3

Models of Decision Making

The Attitudinal and Rational Choice Models

The legal model, as Chapter 2 explains, holds that the Supreme Court decides disputes before it in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, and the intent of the framers. We have shown that both litigants generally have precedents supporting them and each side typically alleges that either the plain meaning of the legal provisions at issue and/or the intent of the law makers supports its position. If various aspects of the legal model can support either side of any given dispute that comes before the Court, and the quality of these positions cannot be reliably and validly measured a priori, then the legal model hardly satisfies as an explanation of Supreme Court decisions. By being able to "explain" everything, in the end it explains nothing.

THE ATTITUDINAL MODEL

We move now to an alternative explanation of the Court's decisions, the attitudinal model. The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics.[1] This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.

[1] See Forrest Maltzmann, James Spriggs, and Paul Wahlbeck, *The Collegial Game* (New

The Legal Realists

The attitudinal model has its genesis in the legal realist movement of the 1920s. The movement, led by Karl Llewellyn and Jerome Frank, among others, reacted to the conservative and formalistic jurisprudence then in vogue. According to the classical legal scholars of the time, law was

> a complete and autonomous system of logically consistent principles, concepts and rules. The judge's techniques were socially neutral, his private views irrelevant; judging was more like finding than making, a matter of necessity rather than choice.[2]

Legal jurisprudence had hardly advanced since the great British jurist Sir William Blackstone wrote in the eighteenth century that judges "are the depositories of the laws; the living oracles, who must decide in all cases of doubt." He is sworn

> to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law.[3]

Against this nescient theory of a static law that judges merely find rather than make, the legal realists argued that lawmaking inhered in judging. According to Karl Llewellyn, the first principle of legal realism is the "conception of law in flux, of moving law, and of judicial creation of law."[4]

Judicial creation of law did not result because bad jurists sought power for themselves, but as inevitable fallout from an ever-changing society. According to Jerome Frank:

> The layman thinks that it would be possible so to revise the law books that they would be something like logarithm tables, that the lawyers could, if only they would, contrive some kind of legal sliderule for finding exact legal answers. . . .

[2] Yosal Rogat, "Legal Realism," in Paul Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan, 1972), p. 420.

[3] Quoted in Walter F. Murphy and C. Hermann Pritchett, eds., *Courts, Judges and Politics*, 4th ed. (New York: Random House, 1986), pp. 14, 15.

[4] Karl Llewellyn, "Some Realism about Realism – Responding to Dean Pound," 44 *Harvard Law Review* 1237 (1931).

But the law as we have it is uncertain, indefinite, subject to incalculable changes. This condition the public ascribes to the men of law; the average person considers either that lawyers are grossly negligent or that they are guilty of malpractice, venally obscuring simple legal truths in order to foment needless litigation, engaging in a guild conspiracy of distortion and obfuscation in the interest of larger fees. . . .

Yet the layman errs in his belief that this lack of precision and finality is to be ascribed to lawyers. The truth of the matter is that the popular notion of the possibilities of legal exactness is based upon a misconception. The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it – more confused than ever, in our kaleidoscope age.

Even in a relatively static society, men have never been able to construct a comprehensive, eternalized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times. . . . Our society would be straight-jacketed were not the courts, with the able assistance of lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions.[5]

If judges necessarily create law, how do they come to their decisions? To the legal realists, the answer clearly is not to be found in "legal rules and concepts insofar as they purport to describe what either courts or people are actually doing."[6] Judicial opinions containing such rules merely rationalize decisions; they are not the causes of them.

Without clear answers to how judges actually made decisions, the legal realists called for an empirical, scientific study of law,[7] taking as dictum the statement of Oliver Wendell Holmes, Jr., that "the prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by law." "The object of our study, then, is prediction."[8]

The Behavioralists

Scholars responded only slowly to the call for scientific study of law. Jerome Frank attempted to use the theories of Sigmund Freud and Jean

[5] Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1949), pp. 5–7.

[6] Llewellyn, *op. cit.*, n. 4, *supra*, p. 1237.

[7] Hessel Yntema, "Legal Science and Reform," 34 *Columbia Law Review* 209 (1934).

[8] Oliver Wendell Holmes, "The Path of the Law," 10 *Harvard Law Review* 460–61, 457 [illegible] an effective counsel need not be able to explain decisions as long as he

Piaget to explain judicial decisions, but understandably little has come of this line of work.

Meanwhile, the heretofore misnomered discipline of political science began to test its theories scientifically. This movement, known as behavioralism, argued that

1. Political science can ultimately become a science capable of prediction and explanation. . . .
2. Political science should concern itself primarily, if not exclusively, with phenomena which can actually be observed. . . .
3. Data should be quantified and "findings" based upon quantifiable data. . . .
4. Research should be theory oriented and theory directed.[9]

Among early behavioral works was a 1948 book by C. Herman Pritchett entitled *The Roosevelt Court*. It systematically examined dissents, concurrences, voting blocs, and ideological configurations from the Court's nonunanimous decisions between 1937 and 1947. Pritchett did not provide a theory of Supreme Court decision making, yet he made the assumptions behind his work quite explicit. "This book, then, undertakes to study the politics and values of the Roosevelt Court through the nonunanimous opinions handed down by the justices" and acknowledged that the justices are "motivated by their own preferences."[10]

The Psychological Influence

Glendon Schubert, drawing on the work of psychologist Clyde Coombs, first provided a detailed attitudinal model of Supreme Court decision making.[11] Schubert assumed that case stimuli and the justices' values could be ideologically scaled. To illustrate: Imagine a search and seizure whose constitutionality the Court must determine. Assume the police searched a person's house with a valid warrant supported by probable cause. There were no extenuating circumstances. The search uncovers an incriminating diary. Now imagine a second search, similar to the first in that probable cause existed, but in which the police failed to obtain a warrant. Again, there were no extenuating circumstances.

[9] Albert Somit and Joseph Tanenhaus, *The Development of Political Science* (Boston: Allyn and Bacon, 1967), pp. 177–78.

[10] (New York: Macmillan, 1948), pp. xii, xiii.

[11] Clyde Coombs, *A Theory of Data* (New York: Wiley, 1964); Glendon Schubert, *The Judicial Mind* (Evanston: Northwestern University Press, 1965). See also Glendon Schubert, *The Judicial Mind Revisited* (New York: Oxford University Press, 1974).

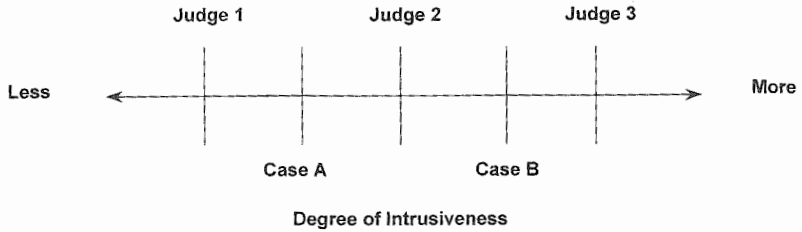

FIGURE 3.1. Justices and cases in ideological space.

According to Schubert, one can place these searches in ideological space. Since the search without a warrant can be considered less libertarian than the search with the warrant, we place the first search to the left of the second search. This is diagrammed in Figure 3.1, where A represents the first search and B the second. Presumably, any search and seizure will locate on the line; depending on case characteristics the search will be to the left of A, between A and B (inclusive), or to the right of B. The less prior justification (probable cause or warrant) and the more severe the intrusion (home vs. car, or full search vs. frisk), the further to the right the search will fall. The more prior justification and the less intrusive the search, the further to the left it will be. The points on the line where the searches lie are referred to as j-points.

