Are Judges Political?
Ken Merber, ’07
Lisa M. Ellman, JD/MPP, ’05, and Andres Sawicki, ’06, recently graduated from the University of Chicago Law School. Ellman now works as an attorney at the Washington DC office of Mayer, Brown, Rowe & Maw LLP, while Sawicki is currently clerking for the Honorable Robert D. Sack of the United States Court of Appeals for the Second Circuit. While students at the Law School, Ellman and Sawicki had the unique experience of coauthoring a book with the Law School’s own Professor Cass Sunstein and Professor David Schkade of the University of California, San Diego. The book, entitled Are Judges Political? and published by Brookings Press, is an empirical analysis of the effects of political ideology on decisions of the federal courts of appeals.

Empirical analysis of judicial opinions is still a relatively unusual technique for legal scholars. Unlike ordinary legal research, which focuses attention on a few important cases, an empirical study casts a wide net, incorporating as many relevant cases as possible. As the results described in Are Judges Political? demonstrate, this broadened scope can cast new light on old debates. I spoke to Ellman and Sawicki about the Chicago Judges Project, writing the book, and their experience working with Professor Sunstein.

Seeing Professor Sunstein’s name on the cover of a new book is hardly a surprise. It’s much more unusual to see two University of Chicago Law School students (now alumni) as co-authors. How did you begin working on the project, and what was it like working with Professor Sunstein?

Ellman—My involvement began in the summer of 2002, when I worked for Professor Sunstein as a research assistant. I had always been interested in the intersection of law and policy, and so I was particularly excited to work with Professor Sunstein on an empirical study of judicial voting. We started with environmental cases in the District of Columbia Court of Appeals and eventually ended up coauthoring an article, “Idiosyncratic Voting on Federal Courts of Appeals: A Preliminary Investigation,” which was published in the University of Virginia Law Review (90 Va. L. Rev 301, 2004). The article generated a great deal of attention, at which point we decided to expand the research into the Chicago Judges Project.

Sawicki—I also began by working for Professor Sunstein as a research assistant in the summer of 2004. I had done a little bit of work on the Judges Project then, but I didn’t get involved full-time until Lisa contacted me during the winter. When she asked if I’d be interested in doing more research, I jumped at the chance.

We really enjoyed working with Professor Sunstein—as everybody knows, he is a brilliant scholar. He is always excited about new ideas and data, and his curiosity carries over to those around him. He is also an amazing teacher. We feel very fortunate to have had the opportunity to work with him and learn from him.

The book draws on the Chicago Judges Project, a database of empirical information on judges and judicial “voting” in certain politically sensitive cases, which has involved a number of University of Chicago Law students. You have both had important roles in the project. What are the goals of the project, and how have you been involved? And what was your role in the final version of the book?

Many legal debates center around the effect of politics on the rule of law. The Chicago Judges Project is part of a growing movement to inform these debates with descriptions of actual judicial behavior. What the project does is take the huge amount of existing data in the form of real case outcomes and translate it into a large but manageable database. The focus is mainly on the courts of appeals, as opposed to most studies, which focus on the Supreme Court. The Supreme Court is obviously quite important, but it is not the whole story. Studying appellate judges makes particular sense in light of some of Professor Sunstein’s other work on group interactions, such as the Chicago Judges Project.

Our roles in the project consisted of managing the team of students who were coding the cases, instructing them as to what they were looking for, and then managing the resulting data. We spent a great deal of time cleaning up the coding, verifying results, and trying to determine what the numbers might mean. As for the final version of the book, the writing was a collaborative process: we all sent drafts around to each other, writing and rewriting, until we had decided exactly what we wanted to say.
The book primarily reports the results of a study of the effect of politics on judicial decision making. Judges from the federal courts of appeals (who sit in three-judge panels) are assigned political parties, for purposes of the study, based on the presidents who appointed them. Using that measure, the study then examines three main hypotheses: First, do politics matter? Second, does it matter less when Republican judges sit with Democratic judges? Third, does it matter more when you find all Republican or all Democratic panels? In most controversial areas of law, the answer to these questions was yes. However, your data, and your analysis of the data, were more nuanced than that. What did you find to be the most interesting finding?

It was interesting to find what we term panel effects—that is, a Democratic judge sitting with two Republican judges votes more like a Republican in the controversial areas of law that we studied, and vice versa. The findings echo social science research demonstrating how groups interact. To that extent, a more appropriate title may have been: are judges human? And the answer is yes: judges respond to group influences in much the same ways as other people.

We were also intrigued by areas in which the hypotheses were not confirmed. For example, in abortion cases, judges vote in political ways but resist group influence, while in other areas of political controversy, the law is sufficiently settled so that the politics are not reflected in the jurisprudence. Finally, the widespread agreement in other politically controversial areas, like takings law, was perhaps the most interesting, and perhaps also the most reassuring for those who hold traditional aspirations for the rule of law. It’s likely that for the politically uncontroversial areas that make up most of courts’ workload, there are few differences between the voting of Republican and Democratic judges.

In other parts of the book, you examine changes in judges over time, differences among judges appointed by different presidents, and judicial responses to landmark cases such as Roe v. Wade. Which of these issues do you think provided the most important insights, and what did you find there?

We were struck by the growing conservatism of the judges and courts over time. The data were not conclusive on this point but suggest a slow, systematic shift of judicial decision making, on average, to the right.

We were also intrigued by how judges reacted to landmark cases, with little party distinctions at first, but both ideological and panel (group influence) effects growing over time. Again, it shows how judges are human, and how people respond to new and unfamiliar situations. It is the sort of thing that social scientists have looked at a great deal, but the implications of their findings have not yet been widely acknowledged in legal studies. While academics are used to looking at big decisions in a legal sense, judges react in a very human sense.

Books by Alumni


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Books by Alumni

Steve Fiffer, '76, and James A. Baker III. "Work Hard, Study... and Keep Out of Politics!" Adventures and Lessons from an Unexpected Public Life (Putnam 2006).