Tribute to David Stras: Under the Microscope

Ryan W. Scott
Indiana University Maurer School of Law, ryanscot@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Legal Biography Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
Tribute

Tribute to David Stras: Under the Microscope

Ryan W. Scott†

In July 2010 my former professor and longtime collaborator David Stras began service as an Associate Justice of the Minnesota Supreme Court. The nomination was an inspired choice, and a fitting tribute to Professor Stras could cover a lot of ground. As a scholar, he has quickly established himself as one of the nation’s brightest and most influential commentators on the U.S. Supreme Court and the federal judiciary. As a teacher, he received a Teacher of the Year award for his work in the classroom. As a mentor, to me and to countless other students, he has worked tirelessly as an advisor and advocate. A tribute to Professor Stras might praise his radio and television analysis of the judicial appointments process, or his outstanding Federal Courts casebook,1 or his commentary at the leading Supreme Court web site, SCOTUSblog.2

But I want to focus, instead, on the rich irony of Professor Stras’s latest career move. After years of research on judicial decisionmaking, placing judges under the microscope, he has somehow managed to hop under the microscope himself. Before joining the court, he generated an impressive body of scholarly writing that scrutinizes and challenges judges’ decisions. He has cheerfully proposed methods of manipulating judges into leaving the bench.3 He has suggested increasing judges’ work-

† Associate Professor, Indiana University Maurer School of Law, Bloomington. Copyright © 2011 by Ryan W. Scott.


load,4 while openly discussing whether to reduce their support staff.5 He has even questioned the constitutionality of senior status, the generous retirement program prized by the federal judiciary.6 Some of these excesses, no doubt, can be blamed on reckless and irresponsible coauthors. Still, after spending the better part of his career devising innovative ways of provoking judges, how did this guy become a judge himself?

Professor Stras’s groundbreaking work on the judiciary deserves greater attention, not only because of its importance to scholars but because of what it reveals about his future as a justice. This Tribute summarizes three strands of Professor Stras’s scholarship—on judicial retirement incentives, the judicial appointments process, and decisionmaking on the Supreme Court of the United States—that have proven especially influential. Although his writing frequently places judges under the microscope, it also reflects a profound respect for the work of the courts, and for the proper limits of the judiciary in the constitutional design.

I. JUDICIAL RETIREMENTS

As other contributors to this Tribute have noted, Professor Stras’s early work focused on judicial retirement decisions, and in many ways charted the course of his later scholarship. In *The Incentives Approach to Judicial Retirement*,7 he proposed and developed a rational-choice decision model for judicial retirements. Drawing upon research into judicial opinions, especially the attitudinal and rational-choice models of judicial decisionmaking advanced by political scientists, Professor Stras contended that judges behave rationally in determining whether and when to retire.8 Recognizing that retirement decisions are rational, he argued, has important implications for policy-

---

8. *Id.* at 1431.
makers who hope to change judicial retirement patterns. Fixed-term lengths, mandatory age limits, and similar direct measures for restricting judicial tenure are not the only options.\footnote{136} Equally viable, he contended, are indirect methods that alter judges’ incentives, for example by manipulating their retirement income and workload.\footnote{137}

Other articles developed and applied the incentives approach. In *Retaining Life Tenure: The Case for a “Golden Parachute”*\footnote{138} and a follow-up piece,\footnote{139} Professor Stras and I weighed in on the long-standing debate over life tenure for federal judges. We acknowledged that, despite its advantages, life tenure creates a serious risk of mental infirmity among elderly judges, which threatens the performance and legitimacy of the courts. Yet we criticized “command and control” measures like mandatory age limits and fixed terms for Supreme Court Justices, instead recommending less drastic reforms that would not require a constitutional amendment.\footnote{140} Empirical research by political scientists and economists, we noted, has demonstrated that throughout the nation’s history the single strongest predictor of judicial retirements is pension eligibility.\footnote{141} We therefore proposed a “golden parachute” for Supreme Court Justices, providing strong financial incentives to retire in a timely fashion—especially upon experiencing a serious mental disability—rather than clinging to office into extreme old age.\footnote{142}

