Judicial Decision-Making:
An Austrian Perspective

Christopher M. Holbrook

University of Missouri, Department of Political Science

Austrian Student Scholars Conference

February 18-19, 2011
Introduction

Political science has long discussed how judges decide cases, in particular those of the Supreme Court. Considerations of social choice theory, normative approaches to constitutional interpretation, and modeling highlight these discussions. Much of the current debate, however, focuses on four models of Supreme Court judicial decision-making: the legal, strategic, institutional, and attitudinal models. The disagreement over their use centers on the extent to which each explains Court decision-making and its ability to predict outcomes. The winner of this debate gets to “kick the others out.” As Segal and Spaeth argue: “ultimately… the crucial question becomes whether [one model] does a better job than its competitors.”¹ I argue, however, that these models are too narrowly focused on outcomes, and give too little consideration for much of the institutional influence placed on the Supreme Court. Starting with the concept of a free market in adjudication, I use an Austrian economic approach to understanding how the influence of governmentally created institutions affect judicial decision-making at the Supreme Court level.

The first section of this paper is a review of the four competing types of judicial decision-making models that are popular in political science. It highlights the process and expectations that result from each model. In the second section of this paper, I discuss the characteristics of a free market adjudication system. Specifically, I discuss a praxeological interpretation of how judges respond to incentives and constraints characterized in a free market for adjudication services. I argue that governmentally

controlled judicial services place different incentives and constraints on judges. The third section highlights the institutional affects on these influences by government intervention.

In the final section, I argue that to better understand judicial decision-making, institutional environments must be considered. The rejection of institutional models, because some have not predicted case outcomes as well as attitudinal ones, indicates a narrow focus on parsimony and predictability. Additionally, I argue that political scientist define institutions too narrowly for the purposes of understanding judicial decision-making. By understanding how institutional changes affect the adjudication process, political scientists will have a better grasp on the judicial decision-making process.

Models of Judicial Decision-Making

The Legal Model

The legal model posits that judicial decisions are based on the facts of the case and the rule of law. In the context of the Supreme Court, this includes: the plain meaning of constitutional clauses, the intent of the Framers, and precedent. A judge will apply his legal training and knowledge to the facts at hand and decide in an objective legal manner. It assumes that that there is a correct solution, one to be discovered or passed on by
learned judges. This model and its approach, therefore, are most often supported by those in the legal professions.\textsuperscript{2}

Precedent plays an important role in the legal model. It builds the legal doctrine and “is the primary determinant of extant case outcomes.”\textsuperscript{3} That is, judges are constrained by precedent. It provides an “enacting force,” when new cases are within its scope, and a “gravitational force” when they are slightly different.\textsuperscript{4} Either way, judges seek the right answer; they do not ”freely exercise discretion.”\textsuperscript{5} Rather, “it remains the judges duty, even in hard cases, to discover what the rights of the parties are.”\textsuperscript{6} Levi outlined the process of using precedent.\textsuperscript{7} It begins with the observation that two cases are similar, followed by an “announcement of the rule of law inherent in the first case.”\textsuperscript{8} This rule is then applied to the second case.

Segal and Spaeth, however, argue that legal explanations are merely attempts “to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”\textsuperscript{9} According to Hasnas, the rule of law is a myth; precedent and “a logically sound argument can be found for any legal conclusion.”\textsuperscript{10} Segal and Spaeth test the

\begin{flushleft}
\textsuperscript{3} Ibid, 324
\textsuperscript{5} Segal and Spaeth, 49
\textsuperscript{6} Dworkin, 39
\textsuperscript{8} George and Epstein, 324
\textsuperscript{9} Jeffrey A. Segal and Harold J. Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited}, New York: Cambridge University Press, 2002, 53
\end{flushleft}
influence of precedent and determine that justices are rarely influenced by *stare decisis*. They conclude that since precedent usually exists for both sides of a case, the legal model cannot predict how the Court will rule. As such, they argue it is a poor approach to understanding judicial decision-making.

