Part I

Introduction

CHAPTER ONE

The Legal Model

Why do the justices on the United States Supreme Court be-
have they way they do? In an attempt to answer this ques-
tion, Supreme Court scholars have posited three theoretical
models: the legal model, the attitudinal model, and various
strategic models.

Models, according to Segal, Spaeth, and Benesh (2005,
p. 20), are "a simplified representation of reality. They do not
constitute reality itself. A good model serves two contradictory
purposes: It accurately explains the behavior in question and
it does so parsimoniously, that is, sparingly or frugally." One
can always maintain that a given model explains the behavior,
but in science we expect models to be testable or falsifiable.
A simple model might be easier to test and may be accurate
enough especially when used to explain behavior averaged

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over a large number of people or for a long period of time. The legal model is the traditional, nineteenth-century explanation of why the justices behave the way they do. Advocates of this model posit that the justices decide cases based on their interpretation of the relevant legal materials. These materials include the U.S. Constitution, federal and state statutes, local ordinances, and the Court's precedents.

The legal model is insufficiently explanatory of decision making on the Court because the justices usually have to interpret ambiguous legal texts and it is uncertain how they ought to do so. Let us assume, for example, that the Supreme Court has to decide whether the use of lethal injections as a means for imposing capital punishment constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the U.S. Constitution. Should the justices focus on the text of the constitutional language? If they do, should they use the meaning of that text at the time the Eighth Amendment was adopted or should they use today's meaning? Whichever time period they choose, what sources should they examine to determine the meaning of the text? Should they examine public opinion, the opinion of elites, or the opinion of those who drafted this provision of the Constitution? What sources should they use to obtain this information? It is even uncertain as to who are the drafters of a provision of the Constitution. Is it the person or persons who wrote the language, the

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framers who voted for it, or the men who voted for the Constitution in the various states? Should the justices care about the purpose of the provision or the purpose of the Bill of Rights as a whole? How much attention should the justices pay to how prior Courts have interpreted this provision? There are no good obvious answers to these questions. Because there are no good obvious answers, this model cannot be tested and, thus, cannot be shown to be true or false.

Because the law is ambiguous, Segal and Spaeth (2002) reject the legal model. In place of this model, they argue that the justices vote their attitudes. We contend, however, that even though the law usually is ambiguous in the cases decided by the Court, a legal argument in favor of one side is often stronger than a legal argument in favor of the other side and that the strength of the legal argument is likely to be one of the variables influencing the justices' decision in a given case.

What characteristics should we associate with a strong legal argument? First, like all strong arguments, a strong legal argument ought to be coherent, complete, and consistent with our understanding of the real world. Second, it should be consistent with the relevant precedents or present a good reason why these precedents should not be followed or extended. Third, a strong legal argument ought to be based on an intelligent understanding of the relevant legal text. Fourth, it should be based on a favorable factual situation. Finally, for most

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justices, a strong legal argument ought to support an outcome
and rule of law that will enable the Court not only to present
a principled resolution of the question involved in the case,
but also to establish a workable standard for future cases.

Until now we have advanced arguments both in favor of
the legal model and against it. Can we posit a legal model
that also recognizes the fact that the justices are influenced
by their attitudes? Braman and Nelson (2007) have done so.
They maintain (2007, p. 942) that the justices "really do use
the law in thinking through cases, though their preferences [or
attitudes] may influence the kinds of arguments and evidence
they find persuasive." Braman and Nelson further maintain
that there are limits to the extent to which the justices' deci-
sions are based on "motivated reasoning" (i.e., reasoning
influenced by their attitudes). Indeed, the "legal training and
socialization of judges . . . includes constant reinforcement of
the norm that it is *wholly inappropriate* for unelected jurists to
impose their own beliefs on their decisions" (p. 941). Thus, we
might expect that in some cases a given justice will interpret
the relevant legal materials without regard to his attitudes.
He would, instead, vote for the litigant with the stronger legal
argument. Braman and Nelson's argument was influenced by
their understanding of cognitive psychology.

