

Jeffrey Segal & Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited*

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1 Citation

Segal, Jeffrey, and Harold Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York, NY: Cambridge University Press.

2 Abstract

Segal and Spaeth's *The Supreme Court and the Attitudinal Model Revisited* argues that judges are policy-makers who decide cases primarily (and sometimes exclusively) on the basis of their personal policy preferences. This is particularly true of Supreme Court justices, for the American political system leaves them unconstrained when issuing decisions on the merits. Segal and Spaeth label this thesis *the attitudinal model*. They contrast the attitudinal model with the legal model, which posits that judges are relatively mechanical decision-makers who are fully constrained by pre-existing law, and the rational choice (or strategic) model, which posits that all judges, including Supreme Court judges, are constrained by their institutional environment (and Congressional preferences), and will hence decide cases strategically to avoid being overruled. A series of statistical analyses run on post-WWII Supreme Court case law data are interpreted as establishing the superiority of the attitudinal model, the incompleteness of the legal model, and the irrelevance of the rational choice model.

3 Details

3.1 Creating Policy: What Courts Do

Segal and Spaeth begin their book with a fairly unoriginal claim (at least since Robert Dahl's 1957 article, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker"): Supreme court judges make policy: "While *Bush v. Gore* may appear to be the most egregious example of judicial policy making, we suggest it is only because of its recency. Our history is replete with similar examples, although perhaps none as shamelessly partisan" (Segal and Spaeth 2002: 2). Policymaking, however, is not a "subversive activity;" it merely entails "choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy maker's authority" (ibid: 6).

Ultimately, despite the "panoply of myth" that judicial decisions "are objective, impartial, and dispassionate," the truth is that the combination of four factors endow American judges, and particularly Supreme Court justices, with "virtually untrammled policymaking authority" (ibid: 10; 12). First, Americans treat the Constitution as the fundamental law of the land and a benchmark from which to assess the legitimacy of all government action; Second, Americans' adherence to the principle of limited government engenders distrust of government and politicians from which judges remain immune; Third, the American federal structure, with a vertical division of powers between state and federal government and a horizontal separation of powers between the three branches, requires the adjudication of inter-governmental conflict; Fourth, the Supreme Court in *Marbury v. Madison* bestowed this settlement authority upon itself, and this role for the Court has since become entrenched (ibid: 44).

The relevance of this preliminary discussion emerges as the book progresses, namely that Supreme Court justices are virtually unconstrained in their decisionmaking.

3.2 Three Models: The Legal, Attitudinal, and Rational Choice Model

Segal and Spaeth proceed to divide the judicial politics scholarship into three categories: the legal model, the attitudinal model, and the rational choice model. The legal model is most frequently invoked by judges themselves, particularly by originalists; the attitudinal model is the framework defended by Segal and Spaeth; and the rational choice model, sometimes alternatively referred to as the ‘strategic’ model, is preferred by such scholars as Lee Epstein and Jack Knight in *The Choices Justices Make*.

3.2.1 The Legal Model: Binding Law, No Judicial Discretion

The legal model has its origins in the “mechanical jurisprudence” in vogue through the early 20th century (before the emergence of the Legal Realist critique). While it comes in many shades, “what typically connects these variants together is the belief that, in one form or another, *the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent*” (ibid: 48). While Segal and Spaeth do not make this reference, the civil law treatment of jurisprudence as a ‘legal science’, the law as a seamless and deterministic web, and the judge as mechanically guided by rules to the single correct legal answer comprises the heart of the legal model.

Segal and Spaeth are not sympathetic to the legal model’s claims. The legal model assumes that judges rest their decisions “in significant part on the plain meaning of the pertinent language,” yet “English as a language lacks precision. . . legislators and framers of constitutional language typically fail to define their terms. . . one statutory or constitutional provision or court rule may conflict with another. . . [and] identical words in the same or different statutes need not have the same meaning” (ibid: 53-54).

The legal model also assumes that judges construe the Framers’ intent in constitutional cases and legislative intent in statutory cases; yet “It is not clear [from the Constitution’s open-ended language] that the Framers intended that their intent be binding;” and legislative intent, following Kenneth Arrow’s impossibility theorem establishing that every method of preference aggregation violates at least one principle required for reasonable and democratic decisionmaking, is frequently “meaningless” (ibid: 66-68).

