

# Crafting Law on the Supreme Court

The Collegial Game

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# Introduction

On June 18, 1990, the Supreme Court ruled in *Pennsylvania v. Muniz* that although a drunk driving suspect had not been advised of his right to remain silent, as mandated by *Miranda v. Arizona* (1966), the prosecution could introduce at trial a videotape of his slurred speech taken as he answered questions during his booking. Writing for the Court, Justice William Brennan explained that the videotape was not “rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating.” Instead, the Court ruled “the physical inability to articulate words in a clear manner” was akin to physical evidence, such as a blood test, rather than testimonial evidence, and thus was not covered by the Fifth Amendment’s protection against self-incrimination. Eight justices supported this portion of the Court’s opinion. Justice Thurgood Marshall was the lone dissenter.

Once the Court’s opinion upheld the right to use the videotape, the Court turned its attention to the more contentious issue of whether the questions asked of the defendant were permissible under *Miranda*. In addressing this issue, Brennan’s opinion drew a distinction between routine questions about the suspect’s name and address and questions intended to check Inocencio Muniz’s analytical ability. After arresting Muniz, the police asked him in what year he had turned six. Even though Muniz could answer the routine booking questions, albeit in a slurred manner, he was unable to determine the year of his sixth birthday. The Brennan opinion made clear that a criminal suspect’s response to a question requiring this sort of calculation was testimonial in nature and thus infringed upon the suspect’s Fifth Amendment rights. That is, Muniz’s inability to make the rather simple calculation about the year of his sixth birthday potentially communicated his guilt by permitting someone to infer that his mental state was impaired. While Justice Marshall supported the

majority on this point, four justices, including Chief Justice Rehnquist, dissented.

In allowing questions about Muniz's name and address, Justice Brennan's opinion recognized a "routine booking question" exception to *Miranda v. Arizona* (1966). Based on the reasoning in *Muniz*, police can ask questions regarding biographical information without giving a *Miranda* warning. Importantly, this case represents the first time the Supreme Court explicitly recognized such an exception to a criminal suspect's constitutional right not to incriminate himself. Thus, Muniz's answers to the questions regarding his age, weight, height, and the like were admissible at trial because they fell within this exception, while his answer to the question about his sixth birthday was inadmissible. This portion of the opinion, however, did not receive majority support. Justice Marshall dissented, and Chief Justice Rehnquist with three other justices (White, Blackmun, and Stevens) concurred in the result, but found the exception unnecessary as they believed none of the responses to the booking questions were testimonial.

On its face, the outcome in *Muniz* was not entirely surprising. Since the appointment of Chief Justice Warren Burger in 1969, the Court has issued rulings in favor of the prosecution in 71.6 percent of the 162 cases that pertain to *Miranda*-related issues.<sup>1</sup> Indeed, in 1990, the median justice, Byron White, supported prosecutors in 75.2 percent of these cases.

Brennan's ruling was extraordinary, though, for several different reasons. Coming only two weeks before he was to retire from the bench, the decision appears inconsistent with the historically broad interpretation that Brennan had given to the Fifth Amendment. Of the *Miranda*-related cases that were decided while Brennan served on the Court (1956–1990), Brennan voted with prosecutors only 28.0 percent of the time. Brennan was considered a consistent voice in favor of protecting an individual's *Miranda* rights. Moreover, Brennan's defense of defendants' rights was historically supported by his ideological ally, Justice Thurgood Marshall. Indeed, in the 146 *Miranda*-related cases in which both Marshall and Brennan participated, the two justices voted alike 93.2 percent of the time. In *Muniz*, however, Justice Marshall agreed to

<sup>1</sup> *Miranda v. Arizona* (1966) establishes a right to remain silent, the presence of counsel at interrogations, and knowledge of one's rights. To calculate the percentage of cases where the Court rules with the prosecution, we rely on Spaeth (1998) to establish the Court's behavior in orally argued, signed, and per curiam opinions that delve into issues of self-incrimination, right to counsel, and *Miranda* warnings.

join his ideological ally on only one point. In contrast, the justices who supported Brennan's opinion in *Muniz* agreed with Brennan, on average, in only 28.7 percent of these cases.

Why did Brennan author an opinion that restricted individual liberties? And why did Marshall refuse to join his ideological ally, while Brennan's usual adversaries chose to join his opinion? The answers become clear when we delve into the personal papers of the justices. In a letter to Marshall dated June 7, 1990, Justice Brennan informed Marshall that although "everyone except you and me would recognize the existence of an exception to *Miranda* for 'routine booking questions,' . . . I made the strategic judgment to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible" (Brennan 1990a). In this letter, Brennan admitted that even though he personally opposed his newly created exception to *Miranda*, he voted with the majority to control the breadth of the legal rule being developed in the opinion.<sup>2</sup>

Indeed, in his first draft of the *Muniz* majority opinion, Brennan argued that the routine booking question exception should not be applied in this case because the state had not demonstrated an administrative need to ask the questions. He held that the case should be remanded to establish whether such a need necessitated these questions (Brennan 1990b). Justice O'Connor responded to this draft by writing a note to Brennan in which she characterized herself as "in accord with much of [his] opinion" (O'Connor 1990), but she took issue with the doubts Brennan expressed about its application in this case. O'Connor particularly objected to the administrative needs test articulated by Brennan, concluding with a threat to withhold support from Brennan's opinion. Brennan immediately responded by circulating a draft that both acknowledged the presence of a routine booking question exception and removed the doubt he previously expressed about the admissibility of the videotape of the defendant's answers to these questions (Brennan 1990c).

