

How Did U.S. Supreme Court Jus...rty Lines_ Lawrence Baum Knows

Wed, Nov 08, 2023 2:09PM 24:24

SUMMARY KEYWORDS

judges, justices, supreme court, court, courts, polarization, ideological, party, ohio state university, partisan, congress, decisions, appointed, liberal, conservative, focus, sciences, stronger, partisan lines, reinforces

SPEAKERS

Eva Dale, Janet Box-Steffensmeier, David Staley, Lawrence Baum

David Staley 00:00


From the heart of the Ohio State University on the Oval, this is Voices of Excellence from the College of Arts and Sciences, with your host, David Staley. Voices focuses on the innovative work being done by faculty and staff in the College of Arts and Sciences at The Ohio State University. From departments as wide ranging as art, astronomy, chemistry and biochemistry, physics, emergent materials, mathematics, and languages, among many others, the college always has something great happening. Join us to find out what's new now. Larry Baum is Professor Emeritus of Political Science at The Ohio State University College of the Arts and Sciences. He joined the faculty of Ohio State in 1973 and retired in 2012, continuing to teach and do research in the department. That research has especially focused on the courts and judicial decision making. He is the author of two textbooks: American Courts, which was published in its 7th edition, and The Supreme Court, which was just published in its 12th edition. He's received Ohio State's Distinguished Scholar Award, and the Lifetime Achievement Award of the Law and Courts section of the American Political Science Association. Welcome to Voices, Dr. Baum.

Lawrence Baum 01:14

Thank you.

David Staley 01:15

You've recently co-authored the book, The Company They Keep: How Partisan Divisions Came to the Supreme Court. So, how did partisan divisions come to the Supreme Court?

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Lawrence Baum 01:25

Well, let's talk first of all about the fact that they came. People who look at the Supreme Court now see five justices who would be characterized as conservative, all appointed by Republican presidents, and four who would be characterized as liberal, all appointed by Democratic presidents. And that seems very natural to us.



David Staley 01:25

It's the way things are.



Lawrence Baum 01:25

Exactly. What we found was that did not happen, never existed in the Court's history for 220 years, until the year 2010. Only with the appointment of Justice Elena Kagan in 2010 did we have ideological divisions on the Court that coincided with partisan divisions. That was a real surprise to us, and that's what we wanted to try to figure out. It seems to us there are two things going on. The first is that presidents in the recent era care a great deal about getting people on the Court who share their party's ideological orientation. Now, presidents always cared about that to some degree, but they're more consistent and more careful than they've ever been, in part, because the people in their party demand that of them. If a Republican president were to choose a liberal, there would be enormous outcry. And so presidents in their choices have become more sensitive to ideology and trying to make sure they get people who are right from their party's perspective. But, there's a second thing that's going on that's not noticed as much, which is, as the country - and particularly political and social elites - become more and more polarized in ideological terms, in partisan terms, the justices themselves increasingly live in worlds in which they're surrounded by people who share their ideological views, and who reinforced those views. And that kind of reinforcement among ideological and partisan lines is much stronger than it was in most prior eras of the Court.



David Staley 01:32

Judges weren't so ideological, and that maybe is part of the reason why they were selected, or is there something else at work here?



Lawrence Baum 03:25

Well, I think, to a great extent they were ideological, but those ideological lines didn't follow partisan lines completely. And if you look at justices who served on the Court in recent eras, some of them were Republican appointees who were in fact liberal, some Democratic appointees who were conservative. So they're always ideological divisions on the Court, and they were, in some respects, at some times, as strong as they are now. They just weren't partisan divisions, and that's what's changed.



David Staley 03:56

From the perspective of these three justices, did that feel like a partisan line?

Example, example of these these justices, ideological but not partisan?

L Lawrence Baum 04:00

Well, John Paul Stevens, appointed by President Gerald Ford in 1975, served until 2010. President Ford said to his Attorney General, find me the best possible person, I'm not worried about what their ideological views are. And Stevens was a moderate liberal, perhaps became even more liberal during his time on the Court. Justice Byron White, appointed by President John Kennedy, he was basically a moderate. And President Kennedy was comfortable with that, just because he was a Democratic president, he didn't feel any great pressure to appoint a strong liberal. And so, you had those kinds of justices who muddled up the linkage between party and ideology.

