

University of Vermont – Political Science Department

Public Law Newsletter

July, 2010

Public Law in the Department of Political Science at UVM

Greetings from the Department of Political Science at the University of Vermont! We have recently completed another busy year in the department and are awaiting the influx of a new group of students in the fall. The three core public law faculty (myself, Alec Ewald, and Ellen Andersen) continue to provide a number of law-related courses for our undergraduates, and we also continue to assist our students who are interested in and applying to law school. Information we have received from many of you about where you went to law school and your professional experiences has been very useful for us in our pre-law advising capacity.

Compared to most political science departments across the country, we are fortunate to be able to offer a good variety of law-related courses taught by a relatively large number of public law faculty. That being said, our public law offerings will be somewhat lessened in the coming year with the departures of Alison Arms and Bageshree Blasius, two of our adjunct professors. Alison's class on Individual Rights in the War on Terror has been a useful and popular addition to our curriculum since 2007. Since joining us in 2006, Bageshree has taught Civil Liberties and the American Political System, and as well offered our course on American Civil Rights Movements for the first time since Howard Ball's retirement in 2002. Their presence in the classroom will be missed, but I remain hopeful that they will each be able to teach for us in the future. In addition, George Moyser, our department chair since 1996, has retired. Fortunately for the department, he will continue to teach for us on a part time basis next year.

Although Ellen Andersen, Alec Ewald, and I comprise the formal core of the public law faculty in the department, many of our colleagues have research interests in legal areas as well. This year, two of them have contributed short pieces to this newsletter. John Burke questions whether or not prior federal judicial experience is necessary for one to become a "great"

Supreme Court justice. Alex Zakaras has written about the democratic ideal in the context of the Supreme Court's recent *Citizens United v. Federal Election Commission* decision. In a large department comprised of faculty with a diversity of research and teaching interests, our students are exposed to questions concerning law and legal students well beyond the core public law curriculum that we offer.

I am pleased to say that we have a number of recent graduates going on to law school this fall. We have students who have been admitted to many schools across the country, with department graduates enrolling at Duke, Cardozo, Northeastern, Louisville, Loyola University Chicago, Pace, and the University of La Verne, among others. Caryn Devins and Max Bookman, both 2010 graduates of the department, have written about some of their thoughts upon leaving UVM and looking ahead to law school. On behalf of the department, I wish Caryn, Max, and all of our students who are moving on to law school the best of luck in the future.

I am pleased to have an opportunity to keep in touch with our alumni, and hope to keep you informed of any speakers or events of interest to you in the coming year. I have been delighted by our alumni's interest in our pre-law advising program and in assisting our students. Please feel free to contact me (Lisa.M.Holmes@uvm.edu) with any questions or suggestions, or to let me know what you are up to or if your contact information has changed. Enjoy the summer!

Lisa Holmes
Associate Professor and
Pre-law Advisor

From the Student Perspective.....

Caryn Devins (UVM '10)

My decision to go to Duke University School of Law came at the end of a long process of emotional and intellectual growth undertaken during college, achieved by living in diverse places and taking advantage of a range of opportunities. Through congressional internships in Washington, DC and Burlington, VT, various courses in constitutional law and human rights, and a study abroad experience in Argentina that illuminated the contrast between societies that respect the rule of law and those that do not, I realized that law would be the most effective route for me to affect change in society. Although I still don't know exactly what kind of law I want to practice, public international law and constitutional law currently appeal to me. I hope to eventually work to strengthen legal access at home and abroad to traditionally marginalized communities.

The political science department at UVM has helped me tremendously in honing and achieving my ambitions. My professors were never afraid to challenge me intellectually, and they pushed me in the classroom and beyond precisely because they understood my potential. My senior honors thesis, in which I studied the rule of law in Argentina under two different presidents, was especially important because it allowed me to understand my study abroad experiences through a rigorous academic project. My advisor, Professor Caroline Beer, exemplified the ideal thesis advisor through her simultaneous encouragement and intellectual challenges to my work. Overall, I have been truly impressed with my professors' academic credentials and dedication to students. My main regret is not having had the time or opportunity to take classes with more professors!

Caryn Devins was the recipient of the 2010 Departmental Prize for Comparative Politics and the Alan Wertheimer Outstanding Honors Thesis award.

