

Political Science 429
Spring 2005
Gilkey 108
Monday/Wednesday 1-2:50 p.m.
Office Hours: TBA

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Topics in Judicial Politics: Judicial Decision-making

"We live under a Constitution, but the Constitution is what judges say it is."
(Chief Justice Charles Evans Hughes)

Introduction:

This course takes a pragmatic view of our political system and the role of the courts. In order to do so, we must initially reject the myth of the court—that judges and the courts are impartial arbiters and non-partisan actors and that the law alone determines the outcome of any given case. This task is likely aided by recent experiences with the intervention of the courts in the 2000 presidential election. In short, the position of *judge* is inherently political and through decisions judges affect public policy. Even if we place aside the recent electoral controversy, it would be hard to dispute the claim that the courts are now involved with a broad range of subjects touching upon some of the most salient and politically charged topics of the day. Indeed, to note just a few examples, appellate and trial judges have reapportioned state legislatures; administered prisons, hospitals, railroads, schools and mental institutions; raised taxes; allowed the publication of secret documents; quashed congressional attempts to secure religious freedoms; and allowed the burning of the American flag as a form of protest.

The opinions accompanying these decisions are explained using legal reasoning and justifications, usually carefully explaining how this ruling follows previous doctrine or precedent. These opinions—and the doctrines announced within them—comprise the study of most academic lawyers. The origins, development, and implications for current doctrine of the most relevant constitutional issues fill the pages of law reviews. However, we are political scientists and as such we cannot simply accept the explanation proffered by the judge or justice. Nor do we willingly accept that judges and justices, unlike all other humans, are capable of setting aside all preconceived notions and opinions once they don their black robe. Therefore, in this class, we draw on social science scholarship to examine a central question addressed by students of the courts for over sixty years: “why do judges decide as they do?” We will draw on literature from a variety of disciplines, with a strong emphasis on political science and analyze the theories; the findings; and the conclusions of these inquiries. Given the primacy of the Supreme Court, we will spend a great deal of our time investigating how the justices decide, but we will also turn some of our lens toward other courts to more fully explore the “mysteries surrounding the cult of the robe.”

The reading in this course will consist of scholarly literature—some old and some new—that surveys the field of judicial decision-making. The research assigned will focus primarily on the United States federal courts, but not exclusively. Most of the assigned reading is available via JSTOR or the periodical stacks in Valley Library. Additionally, we will utilize the text, *Crafting Law on the Supreme Court* by Maltzman, Spriggs, and Wahlbeck, available at the OSU bookstore. The reading is substantial and the writing load for this course is heavy (which makes sense since it is a WIC course); students should take this into account while preparing their schedules. Given the size of the class, we all must be committed to attending, and participating. Failure to attend class and to participate knowledgeably in class discussions will result in a failing grade.

Format: The class will be conducted as a seminar. In order to create a productive seminar environment, students are required to fulfill several roles during the term. Obviously, participants are expected to come prepared and willing to discuss the scheduled reading. In addition, students will be assigned to present the material and lead the discussion for several sessions (15%); this may occur in teams of two or solo. Students are not limited by the syllabus during their presentations; outside reading is strongly encouraged. Other students will prepare and distribute discussion questions to the professor and the class by 2 p.m. the day prior to the session (10%). These questions will be disseminated via blackboard and should assist the student “running” class. Students must prepare questions for each session. **Early questions will be accepted; late ones questions will not be accepted.** Discussion questions can be broad or specific; they should be designed to provoke discussion and assist your colleagues in their presentation. Yes or no questions, or questions similarly easy to dispense with are strongly discouraged. Questions should cover the full range of readings for the session. Additionally, throughout the term, you will write three review essays of the readings for class sessions (total 15%). The each review essay will go through a peer review process prior to its due date. Students will have time to revise this essay before submitting it. I will average the essay grades for the computation of the final grade. Students cannot “double dip”; students cannot write a review essay for days they are presenting the material. These essays must also be distributed to the professor and the class by 2 p.m. the day prior to the session. Again, early papers are acceptable, late ones are not. Overall participation will also comprise a portion of your grade (10%).