D David Staley 04:43

And so the selection criteria was... the best?

L Lawrence Baum 04:46

Well, Stevens was an extreme case.

D David Staley 04:48

Okay.

L Lawrence Baum 04:49

Lots of people were appointed because they knew the President.

D David Staley 04:52

Well, that was my next question, so, what were the criteria then, if not ideological?

L Lawrence Baum 04:57

Well, there was an element of ideology, there was an element of personal acquaintanceship, of reward. President Truman had several appointments to the Supreme Court, and they were all people who were friends of his. One of them actually came to see Truman taking a train from Indiana as soon as he heard about the death of a Justice, said, Harry, put me on the court, and Harry said, sure, I'll do that. So, there were personal elements, acquaintanceship, rewarding political friends. That's how Earl Warren, the Chief Justice, who was of enormous importance, got appointed to the court by President Eisenhower. Some presidents thought they were

choosing people on an ideological basis, but they weren't very careful about it, and so they got something different from what they expected. And some justices change their views, change their positions after they were appointed to the court.

D David Staley 05:46

So is this change, that you notice as a 2010, I think you said, is this sort of the tipping point - is the change part of just the larger fragmentation that we're seeing across the political spectrum, or is there something specific about the courts, especially the Supreme Court, that caused this shift?

L Lawrence Baum 06:04

No, it's really part of the larger fragmentation. People, when they speak of political polarization, it means several different things. But, if we think of polarization in terms of the party splitting along ideological lines, what's happened in the Supreme Court is very similar to what happened just a little bit earlier in Congress. If you look at Democrats and Republicans in Congress, for many decades, there were lots of liberal Republicans, conservative Democrats; there aren't any anymore. If you look at either the House and the Senate, every Republican is more conservative than every Democrat. That, by historical standards, is very unusual. And so, what's happened in the Supreme Court has pretty much mirrored what had already happened in Congress.

D David Staley 06:47

Are we seeing this pattern also at lower courts, the circuit courts, for instance?

L Lawrence Baum 06:51

Absolutely. It isn't that long ago that Court of Appeals judges, the circuit judges, were chosen without a great deal of attention to ideology, that started to develop in the 1970s and became stronger and stronger. In the current administration, for instance, they are vetted, analyzed, probed almost as carefully as Supreme Court nominees, and that is a real change.

D David Staley 07:17

From your vantage point, as someone who's studying the courts, the judicial system, what do you see as the underlying causes for political polarization?

L Lawrence Baum 07:27

People have tried to figure out what's going on, and they have different theories, different views about it. Part of what happened is that the Democratic Party, which used to be a kind of alliance of Northern liberals and Southern conservatives, the Southern conservatives aren't in

the Democratic Party anymore. And so the Democratic Party became more homogeneous. As the Republican Party turned right, the people who used to be moderate liberal Republicans, they're not in the party anymore, they can't get nominated for Congress. And so, the parties have drifted away because they become more homogeneous, and that reinforces itself. And the result is there's a gulf between them that really hadn't existed since at least the beginning of the 20th century. Now, the question is, and this is something people reasonably ask all the time, if this is a bad thing, as some people think it is, how are we going to get out of it? And my clear answer is, I have no idea.

D

David Staley 08:25

Do you think it's a bad thing?

L

Lawrence Baum 08:26

In one respect, I think it's not. If you have parties that are clearly differentiated from each other, they give voters a clearer choice, there's something meaningful to party that helps to communicate to all of us what we're getting if we vote for a Republican, or vote for a Democrat. But in most other respects, I think it's bad. The enmity between the parties, the inability to compromise with each other, the thinking of everything in terms of partisan advantage; all of that was there to some degree in the past, is there to a much greater degree, and it makes government much harder to function.

D

David Staley 09:03

Is it fair to talk about a polarization on the Court, first of all, that's the first question?

L

Lawrence Baum 09:07

Well, it depends on what we mean by polarization. Polarization in partisan terms, clearly, yes. Another meaning of polarization is that people become more extreme; strong, liberals, strong conservatives, that really hasn't changed.

