of cases were not free from the courthouse, and Westlaw requires an expensive license to use, PACER data are not free either. Online user fees started at \$0.07 cents per page in 1998, were raised to \$0.08 cents per page in 2005 and as of April 1, 2012 the fee has increased to \$0.10 cents per page (with access to a single document capped at \$3.00, the equivalent of 30 pages). In an effort by the AO to improve public access, written opinions filed after 2005 are available for free. Otherwise, users pay for every document they view, so the search can be costly, but the cost is the same whether you view, print or download the page(s), so most researchers opt to save or print their own copy (Lopucki 2009). Also, since the distribution of the number of pages of a docket is skewed, with many cases having only a handful of entries and a few cases with hundreds (Hoffman, Izenman, and Lidicker 2007), which is also true for estimating the length of opinions and other documents, budgeting for PACER fees within a research proposal can be challenging.

Although there are some proposals to modify court personnel entry of docket information into more standard and searchable forms that would allow direct downloads of information rather than dockets or documents (Lopucki 2009), at the moment you still have to code your own data from the dockets and docket sheets. Likewise, even though the documents available are electronic, they are scanned-based rather than text-based PDF's which prevents word-searching techniques and in my experience the scans are usually of insufficient quality to prevent being able to rescan them to text and use any word-search software.

There have, however, been two major recent attempts at advancing the type and accessibility of the PACER data. First, digital audio recordings of court proceedings are now available to the public through the PACER system. In March 2010, the Judicial Conference approved the plan to make digital audio recordings available on PACER after a two-year pilot project showed significant public interest in accessing these files. Previously, access was only possible by obtaining a CD recording from a clerk of the court office for \$26. The new digital files cost \$2.40 and are linked to docket sheet proceedings just like documents. The following seven courts provide access to audio files through the PACER system: the U.S. District Courts in Nebraska and the Eastern District of Pennsylvania; the U.S. Bankruptcy Courts in the Eastern District of North Carolina, Northern District of Alabama, Southern District of New York, Rhode Island and Maine. Second, in that same March 2010 Judicial Conference, a one-year pilot project to provide free access to dockets and documents in PACER at 17 libraries around the country was approved. As the free trial was getting underway, a small group of open-government activists went to these libraries, downloaded as many court documents as they could, and republished them on the Web (Schwartz 2011). At the time, the servers were shut down, but the AO appears to be still working on a public release.³

Although not affiliated with or endorsed by the PACER system or the United States Judiciary, a more organized and legal approach to the public re-dissemination of PACER data is RECAP⁴ which is an independent project of the Center for Information Technology Policy at Princeton University. RECAP is an extension (or “add on”) for the Firefox web browser that allows users to automatically donate the documents they purchase from PACER into a public repository hosted by the Internet Archive. In turn, RECAP alerts a PACER user when a document they are searching for is already available from this repository for free. Currently an experimental interface also allows researchers to search the archive directly. Since the documents on RECAP are not known to be a random or even representative sample, this source would probably work best for those interested in docket level research or obtaining documents for an existing case population.

Obviously utilization of PACER as a source for USDC data, as I hope to have outlined above, is no silver bullet and there are significant data considerations. Given the nearly 400,000 filings per year across 94 jurisdictions involving around a 1,000 different judges (Federal Judicial Center 2011), data collection and coding is still very labor

³ PACER CM/ECF release notes for all this information available at: <http://www.pacer.gov/>

⁴ Information and download available at: <https://www.recapthelaw.org/about/>

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intensive. Additionally, PACER does cost money that comes out of a researcher's own budget (unless you use RECAP) as opposed to databases like Westlaw where the license is usually paid for by an institution. However, the changes in access and availability of courthouse records is orders of magnitude less expensive and less time-consuming than when docket level judicial research was pioneered pre-PACER in the 1980s (Ashenfelter, Eisenberg, and Schwab 1995). Just as with technological advances in other data sources over time, PACER has evolved into a source that is now very similar in terms of the type of work, time and expense that researchers invest in collecting cases from other traditional sources. The historic reason for not utilizing courthouse records as a data source because they were too time-consuming and expensive to collect is simply not as true as it once was.

More importantly, because of the traditional data sources utilized by the majority of scholars, our conclusions about USDC judicial decision-making are incomplete. PACER alleviates the three most significant limitations of the predominant data sources utilized for USDC scholarship in that it provides access to all unpublished opinions, all types of decisions in cases (i.e. orders), and to all cases filed regardless of the type of final outcome. PACER can provide representative samples of the actual institutional context of judicial decision-making on the USDC. PACER could represent a tipping point for change in research since scholars who utilize it will no doubt discover obscure information, make connections between discrete bits of information, more completely answer questions that have previously been asked, and ultimately pose new questions. These type of data, which have been largely inaccessible from the traditional data sources, warrant attention by law and courts scholars and could be taken advantage of in order for scholars to contribute greatly to our understanding of USDC judicial decision-making.

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Budgeting the Bench: The 'Nuclear Option' and Preference Disparity at the U.S. District Court Level

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In the spring of 2005, President George W. Bush was embarking on his second term of office and was laying out a wide ranging agenda during a state of the union address to a country that faced numerous challenges. In the international context, the United States was engaged in the two front campaign of the *War on Terrorism*, with sectarian violence and protest on the rise in the run up to elections of new governments in Afghanistan and Iraq. On the domestic front, the structure and leadership of a homeland security and counter-terrorism programs were in debate, the country was in the midst of an intermittent recovery from economic recession, budget deficits were accumulating, and a significant restructuring of the Social Security program was on the table. In addition to these significant issues, President Bush used this opportunity to address another less salient topic. He spoke of the importance of the judicial appointment process in the following statement:

Because courts must always deliver impartial justice, judges have a duty to faithfully interpret the law, not legislate from the bench. As President, I have a constitutional responsibility to nominate men and women who understand the role of courts in our democracy, and are well qualified to serve on the bench—and I have done so. The Constitution also gives the Senate a responsibility: Every judicial nominee deserves an up-or-down vote (Bush 2005).

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Of course, the timing of this assertion on appointment powers was not coincidental. The Senate soon would be in the midst of a historic partisan showdown over rules governing federal judicial appointments and “up-or-down vote” would be an oft repeated call for change.

In retrospect this episode within the Senate seems incongruent with the times, but the controversy had long roots and real implications. Debate focused upon Senate Majority Leader William Frist’s (R-TN) proposed Senate Resolution 138 (108th Congress) that would alter filibuster / cloture requirements for nominations subject to the Article II, Advice and Consent power. Under this proposed rule change, the threshold for invoking cloture, or terminating a filibuster challenge, would incrementally decline until a simple majority could call for an up-or-down vote upon a nominee (Beth 2005; Palmer 2005). This proposal was better known as the “nuclear option;” a reference to the Democratic minority’s threat to abstain from future unanimous consent agreements that are necessary for the Senate to proceed with its day-to-day business. Thus, both the composition of the federal bench and the legislative calendar hung in the balance as deliberation began.

Over six days, the floor of the Senate was consumed by the topic in a debate that is remarkable in scale and content. The printed record associated with judicial appointments would comprise more than 260 pages of the Federal Register.¹ On the last day of deliberation, Senator Ben Nelson (D-NE) came to the floor with a statement titled “Putting Partisanship Aside” (Nelson 2005), which offered details of the compromise agreement that brought this incident to a close. Negotiations amongst 14 moderates from both parties had yielded a compromise whereby the filibuster / cloture requirement remained unchanged and most of the stalled nominees would now move forward to confirmation. With the status quo maintained and a legislative stalemate averted, the Senate would soon return to its regular business.

