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New Institutional Approaches

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Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making

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Perhaps the newest theoretical advance in the study of judicial decision-making is the application of a positive theory of institutions. Just as neoinstitutionalism has challenged traditional ways of thinking about legislatures and bureaucracies, so too has a new institutionalism come to challenge legal and attitudinal approaches to the study of the Supreme Court. Indeed, many students of judicial politics now embrace an approach that recognizes the role of both policy preferences and institutional constraints in shaping Court outcomes (Baum 1997; Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 1998). This approach to the study of judicial decision-making has its roots, of course, in an old favorite of judicial process scholars, Walter Murphy's (1964) work on the strategic behavior of Supreme Court justices within institutional constraints.¹ Reviving Murphy's strategic approach of judicial decision-making, these new studies suggest that justices pursue their policy preferences subject to constraints both endogenous and exogenous to the Court.

This strategic approach rejects two notions central to alternative views of Court dynamics: first, that justices are sufficiently constrained by legal precedent that their policy preferences have little influence over their actions on the bench, and second, that justices are "unconstrained" and thus they are free to pursue their policy goals. In contrast, strategic justices, in the words of Lee Epstein and Jack Knight, "realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act" (1997:4).

Although elements of the strategic approach can be found in the at-

titudinal approach embraced by most judicial process scholars since C. Herman Pritchett's work in the 1940s and 1950s, it constitutes a significant break from dominant explanations of Court politics. In this chapter, we articulate how this approach differs from the attitudinal approach, elaborate on the two forms of strategic decision-making that judicial scholars have tended to embrace, and reflect on the strengths and weaknesses of strategic theories of decision-making. Because the articulation and testing of a strategic approach is still in its formative years, we trust that judicial scholars will not view this as the last word on the strategic and institutional dimensions of Court dynamics.²

The Behavioralist Legacy: The Attitudinal Approach

As is well known, the behavioral revolution in the first half of the twentieth century radically altered the study of politics. Rather than merely describing historical events and institutions, political scientists sought to identify and understand empirical regularities. The behavioral approach represented a new and radical 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).³ Indeed, the leading behavioral studies of the electorate (Berelson, Lazarsfeld, and McPhee 1954; Campbell, Converse, Miller, and Stokes 1960), Congress (Fenno 1962, 1966; Matthews 1960; Manley 1970), and the judiciary (Schubert 1965; Spaeth 1963) almost always embraced social and psychological explanations of behavior. Such psychological and sociological theories of human behavior shared two important tenets. First, both portrayed human actions as free from having to make choices. Instead, human action was said to be dictated by sociological or psychological forces beyond the 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" (*ibid.*).

Although some of the earliest works that embraced the attitudinal approach had explicit links to sociological and psychological theories dominant in the 1950s and 1960s (see Nagel 1961, 1962; Schmidhauser 1961; Schubert 1961, 1962b, 1965; Spaeth 1961, 1963; Ulmer 1970a, 1973; Vines 1964), the attitudinal approach took a significant turn in the 1970s with the advent of rational-choice analysis. Political actors 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, lack of ambition for higher office, and control over the Court's agenda. The shift to the rational-choice framework with its emphasis on maximizing policy goals was furthered in Segal and Spaeth (1993). As they characterize the approach, "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). Attitudinalists, in short, view justices as "decision makers who always vote their unconstrained attitudes" (Epstein and Knight 1995a: 2). Empirical support for the attitudinal model is widespread. As numerous scholars successfully document, justices' votes are consistent with their policy preferences (Hagie and Spaeth 1992, 1993; Segal and Spaeth 1993; Segal et al. 1995; Segal and Cover 1989).

To be sure, the work of Spaeth and his collaborators is a significant break from the sociological and psychological theories that played such an important role in the early years of the behavioral revolution and of the attitudinal approach. Because preferences can be imputed (see Segal and Cover 1989; Segal et al. 1995; Epstein and Mershon 1996) and because preferences vary across justices, the attitudinal approach accounts for the voting patterns that judicial scholars had noted since Pritchett's work in the 1940s (1941, 1945, 1948). Still, 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 approach continues to see the actions of justices as shaped by forces (in particular, preferences) out-

side the strategic context of the Court. Second, the attitudinal approach continues to view individuals as the analytical building blocks and outcomes as the aggregation of individual actions. The attitudinal model forecasts case outcomes as a reflection of the aggregated preferences of a Court majority. In many respects, then, the attitudinal model articulated since the 1970s represents the culmination of the behavioral revolution as applied to the study of judicial politics.

