

Introduction to the American Political Process

Class 11: The Judiciary

Asya Magazinnik (Professor)

Zeyu Chris Peng (Teaching Assistant)

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MIT

Overview

1. Some Feedback on Paper 1

2. Readings

Segal and Spaeth, "The Supreme Court and the Attitudinal Model Revisited"

Rosenberg, "The Hollow Hope"

Some Feedback on Paper 1

Strengths

You are all compelling writers.

- The papers kept the reader's interest
- Papers were creative, well-informed, and had sophisticated ideas

Excellent use of sources.

- Very few issues with unfounded statements, quoting, failing to attribute ideas, etc.

General Feedback

1. Avoid long runway time

- You may assume the reader has enough background information to have posed the question
- Argument should appear in the first paragraph
- **Avoid:** summary of legal history, broad statements and clichés (“The U.S. has been plagued by many challenges”)

2. Engage with course readings

- Engagement with sources overall was strong
- But the papers are an assessment of what you’re learning in the class; outside knowledge is welcome but not expected

3. Avoid lengthy quotations and textual analysis

4. Please provide an informative title

What is a good argument?

- First and foremost, it's an answer to the question in the prompt
 - Thus a successful paper will **answer the question**
 - Revision helps with this! We all develop our ideas while writing.
- To answer the question, you must take a side
 - e.g., *Federal courts are better than state legislatures at protecting minority rights.*
 - That said, avoid reductionist arguments (I'll never pose a question that has an easy answer!)
- **Analysis:** Neither opinion nor fact but the space in between
 - You are offering your original point of view
 - But you are disciplined by the definitions, frameworks, ideas, and empirical facts we learn in class
- Meeting with us to pitch your argument could be really helpful

Substantive Feedback: Question 1

Define your umbrella:

- Narrow reading: preclearance
- Broader reading: voting rights protections
- Broadest reading: institutional protections for the minority

Why is this important? Because preclearance only gets you so far:

- Aggregation of votes (winner-take-all system)
- Electoral geography (Rodden)
- Collective action problems (Olson, Strolovitch)

Given the depths of these inequalities, what is the appropriate role of government?

Substantive Feedback: Question 2

- Always take the strongest version of your opponent's viewpoint.
 - Roberts is right about one thing: **there is no such thing as an apolitical map.**
 - So it's not obvious what an "unbiased" map means. Satisfies predetermined characteristics? Determined by participatory/fair process?
- Central issue is not **gerrymandering v. no**; issue is **legislatures v. courts**
 - Not enough to write an essay on why gerrymandering is bad
 - Think through the ways these two institutions are different → different outcomes
 - Which is more democratic in theory? In practice?
 - Are courts neutral arbiters of the law?

Readings

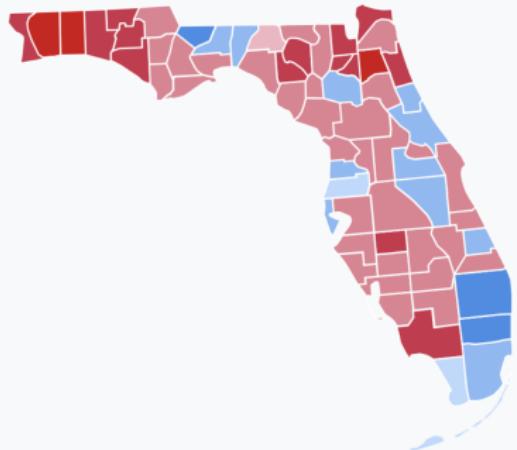
Readings

Segal and Spaeth, “The Supreme Court and the Attitudinal Model Revisited”

Bush v. Gore (2000)



Gap appeared to be .01%, triggering a recount



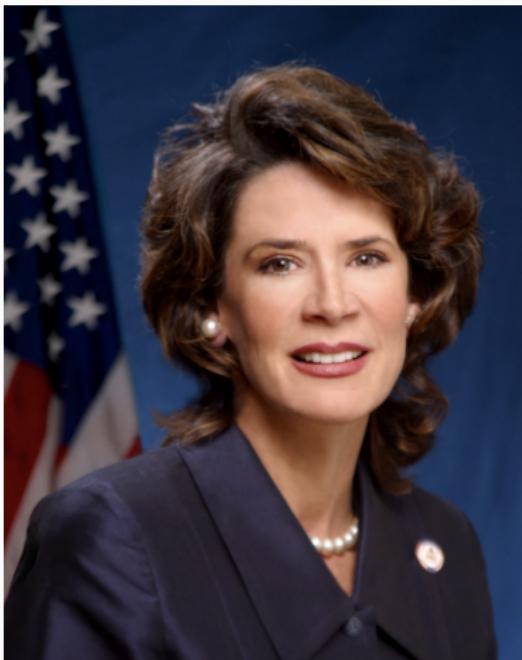
County Results

Bush

- 40-50%
- 50-60%
- 60-70%
- 70-80%

Gore

- 40-50%
- 50-60%
- 60-70%



Remember the Hanging Chad...