In a subsequent letter Brennan sent to Marshall after seeing Marshall's *Muniz* dissent, Brennan wrote: "Thanks, pal, for permitting me to glance at your

<sup>2</sup> Brennan had a disproportionate ability to shape the majority because he was in a position as the senior associate justice to assign it to himself. Even though the chief justice assigns the majority opinion when he votes with the majority, in this instance Chief Justice Rehnquist did not support the majority position in all respects. Although Rehnquist joined the majority's ruling on the use of the videotape at trial, he dissented on the "birthday question" and concurred on the "routine booking question" exception without joining that part of Brennan's opinion.



dissent in this case. I think it is quite fine, and I fully understand your wanting to take me to task for recognizing an exception to *Miranda*, though I still firmly believe that this was the strategically proper move here. If Sandra had gotten her hands on this issue, who knows what would have been left of *Miranda*" (Brennan 1990d).

*Pennsylvania v. Muniz* raises a theoretical puzzle for scholars of the Supreme Court. The dominant explanations of Supreme Court decision making – the legal and attitudinal models – leave little room for such strategic positioning and calculation by the justices. Scholars who adhere to the legal approach to decision making generally attribute case outcomes and thus the behavior of individual justices to particular factual circumstances, the present state of the law, or other legally relevant factors. The legal model would therefore predict that legal precedent or modes of legal analysis (such as original intent) would explain Brennan's vote and opinion in this case.

Political scientists attempting to explain judicial outcomes tend to dwell on the ideological proclivities of individual justices. According to what has become known by political scientists as the attitudinal model, judicial outcomes reflect a combination of legal facts and the policy preferences of individual justices. As Segal and Spaeth characterize the model, "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (1993, 65). The attitudinal model suggests that Brennan's vote in *Muniz* resulted from his ideological orientation. Because the model's main proponents indicate that empirical evidence only supports the notion that a justice's final vote on the merits should be attributed to a justice's policy preferences, the model does not explain how opinions are crafted (Segal and Spaeth 1994).

Brennan's actions and correspondence in *Muniz* reveal that more than his understanding of legal precedent or his ideology shaped his final vote and the opinion he crafted for the Court. Indeed, Brennan's actions reflected his strategic calculation about what steps could be taken to curtail the erosion of *Miranda v. Arizona* (1966) favored by a majority of the Court. Both policy preferences and rational calculation mattered in this case. Yet, although the strategic nature of Brennan's actions in *Pennsylvania v. Muniz* are clear, we know little about how frequently or under what conditions justices are prone to play this strategic game. The primary focus of this book is strategic calculation on the Supreme Court. Such an approach, we argue, represents a significant departure from the dominant paradigm favored by political scientists,

the attitudinal model. As we hope to show, shifting our substantive focus from casting votes to crafting opinions requires that we adapt our theoretical lenses as well.

## COURT OPINIONS MATTER

Brennan's actions in *Muniz* highlight a point that is obvious to legal scholars but often underestimated by political scientists: Court opinions matter. Brennan worried more about how the opinion in *Pennsylvania v. Muniz* would be framed than about casting a vote against the defendant. Political scientists who study judicial process and politics tend to focus on the disposition of cases, because that is where the most readily available data exist. In contrast, scholars who approach the study of the Court from a legal perspective recognize that it is the legal rules articulated in Court opinions that give the Court its most powerful legal weapon. Thus, to understand fully the political dynamics of the Court, we need to move beyond the study of voting alignments to explore the multiple strategies that produce Court opinions. It is this premise that motivates our study of the modern Supreme Court.

Creating expectations about future Court behavior and sanctions for non-compliance, Supreme Court opinions have implications for the behavior of private parties and decision makers in all three branches of government (Spriggs 1996; Wahlbeck 1997; Epstein and Knight 1998). Court opinions influence subsequent rulings by lower courts (Rohde and Spaeth 1976; Segal and Spaeth 1993, 261; Johnson 1987a; Songer, Segal, and Cameron 1994), provide guideposts or targets for subsequent congressional behavior (Es-kridge 1991a, 1991b; Ignagni and Meernik 1994), and even affect executive branch decision making (Spriggs 1996, 1997). In addition to influencing political decision makers, Court opinions provide private parties and organizations with information about future Court actions and thus influence private behavior as well. As Hurst explains, "legal procedures and tools and legal compulsions . . . create a framework of reasonable expectations within which rational decisions could be taken for the future" (1956, 10–11).

Judicial scholars, of course, have recognized the importance of Supreme Court opinions. As Rohde and Spaeth explain, "The Opinion of the Court is the core of the policy-making power of the Supreme Court. The vote on the merits in conference determines only whether the decisions of the court be-

low will be affirmed or reversed. It is the majority opinion which lays down the broad constitutional and legal principles that govern the decision in the case before the Court, which are theoretically binding on lower courts in all similar cases, and which establish precedents for future decisions of the Court” (1976, 172). But journalists and scholars, recognizing the importance of opinions, usually offer only anecdotal evidence about the crafting of particular opinions (Woodward and Armstrong 1979; B. Schwartz 1985, 1988, 1996). Such detailed case studies highlight the vast array of tactics and factors that may influence Court opinions but offer little theoretical grounding for framing our understanding of Court dynamics.