A Neoinstitutionalist Approach

The intellectual origins of neoinstitutionalism certainly preceded the behavioral revolution, since it found its roots in early political scientists' focus on the history and mechanics of political institutions. The return to an institutional focus after the 1970s, however, can best be seen as a response—indeed, a backlash—against 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, the new institutionalists place rational political actors back into their institutional context, arguing that rational calculation entails consideration of the strategic element of the political game. Instead of being simple goal maximizers, rational actors understand that they face a number of constraints, constraints imposed by the actions of other political actors and by the institutional context in which they act. Justices, in short, are strategic actors who take into consideration the constraints they encounter as they attempt to introduce their policy preferences into the law.⁴

These 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). In the study of legislative behavior, the effects of institutions on the expression and aggregation of preferences are well documented (see Shepsle and Weingast 1987). The rules of debate (Bach and Smith 1988; Smith 1989; Sinclair 1995), the use of committees (Shepsle and Weingast 1987; Weingast and Marshall 1988), voting arrangements (Shepsle 1979; Weingast 1992) all channel and constrain choices. Bureaucratic decision-making is also constrained by internal rules and procedures (Eisner and Meier 1990) and by actors external to the agency (Moe 1985; Weingast and Moran 1984; Wood 1988; Wood and Anderson 1993). Court scholars have also examined the constraining effects of institutions on judicial behavior. For instance, court behavior is affected by the decisions to establish

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 voting by judges (Brace and Hall 1993), informal norms of adhering to precedent (Knight and Epstein 1996a), rules governing the number of justices required to grant *certiorari* (see Perry 1991), rules for selecting judges (Brace and Hall 1995), and norms of consensus on the Supreme Court (Walker, Epstein, and Dixon 1988).

Although the label "new institutionalism" is often used to characterize this variant of rational-choice analysis, we focus here on strategic behavior on the Court.⁵ We define strategic action as interdependent behavior with justices' choices shaped, at least in part, by the preferences and likely actions of other relevant actors. To act strategically, of course, justices must understand the consequences of their own actions and be able to anticipate the responses of others. Institutions facilitate this process and thus mediate between preferences and outcomes by affecting the justices' beliefs about the consequences of their actions. Institutions therefore influence strategic decision makers through two principal mechanisms—by providing information about expected behavior and by signaling sanctions for noncompliance (Knight 1992; North 1990). It is important to note that while we see strategic justices as responding to the anticipated response 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.⁶

For instance, given the institutional requirement that majority opinion authors must generally gain five votes before their opinions speak for the Court, authors recognize that they are not necessarily free to express their most preferred positions in the opinion, but that they must consider the views of other justices too. If they fail to accommodate the views of their colleagues, their opinions may not carry the imprimatur of the Court. This rule may therefore prompt a justice to accommodate a justice in either the first (Spriggs, Wahlbeck, and Maltzman 1997) or subsequent drafts of the majority opinion (Wahlbeck, Spriggs, and Maltzman 1998). Likewise, institutional rules external to the Court also structure decision-making. The most visible set of rules is the Constitution's separation of powers and checks and balances. In this setting, a justice understands that it is possible for elected officials to overturn an opinion, most likely by passing override legislation. In-

stitutions, therefore, create an environment in which a justice's behavior is dependent on the actions of other justices and other organizations.⁷

Among judicial scholars, the intellectual origins of a model of strategic interaction were offered by Murphy in his path-breaking *Elements of Judicial Strategy* (1964). According to Murphy, a strategic justice is constrained by the actions and preferences of his or her brethren, as well as by actors and influences outside of the Court. Murphy did not see each justice acting independently. Nor did he see outcomes as the aggregation of individual preferences. Instead, Murphy argued, 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. Although Murphy's classic was well read, its effect on judicial research was very modest until the 1990s. Recently, judicial scholars have attempted to build upon Murphy's contributions by devising and testing models that tap the strategic element of judicial decision-making, including both the strategic interactions amongst the justices and the strategic relationships between the judicial, executive, and legislative branches.

EXOGENOUS CONSTRAINTS: THE SEPARATION OF POWERS GAME

Because the Supreme Court is embedded in a political system in which the legislative and executive branches of government have the capacity to overturn, circumvent, or even ignore its decisions, the separation of powers view suggests that the "Supreme Court will anticipate the reaction of Congress and craft its statutory interpretation decisions so that they will not be overturned" (Bawn and Shipan 1997:1-2). Such a view of the Court is consistent with Murphy's belief that strategic justices may find themselves "in a situation in which [their] objectives would be threatened by programs currently being considered seriously in the legislative or executive branches of government. To cope with either eventuality, a Justice would have open to him a broad range of strategic or at least tactical alternatives" (1964:156).

To prevent Congress from overturning the Court, those who subscribe to the separation of powers approach maintain that the Court takes a position that is as close to its ideal point as possible, without being so far from Congress that it is overturned (Ferejohn and Shipan 1999; Gely and Spiller 1990; Spiller and Gely 1992; Bawn and Shipan 1997). Since Congress itself is constrained by the Executive Branch and since institutional features of Congress such as its bicameral structure

(Marks 1988), the committee system (McCubbins, Noll, and Weingast 1989; Ferejohn and Shipan 1990; Gely and Spiller 1990), and even the subcommittee system (Bawn and Shipan 1997), make it difficult for Congress to overturn a Supreme Court decision, legislative constraints provide the judiciary with a great deal of discretion.⁸ Because of the difficulty in forecasting electoral returns (Baum 1997) and in anticipating congressional action (Bawn and Shipan 1997; Melnick 1994; Katzmann 1997; Baum 1997) and because of the extensive set of veto points that exists in the legislative policy-making process (Krehbiel 1998; Segal 1997), Supreme Court justices need not always alter their behavior in anticipation of a congressional response.⁹