*Attitudinal Models*

Segal and Spaeth contend that the best way to understand judicial decision-making is to focus on the policy preferences of the justices. As mentioned above, they argue that Court opinions are merely defenses of those preferences. Justices will vote according to how well they can advance their preferences. This should come to no surprise to anyone with an understanding of economic theory or social choice theory. When making a choice from a set of alternatives, individuals choose the one they prefer most. That is, they rank alternatives in an ordinal manner and select their first choice. When they make a choice, they demonstrate a preference. Demonstrated preferences are not enough for Segal and Spaeth, however. They want to test judicial decision-making against voiced preferences. That is, preferences regarding policy that justices have written about or spoke of previously. Unlike the legal model, which states that judges distinguish cases and “discover” the law, the attitudinal model advances the position that personal policy preferences motivate a justice’s efforts to find supportive precedent and write legal opinions to rationalize their positions in light of the case at hand.

Segal and Spaeth test the attitudinal model by comparing a justice’s Supreme Court votes to newspaper editorials written between the justices presidential nomination...
and senate confirmation, which describe the ideological position of the nominee regarding civil liberties. They find that the correlation between these two variables is 0.76, and that regression supports their position that policy preferences predict votes.

Critics argue that attitudinal modelers develop straw-man legal models or incorrectly account for proper legal variables. In their attempt to correct these, George and Epstein model death penalty cases with both the legal and attitudinal versions. They find that the legal model accurately predicts 75% of the cases, while the attitudinal model predicts 81%.

Interestingly, George and Epstein discover that the models are ideologically biased. “The [attitudinal] model becomes increasingly, monotonically, and incorrectly prone toward conservatism.” That is, over time the attitudinal model classified too many cases as “conservative” outcomes and classified too little as “liberal” outcomes. The legal model, in contrast, exhibited the exact opposite. George and Epstein suggest that the legal model “contains an inherent flaw.” Because it only considers legally relevant facts, it will continue to forecast liberal outcomes as attorneys capitalize on existing precedent even though ‘the law’ may not actually move in that direction.” The attitudinal model’s flaw is that it assumes too strongly “that changes in the political

11 Segal and Spaeth, 323
12 George and Epstein
13 Ibid, 329
14 Ibid, 331 [emphasis in original]
15 Ibid, 332
environment will contemporaneously affect court decisions.” They conclude that these changes are sometimes too abrupt to change doctrine immediately.

**Institutional Models**

George and Epstein’s findings suggest that the tradition of precedent does matter. While Austrian economists view such traditions as institutions, political scientists are more apt to consider other, more visible institutions in their analyses. This is the case with the rational choice institutional models of judicial decision-making. These rational choice models pit the Court’s interests against the interests of Congress. Just as Shepsle and Weingast demonstrated the power of committees in passing legislation closer to their preferences than the preferences of the House and Senate chambers, the Separation-of-Powers model seeks to demonstrate that the Court must defer to Congress at some level when it decides cases.

Marks shows that if the Court rules at its ideal point, it jeopardizes having its ruling overturned by Congress. This risks a policy position further away from the preferences of the Court than if the Court acted more strategically. That is, the influence of the legislature may move the Court’s decision away from its ideal point – one risking congressional overturn – to one that is less ideal but more secure.

---

16 Ibid
Segal and Spaeth point out, however, that judicial preferences should lie close to legislative preferences in the first place. “It would be rare, indeed, to find that the president and the Senate consistently nominate and approve people who are well to the left or to the right of their preferences.”\footnote{Segal and Spaeth, 109} This makes this type of institutional modeling difficult to use, since differences in preferences should be rare. The Court “follows the preferences of the dominant electoral coalition not because of deference,… but because the coalition chooses the Court.”\footnote{Ibid, 109}

\textit{Strategic Models}

Marks’ separation-of-powers model highlights the strategic relationship between the Court and the other branches of government. Perry argues that strategic relationships exist within the Court as well.\footnote{H.W. Perry, \textit{Deciding to Decide: Agenda Setting in the United States Supreme Court}, Cambridge: Harvard University Press, 1991.} His interviews with former and current Supreme Court judges and clerks illustrate a relationship between justices characterized by bargaining and strategy.