In *Why Supreme Court Justices Should Ride Circuit Again*,\footnote{143} Professor Stras turned to the workload of Supreme Court Justices. He proposed resuscitating the nineteenth-century practice of “circuit riding” by compelling Supreme Court Justices to spend a week or more each year sitting as judges on the federal courts of appeals.\footnote{144} Circuit riding would benefit the Justices themselves, he argued, by wrenching them from their isolation in Washington and exposing them to other judges, lawyers, and communities. He argued that the Court’s
work product would improve if Justices were required, from
time to time, “to grapple with the gaps or inconsistencies in the
Court’s contemporary opinions or the challenges faced by lower
courts in implementing them.”18 Moreover, increasing Justices’
workload would also provide a strong incentive to retire in a
timely manner. Social science research has confirmed a signifi-
cant relationship between federal judges’ workload and their
retirement decisions. Measures like circuit riding, which would
make Supreme Court Justices’ work much more demanding,
therefore can be expected to induce earlier retirement.19

Another important advantage of Professor Stras’s proposal,
in my view, is that circuit riding might provide a particularly
strong retirement incentive for mentally infirm Justices. Today,
a Justice whose mental health is failing can easily “hide out” in
Washington, insulated by protective law clerks and Court staff,
seldom interacting with outsiders. A weeklong stint serving
with a new slate of judges, however, poses a real risk of public
embarrassment for a mentally infirm Justice. That makes a
dignified resignation more attractive.

Several of Professor Stras’s strengths as a scholar are evi-
dent in his early work. His writing on judicial retirements and
workload focuses on practical questions—what works?, what
doesn’t?, what institutional hurdles realistically can be over-
come?—and not just abstract debates about theory and doc-
trine. At a time when much legal scholarship is aimed primari-
ly at other academics, Professor Stras has produced a body of
work that is of equal interest to judges and lawmakers, devel-
oping and defending concrete proposals for legal change. In ad-
dition, his writing on judicial retirement and workload show-
cases his facility with empirical methods. Not content to
speculate about how judges will respond to changing incentives,
from the outset he has grounded his proposals in the kind of so-
cial science research that too many law professors overlook.

II. JUDICIAL APPOINTMENTS

Next Professor Stras wrote several articles analyzing
changes in judicial appointments. In Understanding the New
Politics of Judicial Appointments,20 he catalogued key structur-

18. Id. at 1731.
19. Id. at 1733–34.
20. See David R. Stras, Understanding the New Politics of Judicial Ap-
Wittek, Conformation Wars: Preserving Independent Courts in Angry
al, external, and judicial factors that have contributed to increasing politicization of the federal judicial appointments process in the last century. One underappreciated structural change was the Seventeenth Amendment, which has required the direct election of Senators since 1913. Another was an amendment to the Senate rules in 1929 to require roll-call votes for judicial confirmations. Structural changes, including the direct election of Senators and roll-call votes and public committee hearings on judicial nominees, made Senators directly and publicly accountable for their votes on judicial nominations. External forces such as interest group lobbying and intense media attention now play a powerful role in whether the nominee is confirmed to the Supreme Court. Meanwhile, the judiciary itself has contributed to the politicization of the process by injecting itself into hot-button social and political questions and thereby raising the stakes of each new confirmation battle. Professor Stras dissented from the common view that Presidents have caused the confirmation process to become more divisive by “selecting ideologically controversial nominees.” Presidents’ “ideologically driven selection” of nominees, he argued, is primarily a response to the aggrandizement of the power of the federal judiciary, and therefore “more of a symptom than a cause of the new politics of judicial appointments.” In a follow-up article, Navigating the New Politics of Judicial Appointments, Professor Stras and I extended that analysis to the confirmations tug-of-war between the President and the Senate.