In contrast, the most theoretically rich and empirically robust studies by judicial scholars generally focus on explaining case outcomes (e.g., who wins or loses) or the behavior of individual justices. For instance, we know much about what factors influence the Court’s decision to grant certiorari (Caldeira and Wright 1988; McGuire and Caldeira 1993; Perry 1991; Provine 1980; Tanenhaus et al. 1963; Ulmer 1984), and we can account for the voting patterns of individual justices or the Court (Pritchett 1948; Rohde and Spaeth 1976; Schubert 1965, 1974; Segal et al. 1995; Segal and Cover 1989; Segal and Spaeth 1993). Although such studies have been instrumental in furthering our understanding of the Court, they leave unexamined the factors that shape Court opinions and thus ultimately the law. The new challenge for students of the Court, it seems clear, is to offer a theoretically grounded and empirically rich portrait of the multiple strategies that together yield the Court’s most powerful weapon. That is the challenge we take up in this book.

## THE OPINION-WRITING PROCESS

Supreme Court opinions are shaped sequentially by four elements of the opinion-writing process: the initial assignment of the case, the writing of the first opinion draft, the response of the justices to the opinion author’s drafts, and the subsequent reply of the opinion author to his or her colleagues on the bench. We consider each of these influences in turn.

After oral arguments are heard, the justices meet in conference, which provides them an opportunity to cast an initial vote and to provide their colleagues with the legal justification for their vote. The purpose of the conference vote and discussion is, as Justice Rehnquist (1987, 295) put it, “to

determine the view of the majority of the Court.” Although these votes provide an indication of the direction in which the Court is likely to rule, the votes are nonbinding. Indeed, justices’ final votes do not necessarily resemble their initial conference votes (Brenner 1995; Brenner, Hagle, and Spaeth 1989; Dorff and Brenner 1992; Hagle and Spaeth 1991; Howard 1968; Maltzman and Wahlbeck 1996a). In this sense, the conference discussion resembles a form of “cheap talk,” or communication through costless words (Crawford 1990; Farrell and Gibbons 1989). Justices thus can articulate positions at conference without necessarily binding themselves to that position in the future.

A justice voting with the majority in conference is normally selected to craft the majority opinion. According to Court custom, if the chief justice votes with the majority, he has the right to assign the majority opinion (Schwartz 1993, 152; Rehnquist 1987, 296). If the chief justice sides with the conference minority, the most senior associate justice in the majority assigns the majority opinion (Brennan 1963; Hughes 1966, 58–59; Segal and Spaeth 1993, 262). Because of their control over the shape of the opinion, majority opinion authors are traditionally considered to wield considerable influence over Court opinions (Rohde and Spaeth 1976, 172). A large part of the assigned author’s influence stems from his or her position as an agenda setter (see Riker 1982, 1986; Hammond 1986; Shepsle and Weingast 1987). The opinion circulated by the author is almost always the first move in the case. Other justices wait to circulate dissenting or concurring opinions until they have at least seen the majority opinion draft. By virtue of this position, then, the assigned author enjoys an agenda-setting advantage, given his or her ability to propose a policy position from the range of available policy alternatives. This advantage is enhanced by the costs associated with writing a competing opinion. Because justices encounter time and workload constraints, a justice who disagrees with portions of an opinion may simply join to avoid the costs associated with writing an alternative opinion.<sup>3</sup>

This agenda-setting effect makes the assignment of the opinion a particularly strategic choice. As much was suggested by Justice Frankfurter in 1949 when he noted, “perhaps no aspect of the ‘administrative side’ that is vested in the Chief Justice is more important than the duty to assign the writing of the Court’s opinion” (Frankfurter 1949, 3; Clark 1959, 51). Or, in the words

<sup>3</sup> Justices call this type of grudging assent a “graveyard dissent.” As Justice White wrote to Justice Marshall in *Department of Justice v. Tax Analysts* (1989): “I was the other way, but I acquiesce, i.e., a graveyard dissent” (White 1989).

of Justice Fortas, “If the Chief Justice assigns the writing of the Court to Mr. Justice A, a statement of profound consequence may emerge. If he assigns it to Mr. Justice B, the opinion of the Court may be of limited consequence” (Fortas 1975, 405). Political scientists, of course, have also long recognized that one of the chief justice’s most important tools is his prerogative to assign the Court’s opinion when he is in the majority (e.g., Danelski 1968; Murphy 1964; Ulmer 1970a; Rohde 1972a; Rohde and Spaeth 1976; Slotnick 1978, 1979a; Segal and Spaeth 1993). Likewise, such assignment power has led some scholars to argue that the senior associate justice is also more powerful than his colleagues because of his occasional role in assigning the majority opinion (Johnstone 1992).

Although the majority opinion author may have a disproportionate ability to shape the majority opinion, the majority opinion author “is not, however, a free agent who can simply write the opinion to satisfy solely his own preferences” (Rohde and Spaeth 1976, 172). Because outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process, what we call the collegial game. As Chief Justice William Rehnquist put it, to get an opinion for a majority of the Court, “some give and take is inevitable. . . . Judging inevitably has a large individual component in it, but the individual contribution of a good judge is filtered through the deliberative process of the court as a body” (Rehnquist 1992, 270). Or, as Rehnquist wrote elsewhere, “While of necessity much latitude is given to the opinion writer, there are inevitable compromises” (Rehnquist 1976, 643). The institutional structure of the Court’s opinion-writing process – including such informal rules as the chief assigning cases when voting with the majority or Court opinions constituting precedent only when supported by a majority of the justices – creates the context in which the collegial game is played.

