

Syllabus

219.7 Judicial Decision Making

Professor: Kevin Quinn
Spring Semester 2012

Class Room

Boalt 141
10:00am - 12:40am
Thursday

Office

Kevin Quinn
Simon 490
Phone: (510) 642-2485
Email: kquinn@law.berkeley.edu

Preliminaries

Overview and Course Goals

How do judges decide cases and why do they decide as they do? Answers (or in some cases implicit assumptions about the answers) to these questions play a foundational role in a wide variety of scholarly research topics including: the evolution of the common law, the normative desirability of judicial review, normative and positive accounts of statutory interpretation, the federal judicial appointment and confirmation process, criminal sentencing, and the functioning of appellate review.

This course is designed to help students answer the questions of how and why judges do what they do. To do this, we will spend a bit of time examining the intellectual history of the study of judicial decision making and we will also examine modern work dealing with topics of special interest to legal scholars and political scientists. In terms of focus, we will be primarily concerned with positive accounts of judging. Nonetheless, normative issues will be lurking in the background and we will, on occasion, think about the implications of positive scholarship for normative research programs.

Class Requirements

This course will be conducted as a seminar. Students are expected to come to class fully prepared to discuss the strengths and weaknesses of the assigned readings. Students are expected to read all of the assigned material well ahead of time, think about how the various pieces might fit together, and, if necessary, do additional research. Class attendance is mandatory. Please consult with me *in advance* if you cannot attend a seminar meeting for any reason.

At five times during the semester you will be required to write a 1-2 page reaction memorandum. These memoranda must be solely your own work. These memoranda should not be summaries of the assigned reading. Instead, they should assess the quality of the arguments and evidence, draw linkages between readings, and raise questions for discussion.

On January 19 you will receive, by lot, the sessions for which you are responsible for circulating a discussion memorandum. The memoranda will not be formally graded although they will count toward class participation. The memos will form the basis for class discussion. Please write these memoranda to the seminar, and email them to my assistant, Ida Ng (ing@law.berkeley.edu), before 4:00pm the Wednesday immediately before the seminar. Ida will distribute the memos to the class. You should plan to read these memos before the seminar meets.

I will base student evaluation on two components:

- **Essays.** Each student will write a 20-40 page essay over the course of the semester. This will count for 60% of the final grade. The topic of the essay can be chosen by the student, but requires the approval of the instructor. There are three types of essays students can choose to write:

- **Critical Literature Review.** These essays will critically review a literature related to judicial decision making. The essays should contain a clear thesis, a discussion of what we know (and, perhaps, what we do not know), and the implications of what we know to legal practice. These essays might, also, contain a discussion of the normative implications of a particular literature.
- **Case Analysis.** These essays will contain an analysis of a set of cases, typically in a single area of law, through the lens of one or more literatures related to judicial decision making. Students should carefully select cases that provide analytical leverage for the thesis of the essay.
- **Original Empirical Research.** These essays will contain some original research conducted by the student. These should be written as research notes, that situate the research question within a literature, posit a clear research design, and—using existing or original data—conduct suitable statistical analysis.

If students have ideas about other types of suitable essays to write, please discuss as soon as possible with the instructor.

Each student is responsible for submitting a 1-2 page proposal to the instructor by February 23. I will then meet with each student between February 27 and March 9 to provide feedback and guidance. On or before March 22, each student is responsible for submitting a full outline of their essay. This outline should include citations to cases and/or the literature that will be referenced. I will provide written feedback on these outlines, and will meet with students as needed. First full drafts of your essays will be due on April 12. I will return them with comments no later than April 26. Final essays are due on May 10.

Essays should be double-spaced, with one-inch margins, using 12 point Times New Roman or Computer Modern fonts. Students can use either the Bluebook or American Political Science Association citation style. The content of the essay should be no longer than 40 pages. Footnotes, endnotes, tables, figures, and a bibliography do not count toward the page limit.

- **Class Participation.** I will assign each student a class participation score at the end of the semester. These scores will count for 40% of the final grade.

I will not give incompletes in this course.

Office Hours and Availability

I will hold office hours on Wednesdays from 10:00am to noon.

Course Website

The course website is available via bSpace.

Required Books

There are no required books for this course. Instead, we will be reading journal articles from legal academics and social scientists as well as a draft version of a book manuscript from Barry Friedman and Andrew Martin. Most readings will be available via JSTOR and / or HeinOnline. This syllabus provides links to articles that are not found on either JSTOR or HeinOnline. It is the student's responsibility to locate and download the required readings for each week.

Preliminary Schedule

The following is a preliminary schedule of course topics. It is a rough guide to what we will be covering and may well undergo some changes over the semester.

January 12: Course Overview

Optional Reading

Friedman, Barry. 2006. "Taking Law Seriously." *Perspectives on Politics*. 4: 261-276.

