STRATEGY ON THE UNITED STATES SUPREME COURT

To what extent do the justices on the Supreme Court behave strategically? In *Strategy on the United States Supreme Court*, Saul Brenner and Joseph M. Whitmeyer investigate the answers to this question and reveal that justices are substantially less strategic than many Supreme Court scholars believe. By examining the research to date on each of the justice’s important activities, Brenner and Whitmeyer’s work shows that the justices often do not cast their certiorari votes in accord with the outcome-prediction strategy, that the other members of the conference coalition bargain successfully with the majority opinion writer in less than 6 percent of the situations, and that most of the fluidity in voting on the Court is nonstrategic. This work is essential to understanding how strategic behavior – or its absence – influences the decisions of the Supreme Court and, as a result, American politics and society.

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Strategy on the United States Supreme Court

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Saul Brenner dedicates this book to his beautiful and talented grandchildren, Noam, Jonah, and Adira.

Joseph M. Whitmeyer dedicates this book to Rosemary.
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Preface

Since 1958 (Schubert, 1958) and particularly since 1989 (Marks, 1989), a host of Supreme Court scholars have advanced various strategic models in an attempt to explain why the Supreme Court justices behave the way they do.

The purpose of this book is to introduce a great deal of the Supreme Court strategic research to undergraduate and graduate students, to evaluate it, and, at times, to present an original perspective regarding the topics covered by it. Strategic scholars, for example, typically view the majority opinion as a product of bargaining among the justices. In Chapter 8 of this book, however, we use the data supplied by Maltzman, Spriggs, and Wahlbeck for the Burger Court (2000) and show that there was very little individual bargaining over the content of the majority opinion on that Court. In addition, the
conventional wisdom is that the individual justices pursue an outcome-prediction strategy; in other words, they vote to grant cert when they expect to win at the final vote on the merits and vote to deny cert when they expect to lose. In Chapter 5, we examine the prior literature, present some new findings, and conclude that there is much less support for this model than many strategic scholars believe.

We have attempted to write a book that can be understood by students who may lack a good methodological background but who are willing to make the effort of following a theoretical argument.

Although we have learned a great deal from many of the sources listed in the reference section, this book is particularly dependent on the prior research and theoretical discussion of eight scholars: Larry Baum, Lee Epstein, Jack Knight, Forrest Maltzman, Jeffrey Segal, Harold Spaeth, James Spriggs, and Paul Wahlbeck. These scholars have been the main protagonists in the debate regarding the value of strategic models for the study of Supreme Court decision making. We believe that the field of judicial behavior would have been substantially less sophisticated and informative if these scholars had chosen, instead, to become Wall Street lawyers or stand-up comics.

The two authors of this book come from very different backgrounds. Saul Brenner received a law degree from
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Columbia Law School and a Ph.D. in political science from New York University. He has been publishing articles concerning Supreme Court decision making since 1975 (Brenner, 1975).

Joseph M. Whitmeyer has a Ph.D. in sociology from the University of Washington. Most of his research has concerned behavior in small groups in general. He began publishing articles regarding Supreme Court decision making only recently.

The authors of this book have submitted a longer version of Chapter 10 to a political science journal for possible publication.

We want to thank the following scholars for their critiques of earlier versions of this book: Ted Arrington, Larry Baum, Ken Godwin, Timothy Hagle, Eric Heberlig, and John Szmer, as well as the anonymous reviewers.

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