After opinion assignment, the collegial game is played in three additional phases. The first phase occurs as the opinion author crafts a first draft of the majority opinion.<sup>4</sup> At this stage, opinion authors frequently take into account any discussion that occurred in the initial justices’ conference following the oral argument. In many respects, the initial conference serves as an opportunity for each justice to communicate information to the majority opinion

<sup>4</sup> As is well known, contemporary Supreme Court justices generally use law clerks to help craft the first draft of an opinion (Rehnquist 1987). For an examination of the stylistic effect clerks have on opinions, see Wahlbeck, Spriggs, and Sigelman (1999).

writer about his or her preferences regarding the legal outcome and reasoning for each case. Although the conference discussion constitutes “cheap talk,” it may nevertheless allow justices to coordinate their positions and enable the author to pen an opinion that will gain support among the justices (see Crawford 1990). In other words, an opinion author is likely (and wise) to use the information gleaned at conference to try to draft an opinion that reflects both his or her own policy goal and the preferences of the expected majority coalition.

The other postassignment phases of the collegial game begin after a first draft opinion is circulated. Now a process of give-and-take occurs among the justices. Court custom is for the justices to respond to the draft opinion in writing (B. Schwartz 1996; Rehnquist 1987). Once a draft is circulated, other justices who initially voted with the majority have a range of options. They can proceed to “join” the opinion, make suggestions (sometimes friendly, sometimes hostile) for recommended changes, announce that they are unprepared to take any action at that time, or decide to abandon the majority and write a concurring or dissenting opinion. These reactions signal to the majority opinion author whether and in what manner to respond to the multiple demands of his or her colleagues. The final phase occurs as opinion authors circulate additional draft opinions in response to their colleagues’ concerns.

The importance of the signals sent during the second postassignment phase is made apparent by the office manual Justice Lewis Powell prepared for his new clerks. Powell explains that after circulating the first draft: “You then wait anxiously to see what reaction this initial draft will prompt from other Justices. Subsequent drafts may be sent around to reflect stylistic revisions, cite checking changes, or accommodations made in the hope of obtaining the support of other Justices” (Powell 1975). This portrait of the Court’s decision-making process resembles Justice Rehnquist’s. Rehnquist notes that while he tries to write a first draft that comports with the conference discussion, “the proof of the pudding will be the reactions of those who voted with the majority at conference” (Rehnquist 1987, 301).

Eventually, every justice writes or joins an opinion, and the opinion that commands the support of a majority of the justices becomes the opinion of the Court. Although the final majority opinion is most regularly authored by the justice who was initially assigned the opinion, on rare occasions another justice’s concurrence or dissent is transformed into the Court’s majority opinion. Justice William Brennan explains, “Before everyone has finally made up his mind [there is] a constant interchange among us . . . while we hammer out

the final form of the opinion” (Brennan 1960, 405). Justice Brennan’s description of the opinion-writing process is consistent with Justice Tom Clark’s observation that once the opinion draft is circulated, “the fur begins to fly” (1959, 51, as quoted in O’Brien 1996, 307). Thus, although the assignment of the majority opinion is a first critical step in shaping the final opinion, the responses of the other justices and the subsequent replies of the majority opinion author also play a dramatic and influential role in shaping the Court’s opinion. Understanding the political dynamics of these interchanges among the justices – and offering a coherent theoretical perspective to account for such strategic interaction – is our task in this book.

### THE (POLITICAL SCIENCE) TEXTBOOK COURT

Whereas adherents to the legal approach tend to attribute case outcomes to case facts and the law (see Levi 1949; Segal 1984), the textbook justice according to most political scientists votes in a manner that reflects his or her sincere policy preferences (Segal and Spaeth 1993). Those scholars who suggest that policy preferences shape judicial behavior subscribe to the attitudinal model: justices cast votes based exclusively on their policy preferences. If a justice prefers policy Y and a lower court strikes down that policy, the attitudinal model predicts that the justice will vote to reverse the lower court. As Segal and Cover succinctly put it: “The Court’s structure grants the justices great freedom ‘to base their decisions *solely* upon personal policy preferences’” (1989, 558, quoting Rohde and Spaeth 1976, 72).

Empirical support for the attitudinal model is widespread. As numerous scholars successfully document, justices’ votes are consistent with their policy preferences (Hagle and Spaeth 1992, 1993; Segal and Spaeth 1993; Segal et al. 1995; Segal and Cover 1989). Although the attitudinal approach has been fruitfully employed to explain justices’ final votes on case dispositions, its applicability to other, and potentially more important, forms of judicial behavior is unclear. Modern proponents of the attitudinal model, for example, insist that it is only applicable to Supreme Court justices’ final votes on the merits (see Segal and Spaeth 1994, 11).<sup>5</sup> Indeed, even Harold Spaeth, the

<sup>5</sup> Although Segal and Spaeth (1994) claim that the model does not attempt to explain choices other than the votes on the merits, other scholars have interpreted the model as attempting to explain much more than justices’ final votes on the merits (Knight 1994). This interpretation

scholar most closely associated with the attitudinal model, has noted that “opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate” (Spaeth 1995a, 314).