Research Paper: Additionally, there is a research component to this course, and the paper is designed to assist you in critically evaluating the state of the discipline. This paper is sub-divided into two parts. First, students are required to choose a Supreme Court justice to serve as the linchpin of the paper. Through extensive research, the student will characterize their justice. What type of justice was/is he or she? Describe the justice’s politics and attitudes. Describe why this person was placed on the bench? How did this justice interact with the rest of the brethren? What type of legacy does or will this justice have? Students can choose any justice, although I suggest selecting someone who has or did serve for an extended period of time. (For example, Justice Goldberg, while extraordinarily interesting, served less than 3 years on the Court.) In other words, students are preparing a judicial biography of their selected justice. A judicial biography does more than report the facts relating to the life and times of a justice; it analyzes their background, and career for a fully informed picture of the justice and his or her jurisprudence. (20%)

The second portion of the paper requires students to evaluate course material in light of their newfound knowledge of their justice. In other words, students will critically analyze the explanatory power of the approaches we studied during the quarter by creating a case study of their justice and his or her decisions using a sample of the justice's work. Students must use at least eight opinions authored by their justice, although ten would be preferable. There must be a cross-section of types of opinions represented in your small sample. Generally, the decision-making literature splits opinions into two categories—economic and civil rights and liberties cases; your choice of opinions should reflect that division. Additionally, students must include at least two statutory cases. Finally, it may be advisable to include some highly salient or controversial cases. Your paper should then use these opinions to come to a conclusion about the behavior of your justice and the explanatory power of the theories we studied during the term. (30%)

Throughout the term, students will share their progress on these papers with their peers. Additionally, students will be able to revise the first part of their paper when they turn in their final product. Final papers must include the graded first part of the project, regardless of the revisions.

Alternatively, students interested in conducting their own test or study of judicial behavior may, in consultation with me, substitute an independent and original research paper for this assignment. (50%)

Advisories:

I am required to advise students of certain policies:

1. **Plagiarism:** This concept causes many students confusion, so I will try and put it plainly. Academic work must be your own work. It is plagiarism to claim work (such as writing, exams, or presentations) done by anyone other than the author named. Plagiarism also includes cutting and pasting information from internet websites without attribution or paraphrasing someone else's ideas or writing without attribution. It is not sufficient to re-arrange or re-state someone else's writing or ideas. Plagiarism unacceptable. Any plagiarized writing or work turned in for this course will result in a **course grade** of "F."
2. **Disrespectful behavior:** In the university we are all students, seeking truth and understanding. Skin color, gender, age, or other characteristics over which individuals have no choice are irrelevant to that pursuit, as are religious preference or sexual orientation. Students will be expected to treat all others with the same respect as they would want afforded themselves. Disrespectful behavior to others in the course is unacceptable and can result in a course grade of "F."
3. **Disabilities:** Students with documented disabilities should be registered with the Office of Services for Students with Disabilities (OSSD). Students with documented disabilities who may need accommodation should make an appointment with the professor as early as possible, but no later than the first week of the quarter. The same requirements apply to students who may need to have known emergency medical information. Alternative testing requests and arrangements should be made by the student at least one week in advance of the test.

Late Assignments:

ALL students are expected to hand in papers at the scheduled times. Late papers will be allowed only under **EXCEPTIONAL** circumstances **and** with **PRIOR** consent of the instructor. Exceptional circumstances will require documentation of that circumstance.

Contacting me:

Students should feel free to stop by during office hours or to contact me via e-mail. If you are unable to attend office hours, contact me for an appointment. If you have questions or concerns, please do not wait until before an assignment is due to stop by my office. If you choose to contact me via e-mail, you should make sure that you sign your name and use an address that accepts replies. I do not respond to anonymous messages. If you send an e-mail message after 4:00 pm Monday through Thursday, I will not respond until the following day. If you send a message after 4:00 pm on Friday, then the earliest I will respond is the following Monday. I will try to attend to your messages promptly, but do not anticipate immediate responses. If your query requires an extensive reply, I will respond by suggesting an appointment.