Max Bookman (UVM '10)

I was always somewhat jealous of my friends who pursued majors like engineering or business, because I couldn't shake this feeling that they were actually getting *something practical* from their college educations, while I was simply writing academic essays about policymaking during the Nixon administration (which could be boiled down to one word, by the way: Kissinger). It is only now, as I prepare to enter my first year at law school, that I realize that the core components of my Political Science education at UVM – analytical thinking, an emphasis on writing, and a respect for crafting strong arguments that address anticipated dissent – not only laid the groundwork for my future legal career, they played an important role in my decision to go to law school.

Embarking on a three-year journey through law school, culminating in a career in law (not to mention hundreds of thousands of dollars in student loans), is not a decision to make lightly. Yet, for me, as I'm sure it was for many UVM alumni who ultimately went on to law school, it was a natural choice. Granted, it was a heavy and consequential choice, but a natural choice nonetheless. Everybody has unique reasons behind their choice to go to law school, but I think it is safe to assume that if you regularly kept your Constitutional Law textbook on your nightstand for some recreational reading before bedtime, you might have had an affinity for the practice of law. It didn't take me long to discover that most people in my class actually hated that textbook (much to my surprise).

But beyond that, I think majoring in Political Science was informative to my decision to go to law school because it brought me to recognize that so many of the figures I have come to admire from studying in my Poli Sci courses – Marshall, Lincoln, Bryan, Reno, Obama –all were lawyers. Those who take on the challenge of becoming attorneys aspire to join the ranks of those people who make the important decisions, espouse the critical arguments, and defend the God-given rights that we study in Political Science –

that we also require to maintain our democratic society.

So, yes, my engineering and business classmates who graduated alongside me in May know how to design a jet engine or how to run a focus group. But I can make an argument, identify opposing viewpoints, and rebut. I have inspiration from the example set by the men and women I've studied. It's a solid foundation, and I intend to build upon it.

Max Bookman, a 2010 graduate of the Department of Political Science Honors Program, was inducted into Pi Sigma Alpha in May. He will be attending Benjamin Cardozo School of Law in the fall.

Is Corporate Speech Democratic?

Alex Zakaras

Assistant Professor of Political Science

In January of this year, the Supreme Court changed the shape of American politics. In a 5-4 decision, in *Citizens United v. Federal Election Commission*, the court struck down an important piece of the McCain-Feingold campaign finance law, which had prohibited corporations from using money from their general treasuries to fund political ads during election season. In doing so, the court tore down one of the bulwarks that has prevented corporations from pouring money into political campaigns. Many political commentators, from the left and right alike, immediately denounced the decision as an attack on democracy and a victory for wealthy special interests. It is striking, therefore, that the Court believed just the opposite—in fact, Justice Kennedy, who delivered the opinion of the Court, argues that corporate spending on elections is a vital part of democracy itself. Let us consider his argument.

Kennedy argues that every citizen has the right “to inquire, to hear, to speak, and to use information to reach consensus” (558 U.S.__(2010), p.23). The right

not just to speak, but also to *hear* information, is essential, in Kennedy's view, to democracy; without it, citizens would be unable to make informed, rational political decisions. Any law that prevents a corporation from funding political ads is a form of censorship that deprives citizens of political information that they could use in forming their opinions. Such laws must be struck down, says Kennedy, so that democracy can be preserved.

Kennedy is right, of course, that democracy, as an ideal, guarantees all citizens an equal opportunity to speak in public forums and to hear the opinions of others. When Vermonters congregate for their local Town Meetings, for instance, every resident has the right both to speak and to hear what others have to say. Any other arrangement would be patently undemocratic.

But consider how very different political "discussions" broadcast over mass media are from discussions held in face-to-face political forums. In broadcast media, political voice is distributed to whomever can afford the going price. Broadcast media are, in other words, governed by the logic of the *market*, not the logic of the forum. And markets have never been especially democratic places: richer buyers do much better than poorer ones (imagine the uproar if someone proposed to auction off speaking time at Town Meeting to the highest bidders). Goldman Sachs can, for instance, credibly threaten to inundate television viewers with ads attacking a Congressman who is considering voting for tough banking reform; most ordinary citizens, and most groups of citizens, simply cannot.