In many respects, the attitudinal approach is the culmination of the behavioral revolution as applied to the study of politics (see Segal and Spaeth 1993, 73). As is well known, the behavioral revolution, which began to flourish in the early 1950s, radically altered the study of politics. Rather than merely describing historical events and formal institutions (e.g., constitutions), political scientists sought to identify and understand empirical regularities. The behavioral approach represented a marked departure from political science’s normative and anecdotal origins (Dahl 1961; Polsby, Dentler, and Smith 1963), placing political scientists who articulated and tested hypotheses with empirical data at the forefront of the discipline. The behavioral revolution, in short, ushered in the scientific study of politics.

The signal distinction between behavioralists and their predecessors was the behavioralists’ abandonment of political science’s earliest roots: the study of political institutions. In the words of Kenneth Shepsle, “institutions were, in the thinking of many behavioralists, empty shells to be filled by individual roles, statuses and values” (1989, 133; Clayton 1999). Indeed, the leading behavioral studies of the electorate (Berelson, Lazarsfeld, and McPhee 1954; Campbell et al. 1960), Congress (Fenno 1962, 1966; Matthews 1960; Manley 1970), and the judiciary (Schubert 1965; Spaeth 1963) almost always embraced sociological or psychological explanations of behavior. Such psychological and sociological theories of human behavior shared two important tenets. First, both portrayed human action as basically free from real choices. Instead, human action was said to be dictated by sociological or psychological forces beyond the immediate control of any individual. Sociological and psychological explanations, in other words, were deterministic at their core. Second, both approaches viewed individuals as “fundamental building blocks” (Shepsle 1989, 133). Under such a rubric, political outcomes were no more than “the aggregation of individual actions” (Shepsle 1989, 133).

Although some of the earliest works that embraced the attitudinal approach had explicit links to sociological and psychological theories dominant in the

is obviously based on the amount of attention that Segal and Spaeth (1993) devote to stages in the Court decision-making process that precede the final votes. Regardless of Segal and Spaeth’s intentions, their empirical findings suggest that the attitudinal model consistently explains only the final vote on a case’s merits.



1950s and 1960s (see Nagel 1961, 1962; Schmidhauser 1961; Schubert 1961, 1962, 1965; Spaeth 1961, 1963; Ulmer 1970b, 1973a; Vines 1964), the attitudinal approach took a significant turn in the 1970s with the advent of rational choice analysis. Supreme Court justices were now seen as maximizers of exogenously determined preferences. This new attitudinal perspective suggested that preferences, not roles or backgrounds, shaped behavior. Drawing on this new perspective, Rohde and Spaeth (1976) placed the psychometric attitudinal model within a rational choice framework. Somewhat similar to Schubert (1965), Rohde and Spaeth maintained that justices cast votes by thinking about the facts of a case – the dominant legal issue and the types of litigants – in light of their attitudes and values. They went on to argue, though, that justices are free to vote their attitudes because of the insulating nature of the Court’s institutional features, specifically because of justices’ lifetime tenure, their lack of ambition for higher office, and the Court’s position as the court of last resort.

Although the attitudinal approach articulated by Spaeth and his collaborators builds from a different theoretical base than the earlier versions of the attitudinal approach, it has two very important links to its sociological and psychological roots. First, the attitudinal model continues to view the votes of justices as shaped by forces (in particular, preferences) exogenous to the strategic context of the Court. Second, the attitudinal approach continues to view individuals as the analytical building blocks and outcomes as the aggregated preferences of a Court majority. For this reason, Baum observes that “students of judicial behavior generally focus on individual judges, building explanations of collective choices from the individual level” (1997, 7). In many respects, then, the attitudinal model as articulated since the 1970s represents the culmination of the behavioral revolution as applied to the study of judicial politics. As Segal and Spaeth explain, “The behavioral school of political science that began to flower in the 1950s and continues to bloom today brought it [the attitudinal model] to fruition” (1993, 73).

## INSTITUTIONS AND JUDICIAL BEHAVIOR

In recent years, judicial scholars have begun to incorporate into their explanations the role of institutions (Baum 1997; Brace and Hall 1990, 1995; Clayton and Gillman 1999; Epstein and Knight 1998). “Institutions are the rules

of the game in society or, more formally, are the humanly devised constraints that shape human interaction” (North 1990, 30). Institutions, in other words, provide the structure within which decision making occurs and thereby affect the choices that can be made. This book fits squarely in this theoretical tradition. Rather than viewing justices as unconstrained actors whose behavior is dictated by their policy preferences, recent work has suggested that justices are strategic actors operating in an environment defined by institutional constraints. As Baum explains, “Judges who vote strategically take into account the effects of their choices on collective results when they vote on outcomes and write or support opinions. . . . Because of this motivation, the positions they take may differ from the positions that they most prefer” (1997, 90).