Course Outline and Reading Assignments

Key for journal articles listed below

AJPS	American Journal of Political Science
APSR	American Political Science Review
JOP	Journal of Politics
APQ	American Politics Quarterly
PRQ	Political Research Quarterly

These journals are readily available in Valley Library. Additionally, I will place one copy of each reading assignments outside my office one week prior to the session. Please make one personal copy and return the readings promptly.

3/28 Introduction: Studying Judicial Politics

- Overview from *Courts, Judges & Politics*
 - p. 12-18; p. 603-627

Agenda Setting

3/30 Certiorari

- *Courts, Judges & Politics: Deciding to Decide* by H.W. Perry
 - p. 656-62
- Provine. 1981. "Deciding What to Decide..." from *Readings from Judicature*. Eds. Elliot Slatinick.
- McGuire, Kevin and Gregory A. Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity." APSR 87: 717-26

The Decision on the Merits

4/4 & The Legal Model

4/6

- Segal. 1984. "Predicting Supreme Court Decisions Probabilistically: the Search and Seizure cases." APSR 78: 891-900.
- Songer and Lindquist. 1996. "Not the whole story..." AJPS 40 1049-63.
- From *Courts, Judges & Politics*
 - *The Influence of Stare Decisis on the Votes of USSC Justices* by Segal and Spaeth
 - *The Norm of Stare Decisis* by Epstein and Knight
 - *Stare Decisis and Judicial Restraint* by Lewis F. Powell
 - *Institutional Norms and Supreme Court Decision-making: The Rehnquist Court on Privacy and Religion* by Ronald Kahn
 - *Originalism: The Lesser Evil* by Antonin Scalia
 - p. 462-77
 - p. 553-58

4/11 &

4/13 The Attitudinal Model

- Pritchett. 1941. "Divisions of Opinion Among Justices of the USSC." APSR 35:890-98.
- *Contemplating Courts: The Attitudinal Model* Chapter 13
- *Majority Rule or Minority Will* Chapter 8 & 9 by Spaeth and Segal
- Baum. 1995. "Measuring Change in the Rehnquist Court." APQ July: 373-82.
- Segal and Cover. 1989. "Ideological Values and Votes...." APSR 83:557-65.

4/18 &

4/20 Role Theory

- James. 1968. "Role Theory and the Supreme Court." JOP 30:160-86SC."
- Gibson. 1978. "Judges' Role Orientations, Attitudes, and Decisions: an interactive model." APSR. 7:911-24.
- Howard. 1968. "Role Perceptions and Behavior in 3 U.S. Courts of Appeals." JOP 39: 1069-90.
- Allen and Wall. 1993. "Role Orientations and Women State Supreme Court Justices." *Judicature*. 77:156-65.
- Welch, Combs, and Gruhl. 1988. "Do Black Judges Make a Difference?" AJPS. 32:126-36.

4/25 &

4/27 The Strategic Model

- *Crafting the Law* by Maltzman, Spriggs, and Wahlbeck
 - Chapters 1, 3, 4, 5, & 6
- Arrington and Brenner. 2004. "Strategic Voting for Damage Control on the Supreme Court." PRQ. 57: 565-574.

5/2 Small Groups

- Ulmer. 1971. "Earl Warren and the Brown Decision." JOP 33:689-702.
- *Courts, Judges & Politics: The Influence of the Chief Justice in the Decisional Process* by Danelski, David
 - p. 662-671
- Walker, Epstein and Dixon. 1988. "On the Mysterious Demise of Consensual Norms in the USSC." JOP 50:361-89
- Haynia, Stacia L. 1992. "Leadership and Consensus on the U.S. Supreme Court. JOP. 54:1158-69.