Although there is obviously a great deal of uncertainty involved in predicting congressional action, it is important to note that congressional response is not random. As Baum (1997) points out, numerous studies identify when a legislative response is likely (Eskridge 1991a, 1991b; Solimine and Walker 1992; Ignagni and Meernik 1994; Meernik and Ignagni 1997; Bawn and Shipan 1997; De Figueiredo and Tiller 1996). Even if justices recognize the difficulty in anticipating congressional response, we would be reluctant to use this finding as grounds for rejecting the strategic approach. Indeed, a strategic justice would take into consideration a legislative response, and then discount it because of uncertainty. Whereas the attitudinal approach emphasizes the unconstrained nature of judicial decision-making, the strategic approach suggests that justices take into account the constraints that may exist. A strategic justice is sophisticated enough to take this into consideration.

Separation of powers models are a clear break from the traditions of the behavioral revolution. Instead of starting with the individual as the unit of analysis, separation of powers models assume that it is institutional structures that are given and that individuals (legislators and justices) act within these structures. Rather than focusing on individual behavior, the separation of powers literature tends to treat the Court (and Congress) as the unit of analysis. Literature looking at the links that exist between the Court and the broader political environment "is almost completely insensitive to the microlevel models of the linkage process" (Gibson 1983:31).

Furthermore, behavior in a separation of powers game is not predetermined. Instead of simply reflecting the preferences of the median justice, justices playing the separation of powers game have to make strategic choices to avoid congressional censure. For example, even if the Court did believe that Congress was likely to overturn its decisions,

behavior because of an anticipated congressional response, the median justice on the Court (assuming one actually exists) may, and thus the Court as a whole responds to Congress.

Although Segal's study of aggregate voting patterns raises questions about the strategic approach, individual case studies have shown that on highly salient issues there is some evidence of justices playing a separation of powers game (see Epstein and Walker 1995; Eskridge 1991b). For example, in their analysis of the *Marbury v. Madison* case (1803), Knight and Epstein (1996b) document that Chief Justice Marshall wrote an opinion that strategically accommodated the political environment of the time. Likewise, Gely and Spiller (1990) maintain that the Court's decisions in *Grove City College v. Bell* (1984) and *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance* (1983) were influenced by anticipated congressional reactions.

ENDOGENOUS CONSTRAINTS: THE COLLEGIAL COURT GAME

Institutional rules, procedures, and norms that are internal to the Court constrain justices' capacity to translate their preferences into legal policy outcomes. The capability of a justice to convert his or her policy goals into law is checked by the Court's agenda setting, opinion assignment, and opinion writing/coalition formation norms and policies (Epstein and Knight 1998). As a result of these institutions, justices engage in strategic behavior as they attempt to shape the Court's policy output into conformance with their policy goals. Such models of strategic interaction recognize the importance of policy preferences in influencing judicial behavior, but hold that justices also act within constraints imposed by the Court's institutional context. The intra-court strategic game thus results from the rules, practices, and institutions 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 separate law firms that have little interaction with one another (Segal and Spaeth 1993:297), 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 selection and consideration of cases will depend in large part on the choices made by the other justices (see Rohde 1972a, 1972b). Decision-making is interdependent because justices' ability to have majority opinions reflect their policy preferences depends in part on the choices made by other justices.

it might opt to base its ruling on constitutional grounds and thus significantly raise the costs associated with overturning the Court (Murphy 1964; Spiller and Spitzer 1992; Segal 1997). Furthermore, justices may seek to exploit their capacity to draft opinions that fall into several different dimensions so as to avoid a hostile congressional response (Segal 1997).¹⁰ Although those who have most rigorously articulated separation of powers models may succeed in identifying the equilibrium point where outcomes are likely to fall, individuals playing a separation of powers game can pursue many different strategies and are likely to make numerous miscalculations.

Criticism of the separation of powers literature tends to take two forms. First, some critics argue that the separation of powers game is based upon so many unrealistic assumptions that justices cannot seriously allow fear of being overturned to influence their decisions (Baum 1997:96-97; Melnick 1994:263-64). Second, some question the extent of the empirical support for a separation of powers model. Both of these points are forcefully argued in Segal's contribution to this volume.

In his present essay, Segal shows that the final votes cast by individual justices usually reflect their ideal preferences, rather than a strategic calculation about what is acceptable to Congress. Segal views this as grounds for rejecting the notion that justices take into consideration congressional preferences when making their rulings. Of course, finding that justices do not moderate their voting behavior to comply with congressional preferences does not mean that justices are unwilling to play the separation of powers game. Indeed, Segal concludes by arguing that because of the difficulty in overturning court decisions, the strategic justice may consider and then ignore congressional preferences (see also 1997:42). While Segal's findings raise questions about the validity of the separation of powers game, it is important to note that it is only a first step in empirically testing the exogenous strategic approach. Indeed, it is likely that justices' responses to the political environment take forms that are not easily observed in final votes on the merits. First, a strategic justice who perceives that deciding a case is too costly is likely to deny *certiorari* and thus not decide the case. Second, we also suspect that if justices are responding to exogenous forces that they do so by modifying the legal rule, rather than the disposition, to be more in line with the dominant political coalition. Congress, like the justices themselves, is likely to be more concerned with how the legal rule undergirding an opinion will affect future social, political, or economic relationships than with who won the case. Third, it is conceivable that even though many justices are not altering their

Below we discuss several of the Court's intra-institutional features and the ways in which they promote interdependent decision-making.

