

Vanderbilt University Law School

Scholarship@Vanderbilt Law

Vanderbilt Law School Faculty Publications

Faculty Scholarship

2004

Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis

Tracey E. George

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Common Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Tracey E. George, *Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis*, 69 Missouri Law Review. 951 (2004)

Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/608>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Tue Feb 7 13:25:51 2023

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Bluebook 21st ed.

Tracey E. George, Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis, 69 MO. L. REV. 951 (2004).

ALWD 7th ed.

Tracey E. George, Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis, 69 Mo. L. Rev. 951 (2004).

APA 7th ed.

George, T. E. (2004). Other disciplines, methodologies, and countries: studying courts and crisis. Missouri Law Review, 69(4), 951-958.

Chicago 17th ed.

Tracey E. George, "Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis," Missouri Law Review 69, no. 4 (Fall 2004): 951-958

McGill Guide 9th ed.

Tracey E. George, "Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis" (2004) 69:4 Mo L Rev 951.

AGLC 4th ed.

Tracey E. George, 'Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis' (2004) 69(4) Missouri Law Review 951

MLA 9th ed.

George, Tracey E. "Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis." Missouri Law Review, vol. 69, no. 4, Fall 2004, pp. 951-958. HeinOnline.

OSCOLA 4th ed.

Tracey E. George, 'Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis' (2004) 69 Mo L Rev 951

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Other Disciplines, Methodologies, and Countries: Studying Courts and Crisis

Tracey E. George*

"We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

-Justice O'Connor, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004)

The United States is at war: in Iraq, in Afghanistan, and against terrorism. This symposium asks the timely question: How do governments and their citizens respond to fear and risk in times of crisis? Dr. Lee Epstein¹ and Professor Christina Wells,² in papers presented on the final symposium panel, focus in particular on the Supreme Court's response to government encroachment on individual liberties during a national emergency. Their work is made particularly timely by three Supreme Court decisions this past term. In this essay, I begin by framing the issue very briefly. I then argue that understanding this issue requires scholars to follow Epstein and Wells by looking to other disciplines, methodologies, and countries.

I. THE ISSUE: JUDICIAL DECISION MAKING DURING TIMES OF WAR

One month before the present symposium, the Supreme Court agreed to hear *Hamdi v. Rumsfeld*.³ The Supreme Court also accepted two other suits⁴ raising questions considered by Epstein and Wells: How will the Supreme Court respond to threats to individual freedoms during national emergencies, and how should it? The conventional answer to the positive question, as explained by Epstein and Wells, is that the United States has two constitutions—one during times of peace and one during war.⁵ The answer to the

* Professor of Law, Vanderbilt University. I would like to thank Professors Christina Wells and Jennifer Robbennolt and their colleagues at the University of Missouri for inviting me to participate in the present symposium. I also wish to express my gratitude to Northwestern University, where I was a professor of law at the time of this conference, for its support of my research including this commentary.

1. Lee Epstein et al., *The Effect of War on the Supreme Court*, 79 N.Y.U. L. REV. (forthcoming 2004).

2. Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004).

3. 124 S. Ct. 2633 (2004).

4. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

5. See, e.g., CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 129 (1951) (observing, based on his review of wartime judicial review, that "[t]here do indeed seem to be two Constitutions—one for peace, the other for war"); see also CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948) (examining war-

normative question depends on the writer's conception of the costs and benefits of the two standards.⁶

Proponents of the two-constitutions or "crisis" thesis regularly point to the contrasting outcomes in the Civil War decision of *Ex Parte Milligan*⁷ and the World War II case of *Korematsu v. United States*.⁸ In *Ex parte Milligan*, the Supreme Court ruled that an Indiana citizen accused of conspiring against the Union had a right to a trial before an Article III judge rather than a military tribunal.⁹ Chief Justice Davis, writing for the unanimous *Milligan* Court in 1866, declared "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."¹⁰

Three-quarters of a century later, a deeply divided *Korematsu* Court upheld the government's military internment, without charge or due process, of American citizens of Japanese ancestry as well as individuals labeled "enemy alien[s]."¹¹ Justice Black rationalized the majority's decision by explaining that such "hardships are part of war, and war is an aggregation of hardships."¹²

The contrasting outcomes in these cases are typically attributed to the contemporary state of crisis: The *Milligan* Court acted *after* the end of Civil War hostilities while the *Korematsu* Justices issued their decision *during* World War II, indeed only two days after the commencement of what became known as the Battle of the Bulge. These two cases, then, are illustrative of the crisis theory, namely that a "pattern of [Supreme Court] deference exists" during national emergencies, allowing the executive to curtail rights and liberties.¹³

The Supreme Court recently presented a test of that theory in three cases arising during and out of the wars in Afghanistan and Iraq.¹⁴ In all three lawsuits, the Bush Administration argued that the terror threat justified its decision to hold suspects without charges, access to counsel, the right to challenge

time governments in Britain, France, Germany, and the United States and specifically focusing on how each government's response to crisis affected the rights of the citizens vis-à-vis the state).