Next, we place the justices in ideological space. Consider three justices, 1, 2, and 3, who are respectively liberal, moderate, and conservative. They could easily be ranked on an ideological scale, with 1 on the left, 2 in the middle, and 3 on the right.

With some additional information we might be able to go a bit further and say that justice 1 is so liberal that he or she would not even uphold the search in the first case, perhaps because he believes that police may not search and seize "mere evidence," such as papers and diaries.[12] Thus we could place justice 1 to the left of case A. Justice 2 might not be quite so strict as justice 1; he or she would uphold the search of the home with a warrant, but would not uphold the warrantless search. Thus we could place justice 2 to the right of case A but to the left of case B. Finally, justice 3 might find the warrant requirement fairly unimportant and would uphold any search he or she considered reasonable. Since prob-

[12] See, e.g., Justice Douglas's concurrence in *Berger v. New York*, 388 U.S. 41 (1967), at

able cause supported both searches, both are reasonable. Thus we could place justice 3 to the right of case B. The justices are placed in ideological space with the cases in Figure 3.1.

Schubert refers to the positions of the justices as their "ideal points" (i-points), though as we see below the term is a misnomer. According to Schubert, a justice would vote to uphold all searches that are dominated by (i.e., are to the left of) the justice's ideal point and would vote to strike all searches that dominate (i.e., are to the right of) the justice's ideal point. If this is the situation, though, the i-points represent not the ideal points of each justice, but the indifference point. Justice 1 upholds all searches to the left of her indifference point, rejects all searches to the right of her indifference point, and is indifferent whether searches at that point are upheld or overturned.

In addition to Schubert, Harold Spaeth investigated the influence of attitudes on the justices' behavior in a series of articles and monographs. Relying on the work of psychologist Milton Rockeach, Spaeth defined his central concept, an attitude, as a relatively enduring "interrelated set of beliefs about an object or situation. For social action to occur, at least two interacting attitudes, one concerning the attitude object and the other concerning the attitude situation must occur."[13] The objects are the direct and indirect parties to the suit; the situations are the dominant legal issue in the case.

In focusing on attitudes, Spaeth's work begins at a microanalytic level. For example, Spaeth and Peterson gather the Court's decisions into discrete sets of cases, each of which is organized on the basis of the "attitude situation" within which the "attitude object" is encountered. These are categorized as specifically in content as the decisions of the Court permit. The theory on which the model is based assumes that sets of these cases that form around similar objects and situations will correlate with one another to form issue areas (e.g., criminal procedure, First Amendment freedoms, judicial power, federalism) in which an interrelated set of attitudes – that is, a value – will explain the justices' behavior (e.g., freedom, equality, national supremacy, libertarianism).[14]

[13] Harold J. Spaeth, *An Introduction to Supreme Court Decision Making: Revised Edition* (New York: Chandler Publishing, 1972), p. 65.

[14] Harold J. Spaeth and David J. Peterson, "The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making," 15 *American Journal of Political Science* 415 (1971).

The Economics Influence

While building on Spaeth's earlier psychological works, David Rohde and Harold Spaeth provide an explanation why the justices are able to engage in attitudinal behavior.[15] Whereas Schubert viewed the attitudinal model as a general model of political decision making,[16] Rohde and Spaeth, influenced by the application of economic notions of rationality to political decisions, recognize that decisions depend on goals, rules, and situations. While their definitions may have been updated in more recent years, the economics influence is obvious.

Goals

To Rohde and Spaeth, goals simply mean that "actors in political situations are outcome oriented; when they choose among a number of alternatives, they pick the alternative that they perceive will yield them the greatest net benefit in terms of their goals."[17] To Rohde and Spaeth:

> the primary goals of Supreme Court justices in the decision-making process are *policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.[18]

Rules

Next, they contend that an actor's choices will depend on the rules of the game, "the various formal and informal rules and norms within the framework of which decisions are made. As such, they specify which types of actions are permissible and which are impermissible, the circumstances and conditions under which choice may be exercised, and the manner of choosing."[19]

The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices enormous latitude to reach decisions based on their personal policy preferences. Members of the Supreme Court can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload. While the absence of these factors may hinder the personal

[15] David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976).

[16] Schubert, 1965, *op. cit.*, n. 11, *supra*, pp. 15–21.

[17] [illegible] *op. cit.*, n. 15, *supra*, p. 70. [18] *Id.* at 72. [19] *Id.* at 71.

policy-making capabilities of lower court judges or judges in other political systems, their presence enables the justices to engage in "rationally sincere behavior."[20]

We start our elaboration of these issues with the fact that unlike most other appellate courts, the Supreme Court *controls its own docket.* While this does not guarantee that the justices will vote their policy preferences, it is a requisite for their doing so. Many meritless cases undoubtedly exist that no self-respecting judge would decide solely on the basis of his or her policy preferences. If a citizen sought to have President Clinton's midnight pardons declared unconstitutional, and if the Supreme Court had to decide the case, we would not expect the votes in the case to depend on whether the justices favored the particular pardons. But because the Supreme Court does have control over its docket, the justices would refuse to decide such a meritless case. Those that the Court does decide tender plausible legal arguments on both sides.

Echoing our position on the discretion inherent in judicial lawmaking, Judge Richard Posner declares:

> Where the Constitution is clear, for example in entitling each state to two senators regardless of population, there is no need for judicial review to determine whether there has been a violation. The violation would be obvious, and (save in an extraordinary crisis) the people would be indignant. Where the Constitution is unclear, judicial review is likely to be guided by the political prejudices and the policy preferences of the judges rather than by the Constitution itself. The text is so old, and the controversies over its meaning are so charged with political significance, that constitutional "interpretation" in doubtful cases (the only cases likely to be litigated) is bound to be creative and discretionary rather than constrained and interpretive.[21]

With regard to *electoral accountability*, many state court judges are subject to electoral sanctions. Such judges do indeed react to factors such as public opinion at least in highly salient areas.[22] But in low visibility areas and especially in cases that contain a federal question, state supreme courts do not appear to follow public wants, according to a

[20] Jeffrey A. Segal, "Separation of Power Games in the Positive Theory of Law and Courts," 91 *American Political Science Review* 28 (1997).

[21] Richard A. Posner, "Appeal and Consent," *The New Republic*, August 16, 1999, pp. 36–40 at 37.

[22] James Kuklinski and John Stanga, "Political Participation and Governmental Responsiveness," 73 *American Political Science Review* 1090 (1979); James Gibson, "Environmental Constraints on the Behavior of Judges," 14 *Law and Society Review* 343 (1980); Paul Brace and Melinda Gann Hall, "Neo-Institutionalism and Dissent in State Supreme Courts," 52 *Journal of Politics* 54 (1990).

recent study.[23] The evidence on life-tenured federal court judges, however, suggests no such influence, including those who sit on the Supreme Court.[24]

Relatedly, justices are virtually immune from *political accountability*. Congress can impeach Supreme Court justices, but this has happened only once and the vote to remove failed.[25] The Court's appellate jurisdiction totally depends on Congress and Congress may alter it as it sees fit. Rarely, though, has Congress used this power to check the justices.[26] Overall the negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court. Nevertheless, we do note that there is some evidence that two Justices, Roberts in 1937 and Harlan in 1959, reversed previously unpopular decisions in the face of threats by Congress, but such examples are rare indeed. Moreover, while the President appoints the justices, he has no authority over them once they are confirmed. *United States v. Nixon* forcefully illustrates this point, where three Nixon appointees joined a unanimous Court requiring the President to relinquish the Watergate tapes, and thus delivered the coup de grace that forced Nixon to resign.[27]

This is not to say that a lack of political finality necessarily characterizes all Supreme Court decisions. Congress can overturn judicial interpretations of statutory language and amendments can undo constitutional interpretation. Nevertheless, the fact that the President and the Senate choose the justices means that the justices' preferences will rarely be out of line with that of the dominant political coalition at the time of their individual selection. And even if on some matters they are, the difficulty of overriding Supreme Court decisions, even statutory

[23] Sara C. Benesh and Wendy L. Martinek, "State-Federal Judicial Relations: The Case of State Supreme Court Decision Making in Confession Cases," paper presented at Federalism and the Courts: A National Conference, Athens, Ga., February 2001, and Sara C. Benesh and Wendy L. Martinek, "State Court Decision Making in Confession Cases," 23 *Justice System Journal* (2002) [forthcoming]. The authors' findings in both indicate that the new institutionalism may be relatively inoperative in other than high-salience areas like abortion and death penalty.