III. SUPREME COURT DECISIONMAKING

Most recently, Professor Stras has made two important contributions to the empirical literature on Supreme Court de-


22. Id. at 1059–62.
23. Id. at 1062–66.
24. Id. at 1069.
25. Id. at 1071.
26. Id.
27. Stras & Scott, supra note 20.
cisionmaking. The first, a study called The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation, traces the dramatic decline in the size of the Supreme Court’s docket between 1981 and 2007 to changes in the Court’s membership. Using the private papers of Justice Harry Blackmun, now available at the Library of Congress, Professor Stras generated a unique new dataset of certiorari votes for every case on the Court’s plenary docket between 1986 and 1993. The data are striking. Different Justices voted to grant certiorari “at considerably different rates,” and several new members of the Court—Justices Souter, Thomas, and Ginsburg—voted to grant certiorari at a much lower rate than the Justices they replaced. Scholars frequently attribute the decline in the Supreme Court’s docket to the certiorari pool, the elimination of the Court’s mandatory jurisdiction, and changes in the actions of the Solicitor General’s office. Professor Stras’s study powerfully demonstrates that, whatever the influence of those factors, turnover in the Court’s personnel also has played a central role.

The second, Explaining Plurality Decisions, is the most comprehensive study to date of plurality decisions on the U.S. Supreme Court. Cases that produce only a plurality opinion, with one or more opinions concurring in the judgment, have come under criticism because they often provide unclear and unstable answers to high-profile legal questions. Professor Stras and coauthor James Spriggs developed a case-level model of plurality decisions, identifying a host of ideological, collegial, legal, and contextual factors that might contribute to a breakdown in the process of coalition building and compromise necessary to produce a unified opinion for the Court. They found, surprisingly, no evidence that ideological factors systematically influence when, or how often, the Court issues plurality opinions. Instead, the strongest predictors of a fractured Court related are legal and contextual: constitutional interpretation, common law and administrative review cases are more

29. Id. at 153.
30. Id. at 155–58.
32. Id. at 518.
33. Id. at 532–43.
34. Id. at 545.
likely to produce a plurality opinion, while cases reviewing circuit splits in the lower courts are less likely to produce a plurality opinion.35

These studies mark Professor Stras’s transition from a consumer to a producer of first-rate empirical work on the Supreme Court. That evolution should come as no surprise, given his long-standing joint appointment in the political science department and his regular contributions to the Empirical Legal Studies blog. In an increasingly interdisciplinary world, he has proven himself capable both as a legal scholar and as a social scientist.

IV. JUSTICE STRAS

But here’s the irony. For all of their strengths, Professor Stras’s articles do not read as if they were written by an aspiring judge. To the contrary, they mostly treat judges as objects of study and objects of manipulation.

Professor Stras’s research frequently places judges under the microscope as objects of study. His work reflects a keen interest in the factors, conscious and unconscious, that influence judicial decisionmaking. And he has never hesitated to engage the political science literature that emphasizes the role of judges’ attitudes and strategic choices. His research on the Supreme Court, for example, has demonstrated that Justices’ ideological values, turnover of Court membership, and collegiality can concretely affect judicial outcomes. Judges rarely acknowledge those influences.

His scholarship also cheerfully encourages legislatures to manipulate judges. In his work on judicial retirements, he has championed an “incentives approach.” He proposes, for example, enhancing Supreme Court Justices’ retirement benefits (through a “golden parachute”) while ratcheting up their workload (through circuit riding), as a way of inducing mentally infirm Justices to leave the bench in a timely manner. Judges seldom embrace that kind of carrot-and-stick approach to their own decisions.

To put it mildly, that is an unusual background for a newly minted Justice. But I predict that Professor Stras’s distinctive perspective on judicial decisionmaking will serve him well on the court. His familiarity with the distorting effects of ideology, honed by years of research, gives him an unusual ability to rec-

35. Id. at 547-48.
ognize and avoid them. And his calls for reform, especially his proposals for workload and retirement incentives, reveal a healthy sense of the judiciary’s limited role in the constitutional design. I trust, as he repairs from Mondale Hall to the Judicial Center, that Professor Stras will retain the intellectual rigor, curiosity, and modesty that have made him an outstanding scholar and collaborator.

On behalf of the many law professors he leaves behind, I wish Justice Stras congratulations. Enjoy life on the other side of the microscope. We look forward to scrutinizing your every move in the years to come.

36. E.g., Stras & Scott, supra note 20, at 1873–74, 1879.