The strategic model also injects a dynamic element into explanations of judicial decision-making, providing variation that is untapped by the relatively static attitudinal model.¹¹ According to the attitudinal approach, changes in justices' votes should reflect changes in their policy preferences, but such preferences tend to be stable, especially in the weeks or months in which it takes to decide a case.¹² The dynamic nature of the collegial court game poses a significant challenge to the attitudinal model, as behavior is no longer simply the expression of preferences and outcomes are not merely the aggregation of individual preferences.

Indeed, the attitudinal model's focus on final votes on the merits itself obscures the microanalytic foundations of Supreme Court decision-making. By focusing on final outcomes, instead of the dynamic, political process by which legal policy is produced, the attitudinal model misses an important element of decisionmaking. The historical-interpretive approach generally focuses on the Court's final output—in the form of the language contained in final opinions—and thus, like the attitudinal model, it also often misses the microfoundations of the law. Judicial outcomes, in short, cannot be fully explained without attention to the political dynamics of the decision-making process on the bench.

The first institutional obstacle for justices attempting to convert their policy goals into the law is getting appropriate cases on the Court's docket. Unlike Congress, where a single member can initiate a policy change by introducing a bill, individual justices interested in achieving their policy goals cannot independently place a case on the Court's agenda.¹³ A justice needs the support or acquiescence of at least three other justices before a case is placed on the Court's docket. This is known as the Rule of Four. Since an individual justice is unable to set the Court's agenda, we expect interaction among the justices to play a role in the *certiorari* process. Even though some judicial scholars focus their attention on exogenous determinants of the *certiorari* decision (Tanenhaus et al. 1963; Ulmer 1983, 1984; Caldeira and Wright 1988; McGuire and Caldeira 1993), others explore an intra-court, strategic approach (Cameron, Segal, and Songer 1997; Caldeira, Wright, and Zorn 1996; Perry 1991; Boucher and Segal 1995; Brenner and Krol 1989). This approach to decision-making suggests that policy preferences alone do not dictate a justice's willingness to support a *certiorari* petition. Instead, justices' willingness to grant *certiorari* depends in part

upon the actions of their colleagues. Because a court opinion that is inconsistent with a justice's policy preferences may be more detrimental to the justice's policy goals than no opinion, a strategic justice will calculate how other justices will vote on the cases' merits. Schubert (1982b), Brenner (1979), Palmer (1982), Brenner and Krol (1989), Krol and Brenner (1990), Boucher and Segal (1995), Caldeira, Wright, and Zorn (1996), and Epstein and Knight (1998) argue that a justice's willingness to grant *certiorari* depends in part upon his or her perception of the likely outcome of a particular case.¹⁴

Anticipating a colleague's eventual vote on a case's merits is not the only strategic interaction that occurs during the *certiorari* process. Although Perry (1991) argues that a justice's vote on *certiorari* is primarily, albeit not always, influenced by legal considerations, he discovers that there is a strategic element to the process. After interviewing five U.S. Supreme Court justices, Perry (*ibid.*) discovered that justices regularly threaten to dissent from a denial of *certiorari* as a strategic mechanism to entice other justices to support *certiorari* (see also Epstein and Knight 1998). The existence of what has become known as "Join Three" also represents an indicator of the strategic nature of the *certiorari* process (Perry 1991; Epstein and Knight 1998; O'Brien 1996:238). Although its frequency of use is unclear, justices occasionally state that they will support a motion to grant *certiorari* because three of the other justices support the petition, and a fourth vote is needed to bring up the case. Although Perry rejects the hypothesis that justices "join three" as part of an explicit "logroll," he states that at least one of the justices he interviewed occasionally joined three because "he was interested in a more collegial process" (1991:168–69). Whereas the behavioralist model suggests that the behavior of justices is predetermined by their prevailing preferences, numerous studies of the *certiorari* process suggest that the evolving political dynamics thereto influence the choices of the justices.

Another important institution 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. 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 institution provides an opportunity for opinion assigners to attempt to affect the Court's decisions (Epstein and Knight 1998; Baum 1997). Since opinion authors have a disproportionate influence on the content of an opinion, the decision of who will

write the opinion affects the policy content of the opinion as well as the breadth of the legal doctrine. Or, in the words 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).

