

The Psychology of the Supreme Court

Lawrence S. Wrightsman

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The Psychology of the Supreme Court

American Psychology-Law Society Series

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*To the memory of Flip Kissam, whose enthusiasm
for the law smoothed my introduction to it.*

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Series Foreword

This book series is sponsored by the American Psychology-Law Society (APLS). APLS is an interdisciplinary organization devoted to scholarship, practice, and public service in psychology and law. Its goals include advancing the contributions of psychology to the understanding of law and legal institutions through basic and applied research; promoting the education of psychologists in matters of law and the education of legal personnel in matters of psychology; and informing the psychological and legal communities and the general public of current research, educational, and service activities in the field of psychology and law. APLS membership includes psychologists from the academic research and clinical practice communities as well as members of the legal community. Research and practice is represented in both the civil and criminal legal arenas. APLS has chosen Oxford University Press as a strategic partner because of its commitment to scholarship, quality, and the international dissemination of ideas. These strengths will help APLS reach our goal of educating the psychology and legal professions and the general public about important developments in psychology and law. The focus of the book series reflects the diversity of the field of psychology and law as we will publish books on a broad range of topics.

I am pleased to add *The Psychology of the Supreme Court* by Professor Larry Wrightsman to this series. Professor Wrightsman is a prolific and influential contributor to the field of psychology and law. In addition to his outstanding scholarly contributions, he has authored and co-authored perhaps the most widely used psychology and law textbooks, and these books have directly influenced generations of students in psychology and law. In 1999,

he was recognized for his many contributions when he received the American Psychology-Law Society Award for Distinguished Contribution to Psychology and the Law. He has previously written about judicial decision making, and in this book, Wrightsman again turns his attention to this area, focusing specifically on the United States Supreme Court. This book provides a compelling and thoughtful analysis of how nine Supreme Court justices behave both individually and as a group in reaching decisions that can affect all Americans. He draws on psychological theory to examine how the values and backgrounds of each of the justices influence the decisions they make. This is a fascinating and insightful analysis, and perhaps all the more significant given the changes to the Court with the retirement of Justice Sandra Day O'Connor and the death of Justice William H. Rehnquist. Senate confirmation hearings focus on the writings and backgrounds of nominees in attempt to predict how they might vote on certain key issues. In this book, Wrightsman provides an empirically grounded approach to understanding their votes. Many Supreme Court key decisions are divided (e.g., 5 to 4 decisions), such as the juvenile death penalty or abortion rights decisions. It is therefore of paramount importance to gain an understanding of what leads justices to draw different conclusions from the same case facts, legal precedents, and other information (including amicus briefs). Professor Wrightsman's book provides a solid foundation in theory and research to explain these differences among justices, and it should be a highly regarded reference not just for psychologists but for anyone interested in the inner workings of the Supreme Court.

Ronald Roesch
Series Editor



Preface

The Supreme Court presents a challenge to understand. Its decisions and the actions of its individual justices often surprise us. As the Court's term ended in the summer of 2005, Court watchers were convinced that Chief Justice Rehnquist would resign, but instead it was Justice Sandra Day O'Connor who did so. Her surprise announcement was followed two weeks later by one by the chief justice, who adamantly stated that he would continue as long as his health permitted. But his death two months later led to another surprise—John Roberts, who had been nominated by President Bush to be an Associate Justice, was promoted to Chief Justice.

As a source of public interest, the Supreme Court generates its share of stereotypes. Upon her resignation, media accolades labeled Justice O'Connor as the "swing vote" on the Court, and while that had been largely true in the past, in the term that had just ended days before her announcement, it was Justice Breyer, not O'Connor, whose vote was the crucial fifth vote in more of the 5 to 4 decisions. In fact, in several major decisions, Justice O'Connor was on the losing side, and she wrote dissents in 11 of the 74 decided cases.

Individual justices are not just stereotyped; they are pigeonholed into conservative or liberal camps. And while these classifications reflect their votes and justifications in certain types of cases, as this book documents, the decisions and votes of each justice are more complexly determined than their simply reacting to their ideological bent. For example, in the 2004–2005 term, 24 decisions were 5 to 4; the conservative majority on the Court held together on only five. In eight of these cases, one of the conservatives formed a majority with the liberals.

Study of the Court can be approached from many perspectives. Psychology seeks to understand the Court as an organization of diverse individuals who share some goals but not others. It offers concepts and theories to describe and explain the behavior of justices. For example:

1. Chief Justice Rehnquist, in his last terms on the Court, displayed several surprising votes, for example upholding the *Miranda* ruling that required police to inform suspects of their rights and, in some cases, supporting the family and medical leave rights of individuals who sued the government. Leaders who have “paid their dues” for a number of years have earned what psychologists call *idiosyncrasy credits*, the right to deviate, on occasion, from what their supporters expect of them.
2. In contrast to the predictions of experts or of a statistical model based on past votes, the Court reaches unanimous votes much more often than votes of 8 to 1. *Pressures to uniformity* exist in the Court just as they do in any other small, tightly knit organization.
3. Individuals make a difference. Every 5 to 4 vote is, of course, testimony to the difference one justice can make, but the observation is especially demonstrated when a new chief justice is on board. For example, the case of *Brown v. Board of Education* languished when it was first reviewed by the Court in 1952 when Fred Vinson was chief justice; the Court was split, and had a vote been taken, the decision could have gone either way. Justice Vinson’s sudden death and the presence of Earl Warren as chief justice meant vigorous leadership that led to a unanimous endorsement of desegregation in the public schools.