Perry emphasizes that votes on certiorari fall within two categories, which determine the type and level of strategy involved by the justices. His decision model posits an initial step that determines the basic logic by which a justice will decide to grant certiorari. For non-frivolous cases, a justice follows the \textit{jurisprudential mode} when he is
not substantially interested in the policy outcome of the case. If the justice does care, he will proceed down the *outcome mode*.

The jurisprudential path represents the more legalistic approach. Justices following this path want to know answers to more technical questions. Is there a conflict between circuits? Is the issue important? Is there a strong reason to resolve the case? Is the case a good vehicle to clarify and settle law? If not, is a better case likely to present itself?

The outcome path, in contrast, is the more political of the two. If the justice cares strongly about the outcome, he needs to assess his chances of winning on the merits. If he can win on the merits, then the justice determines whether the case is a “good vehicle.” A good vehicle in the outcome path is slightly different from its conception in the jurisprudential path. Here, a good vehicle can provide a means to attract a swing vote, or more importantly, “to move doctrine in the particular way [the justice] wanted.” If the case is not a particularly good vehicle, then the justice determines whether there is a better case likely to emerge.

The steps in the process suggest a great deal of strategy. For instance, if a judge who cares greatly about an outcome but does not think he will win on the merits, he will “defensively” deny cert. A potential win, however, is not enough to grant cert. If a justice perceives the case to be a weak vehicle for his view of the law, he will deny cert if he perceives that a better case will present itself in the future.

____________________

22 Ibid, 281
Free Market Adjudication Services

The previous discussion highlighted four ways that political scientists look at Supreme Court decision-making. These models take as given most of the institutional structure that encompasses the Supreme Court. They fail to account for many institutions and the significant changes in the ones they do acknowledge. An Austrian economic analysis can account for changes in institutional norms, and predict the differences between the new situation in which justices find themselves and the situation that existed before. It is along this line that political scientist risk ignoring. Their focus on parsimony and predictability has led them to models that uninterested in institutional change. I argue that an institutional change provides a new impetus for the Court to decide cases. It should not be surprising that two cases separated by fifty years are decided differently. By starting with free market judicial services, an Austrian economic analysis can trace differences in rulings to the institutional affects on preferences.

Although Austrian economics is focused more on the understanding of market institutions, its scope need not be so narrow. “Economic theory requires only that scarce resources be allocated among competing uses.”23 With respect to government courts, the quantity of laws applies pressure on the court resource of time. Economic theory also considers how individuals respond to incentives and constraints.

Without government control of judicial services, judges would operate under markedly different incentives and constraints. Because a free market judge does not have a monopolistic use of force behind his decisions, the way a government court judge does,

he has a greater incentive to make the parties to a case respect his decision compared to
the advancement of his policy preferences. He has a profit incentive that is maximized
by his ability to justly arbitrate a case. If he sells out to the higher bidder in a case, then
he jeopardizes losing clients; for no one would want to have him as judge unless one new
he could buy his preferred verdict. As Benson argues:

> the origin, formation, and ultimate process of all social institutions (*including law*) is essentially the same as the spontaneous order Adam Smith described for markets. Markets coordinate interactions, as does customary law. Both develop as they do because the actions they are intended to coordinate are performed more effectively under one system or process than another. The more effective institutional arrangement replaces the less effective one.  

24 History provides examples of this free market adjudication processes. The lex mercatoria (law merchant) developed out of a need for international traders to settle disputes. Members of a contract would agree to allow a law merchant court handle any dispute, if it would arise. The law merchant developed a reputation of fairness that assuaged fears of traders entering into a contract. They were confident that the court would handle the case fairly.

The law merchant had no compulsory violent force mechanism to make losers comply with its decision. Only ostracism, by the rest of the trading community, compelled losers to comply with the ruling. “Good faith was the essence of the mercantile agreement. Reciprocity and the threat of business sanctions compelled

24 Ibid
Rothbard argues that the free market judge is, thus, more likely to be an expert in the area in contest. The current popularity of arbitration illustrates this.

Being voluntary, … the rules of arbitration can be decided rapidly by the parties themselves, without the need for a ponderous, complex legal framework applicable to all citizens. Arbitration therefore permits judgments to be made by people expert in the trade or occupation concerned.26

These examples suggest that government courts are different from free market courts. Free market courts, and consequently their judges, have different incentive than their government counterparts. Once courts fall within the domain of government, the incentives and constraints on the judges change. This is a fundamental institutional change. From this, it follows that incentives and constraints on government judges change when governmental institutional changes occur.