[24] E.g., Micheal Giles and Thomas G. Walker, "Judicial Policy-Making and Southern School Segregation," 37 *Journal of Politics* 917 (1975). See Chapter 10, *infra*, for further discussion.

[25] The justice was Samuel Chase, a Federalist, whom the Jeffersonians impeached in 1804.

[26] One such instance occurred after the Civil War when Congress denied the Court authority to hear appeals of persons detained by the military authorities. The Supreme Court complied with Congress's decision in *Ex parte McCardle*, 7 Wallace 506 (1869).

[27] 418 U.S. 683 (1974).

ones,[28] in a decentralized legislative environment means that the Court typically has little to fear from Congress. We detail these and other factors that protect the Court from Congress when we discuss the rational choice model, below.

Moreover, the supermajorities needed to propose and ratify an amendment make constitutional overruling vastly more difficult. Constitutional amendments have overturned only five Supreme Court decisions: the Eleventh Amendment (1798) overturned *Chisholm v. Georgia*,[29] which had allowed individuals to sue states in federal courts; the Fourteenth Amendment (1868) overturned *Scott v. Sandford*,[30] which had declared blacks ineligible for United States citizenship; the Sixteenth Amendment (1913) overturned *Pollock v. Farmer's Loan and Trust Company*,[31] which had voided the federal income tax; the Nineteenth Amendment (1920) overruled *Minor v. Happersett*,[32] which precluded the Fourteenth Amendment from guaranteeing women's suffrage; and the Twenty-sixth Amendment (1971) overturned *Oregon v. Mitchell*,[33] which had struck a federal law permitting eighteen-year-olds to vote in state elections.

With regard to *ambition*, lower court judges may desire higher office and thus be influenced by significant political others. Lobbying for a Supreme Court seat from the lower courts, through speeches or through written opinions, is not uncommon. One interested in reaching the High Court could hardly vote his or her personal policy preferences on abortion during the Bush administrations if those preferences were prochoice. Lower court judges might also be interested in other political positions besides the Supreme Court. Howell Heflin (D-Ala.) went from the Supreme Court of Alabama to the United States Senate. Thus we cannot assume that those interested in higher office will necessarily vote their personal policy preferences.

Efforts to seek higher office – assuming that such exists – is most improbable for today's justices. During the first decade of the Court's existence, members used the office as a stepping stone to run for positions such as governor,[34] but today few – if any – positions have more power, prestige, and security than that of Supreme Court justice. Three

[28] See Beth Henschen, "Statutory Interpretations of the Supreme Court," 11 *American Politics Quarterly* 441 (1983).
[29] 2 Dallas 419 (1793). [30] 19 Howard 393 (1857).
[31] 157 U.S. 429, 158 U.S. 601 (1895).
[32] 88 U.S. 162 (1874). [33] 400 U.S. 112 (1970).
[34] The first chief justice, John Jay, twice ran for governor of New York while on the Supreme Court and left the bench when he finally won.

times during the twentieth century members have resigned for alternative (or at least the potential of alternative) political positions, but in only one case was the move for a potentially higher office. That occurred in 1916, when Charles Evans Hughes resigned in order to seek the presidency. The other two cases occurred in 1942, when the exigencies of World War II led President Roosevelt to ask James Byrnes to become Director of Economic Stabilization, and 1965, when President Johnson convinced Arthur Goldberg to become United Nations Ambassador in order, Goldberg believed, to negotiate an end to the Vietnam War.

Finally, the Supreme Court is the *court of last resort*. Other judges are subject to courts superior to their own. Unless they wish to be reversed, they must follow the legal and policy pronouncements of higher courts. Though the evidence is mixed, examination of appellate court decisions in several different issue areas shows little overtly noncompliant behavior.[35] The Supreme Court, of course, sits at the pinnacle of both the federal and state judicial systems. No court overrules it.[36]

Situations

Because few areas in political life can be well represented by unconstrained choice, judicial scholars have carefully limited the attitudinal model in its pure form to the one area where it most plausibly applies: the decision on the merits. More broadly, attitudinal works have gone beyond the unconstrained-choice model when examining factors such as the vote on certiorari, formation of the majority opinion, opinion assignment, and so on. In these areas, attitudinalists expect that attitudes will be a crucial factor shaping decisions, but not the only factor. Such works have extended the pure model by *starting* with notions of attitudes, values, and policy goals and intuitively deriving hypotheses therefrom based on the rules and situations facing the Court. Thus as far back as 1959 Glendon Schubert argued that the justices' certiorari decisions would depend on their beliefs as to what would happen on the

[35] See Donald R. Songer, "An Overview of Judicial Policymaking in the United States Courts of Appeals," in John B. Gates and Charles A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington, D.C.: Congressional Quarterly, 1990), and Sara C. Benesh, *The U.S. Court of Appeals and the Law of Confessions: Perspectives on the Hierarchy of Justice* (New York: LFB Scholarly Publishing, 2002).

[36] In approximately one fifth of the decisions in which it overruled its own precedents, the Warren, Burger, and Rehnquist Courts *affirmed* the lower court's decision that overruled it! See Malia Reddick and Sara C. Benesh, "Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework," 21 *Justice System Journal* 117 (2000).

merits.[37] In the 1970s Rohde and Spaeth examined the likelihood of minimum winning opinion coalitions while incorporating the anomaly of decision making under threat situations.[38] And in this book's predecessor volume we showed that opinion writers frequently have to move beyond their sincere preferences if they hope to obtain a majority opinion, especially in closely divided cases. On the merits, though, the attitudinal model has produced clear and convincing evidence of the overwhelming importance of the justices' attitudes and values, as we demonstrate in Chapter 8.

THE RATIONAL CHOICE MODEL

The final model we consider is the rational choice model, which we discussed briefly above in terms of its influence on the attitudinal model. The rational choice paradigm represents an attempt to apply and adapt the theories and methods of economics to the entire range of human political and social interactions. Because of the scope of this paradigm, innumerable rational choice models that rest on a common set of assumptions exist. While scholars might quibble about the core of rational choice, we adopt William Riker's statement of its essence:

1. Actors are able to order their alternative goals, values, tastes and strategies. This means that the relation of preference and indifference among the alternatives is transitive. . . .
2. Actors choose from available alternatives so as to maximize their satisfaction.[39]

The first statement requires that individuals can rank alternatives, such that an individual either prefers one alternative to another or is indifferent between them. For example, a justice might prefer, say, reversing a lower court decision to not hearing the case (i.e., denying cert), and might prefer not hearing the case to affirming it. Moreover, individual

[37] Glendon Schubert, *Quantitative Analysis of Judicial Behavior* (Glencoe, Ill.: Free Press, 1959).

[38] Rohde and Spaeth, *op. cit.*, n. 15, *supra*, chs. 8 and 9.

[39] William H. Riker, "Political Science and Rational Choice," in James E. Alt and Kenneth A. Shepsle, eds., *Perspectives on Positive Political Economy* (New York: Cambridge University Press, 1990), p. 172. We note, additionally, that there may be serious differences among rational choice theorists about noncore assumptions. We rely primarily, though not exclusively, on the writings of William Riker, who more than anyone created the field of positive political theory (the application of rational choice theory to political phenomena).

preferences are transitive, such that if the justice prefers reversing to denying cert, and denying cert to affirming, then the justice must prefer reversing to affirming.