Finally, the legal model asserts that precedent, or *stare decisis*, constraints judges and endows law with temporal stability; yet “judges use precedent as an ostensible explanation for virtually every decision they make,” since precedents lie on both sides of almost all controversies (ibid: 76-77). Judges frequently disagree over what constitutes precedent (is it the decision plus the material facts, or the underlying principle on which the case was decided?), and even when the precedent is clear, they possess four legal tools to sidestep it: (1) *obiter dicta* (the argument that the precedent relates to surplus language from a previous case, and hence does not bind); (2) distinguishing a precedent (by asserting that the facts of the case are so different that the precedent no longer binds); (3) limiting a precedent; and (4) overruling a precedent (ibid: 81-83).

In short, the legalists’ own arguments about the bindingness of law appear implausible.

3.2.2 The Attitudinal Model: Policy Preferences Amidst an Ocean of Discretion

Segal and Spaeth’s favored model, the attitudinal model, has its origins in the Legal Realist movement of the 1920s, which challenged the legal model’s myth of the discretion-less, mechanical judge. It further incorporated key concepts from political science, psychology, and economics, and “holds that *the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices. Simply put, Renhquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal*” (ibid: 86). Its central concept is that of an “attitude,” which comprises a relatively enduring “interrelated set of beliefs about an object or situation. For social action to occur, at least two interacting attitudes, one concerning the attitude object and the other concerning the attitude situation must occur” (where the attitude objects are the parties to the suit, and the situations are the legal issues at stake in the case) (ibid: 91).

The attitudinal model assumes that decisionmaking depends on goals, rules, and situations: by goals, we mean that judges are outcome-oriented; by rules, we mean that the choices available to judges depend on the rules of the game (the institutional environment); and by situations, we mean, most centrally, the facts of the case at hand (ibid: 92-96). Where the attitudinal model departs from the rational choice model, as we shall see, is in positing that Supreme Court justices are virtually unconstrained by rules when issuing decisions on the merits; in this arena, we should expect their policy attitudes to be the determining factor

shaping the Court's decision (elsewhere, we can expect the judges' policy attitudes to be a crucial, but not exhaustive, factor) (ibid: 96).

3.2.3 The Rational Choice Model: Strategic Behavior Subject to Exogenous Constraints

Segal and Spaeth posit that the rational choice model seeks to apply and adapt the theories and methods of economics to the study of judicial behavior, and that it rests on two fundamental premises. First, "actors are able to order their alternative goals, values, tastes and strategies. This means that the relation of preference and indifference among the alternatives is transitive;" Second, "Actors choose from available alternatives so as to maximize their satisfaction" (ibid: 97). The comparative advantage of rational choice models is their discernment of an equilibrium derivable via logical proof, where an outcome is in equilibrium when no player has an incentive to unilaterally defect (ibid: 99). Note that, unlike the attitudinal model, which posits that judges act to fact situations in light of their personal policy preferences, the rational choice model is agnostic as to the content of said preferences (ibid: 111).

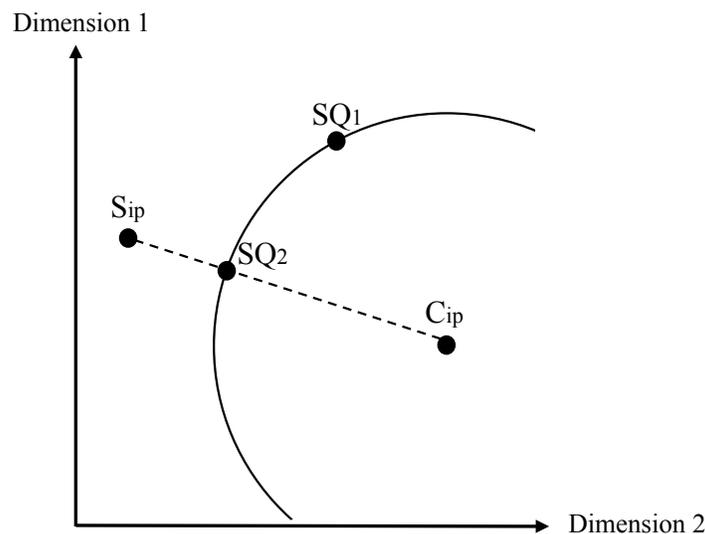
Rational choice models of Supreme Court behavior either consider the interactions amongst the justices or focus on the external constraints imposed by the Court; because the former have hitherto failed to posit testable equilibrium predictions, Segal and Spaeth focus on the latter, specifically on what they term the "separation-of-powers" model. In this framework, Supreme Court justices strategically deviate from their ideal points in order to prevent the legislative override of their decision (ibid: 103). In short, "*if the Court exercised rational foresight, it would not always choose its ideal point;*" rather, it will "*construe legislation as close to its ideal point as possible without getting overturned by Congress*" (ibid: 104-105).