The goal of this book is to describe every major aspect of the Court’s functioning and explain each through the use of knowledge from the social sciences. These aspects include the nomination and confirmation of justices, the steps in the process by which the Court reviews petitions and makes its rulings, the role of law clerks, the individual qualities that make justices succeed or fail, the influence of the chief justice, and various aspects that need review and reform. The *Bush v. Gore* decision is examined in detail, in a quest to understand what led to the most important decision by the Court in recent times. Systematic efforts to predict the votes of justices and decisions of the Court are described, with statistical analyses that are new to this volume.

This book is an extension and expansion of my book *Judicial Decision Making: Is Psychology Relevant?* (published in 1999). In that book, my focus was on the impact of organized psychology, through the submission of amicus briefs, in trying to influence Supreme Court decisions. The purpose of this book is a broader one, seeking comprehension of the Court as a real-life, ever-changing organization. The psychological approach is empirical, hence the book summarizes data-oriented studies on, for example, such matters as the number of petitions submitted and acted upon, the reversal rate by the

Court, the frequency of unanimous decisions, and the number of changed votes from the conference to the final decision. But psychology also concerns itself with the impact of the personalities of the participants in the organization. Why was Earl Warren so effective as a chief justice, when Fred Vinson was not? What qualities led William Brennan, and later, Sandra Day O'Connor, to become influential?

The Supreme Court is always important in the lives of all Americans. But now it is going through a period of change, and thus it is especially important that we seek to understand why it behaves as it does.

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Acknowledgments

It has been a joy to prepare this book. While the writing was mine, many others contributed to its preparation and completion. Cindy Sexton solved my computer problems. Among students at the University of Kansas, Justin LaMort assisted me greatly in finding obscure references, Mary Pitman drew my attention to websites, and Angela Rasmussen contributed to my knowledge when, on my request, she asked Justice Clarence Thomas a question during one of his visits to our campus. (“How do the justices refer to the chief justice in private? Do they call him by his first name like they do each other?” “No, they refer to him as ‘The Chief.’”)

Professor Ronald Roesch, editor of the American Psychology-Law Society series of books, was very prompt and encouraging, not only in obtaining reviews of the prospectus but in working with the publisher and especially in providing me with a detailed critique of the entire manuscript.

The staff at Oxford University Press has been exceedingly helpful. Joan H. Bossert, vice president/associate publisher and editorial director for science, professional, and medical books, met with me and suggested the title for the book. Mariclaire Cloutier, executive editor for Psychology, facilitated the review of the prospectus by further reviewers. Joseph Zito, associate editor for psychology, and Cristina Wojdylo, developmental editor, have provided responses to my frequent inquiries.

Needless to say, any errors in the book, despite the efforts of these folks, are mine.

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The Supreme Court

The Least Understood Branch

Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.
—Justice Felix Frankfurter

The United States Supreme Court only occasionally penetrates the threshold of awareness of the American public. People do not typically ruminate about the Court, but periodically news about the justices, the Court, or the federal judiciary intrudes into people's consciousness. In the fall of 2004, it was the serious illness of the chief justice; in the winter of 2005 the removal of life support from Terri Schiavo, in which the Supreme Court refrained from intervening; in the summer of 2005 the resignation of Sandra Day O'Connor; and in the fall of that year, the nomination of John Roberts to replace her, then the death of Chief Justice Rehnquist, followed quickly by the substitution of Justice Roberts's seat from O'Connor's to the chief justice's. In October of 2005 President Bush nominated Samuel Alito to fill the O'Connor seat.

But despite the public's only spasmodic attention, the Supreme Court continues to exert an influence on every American. As the public gives it less consideration than the other two branches of government, it is truly the least understood branch. The purpose of this book is to apply the methods and findings of psychology and the other social sciences to further a knowledge and appreciation of the Court's processes and decisions.

As noted, sometimes the Court makes news. And on occasion it makes big news. Many admirers of the United States Supreme Court—and needless to say, most supporters of Al Gore's bid for the presidency in 2000—were disappointed when, on December 12, 2000, the Supreme Court effectively decided the outcome of that year's presidential election in favor of George W. Bush. Some observers immediately proclaimed that the Court's decision in the case of *Bush v. Gore* (2000), which reflected a narrow and ideologically predictable 5 to 4 vote,