The Effect of Government Institutions on Judicial Incentives and Constraints

Unlike the free market judge, the Supreme Court justice does not have a profit motive that affects his rulings. Instead, he has a certain amount of power given to him by the Constitution. Once confirmed as a member of the Court, he enjoys lifetime tenure; only exceptionally poor conduct can result in his removal. The Constitution also establishes the extent of the Supreme Court’s power and jurisdiction:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made ... In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

This clause may be viewed as rather vague in light of the concept of judicial review, but that vagueness was removed with *Marbury v. Madison* (1803). In that case, Chief Justice John Marshall established judicial review, in effect extending the power of the Supreme Court. Without this ruling, the Court may have proceeded down a different path.

Jefferson’s theory of concurrent review may have continued instead. This theory held that each branch (and state) had a say in the constitutional interpretation of laws. If we assume that actors within the branches of government seek to increase their power relative to the others, then the institutional effect of concurrent review losing out to judicial review should be clear: justices on the Court now have less incentive to consider the preferences of other branches of government, including the states. *Marbury v. Madison* represents the first step in the Supreme Court increasing this power. Indeed, early in its history Supreme Court justices left their appointments much earlier than they do today to seek positions of greater prestige and power, such as governorships.27 For example, the first Chief Justice John Jay stepped down from his appointment to become governor of New York. With *Marbury v. Madison* establishing judicial review, however, one could become powerful by residing on the bench.

Another institutional change came with the decision in *Martin v. Hunter’s Lessee* (1816). This case established the Supreme Court’s power over state courts regarding federal law. The Supreme Court could now extend its power over state courts that tried to interpret federal law. Without this ruling, Supreme Court jurisdiction may have remained over appellate courts, but not state courts. In *McCulloch v. Maryland*, the Supreme Court ruled that Congress possessed implied powers for the implementation of expressed powers. It also ruled that states could not impede constitutional exercises of federal power. These cases effectively change the power balance between the federal government and the states, as well as increase the Court’s role as the arbitrator between the two. Before these cases, states governments’ competition with the federal government was handled between elected officials, whereas afterward states found themselves in competition with the Court as well.

The most significant institutional change, however, came with the end of the Civil War. Before then, states could threaten federal legislation with nullification or secession. The natural response for Congress was to back off unpopular legislative efforts. The most famous of these is arguably the fight over the Tariff act of 1828. In 1832, South Carolina passed its Ordinance of Nullification, effectively declaring the act unconstitutional. In 1833, Congress lowered the tariff to a level satisfactory to South Carolina. If state nullification threats can affect federal policy, then it is likely that it would also affect judicial decisions.

This was tested after the Civil War when states effectively lost nullification and secession as means to protect their interests. Table 1 shows the number of “Milestone”
cases decided by the Court for each decade from 1790 to 1998. This illustrates that the Court may have been less constrained by state action than before the war began.

Table 1: Milestone Supreme Court Decisions by Decade

<table>
<thead>
<tr>
<th>Decade</th>
<th>#</th>
<th>Decade</th>
<th>#</th>
<th>Decade</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>1790</td>
<td>7</td>
<td>1860</td>
<td>12</td>
<td>1930</td>
<td>20</td>
</tr>
<tr>
<td>1800</td>
<td>4</td>
<td>1870</td>
<td>8</td>
<td>1940</td>
<td>24</td>
</tr>
<tr>
<td>1810</td>
<td>6</td>
<td>1880</td>
<td>12</td>
<td>1950</td>
<td>5</td>
</tr>
<tr>
<td>1820</td>
<td>8</td>
<td>1890</td>
<td>12</td>
<td>1960</td>
<td>18</td>
</tr>
<tr>
<td>1830</td>
<td>6</td>
<td>1900</td>
<td>13</td>
<td>1970</td>
<td>13</td>
</tr>
<tr>
<td>1840</td>
<td>4</td>
<td>1910</td>
<td>8</td>
<td>1980</td>
<td>10</td>
</tr>
<tr>
<td>1850</td>
<td>4</td>
<td>1920</td>
<td>13</td>
<td>1990</td>
<td>11</td>
</tr>
</tbody>
</table>