Studies of the opinion assignment process demonstrate that the Chief Justice frequently bases opinion assignments on strategic considerations. For example, Slotnick (1978, 1979), Davis (1990), Brenner (1982), and Maltzman and Wahlbeck (1995, 1996a) hypothesize that the Chief Justice is more likely to assign important cases to himself, since by doing so the chief increases the probability that the final opinion will be consistent with his policy preferences. Other scholars suggest that the Chief Justice strategically assigns opinions, especially in minimum winning cases, to ideological crossovers who may not write an opinion that perfectly reflects their policy views (Maltzman and Wahlbeck 1995, 1996a; Danelski 1960; McLaughlan 1972; Murphy 1964; Rohde 1972c; Rohde and Spaeth 1976; Ulmer 1970b; but see Brenner 1982; Brenner and Spaeth 1988; Rathjen 1974). Although some scholars speculate that such an assignment may stem from an attempt to preserve a fragile majority and the chief's preferred outcome (Murphy 1964; Rohde 1972c; Rohde and Spaeth 1976; Davis 1990; Maltzman and Wahlbeck 1995, 1996a), others contend the chief assigns for different, yet still strategic, reasons. For example, McLaughlan (1972) argues that the pivotal justice is assigned the case because of the chief's long-term goal of promoting Court harmony; Brenner, Hagle, and Spaeth (1990) argue that the Chief Justice is more likely to assign highly contested opinions to the pivotal justice to avoid the breakup of the original coalition majority and thus the need to reassign the majority opinion.

The opinion-writing process includes the key aspects of the formation of legal doctrine. It is during this stage that justices bargain, negotiate, and compromise about the content of the legal rules announced in majority opinions. In spite of the substantial influence of the opinion author, that justice is not a "free agent" (Rohde and Spaeth 1976:172). Instead, he or she is constrained by the actions and choices of other justices. This stems in part from the Court's rule that before an opinion can carry the imprimatur of the Court, it must gain the support of a majority of justices. Opinions that fail to gain the necessary support will not be seen as speaking for the Court, although they may announce the judgment of the Court, and their precedential impact will be lessened (Johnson and Canon 1984; Segal and Spaeth 1993).

Although Murphy may be the scholar most closely affiliated with a strategic approach to opinion-writing, he is not the only one to adopt such a theoretical framework. Even earlier, Westin (1958) wrote that justices may respond to a majority opinion draft with "returns [that] suggest detailed changes in argument, or even style. . . . Polishing the opinions is therefore a process of group adjustment, in which the Justice assigned the opinion to write must shape his statement to the wishes of his colleagues or risk separate concurrences or even defections to the minority" (127). Consistent with Murphy's and Westin's observations is the view that opinions are "the result of a cooperative process in which nine supreme individuals collaborate to bring about the desired result—a result that is the joint work of the justices rather than the product of the named author alone" (B. Schwartz 1996:8). In short, opinion-writing is an interdependent process in which opinion writers are dependent on the support of their colleagues.

Given the importance of Court opinions, it is not surprising that each justice attempts to shape the majority opinion consistent with his or her policy objectives. Opinions contain legal rules that establish referents for future behavior and thus have an impact beyond the parties in the litigation (Hurst 1956; Knight 1993; McIntosh 1990; Spriggs 1996, 1997; Wahlbeck 1997). Justices therefore attempt to shape legal rules so that they can impact future social, economic, and political relationships. They thus do not necessarily join the first draft of the majority opinion. Instead, justices will often use a "mixture of appeals, threats, and offers to compromise" (Murphy 1964:42) to encourage opinion authors to write legal rules that reflect their policy preferences.

Murphy (1964), Spriggs, Maltzman, and Wahlbeck (forthcoming), Epstein and Knight (1998), and others argue that justices regularly make suggestions and threats and even circulate separate opinions as a mechanism for extracting concessions from the majority opinion author. And, they show that majority opinion authors frequently respond to these bargaining strategies by altering the opinion. During the Burger Court, justices requested that the author make a change to the majority opinion in about 23 percent of the cases.¹⁵ Wahlbeck, Spriggs, and Maltzman (1998) also hypothesize and empirically demonstrate that these bargaining strategies are more likely to result in the author's willingness to accommodate, as seen in the number of majority opinion drafts circulated. For example, the greater the number of suggestions or threats by members of the majority conference coalition, the greater the level of accommodation by the author. Likewise, if the majority conference coalition is small in number, thus endowing its members

with leverage over the author, the author is more likely to accommodate. This finding is consistent with the claims made by the justices themselves. Indeed, Chief Justice Rehnquist has explained: "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. . . . [I]f the result at conference was reached by a unanimous or a lopsided vote, a critic who wishes substantial changes in the opinion has less leverage" (1987:302).

Another important component of the opinion-writing process is the formation of majority opinion coalitions.¹⁶ According to Murphy (1964) and Epstein and Knight (1998), coalition formation reflects a series of strategic calculations by justices fully cognizant of the dynamic and interactive nature of the opinion-crafting process. The strategic portrait of Court politics has been reinforced by a series of case studies looking at opinion writing and coalition formation on the Court (Murphy 1964; Woodward and Armstrong 1979; B. Schwartz 1985, 1988, 1996; Epstein and Knight 1998), as well as a variety of papers focusing on the size and composition of opinion coalitions (see Schubert 1959, 1964; Ulmer 1965; Rohde 1972a, 1972b; Rohde and Spaeth 1976; Brenner and Spaeth 1988; Brenner, Hagle, and Spaeth 1990).