6. See Wells, *supra* note 2, at 906-07 (reviewing the arguments of opponents and proponents of judicial deference).

7. 71 U.S. (4 Wall) 2 (1866).

8. 323 U.S. 214 (1944).

9. *Milligan*, 71 U.S. 2.

10. *Id.* at 120-21.

11. *Korematsu*, 323 U.S. 214.

12. *Id.* at 219. For a detailed behind-the-scenes account of the *Korematsu* litigation, see PETER IRONS, *JUSTICE AT WAR* chs. 10-12 (1983).

13. Wells, *supra* note 2, at 903-07.

14. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

their status, or any other judicial process. In one case, *Rasul v. Bush*,¹⁵ al Qaeda and Taliban suspects being held indefinitely at the U.S. Naval Base in Guantanamo Bay, Cuba, sought the right to challenge their confinement through a habeas corpus suit in federal court.¹⁶ In *Hamdi v. Rumsfeld*¹⁷ and a third case, *Rumsfeld v. Padilla*,¹⁸ American citizens being held as "enemy combatants" in military prisons on U.S. soil also sought a hearing before a civilian court regarding their status.¹⁹ The fundamental question before the Court was whether federal courts have jurisdiction to protect the liberty of the detainees given the President's assertion of national security concerns.

The two-constitutions thesis would predict that the Supreme Court would defer to the executive in all three cases because the country is engaged in combat in two countries and is also threatened by terror attacks within our borders. The Supreme Court, however, did not bow to presidential power. But, it also did not act decisively to check the President. Although the Court rejected the President's argument that American courts lack jurisdiction over prisoners in Guantanamo,²⁰ the *Rasul* majority did allow for more limited process than would otherwise be required under the Constitution.²¹ Similarly, in *Hamdi*, the Court concluded that an American captured in Afghanistan has the right to challenge the government's "enemy combatant" classification, but the majority did not grant full due process rights to the prisoner.²² And, in the case of an American citizen arrested in an American airport, a six-Justice majority concluded that Padilla filed his suit in the wrong district and dismissed for lack of jurisdiction.²³

Not only were the holdings in the three cases confusing, the dynamics were as well. Eleven opinions were issued in the three cases. A different Justice wrote the majority opinion in each case. In *Hamdi*, the Court issued a plurality rather than a majority opinion. Justices O'Connor and Kennedy were

15. 124 S. Ct. 2686 (2004).

16. *Id.*

17. 124 S. Ct. 2633 (2004).

18. 124 S. Ct. 2711 (2004).

19. *Padilla*, 124 S. Ct. at 2715 (Padilla is an American citizen who was arrested in May 2002 at Chicago O'Hare Airport on suspicion of terrorist involvement and was eventually transferred to a South Carolina Naval brig where he was denied access to counsel or a right to respond to the charges.); *Hamdi*, 124 S. Ct. at 2635-36 (Hamdi is an American citizen who was seized in Afghanistan in the fall of 2001 and was being held at a U.S. military prison in Virginia incommunicado.).

20. *See, e.g., Rasul*, 124 S. Ct. 2686.

21. Joan Biskupic & Toni Locy, *Detainees Still Will Face Many Hurdles to Freedom*, USA TODAY, June 29, 2004, at A10 (observing that although "the Supreme Court sharply rebuked President Bush's claim that he has unfettered power to lock up people without giving them hearings. . . the court made clear that even when a detainee gets his day in court, he faces many hurdles to freedom").

22. *Hamdi*, 124 S. Ct. at 2648-49.

23. *Padilla*, 124 S. Ct. at 2727. This case is eerily similar to a dispute decided contemporaneously with *Korematsu*.

in the winning coalition on every case. And, Justices Scalia and Stevens, who disagreed in *Padilla* and *Rasul* (and more than half of the Court's other decisions during the 2003-2004 term), joined together in a strongly worded dissent in *Hamdi*.²⁴ The lower courts were similarly confused in these cases. The Fourth Circuit and Second Circuit split on the question presented by the American citizen lawsuits, but both were reversed by the Supreme Court.²⁵ Of particular interest, the Supreme Court disagreed with the substantive holding of the Fourth Circuit, a circuit that is ideologically aligned with the Supreme Court.