In many respects, the strategic approach directly contradicts the two tenets of the behavioral tradition: that human behavior is predetermined and that individual action can be aggregated to account for political outcomes. In contrast, a strategic explanation places rational political actors back into their institutional context, recognizing that rational calculation entails consideration of the strategic element of the political game. Instead of deterministically responding to psychological or sociological forces beyond their control, rational actors understand that they face a number of constraints imposed by the actions of other political actors and by the institutional context in which they act. Justices as strategic actors must take into consideration these constraints as they attempt to introduce their policy preferences into the law.<sup>6</sup>

Among judicial scholars, the intellectual origins of a model of strategic interaction were offered by Murphy in his pathbreaking *Elements of Judicial Strategy* (1964). According to Murphy, justices are constrained by the actions and preferences of their colleagues, as well as by decision makers and influences outside of the Court. Murphy did not view each justice as an independent actor. Nor did he think outcomes were the aggregation of individual preferences. Instead, Murphy argued that justices’ behavior was shaped by the actions taken by the other justices and the potential for action by Congress, the president, and the general public. In short, Murphy saw that justices are constrained by institutional features internal, as well as external, to the Court.<sup>7</sup>

<sup>6</sup> Although we argue that a justice’s principal goal is policy, at times justices may pursue other goals, such as legitimacy of the Court (Epstein and Knight 1998; Baum 1997).

<sup>7</sup> Scholars have investigated whether justices strategically respond to actors external to the Court, but the results have been mixed. While some scholars suggest that the Court acts strategically either in specific cases (Knight and Epstein 1996a) or under particular conditions (Hansford and Damore n.d.), others argue that the political environment does not systemat-

Institutional constraints often take the form of formal rules or informal norms that limit the choices available to political actors (Knight 1992; North 1990; March and Olsen 1984, 1989).<sup>8</sup> Formal rules can be in the form of constitutional provisions, legislative statutes, or even court opinions. Informal rules and procedures include, for example, the chief justice assigning the majority opinion when in the conference majority, or a Court opinion setting precedent only if supported by a majority of the sitting justices. Rules provide the context in which strategic behavior is possible by providing information about expected behavior and by signaling sanctions for noncompliance (Knight 1992; North 1990). Institutions therefore mediate between preferences and outcomes by affecting the justices' beliefs about the consequences of their actions. Because the heart of strategic action is interdependency – with justices' choices being shaped, at least in part, by the preferences and likely actions of other relevant actors – justices must possess information about how other justices are likely to behave. Formal or informal rules facilitate this process, providing the requisite information for successful strategic action. Of course, while justices respond to the anticipated or observed choices of others, strategic justices will not necessarily act insincerely. If the political context favors the justice's preferred course of action, a strategic justice's behavior will be the same as it would be without constraints.<sup>9</sup>

In this book, we are concerned with the rules, procedures, and norms, internal to the Court, that constrain justices' capacity to translate their preferences into legal policy outcomes.<sup>10</sup> The Court's agenda-setting, opinion-as-

ically constrain the justices (Segal 1997). Although extrainstitutional constraints are theoretically plausible and interesting, we focus on the intra-Court collegial game.

<sup>8</sup> There are other definitions of institutions. Historical institutionalism, sociological institutionalism, and other institutionally focused approaches to the study of politics provide alternative concepts of institutions. In fact, neoinstitutionalism incorporates a variety of theoretical and empirical perspectives. For an overview of the political economy of institutions, see the edited volumes by Alt and Shepsle (1990) and Knight and Sened (1995). For alternative theoretical approaches, see, for example, March and Olsen (1984, 1989) and Smith (1988, 1996). Distinctions between rational choice and non-rational-choice institutionalism are discussed in detail by Orren and Skowronek (1994) and Smith (1996).

<sup>9</sup> In other words, sophisticated behavior (i.e., acting contrary to one's most preferred course of action) is a sufficient, but not necessary, condition for a justice to have been subject to strategic constraints. Again, the essence of a strategic explanation is the interdependency of choice among actors (see Elster 1986).

<sup>10</sup> In addition to the rules we examine, there are other institutions that affect judicial behavior: rules establishing three-judge federal appellate panels (Atkins 1970, 1972), rules for assigning judges to federal appellate panels (Atkins and Zavoina 1974), rules for assigning opinions to judges (Brace and Hall 1990; Hall and Brace 1989, 1992), rules for seniority-ordered vot-

signment, and opinion-writing norms and policies each affect justices' success in converting policy goals to legal doctrine (see Epstein and Knight 1998). As a result of these informal rules, justices engage in strategic behavior as they attempt to shape the Court's policy output into conformance with their policy goals. The intra-Court strategic game thus results from the institutional rules and practices of the Court arena.

Perhaps the most important institutional feature of the Court is its collegial character. Contrary to a portrait of the Court as "nine small, independent law firms" that have little interaction with one another (Powell 1976), the strategic approach recognizes that the behavior of individual justices is shaped in part by the actions and preferences of their brethren. As a result, a justice's choices during the opinion-writing process will depend in large part on the choices made by the other justices (see Rohde 1972b, 1972c). Decision making is thus interdependent because justices' ability to have majority opinions reflect their policy preferences depends in part on the choices made by other justices.

The first important, post-oral-argument informal rule that constrains the ability of justices to see their individual preferences converted into legal policy is the process by which opinions are assigned on the Supreme Court. As we have already noted, since the tenure of Chief Justice Roger Taney (Schwartz 1993, 152), the custom has been for the chief justice to assign opinions when in the conference majority; otherwise, the most senior associate justice in the conference majority assigns the opinion. This norm provides an opportunity for opinion assignors to attempt to affect the Court's decisions (Epstein and Knight 1998; Baum 1998). This influence may be achieved by assigning the case to a justice who will represent the assignor's preferences. After all, as we previously discussed, the opinion author occupies an agenda-setting position and can write an opinion draft that proposes a policy position from the range of alternatives available in a case.