...and the Butterfly Ballot

1-L

OFFICIAL BALLOT, GENERAL ELECTION
PALM BEACH COUNTY, FLORIDA
NOVEMBER 7, 2000

ELECTORS
FOR PRESIDENT
AND
VICE PRESIDENT

(A vote for the candidates will
actually be a vote for their electors.)

(Vote for Group)

(REPUBLICAN)	
GEORGE W. BUSH -PRESIDENT	3 ➤
DICK CHENEY -VICE PRESIDENT	
(DEMOCRATIC)	
AL GORE -PRESIDENT	5 ➤
JOE LIEBERMAN -VICE PRESIDENT	
(LIBERTARIAN)	
HARRY BROWNE -PRESIDENT	7 ➤
ART OLIVIER -VICE PRESIDENT	
(GREEN)	
RALPH NADER -PRESIDENT	9 ➤
WINONA LaDUKE -VICE PRESIDENT	
(SOCIALIST WORKER)	
JAMES HARRIS -PRESIDENT	11 ➤
MARGARET TROWE -VICE PRESIDENT	
(NATURAL LAW)	
JOHN HAGELIN -PRESIDENT	13 ➤
NAT GOLDHABER - VICE PRESIDENT	

OFFICIAL BALLOT, GENERAL ELECTION
PALM BEACH COUNTY, FLORIDA
NOVEMBER 7, 2000

1-R

(REFORM)	
PAT BUCHANAN -PRESIDENT	
EZOLA FOSTER - VICE PRESIDENT	
(SOCIALIST)	
DAVID McREYNOLDS -PRESIDENT	
MARY CAL HOLLIS - VICE PRESIDENT	
(CONSTITUTION)	
HOWARD PHILLIPS -PRESIDENT	
J. CURTIS FRAZIER - VICE PRESIDENT	
(WORKERS WORLD)	
MONICA MOOREHEAD -PRESIDENT	
GLORIA La RIVA - VICE PRESIDENT	
WRITE-IN CANDIDATE	
To vote for a write-in candidate, follow the directions on the long stub of your ballot card.	

TURN PAGE TO CONTINUE VOTING

Bush v. Gore

Bush sued to stop the recount and the Florida Supreme Court ruled that it should go forward.

Federal case hinged on **Equal Protection Clause/Fourteenth Amendment**: everyone entitled to have their vote counted the same way

The case came down to two questions:

1. Were the recounts, as they were being conducted, constitutional?
2. If the recounts were unconstitutional, what is the remedy?

The Supreme Court came down as follows:

DECISION FOR GEORGE W. BUSH

PER CURIAM OPINION

Standardless manual recounts violate the Fourteenth Amendment's Equal Protection Clause.

Ginsburg

Souter

Kennedy

Scalia



Stevens



Breyer



O'Connor



O'Connor



Kennedy



Scalia



Thomas

No other recount method could be decided and executed within the election time limit per 3 U.S.C. § 5.

Ginsburg

Souter

Kennedy

Scalia



Stevens



Breyer



O'Connor



O'Connor



Kennedy



Scalia



Thomas



States' Rights

Federal Protection

The Day the Music Died?

Bush v. Gore broke David Souter's heart. The day the music died, he called it. It was so political, so transparently political, that it scarred Souter's belief in the Supreme Court as an institution.

– Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court*

The decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants. This was cheating, and a violation of the judicial oath.

– Alan Dershowitz

"The authoritative character of judicial decisions results because judges make policy. This statement may have once appeared heretical—as well as demeaning to judges—because it conflicts with the unsophisticated view that judges are objective, dispassionate, and impartial in their decision making. But the Warren Court's liberal activism, followed not long after by the Rehnquist Court's conservative activism (topped off by Bush v. Gore) certainly must have dampened the remaining remnants of such a notion."

Modeling the Courts

As always, we seek several features of a model:

1. Explanatory power
2. Parsimony
3. Falsifiability

“All models are wrong. Some models are useful.” – George Box

The Legal Model

"The decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of the statutes and the Constitution, the intent of the framers, and/or precedent."

