
Constitutional Process

A Social Choice Analysis of Supreme Court Decision Making

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**with a Foreword by
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Foreword

Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making

Most readers of this foreword are, in all likelihood, “legal scholars.” This is a term the popular press occasionally uses to refer to those of us who study law and courts. And it is a term we ourselves often invoke, even though we are such a heterogeneous group that a label implying anything else is something of a misnomer. We are lawyers, political scientists, sociologists, anthropologists, psychologists, criminologists, historians, and even mathematicians. And we focus our inquiries on a wide range of problems, from the correlates of judicial behavior to the doctrine judges produce to the impact of their decision on society, to name just a few.

In fact, the list of our concerns is seemingly endless. But the general point should not be missed: To speak of “legal scholars” is to speak of large, diverse group, who do not necessarily see eye to eye on the types of questions to ask, the kinds of theories to invoke to answer those questions, or the sorts of data necessary to assess propositions emerging from those theories.

It is in this spirit that I commend to you *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making*. For Maxwell Stearns has done the extraordinary: Amid all the division, he has managed to find common ground, to craft a book that “legal scholars” of all stripes will find attractive.

How has he accomplished this seemingly impossible task? One answer centers on his primary research question—a question that is as old as the study of law and courts but is, nonetheless, of enduring value: How do courts make constitutional law? At least in my discipline (political science), I cannot imagine too many of my colleagues for whom this is not a question of central concern—regardless of whether they focus on the approaches justices take to produce doctrine or the doctrine itself. Much the same, I am sure, can be said of scholars toiling in other fields.

But Professor Stearns does more than simply ask a good question. Which takes me to a second point: He invokes a provocative and, to my mind, appropriate methodology to answer it, the theory of social choice. Also known as “public choice,” this theory provides a potent set of tools for examining group decision making.

In the political world, social choice approaches are, perhaps, most commonly associated with the study of legislative behavior, but Professor Stearns is not the first to exploit their power to illuminate decision making on collegial courts. Nearly two decades ago, Frank Easterbrook, in his now-seminal “Ways of Criticizing the Court,”¹ relied on the “developing theory of public choice” to explore the Supreme Court’s performance in various legal areas. Professor Stearns himself produced an outstanding reader, just three years ago, that brings together some of the best exemplars of the application of social choice to legal problems.²

And, yet, even among these classic writings, I can identify nary a one that comes close to harnessing the power of social choice theory to the extent that Professor Stearns does in *Constitutional Process*. Perhaps this is a reflection of the care he takes, in chapter 2, in explaining the basic tools of social choice (including the Condorcet paradox and Arrow’s Theorem)—an explanation that, astonishingly, well-versed readers will find insightful and newcomers will find accessible. Indeed, his “Introduction to Social Choice” (chap. 2) is just about the best I have ever read, and will go some distance to encouraging the broader use of these tools by legal scholars, including those who had never encountered them before reading this volume. Or perhaps it is because of a claim Professor Stearns makes throughout: social choice theory enables us to analyze features of the rules courts adopt in ways that traditional approaches cannot readily (or do not attempt to) do. This is a bold claim, to be sure, but one that goes some distance toward explaining the power of *Constitutional Process*. It brings to the fore a point that many other scholars have skirted: If we want to develop a full understanding of constitutional process, we avoid social choice at our own peril.

In theory, this is an argument that anyone who has puzzled through recent Supreme Court decisions must acknowledge as facially valid. To see this point, I need only invoke but one of Professor Stearns’s many examples: Why in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³ did a majority of the justices empower a minority of their colleagues “to define the critical case issue and thus the direction of constitutional doctrine?” Surely, this question dawned on many of us after reading the case. But, in practice, we tend to put it to the side in favor of those stressing the doctrine itself or the approaches invoked by individual justices in articulating doctrine. What *Constitutional Process* highlights with force is the problem with so doing; namely, we cannot understand the doctrine unless we understand the collective nature of the decision-making process that undergirds it.