As an isolated event, this senatorial dispute over the “nuclear option” appears to be enigmatic, but contests over judicial appointments have arisen throughout the history of the Constitution. The origin of judicial review in *Marbury v. Madison* (1803), the contested appointment of Justice Brandeis (Abraham 2008, 135), FDR’s failed “court-packing” attempt (Nelson 1988), and modern appointment controversies associated with Robert H. Bork and Clarence Thomas (Gerhardt 2003, 234) offer relevant examples. The “nuclear option” dispute is somewhat unique with respect to the past, since it marked an expanded focus that now comprised the lower federal courts. In an era of stable Supreme Court membership, the lower court appointment process became the active arena for elected branch contests over the composition of the judiciary (Hartley and Holmes 2002). Institutions, such as the norm of senatorial courtesy (Binder and Maltzman 2004; Hendershot 2010), the judiciary committee’s blue slip (Binder 2007), and legislative holds and filibusters (Steigerwalt 2010), were being utilized in new ways to impede the once routine path to confirmation. Within this context, the lower court appointment process devolved into a historic period of delay and gridlock (Binder and Maltzman 2002; Martinek, Kemper and Van Winkle 2002).

This modern conflict over judicial appointments can best be seen through Axelrod’s (1984) concept of tit-for-tat retaliation over the ideological construct of the judicial branch. Both the Democratic and Republican Parties have used the institutions of appointment in an attempt to sculpt this collection of life tenured policy makers in their preferred image. Both point to past instances of partisan obstruction to executive’s nominees and therefore in a retaliatory manner invoke these same tools to keep vacancies open for future changes in control of the White House. However, we have little systematic evidence about which party has had the upper hand with respect to the ongoing game.

¹ The debate can be found in the 109th Senate Congressional Record, Vol. 151, Nos. 66, 67, 68, 69, 70, and 71. Utilizing the daily issue summaries, the judicial appointment topic could be found on May 18th (issues 7 and 9), 19th (issue 4), 20th (issue 7), 23rd (issues 8, 13, 15, and 42), 24th (issues 8, 9, 11, 13, and 37), and 25th (issues 7, 9, 11, 13, 15, and 19).

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Mapping Changes at the U.S. District Court Level

Conceptualizing preference changes in federal courts becomes more challenging as we move from the Supreme Court down through the circuit and district court levels. On one hand, it is reasonably straightforward to understand that replacing a liberal justice with a conservative (or *vice versa*) should alter the position of the median justice of a nine-person court. Figures invoking a simple liberal-conservative ideological continuum can effectively relate these movements and convey potential implications for decision-making outcomes. The more numerous judgeships and geographical boundaries found at the lower federal court, however, make such tools unsuitable to the task, and thus a mapping strategy offers a more useful means to relate data associated with levels of ideological disparity and change over time. In this instance, all that is needed is a wide-ranging source of preference data and simple mapping software to generate visual evidence regarding the relative success of the Democratic and Republican parties in their attempts to budge the bench within district court context.

The following figures are the product of such a strategy and provide some insight on the interaction of elected and judicial branch actors² within the appointment process of district court judges, this analysis considers the successful appointments to these state level jurisdictions³ that took place from 1901 to 2004 (Hendershot 2010), or just prior to the Senate debate over the “nuclear option.” These successful appointments are associated with new proxies of district court judges’ preferences (Hendershot and Tecklenburg 2011), which are a product of Poole and Rosenthal’s (1997) DW Nominate scores of senators and presidents and are similar to the preference measurement strategies of the courts of appeals (Giles, Hettinger, and Peppers 2001).

The Giles, Hettinger and Peppers scores are constructed with a singular formula predicated on the assumption of a traditional senatorial courtesy norm, but these district court preference positions come in four unique forms – an *executive point*, a *traditional courtesy point*, a *selection point* and a *confirmation point*. The judge’s executive point is represented by the appointing president’s DW Nominate position when available and the presidential party median in the Senate when not. The traditional courtesy point represents the calculated mean of the presidential position and the most distant home state senator of the same party. Both are temporally static meaning that the calculation of the formula is consistent throughout the entire sample period. However, the selection and confirmation points take into account cyclical appointment regimes of senatorial influence (Hendershot 2010). The calculating formula is temporally dynamic and considers the robustness of senatorial constraints within the selection and confirmation of these judges. Depending upon the appointment regime, the calculated score alternatively invokes the most ideologically distant home state senator, the Judiciary Chairman position, or the opposing party median at the floor stage.⁴ These selection and confirmation points thus account for independent executive vetting practices (Goldman 1997) and broader conflict over judicial appointments within the modern era.

Annual databases of district court membership⁵ were created and reconciled. Within these 50 state-level databases, each judge was then associated with his or her four preference positions, making it possible to construct the annual median positions of each state between 1901 and 2004. These medians are plotted for the 48

² The district court judges also play a part in the game, since they can initiate vacancies through resignation, retirement, or the assumption of senior status.

³ The analysis excludes the District of Columbia and U.S. District Courts and the various territorial courts that did not have representation in the Senate.

⁴ An appendix with the ideal points and calculation matrices of the four scores can be found on the author’s webpage at: <http://plaza.ufl.edu/mehender/preferencepage.htm>.

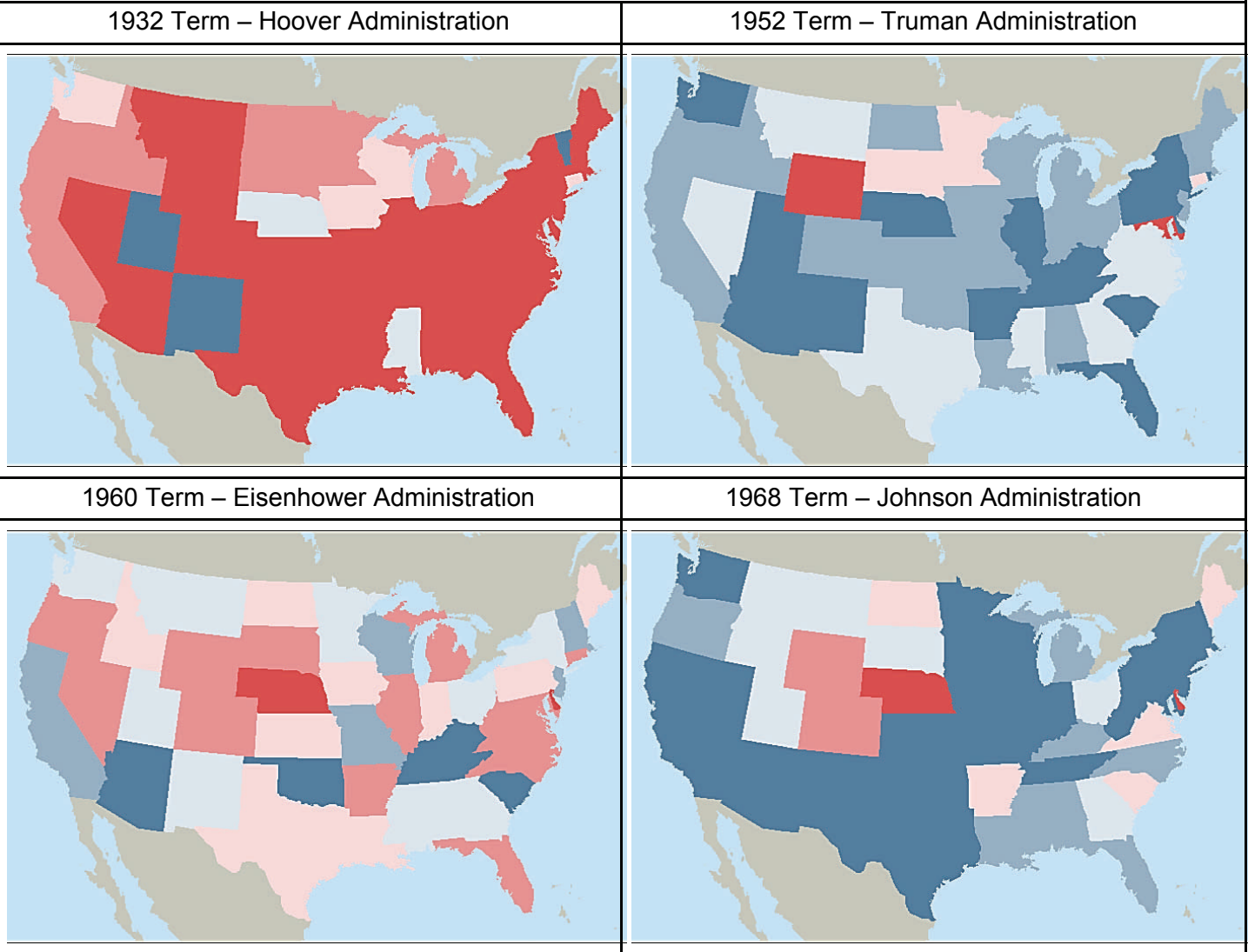
⁵ These data account for all active and confirmed U.S. District Court judges as of October 1st in each year and do not comprise those judges in senior status (Vining 2009).