Segal and Spaeth raise a series of weaknesses of extant separation-of-powers models. First, these models assume that Court justices possess perfect information regarding Congressional preferences; they also assume that Congressmen face no transaction costs in seeking to override a Court precedent; they assume a world of statutory interpretation, rather than one of constitutional review where the Court possesses the final say; they do not consider the Court's ability to react and respond to Congressional action; and, finally, they treat judicial preferences as exogenous even though, as Dahl (1957) argued, it is unlikely that the President and Senate will consistently appoint justices who deviate from their own preferences (ibid: 106-108).

3.2.4 The Legal, Attitudinal, and Rational Choice Models Visualized

In an effort to distill the essence of the legal, attitudinal, and rational choice models, consider Figure 1, which represents the decisionmaking environment of the Supreme Court in two-dimensional space:

Figure 1: *The Decisionmaking Environment of the Supreme Court*



Suppose a case comes before the Court that can be situated in the two-dimensional policy space of Figure 1. Here, SQ_1 represent the status quo ante, namely the precedent governing the case at hand; S_{ip} represents the policy ideal point of the median Supreme Court Justice; and C_{ip} represents the policy ideal point of the pivotal Congressman. In this simplified setup, the legal model would predict that the Supreme Court justice will ignore his/her policy ideal point as well as Congressional preferences and be bound by SQ_1 (assuming that there is no compelling reason to overrule SQ_1), which remains the equilibrium outcome. The attitudinal model, on the other hand, would predict that the Supreme Court justice is virtually unconstrained by either precedent or Congressional preference, and would hence vote sincerely, such that S_{ip} becomes the new equilibrium outcome. Finally, the rational choice model would predict that the Supreme Court justice would select the outcome that lies closest to his/her ideal point along the indifference curve of the median or pivotal Congressman, such that SQ_2 would emerge as the new equilibrium outcome.

3.3 Statistical Results

The heart of Segal and Spaeth's empirical analysis concerns the Supreme Court's decisions on the merits, for it is here that the attitudinal and rational choice models most diverge in their empirical predictions. All of Segal and Spaeth's econometric models are run on post-WWII Supreme Court case law data. First, logistic regression results find that the facts of search and seizure cases significantly affect the decisions of the Supreme Court, "but on that point the attitudinal model does not differ from the legal model. The models differ in that proponents of the legal model conjoin facts with legalistic considerations. . . while proponents of the attitudinal model describe the justices' votes as an expression of fact situations applied to their personal policy preferences" (ibid: 319).

To obtain an exogenous measure of the justices' attitudes, Segal and Spaeth code "the judgments in newspaper editorials that characterize nominees prior to confirmation as liberal or conservative insofar as civil rights and liberties are concerned" (ibid: 321). While this is an imperfect measure, so long as it is unbiased (as Segal and Spaeth claim) it will merely artificially weaken the correlations with judicial decisionmaking and produce a conservative estimate (ibid: 322). Their dependent variable constitutes whether a liberal decision is issued in a civil liberties case (where a liberal decision is measured as one that is (1) pro-person accused or convicted of a crime; (2) pro-civil liberties or civil rights claimant; (3) proindigent; (4) pro-Indian; or is (5) antigovernment in due process and privacy (ibid: 323). Once this dependent variable is regressed on the facts of the case and the measure of the policy preference of justices, the latter is highly statistically significant: In fact, attitudes alone predict 70% of outcomes in search and seizure cases (ibid: 325).

Finally, when Congressional preferences, using two rational choice models of preference aggregation, are incorporated into the regression, they do not significantly predict the outcome of statutory cases (controlling for justices' policy preferences). This suggests that rational choice models are incorrect, for "judges frequently fall inside the set of irreversible decisions, and thus could only infrequently be constrained. And even if they fall outside the set, factors such as the ability to manipulate issues, the ability to review congressional overrides, or the high cost of passing legislation can still lead to rationally sincere voting" (ibid: 345).