January 19: The Role and Identity of the Judge

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 1, Section I. (available at course website)

Optional Reading

Howard, J.W. 1977. "Role Perception and Behavior in Three U.S. Courts of Appeals." *Journal of Politics*. 39: 916-938.

Gibson, James L. 1978. "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model." *The American Political Science Review*. 72: 911-924.

January 26: Law and Constraint

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 1, Section II. (available at course website)

Stephenson, Matthew C. 2009. "Legal Realism for Economists." *Journal of Economic Perspectives*. 23: 191-211. Available at: <http://www.law.harvard.edu/faculty/mstephenson/pdfs/StephensonLegalRealismJEP.pdf>.

Optional Reading

Grey, Thomas C. 1983. "Langdell's Orthodoxy." *University of Pittsburgh Law Review*. 45: 1-53.

Schauer, Frederick. 1988. "Formalism." *Yale Law Journal*. 97: 509-548.

Schauer, Frederick. 1995. "Giving Reasons." *Stanford Law Review*. 47: 633-659.

Radin, Max. 1925. "The Theory of Judicial Decision: Or How Judges Think." *American Bar Association Journal*. 11: 357-362.

Llewellyn, Karl N. 1950. "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed." *Vanderbilt Law Review*. 3: 395-406.

Leiter, Brian. 2003. "American Legal Realism." in *The Blackwell Guide to Philosophy of Law and Legal Theory*. Available at: <http://ssrn.com/abstract=339562>.

February 2: Ideology

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 1, Section III. (available at course website)

Optional Reading

Pritchett, C. Herman. 1941. "Divisions of Opinion Among Justices of the US Supreme Court, 1939-1941." *The American Political Science Review*. 35: 890-898.

Segal, Jeffrey A. and Albert D. Cover. 1989. "Ideological Values and the Votes of US Supreme Court Justices." *The American Political Science Review*. 83: 557-565.

Revesz, Richard L. 1997. "Environmental Regulation, Ideology, and the D.C. Circuit." *Virginia Law Review*. 83: 1717-1772.

Edwards, Harry T. 1998. "Collegiality and Decision Making on the D.C. Circuit." *Virginia Law Review*. 84: 1335-1370.

Revesz, Richard L. 1997. "Ideology, Collegiality, and the D.C. Circuit." *Virginia Law Review*. 85: 805-851.

Sunstein, Cass R., David Schkade, and Lisa Michelle Ellman. 2004. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." *Virginia Law Review*. 90: 301-354.

Martin, Andrew M. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10: 134-153.

Ho, Daniel E. and Kevin M. Quinn. 2010. "Did a Switch in Time Save Nine?" *Journal of Legal Analysis*. 2: 1-45.

Ho, Daniel E. and Kevin M. Quinn. 2010. "How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models." *California Law Review*. 98: 813-876.

February 9: Case-Space Models and Fact Pattern Analysis

Required Reading

Kornhauser, Lewis A. 1992. "Modeling Collegial Courts I. Path Dependence." *International Review of Law and Economics*. 12: 169-185.

Segal, Jeffrey A. 1984. "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981." *The American Political Science Review*. 78: 891-900.

Kastellec, Jonathan P. 2010. "The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees." *Journal of Empirical Legal Studies*. 7: 202-230.

February 16: Disagreement on the Bench

Required Reading

Epstein, Lee, Jeffrey A. Segal, and Harold J. Spaeth. 2001. "The Norm of Consensus on the U.S. Supreme Court." *American Journal of Political Science*. 45: 362-377.

Epstein, Lee, William M. Landes, and Richard A. Posner. *forthcoming*. "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis." *Journal of Legal Analysis*.
Available at: <http://epstein.law.northwestern.edu/research/WhyDissent.pdf>.

Landa, Dimitri and Jeffrey A. Lax. 2008. "Disagreements on Collegial Courts: A Case-Space Approach." *The Journal of Constitutional Law*. 10: 305-329.

Optional Reading

Scalia, Antonin. 1994. "The Dissenting Opinion." *Journal of Supreme Court History*. 33-44.

Brennan, William J. Jr. 1999. "In Defense of Dissents." *Hastings Law Journal*. 50: 671-682.

February 23: Race, Gender, and Other Ascriptive Characteristics

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 1, Section IV. (available at course website)

Boyd, Christina L., Lee Epstein, and Andrew D. Martin. 2010. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science*.

Sen, Maya. 2011. "Descriptive Representation in the U.S. Courts: Legal Impact or Window Dressing?" (available at: http://scholar.harvard.edu/msen/files/sen_judges.pdf)

Optional Reading

Farhang, Sean and Gregory Wawro. 2004. "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making." *Journal of Law, Economics, & Organization*. 20: 299-330.

Kastellec, Jonathan P. 2011. "Racial Diversity and Judicial Influence on Appellate Courts." (Princeton University Working Paper).