The Court's informal rule that before carrying the imprimatur of the Court an opinion must gain the support of a majority of justices is another reason that judicial behavior is interdependent. Opinions that fail to gain the necessary

ing by judges (Brace and Hall 1993), informal norms of adhering to precedent (Knight 1993; Knight and Epstein 1996b; Spriggs and Hansford 1998), rules governing the number of justices required to grant certiorari (Perry 1991), rules for selecting judges (Brace and Hall 1995), and norms of consensus on the Supreme Court (Walker, Epstein, and Dixon 1988; Caldeira and Zorn 1998).

support will not be seen as speaking for the Court, although they may announce the judgment of the Court, and their precedential impact may be lessened (Johnson and Canon 1984; Segal and Spaeth 1993).<sup>11</sup> Thus, because outcomes on the Supreme Court generally depend on the agreement of at least five justices, Murphy (1964) argues that justices do not simply vote their policy preferences. Instead, he characterizes the Supreme Court's deliberative process as a struggle among the justices to shape the content of opinions. At the heart of this process are policy-oriented justices who employ a "mixture of appeals, threats, and offers to compromise" (1964, 42) to encourage their colleagues to support legal rulings that reflect their policy preferences. As we show in this book, the choices justices make reflect the role of this informal rule.

In this book, we systematically explore what happens after the justices hold an initial vote on a case's merits and prior to the release of the Court's opinion. We seek to show the extent to which institutional constraints endogenous to the Court shape the opinion-writing process and thus ultimately the law. More specifically, we seek to explain under what conditions, and to what extent, the choices that justices make in the process of writing opinions result from strategic interdependencies on the Court.

### STRATEGIC INTERACTION AND THE OPINION-WRITING PROCESS

The strategic model implies that final Court opinions cannot be exclusively attributed to justices' strict reading of the law, simple accounting of justices' policy preferences, or strategic calculations about the response (or non-response) of political actors exogenous to the Court. The hallmark of this approach is its focus on the interdependencies inherent in judicial decision making. To achieve policy outcomes as close as possible to their own preferences, justices must at a minimum take into account the choices made by

<sup>11</sup> Traditionally, a plurality opinion (i.e., one lacking majority support) did not establish a legal precedent. In 1977, however, the Supreme Court, in *Marks v. United States*, ruled that "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." Thus, it is possible that a plurality opinion might create a precedent, provided it is the opinion in the case decided on the narrowest grounds (see Thurmon 1992). Of course, deciphering exactly which opinion rules on "the narrowest grounds" is often no easy task. Thus, strategic justices generally prefer having their views written into law by a majority opinion.

their colleagues, with whom they ultimately must negotiate, bargain, and compromise.

In the spirit of earlier work, our strategic model of judicial decision making is based on two postulates. These postulates broadly define the contours of what we view as the collegial court game. Both postulates stem from institutional features of the American legal system. The first postulate touches upon two principles that are at the heart of the legal and attitudinal models.

*Outcome Postulate:* Justices prefer Court opinions and legal rules that reflect their policy preferences.

Reflecting the tenets of the legal model, this postulate recognizes the importance of Court opinions to members of the bench. Consistent with the attitudinal model, this postulate asserts that justices are principally motivated by their policy preferences. Even though the attitudinalists do not believe that Supreme Court opinions constrain the justices' decisions as precedent (Segal and Spaeth 1993; Spaeth and Segal 1999), they do recognize that the Court's opinions produce its most profound policy contributions (Rohde and Spaeth 1976, 172). Thus, some have argued that having justices prefer legal rules that conform to their preferences is consistent with the attitudinal model (Wahlbeck 1997, 1998).

The second postulate recognizes that even though justices hope to see their policy preferences implemented into law, the Court's institutional structure constrains the choices that justices are likely to make. The most important of these constraints is an acknowledgment that Supreme Court decision making is a collective enterprise among all of the justices. Contrary to the portrait of the Court as nine separate law firms that have little interaction with one another, our model of strategic interaction recognizes that the behavior of individual justices is determined in part by the actions and preferences of their brethren.

*Collective Decision-Making Postulate:* Justices will try to secure opinions that are as close as possible to their policy positions by basing their decisions in part on the positions and actions of their colleagues.

Indeed, a recognition that in a collegial setting strategic action is necessary might lead justices to support positions that deviate from their ideal policy outcome. In many respects, the collective decision-making postulate constitutes what we consider to be the heart of the collegial game. As we have al-

ready alluded to, our definition of strategic behavior touches on these two postulates. A strategic justice is one who pursues his or her policy preferences within constraints determined by the interdependent nature of decision making on the bench.

If one accepts the principles that justices care more about the content of the Court's opinion than the actual decision to vacate, reverse, or affirm the lower court's decision and that opinions crafted by the Court reflect justices' interaction with one another, then it seems reasonable to suspect that neither an understanding of the law nor the policy preferences of justices alone can account for their behavior. Instead, Court outcomes depend on a combination of the preferences held by the justices and the strategic moves of the justices in their efforts to ensure that the final opinion represents, as much as possible, their policy views. These postulates lead us to ask how and when the actions of each justice are constrained by the concurrent actions of his or her colleagues on the bench.