D

David Staley 09:23

On the Supreme Court?

L

Lawrence Baum 09:23

On the Supreme Court. It has certainly in Congress, it has to a degree among us, the voters. But in the Supreme Court, the justices are not more extreme than they used to be, they are just divided by party in a way they weren't. Now, there's a third meaning of polarization, which is what the psychologists call effective polarization. What it really means is enmity between liberals and conservatives, between Democrats and Republicans. That has grown enormously in

the political arena as a whole and it's not hard to see. Has that happened in the Supreme Court? It's not clear to me that it has. Of course, we're not inside the Court, it's a pretty closed institution, but I don't think that that's true. So the polarization that's occurred is polarization along partisan lines. Now, in another sense that I alluded to earlier, that the Justices kind of live in different worlds, different ideological camps, that clearly has increased. Not in the sense of enmity, I don't think, but simply in the sense that they have different worldviews, and they live among people who share and reinforce those worldviews.

D David Staley 10:31

So maybe you've already answered my second question, which is the polarization on the Court, is that a bad thing, or a good thing?

L Lawrence Baum 10:38

Well, if it's simply polarization partisan terms, it's probably neither. As I said before, we've always had ideological divisions, we've had enmities on the court, much stronger in the past than we do today. There were periods when there were justices who wouldn't talk to other justices, certainly made life a little more complicated. So, it's not as though the court's not functioning well. It's simply divided more along partisan lines, and the justices, probably unconsciously, are thinking more on partisan lines than they used to.

D David Staley 11:09

We tend to concentrate on the five-four decisions, but my understanding is that those are the exceptions, that, for the most part, the justices, most of what they're deciding on, there tends to be more agreement or less agreement.

L Lawrence Baum 11:24

No, you're exactly right. There are more unanimous decisions than there are five to four decisions, and the five to four decisions, once in a while, don't even follow ideological lines. But it's on the big issues, big in terms of their policy impact, big in terms of their partisan implications, that we're more likely to find the justices divided on five to four lines. And again, those lines look partisan now in a way that they didn't in the past.

J Janet Box-Steffensmeier 11:55

I'm Janet Box-Steffensmeier, Interim Executive Dean and Vice Provost for the Ohio State University, College of Arts and Sciences. Did you know that 23 of our programs are nationally ranked as top 25 programs with more than ten of them in the top ten? That's why we say the College of Arts and Sciences is the intellectual and academic core of the Ohio State University. Learn more about the college at artsandsciences.osu.edu.

D David Staley 12:20

In my introduction, I said that one of things you focus on is judicial decision making. What does that mean, and how does one study judicial decision making?

L Lawrence Baum 12:29

Well, it's really about why judges do what they do.

D David Staley 12:32

Okay.

L Lawrence Baum 12:33

Judges are inherently decision makers. Whether you're talking about a Supreme Court justice or a trial judge, they are required by their job to make decisions all the time, and they have choices. And for those of us who study judicial decision making, the question is, what's the basis for those choices? And of course, when we look at the Supreme Court, where the justices divide, then one important element of that is, what causes them to divide in the ways that they do? Now, how do you go about studying that? Different people have done different things. Most people, I think, look, in quantitative terms, at the positions that judges take in different cases, how that compares to their colleagues on the same court, and therefore, what might be explained here, what is going on, and then look at attributes of judges, attributes of cases, that might correlate with the ways the judges come down. If we define decision in ideological terms, and that's a little tricky, because how decisions are defined ideologically is partly just a matter of convention rather than something inherent, that makes a decision liberal or conservative. But if we define it in that way, why do some judges vote more liberally than others? And we might look to their party affiliation, we might look to elements of their background, and then if we compare decisions, why do some decisions come out liberal others conservative, we'd look at attributes of the decisions to try to get at that. Now other people talk to judges.

D David Staley 14:06

Interview them.

