The CONSTRAINED COURT

Law, Politics, and the Decisions Justices Make

Michael A. Bailey &
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The Constrained Court

This book is dedicated to our parents

Who gave us worlds with few constraints

PREFACE

Few decisions in American politics are more important than those reached by the justices of the United States Supreme Court. These nine judges routinely make decisions involving the most significant social and political issues in the country. They decide, among other things, whether government can mandate health insurance, detain suspected terrorists without a trial, ban abortion, or execute criminals who are mentally impaired.

How do justices make these momentous decisions? Many political scientists claim justices have essentially no constraints and, as political creatures, use their positions on the bench to pursue their ideological predilections. In this view, law does not matter. Likewise, according to this view the preferences of elected officials do not matter. Instead, justices themselves are like elected officials who use the power of their office to advance their policy goals.

This explanation has much to recommend for it. It moves past naive views of justices as apolitical legal sages. And it is consistent with empirical evidence that suggests that the votes cast by the justices frequently split along predictable ideological lines. For this reason, it has become a part of the political science canon.

But is it right? Do justices simply base their decisions on the policy preferences they bring to the bench? Many lawyers, students of American politics, judges, and political scientists believe that there is more to justices' decision-making. Elaborate opinions, cites to precedent, and even the robes suggest something beyond a purely political Court. Without denying the role of politics, many scholars and lawyers argue that law really does matter. According to this view, legal doctrine, not just policy preferences, constrains the decisions justices reach. Others argue that the legislative and executive branches also can constrain justices. In this view, the Supreme Court and its justices act interdependently with the other branches that make up the American political system. As such, the actions of justices depend in part upon the preferences of elected political actors.

While such explanations are intuitive, they are hard to prove empirically. Throughout this book, we provide evidence that justices are not simply pursuing their policy preferences. Instead, they are subject to constraints, whether they come from their internal value systems or from external political forces. We have wrestled with this task for eight years, and the result is a model that allows us statistically to identify legal and institutional influences on justices. To test this model, we have created a

large original data set of judicial and non-judicial position-taking on Supreme Court cases. We have read and coded scores of opinions. We have tapped the latest improvements in measurement theory.

The results give us confidence that judicial policy preferences provide only a starting point for explaining judicial decision-making. Justices' values also matter. Just as justices have attitudes about policy, they have attitudes about the law. Some value precedent; some believe in judicial deference; others interpret the First Amendment strictly. Expressions of these values are not always smoke screens. They routinely affect how justices decide cases. In addition, we show that justices are not independent of the rest of the political system. They act differently when Congress and the president are united against them. And, they are informationally interdependent on external actors, especially the solicitor general. In short, the view that justices are purely political animals who utilize their positions in pursuit of their policy preferences is too simplistic. And the view that justices are robotic creatures neutrally enforcing the decisions of others or interpreting the law misses the complexity of the decisions the justices make.

We could not have pursued a project of this scope without the wisdom and support of many colleagues and friends. We have been fortunate to have benefited from a very able and generous scholarly community. Most notably, we thank Brandon Bartels, Chris Bonneau, Saul Brenner, Cliff Carrubba, Kelly Chang, Tom Clark, John Ferejohn, Josh Fischman, Barry Friedman, Michael Giles, Tom Hammond, Robert Howard, Brian Kamoie, Bob Katzmann, Eric Lawrence, Jeff Lax, Jeff Lewis, Andrew Martin, Hans Noel, Kevin Quinn, Doug Reed, Jeff Segal, Lee Sigelman, Jim Spriggs, Paul Wahlbeck, Barry Weingast, and participants at seminars at Dartmouth, Emory University, the University of Georgia, Georgetown University, George Washington University, the University of Minnesota, New York University, the University of Pittsburgh, SUNY-Stony Brook, Washington University in St. Louis, William and Mary, and the 2005 Summer Meeting of the Society for Political Methodology. Keith Poole generously provided congressional vote data. Sarah Binder, Kevin McGuire, and Chuck Shipan read the entire manuscript and commented extensively. We also appreciate the assistance of Maeve Carey, Chris Drewry, Stephen de Man, Cynthia Fleming, Greg Fortelny, Elliott Fullmer, Carroll Ganier, Mike Griffin, Matt Hard, Jake Haselswerdt, Alex Karjeker, Laura Miller, Karen Miranda, Michael Schroeder, Alexis Teagarden, and Caroline Wells. Fully unpacking the contributions that have gone into this book may be more difficult than unpacking influences on judicial decision-making. Nevertheless, we appreciate the willingness of so many to help us in so many ways, either knowingly or not.