In subsequent chapters, we articulate and test a series of hypotheses consistent with the postulates that structure the collegial game on the Court. These hypotheses should help us determine to whom cases are likely to be assigned, the tactics justices are likely to pursue to shape majority opinions, the likely response of opinion authors to such bargaining, and the justices' final decisions to join majority opinions. Although the primary focus of this book is to demonstrate how the collegial nature of the Court influences justices' ability to pursue their policy preferences, we recognize that it is not the only constraint that shapes judicial behavior. Other contextual constraints, such as workload capacity and the Court's calendar, may affect the choices justices make. Because any explanation of behavior that ignores such relevant contextual constraints would be underspecified, it is important for us to recognize and control for such factors. Therefore, even though the purpose of this book is to explore how the Court's collegial character affects the development of the law, we also discuss several variables that do not emanate from the collegial game.

### *Explaining Justices' Choices*

Our primary argument is that Supreme Court justices are strategic actors who pursue their policy preferences within the strategic constraints of a case and the Court. As our two postulates make clear, within constraints imposed by the collegial nature of the institution, justices attempt to secure legal rulings

that comport as much as possible with their preferred outcomes. Two sets of hypotheses explicitly derive from our postulates, one pertaining to justices' preferences and the other relating to strategic constraints on choice.

Consistent with our first postulate, we expect a justice's policy preferences to guide the decisions he or she makes in a case. A justice's choices in a case depend on both the proximity of his or her policy views to the policy outcome preferred by the other justices and the overall level of policy agreement among the justices. For example, we expect a justice whose views clearly differ from the majority of the Court to be more willing to author a separate opinion and less willing simply to agree with the Court majority. Likewise, if an opinion draft is inconsistent with a justice's values, we also anticipate a strategic justice will aggressively pursue changes to the opinion.

Strategic justices take into consideration not only the proximity of their policy views to those of their brethren, but also the level of policy cohesion among the justices. The importance of a coalition's ideological heterogeneity is based on Axelrod's observation that "the less dispersion there is in the policy positions of the members of a coalition, the less conflict of interest there is" (1970, 169). When there is a great deal of conflict among the justices, each justice will understand that such disagreements will help shape the final opinion.

It is the importance of policy preferences that led Murphy to argue that the strategic justice's "initial step would be to examine the situation on the Court. In general three sets of conditions may obtain. There may be complete coincidence of interest with the other justices, or at least with the number of associates he feels is necessary to attain his aim. Second, the interests of the other justices, or a majority of them, may be indifferent to his objective. Third, the interests of his colleagues may be in opposition to his own" (1964, 37). A justice's ideological position relative to that of his colleagues and a justice's understanding of the ideological preferences of his or her colleagues relative to each other is thus the first factor likely to influence the decisions on any particular case before the bench. The notion that ideological compatibility affects justices' decisions is consistent with Axelrod's argument that "the amount of conflict of interest in a situation affects the behavior of the actors" (1970, 5).

Given the Court's institutional rules, our second postulate suggests that justices must take into consideration the preferences and choices of their colleagues deciding the same cases. The decisions made by each justice are therefore likely to vary with the positions and signals that are sent by the other jus-



tices. As previously discussed, Supreme Court decision making is interdependent because the costs or benefits any one justice receives from a particular decision depend in part on the choices made by the other justices. For example, the size of the winning coalition that exists at the initial conference on a case's merits affects the decisions each of the justices may subsequently make. Indeed, in a 5–4 case, the chief justice may be more reluctant to jeopardize the majority coalition by assigning the opinion to an extreme colleague than in a 7–2 case. Likewise, an opinion author's willingness to accommodate a colleague is likely to be greater in a 5–4 case than a 7–2 case. As observed by Chief Justice William Rehnquist:

The willingness to accommodate on the part of the author of the opinion is directly proportional to the number of votes supporting the majority result at conference; if there were only five justices at conference voting to affirm the decision of the lower court, and one of those five wishes significant changes to be made in the draft, the opinion writer is under considerable pressure to work out something that will satisfy the critic. (1987, 302)

In both scenarios, the fragility of the minimum winning coalition will affect the justices' calculations.

Of course, tentative votes cast at initial conferences are only one of many ways that justices signal their brethren. Throughout the opinion-writing process, justices circulate memos announcing their willingness or reluctance to accept a particular opinion draft or their intention to circulate dissenting or concurring opinions. Because opinion authors lack perfect information about each justice's preferred position, such signals sent between the justices are critical to the process of forming the final majority opinion and its supporting coalition (see Austen-Smith and Riker 1987; Crawford and Sobel 1982). For example, once a majority of justices has announced its support for an opinion, the author learns that there is little to be gained by further attempts at accommodation. For this reason, Justice Powell (1984a, 18) argued: "A Justice is in the strongest position to influence changes in an opinion before other justices have joined it. Once an opinion is supported by a 'Court' (a 'majority'), it is virtually impossible to negotiate a change."

Strategic justices recognize another form of interdependency of choice – the nature of the cooperative relationship between pairs of justices. Because justices are engaged in long-term relationships with their colleagues, over time justices presumably learn to cooperate and engage in reciprocity, re-