How can we make sense of these recent Supreme Court decisions as well as the broader subject of the Supreme Court during times of crisis? I argue in the next Section that we must draw on social science scholarship, richer methodologies, and comparative knowledge.

II. THE MEANS OF ANALYSIS: INTERDISCIPLINARY, MULTI-METHOD, COMPARATIVE

The complexity of the conference's question demands an ambitious scholarly agenda, one that looks to other disciplines, other methods, and other countries. I consider here the value of interdisciplinary work, the gains available from exploring alternative methodologies, and the insights gleaned from experiences in other countries.

A. Value of Interdisciplinary Work

Law should be a pluralistic discipline, drawing on paradigms created in other fields and developing them to fit the legal context. We must look to many disciplines beyond law in order to understand law. Now, this statement is relatively self-serving given my own focus on theories from political science. But, I am certainly following an accelerating trend in law. While economics made early headway, other disciplines are gaining ground: cognitive and social psychology,²⁶ sociology, political science,²⁷ and the list goes on.

24. *Hamdi*, 124 S. Ct. at 2660 (Scalia, J., & Stevens, J., dissenting).

25. *Padilla v. Rumsfeld*, 352 F.3d 645 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002), *rev'd*, 124 S. Ct. 2633 (2004).

26. See, e.g., Chris Guthrie, *Insights from Cognitive Psychology*, 54 J. LEGAL EDUC. 42 (2004) (discussing insights from cognitive and social psychology that are relevant and have been explored, to varying degrees, in legal scholarship); Russell Korobkin, *A Multi-disciplinary Approach to Legal Scholarship: Economics, Behavioral Economics, and Evolutionary Psychology*, 41 JURIMETRICS J. 319 (2001) (examining the role for these three disciplines in the study of law and arguing for an approach that draws on all three); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739,

The argument for an interdisciplinary perspective is especially strong for the question of personal liberties in times of crisis. This conference, then, is interdisciplinary both by design and by necessity. As Professor Wells highlights so nicely, we cannot prescribe the appropriate place for individual rights during national emergencies without understanding the way governments and individuals act in such times.²⁸ In her paper, for example, she deftly draws out the implications of the psychological study of risk assessment for the judicial deference debate.²⁹ She examines what we know about the relative ability of decision makers to evaluate threats to national security and to weigh those threats against the costs of limiting individual liberties.³⁰ She concludes that, contrary to a commonly held belief, executive officials are prone to skewed risk assessment in the absence of objective monitoring.³¹ Therefore, "rigorous judicial review can deter skewed risk assessment."³²

B. Methodological Challenge to the Legal Academy

The case study is the dominant mode of analysis in legal scholarship because it is the standard mode of education and practice in law. Case study methodology can provide a useful and interesting description of a single court case, but it does not and cannot explain action independent of that event. Close study of a case reveals possible points of interest, possible relevant factors; therefore, it is best viewed as a revelatory approach which poses questions but provides no broader answers.³³ In isolation, the case study cannot provide us with an understanding of broader human behavior, whether that behavior is of judges, litigants, or governments. As the crisis theory work of Lee Epstein and her co-authors reveals, a more rigorous approach is necessary to understand complex phenomena like courts and crisis.³⁴

763-66 (2000) (presenting an argument for the relevance of behavioral decision theory to the study of law and legal institutions).

27. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (reviewing and comparing legal and political science study of courts); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003) (offering a largely political-science based analysis of the Rehnquist Court).

28. Wells, *supra* note 2.

29. *Id.* at 921-28.

30. *Id.* at 928-35.

31. *Id.*

32. *Id.* at 936.

33. For an excellent discussion of the relative shortcomings of the case study methodology in the context of courts, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44-48 (2002).

34. See, e.g., Epstein et al., *supra*, note 1.

Models offer this possibility. A model is a systematic, empirically verifiable understanding of why a phenomenon occurs as it does. Models simplify the world in order to focus on those factors that are crucial to an event and to reveal the relative importance of those factors. As political economist Anthony Downs explained, the goal of scientific theory is to explain complex and seemingly unrelated phenomena by simple—and therefore from a realistic standpoint necessarily incomplete—principles.³⁵ Although definitionally incomplete, models can contribute more to our understanding of human behavior than hundreds of separate case studies.

One of the most valuable contributions of a model is that it is falsifiable.³⁶ “That is, the model must be able to state a priori the potential conditions that, if observed, would refute the model.”³⁷ And a good model is not merely falsifiable, but readily so, such that the model is sufficiently narrow that it limits the field of potential behavior that satisfies its predictions.³⁸ Only then does the model offer meaningful insight. If very few conditions exist that can prove the model wrong, then the model does not tell us very much.