5/4 **Research Day**

5/9 &
5/11

Separation of Powers a.k.a. Positive Political Theory

- Segal. 1997. "Separation of Powers Games in the Positive Theory of Congress and Courts." APSR 91:28-44.
- Hausegger and Baum. 1999. "Inviting Congressional Action..." AJPS 43:162-185.
- Heberlig and Spill. 2000. "Congress at Court: Members of Congress as Amicus Curiae." *Southeastern Political Review* 28: 189-212.
- Lindquist and Yaloff. 2001. "Congressional Responses to Federal Circuit Court Decisions." *Judicature* 85:60-68

5/16 &

5/18 Party Capability Theory

- Galanter. 1974. "Why the 'Haves' Come Out Ahead...." *Law and Society Review* 9 (Copy of an edited version will be available.)
- McGuire. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in the Litigation Success." JOP 57: 187-196.
- Songer, Sheehan, and Haire. 1999. "Do the Haves Come Out Ahead Over Time?" *Law and Society Review* 53: 811
- Epstein and Rowland. 1991. "Debunking the Myth of Interest Group Invincibility in Courts." APSR. 85: 205-17.
- Solberg and Ray. 2005. "All States are not Equal: Investigating the Differential Advantages of States in the Courts of Appeals." *State Politics and Policy Quarterly*. Forthcoming.

Opinion Assignment

5/23

- *Crafting*: Chapter 2
- Slotnick, Elliot. 1979. "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger." *AJPS*. 23: 60-77.
- Brenner, Saul. 1984. Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court." *JOP*. 46:1217-1225.
- Maltzman and Wahlbeck. 2004. "A Conditional Model of Opinion Assignment on the Supreme Court." *Political Research Quarterly*. 57: 551-564.

5/26 & 6/1

- Peer review/discussion of analysis portion of paper....

What is the main purpose of the article? What is the research question(s)?

What approach is being tested?

How does the article or study fit in with the overall goal of this approach?

Does the study test part of the approach or the whole kit and kaboodle?

What are the hypotheses or educated guesses of the article?

What is the dependent variable? (What is the author trying to explain?) Is it the same as what is proposed in the theoretical section of the article?

What are the independent variables? (What factors are used to explain the dependent variable) Are they gauged or measured sensibly? How else could we measure them?

Are alternative hypotheses presented?

What types of data are used?

Are the data appropriate for the test? Do they fit with the hypotheses?

Are the data sufficient? What other information should be included?

What controls are used, if any? What controls would you suggest?

What are the findings? Are they supported by the tests?

Are they generalizable? Do the findings extend beyond the issue area/court/judges tested?

What are the conclusions? Do the findings support them?

What can we take away from this article? What does it tell us about judicial behavior?

What insights does it give us about the decision-making process of the Court?

What other questions does this research lead us to?

Are there any findings that are particularly intriguing or surprising?