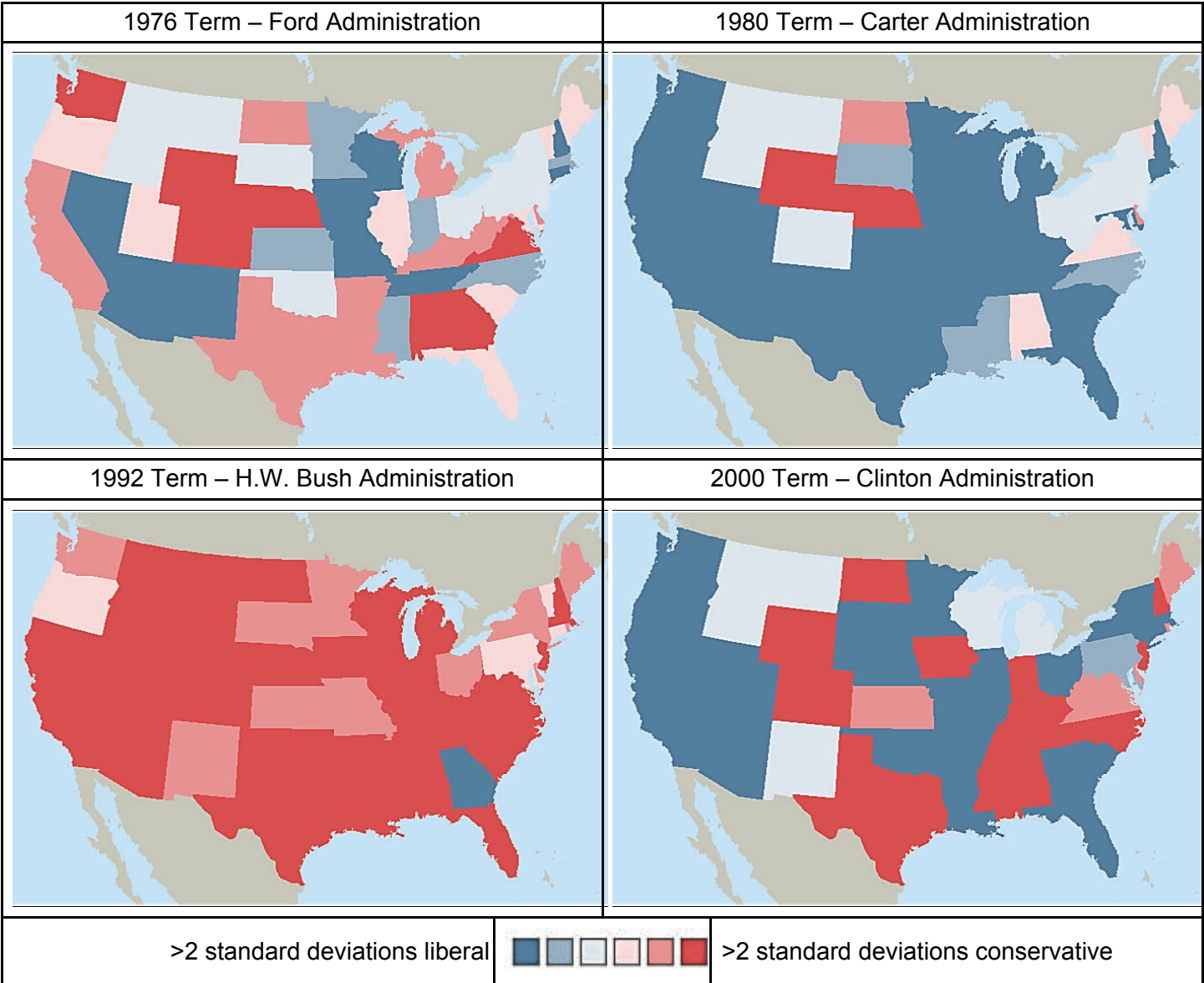
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contiguous states at changes in partisan control of the executive branch since the Hoover administration. They are depicted in standard deviation intervals (i.e., less than 1 standard deviation; greater than 1 standard deviation; greater than 2 standard deviations) from the mean position of all these courts for the entire sample period.

The district court medians at the end of Republican and Democratic administrations are presented in Figure 1. These values are functions of the traditional courtesy based measures and account for a uniform norm of senatorial courtesy with members of the president’s party. Following the Hoover administration, almost all of the 48 contiguous states were stocked with conservative appointees, but less populous states (i.e., New Mexico, Utah, Nebraska and Mississippi) either leaned slightly liberal or were closer the sample period mean – the national mean position from 1901-2004. The subsequent New Deal administration and President Truman’s appointees tended to pull the state medians back toward this mean, with the exception of the Northern Plains region and a couple of Eastern holdovers such as Connecticut and Maryland. Liberal gains are again evident in the less populated Southwest, but some larger states such as Illinois, Pennsylvania, and New York were now more firmly liberal.

Figure 1: U.S. District Court State Median Positions at Changes in Control of the White House





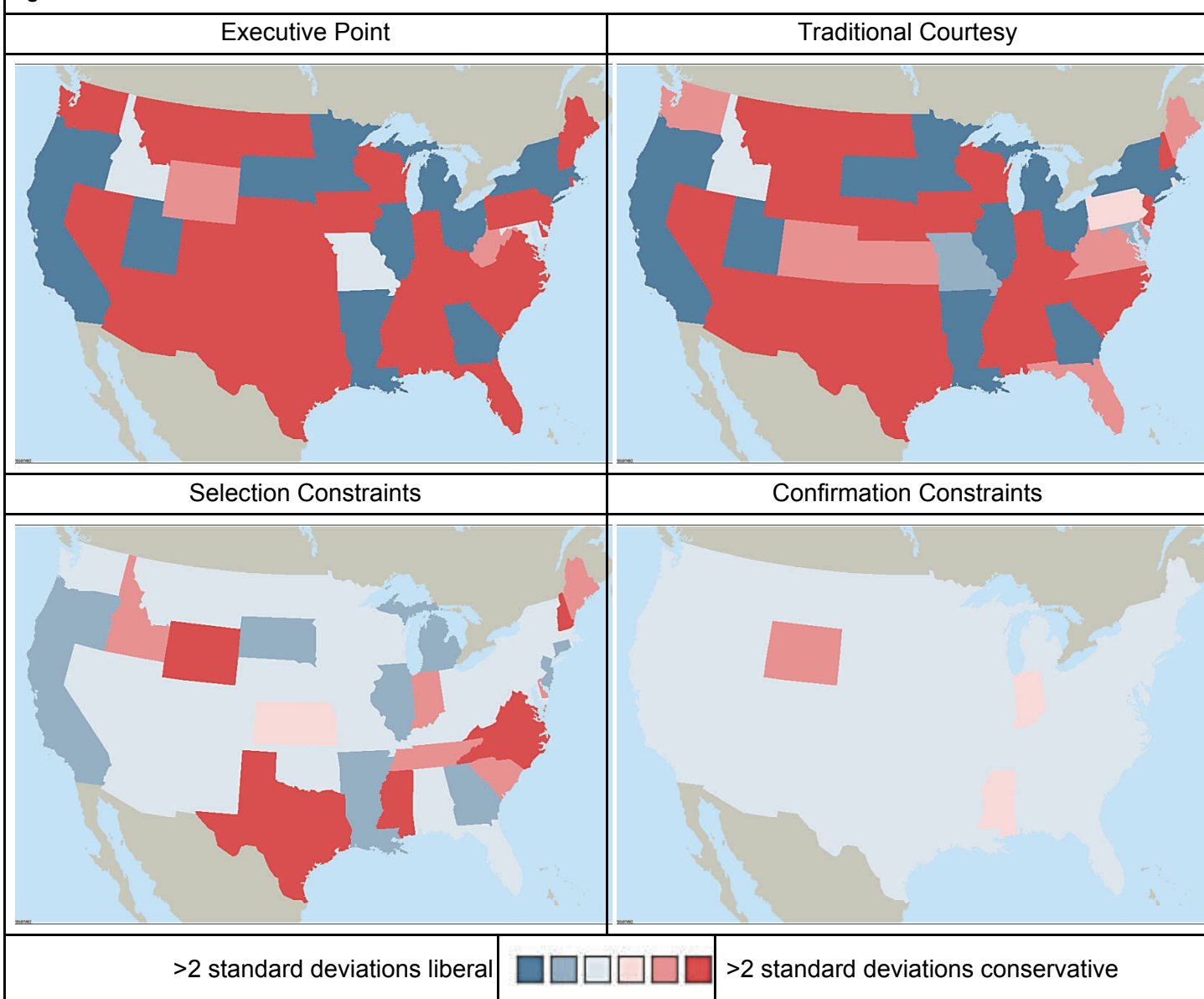
Note: State level median positions of the traditional courtesy point measure for U.S. District Courts in the 48 contiguous states. Scale is based on the mean (.084) and standard deviation (.145) of the mean position of all 50 U.S. District Courts for the entire sample period.