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Finally, we wish to recognize our children, Jack, Emi, and Ken Bailey and Noa and Mica Maltzman. They may not always comply with the doctrines we prescribe, but our love for them has no bounds. Even more, this book would not exist without the patience and love shown by Mari Bailey and Sarah Binder. Above all, this book originates in the laws and values taught to us by our parents, Donald and Katherine Bailey and Charlene and Richard Maltzman, and we therefore dedicate this book to them.

The Constrained Court

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Chapter 1

INTRODUCTION

IMMEDIATELY FOLLOWING the Supreme Court's ruling in *Bush v. Gore* (2000), George Washington University law professor Jeffrey Rosen expressed shock that the justices in the majority did "not even bother to cloak their willfulness in legal arguments intelligible to people of good faith." Rosen believed that the decision "made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor" (2000).

Rosen was not alone within the legal academy. Over five hundred law professors wrote a public letter "as teachers whose lives have been dedicated to the rule of law" to condemn the Court's decision (Berkowitz and Wittes 2001). They argued that the majority of justices had acted as "political proponents for candidate Bush, not as judges." One signatory "deplored the fact that one of his primary teachings to his students over a 40-year career in constitutional law—that the U.S. Supreme Court acts as a nonpartisan institution despite differing judicial philosophies—had been rendered null and void by the actions of the five justices who stopped the count" (Dickenson 2001).

Not all Court critics think justices are right-wing partisans. Conservatives, too, routinely attack the Court for pursuing political, not legal, aims. Onetime Supreme Court nominee and conservative icon Robert Bork characterizes the Supreme Court as "an active partisan on one side of our culture wars" (quoted in Boot 1998, vi). Conservative columnist Thomas Sowell claims "Supreme Court decisions suggest that too many justices are not satisfied with their role, and seek more sweeping powers as supreme policy-makers, grand second-guessers or philosopher-kings" (2010).

Many political scientists see politics on the Court as business as usual. Much of the discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences (see discussions in Friedman 2006; Tamanaha 2010). Indeed, seven years before *Bush v. Gore* political scientists Jeffrey Segal and Harold Spaeth predicted that "if a case on the outcome of a presidential election should reach the Supreme Court, . . . the Court's decision might well turn on the personal preferences

of the justices" (1993, 70). *Bush v. Gore* made Segal and Spaeth look like the oracles of Delphi.

If justices are indeed pursuing their personal policy preferences, those who believe that an independent judiciary undermines our democratic system have a strong argument. And the fears that were expressed at the founding will have come to pass. *Federalist 78* noted that if the courts "should be disposed to exercise will instead of judgment, the consequence would be the substitution of their pleasure for that of the legislative body." The only democratic recourse would be the appointments process, which would, we could hope, elevate individuals to the bench who share the views of the people (Dahl 1957). However, if justices are unconstrained policymakers they need not remain in accord with popular wishes. And with the recent trends of appointing younger justices and the greater longevity of sitting justices, there is more reason to worry that the policy preferences of the Court could become disconnected from the popular will.

Not everyone believes justices are unconstrained policymakers, however. Many believe justices feel constrained to follow established legal principles. The operation of the Court and the norms of the legal community clearly support this. Justices parse legal doctrine in detailed opinions. Law students and journals analyze legal doctrine. Sitting judges express bafflement at the idea that law does not matter (Edwards 1998; Wald 1999). And we suspect that the law professors who objected to *Bush v. Gore* continue to teach that legal doctrines provide useful tools for understanding Court decisions.