One of the most encouraging trends in work by law professors is the increased use of a model-based approach to considering the behavior of actors in the legal system and the development of law. Unlike a historical or case study approach, this scholarship offers us the means to understand more fundamental questions with respect to a wider range of legal or law-related events.

The use of models and data in legal scholarship poses many challenges. Social scientists who study law and legal institutions have a comparative advantage over law professors because of their training and a shared methodology or approach to research. Although great at research design, social scientists may be comparatively weak on theory building. That is where I think law professors hold a comparative advantage. Legal education, training, and teaching are case-study-based so law professors think more easily about questions in a coherent explanatory fashion. But, law professors’ weakness is limited methodological sophistication. There are several possible ways for legal scholars to overcome these methodological challenges:³⁹

35. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 34 (1957) (explaining that his model, like all models, “is not an attempt to describe reality accurately. Like all theoretical constructs in the social sciences, it treats a few variables as crucial and ignores others which actually have some influence.”).

36. See generally KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* (1962).

37. SEGAL & SPAETH, *supra* note 33, at 46; see also *id.* at 47-48 (explaining the concept of falsifiability).

38. *Id.*

39. For a much more developed and insightful set of suggestions, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 114-33 (2002) (presenting ways to develop an “infrastructure to support empirical research” in law).

- Increased use of peer review and collaboration as a means of attaining more consistently excellent work,
- Education and training in theory and methods of other disciplines as a way to gain skills,
- Participation in other disciplines' meetings so as to develop a network of people who will provide advice and read work, and
- An organization of law professors with empirical interests who meet to improve our understanding.

This last idea is based on my experience as a participant in the Annual Conference on the Scientific Study of Judicial Politics co-sponsored by NSF and a number of universities. A recent year's theme was institutionalism. Seven of the forty participants were law professors. One of the organizers of the conference was Lee Epstein, who has called for increased connections between political scientists and members of the legal academy. Perhaps it would be possible to copy this model in order to enrich the empirical work of law professors by providing us with a forum and a robust environment in which to learn and teach methods.

C. Courts in Comparative Perspective

In the United States, separation of powers and the electoral scheme create a great deal of residual power for the Supreme Court: it has room to move between Congress and the President. In the United Kingdom, by comparison, the executive and legislative branches are essentially monolithic. However, the elected branches in the United States act in unison during times of crisis.⁴⁰ This surprising result offers an opportunity. We may understand more about the crisis thesis if we consider whether the same dynamic plays out in other constitutional democracies.

I am usually deaf to the call for cross-national comparison because of a real skepticism about our ability to compare highly distinctive phenomena and unique institutions across countries.⁴¹ Nevertheless, the subject of this conference may be the exact circumstance in which comparison would be particularly effective. For example, do other developed democracies' constitutional courts defer to elected branches in times of crisis? If not, is it because their discretion remains essentially unchanged during crisis? By considering how constitutional courts with similar and dissimilar characteristics respond

40. As Professor Geoffrey Stone noted in his presentation, the alignment may not be as perfect as imagined as we can see by looking at legislative changes to Wilson's Espionage Act. See Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131 (2004). See also Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215 (2003).

41. For an article by a conference participant making a compelling case for comparative study of law and courts, see Lee Epstein, *The Comparative Advantage*, LAW & CTS. (Am. Political Sci. Ass'n, Washington, D.C.), Winter 1999, at 1.

to comparable factors, we can gain a greater understanding about the United States Supreme Court.⁴²

A comparative perspective is a particular advantage in studies of crisis because it offers a significant expansion in the number of observations to study and in the types of approaches taken to crisis.⁴³ Comparative scholars must recognize, however, the myriad variations across countries. Two paths may lead courts to decisions that superficially resemble each other but are the product of different relevant factors.

CONCLUSION

This symposium highlights the tools available, and required for, thinking about law and legal institutions: *other* fields, *other* methods, and *other* countries. Law as an academic discipline has arguably evolved the most of any discipline over the last hundred years. In order to continue to progress, we will have to draw on ideas developed in non-law disciplines, to utilize methodologies created outside of law schools, and to consider the relationship between law in the United States and law in the world.

42. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 144-88 (1999).

43. Cf. WALTER F. MURPHY & JOSEPH TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* ix (1977) (arguing that a "[comparative] perspective . . . offers far greater understanding both of certain political problems and of judicial involvement in formulating public policy than does the traditional, ethnocentric approach to judge-made constitutional law as a peculiarly American phenomenon").