These transitions are emulated between the Eisenhower and Johnson presidencies. President Eisenhower’s gains are located in the Central Southwest and the Great Plains and Mountain regions. Increases in the number of authorized judgeships⁶ during the Kennedy and Johnson era (Barrow, Zuk and Gryski 1996) contributes to a more liberal distribution of preferences with the exception of the Northern Plains and Mountain regions. The traditional South, however, tended to remain more moderate due to the influence of Southern Democrat senators within the appointment process (Hendershot 2010). This geographically weak party structure, ongoing realignment (Carmines and Stimson 1989), and further expansion of the district court bench⁷ afforded opportunities for the Nixon and Ford administration to push the South toward a more conservative direction. In addition to these states, the Pacific West, North Central and Middle Atlantic areas make substantial movements to the right.

⁶ In 1961, or the beginning of the Kennedy Administration, 60 new positions were authorized and an additional 36 were allocated in 1966.

⁷ During President Nixon’s first term, 57 new District Court judgeships were authorized.

Figure 2: U.S. District Court State Median Positions at the 2004 Term

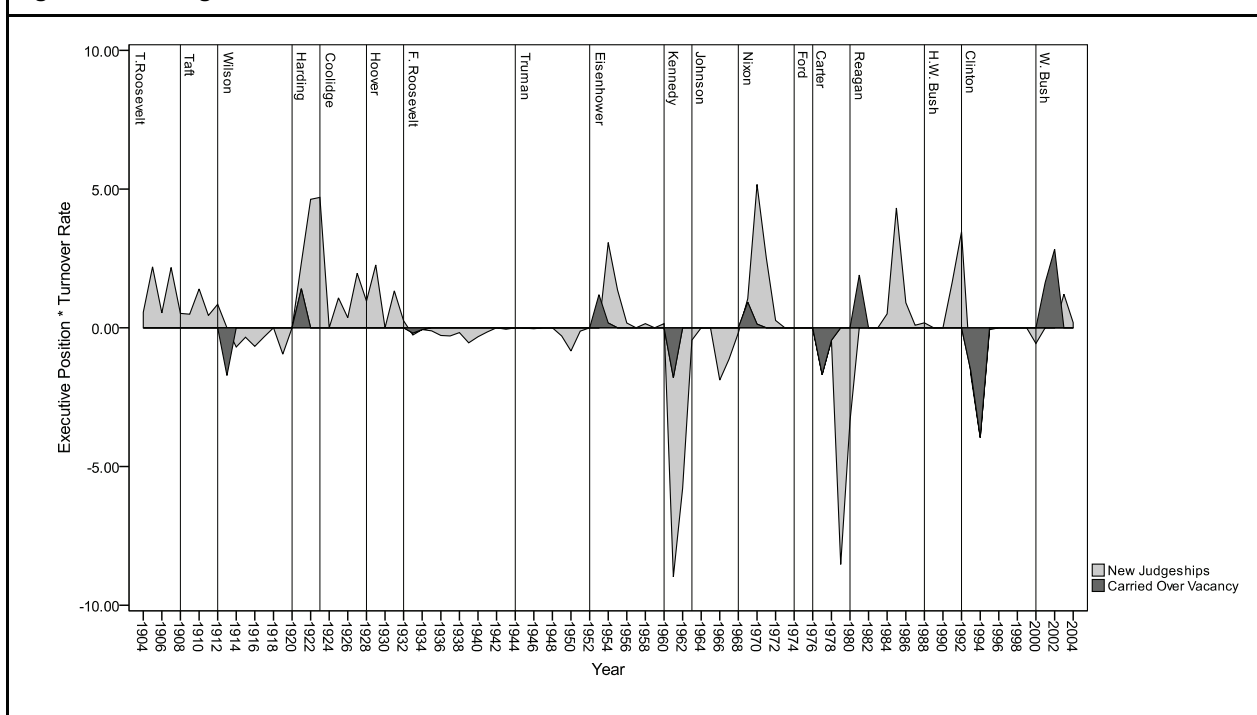


Note: State level median positions of the traditional courtesy point measure for U.S. District Courts in the 48 contiguous states. Scale is based on the mean (.084) and standard deviation (.145) of the mean position of all 50 U.S. District Courts for the entire sample period.

Is Either Party Winning and Does it Affect Decision-Making Outcomes?

As the above figures suggest, major changes in the distribution of district court preferences are a function both of the creation of new judgeships and confirmation conflict that engenders carry-over vacancies. These types of opportunities are in a sense the currency of the appointment contest and provide another means to assess which party, if any, is ahead in the game. One way to leverage this aspect is through an evaluation of turnover rates. Figure 3 presents an interaction variable of executive preference positions and the turnover rates associated with new judgeships and carried over vacancies. This plot more concisely depicts modern tit-for-tat conflict between the two parties. In the early portion of the sample, expansion of the bench took place at an incremental pace. Some evidence of carried over vacancies can be found between the Taft, Wilson, and Harding presidencies, but generally these new seats were filled in a rapid fashion. President Eisenhower inherited some vacancies from Truman who was known for taking stubborn stances in the appointment of trusted friends (Goldman 1997).

Figure 3: Packing the U.S. District Courts



Note: U.S. District Court appointments to the 50 state courts (District of Columbia and territorial courts are excluded). Values represent the current executive position multiplied by turnover rate. To control for expansion of the bench due to the authorization of new judgeships, turnover rates are calculated with a 3 year lag of the number of authorized judgeships.

Major opportunities to affect changes in district court membership occur during the rapid expansion of the bench in the Kennedy and Johnson presidencies. Democrats in Congress provided considerable numbers of new positions and along with holdover vacancies were able to draw the bench toward a liberal direction (see Figure 1 above). Not all of these positions were filled by the end of Johnson's term, and President Nixon too had new positions to fill. Nonetheless, Nixon had a relatively fewer opportunities to affect the ideological composition of the district court bench.

The second wave of court-packing takes place under President Carter. Following the Watergate crisis, Democratic Party resistance in the Senate created a number of carried over vacancies and then a large number of new seats were created. President Reagan was able to fill some of these seats at the beginning of his first term but expansion was more limited thereafter. Many of the new seats established at the end of President H.W. Bush's single term ended up vacant at the beginning of the Clinton administration. Democratic Party efforts to expand the bench under Carter and then stymie H.W. Bush's appointments engendered partisan retaliation when Republicans later took control of the Senate. President Clinton's nominees that faced a Republican Senate were prone to conflict and a number of carried over vacancies existed at the beginning of the W. Bush presidency.