L Lawrence Baum 14:07

Interview them, and try to get a feel for their thinking based on the interviews. Now, when you get up to the Supreme Court, the justices are a little leery about being interviewed. And of course, for any judge, like any of us, what they think is going on, why they think they're doing what they're doing, may not be entirely accurate. Not because they're not telling us the truth, but because we all have difficulty in knowing why we're doing what we're doing, and I think that's one reason why most people study decision making say, well, we can learn things by talking with judges, but we can look more by looking at patterns of their decisions, and then

looking at what factors might influence those. What describes your approach, then, are you quantitative, are you...? I am overwhelmingly quantitative. Partly that's a matter of taste, I enjoy talking with judges but I feel more comfortable working with patterns in what they do. And I feel like it's highly imperfect, it doesn't lead us to any decisive answers, but I can get the best feel that I can get for why they're doing what they're doing by looking at the attributes that correlate with their decisions.

D David Staley 15:16

When I see the term decision making, it makes me think of psychology. To what degree does your work sort of bleed into psychology?

L Lawrence Baum 15:24

I've increasingly drawn on psychology, because it seems to me that psychologists have gotten at basic questions about why people behave the way they do. And let me give you an example: one of the things that I learned from a psychologist is that people's social identities, to use the psychological term, are terribly important to them. They see themselves as linked to other people, and they care about how those other people react to what they do. They want to be liked, they want to be respected. Now, people who study judicial decisions hadn't talked much at all about that. And one of the things I've tried to emphasize in my work over the last couple of decades is that judges are human beings, they care about how other people regard them, and so to me, it's really important, who is their reference group? Who is part of their social identity, and how might those people be shaping what they do? And that is something I simply learned from the psychologists.

D David Staley 16:25

Any policy implications of your research, you've been doing this a long time? If so, what are the policy implications of your research?

L Lawrence Baum 16:33

I think that the implications are not necessarily direct and clear, but, certainly one of the things that I'd emphasize is that judges have different perspectives, they come to court with different perspectives, and therefore, we should accept the fact that no judge is unbiased in the sense of coming fresh to every case. When Supreme Court nominees testified before the Senate Judiciary Committee, they always speak as if, well, we're just going to follow the law.

D David Staley 17:05

Right.

L Lawrence Baum 17:05

L Lawrence Baum 17:05

Chief Justice John Roberts in 2005 said, well, a judge is just an umpire.

D David Staley 17:11

Calling balls and strikes.

L Lawrence Baum 17:12

Exactly, exactly. Now, I'm not saying those justices aren't telling the truth as they see it, but that can't be the reality. And the more we accept the reality, that they have different perspectives, that no matter how hard they try, they can't keep those perspectives from shaping their judgments, the better we can assess what the courts are doing, and the more we can take that into account when we choose judges as voters, for state courts, or when we observe the process of selection at the federal level.

D David Staley 17:44

So that leads in, I guess, into my next question - if we assume that polarization of the court is a problem, given that, what can be done?

L Lawrence Baum 17:52

Polarization of the court is not going to change until polarization for the larger political world does. And particularly, the elite political world: policymakers, people who surround them. As polarized as the general public may be, the elite segment of the political world is even more polarized. And until that polarization lessens, polarizations in the courts isn't going to lessen. And, as I said earlier, I don't know how that's going to come about, and at the moment, there aren't any signs of what's going to lessen that, because it really reinforces itself, in part because each party reacts to what they see as the wrongs of the other party. To the extent that there's a problem of polarization in the court - and I don't think it's nearly as serious as polarization in, say, the other branches of government - but to the extent that we see it as a problem, it's going to be there for a while.

D David Staley 18:47

How did you get into this line of research, what drew you to the courts or to the Supreme Court?

L Lawrence Baum 18:52

Well, growing up, reading magazines my parents brought into the house, I got kind of fascinated by the courts. And then I started-

D David Staley 19:01
What kind of magazines are these I wonder?

L Lawrence Baum 19:04
Well, just your standard magazines that cover politics. When I was growing up, this is a period when the Supreme Court was very interesting, there's a period of Earl Warren's Chief Justiceship.

D David Staley 19:14
And what years were that, roughly?

L Lawrence Baum 19:17
Well, the era when things were really happening was between 1962 and 1969, and this was when I was growing up, beginning to read things about politics, and it fascinated me. Now I kind of lost sight of that, but when I got to graduate school at the University of Wisconsin and I took a course on the courts from a brilliant teacher named Joel Grossman, that reminded me how interesting the courts were to me, and from then on, that became my specialization. It was a great piece of good fortune for me.