Recently, we (Wahlbeck, Maltzman, and Spriggs 1996) have attempted to systematically test a strategic model of the coalition formation process. We hypothesize and demonstrate empirically that the time it takes for a justice to join the majority opinion depends upon more than just his policy preferences. Such choices also depend upon strategic factors such as whether the majority opinion author already has enough votes to win—a finding consistent with the argument that an individual's bargaining leverage declines once a winning coalition forms (Rohde 1972a:214; see Riker 1962; Riker and Niemi 1962)—and the concurrent bargaining tactics of other justices, such as the circulation of suggestions or concurring opinions.

Justices also have an incentive to adopt tit-for-tat tactics, since their lifetime tenure guarantees that they will continue to interact with the same colleagues over the course of the near, and often distant, future. Justices, that is, are engaged in repeated play, so it is reasonable to expect them to embrace a long-term strategy designed to enhance their future bargaining leverage and power. Murphy (1964:52), for example, argues that a justice can "build up a reservoir of good will for later use" by joining the majority opinion despite having reservations about it. This tactic is useful because such a justice "may have put himself in an excellent position to win reluctant votes from colleagues on other

issues" (Murphy 1964:53). Thus, in Wahlbeck, Maltzman, and Spriggs (1996), we hypothesize and show that justices are also likely to engage in tit-for-tat behavior. In particular, we show that even after controlling for preferences and other factors that might influence a justice's willingness to join a majority opinion, justices join majority opinions more quickly if the opinion's author has cooperated with them in the past. As they are political actors involved in a repeated game with their brethren, this finding is not surprising. (see Axelrod 1984; E. Schwartz 1996). In a separate paper (Wahlbeck, Spriggs, and Maltzman 1997), we further demonstrate that the more cooperative an opinion author has been with a justice in the past, the less likely that the justice will now concur or dissent.

The collegial nature of Supreme Court decision-making provides an institutional context in which justices' decisions are interdependent. As is obvious, however, scholars have just begun to offer theoretically and empirically rigorous models of this process and its effect on judicial outcomes.¹⁷ We are confident that in the future, as more scholars examine this process, our understanding of the dynamic, political nature of the Supreme Court decision-making will be improved. The key to advancing our understanding rests in scholars' use of theoretically and empirically rigorous tests of their models.

Assessing the Strategic Approach

Critics of the strategic approach tend to take two different tacks. First, they accuse the strategic approach of being overinclusive. Indeed, in his contribution to this volume, Gillman writes: "In general, if one is being strategic whenever one considers the consequences of one's behavior in light of the behavior of others. . . . virtually all decisions handed down in the history of the Court, are properly labeled strategic." Our response to this criticism is twofold. First, Gillman is correct. We suspect that most decisions handed down by the Court are subject to strategic considerations by the justices. Nevertheless, despite the presence of institutional constraints on justices, which leads to strategic calculations, justices may be able to express their ideal policy preferences without concern for the choices of other justices or reactions by Congress and the President. Undoubtedly, there are cases that lack sufficient saliency to merit a congressional attack even though the decision is at odds with the views dominant in Congress. Likewise, justices may be free to author opinions that express their true policy views when there is general consensus on the Court or the case is relatively unim-

portant. This suggests, we think, not a limitation of the strategic model, but a potential research agenda as scholars attempt to discern the conditions under which justices modify their behavior in response to the threats and suggestions of their colleagues or the anticipated reaction by Congress. In short, scholars need to provide theories about the extent to which, and under what conditions, justices' choices are altered by interdependent decision-making.

Although we believe that most judicial behavior is influenced by strategic considerations, we are also confident that other factors play an important role in shaping judicial behavior. For this reason, we believe that it is imperative that when scholars employ either qualitative or quantitative evidence to explain outcomes, they are pluralistic enough to search for variables that are related to other approaches to the study of the Court. Inevitably, organizational factors, strategic considerations, attitudinal factors, and even legal factors influence the positions a justice is likely to embrace. Again, the principal task of judicial scholars is to provide theories for and empirical evidence of the circumstances under which these various factors affect justices' decisions. Furthermore, we also believe it is imperative that all empirical claims include information about what is not being explained. For quantitative studies, it is standard practice to inform the reader how much of the variance is being explained. Frequently, we see that statistically significant variables still only explain a modest amount of the variance.

Of course, Gillman's point raises a more serious consideration. If strategic behavior is defined so broadly, does it have any predictive power? We believe that a strategic approach does have uses if one recognizes that there is no single strategic model. Instead, the strategic approach represents a class of models that each individually helps us to understand judicial behavior and outcomes. In other words, the strategic model rests on one premise: that justices' choices are interdependent, a premise that must be given life through the use of specific conditional hypotheses about when and to what extent justices reflect on other actors' preferences and likely behavior. Thus, in the intra-court game, one of the hypotheses that the strategic approach leads to is that justices engage in tit-for-tat behavior. Even after controlling for preferences, we expect justices to join opinions of those colleagues who historically support them. Likewise, we expect justices to take into consideration the size of the winning coalition when deciding how to respond to a draft opinion. We further argue that most choices a justice makes during the opinion-writing process—from making a suggestion, to circulating a concurrence, to joining the majority opinion—depend in

part on the concurrent actions of his or her colleagues. Each of these hypotheses represent specific and testable claims that fall under the strategic rubric.

