
Washington University in St. Louis
School of Law

Law 786S. Judicial Decisionmaking Seminar

Fall 2012 Semester

Instructor

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Friedrich (bfriedrich@law.wustl.edu) to
schedule]

Class Schedule

Tuesday 2:00-4:00 PM
Seigle 208

Course Description

To understand what the law actually is in practice, and to understand how it evolves over time, it is necessary to understand how judges decide cases. The purpose of this seminar is to survey the social scientific literature on how judges make decisions. Topics include: theories of decisionmaking; judicial selection; constraints under which judges operate; the agenda and litigation process; collegial courts; intercourt relations; the separation of powers; and, the public. Course materials will be drawn from original published studies. The seminar will meet weekly to discuss the assigned readings. Students are expected to participate actively in the seminar discussion. Each student will be required to write a 1-2 page reaction memorandum four times during the semester. Throughout the semester students will research and write a paper, approximately 15 pages in length, on a topic agreed on with the instructor. Students are expected to turn in an outline, rough draft, and final version of the paper. Seminar attendance and preparation are required.

Requirements and Evaluation

Class meetings will be conducted as a seminar. Students are expected to come to class fully prepared to discuss the merits or lack thereof of the assigned readings. This means reading all of the assigned material ahead of time, thinking about how the various pieces might fit together, and doing outside research, if necessary. Class attendance is mandatory. Please consult with me *in advance* if you cannot attend a seminar meeting for any reason.

At four times during the semester you will be required to write a 1-2 reaction memorandum. These memoranda must be solely your work. On the first day of class you will receive, by lot, the sessions for which you are responsible for circulating a discussion memorandum. These 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, Bethany Friedrich (bfriedrich@law.wustl.edu), by noon the day before the seminar. She will distribute them via email to all of us. You should plan to read them before the seminar meets.

I will base student evaluations on two components:

- **Essays.** Each student will write a 15 page essay over the course of the semester. The topic of the essay can be chosen by the student, but requires 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 decisionmaking. 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 decisionmaking. 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.

Law students can choose which of the three essays they will write. Ph.D. students are required to perform their own original empirical research. 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 to me, by September 25 via email, a one or two paragraph description of the essay the student plans to undertake. I will, then, meet with each student on September 27 or 28 to provide feedback and guidance. On or before October 30, each student is responsible for submitting, in hard copy, a full outline of their essay, including citations to cases and/or the literature that will be referenced. I will provide written feedback on these outlines and meet with students as needed. First full drafts of your essays will be due in hard copy on November 19. I will return them no later than November 27. Final essays are due in hard copy on December 7.

Essays should be double-spaced, with one-inch margins, using Times New Roman font. Students can use either the Bluebook or American Political Science Association citation

style. The content of the essay should be no longer than 15 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 20% of the final grade.

For law students, grades will be assigned using the mandatory median (for seminars) required by the law school. I expect to use a symmetric distribution of grades around that median with a standard deviation of five, unless I think a different standard deviation or allowing a skew better reflects aggregate performance in the course. In particular, if all student performance is excellent I am happy to have a heavily right-skewed distribution. Ph.D. students in Arts & Sciences will be graded separately, and will have no effect on the evaluation of law students. I will give no incompletes in the course.

Readings

I have assigned original research in law and social science on each of our discussion topics. Unless noted otherwise, links to these articles, whether as encrypted PDFs, JSTOR links, or HeinOnline links will be posted on my course website located at:

<http://adm.wustl.edu/courses/jdm.php>

I will use this site to distribute other course content. I will also regularly use email to communicate with students in the course. Please check the course website and your email regularly. I will not be using the MyLaw site.

Course Topics and Schedule

Meeting 1. Organizational Meeting [8/28]

Meeting 2. Empirical Legal Studies and Statistics Lecture [9/4]

Background: Lee Epstein and Gary King. 2002. "The Rules of Inference." *University of Chicago Law Review*. 69: 1-133.

Meeting 3. The Role and Identity of the Judge [9/11]

Friedman and Martin, Chapter 1, Part I.

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

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

Meeting 4. Law and Constraint [9/18]

Friedman and Martin, Chapter 1, Part II.

Barry Friedman. 2006. "Taking Law Seriously." *Perspectives on Politics*. 4: 261-76.

Matthew C. Stephenson. 2009. "Legal Realism for Economists." *Journal of Economic Perspectives*. 23: 191-211.

Meeting 5. Ideology [9/25]

Friedman and Martin, Chapter 1, Part III.

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

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

Andrew D. Martin, Kevin M. Quinn, and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review*. 83: 1275-1321.

Meeting 6. Legal Models [10/2]

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

Tracey E. George and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review*. 86: 323-337.

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

Mark J. Richard and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review*. 96: 305-321.

Meeting 7. Race, Gender, and Other Ascriptive Characteristics [10/9]

Friedman and Martin, Chapter 1, Parts IV and V.

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

Christina L. Boyd, Lee Epstein, and Andrew D. Martin. 2010. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science*. 54: 389-411.

Adam Glynn and Maya Sen. 2012. "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" Working paper.

Meeting 8. Collegial Courts [10/16]

Lewis A. Kornhauser and Lawrence G. Sager. 1986. "Unpacking the Court." *Yale Law Journal*. 96: 82-117.

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

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

Richard L. Revesz. 1999. "Ideology, Collegiality, and the D. C. Circuit: A Reply to Chief Judge Harry T. Edwards." *Virginia Law Review*. 85: 805-851.

Meeting 9. Trial Courts [10/23]

C. K. Rowland and Robert A. Carp. 1980. "A Longitudinal Study of Party Effects on Federal District Court Policy Propensities." *American Journal of Political Science*. 24: 291-305.

Judith Resnik. 1982. "Managerial Judges." *Harvard Law Review*. 96: 374-448.

Pauline Kim, Margo Schlanger, Christina L. Boyd, and Andrew D. Martin. 2009. "How Should We Study District Court Decision-Making?" *Journal of Law and Policy*. 29: 83-112.

Meeting 10. Judicial Selection and Retention [10/30]

Friedman and Martin, Chapter 2, Parts I and II.

Meeting 11. Independence vs. Accountability [11/6]

Friedman and Martin, Chapter 2, Parts III and IV.

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

Brandice Canes-Wrone, Tom S. Clark, and Jee-Kwang Park. 2012. "Judicial Independence and Retention Elections." *Journal of Law, Economics, and Organization*. 28: 211-234.

Meeting 12. Intra-Court Bargaining and Opinion Writing [11/13]

Jeffrey R. Lax and Charles M. Cameron. 2007. "Bargaining and Opinion Assignment on the US Supreme Court." *Journal of Law, Economics, and Organization*. 23: 276-302.

Lee Epstein, William M. Landes, and Richard A. Posner. 2011. "Why (And When) Judges Dissent: A Theoretical and Empirical Analysis." *Journal of Legal Analysis*. 3: 101-137.

Clifford Carrubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg. 2012. "Who Controls the Content of Supreme Court Opinions?" *American Journal of Political Science*. 56: 400-412.

Meeting 13. Separation of Powers [11/27]

Robert Dahl. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law*. 6: 279-295.

John A. Ferejohn and Barry R. Weingast. 1991. "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics*. 12:263-279.

Pablo T. Spiller and Matthew L. Spitzer. 1992. "Judicial Choice of Legal Doctrines." *Journal of Law, Economics, and Organization*. 8: 8-46.

Tom S. Clark. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science*. 53: 971-989.