

**TONJA JACOBI**

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**ACADEMIC EMPLOYMENT****Northwestern University**

School of Law	Professor	2008 –
	Associate Professor	2007 – 2008
	Assistant Professor	2004 – 2007

Kellogg School of Management:

Center for Business, Government & Society	Affiliated Faculty Member	2005 –
Searle Center	Affiliated Faculty Member	2011 –

**University of Virginia**

School of Law	Visiting Associate Professor	Spring 2008
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**Stanford University**

Hoover Institute	Fellow	Spring 2012
Department of Political Science	Lecturer	Summer 2003

**PUBLICATIONS****Articles**

*The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME LAW REVIEW \_ (forthcoming)

A Positive Political Theory of Rules and Standards (with Frank Cross and Emerson H. Tiller) 2012 UNIVERSITY OF ILLINOIS LAW REVIEW \_ (forthcoming 2012)

*How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court* (with Vanessa A. Baird) 59 DUKE LAW JOURNAL 183: 238 (2009)

*Competing Theories of Coalition Formation and Case Outcome Determination*, 1 JOURNAL OF LEGAL ANALYSIS 411: 458 (2009)

*The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States*, 38 JOURNAL OF LEGAL STUDIES 205: 233 (2009)

*Judicial Agenda Setting through Signaling and Strategic Litigant Responses* (with Vanessa A. Baird), 29 JOURNAL OF LAW AND POLICY 215: 239 (2009) – symposium on empirical legal studies

*Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases* (with Matthew Sag) 98 THE GEORGETOWN LAW JOURNAL 1: 75 (2009)

*Ideology and Exceptionalism in Intellectual Property – An Empirical Study* (with Matthew Sag and Maxim Sytch) 97 CALIFORNIA LAW REVIEW 801: 856 (2009)

*Super Medians* (with Lee Epstein) 61 STANFORD LAW REVIEW 37: 100 (2008)

*The Judicial Signaling Game: How Judges Strategically Shape Their Dockets*, 16 SUPREME COURT ECONOMIC REVIEW 1:38 (2008)

*Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing* (with Gwendolyn Carroll) 102 NORTHWESTERN UNIVERSITY LAW REVIEW 263: 306 (2008)

*Legal Doctrine and Political Control* (with Emerson H. Tiller) 23 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 326: 345 (2007)

*The Subtle Unraveling of Federalism: The Illogic of Using State Legislation As Evidence of an Evolving National Consensus*, 84 NORTH CAROLINA LAW REVIEW 1089: 1158 (2006)

- Cited in Supreme Court Brief for Respondents, *Baze v. Rees* (2007), relied on by Justice Alito's concurrence

*Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY 11: 58 (2006)

*How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action and Judicial Power*, 15 JOURNAL OF CONTEMPORARY LEGAL ISSUES 219: 241 (2006)

*The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NORTHWESTERN UNIVERSITY LAW REVIEW 259: 278 (2006) – centennial symposium edition

*The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in 'Advice and Consent' Nominations*, 30 LEGISLATIVE STUDIES QUARTERLY 193: 217 (2005)

*Same-Sex Marriage: Implications of Legislative Remand for the Judiciary's Role*, 26 VERMONT LAW REVIEW 381: 406 (2002)

- Republished in GENERAL ASSEMBLY OF MARYLAND, COMPILATION ON STATE LEGISLATURES AS AN INSTITUTION, October 2002
- Cited in Vermont Civil Unions Legislation (15 V.S.A. @ 1201) (2006) & Vermont Marriages and Licenses Legislation (18 V.S.A. @ 5131) (2006)

## Book Chapters

*The Strategic Analysis of Judicial Decisions* (with Lee Epstein), 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 341-358 (2011)

*The Judiciary*, in PUBLIC CHOICE AND PUBLIC LAW (DAN FARBER AND ANNE JOSEPH O'CONNELL, EDS.); Research Handbooks in Law and Economics series (Richard Posner and Francesco Parisi, Eds.) (Edward Elgar Publishing), 234-260 (2010)

*The New Separation of Powers: Integrating the Study of American Politics* (with Rui de Figueiredo and Barry R. Weingast), HANDBOOK OF POLITICAL ECONOMY (BARRY R. WEINGAST AND DONALD WITTMAN, EDs.) (New York: Oxford University Press), 199: 222 (2006)