The other criticism that has been lodged against the strategic approach is that it is underinclusive in that it cannot explain every aspect of Supreme Court decision-making. In particular, the strategic approach, like the attitudinal approach, continues to treat preferences as exogenous. As Clayton points out in his contribution to this volume (see also Smith 1988; March and Olsen 1984, 1989; Gates 1991), institutions do more than structure outcomes by affecting actors' beliefs; they shape preferences and values. We have no doubt that this is true: institutions affect individuals in a variety of ways, including the formation of values and preferences. Nevertheless, to account theoretically and empirically for all phenomena is a herculean task to which no one approach has yet risen. Thus, most scholars who embrace a strategic approach content themselves with clearly delimiting what they take to be exogenous (normally, institutional structures and preferences) and then determining what behavior is likely to flow from such assumptions. Even if preferences are endogenous to the Court's institutions, we can arguably still gain much insight into the dynamics of judicial choice by evaluating how a range of such preferences affects justices' subsequent choices. Finally, the strategic perspective—far more so than the attitudinal perspective—is appropriately attentive to the possibility of changing preferences in the course of Court decision-making. Recognizing the dynamic element of judicial decision-making and the interdependent character of justices' choices, the strategic approach recognizes that preferences indeed may shift. What is more, it is unclear why the historical-interpretive approach is considered to be better suited to untangling the linkages between institutional configurations and the formation of preferences. If one is interested in explaining the formation of and change in institutions (Knight 1992; North 1990), as well as in how such arrangements might affect actors' preferences, we suspect that a rational-choice perspective can offer valuable insight by focusing on the microanalytic linkages between them.¹⁸ We, however, also suspect that an interpretive approach can also be of benefit, and thus urge scholars from both schools to tackle this issue.

An Emerging Source of Commonality: Focusing on Legal Rules

Both the attitudinal and strategic approaches emerge from distinct intellectual traditions. Their understanding of the motivations and fac-

tors that shape human behavior fundamentally differ. The lack of a common theoretical link between these approaches is matched by their divergent empirical interests. The attitudinal approach has been most fruitfully employed in understanding a justice's decision regarding how to vote on a case's merits. Attitudinalists claim that preferences alone account for a justice's decision to affirm or reverse a lower court decision.¹⁹ In contrast, those scholars who embrace a strategic approach primarily, but not exclusively, cast their analytical scope on the opinion-writing process. This is one area in which the attitudinal approach has not been fruitfully employed. Even Harold Spaeth, the scholar most closely associated with the attitudinal model, notes that "opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate" (Spaeth 1995: 14).

We find the emphasis on the formation of legal rules to be an encouraging development that may eventually bridge the gap between scholars who embrace an interpretivist orientation to the study of the law and those who study the law from a more positivist perspective. While the strategic approach, we think, will result in a much richer understanding of how justices pursue their policy preferences, the interpretivists are beginning to demonstrate that noninstrumental goals may matter as well. We believe that a more comprehensive model may ultimately emerge which recognizes that, while a justice's principal goal is public policy, other goals also matter. Such a model, of course, would necessarily have to provide a theory for under what conditions various goals take primacy and the ways in which goals interact to result in judicial choice and ultimately legal policy. For the time being, however, we think that viewing justices as constrained seekers of legal policy provides a parsimonious, powerful way to conceptualize Court decision-making. We are thus hopeful that the strategic approach's success in helping to account for the development of legal rules will help reunite a subfield that has historically been so divided that some scholars have questioned whether it should be divided into two distinct subfields (Scheppelle 1996).

Understanding the *certiorari* process, opinion assignments, opinion-drafting, accommodation amongst the justices, and competition between the three branches is central to explaining the development of the law. However, it would be a mistake to claim that strategic factors alone can fully account for the precise wording of Court opinions. Inevitably, opinions take the form they do because of a variety of factors that will never be fully accounted for by any single model of Supreme Court decision-making. Legal factors, a variety of endogenous and exogenous strategic calculations, role orientations, and numerous idio-

syncratic factors that can never be completely captured in a reasonably parsimonious model are all likely to shape the Court's final opinion. Whether one's evidence is in the form of a statistical model or detailed, rich case studies, life is too complex, varied, and even random to be perfectly captured by any single model. Yet, we argue that viewing justices as pursuing their policy preferences within the constraints imposed by collaborative decision-making and other institutional constraints takes us a long way toward understanding the dynamics of the law's development.

For a good portion of the twentieth century, legal theorists and legal realists have vented their frustration with each other. We suspect that the lack of communication stems from unique theoretical perspectives, divergent empirical approaches, and the historical reluctance of judicial process scholars to study the opinion-writing process. Fortunately, theoretical and empirical advancements are enabling judicial process scholars to move beyond explaining justices' votes and instead to contribute to the issue that is central to public law scholars—the explanation for the development of Supreme Court opinions and thus the formation of legal precedent. In so doing, judicial scholars are developing a much richer and more dynamic understanding of the political, strategic nature of Supreme Court decision-making.