The second statement requires only that the actor attempt to maximize satisfaction. Actors are allowed to make errors that frustrate their goals because they lack information about the consequences of their decisions, about the preferences of others, and so on. Nor are there any limits as to what brings actors satisfaction; no goals are ruled out.

This breadth, we note, means that while specific rational choice models can be falsified, as scholars invariably state the goals assumed to motivate their specific models, rational choice theory itself, for the most part, cannot be.[40] If any goals are allowed, then there must always be goals that can explain the behavior in question. For example, Riker argues that even suicide can be consistent with rational choice theory.[41] Moreover, as Riker recognizes, the allowance of incomplete information means that even for a specific goal, all choices, even the most foolish ones, can be deemed rational because they may result from incomplete information.[42]

Maximizing satisfaction requires rational foresight, the consideration of the consequences of one's decisions. For example, justices often engage in error-correction, voting to hear a case if they disapprove of a lower court decision in the hope of reversing it. But if a justice casts a decisive vote to grant cert in a disfavored case but the Court affirms the decision, voting to grant will have harmed her goals, as she would have been better off if cert had been denied. When an actor considers the ramifications of his or her actions in a game-theoretic situation and makes the best response to that situation given available information, that actor may be said to have behaved strategically. This may involve acting in accordance with one's sincere preferences, or it may involve acting in a sophisticated manner, that is, against one's sincere preference in order to obtain a better result. For example, if the justice believed that the Court would reverse the lower court decision, then the strategic choice would be his or her sincere preference: to grant cert. But if the justice thought the Court would affirm the lower court decision, then the strategic choice would

[40] Taking actions that defeat one's goals would seem to qualify, but Riker and Ordeshook argue that if one's behavior is contrary to one's stated goals, then we should disbelieve the stated goals and give credence only to the behavior. See *An Introduction to Positive Political Theory* (Englewood Cliffs, N.J.: Prentice Hall, 1973), p. 21.

[41] *Id.*, and Riker, *op. cit.*, n. 39, *supra*, p. 173. [42] Riker, *id.*

be to vote to deny cert in order to prevent the disfavored lower court decision from being affirmed by the Supreme Court.

Unlike the intuitions that frequently influence behavioral models, rational choice theorists typically insist that hypotheses and explanations derive from mathematical and/or logical deductions.[43] Thus to Bruce Bueno de Mesquita, scientific knowledge cannot be attained "without the abstract, rigorous exercise of logical proof."[44]

The goal of logical proof in rational choice theory is the finding of equilibrium. An outcome in equilibrium is a stable outcome, one that no player has any incentive to unilaterally shift away from. While there are different types of equilibria, the broadest and most widely used, Nash equilibria,[45] represent a best response to the other player's best response. For a classic example, consider Anthony Downs's conclusion that in a two-party system in which voters vote ideologically, the party closer to the median voter will win. If the median voter is at 50 on a ideological scale of 0 to 100, and the left party is at 30 while the right party is at 60, the right party will capture the votes of all citizens to the right of 45, the midpoint between 30 and 60. Since this includes the median, the party will win a majority. But the parties' positions are not in equilibrium, as the left party's best response to a right party at 60 is not to remain at 30. Let's say the party moves to 45, while the right party stays where it is. In the next election, the left party will win, as it captures all voters to the left of 52.5. A right party at 60 is not a best response to a left party at 45, so the right party then moves closer to the middle, which induces the left party to move toward the center. Eventually, both parties will converge on 50. This equilibrium is each party's best response to the other party's best response.

Equilibria, as with the logical proofs from which they derive, are crucial to most rational choice theorists. They represent "a prediction,

[43] David Austen-Smith and Jeffrey S. Banks, *Positive Political Theory I* (Ann Arbor: University of Michigan Press, 1999), p. xi; Michael Laver, *The Politics of Private Desires: The Guide to the Politics of Rational Choice* (New York: Penguin Books, 1981), p. 11; Riker and Ordeshook, *op. cit.*, n. 40, *supra*, pp. 9–12. Alternatively, see Lee Epstein and Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead," 53 *Political Research Quarterly* 625 (2000).

[44] Bruce Bueno de Mesquita, "Toward a Scientific Understanding of International Conflict: A Personal View," 29 *International Studies Quarterly* 121 (1985), p. 129.

[45] We include under "Nash equilibria" its various refinements, such as subgame-perfect equilibria, perfect Bayesian equilibria, sequential equilibria, perfect equilibria, and trembling hand equilibria.

for a prespecified circumstance, about the choices of people and the corresponding outcomes. This prediction generally takes the form of 'if the institutional context of a choice is . . . and if people's preferences are . . . then the only choices and outcomes that can endure are . . .'" (ellipses in original).[46] To Riker they are absolutely essential to both social science theory[47] and explanation, providing necessary and sufficient conditions for choices to occur.[48] Note, though, that Epstein and Knight dispute the centrality of equilibrium analysis for rational choice models, labeling the positions taken by each side of this debate a play "to its competitive advantage."[49]

While we agree with Epstein and Knight that equilibrium analysis is not the only way to "do" rational choice theory, equilibrium analysis is rational choice theory's most powerful tool and is clearly *the* comparative advantage that rational choice theory has over other theories.

The Supreme Court and Rational Choice Theory

The Supreme Court rational choice arena may be divided into two camps: an internal camp that focuses on the interactions among the justices and an external camp that focuses on constraints imposed on the Court by other political actors. For better or worse, the leading internal rational choice studies of the Supreme Court, such as Walter Murphy's masterful *Elements of Judicial Strategy*,[50] have not availed themselves of the exceptional power that equilibrium analysis provides. The consequences of this for Murphy's work, in terms of the possibility of a rational choice theory of the Court, are laid out by Edward Schwartz, who tries to explain why Murphy's work did not achieve the prominence of Riker's, Downs's, or Thomas Schelling's:

> All three of these authors produced very specific behavioral predictions within their books. Some of these predictions were more credible than others, but even those that seem most incorrect spawned attempts to refine the theory in order

[46] Peter C. Ordeshook, *Game Theory and Political Theory* (New York: Cambridge University Press, 1986), p. xii.

[47] Riker, *op. cit.*, n. 39, *supra*, p. 175. [48] *Id.* at 177.

[49] Epstein and Knight, *op. cit.*, n. 43, *supra*, p. 642.

[50] (Chicago: University of Chicago Press, 1964). Our list of leading rational choice works on the Court also includes Lee Epstein and Jack Knight's award-winning *Choices Justices Make* (Washington, D.C.: Congressional Quarterly Press, 1998), and Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck's award-winning *The Collegial Game* (New York: Cambridge University Press, 2000).

to produce results more in accord with observed behavior. Murphy, however, only identified strategies that might be pursued under some circumstances. Often, such a pronouncement is immediately followed by a disclaimer that the contrary strategy might be more appropriate under other circumstances. The problem is that he derives no tight predictions about exactly when we should expect to see certain behaviors as opposed to others.

To wit, from the chapter on "Marshalling the Court," Murphy writes "[a justice] would probably feel it unethical to appeal to the strong personal dislike of one justice for another, though there may have been occasions when such an appeal would have been effective." Murphy is just stating that sometimes we will observe a strategy and sometimes we won't.