It is too easy to adopt this alternative understanding of the
decision making by the Supreme Court and conclude that the

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justices follow the legal model. Our job, if we want to be persuasive, is to indicate whether legal variables are influential even if we accept the view of Segal and Spaeth that the legal model has to be compared with an attitudinal model. More specifically, they argue that when a conservative justice votes for the conservative outcome in a given case and offers a legal justification for the outcome he favors, we should assume that he is voting his attitudes and not assume that his vote was a product of legal interpretation.

Some Supreme Court scholars have attempted to address this issue and have concluded that precedent influences the justices' votes. Richards and Kritzer (2002) and Kritzer and Richards (2003, 2005), for example, examined decision making at the final vote on the merits in three narrow areas of the law – freedom of speech, the establishment (of religion) clause, and search and seizure cases. They discovered that the attitudes of the justices and various case characteristics (usually called "case stimuli") significantly affected the voting of the justices, but they also found that the justices voted differently whether they were voting prior to or after a key landmark decision. In addition, in a major book-length study of the 1946 to 1999 era of the Court, Hansford and Spriggs (2006) discovered that the Court's interpretation of precedent was based not only on the attitudes of the justices but also on the extent to which the precedent was treated favorably in past

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decisions. Based on these four studies, it is reasonable to con-
clude that precedent influences the justices' decision making,
even if we do not adopt the legal model advanced by Braman
and Nelson.

It is uncertain, however, whether aspects of the legal model
other than precedent are influential. Baum (2007, p. 120)
maintains that "the law in general . . . channels the justices'
choices, often in subtle ways." In support of this statement,
one might point to those cases in which a justice interprets
a federal statute in a certain way while urging Congress to
change the statute (see Hausegger and Baum 1999). In these
cases it is reasonable to assume that the justices did not favor
the decision they handed down but believed that they were
compelled to so rule. This kind of activity, however, does not
occur often on the Court. Also, in a recent study Howard and
Segal (2002) sought to ascertain whether the justices on the
Court are influenced by the original meaning of the constitu-
tional text or by the intent of the framers of that text. They
examined eight terms of the Supreme Court and discovered
that the liberal and conservative justices were likely to sup-
port the arguments made by the attorneys from their preferred
sides. In other words, they did not find any evidence that this
aspect of the legal model was influential.

Because the legal model in its entirety has not been shown
to be influential in determining the justices' final votes, and

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because other variables (such as attitudes) are likely to be influential, this model is simply not sufficiently useful for explaining decision making on the Court. Scholars, therefore, have turned to other models for this purpose.

Before you read about the first of these other models, it is necessary to know about the various stages in Supreme Court decision making. To facilitate this goal, we urge you to read Appendix 1 of this book.

CHAPTER TWO

The Attitudinal Model

In reaction to the weaknesses of the legal model, Pritchett (1948) proposed an attitudinal model. This model was the dominant model for explaining the final vote on the merits from the 1950s until the end of the 1990s. Some scholars (Segal and Spaeth, 2002) believe that it is still the dominant model for explaining this vote. It is widely accepted among Supreme Court scholars (or at least among most political scientists) that the attitudes of the justices are the most important determinants of why some justices confronted with the same set of cases vote for the liberal outcome, whereas other justices vote for the conservative outcome. Baum (2007, p. 149), for example, concluded that

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Of all the considerations that could influence the Supreme Court decisions [at the final vote on the merits], I have given primary emphasis to the justices' policy preferences. The application of the law to the Court's cases is usually ambiguous, and constraints from the Court's environment are generally weak. As a result, the justices have considerable freedom to take positions that accord with their own conceptions of good policy.

Segal and Spaeth (2002) present an even more elaborate explanation of why the justices can be expected to cast sincere, attitudinal votes at the final vote on the merits. They tell us that (1) the justices possess lifetime tenure; (2) they hold highly prestigious jobs and, therefore, rarely seek higher office; (3) the justices constitute an independent, strong branch of the federal government and usually do not have to worry about the possible reaction of Congress or the president to their decisions; (4) there is a "reservoir of public support" for the Court (Segal, Spaeth, and Benesh, 2005, p. 35); (5) the Court is a court of last resort (unlike the highest state court and the U.S. Court of Appeals, decisions of the U.S. Supreme Court cannot be appealed to a higher court); and (6) the justices have virtually complete discretion regarding which cases they wish to decide, and they use this discretion to decide cases that offer plausible legal arguments on both sides and, therefore, give them the freedom to vote their

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