*Cruel and Unusual Punishment*, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES, (PAUL FINKELMAN, ED.) (Routledge) (2006)

**WORKING PAPERS** Strategic Judicial Preference Revelation: Signaling in Judicial Nominations (with Alvaro Bustos) – under review

Why Judges Always Vote (with Eugene Kontorovich)

#### EDUCATION

Ph.D.	Stanford University, Political Science Department <u>Dissertation</u> : the Judiciary's Strategic Interactions with the Elected Branches in the U.S. Political System <u>Committee</u> : John Ferejohn, Barry Weingast, Jeff Strnad	2004
M.A.	Univ. of California, Berkeley, Political Science Department	2000
LL.B.	Australian National University; with 1 <sup>st</sup> Class Honors	1999
B.A.	Australian National University; with 1 <sup>st</sup> Class Honors	1996

#### INVITED RESEARCH PRESENTATIONS

University of Chicago, Public Law & Legal Theory Workshop	Fall 2012
University of Chicago, Constitutional Criminal Procedure	April 2011
University of Chicago and Northwestern Law Schools, Judicial Behavior Workshop	February 2009
American Constitution Society & Federalist Society, <i>The Future of Gun Control after Heller</i>	January 2009
George Mason University Law School, Faculty Workshop	November 2008
Harvard Law School, Public Law Workshop	November 2007
University of Virginia, Olin Law & Economics Workshop	November 2007
Boalt Law School, UC, Berkeley, Law and Economics Workshop	October 2007
University of Pennsylvania Law School, Positive Approaches to Constitutional Law and Theory Symposium	February 2007
University of Pennsylvania Law School, Faculty Workshop	November 2006
University of Southern California, Law and Economics Workshop	November 2005
New York University, Law and Economics Workshop	November 2005
Stanford University, Olin Law and Economics Program	November 2003

## CONFERENCE PARTICIPATION

American Law and Economics Association Annual Meeting  
May 2005, 2006, 2007, 2008, 2009, 2011  
American Political Science Association Annual Conference  
September 2003, 2004, 2005, 2007, 2008, 2009  
European Law and Economics Association Annual Meeting  
September 2009  
Midwest Political Science Association National Conference  
April 2004, 2005, 2006, 2007 (discussant), 2009, 2010, 2011  
Law and Positive Political Theory Conference  
April 2005, October 2009, 2010  
Law and Social Sciences Conference  
August 2010  
Intellectual Property Scholars Conference  
August 2008, 2009  
Political Economy and Public Law Conference  
June 2008  
Conference on Empirical Legal Studies  
November 2007  
Midwest Law and Economics Association Annual Meeting  
October 2005  
American Association of Law Scholars  
January 2005

## COURSES TAUGHT

Constitutional Law  
Constitutional Criminal Procedure  
Legislation  
Introduction to American Politics and Government  
Congress, Courts and Politics  
Contemporary Supreme Court Cases  
Constitutional Law Colloquim  
Positive Political Theory Colloquim

## GRANTS, FELLOWSHIPS AND PRIZES

W. Glenn Campbell and Rita Ricardo- Campbell Fellowship, Hoover Institute, Stanford University  
2012  
Research Fellowship, Searle Fund for Policy Research  
2005  
Outstanding Small Class Professor Nominee, Northwestern University  
2005  
Ph.D. Scholarship, Stanford University  
2000-2004  
Essay Prize, AT&T  
2000  
Tuition Scholarship, Institute of Governmental Studies, U.C. Berkeley  
1999-2000  
1<sup>st</sup> Class Honors in Law, Australian National University  
1998  
1<sup>st</sup> Class Honors in Political Science, Australian National University  
1996  
Top Ranked Honors Thesis in Political Science, Australian National University  
1996  
L.F. Crisp Prize in Political Science, Australian National University  
1993

## PROFESSIONAL MEMBERSHIPS

American Political Science Association  
American Law and Economics Association  
Society for Empirical Legal Studies  
American Association of Law Scholars  
Admitted to the Bar in Australia