In the same section, Murphy suggests that "when a new justice comes to the Court, an older colleague might try to charm his junior brother." Might? Well, when will he and when won't he? We now understand from game theory that such overtures are likely to be perceived as "cheap talk" absent some costly signal attached thereto. The book is filled with such lukewarm or fuzzily conditional recommendations about strategies that the justices can employ. A scholar reading the book is likely to emerge from the experience, as I did, wondering exactly what Murphy thought Supreme Court justices actually do, given that he seems to believe that almost any tactic might be useful (or not), depending upon the circumstances.

Why does Murphy come across so wishy-washy where Downs, Riker and Schelling appear bold, decisive and challenging? The answer lies in understanding the importance of deriving equilibrium predictions. Downs, Riker and Schelling actually write down models, solve them and derive equilibria – Murphy does not. Without attention to finding combinations of judicial strategies that formed in equilibrium, it was not possible for Murphy to generate hypotheses about exactly what kind of strategies we should expect to observe the justices pursuing.

Absent such predictions and hypotheses there's not much for subsequent scholars to sink their teeth into. Murphy all but admitted that any behavior might be a good strategy, so it was not possible to refute or corroborate his theory. All that Murphy managed to do was to provide a laundry list of strategic concerns for the justices to think about. He left to others the job of matching desirable strategies with particular scenarios.[51]

Schwartz, a rational choice theorist, goes on to declare:

Schubert, on the other hand, offers a tight internally consistent theory of judicial behavior. It was possible to apply this theory to available data and investigate whether it predicted actual judicial practice. Scholars like Rohde and Spaeth (1976) latched onto Schubert's theory, improved upon it, and spawned the attitudinal model that enjoys a position of prominence within the judicial politics community to this day.[52]

[51] Edward Schwartz, "The New Elements of Judicial Strategy," unpublished manuscript, Harvard University, 1997, pp. 18–20.

[52] *Id.* at 20.

Similar to Murphy's work, the most prominent of the recent rational choice works on the Supreme Court do not derive or adapt equilibrium solutions, for example, they do not demonstrate that interactions among the justices constitute a best response to a best response, or alternative equilibrium solutions. Consider, for example, various works that consider multiple opinion drafts as evidence of strategic behavior.[53] While this seems to make sense, this hypothesis fails to account for the likelihood that if delay is costly, a rational opinion writer will preemptively accommodate her coalition. Indeed, the adaptation of at least one prominent class of bargaining models would lead to the conclusion that the best response of the opinion writer is to write a first draft that leaves the fifth most distant member of the coalition just barely at the point where she prefers signing on to concurring separately.[54]

To date, the top journals of political science have published less than a handful of studies that derive or examine equilibrium behavior of judges,[55] though economics journals, of course, have published

[53] Paul J. Wahlbeck, James F. Spriggs II, and Maltzman, "Marshalling the Court: Bargaining and Accommodation on the U.S. Supreme Court," 42 *American Journal of Political Science* 294 (1997); and Epstein and Knight, *op. cit.*, n. 50, *supra*, ch. 3.

[54] Ariel Rubinstein, "Perfect Equilibrium in a Bargaining Model," 50 *Econometrica* 97 (1982). See also Maltzman, Spriggs, and Wahlbeck, *op. cit.*, n. 50, *supra*, ch. 4.

[55] Accepting the *American Political Science Review*, the *American Journal of Political Science*, and the *Journal of Politics* as the top journals, we count to date one case study (Robert Clinton, "Game Theory, Legal History, and the Origins of Judicial Review," 38 *American Journal of Political Science* 285 (1994)), one analysis of certiorari (Charles M. Cameron, Jeffrey A. Segal, and Donald R. Songer, "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions," 94 *American Political Science Review* 109 (2000)), and one comparative study (Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review," 45 *American Journal of Political Science* 346 (2001)) that derive equilibria. Two others test equilibrium predictions derived elsewhere (David Rohde, "Policy Goals and Opinion Coalitions in the Supreme Court," 16 *American Journal of Political Science* 208 (1972), and Jeffrey A. Segal, "Separation of Powers Games in the Positive Theory of Law and Courts," 91 *American Political Science Review* 28 (1997)).

There is also a growing rational choice literature on the behavior of juries. For example, Fedderson and Pesendorfer conclude that unanimous juries are *more* likely to convict the innocent or acquit the guilty than majority-rule juries. See Timothy Fedderson and Wolfgang Pesendorfer, "Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts under Strategic Voting," 92 *American Political Science Review* 23 (1998). Gerardi concludes that as jury size increases, unanimous juries almost never convict. In his prime example, the probability of acquitting the guilty is greater than 0.5 for five-person juries and almost 0.67 for twelve-person juries. See Dino Gerardi, "Jury Verdicts and Preference Diversity," 94 *American Political Science Review* 395 (2000). Needless to say, empirical support is lacking for both sets of findings.

more.[56] Moreover, while there are some internal equilibrium models out there,[57] these models have not been empirically tested.

Because the internal works are either consistent with earlier attitudinal works or, at least, not inconsistent with them (see pp. 86–97), and because these works generally do not test equilibrium predictions, which are central (and to some, essential) to rational choice theory, we focus on the external works. This external literature formally derives and tests equilibrium predictions that directly contradict the attitudinal model. The prime subject of most of these articles has been the separation-of-powers model originally formulated by Brian Marks.[58]

The Marksist Separation-of-Powers Model

Separation-of-powers models examine the degree to which the courts must defer to legislative majorities in order to prevent overrides that result in policy worse than what the court might have achieved through more sophisticated behavior. In the landmark work, Brian Marks carefully examined the placement of preferences in Congress that prevented *Grove City College v. Bell*[59] from being overturned prior to 1986.[60]

[56] See, e.g., Thomas J. Miceli, "Optimal Prosecution of Defendants Whose Guilt Is Uncertain," 6 *Journal of Law, Economics and Organization* 189 (1990); Edward P. Schwartz, "Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision Making," 8 *Journal of Law, Economics and Organization* 219 (1992); Lewis A. Kornhauser, "Modeling Collegial Courts I: Path Dependence," 12 *International Review of Law and Economics* 169 (1992); and Gregory A. Caldeira, John R. Wright, and Christopher J. W. Zorn, "Strategic Voting and Gatekeeping in the Supreme Court," *Journal of Law, Economics and Organization* (1999).

Of these articles, only the model in the Caldeira et al. article has been tested empirically.

[57] See, e.g., Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheehan, "Toward a Rational Choice Spatial Model of Supreme Court Decision Making: Making Sense of Certiorari, the Original Vote on the Merits, Opinion Assignment, Coalition Formation and Maintenance, and the Final Vote on the Choice of Legal Doctrine," paper presented at the 1999 annual meeting of the American Political Science Association, Atlanta, Ga.

[58] We exclude from consideration here the hundreds of articles in "law and economics" that attempt to demonstrate the economic efficiency, or lack thereof, of judicial decisions.

[59] 465 U.S. 555 (1984).

[60] Brian A. Marks, "A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell*," working papers in Political Science, P-88-7, Hoover Institution, Stanford University, 1988. Senate Judiciary Committee Chair Orrin Hatch (R-Utah) kept override legislation bottled up in his committee.