An analysis of these two vacancy types thus points to a fairly competitive sequence of partisan moves to sway the district courts, with successful expansion of the bench under Kennedy and Carter, and subsequent resistance to H.W. Bush's nominees, evincing a moderately sized advantage for the Democratic Party. The question remains, however, whether such movements are actually reflected in district court decision-making? Here too, the evidence suggests that this competition matters. Figure 4 presents an overlay plot of predicted probabilities for the sample

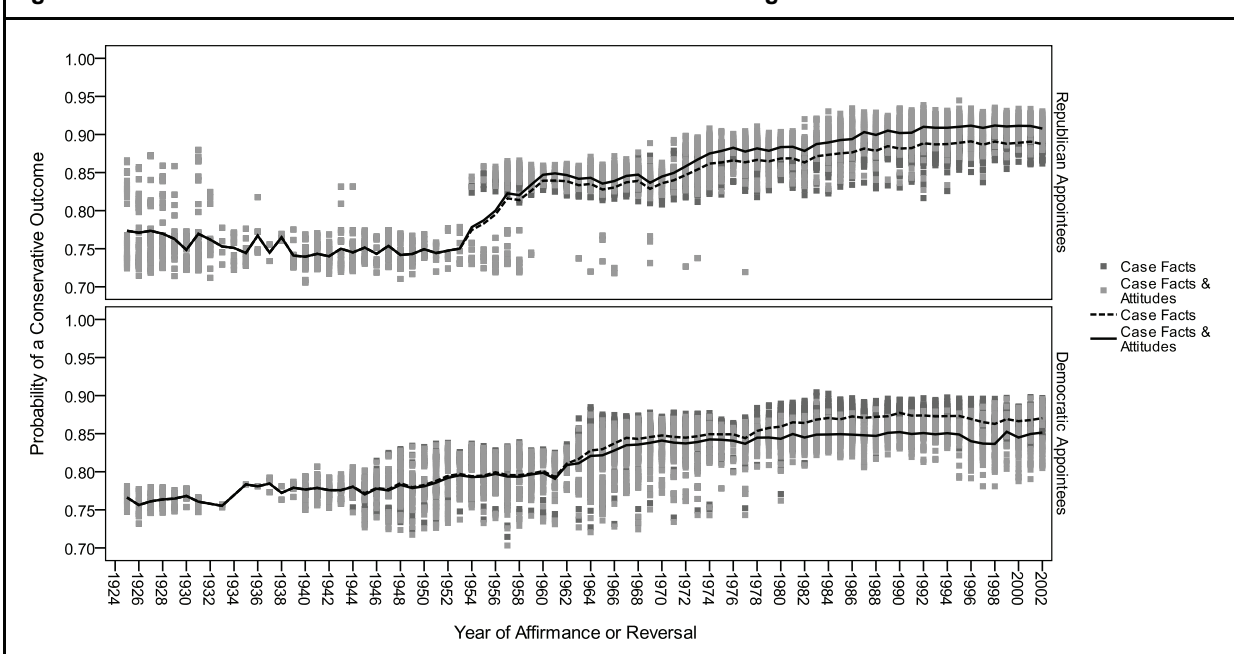
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of appealed district court decisions found in the U.S. Court of Appeals Databases.⁸ This plot stems from the best performing cyclically constructed preference specification in Hendershot and Tecklenburg (2011) and offers some leverage on the magnitude of attitudinal effects at this level. The darker shaded markers represent probabilities of the sample after controlling for case facts alone. The lighter shaded markers incorporate both case facts and attitudinal influences.

As expected, ideological influences move the mean probability value in a more conservative direction for Republican appointees and in a more liberal direction for Democrat appointees. While the differences associated with attitudinal effects are limited (*i.e.*, approximately +/- 3 to 4 percent; in aggregate more than 90% for recent Republican appointees versus less than 85% for Democratic appointees), such differences do exist and have been slowly incorporated into the decision-making calculus over time. Therefore, the observed conflict over these judicial appointments is not simply related to partisan retaliation within the confirmation process, but also to growing ideological influences that have become ingrained in district court decision-making.

Figure 4: Attitudes and Facts In U.S. District Court Decision-Making



Note: Probabilities generated with King, Tomz, and Wittenberg's (2000) Clarify software. Estimated model output (Hendershot and Tecklenburg 2011) is an unweighted specification of the confirmation cycle ideal point (Model 8 in Table 4). All case fact and ideology variables are set to the subsample mean values of the appointing president-regime categories.

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⁸ Donald R. Songer, *The United States Courts of Appeals Database*. National Science Foundation Grant SES-8912678. Ashlyn K. Kuersten and Susan B. Haire, *The United States Courts of Appeals Database Update*. National Science Foundation Grant SES-9911284.

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As an isolated event the “nuclear option” debate that took place at the beginning of George W. Bush’s second term can appear to be an example of simple partisan intransigence. From the longer term perspective, it seems to be just the latest example of tit-for-tat conduct (Axelrod 1984) in parties’ attempts to align the judicial branch with their competing ideological platforms. The story that emerges from this analysis of the U.S. District Courts is that Republicans did have a reasonable case to make about Democrat’s past conduct within the appointment game. Democratic Party efforts to expand the bench during the Kennedy and Carter administrations represented a divergence from the more incremental rate of adding new judgeships and similar opportunities provided to Republican presidents were relatively smaller in scale.

The bipartisan compromise that emerged from this debate essentially maintained the status quo and George W. Bush’s second term and the interval of unified control of the Senate almost certainly helped establish some parity between the parties with respect to district court appointments. Interestingly, it is the Democrats in the Senate who recently have been discussing potential revisions to the cloture norm and legislative holds. For the time being, then, it seems that these retaliations continue in current political context. In the absence of successful attempts to further increase the number of authorized judgeships, the implication for the ideological composition of the district courts most likely are contained. These inter-branch contests over nominees act to moderate partisan swings in the composition of these courts. Presidents’ abilities to effectively budge the bench are most effective through court-packing strategies that either afford new appointment opportunities or stave off appointment for successor presidents. With the House and Senate respectively controlled by Republicans and Democrats the prospects for new seats are low. The narrow balance of power in the Senate will subject some of President Obama’s late term nominees to gridlock. Yet the absence of substantial numbers of these will tend to keep the district court mean within traditional intervals.

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Disparity in Federal District Court Sentencing

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The decisions of the United States district courts provide a valuable resource for understanding the way in which federal law is implemented in the United States. Ninety four judicial districts in this country currently receive about 360,000 new cases a year. This article focuses on a significant portion of the district courts' criminal docket, specifically sentencing defendants under the Federal Criminal Code and the U.S. Sentencing Guidelines. While ideally federal law is implemented similarly across the country, this is not practicable due to the sheer number of cases that district court judges hear and the inability of other political institutions, such as the Supreme Court or Congress, to sufficiently monitor each judge's decisions. Furthermore, trial level judges are neither limited in their decision-making by the work of other judges in their district or by other district courts hearing similar cases. While appellate review and legislation may attempt to constrain judges' decision-making discretion, such constraints are

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imperfect due to the large number of judges and cases at the trial level and an insufficient number of actors to monitor these decisions.

Concerns about the consistent application of federal law arise due to the lack of sufficient practical oversight. For some, such concerns threaten the “democratic rule of law” which is defined by O’Donnell (2004) as “the degree to which the legal system extends homogeneously across the entire territory of the state” (p. 43). Disparity in case outcomes for similarly situated litigants may result in citizens viewing justice as biased. Further, inconsistent application of the law hinders its deterrent effect as individuals will be unable to predict the consequences of their actions based on their understanding of how individuals in similar circumstances are treated by the legal system. For others, the inconsistency of the application of federal law is viewed as less problematic and instead a practical response to local concerns. Inconsistency may signal that law is flexible and responsive to the needs of society.

While the normative value of the inconsistent application of the law can be debated, certain sources of disparity are seen as more troubling than others. For instance, several studies have indicated that federal sentencing disparity is due to attributes of the defendant, such as race and sex (Albonetti 1997; Mustard 2001; Free 1997; Pasko 2002). Recent controversies over the disparate treatment of African Americans involved with cocaine as well as other anecdotal evidence and empirical studies have highlighted traditional arguments made by critical legal studies scholars who see law as a device to perpetuate inequality. Other sources of disparity such as judges’ political affiliation (Schanzenbach and Tiller 2007, 2008; Tiede, Carp and Manning 2010) are also seen as problematic and suggest that the way federal law is implemented depends on the personal biases of individual judges. A further, but no less distressing source of disparity may be due to district level factors such as caseloads and judicial vacancies (Ashcroft 2002; Freed 2003).