- Earlier cases exert a “gravitational force” on judges; their goal is to **find** rather than **make** the “correct answer” (Dworkin)
- Legal positivism: “in an attempt to adhere to the law as an empirical fact, a positivist jurist limits his or her interpretation of the Constitution to the meaning of the words or the text or intent of its authors.”

The Legal Model

Problem: **falsifiability**

Both sides usually have precedent and some reading of the law on their side.

- A case that doesn't even come before the Supreme Court

“By being able to “explain” everything, in the end it explains nothing.”

The Attitudinal Model

The conception of law in flux, of moving law, and of judicial creation of law.

The layman thinks that it would be possible so to revise the law books that they would be something like logarithm tables, that the lawyers could, if only they would, contrive some kind of legal sliderule for finding exact legal answers. This is obviously not so.

In addition to significant room for discretion in the law, judges have **strong preferences** coupled with **considerable power**:

- Judges have **ideologies** and **goals**
- Judges **control their docket**, only selecting cases that are not obviously clear (and where they can exert influence)
- They do so unconstrained by electoral incentives

Case Space

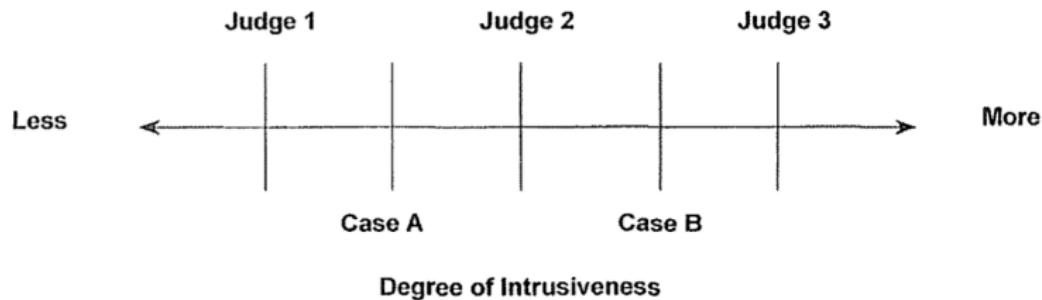


FIGURE 3.1. Justices and cases in ideological space.

The Rational Choice Model

- Actors are able to order their alternative goals, values, tastes and strategies
- Judges choose from available alternatives so as to maximize their satisfaction
- Very similar to attitudinal model, but allows for even more strategic behavior

Readings

Rosenberg, “The Hollow Hope”

Do Courts Ever Produce Meaningful Social Change?

"Are courts effective producers of change... or do their decisions do little more than point the way to a brighter, but perhaps unattainable future?"

Even if we acknowledge the attitudinal or rational choice model, are courts too institutionally constrained in practice to realize their goals?

The Constrained Court View

Even when courts want to act, the “least dangerous branch” is constrained:

1. Reformers must convince the courts that their claims are grounded in constitutional or statutory rights, which are limited
2. Courts are deferential to the federal government and wary of stepping out of the political mainstream
 - They also *themselves* subscribe to the constrained court view
3. Implementation: neither sword nor purse
 - *“John Marshall has made his decision; now let him enforce it!”*
(Andrew Jackson)

The Dynamic Court View

Courts are not bogged down by bureaucratic inertia or electoral constraints

What's more, courts *are* sometimes responsible for major change:

- Brown v. Board of Education
- Roe v. Wade
- Shelby v. Holder
- Citizens United v. FEC

Conditions for Judicial Activism

Reconciling the constrained view and the dynamic view, Rosenberg gives us **conditions** when courts can produce meaningful change:

1. There is ample legal precedent for change
2. There is support for change among a substantial number of legislators and/or the executive
3. There is either support from some citizens, or at least low opposition from all citizens

Meaning the courts are uniquely positioned to tip policy over the edge, though they cannot truly be at the forefront

Brown v. Board of Education of Topeka (1954)

Desegregated public schools, overturning the “separate but equal” doctrine in *Plessy v. Ferguson*

“We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

Condition 1: Precedent

Precedent had already been chipping away at *Plessy*:

- “*In more recent cases, all on the graduate school [347 U.S. 483, 492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637.*”

Condition 2: Support from Executive

Eisenhower sending National Guard to Little Rock:



Condition 3: Public Opinion



People marching with signs to protest segregation in education at the college and secondary levels, 1947. Courtesy: Library of Congress