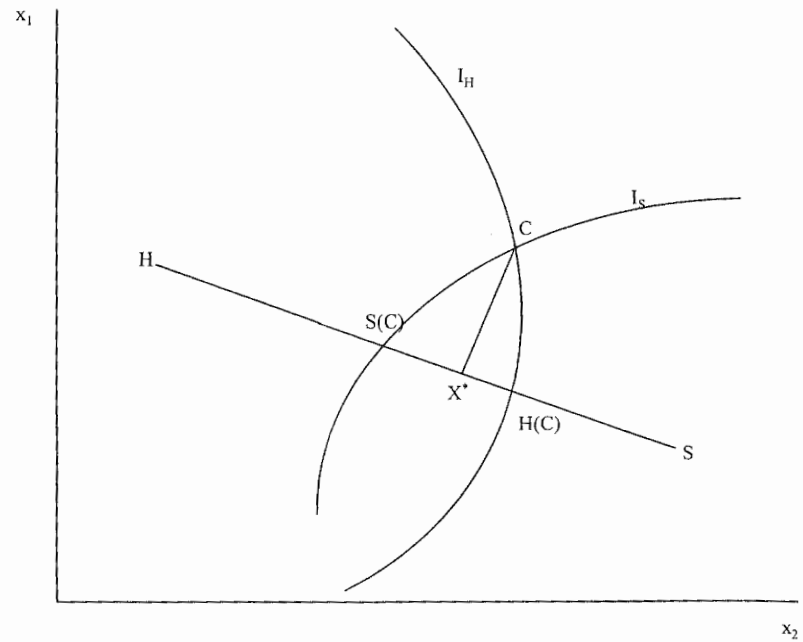

FIGURE 3.2. The neo-Marksist model. H: House ideal point; S: Senate ideal point; C: Court ideal point; I_H: House indifference curve; I_S: Senate indifference curve; S(C): point on set of irreversible decisions where Senate is indifferent to Court ideal point; H(C): point on set of irreversible decisions where House is indifferent to Court ideal point; X^*: equilibrium.

Consistent with the attitudinal model, Marks claimed that the justices simply voted their ideal points. Building on his work, subsequent neo-Marksist theorists argued that if the Court exercised rational foresight, it would not always choose its ideal point.[61] We present a standard representation of these models.

Consider the example in Figure 3.2, where the Court must decide a case in two-dimensional policy space. The game is played as follows. First, the Court makes a decision in (x_1, x_2) policy space. Second, the House and Senate can override the Court decision if they agree on an alternative. H, S, and C represent the ideal points of the House, Senate,

[61] See, e.g., John Ferejohn and Charles Shipan, "Congressional Influence on Bureaucracy," 6 *Journal of Law, Economics and Organization* 1 (1990); and Rafael Gely and Pablo T. Spiller, "A Rational Choice Theory of Supreme Court Decision Making with Applications to the *State Farm* and *Grove City* Cases," 6 *Journal of Law, Economics and*

and Court, respectively. The line segment HS represents the set of irreversible decisions. That is, no decision on that line can be overturned by Congress, because improving the position of one chamber by moving closer to its ideal point necessarily worsens the position of the other. Alternatively, any decision off of HC – call it x – can be overturned, because there will necessarily be at least one point on HC that both H and C prefer to x. Imagine, for example, a Court decision at the Court's ideal point, C. The arc I_S represents those points where the Senate is indifferent to this decision. And, obviously, the Senate prefers any point inside the arc to any point on the arc (or, obviously, outside the arc). Similarly, I_H represents those points where the House is indifferent to the Court's decision. Thus, both the House and Senate prefer any point between S(C) (the point on the set of irreversible decisions where the Senate is indifferent to the Court's decision) and H(C) (the point on the set of irreversible decisions where the House is indifferent to the Court's decision) to a decision at C.

What, then, should a strategic Court do in this situation? If the Court rules at its ideal point (or, indeed, any place off the set of irreversible decisions), Congress may overturn the Court's decision and replace it with something that is necessarily worse from the Court's perspective. For example, if the Court rules at C, then Congress's result will be someplace between S(C) and H(C). The trick for the Court is to find the point on the set of irreversible decisions that is closest to its ideal point. By the Pythagorean Theorem, it accomplishes this by dropping a perpendicular onto the line. Thus, rather than voting sincerely at C and ending up with a policy someplace between S(C) and H(C), the Court rules at X*, the point between S(C) and H(C), indeed, the point between H and S, that it prefers the most. This is the equilibrium result.

The separation-of-powers games vary in a variety of details, such as the number of issue dimensions, the number of legislative chambers, the influence of committees, and the existence of presidential veto. But regardless of the specific assumptions made, these models (with the important exception of Marks) assume that the Court will construe legislation as close to its ideal point as possible without getting overturned by Congress.

The separation-of-powers models, like all models, make a series of assumptions about the behavior in question. What is noteworthy about the simplifications is that they typically make it easier to conclude that the Court will defer to congressional preferences. These assumptions involve the Supreme Court, Congress, and interactions between the two. We begin with assumptions about the Court.

Perfect and Complete Information

Virtually every separation-of-powers model assumes the justices have perfect and complete information about the preferences of Congress.[62] Implicitly, these models also assume complete information about Congress's transaction and opportunity costs (which are, in fact, assumed to be zero).[63] If a policy-seeking Court knew that a particular decision would cause Congress to worsen the result, it boggles the imagination to conclude that the Court wouldn't make the necessary compromises to obtain a better final outcome. But the Court, at best, will have some form of probability distribution as to the preferences of Congress, with some vague inkling about the costs and benefits to Congress of override (based on its preferences and loss function). If the justices typically believe they face a Congress unlikely to override their decisions,[64] then they will be significantly more likely to vote their sincere preferences.

Enforced Statutory Interpretation

Nearly unanimous are the separation-of-powers modelers in their decisions to treat the level of interpretation as exogenously determined. Nevertheless, in many cases the Court can opt out of statutory mode and find constitutional bases for its decisions.[65] Consider, for example, a Court intent on striking private affirmative action plans. William Eskridge argues that in *United Steelworkers v. Weber*[66] the Court had such preferences but was deterred by a Congress that might have overridden such action.[67] If we forget that a divided Court had upheld the constitutionality of affirmative action just one year earlier[68] and thus could not have been that opposed to affirmative action, we still have the possibility that a conservative Court could have opted into constitutional mode. Following *Shelley v. Kraemer*,[69] the Court could have ruled that

[62] Daniel B. Rodriguez, "The Positive Political Dimensions of Regulatory Reform," 72 *Washington University Law Quarterly* 1 (1994), p. 95.

[63] Alternatively, we could view this as perfect information about whether the Court is facing a Congress that will override if the Court rules outside the set of irreversible decisions, which Congress always would.

[64] William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale Law Journal* 331 (1991), p. 365.

[65] Pablo T. Spiller and Matthew L. Spitzer, "Judicial Choice of Legal Doctrines," 8 *Journal of Law, Economics and Organization* 8 (1992).

[66] 443 U.S. 193 (1979).

[67] William N. Eskridge, Jr., "Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *California Law Review* 613 (1991).

[68] *Regents v. Bakke*, 438 U.S. 265 (1978). [69] 334 U.S. 1 (1948).

such private contracts, though legal, could not be judicially enforced. Restricting the Court to statutory mode underestimates the Court's freedom to act.

Unidimensional Issues

The standard separation-of-powers model not only forces the Court to reach decisions statutorily, it also forces the Court to reach decisions in a unidimensional policy space. Unlike the congressional committee system, no corresponding method prevents the Court from bundling issues. Indeed, Court cases often contain multiple dimensions. One likely result is that a strategic Court, through what Riker has labeled "heresthetics,"[70] can reframe and/or bundle issues so as to protect itself from reversal. For example, the Supreme Court recently required a state institution to provide funding for a Christian newspaper.[71] Surprisingly, the howls of outrage that might typically accompany such a decision did not occur. The reason, no doubt, is that the Court packaged the case as a freedom of speech issue. If the University of Virginia generally provides funding to other student newspapers, it cannot deny funding to one because of its religious slant. The Court's preemptive ability to strategically manipulate issues protects it from congressional overrides.

We next consider separation-of-powers assumptions about Congress.

Costless Legislation/Salience

The separation-of-powers models treat the enactment of legislation as costless. Needless to say, Congress incurs both transaction costs and opportunity costs. At the very least, this expands the Court's discretionary zone, and thus makes it less likely for the Court to defer to Congress for fear of being overturned.