Federal Sentencing Policy: Limiting Judicial Discretion

Concerns about sentencing disparity among district courts are not new. Prior to the U.S. Sentencing Guideline system, implemented in 1989, judges had broad discretion to determine criminal sentences and parole boards had the power to reduce these sentences by freeing defendants from prison after only serving part of their sentences. While this system had certain advantages, allowing judges to fashion sentences based on defendants’ background and likelihood of committing other crimes, many in the legal community were concerned with the disparate treatment of similarly situated defendants across the nation. This concern, exhibited in the 1950s and 1960s, manifested itself in Congressional debates concerning the federal criminal code and sentencing disparity. This in turn led to the introduction of substantial sentencing reform legislation in the 1970s and 1980s. After significant bipartisan efforts lead by Senators Edward Kennedy and Strom Thurmond, as part of the Sentencing Reform Act of 1984, Congress finally endorsed the enactment of the U.S. Sentencing Guidelines and established the United States Sentencing Commission (“USSC”), an independent agency of the judicial branch, to draft the Guidelines and collect data on their implementation.

In enacting the Guidelines and amendments, the USSC and the legislature were given almost exclusive authority to shape how judges could make decisions for certain types of federal criminal cases. In other words, the USSC and Congress could specifically mandate what factors judges could and could not consider in sentencing decisions and could limit federal judges’ discretion by mandating that judges sentence defendants to specific amounts of time in prison which fall within a range of fixed sentences in a sentencing table. The Guidelines enacted by the USSC indicate how much discretion judges can exercise depending on the fact pattern of particular cases and the role that prosecutors and defense attorneys take in advocating Guideline departures. The Guidelines and their amendments have been applied to hundreds of thousands of federal criminal cases since 1989 when the Supreme Court in *United States v. Booker* found the Guidelines unconstitutional and rendered their further use to be advisory, rather than mandatory constraints on district court judges.

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Although the Guidelines limit district court judges' discretion, they did allow judges some leeway to "depart" from the Sentencing Guideline ranges in very limited circumstances. Almost all departures are used to order a sentence lower than the Guideline range minimum. According to the Guidelines, district court judges may sentence outside of the fixed ranges or depart due to "specific offender characteristics" including age, education, and socio-economic background. Although judges may sentence below the Guidelines based on these specific offender characteristics, the USSC determined that these factors "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." It should be remembered that the Guidelines were originally adopted to avoid disparities in sentences and to treat similar cases similarly (USSC 2005). Consequently, the USSC suggested that special offender characteristics should not be considered except in certain unusual cases.

Despite the USSC and legislature's intent that judges not use downward departures extensively, they became a major focus of the federal government in the late 1990s and early 2000s. Congress voiced concerns that disparity in sentencing had not been abated by the Sentencing Guidelines. The cause of the continued disparity was seen largely due to attempts by federal prosecutors and judges to undermine the Guidelines by finding ways around them. Specifically, Congress claimed that judges and prosecutors were using downward departures to ensure plea bargains in blatant disregard of Congressional intent in enacting the Guidelines. Of special concern were low sentences and the overuse of departures especially apparent along the Southwest border in immigration and drug cases. To counter this trend, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), heralded as the most significant amendment to the Sentencing Guideline system since its inception. Amongst other provisions, the PROTECT Act limited the ability of judges to use departures and significantly curtailed judicial discretion. It also required federal prosecutors to report to Congress on judges' improper use of departures.

In the wake of the PROTECT Act, the U.S. Supreme Court issued its decision in *United States v. Booker* on January 12, 2005. While *Booker* held that the Sentencing Guidelines in force for over 17 years violated the Sixth Amendment right to a jury trial, this did not result in the demise of the Guideline system. Instead, the justices reasoned that severing the section of the Guidelines rendering them mandatory would remedy the Sixth Amendment problem they had identified. As a result, *Booker* converted the Guidelines from mandatory constraints on judicial discretion to purely advisory. The Supreme Court's conversion of the Guidelines to advisory constraints also ended the Congressional requirements of reporting adverse departures of individual sentencing judges to Congress as required by the PROTECT Act.

Disparity in Sentencing

Despite attempts to curtail judges' discretion, sentencing disparity has been and remains a problem. To illustrate the magnitude of the problem in a general way, I used data from the United States Sentencing Commission which provides data on all federal criminal sentences under the Sentencing Guidelines. The USSC reports annually on about 70,000 cases a year. While these data do not provide information on the individual judges who decided the cases, they do have information on hundreds of case level and defendant specific variables for each case. The data for this article include decisions on federal cases between 1998 and 2006. In order to control for some case level variations, I focused on just one substantive area of offense conduct – "Offenses Involving Drugs and Narcoterrorism" - out of twenty substantive categories. Within this area, I analyzed sentences under Section 2D1.1 for "unlawful manufacturing, importing, exporting, trafficking (including possession) with intent to commit these offenses" as well as attempt or conspiracy for these offenses. For this time period, there were a total of 180,635 cases sentenced under Section 2D1.1.

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For a cursory analysis of disparity, I analyzed the proportion of district court cases within a circuit where judges chose to sentence within the Guideline ranges, as intended by Congress and the USSC, rather than depart from the mandated ranges. Figure 1 shows the proportion of cases under Section 2D1.1 where judges chose to sentence within the Guidelines. As can be seen, in several of the circuits, judges chose to sentence within the Guideline ranges over 70% of the time, while in other circuits, most notably the 9th Circuit, judges stayed within the Guideline ranges for only 35% of the cases. Further, in several other circuits (DC Circuit, 2nd, and 3rd Circuit), judges stayed within the federally mandated Guidelines less than 50% of the time.

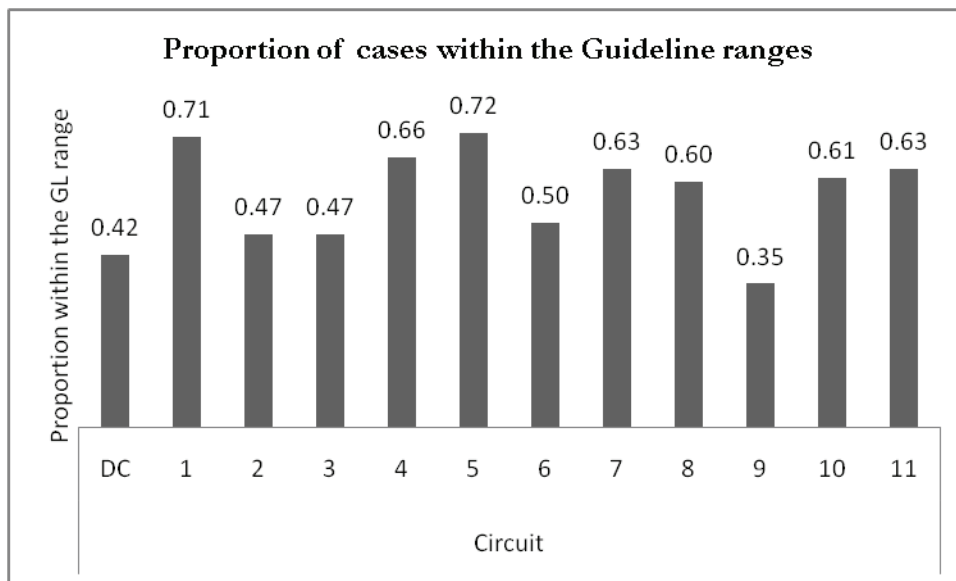


Figure 1. Proportion of cases where judges sentenced within the Guideline ranges (by Circuit)

While the proportion of cases in which judges sentence within the Guidelines within a circuit may be explained by variations in the appellate circuits that oversee the districts, district level variation within each circuit is also persistent. To illustrate district level variation, I analyzed the proportion of cases within each of the two largest circuits. As revealed by Figures 2 and 3 (see *next page*), even district level variation within a circuit is prevalent. In Figure 2, the districts within the 5th Circuit apply the Guideline ranges between 46% and 79%. The districts of Northern Mississippi and Middle Louisiana seem to follow the Guideline ranges the least (47% and 46% respectively) and depart the most. The four districts within Texas seem to comply with the Guideline ranges the most applying them in a high proportion of cases (67% to 79%).