This point, this bold claim that Professor Stearns makes, is related to a third explanation for the volume’s expansive reach: the evidence the author brings to bear to support it. As a matter of general principle, when it comes to validating hypotheses, those of us in the social sciences are supposed to be committed to the view that there is no one right way to get the job done. Nonetheless, at least some scholars working in my field seem to reject this position in favor of a far more orthodox one: We should only accept hypotheses that researchers have assessed against large-scale, large-*n* data sets.

Advocates of this stance have, naturally, taken aim at scholars immersed in the study of doctrine, accusing them of relying on “scattershot” and “selective” evidence to validate their hypotheses. More recently, however, they have pointed their cannons at those who ground their work in theories based on assumptions of rationality. Donald P. Green and Ian Shapiro’s *Pathologies of Rational Choice Theory*⁴ is, perhaps, the most-cited example, but it is hardly the only work to argue that “to date few theoretical insights derived from rational choice theory have been subjected to serious empirical scrutiny and survived.”⁵

Constitutional Process provides forceful evidence of why this particular argument, as well those that take the more general form about the need to employ large-scale data sets, often rings so hollow. Professor Stearns does not rely on “numbers” to do the heavy lifting; he presents detailed analyses of court cases. But, in his hands, the cases are not simply sets of stylized facts designed to prove a point; they are, in every sense of the word, “data” and, more to the point, data that are more compelling than much of that culled from large-*n* databases. That is because they enable him to assess systematically his hypotheses *and* to provide keen insights into the development of law. Sheer “numbers,” yes, can perform the former, but rarely do they accomplish the latter.

I realize these words seem to contradict my earlier statements about the “something for everyone” nature of this book. After all, what could the “large-scale” crowd gain from reading *Constitutional Process*? Such a response, though, would miss the point: It may be scholars of doctrine who will most appreciate his form of evidence, but it is their data-oriented counterparts who will most benefit from Professor Stearns’s rich analyses. They provide, more than any others I have read in the law and courts field, the best evidence of why a commitment to a diversity in evidence is a commitment we all should share.

There is one final feature of Professor Stearns’s work that explains its near-universal appeal, and this may be its most important one: the agenda it sets for future research. In the conclusion of his work, Professor Stearns admonishes us to ask a question about outcomes produced by the U.S. Supreme Court—“how are these outcomes shaped by the collective nature of the Supreme Court’s decision-making processes”—and reminds us of the lesson he has taught throughout: social choice provides a powerful set of tools for answering it. For some scholars, the next venture will involve following the path Professor Stearns has blazed, investigating the Supreme Court’s work in evolving areas of the law or, perhaps, Courts of bygone eras. For others, the task will be to use the tools of social choice to study different American collegial courts, be they appellate panels or state tribunals. For members of yet a third set (and the one into which I fit), *Constitutional Process* will challenge them to think beyond the American legal system to constitutional courts elsewhere, especially in emerging democracies. For years, even decades, judicial specialists have complained about our community’s persistent bias toward U.S. courts and away from judiciaries in other countries.

Why this bias exists is a question on which many scholars have speculated, but Herbert Jacob provides a common response when he writes about the lack of a “widely accepted paradigm [with] which to model the relationship between law, courts, and politics in a cross-national context.”⁶ Social choice theory provides such a paradigm or, at the very least, a set of theoretical tools that our comparative counterparts contend is revolutionizing their field.⁷ With the publication of *Constitutional Process*, we legal scholars can now make much the same claim about ours.

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NOTES

1. Frank Easterbrook, “Ways of Criticizing the Court,” *Harvard Law Review* 95 (1982): 802.
2. Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (Cincinnati: Anderson Publishing Co., 1997).
3. 505 U.S. 833 (1992).
4. Yale University Press, 1994.
5. Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory*, 9.
6. Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzer, Doris Marie Provine, and Joseph Sanders, introduction to *Courts, Law, & Politics in Comparative Perspective* (New Haven: Yale University Press, 1996) 2.
7. See, e.g., Robert H. Bates, “Comparative Politics and Rational Choice: A Review Essay.” *American Political Science Review* 91 (1997): 699.