Limited Veto Points

How legislation gets passed is vitally important to the separation-of-powers model. Theoretically, the gist of the model merely requires chamber medians, as in Figure 3.2. Of course, the addition of committees, presidential veto, and so on would greatly increase the model's correspondence to reality, without altering the fundamental understanding

[70] William H. Riker, "The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice," 78 *American Political Science Review* 1 (1984).

[71] *Rosenberger v. University of Virginia* 515 U.S. 819 (1995).

of the model. Nevertheless, understanding the actual extent to which the Court must defer to Congress requires greater realism. Specifically, as the number of places where legislation can be kept off the floor increases, the Court's discretionary zone increases. Thus, under a potentially more realistic view of the legislative process, the Court's ability to act sincerely might be guaranteed most of the time.

For example, according to some views of congressional procedure, relevant committee chairs are capable of bottling up legislation. Indeed, Marks's study of *Grove City* gives full credit/blame to killing override legislation to Senate Judiciary Chairman Orrin Hatch. Eskridge also finds committee chairs to have special influence over their committees' actions.[72]

To the extent that this view of the legislative process is correct, the set of irreversible decisions is likely to be much greater than currently modeled by the standard separation-of-powers models. Between 1956 and 1986, either James Eastland (D-Miss.) or Strom Thurmond (R-S.C.) headed the Senate Judiciary Committee, except for Ted Kennedy's two-year reign in 1979–1980. Eastland's Americans for Democratic Action scores while chair averaged 12.1, while Thurmond's averaged 2.5.[73] Meanwhile, either Emanuel Celler (D-N.Y.) (1955–72) or Peter Rodino (D-N.J.) (1973–88) headed the House Judiciary Committee during this period. Both were liberals whose ADA scores averaged in the 80s. If override legislation requires the support of both judiciary chairs, then the Court was effectively immune from congressional interference. Thus, the Supreme Court has significantly more discretion than these models suggest.

Finally, we consider assumptions about Congress/Court interactions.

Last Licks

The separation-of-powers models discussed above and below vary as to the inclusion of Presidents, agencies, and second chambers of Congress. However, they do not vary in that they always give Congress the final move. Ferejohn and Weingast note that

> if we can say nothing else with certainty, we can say that there is no "last word" in politics. No person or individual ever gets to say what the law is finally; Congress can and often does react to Court decisions, as can agencies and the pres-

[72] Eskridge, *op. cit.*, n. 67, *supra*, pp. 625, 635.

[73] Michael J. Sharp, *The Directory of Congressional Voting Scores and Interest Group Ratings* (New York: Facts on File Publications, 1988).

ident. Each actor in the political and legal setting – president, agency, Congress, litigants, court – can take new courses of action, devise new interpretations or enact new statutes. This capacity to react is a fundamental feature of the political process.[74]

Obviously, giving Congress the final move is completely arbitrary and, moreover, biases the outcome toward congressional influence. As Ferejohn and Weingast suggest, if Congress overturns a statutory decision of the Court, the Court nonetheless interprets the meaning and the validity of the remedial legislation. For example, the Supreme Court responded to Congress's decision to override *Lampf v. Gilbertson*[75] by declaring pertinent parts of the override unconstitutional.[76] In at least one series of Court decisions-overrides-reinterpretations-reoverrides, "Congress had to pass the same statute three times to achieve its original goal."[77] While Congress might win such battles more often than not, the standard separation-of-powers models underestimate the Court's freedom to act by completely eliminating the Court's ability to react to congressional action.

Exogenous Judicial Preferences

The separation-of-powers literature treats judicial preferences as if they were exogenously determined, which often allows them to be far to the right or left of congressional and/or presidential preferences. While it might not be unusual to find particular Supreme Court justices whose preferences lie outside the set of irreversible decisions, it would be rare, indeed, to find that the President and the Senate consistently nominate and approve people who are well to the left or to the right of their preferences (see Chapter 5). This is especially true when seats that may affect the median position of the Court are at stake.[78] Thus, under Robert Dahl's formulation,[79] the Supreme Court follows the preferences of the dominant electoral coalition not because of deference (whether strategic or otherwise) to its preferences, but because the coalition chooses the

[74] John Ferejohn and Barry Weingast, "A Positive Theory of Statutory Interpretation," 12 *International Review of Law and Economics* 263 (1992), at 263. Despite their cogent argument, Ferejohn and Weingast then proceed to give Congress the last word.

[75] 501 U.S. 350 (1991). [76] *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).

[77] Eskridge, *op. cit.*, n. 64, *supra*, p. 410.

[78] Peter H. Lemieux and Charles H. Stewart III, "Advise? Yes. Consent? Maybe. Senate Confirmation of Supreme Court Nominations," paper presented at the annual meeting of the American Political Science Association, Washington, D.C., 1988.

[79] Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *Journal of Public Law* 179 (1957).

Court and they thus have similar preferences. By modeling judicial preferences as exogenous, the separation-of-powers models significantly overestimate the need for sophisticated voting.

In sum, we have made a strong enough case to cast theoretical doubt on the standard separation-of-powers model. These doubts could be erased – indeed, should be erased – if empirical evidence supports the model. But to date, the empirical evidence refutes the model. We examine this evidence in detail in Chapter 8.

SUMMARY AND CONCLUSIONS

In Chapter 1 we examined why the Supreme Court necessarily makes authoritative policy. In Chapters 2 and 3 we examined the three different models that attempt to explain how justices make policy.

We initially considered the legal model, which holds in one form or another that justices make decisions influenced by the facts of the case in light of plain meaning, the intent of the framers, and precedent. While the Court uses these factors to justify its decisions, they do not explain their outcome.

Plain meaning assumes a mathematical exactness in the use of English that simply does not exist. Yet even when the constitutional language is fairly clear, the Court may behave arrogatingly, reading into the document rights that are not explicitly there, and reading out of the Constitution rights that it explicitly contains. Supporters of legislative or framers' intent must recognize the sparseness of the historical record: that however "framer" is defined, different framers had different intentions; that intent often conflicts with plain meaning; and, most notably, that the framers did not claim such prescience that only their motivations could rightfully bind future generations. Precedent also fails as an explanation of judicial decisions. In appellate cases legitimate precedents exist on both sides of controversies, allowing justices to abide by precedent no matter which position they take. And even when the weight of authority leans heavily toward one side, several legalistic methods enable courts and judges to avoid literal adherence to precedent. Justices can even cite precedents to avoid adhering to precedent.

Against the legal model we present the attitudinal model, which holds that justices make decisions by considering the facts of the case in light of their ideological attitudes and values. The attitudinal model, as developed by Glendon Schubert and David Rohde and Harold Spaeth, emanated from the criticisms of the classical legal model made by the

legal realists in the 1920s, the need for empirical tests as demanded by the behavioral school of political science that began to flower in the 1950s, the psychological theories of Clyde Coombs and Milton Rokeach, and the institutional concerns of the rational choice model.

Attitudinalists argue that because legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies.[80]

Finally, we considered the rational choice model. While the attitudinal model derives in part from the rational choice model, there are several distinctions worth noting.

First, the rational choice model has an extraordinarily powerful tool for explaining interactions between players: equilibrium analysis. But, unfortunately, beyond the questionable separation-of-powers games, these equilibrium solutions have rarely been used to study actual judicial behavior. The results from the extant literature, by and large, derive from strategic intuitions that have not differed markedly from earlier works by Schubert, Rohde and Spaeth, and others.[81] This isn't to say that there hasn't been extremely good work in this area;[82] rather, it is to say that work to date has not taken advantage of what makes rational choice theory powerful.