One reason the legal model may rise above the ashes of *Bush v. Gore* is that justices routinely make decisions that appear to be inconsistent with their policy preferences. For example, in *Dickerson v. United States* (2000) the Court assessed the constitutionality of a law overturning *Miranda v. Arizona* (1966). Conservatives had long railed against *Miranda* and many saw *Dickerson* as a chance for conservative, Republican-appointed justices to reshape constitutional law. Surprisingly, though, the Court stood behind *Miranda* by a 7–2 majority. No less a conservative than Justice Rehnquist wrote an opinion that defended precedent and argued that since *Miranda* was a constitutionally based decision, Congress could not alter the Court's ruling by statute.

In addition, the Court is often unanimous. From 1950 to 2004, about 38 percent of Court decisions had no votes against the majority (Epstein, Segal, Spaeth, and Walker 2007, 227). This suggests that justices share legal values that can supersede policy preferences. While it is possible that policy-motivated justices can be unanimous if the alternative or legal status quo (e.g., upholding the lower court) has policy implications that are so extreme that no justice views this as a viable alternative, it is unlikely

that they would do so as frequently as they do. The legal explanation of unanimous votes is that the "roughly similar forms of legal education and professional experience" of justices lead them to agree on cases for legal, not policy, reasons (Breyer 2005, 110).

Justices may also be subject to external constraints. In particular, the legislative and executive branches may be able to push the Court in favored directions with threats and persuasion, thereby attenuating the danger that the Court becomes a policymaker divorced from public will. Perhaps the most prominent example of such external influence is the "switch in time that saved nine" on *West Coast Hotel v. Parrish* (1937). After the Court struck down several New Deal laws, elected leaders became increasingly aggressive toward the Court, culminating in President Roosevelt's plan to "pack" the Court with more justices (Friedman 2009). One of the justices who frequently voted to strike government intervention in the economy, Justice Owen Roberts, suddenly voted to allow a Washington state minimum wage law. Roberts's change in tune relieved political pressure on the Court and sunk Roosevelt's Court-packing plan.

Hence we are faced with competing views about the role of the Supreme Court in the constitutional order. Many political scientists view the Court as a largely unconstrained policymaking body. Others believe there are constraints, either internal or external. Can empirical analysis resolve this debate? We believe it can. As social scientists, we agree with Segal and Spaeth (1994), who wrote that "it is a basic tenet of science, whether social, political or natural, that an untestable model has no explanatory power." We do not believe there is—nor does social science promise—an easy and definitive answer, but we are optimistic that advances in theory, data collection, and measurement can help us progress.

There are many benefits to understanding whether policy, law, or interinstitutional pressure shapes decisions made by justices. First, we can better explain the development of law. Many important cases have been decided by 5–4 votes, from *Lochner v. New York* (1905) to *Escobedo v. Illinois* (1964) to *Miranda v. Arizona* (1966) to *Furman v. Georgia* (1972) to *Regents of the University of California v. Bakke* (1978) to *Texas v. Johnson* (1989) (see, e.g., discussion in Tribe 1985, 32). If legal or political constraints switched votes in these cases, history and politics in the United States would be quite different.

Second, understanding the constraints faced by justices helps us assess and possibly even reform the Court. Whether justices simply follow their policy preferences affects the manner in which Congress and the president should interact with the judiciary. The optimal appointment process for justices who act as unelected policymakers looks different than one for justices who operate within legal and institutional constraints. If justices are purely political beings, judicial term limits may make sense in order

to ensure that voters and their elected representatives have regular opportunities to influence who sits on the bench. Likewise, if justices are unconstrained policymakers the nomination and approval process for justices should perhaps be even more political. In addition, some argue that limits on the jurisdiction of the Court or challenges to its authority are reasonable if the Court is primarily policy oriented (Tushnet 1999).