The distinction between these two logics—the market and the forum—exposes a deep flaw, not only in Justice Kennedy's opinion, but in one of the dominant ways of talking and thinking about free speech in democracy. Drawing on a metaphor that has become ubiquitous, Kennedy argues that the McCain-Feingold law endangers the "'open marketplace' of ideas" that is so vital to democracy (558 U.S.__(2010), p.38). Kennedy is right in believing that restrictions on

corporate political speech endanger the free marketplace of ideas, but wrong in holding that this particular form of market freedom bears any special relationship to democracy. In fact, we have a choice to make—a choice between two competing ideals. In a world in which individual citizens (and citizen groups) compete for airtime with the likes of Goldman Sachs and ExxonMobil, buying and selling political speech on an open, unregulated marketplace is precisely what threatens the democratic ideal of equal voice and inhibits citizens from hearing a rich diversity of opinions.

Alex Zakaras is Assistant Professor of Political Science. He is the author of "Individuality and Mass Democracy: Mill, Emerson, and the Burdens of Citizenship" published by Oxford University Press in 2009.

What Makes for a "Great" Supreme Court Justice?

**John P. Burke
University of Vermont**

Elena Kagan's nomination to the Supreme Court raises an interesting question: what are the "proper" qualifications for a member of that esteemed body? She has been a law professor at the University of Chicago and at Harvard (the latter also as dean of its law school, as we know). She served in the White House legal counsel's office: the chief advisory unit to the president on legal, constitutional, and ethical issues. She was a White House deputy domestic policy advisor (both of the latter under President Clinton). She was nominated to serve on the D.C. court of appeals (although her appointment was blocked by Senate Republicans).

Impressive? Yes. But is it enough given that she has never served on the federal bench? Nor indeed has she served in any judicial capacity (save as solicitor general, if one wishes to count that as the

“tenth justice,” as some have noted). Is bench experience necessary for a justice of the Supreme Court? All of the current members of the Court have served at the federal appellate level, and the last nominees without any judicial experience were Lewis Powell and William Rehnquist, almost four decades ago. Still, only 34 of 111 members of the Court have had any prior federal court experience. Moreover, at least 38 of the 111 members of the Court through history have lacked any prior judicial experience—whether federal, state, or local—including 21 nominated since 1900 plus 8 of all 17 chief justices.ⁱ

Let’s set the bar high: this is, after all, the Supreme Court. What background makes not just for an “adequate,” or a “good,” but for a “great” member of the Court? I won’t offer my own assessment—determining “greatness,” is, after all, a subjective enterprise—but I will rely instead on four studies. The first is a 1970 survey of experts conducted by Albert P. Blaustein and Roy M. Mersky.ⁱⁱ They found twelve greats: John Marshall, Joseph Story, Roger B. Taney, John Harlan the elder, Oliver Wendell Holmes, Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, Hugo Black, Felix Frankfurter, and Earl Warren.

The second marker is by Robert Bradley.ⁱⁱⁱ Two of his expert surveys—of scholars and sitting judges—found a common list of nine “great” justices: Marshall, Holmes, Brandeis, Cardozo, Black, Frankfurter, Warren, plus William O. Douglas and William Brennan. Bradley’s analysis appears in a 2003 edited collection on great Supreme Court justices by William Pederson and Norman Provizer, and their chapter-long case studies—sixteen in all—provide a third indicator. They include the Blaustein and Mersky twelve, plus Douglas, Brennan, William Rehnquist, and Sandra Day O’Connor.

Finally, in a 2009 piece in *American History* magazine, legal scholar Jonathan Turley offers nine “greats”: Marshall, Hughes, Warren, Brandeis, Brennan, Holmes, Harlan the elder, Black, and Story.^{iv} All told, this is a dance, surely, of the jurisprudentially distinguished.