March 1: Collegial Courts

Required Reading

- Kornhauser, Lewis A. and Lawrence G. Sager. 1986. "Unpacking the Court." *Yale Law Journal*. 96: 82-117.
- Landa, Dimitri and Jeffrey A. Lax. 2009. "Legal Doctrine on Collegial Courts." *Journal of Politics*. 71: 946-963.
- Spitzer, Matthew and Eric Talley. *forthcoming*. "Left, Right, and Center: Strategic Information Acquisition and Diversity in Judicial Panels." *Journal of Law, Economics, & Organization*. (available at course website).

Optional Reading

- Kornhauser, Lewis A. 1992. "Modeling Collegial Courts I. Path Dependence." *International Review of Law and Economics*. 12: 169-185.
- Lax, Jeffrey A. 2007. "Constructing Legal Rules on Appellate Courts." *American Political Science Review*. 101: 591-604.
- Cameron, Charles M. and Lewis A. Kornhauser. 2010. "Adjudication Equilibria." (Princeton University working paper).

March 8: Intra-Court Bargaining and Opinion Writing

Required Reading

- Wahlbeck, Paul J., James F. Spriggs, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science*. 42: 294-315.
- Lax, Jeffrey R. and Charles M. Cameron. 2007. "Bargaining and Opinion Assignment on the US Supreme Court." *Journal of Law, Economics, and Organization*. 23: 276-302.
- Carrubba, Clifford; Barry Friedman; Andrew D. Martin; and Georg Vanberg. *forthcoming* "Who Controls the Content of Supreme Court Opinions?" *American Journal of Political Science*. (available at course website).

Optional Reading

- Murphy, Walter F. 1962. "Marshaling the Court: Leadership, Bargaining, and the Judicial Process." *The University of Chicago Law Review*. 29: 640-672.
- Murphy, Walter F. 1974. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

March 15: Hierarchical Judicial Systems

Required Reading

- Cameron, Charles M.; Jeffrey A. Segal; and Donald Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review*. 94: 101-116.
- Carrubba, Clifford J. and Tom S. Clark. 2011. "Rule Creation in a Political Hierarchy." (available at course website).
- Schanzenbach, Max M. and Emerson H. Tiller. 2007. "Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence." *Journal of Law, Economics & Organization*. 23: 24-56.

Optional Reading

- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science*. 38: 673-696.
- Kornhauser, Lewis A. 1995. "Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System." *Southern California Law Review*. 68: 1605-1630.
- Kornhauser, Lewis A. 1999. "Appeal and Supreme Courts." *Encyclopedia of Law and Economics*. (available at: <http://encyclo.findlaw.com/7200book.pdf><http://encyclo.findlaw.com/7200book.pdf>).
- Spitzer, Matthew and Eric Talley. 2000. "Judicial Auditing." *Journal of Legal Studies*. 29: 649-683.
- Lax, Jeffrey R. *forthcoming*. "Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law." *Journal of Politics*
- Carrubba, Clifford J. and Tom S. Clark. 2011. "A Theory of Opinion Writing in a Political Hierarchy." (Emory University working paper).

March 22: Legal Doctrine

Required Reading

- Kornhauser, Lewis A. 1992. "Modeling Collegial Courts II. Legal Doctrine." *Journal of Law, Economics, & Organization*. 8: 441-470.
- Lax, Jeffrey R. 2011. "The New Judicial Politics of Legal Doctrine." *Annual Review of Political Science*. 14: 131-157.

Optional Reading

- McNollgast. 1995. "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law." *Southern California Law Review*. 68: 1631-1683.
- Gennaioli, Nicola and Andrei Schleifer. 2007. "The Evolution of Common Law." *Journal of Political Economy*. 115: 43-68.
- Clark, Tom. S. and Benjamin Lauderdale. 2011. "The Geneology of Law." (Emory University working paper).

March 29: Spring Break (No Class)

April 5: Judicial Selection and Retention: Overview

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 2, Sections I and II (available at course website)

April 12: Judicial Selection and Retention: Independence vs. Accountability

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 2, Sections III and IV (available at course website)

Canes-Wrone, Brandice; Tom S. Clark; and Kee-Kwang Park, *forthcoming* "Judicial Independence and Retention Elections" *Journal of Law, Economics & Organization*.

Gordon, Sanford C. and Gregory A. Huber. 2007. "The Effect of Electoral Competitiveness on Incumbent Behavior." *Quarterly Journal of Political Science*. 2: 107-138.

Optional Reading

Caldarone, Richard P.; Brandice Canes-Wrone; and Tom S. Clark. 2009. "Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions." *Journal of Politics* 71: 560-573

Canes-Wrone, Brandice, and Tom S. Clark. 2009. "Judicial Independence and Nonpartisan Elections." *Wisconsin Law Review* 2009: 21-65

April 19: Normative Implications

Required Reading

Friedman, Barry and Andrew D. Martin, (n.d.) *Judicial Decisionmaking*, Chapter 1, Section V and Chapter 2, Section V (available at course website)