Notes

1. While Murphy's book represents the most comprehensive work on judicial strategy of his generation, he was not the only scholar making such an argument. In fact, Glendon Schubert, the principal innovator of the attitudinal model, argued that Supreme Court decision-making involves strategic behavior (1959:173-210, 1964; cf. Ulmer 1960, 1965).
2. For additional perspectives on strategic approaches and the U.S. Supreme Court, see Epstein and Knight (1997, 1998) and Baum (1998:chap. 4).
3. For a discussion of the early work on institutions, see Clayton's essay in this volume.
4. While we argue that a justice's principal goal is policy, we recognize that, at times, justices may pursue other goals, such as legitimacy of the Court (Epstein and Knight 1998; cf. Baum 1995).
5. Our preference for the term "strategic," rather than merely institutional, reflects the fact that rational-choice theoretic treatments are not the only tradition to claim the neo-institutionalist banner. Historical institutionalism, sociological institutionalism, and other institutionally focused approaches to the study of politics fall under the general rubric of neo-institutionalism. Neo-institutionalism 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 nonrational-

choice institutionalism are discussed in detail by Orren and Skowronek (1994) and Smith (1996).

6. 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).

7. While a rational-choice approach emphasizes that actors are goal-directed, making choices based on the consequences of a particular course of action, such an explanation can also incorporate such factors as social norms (Elster 1986), normative notions about the duties of judges (Ferejohn 1995), and persuasion based on normative principles (Elster 1995).

8. Indeed, Marks maintains that "The Court is unconcerned with the impact of its decision on the legislature" (Marks 1988:2, as cited in Segal 1997:30).

9. Murphy (1964) explicitly rejects this line of reasoning when he writes:

Accurate prediction of a political reaction is hardly an easy task. It involves weighing of intangibles on a scale calibrated to the unknown quantities of the future. Yet this is the sort of problem which decision-makers in other government positions must regularly handle. Thus it is also the kind of problem which most justices, considering their wide range of political experience before coming to the bench, have also frequently handled. A justice can get the facts on which he bases his estimate of the situation from newspaper reports, leaks, and analyses, from professional or scholarly journals, from the *Congressional Record*, from committee hearings and reports, from presidential press conferences, from statements by cabinet members or bureau chiefs, and of course, from the celebrated Washington grapevine (171-72).

10. The capacity to exploit a multidimensional space is enhanced by the fact that contrary to most treatments of Congress in separation of powers games, Congress is not a unitary actor (Baum 1997:96-97; Bawn and Shipan 1997).

11. The legal approach, like the attitudinal approach, suggests relative stability during the process of deciding a case. According to the legal approach, statutory and constitutional changes or alterations in precedent are the main factors that would lead a justice to alter his behavior in a case, but these factors normally do not change during the course of a single case.

12. Rohde and Spaeth define an attitude as "relatively enduring" (1976:75). Jones (1994) suggests as well that individual policy preferences tend to be stable over time.

13. If a single justice wants the Court to accept a particular appeal, the justice can place the case on the Court's discuss list (see Caldeira and Wright 1990). The discuss list is the list of appealed cases that at least one justice finds sufficiently compelling to merit discussion at the Court's conference. The Chief Justice first creates the discuss list from the appealed cases, and other justices may add cases to it. Chief Justice Burger initiated the present institutional arrangement. Prior to Burger, the Court used the "Dead List," which was a list of cases that did not merit discussion. The Chief created the list and any justice had the opportunity to remove a case from this "special" list.

14. Provine (1980) and Krol and Brenner (1990) believe that a justice's vote on *certiorari* is usually not influenced by their perception of a case's outcome. Perry (1991) concludes that a justice's perception about a case's outcome only plays a role in the cases that the justice finds central to their policy goals.

15. According to Justice Brennan's circulation records, justices circulated suggestions or threats in 527 of the 2,295 signed opinions or assigned cases decided during the Burger Court (1969-85 terms). For more information on these measures, see Wahlbeck, Spriggs, and Maltzman (1998).

16. On the importance of coalition formation, see Schubert 1959; Rohde 1972a, 1972b; Rohde and Spaeth 1976; Brenner and Spaeth 1988; Brenner, Hagle, and Spaeth 1990.

17. The capacity to systematically test hypotheses derived from the strategic approach has been facilitated by Justice Brennan's willingness to share his circulation records with judicial scholars. These records detail when every draft opinion was circulated, and when bargaining statements such as suggestions and threats were circulated by the justices (Epstein and Knight 1995a; Wahlbeck, Spriggs, and Maltzman 1998). These records are available in the Library of Congress's manuscript room.

18. If institutions shape preferences, one cannot determine preferences without understanding where institutions themselves emerge (Knight 1992; Knight and Sened 1995). Congressional scholars have fruitfully employed a rational approach to explain the development of institutional arrangements (Aldrich 1995; Binder 1997; Dion 1997). With a few notable exceptions (e.g., Walker, Epstein, and Dixon 1988), judicial scholars have not focused on the formation of institutional arrangements.

19. Howard (1968), B. Schwartz (1985, 1988, 1996), and Maltzman and Wahlbeck (1996b) argue that a justice's willingness to change their vote between the initial conference vote and the publication of the final opinion regularly result from strategic reasons such as an opinion author's willingness to alter their draft.