## **SERVICE**

Executive Committee of the AALS Law and Social Science Section	2010-2011
Faculty Workshops Committee Chair	2010-2011
Tenure Review Committee	2008-2009
Entry Level Appointments Committee	2004-2005, 2006-2007
Constitutional Law Appointments Committee	2005-2007
JD-PhD Committee	2005-2006

## **AD HOC REVIEW**

American Journal of Political Science	Journal of Law, Economics, and Organization
American Political Science Review	Journal of Legal Analysis
American Politics Research	Journal of Politics
Economics Bulletin	Law and Society Review
Journal of Empirical Legal Studies	Supreme Court Economic Review

Date: April 5, 2011

## **ABSTRACTS OF UNPUBLISHED WORKS:**

### **Working Papers:**

STRATEGIC JUDICIAL PREFERENCE REVELATION (with Alvaro Bustos)  
– under review at the JOURNAL OF LAW, ECONOMICS AND ORGANIZATION

We examine the revelation of preferences of justices whose true ideologies are not known at the moment of entering the Court but gradually become apparent through their judicial decisions. In the context of a two-period President-Senate-Court game — a generalization of Moraski and Shipan (1999) — we show that: while moderate new justices always vote truthfully, more extreme new justices may vote untruthfully at the beginning of their tenures. By concealing their true ideologies, new justices move the perceived ideology of the overall Court closer to their own, which in turn influences the selection of future members of the Court. New justices will sometimes have an incentive to exaggerate the extremeness of their overall preferences, and at other times they will seek to appear more moderate. The manifestation of untruthful voting will depend on the characteristics of the cases they face, their initial ideologies and the ideologies of the President and Senate. Additionally, untruthful voting is more likely when the probabilities of retirement of the current justices are large. Finally, we assess judicial incentives to shape their perceived retirement probabilities.

WHY JUDGES ALWAYS VOTE (with Eugene Kontorovich)

This paper provides the first account of the Supreme Court's practice of universal voting. Full participation among justices is explained using models of spatial competition, showing that two features particular to the Court encourage full participation. First, the doctrine of stare decisis makes the resolution of future cases in part dependent on the resolution of present ones. This raises the cost of abstention, particularly to risk-averse justices. Second, the so-called narrowest grounds or Marks doctrine enforces the logic of the median voter result in cases presenting more than two options. This makes voting by otherwise indifferent or alienated justices rational, where it otherwise would not be.

## **Forthcoming Articles:**

### THE LAW AND ECONOMICS OF THE EXCLUSIONARY RULE

The exclusionary rule is premised on behavioral assumptions about how the law shapes police conduct. Using a law and economics approach, this Article draws out the implications of these assumptions. It shows: first, that in attempting to deter police violations, the rule actually encourages police harassment of ordinary citizens, particularly minorities; and second, when applied at trial, the rule decreases the benefit of the doubt that defendants who are most likely to be actually innocent can receive. Judicial attempts to mitigate these costs of the exclusionary rule in fact exacerbate them. The manifold jurisprudential rules that make up this area of law can be assessed in terms of the extent each effectively differentiates between the guilty and the innocent. Assessed in this way, it becomes clear that much of the secondary jurisprudence in search and seizure law further aggravates the problem.

### A POSITIVE POLITICAL THEORY OF RULES AND STANDARDS (with Frank Cross and Emerson Tiller)

How judges choose between rules and standards fundamentally shapes case outcomes and the development of broader doctrine. While the literature has much to say about the relative merits of rules versus standards, it has largely failed to produce a comprehensive explanation of how judges make that choice. This Article takes a novel approach, using Positive Political Theory to examine the incentives of higher court judges and the information available to them about how lower court judges will be likely to use those doctrinal tools. By taking seriously both how substantive and ideological judicial preferences shape the choice over doctrinal form as well as the value that judges place on legal obedience, we bridge the divide between the overt cynicism of legal realism and the credulity of much of the rules-standards debate.

Our Article identifies the dominant factors in judicial decision-making, at both the higher and lower court level – legal obedience and political ideology. Within that framework, we show how six factors determine higher court choice over rules versus standards: political alignment within the hierarchical judicial system; the distribution of case facts; the inherent control characteristics of rules versus standards; the effect of overlapping doctrines; the extent that lower court discretion is unavoidable; and the effect of political heterogeneity on a multi-member higher court.