Justices of the United States Supreme Court

Jay, John (1789-1795)
Rutledge, John (1789-1791), (1795)
Cushing, William (1789-1810)
Wilson, James (1789-1798)
Blair, John Jr. (1789-1795)
Iredell, James (1790-1799)
Johnson, Thomas (1791-1793)
Paterson, William (1793-1806)
Chase, Samuel (1796-1811)
Ellsworth, Oliver (1796-1800)
Washington, Bushrod (1798-1829)
Moore, Alfred (1799-1804)
Marshall, John (1801-1835)
Johnson, William Jr. (1804-1834)
Livingston, Henry Brockholst (1806-1823)
Todd, Thomas (1807-1826)
Duvall, Gabriel (1811-1835)
Story, Joseph (1811-1845)
Thompson, Smith (1823-1843)
Trimble, Robert (1826-1828)
McLean, John (1829-1861)
Baldwin, Henry (1830-1844)
Wayne, James Moore (1835-1867)
Barbour, Philip Pendelton (1836-1841)
Taney, Roger Brooke (1836-1864)
Catron, John (1837-1865)
McKinley, John (1837-1852)
Daniel, Peter Vivian (1841-1860)
Nelson, Samuel (1845-1872)
Woodbury, Levi (1845-1851)
Grier, Robert Cooper (1846-1870)
Curtis, Benjamin Robbins (1851-1857)
Campbell, John Archibald (1853-1861)
Clifford, Nathan (1858-1881)
Swayne, Noah Haynes (1862-1881)
Miller, Samuel Freeman (1862-1890)
Davis, David (1862-1877)
Field, Stephen Johnson (1863-1897)
Chase, Salmon Portland (1864-1873)
Strong, William (1870-1880)
Bradley, Joseph P. (1870-1892)
Hunt, Ward (1872-1882)
Waite, Morrison Remick (1874-1888)
Harlan, John Marshall (1877-1911)
Woods, William Burnham (1880-1887)
Matthews, Stanley (1881-1889)
Gray, Horace (1881-1902)
Blatchford, Samuel M. (1882-1893)
Lamar, Lucius Quintus Cincinnatus (1888-1893)
Fuller, Melville Weston (1888-1910)
Brewer, David Josiah (1889-1910)
Brown, Henry Billings (1890-1906)
Shiras, George Jr. (1892-1903)
Jackson, Howell Edmunds (1893-1895)
White, Edward Douglass (1894-1921)
Peckham, Rufus Wheeler (1895-1909)
McKenna, Joseph (1898-1925)
Holmes, Oliver Wendell Jr. (1902-1932)
Day, William Rufus (1903-1922)
Moody, William Henry (1906-1910)
Lurton, Horace Harmon (1909-1914)
Hughes, Charles Evans (1910-1916), (1930-1948)
Van Devanter, Willis (1910-1941)
Lamar, Joseph Rucker (1910-1916)
Pitney, Mahlon (1912-1922)
McReynolds, James Clark (1914-1946)
Brandeis, Louis Dembitz (1916-1941)
Clarke, John Hessin (1916-1922)
Taft, William Howard (1921-1930)
Sutherland, George (1922-1942)
Butler, Pierce (1922-1939)
Sanford, Edward Terry (1923-1930)
Stone, Harlan Fiske (1925-1946)
Roberts, Owen Josephus (1930-1945)
Cardozo, Benjamin Nathan (1932-1938)
Black, Hugo Lafayette (1937-1971)
Reed, Stanley Forman (1938-1980)
Frankfurter, Felix (1939-1965)
Douglas, William Orville (1939-1980)
Murphy, Frank (1940-1949)
Byrnes, James Francis (1941-1942)
Jackson, Robert Houghwout (1941-1954)
Rutledge, Wiley Blount (1943-1949)
Burton, Harold Hitz (1945-1964)
Vinson, Frederick Moore (1946-1953)
Clark, Tom C. (1949-1977)

Minton, Sherman (1949-1965)
Warren, Earl (1953-1974)
Harlan, John Marshall (1955-1971)
Brennan, William Joseph Jr. (1956-1997)
Whittaker, Charles Evans (1957-1965)
Stewart, Potter (1958-1985)
White, Byron Raymond (1962-2002)
Goldberg, Arthur Joseph (1962-1965)
Fortas, Abe (1965-1969)
Marshall, Thurgood (1967-1993)
Burger, Warren Earl (1969-1995)
Blackmun, Harry Andrew (1970-1999)
Powell, Lewis Franklin Jr. (1971-1998)
Rehnquist, William Hubbs (1971-present)
Stevens, John Paul (1975-present)
O'Connor, Sandra Day (1981-present)
Scalia, Antonin (1986-present)
Kennedy, Anthony McLeod (1988-present)
Souter, David Hackett (1990-present)
Thomas, Clarence (1991-present)
Ginsburg, Ruth Bader (1993-present)
Breyer, Stephen Gerald (1994-present)