D David Staley 19:47
A great teacher. I've heard that story, something like that, many, many times. You're an Emeritus Professor, but you continue to teach. Tell us about your classes, what sort of classes do you teach in the Political Science department?

L Lawrence Baum 19:59
Well, I'm teaching three classes. One is an honors seminar in Supreme Court decision making, there's a course called "Civil Liberties in the Courts", and of course on women in the law. And I've been teaching each of those every year, and for me, they're enormous fun.

D David Staley 20:16
Tell us about the content of these courses.

L Lawrence Baum 20:18
Well, the civil liberties course, we go through a number of different areas of civil liberties:

freedom of speech, privacy, equality, the rights of criminal defendants. And, we talk about what the Supreme Court has done, what is the law look like, the law that the Supreme Court has created. But for me, of course, I can't resist talking a lot about why it got the way it is, and so that becomes another focus of the course. In the course on women and the law, we do something similar, except we bring all the branches in, because legal rules that affect women in a particular way are created by all three branches. So we look not only at court decisions, but at statutes adopted by Congress, actions taken by the executive branch. And again, we're looking at two things: how did the law get the way it is, and what does the law actually look like? And also, a third thing to some degree, what effect does all that have? In the Supreme Court decision making class, the class is organized around a project. Each student chooses a case that's before the Supreme Court that term, and three of the justices. And everything they do in the course is built toward predicting what those three justices will do in the case -

D David Staley 21:29
Interesting.

L Lawrence Baum 21:30
Which is what they do in their final big paper. And I chose that focus for the course because I think it helps to give students a specific focus. If they want to understand decision making, then they've got to learn a whole bunch of things that are going to help them make their predictions. And I think they enjoy that challenge, and certainly after the semester is over, they get very interested in what actually happens in their case. So I think it's a fun class for all of us.

D David Staley 21:56
And their prognostication abilities...?

L Lawrence Baum 22:00
They're pretty good. They're pretty good. But nobody, even Supreme Court experts, gets anywhere close to 100%, and so my students are in good company. Sometimes they get really surprised, I get really surprised, but the same thing is true of everybody.

D David Staley 22:15
Tell us what's next for your research?

L Lawrence Baum 22:17
Well, I'm continuing to work with Neal Devins, my collaborator, on polarization, but from a different perspective. We want to think about why the Supreme Court is less polarized in certain respects than Congress. What I mean by that is just what you were talking about

earlier; there are five to four decisions that divide people on party lines, but most decisions aren't like that, and a large minority of all decisions are unanimous, even on some fairly consequential issues. Congress isn't like that. The parties are much more divided, certainly the enmity between the two parties is at a level that is nothing like what exists in the Supreme Court, and so having focused on the polarization that does exist in the Supreme Court, we want to think about why it's not stronger than it is. And our view is, there's something about being a judge, including a Supreme Court justice, that changes people's thinking from the kind of thinking they would have if they were members of Congress. The task for us is to try to develop why that is, and to get a better sense of it, and that's what we're really focused on now. That's the single most important project that I'm working on now.

D David Staley 23:28
Any other projects, or...?

L Lawrence Baum 23:29
Well, I've been working with another law professor, Jim Brudney, who teaches at Fordham Law School, used to be an Ohio State faculty member, on the kinds of justifications that Supreme Court justices, and for that matter, Court of Appeals judges, use in their opinions. What are they looking to in the law as a basis for their choices, and there are lots of things they could look to. And they differ from case to case, to a degree they differ from court to court. And we think, by looking at that, we can get a better sense of what it is that going on in their minds, what is it that causes them to go in one direction than another?

D David Staley 24:05
Larry Baum, thank you.

L Lawrence Baum 24:07
Thank you!

E Eva Dale 24:08
Voices from the Arts and Sciences is produced and recorded at The Ohio State University College of Arts and Sciences Technology Services Studio. Sound engineering by Paul Kotheimer, produced by Doug Dangler. I'm Eva Dale.