So what might we conclude? First, we have five “great” Supreme Court justices agreed upon by all four: Marshall, Holmes, Brandeis, Black, and Warren. Interestingly, none were federal appeals court judges or had prior federal judicial experience at any level. To be fair, however, we should perhaps give Chief Justice Marshall a break. For almost all of the 19th Century, no nominee to the Supreme Court could claim federal appeals court experience: that level of the federal court system did not exist until 1891.^v As for the rest, Warren was a county prosecutor, then California’s attorney general and ultimately governor, plus the GOP nominee for vice president in 1948. Brandeis was a private attorney and litigator for progressive causes. Hugo Black was a sitting member of the U.S. Senate. He could claim at best a brief tenure as a local police court judge. He would turn out as one of the Court’s great civil libertarians, despite his earlier flirtation with the Ku Klux Klan. Only Holmes previously had been on the bench, having served on the Massachusetts Supreme Judicial Court.

Let’s lower the bar a bit. How about those who make it among three out of the four lists of the ranked greats? Again, no federal experience is present. Frankfurter was a professor at Harvard Law; but not dean of the law school there, much less solicitor general. Joseph Story predates the creation of the appeals court; although much distinguished, he too had no judicial experience before joining the Court in 1811 (he would serve until 1845). John Harlan the elder had briefly served as an elected county judge, but very early in his career. Charles Evans Hughes was a former governor of New York before he joined the Court in 1910. In 1916, he resigned from the Supreme Court in his effort to challenge Wilson for the presidency. Hughes lost in California by 3773 votes, by the way; had he won, he would have had an Electoral College majority. For Hughes, however, the Court would loom in his future: he served as President Harding’s secretary of state, then as Chief Justice from 1930 until 1941. Only Brennan and Cardozo really had careers on the bench, but, like Holmes, in state supreme courts (New Jersey and New York, respectively).

So who are we left with among the greats? Five remain. Chief Justice Roger Taney, the first Catholic on the Court, had been Andrew Jackson's Attorney General, but lacked prior judicial experience. Harlan Fiske Stone was Attorney General under Coolidge when nominated to the Court; he was subsequently elevated from associate to Chief Justice under FDR (an interesting mix there, by the way). William O. Douglas was chair of the Securities and Exchange Commission under FDR; he is the longest serving justice to date. Chief Justice William Rehnquist was an assistant attorney general before he joined the Court as an associate justice; only later, was he elevated to Chief Justice. Only Sandra Day O'Connor—a former GOP leader of the Arizona state senate—had extensive judicial experience prior to appointment. But, again, O'Connor's bench-time was just at the state level (she was a county judge, then a state appeals court justice—but not on the Arizona supreme court, however). None served in the federal judiciary. Other Supreme Court notables also never served on any bench: Robert Jackson (we shall undoubtedly hear of his concurring opinion in the Youngstown steel-mill seizure case in Kagan's confirmation hearings) and Lewis Powell (the Bakke affirmative action case).

For the whole lot: you judge the judicial results. Is prior federal judicial experience necessary? Greatness—at least by the above measures and to date—suggests not. Remarkably, federal judicial experience is quite missing; indeed judicial service of any sort is, at best, quite limited. As for former solicitors general (a position created in 1870), there have been four on the Supreme Court: William Howard Taft (under Benjamin Harrison), Stanley Reed and Robert Jackson (both under FDR), and Thurgood Marshall (under LBJ).^{vi} I will leave it to you to judge their qualifications—and subsequent records—as members of the Supreme Court.

John P. Burke is Professor of Political Science at the University of Vermont. He is the co-author of "Advising Ike: The Memoirs of Attorney General Herbert Brownell," among other books. His latest book is "Honest Broker? The National Security Advisor

and Presidential Decision Making," published by Texas A&M University Press in 2009. This article was previously published in the Spring 2010 Newsletter of the Presidency Research Group of the American Political Science Association.