Finally, how we view constraints on the Court affects our normative views of the Court. Is the Court legitimate? The executive and legislative branches derive their legitimacy from elections. Some argue that the Court can represent the public as well as the elected branches (Peretti 1999), but most believe that the Court derives its legitimacy from fealty to the Constitution and the law. A Court that is no different from a legislature may not have any moral standing (Ely 1991). As John Adams wrote in the Massachusetts Constitution of 1780, "the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men" (Adams, Adams, and Bowdoin 1780). Even Rosen (2006, 3–7), who believes that the Court does and should follow public opinion, believes that the legitimacy of the Court depends on judicial decisions being "accepted by the country as being rooted in constitutional principles rather than political expediency."

The Attitudinal Model and the Absence of Constraints

We begin our consideration of constraints on the Court with a model that says there are none—the attitudinal model. This model assumes that justices are "decision makers who always vote their unconstrained attitudes" (Epstein and Knight 1995, 2). As Segal and Spaeth summarize it, "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).

Attitudinal Model Claim: Justices' decisions reflect their unconstrained policy preferences.

Empirically oriented scholars have produced decades of research indicating that policy motivations best explain Supreme Court behavior (Spaeth 1961, 1964, 1979; Rohde and Spaeth 1976; Hagle and Spaeth 1992, 1993; Segal and Spaeth 1993, 2002; Segal and Cover 1989). Segal and Spaeth's book *The Supreme Court and the Attitudinal Model* has become required reading for students of the Court. The model is so influential that empirically oriented political scientists have "an almost pathological skepticism that law matters" (Friedman 2006, 261; see also Tamanaha 2010, 232). The attitudinal model builds on two intellectual foundations.

First, legal realism in the early twentieth century highlighted the indeterminacy of law. This indeterminacy allows justices to inject their personal views (perhaps unconsciously) into the development of the law (Frank 2009 [1930]; Llewellyn 1962; Stephenson 2009; Tamanaha 2010). Second, the behavioral revolution in the middle of the twentieth century moved political science away from simple description and proscription toward theory building and testing (see Maltzman, Spriggs, and Wahlbeck 1999, 44; Tamanaha 2010, 111). Research in this vein emphasized observation and measurement, with Spaeth (1965) famously urging scholars to look at what justices do rather than what they say.

The attitudinal model is based on three premises. First, Supreme Court justices are subject to little or no oversight. Within the judicial branch justices face no oversight given the Supreme Court's position at the top of a judicial hierarchy (Segal and Spaeth 2002, 111; Posner 2005, 42). They arguably face little beyond the judicial branch due to the practical difficulty of overturning Supreme Court cases. Former solicitor general Ken Starr (2002) goes so far as to consider the Court "first among equals" in the constitutional order. While we will discuss the possibility of political oversight in both this chapter and chapter 6, it is plausible that, practically speaking, the Court has the final say on constitutional law in the United States given the relatively few instances in which Congress or a constitutional amendment has explicitly overruled the Supreme Court (J. Barnes 2004).

Second, the law is ambiguous enough to permit multiple interpretations (Segal and Spaeth 2002, 72). This is due not only to constitutional and statutory vagueness but also to the winnowing process that sends only a small fraction of all legal disputes to the Supreme Court. These are the truly tough cases and they are only before the justices because the proper legal conclusion is not straightforward (Cross 1997, 285). Posner (2005, 40) sums up this view when he writes, "Almost a quarter century as federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly." If both sides of a case have plausible legal grounds (and justices are subject to no oversight), justices can easily choose the side they prefer on policy grounds while maintaining an appearance of upholding the law.

The third premise of the attitudinal model is that justices care only about policy (Segal and Spaeth 2002, 111). Court cases often have profound policy implications—touching issues ranging from terrorism to segregation to abortion to elections to the death penalty and beyond—and attitudinalists argue that justices focus only on policy when deciding cases. In the attitudinal model, the legal views justices express in their opinions are simply smoke screens to cover their pursuit of policy.

In this book, we focus on two predictions of the attitudinal model. The first is that law does not matter. In *The Supreme Court and the Attitudinal Model*, Segal and Spaeth scoured Supreme Court history looking for influences of law. They concluded "we have not discovered any narrowly defined issues in which variables of a non-attitudinal sort operate" (1993, 359). They went on to write a book-length refutation of the claim that precedent influences Supreme Court behavior (Spaeth and Segal 1999; see also Brenner and Spaeth 1995). Bolstered by the partisan outcomes in *Bush v. Gore*, they describe a Supreme Court that is "activist and conservative . . . [and] blatantly partisan" (2002, 430). Law in this view is "a low form of rational behavior," no more science than "creative writing, necromancy or finger painting" (Spaeth 1979, 64; cited in Gillman 2001, 470).