While there is variation among the districts in the 5th Circuit, there is even more variability revealed among the districts of the 9th Circuit. Judges in district courts in the 9th Circuit follow the Guideline ranges from 16% to 63%. Further, even the districts within the same state vary widely. For example, three of the districts of California followed the Guideline ranges 50% to 60% of the time in these drug cases, but the Southern District of California, noted for judges using departures excessively, applied the Guideline ranges for Section 2D1.1 drug cases only 16% of the time.

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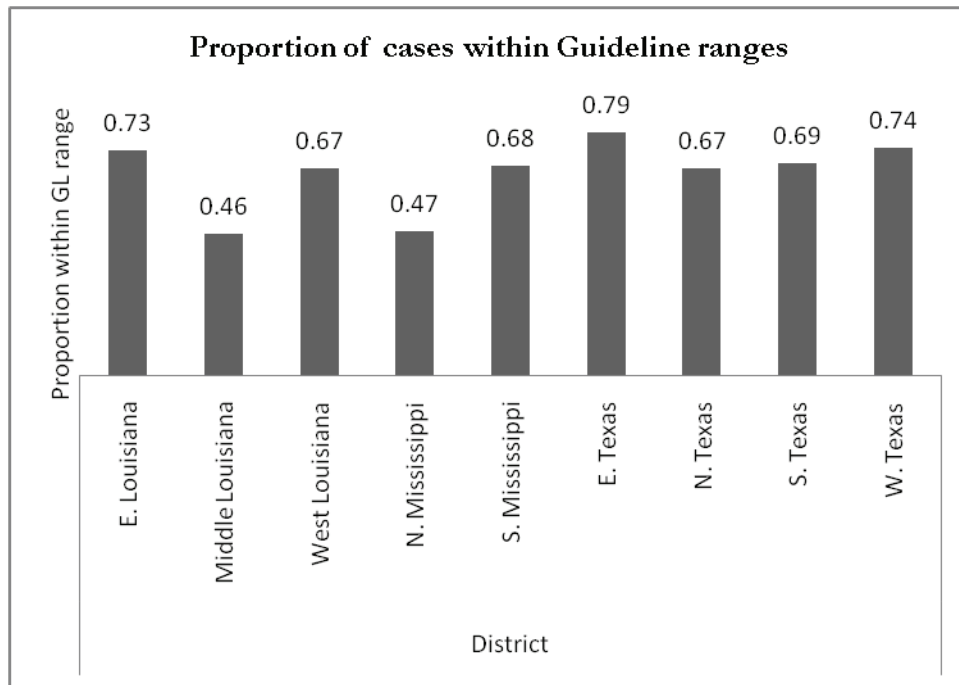


Figure 2. Proportion of cases where judges sentenced within the Guideline ranges (by districts within the 5th Circuit)

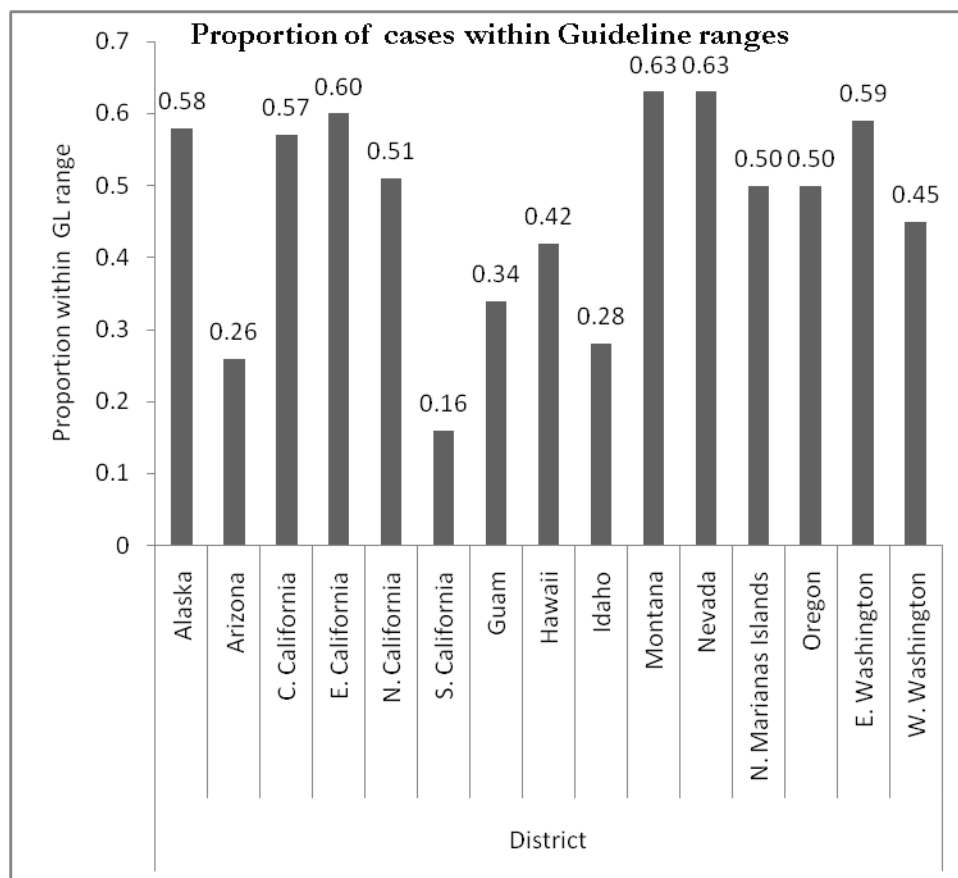


Figure 3. Proportion of cases where judges sentenced within the Guideline ranges (by districts within the 9th Circuit)

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After looking at the pattern of departures, I analyzed the average sentences for district courts in each of the eleven districts and the District of Columbia. For each circuit, Table 1 shows:

- The number of cases under section 2D1.1
- The average sentence for all cases
- The average sentence if the judges sentence within the Guideline ranges
- The average sentence if the judges choose to depart downward from the Guidelines.

As seen from Table 1, average sentences by circuit are always higher when judges stay within the Guidelines than when they depart downward. For those concerned with law and order, following Congress' intent that judges apply the Guideline ranges leads to more severe punishment. The table also reveals a few notable trends. First, the 5th and the 9th Circuit handle the largest volumes of these cases although other circuits have significant amounts as well. Second, the total sentence average by circuit varies with the 9th Circuit having the lowest average sentence of 50 months in prison and the 4th Circuit having the highest average sentence of 114 months in prison. This represents a sentencing disparity of 64 months in prison. Third, variation remains in the subsets of cases sentenced within the Guidelines and after downward departures. Interestingly, for cases sentenced within the Guidelines, district courts in the 5th Circuit issue the lowest average sentences, but for departure cases, district courts in the 9th circuit have the lowest average. When analyzed with the rates of departure, this indicates that districts in the 9th circuit depart the most and when they depart their average sentences are the lowest of all circuits. Further, district courts in the 5th Circuit depart the least, but such non-departure cases have the lowest overall average sentences as compared to the other circuits. Another notable trend is that the 4th, 7th, and 11th Circuits have consistently high average sentences across all three categories.

Table 1. Number of cases and sentences (in months in prison) by departure type

Circuit	Number of cases	Sentence Total (all)	Sentences within GLs (no departure)	Sentences with downward departure
DC	1,194	72.85	107.60	47.64
1 st	5,897	75.76	83.81	57.07
2 nd	12,929	57.73	74.92	42.40
3 rd	6,587	75.47	97.61	56.04
4 th	17,756	113.94	129.31	86.45
5 th	37,938	60.75	63.28	53.81
6 th	13,248	76.73	92.28	61.38
7 th	8,656	108.87	123.20	84.64
8 th	14,195	90.52	104.21	69.66
9 th	29,914	49.90	74.15	36.32
10 th	10,220	64.46	74.16	49.37
11 th	22,101	96.39	108.86	75.35
	Total # 180,635	Overall average 75.19	Overall average 89.57	Overall average 56.35

(Continued on next page)

What drives variation and why do we care?