i. FindLaw lists 40 members of the Court without judicial experience: http://supreme.lp.findlaw.com/supreme_court/justices/nopriorex.html (accessed May 15, 2010). Henry Abraham puts the total at 38 (Henry J. Abraham, *Justices, Presidents, and Senators: A History of Supreme Court Appointments from Washington to Bush II*, 5th ed., (Lanham, MD: Rowman & Littlefield, 2008) 40, 42-43). FindLaw includes John Jay, John Rutledge, John Marshall and Samuel Freeman Miller in its list, while Abraham lists them as having some judicial experience; Abraham, however, lists James Wilson and Morrison Waite as lacking prior judicial experience, while FindLaw does not. Abraham appears correct on Rutledge (he served on the South Carolina Court of Chancery and later as Chief Justice of its Court of Common Pleas and Sessions), Jay (he served as Chief Justice of the New York Supreme Court of Judicature, 1777-1778), while Wilson and Waite were apparently both without prior experience (although Wilson was Avocat Général for maritime and commercial causes, appointed by French government, 1779-1783 and Waite had been U.S. "representative" to a Geneva international arbitration court on Civil War claims). Others are less clear: Samuel Freeman Miller was a justice of the peace and apparently served on a Kentucky county court, while Marshall served as "recorder" of the Richmond City Common Hall and Hustings Court (which handled minor civil and criminal cases) from 1785-1788, a position that may have enabled him to sit as a "magistrate" on the court. Also, Abraham notes that only 33 members (now 34 with Sonia Sotomayor) had prior service in lower federal courts (Abraham, 49).

ii. Albert P. Blaustein and Roy M. Mersky, "Rating Supreme Court Justices," *American Bar Association Journal*, 58 (1972) 1183-1189.

iii. Robert Bradley, "Selecting and Ranking Great Justices: Poll Results," in William Pederson and Norman Provizer, eds., *Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices*, (New York:

Peter Lang, 2003) 1-22. Bradley's combined surveys of experts, judges, attorneys, and students resulted in the following greats, by rank order: Marshall, Holmes, Warren, Brandeis, Black, Brennan, Cardozo, Frankfurter, Douglas, and Rehnquist. Another expert poll-based ranking of Supreme Court members can be found in Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*, (Lawrence, KS: University Press of Kansas, 2004); Comiskey's survey, however, only includes 20th Century members of the Court. Earlier lists of great justices can be found in: Charles Evans Hughes, *The Supreme Court of the United States*, (New York: Columbia University Press, 1928); Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *University of Pennsylvania Law Review*, 105 (1957) 781-796; Roscoe Pound, *The Formative Era of American Law*, (Boston: Little, Brown, 1938).

iv. Jonathan Turley, "The 9 Greatest Supreme Court Justices," *American History*, October 2009; available at: <http://www.historynet.com/the-9-greatest-supreme-court-justices.htm/1> (accessed May 10, 2010).

v. Prior to the Judiciary Act of 1869, the federal appeals level--below the Supreme Court--consisted of a federal district court judge plus members of the Supreme Court "riding circuit." The 1869 act created circuit-level judgeships (which had also briefly existed under the Judiciary Act of 1801 passed by Adams's Federalists in Congress, quickly repealed by Jefferson's Democratic-Republicans, and a single circuit judgeship established for California from 1855-1863). The Judiciary Act of 1891 created the modern circuit court of appeals system.

vi. Warren, by the way, had agreed to be nominated as solicitor general by Eisenhower in July 1953 and then take the next available seat on the Court; the subsequent death of Chief Justice Fred Vinson opened that position for him (and Ike honored his pledge of appointing Warren to the next available seat, whether at the associate or Chief Justice level). I must add that, contrary to conventional wisdom, there was no "deal" for this arrangement at the 1952 GOP convention in order to secure Eisenhower's nomination. Warren did not release his delegates and Eisenhower secured the nomination without them (Gov. Harold Stassen's delegates put Ike over the top; his convention floor leader was a young Minnesota attorney--and future Chief Justice--Warren Burger). My sense is that Eisenhower recognized that Warren wanted to move

on from Sacramento--and that Ike wanted him as part of his "team"--but that Herbert Brownell's appointment as Attorney General precluded a logical spot. Nor was Warren much interested in serving as secretary of the interior (another position considered for him), hence the solicitor general offer and pledge of a subsequent Supreme Court appointment. In addition, Chief Justice John Roberts served as deputy solicitor general and Justice Samuel Alito served as assistant to the solicitor general. Only Stanley Reed and Thurgood Marshall moved directly to the Court from the solicitor general post. Interestingly, Marshall had served as a federal appeals court judge on the 2nd circuit from October 1961 until his confirmation as solicitor general in 1965. One of his law clerks as a Supreme Court justice was Elena Kagan. For an excellent judicial biography of Marshall, see Howard Ball (our departmental colleague, former Dean of the College of Arts and Sciences, and now emeritus faculty): "A Defiant Life: Thurgood Marshall and the Persistence of Racism in America."