Second, while the attitudinal model limits the justices to policy goals, rational choice theory allows any goals whatsoever. For example, Ferejohn and Weingast posit the possibility of legal concerns, such as fidelity to legislative intent, as goals that judges might seek.[83] We believe

[80] This is not to say that the goals of lower court judges (especially other appellate court judges) differ from Supreme Court justices but, rather, that the constraints on reaching those goals differ. See Reddick and Benesh, *op. cit.*, n. 36, *supra.* Indeed, even highly esteemed judges themselves have publicly acknowledged the dominance of their personal policy preferences in arriving at their decisions. See Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," 3 *Supreme Court Economic Review* 1 (1993).

[81] Glendon Schubert, *op. cit.*, n. 37, *supra,* section IV; Rohde and Spaeth, *op. cit.*, n. 15, *supra*, 1976, chs. 8 and 9; Robert Boucher and Jeffrey A. Segal, "Supreme Court Justices as Strategic Decision Makers: Offensive Grants and Defensive Denials on the Vinson Court," 57 *Journal of Politics* 824 (1995).

[82] See, e.g., Epstein and Knight, *op. cit.*, n. 50, *supra*; and Maltzmann, Spriggs, and Wahlbeck, *op. cit.*, n. 50, *supra.*

[83] Ferejohn and Weingast, *op. cit.*, n. 74, *supra.*

that viewing justices as policy seekers provides enormous leverage in understanding their behavior. We also consider it more than ironic that rational choice theorists, whose field includes social choice theory, should model concepts such as "legislative intent," as if group intent exists.

Third, the attitudinal model differs from traditional rational choice models in terms of how the decision on the merits plays out. To rational choice theorists, the Court typically must defer to Congress in statutory cases.[84] Some leading scholars argue that even in constitutional cases, where override is virtually impossible,[85] the Court must frequently defer to the elected branches. According to one set of proponents, rational choice perspectives

> argue that because justices take into account the preferences of the ruling regime (even if they do not necessarily share those preferences) and . . . the actions they expect the regime to take, the Court's decisions typically will never be far removed from what contemporary institutions desire . . . .
>
> This does not mean, however, that the Court will never . . . strike down federal laws. Indeed, if preferences of the contemporary regime and of the Court support those weapons, the Court will feel free to deploy them.[86]

If this is the rational choice perspective on when the Court can invoke judicial review, then that perspective is seriously mistaken, as the Court's willingness to strike down school prayer, Bible readings, flag protection statutes, the Gun Free School Zone Act, the Religious Freedom Restoration Act, and so on amply demonstrate. Nor should one assume that such behavior occurs either infrequently or disproportionately in cases of little moment. One day after declaring the Religious Freedom Restoration Act unconstitutional on the basis that Congress temerariously had the audacity to contravene the sacred principle of separation of powers and tell the Court what constitutes the free exercise of religion,[87] the jus-

[84] William N. Eskridge, Jr., *op. cit.*, n. 64, *supra.*

[85] A constitutional amendment requires two thirds of each chamber of Congress and three quarters of the states. Alternatively, Congress can attempt to attack the Court's independence, e.g., by adding to the size of the Court or limiting the Court's jurisdiction. But concerns over judicial independence, if not by congresspersons themselves, then by their constituents, severely limit Congress's use of this tool to the most extraordinary situations, such as Reconstruction.

[86] Lee Epstein and Thomas Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in Lee Epstein, ed., *Contemplating Courts* (Washington, D.C.: Congressional Quarterly Press, 1995), pp. 323–24; see also Epstein and Knight, *op. cit.*, n. 50, *supra*, pp. 150–54.

[87] *In City of Boerne v. Flores*, 526 U.S. 507 (1997).

tices voided two additional acts of Congress: the Communications Decency Act, which prohibited knowing transmission via telecommunication of "indecent" or "patently offensive" material to minors,[88] and the Brady bill, which required local law enforcement officials to check the background of those transferring handguns.[89] The Court replicated its behavior one year later, declaring unconstitutional another three acts of Congress, two of which were of lesser importance than those of 1997. The Court, moreover, provided a bit more breathing room: voiding the laws over a three-day period rather than only over two days.[90]

Consider the following summary by Linda Greenhouse at the close of the Court's 1998 term:

> The Supreme Court rules.
>
> That was the message of a term in which the Court asserted its power over every branch and level of government, few of which emerged unchanged from the encounter.
>
> Most dramatically, the Court reconfigured the federal-state balance of power in three decisions that carved out a broad sphere of immunity for the states from the reach of federal law. Those decisions had a subtext with even more far-reaching implications, indicating the Court's unwillingness to credit Congress its own view not only of the way legislation should be written but even of the justification for federal legislation at all in areas where Congress has deemed it preferable to switch the states into a uniform, nationwide rule of law.
>
> Nor was the Court any more solicitous of the executive branch, rejecting the Clinton Administration's plan for conducting the 2000 census and insisting that there was no alternative to the traditional headcount for apportioning seats in the House of Representatives. Looking to the states, the court invalidated California's two-tiered welfare policy that disadvantaged new arrivals, a policy the new federal welfare law had authorized. . . .
>
> "This is a court that doesn't defer to government at any level," Walter Dellinger, an acting Solicitor General earlier in the Clinton Administration said

[88] In *Reno v. ACLU*, 521 U.S. 844 (1997).

[89] In *Printz v. United States*, 521 U.S. 898 (1997).

[90] A 1992 law requiring forfeitures grossly disproportionate to criminal offenses violates the excessive fines clause of the Eighth Amendment (*United States v. Bojakajian*, 141 L Ed 2d 314 (1998)); the Line Item Veto Act, authorizing the President to strike certain spending and tax benefit provisions from legislation he otherwise approved, violates the presentment clause of Article I (*Clinton v. New York City*, 141 L Ed 2d 393 (1998)); and a provision of the Coal Industry Retirement Health Benefit Act of 1992 that required coal industry operators who had signed labor agreements to fund retiree health care benefits violates the takings clause of the Fifth Amendment (*Eastern Enterprises v. Apfel*, 141 L Ed 2d 451 (1998)).

the other day. "The Court is confident it can come up with the right decisions, and it believes it is constitutionally charged with doing so."[91]

Consistent with what we more systematically demonstrate below to be the Court's actual behavior, attitudinalists believe the structure of the American political system virtually always allows the justices to engage in rationally sincere behavior on the merits.

[91] Linda Greenhouse, "The Justices Decide Who's in Charge," *New York Times*, June 27, 1999, sec. 4, p. 1. The decision in *Bush v. Gore* unimpeachably established the accuracy of the source Greenhouse quoted, Walter Dellinger, and – for that matter – of Greenhouse herself.

4

A Political History of the Supreme Court

This chapter presents an overview of the role the Court has played as an authoritative policy maker during the course of American history. The mythology described in Chapter 1 that surrounds the Court and its decisions has decreed that the only proper perspective from which to view the Court is a legalistic one, namely, the legal model that we critiqued in Chapter 2. To place the model that we employ – the attitudinal one – in a proper perspective, we present this historical summary.

THE FIRST SUPREME COURT

The eleven years before John Marshall became chief justice are typically viewed as the first Supreme Court. If we adhere to the modern practice of identifying Courts by their chief justice, two Courts preceded Marshall: the Jay Court from 1790 to 1795, and the Ellsworth Court from 1796 to 1800. Neither of them left a legacy akin to that of their successor Courts. By our count, these two Courts decided a grand total of only sixty-one cases, an average of less than six per year.

These Courts, however, did not want for eminent members. Jay himself was the third author of *The Federalist Papers*. Three of the five other original members served in the Constitutional Convention, as did Chief Justice Ellsworth and William Paterson, the author of the New Jersey Plan, whom Washington nominated in 1793. The others all supported ratification of the Constitution. Indeed, all of Washington's and Adams's nominees staunchly supported the Constitution and the federal government in its conflicts with the states.