This analysis¹ has provided a rough overview of variation among the district courts in applying federal law for drug crimes under Guideline 2D1.1. While the extent of the variations requires more rigorous testing and controlling for case, judge, and district level variation, it does suggest that federal law is not consistently applied across the country. Several studies have confirmed this more rigorously for certain classes of cases (See, Tiede 2009, applying exact matching of case facts for certain drug cases; and Kautt (2002) using a multilevel model for certain drug cases). The extant reasons for variation posited by scholars are: 1) local practices of prosecutors (Bibas 2005; 2) Defense Counsel attributes (Berman 2002); 3) Crime rates (Ulmer 2005); 4) Ideological differences among judges (Schanzenbach and Tiller 2007, 2008; Tiede, Carp and Manning 2010); and, 5) Defendant attributes (Albonetti 1997; Mustard 2001; Free 1997; Pasko 2002). Another avenue for more rigorous analysis would focus on district level factors such as the political environment, resources spent on law enforcement, prosecutors, and courts, and local crime conditions as well as judges' caseloads (Braniff 1993) and court staffing. Further, departure rates, length of sentences, and amount of disparity have been influenced by changes in the federal law, most notably the PROTECT Act and *Booker* (See, Freeborn and Hartman 2010; Tiede 2009; Tiede, Carp, and Manning 2010).

Whether variation in the implementation of federal law is problematic depends on the level of variation, the source of variation, and the purpose of federalism. These factors provide many areas for further in depth research. Because federal district court judges implement the federal law by themselves at the trial level, large amounts of variation should not be encouraged if it is based on judges' ideological biases or preferences for certain types of litigants or crimes. Furthermore, if the implementation of law is influenced by heavy case loads and a lack of law enforcement or judicial resources (ie. vacancies), this would imply that wealth and the location of crimes determines outcomes rather than the law as intended by Congress. On the other hand, in a large federal system, such as the United States, we would expect some variation in the prosecution of crimes as judges, law enforcement, and prosecutors adjust their strategies to deal with issues that are particular to certain areas of the country, such as the prevalence of certain crimes and not others. In this way, some variability in the implementation of federal law would allow the criminal justice system to be flexible and arguably more responsive to local concerns. Ultimately, the type and extent of permissible variation in the implementation of federal law depends largely on one's conception of the purpose of federalism and deference to the intent of national policymakers.

¹ Again, the analysis is very general and does not include any control variables. Further, it does not account for the diverse practices of U.S. Attorneys to plea bargain cases which may account for a large amount of the variation. Obtaining information on such practices poses a significant empirical challenge.

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BOOKS TO WATCH FOR

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Corey Brettschneider (Brown University) has published a casebook, *Constitutional Law and American Democracy: Cases and Readings* (Wolters Kluwer/Aspen, 978-0-73-557982-8). The work is “an integrated casebook and reader that guides students through the most important conflicts over legal issues and doctrines today, as debated by Supreme Court justices and leading academics. I use selections from the most influential articles and books in constitutional law, political theory, and legal history to introduce students to doctrinal debates. By showing competing interpretations of the Constitution, the book helps students to appreciate the stakes in the disputes between the justices on separation of powers, federalism, civil liberties, and the equal protection of the law. The format also encourages students to form thoughtful and well-developed positions about where they stand in these debates.”

Dr. Brettschneider has also published *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 978-0-69-114762-8). How should a liberal democracy respond to hate groups and others that oppose the ideal of free and equal citizenship? The democratic state faces the hard choice of either protecting the rights of hate groups and allowing their views to spread, or banning their views and violating citizens' rights to freedoms of expression, association, and religion. Avoiding the familiar yet problematic responses to these issues, political theorist Corey Brettschneider proposes a new approach called value democracy. The theory of value democracy argues that the state should protect the right to express illiberal beliefs, but the state should also engage in democratic persuasion when it speaks through its various expressive capacities: publicly criticizing, and giving reasons to reject, hate-based or other discriminatory viewpoints. By using democratic persuasion, the state can both respect rights and counter hateful or discriminatory viewpoints. Brettschneider extends this analysis from freedom of expression to the freedoms of religion and association, and he shows that value democracy can uphold the protection of these freedoms while promoting equality for all citizens.

Howard Gillman (University of Southern California), **Mark A. Graber** (University of Maryland), and **Keith E. Whittington** (Princeton University) have published *American Constitutionalism, volume 1: Structures of Government* (Oxford University Press, 978-0-19-975126-6). This book of cases and materials for the teaching of constitutional law is the first of two volumes. Constitutionalism in the United States is not determined solely by decisions made by the U.S. Supreme Court, and this book reflects that broader process of how the constitutional system actually works while providing materials for interesting theoretical, political and legal discussions. *American Constitutionalism* offers a number of useful features. It covers all important debates in American constitutionalism (not just those that have been recently litigated before the Supreme Court, organized by historical era. It incorporates readings from all the prominent participants in those debates. It clearly lays out the political and legal contexts of those materials. It integrates a wide range of documents and cases, including decisions made by elected officials and state courts. The book offers numerous pedagogical features, including topical sections within each historical chapter, explanatory headnotes for the readings, questions on court cases, tables and figures, and suggested readings. The text is supported by a supplementary website for instructors and students.

Charles Anthony Smith (University of California-Irvine) has published *The Rise and Fall of War Crimes Trials: From Charles I to Bush II* (Cambridge University Press, 978-1-10-702354-3). “This book is the first comprehensive analysis of the politics of war crimes trials and provides a systematic and theoretically rigorous examination of

(Continued from previous page)

whether these trials are used as tools for political consolidation or whether justice is their primary purpose. The consideration of cases begins with the trial of Charles I of England and goes through the presidency of George W. Bush including the trials of Saddam Hussein and those arising from the War on Terror. The book concludes that political consolidation is the primary concern of these trials, a point that runs contrary to the popular perception of the trials and their stated justification. Through the consideration of war crimes trials, this book makes a contribution to our understanding of power and conflict resolution and illuminates the developmental path of war crimes tribunals.”

Kevin T. McGuire (University of North Carolina at Chapel Hill) has recently published *New Directions in Judicial Politics* (Routledge, 978-0415893329). This book contains a set of original research essays that focus on the actors, institutions, processes, and consequences of judicial policy making. Using a variety of research methods, the essays address such topics as judicial selection, decision making of trial and appellate courts, the political environments in which courts operate, and the implementation and impact of judicial decisions. The book features the work of many of the leading scholars of law and courts, including Michael Bailey, Sara Benesh, Ryan Black, Chris Bonneau, Brent Boyea, Damon Cann, Tom Clark, Paul Collins, Scott Comparato, Shane Gleason, William Haltom, Virginia Hettinger, Timothy Johnson, Jonathan Kstellec, Jeffrey Lax, Stefanie Lindquist, Forrest Maltzman, Wendy Martinek, Michael McCann, Scott McClurg, Christine Nemacheck, Ryan Owens, Justin Phillips, Richard Sander, James Spriggs, Isaac Unah, and Paul Wahlbeck.

Announcements

Call for Participation for the Mid-Atlantic Law and Society Association Conference

THEME: Law, Society and the Social Good

The Mid-Atlantic Law and Society Association will host its Inaugural Conference at the Earle Mack School of Law, Drexel University, in Philadelphia, PA, on October 19-20, 2012. Please make plans to attend and encourage others to join us! Proposals for Individual Papers and Fully-Formed Sessions are welcome. The DEADLINE for submission of paper proposals and other forms of participation is August 1, 2012.

Our theme is purposely broad and encompassing. But we are especially interested in considering the manner in which knowledge obtained from socio-legal research can be used to understand and engage with the social good.

We seek papers, panels, and roundtables aimed at stimulating conversations that will build bridges across the range of law and society topics. We anticipate organizing different kinds of presentations, including both traditional panels for completed papers and workshops for projects and ideas still in development; we welcome proposals that let participants share and respond to intellectual projects in thoughtful and enjoyable ways. We are particularly interested in proposals that cross national, cultural, and disciplinary boundaries. Graduate students and junior scholars are especially encouraged to apply and the conference will provide targeted opportunities for networking and feedback for early career scholars.

We look forward to receiving your submissions via email to: malisa@drexel.edu

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