Source: Constitution.org

Another jump can be seen in the 1930s after Franklin Roosevelt threatened to pack the court with additional judges. As Powell notes:

Justices Hughes and Roberts apparently had been intimidated. … They abandoned the principle of enumerated powers [and] ignored the ninth amendment and the tenth amendment. These justices began upholding laws that asserted federal powers not mentioned anywhere in the Constitution. The commerce clause and general welfare clause were stretched to permit a rapid expansion of federal power.  

From these examples, it seems clear that institutional changes affect court decision-making. They represent, however, only a small portion of the number of  

---

28 Constitution.org
institutional influences on the Court. Justices are also constrained by the traditions within the Court. For instance, justices decide in *conference* which cases to hear. If a case garners four votes, then it is granted cert. This allows minority coalitions to put a case on the docket. Because Congress has removed most of the Court's appellant jurisdiction, most of the Court’s cases are granted from the cert process.

Praxeology and Judicial Decision-Making

Garrison has shown that the government can cause economic downturns using different methods. It can inflate the money supply through the Federal Reserve and it can expand fiscal policy through government spending and taxation. To focus only on one, at the expense of the other, will lead to incomplete understanding of economic policy. In addition, policy recommendations are more likely to fail when they are based on only one of the two.

Similarly, models of judicial decision-making are prone to a certain degree of failure when they only focus on policy preferences. It is not enough to know what a justice said before he rules on cases. There are institutional constraints that dictate how a justice can further his preferences. In close cases, he can consider how the other justices will decide before making his decision.

Using praxeology, we can deduce certain things from the decisions judges make, and then make claims on how changing the institutional structure can affect those

---

decisions. If we assume Supreme Court judges have replaced the profit incentive characterized by free market judicial services with policy advancement, then votes in conference and on the merits provide the researcher with the demonstrated preferences necessary for praxeological analysis. When a justice votes to grant cert we may deduce that he prefers to hear the case, because he thinks he can advance his policy preferences. When a justice concurs with an opinion, he has demonstrated a preference for a position that lies closer to the majority’s than with the dissent’s.

Segal and Spaeth argue that opinions are mere rationalizations for policy preferences. Legal model proponents argue that the legal tradition directs the formation of opinions and thus the ruling. As shown above, major institutional changes have affected the Court in the past. Cases, presidential threats, and even war have changed the rules by which judges further their preferences. To argue, as Segal and Spaeth have, that the legal model should be thrown out because it predicts outcomes poorly misses the importance of legal institutions. If precedent has no effect on judicial decision-making, and only policy preferences matter, then why has judicial policy changed so slowly? Attitudinalists would argue that the slow movement simply reflects the politics of the day. Usually, there is a lag before new political ideologies are expressed by the Supreme Court. This, however, does not seem to be the case during slavery. Justice Taney ruled over the Scott Decision, yet he was personally opposed to slavery for some time. This is not to suggest that Court ideology does not change over time. It merely offers an argument that institutional constraints do play a part in determining how justices make decisions.
Conclusion

Attitudinalists recognize that judges are not the perfectly objective individuals that many view them as being. They have persuasively argued that preferences play a role in the decision-making process, if not the largest. In trying to supplant the legal model, however, they have turned the political science question into one that merely seeks to parsimoniously predict judicial behavior.

I argue that the question should not be focused on whether legal training or preferences better predict judicial behavior. Praxeologically, it is not surprising that preferences are directing behavior on the Court. Instead, the question political scientists should be asking is how and to what extents do institutions and institutional change affect the advancement of those preferences. When Jefferson defeated Adams in 1800, Adams placed as many Federalist judges in federal courts as he possibly could. Those justices had markedly different preferences than Jefferson, but they did not push through a wholly Federalist policy. They were constrained by the institutions surrounding the Court, just as today’s justices are constrained by an increasingly difficult confirmation process.

Future work on judicial decision-making should focus on the institutional effects on Court policy preferences. That is, to what extent do institutional constraints have on judicial preferences?
Bibliography:


