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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.[1] 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

[1] *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.[2]

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

[2] 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 noncompliance, 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 (Eskridge 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.[3]

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

[3] 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.[4] 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

[4] 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).[5] Indeed, even Harold Spaeth, the

[5] 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