A second prediction of the attitudinal model holds that external actors do not influence justices. This prediction implies that a host of potential influences does not matter, including the legislative and executive branches. It is consistent with the Founders' intent of creating an independent judicial branch by providing justices with lifetime appointments and protection from a salary reduction (Hamilton, Madison, and Jay 2011, #78, #79). This corollary suggests that Congress will not be able to otherwise threaten the Court and the president will not be able to use the power, prestige, and legal infrastructure of the executive branch to influence the Court.[1]

Neither of the attitudinal model predictions is foreordained. Segal and Spaeth developed the attitudinal model based on empirical evidence. It is possible that justices follow legal values or defer to Congress and the president; attitudinalists claim that as a matter of fact justices do not exhibit these behaviors.

Constrained by Legal Values

Not everyone agrees that justices are unconstrained. Many in law argue that the main constraint on justices "is an internal one: the judge's integrity and degree of commitment to engage in an unbiased search for the correct legal answer" (Tamanaha 2010, 189). Even legal realists thought that such constraints could and should matter (Stephenson 2009, 206). In its starkest form, this view suggests that justices vote in accordance with legal principles, irrespective of the policy implications. Justice Elena Kagan expressed such a view during her confirmation hearings. After admitting that "I've been a Democrat my whole life, my political views are generally progressive," she said her policy preferences would not influence her decisions as a judge: "You are looking at law all the way

down, not your political preferences, not your personal preferences" (Kagan 2010).

Legal Model Claim: Legal doctrines guide the decisions justices make.

Proponents of this view accept that justices gain considerable latitude from being at the top of the judicial hierarchy and that cases can be legally indeterminate. They differ at the third step of the attitudinal model logic: the idea that policy is the only thing that matters to justices. In other words, legalist scholars grant attitudinal model claims that justices have the ability to do what they want but contest whether justices only want policy outcomes.

Legalist scholars instead contend that justices value the law in and of itself (see, e.g., Cross 1997, 297). Kahn argues that judicial values arise from "a distinctive set of institutional norms and customs, including legal principles and theories" (1999, 175; see also R. Smith 1988). Baum (1997) and Gibson (1978, 1983) attribute these values to justices' socialization in law schools and the legal community. Gillman and Clayton (1999, 4) attribute these values to the nature of the institutional position justices occupy. In particular, the roles of the justices lead them to feel obligated to follow legal principles. This "role orientation" of judges (Gibson 1977, 1978; Ulmer 1973; Glick and Vines 1969) pushes judges to believe that "to regard oneself and be regarded by others, especially one's peers, as a good judge requires conformity to the accepted norms of judging" (Posner 2008, 61). Even Walter Murphy, a scholar most prominent for arguing that justices strategically pursue policy goals, admits that "much of the force of self-restraint can be traced to individual justices' concepts of their proper role in American government" (1964, 29).

The law can matter in rational choice perspectives as well. After all, rational choice models posit utility maximization, not the object of utility. Ferejohn and Weingast (1992, 277) present a rational choice theory of statutory interpretation and argue that "in the past, positive political theory has relied too exclusively on the assumption that judges are political actors with ideological motives identical to elected officials. While this assumption undoubtedly captures an important aspect of judicial decision-making, it hardly exhausts the range of judicial behavior and the manifold normative bases of judicial decisions" (see also Baum 1997, 61). Segal and Spaeth (2002, 111) explicitly reject such an approach.

Judges may also follow legal principals in order to minimize effort (Tiller and Cross 2006, 530; Posner 2008). Judges may value avoiding work on what can sometimes be tedious cases, cases that D.C. Circuit of the U.S. Court of Appeals judge Patricia Wald notes often revolve around