

The Strategic Analysis of Judicial Behavior and the Separation of Powers

Chad L. Westerland

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Edited by Lee Epstein and Stefanie A. Lindquist

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Abstract and Keywords

This chapter uses the separation of powers (SOP) literature to explore the application of strategic models to judicial behavior. Strategic conceptions of judicial decision-making are often presented as a theoretical alternative to the attitudinal model. A review of the basic SOP model highlights the key institutional assumptions that motivate the different major variants of the SOP model and the differences with the attitudinal model. While the empirical literature reveals a tremendous amount of progress in the past twenty-five years, empirical support for the classic statutory SOP model remains elusive. However, the same cannot be said for newer institutional legitimacy models. The chapter concludes with suggestions for directions of future research.

Keywords: strategic decision-making, separation of powers, strategic model, attitudinal model, institutional legitimacy models

THE assertion that judges have policy preferences is no longer a controversial claim. But once we accept the premise of a policy-pursuing judge, we need to understand how judges work to realize favorable policy outputs and outcomes. The strategic analysis of judging focuses on the interdependent nature of political decision-making. These strategic models of judicial decision-making are the most important innovation in judicial research in the last thirty years. Formal models have become more sophisticated, and the variety and quality of quantitative and qualitative evidence has improved greatly.

The attitudinal model and the strategic model have much in common. The major distinction between the two approaches is a different understanding of the institutional context of judging. The attitudinal model (Segal and Spaeth 2002) is an institutional model; it posits that the independence of the U.S. Supreme Court allows justices to pursue their ideological preferences largely without concern for the potential responses outside of the Court. Simply put, the institutional position of the Court allows for strategic sincerity. From the strategic perspective, ideological preferences are no less important. However, the institutional landscape is arrayed in a way that constrains how judges can pursue those preferences (Epstein and Knight 1998). If a sincerely preferred outcome of the

Court will result in a legislative reprisal, then the Court would be better off issuing a moderated decision closer to legislative preferences. Each model generates these different predictions precisely because of a different understanding of institutional constraints.

In this chapter, I use the separation of powers (SOP) literature to explore how well the strategic accounts explain judicial behavior. I first offer a brief explanation for the general absence of strategic models in the early judicial behavior literature. I then explain the basic SOP model and highlight the key institutional assumptions that motivate the (p. 254) major variants of the model. A review of the empirical literatures reveals a tremendous amount of progress in the past twenty-five years. Empirical support for the classic statutory SOP model remains elusive, but the same cannot be said for newer institutional legitimacy models. I conclude with several suggestions for future research.

Strategic Approaches to Judicial Behavior

The prominence of the strategic framework for judicial behavior might be easy to take for granted now, but its rise as a dominant analytic framework is a relatively recent development. While a full intellectual history is beyond the scope of this chapter,¹ the strategic model of judicial decision-making is best understood as a reaction to the attitudinal model. Early classics such as Pritchett's *The Roosevelt Court* (1948), Murphy's *Elements of Judicial Strategy* (1964), and Schubert's *The Judicial Mind* (1965) all explicitly assumed policy-pursuing judges as a starting point for their investigations. Schubert, Pritchett, and Murphy were in some ways speaking the same language about goal-oriented actors, but the socio-psychological strands of Pritchett's and Schubert's work had the most important initial impact. Schubert's behavioral insights in particular greatly influenced other early attitudinal studies (Spaeth 1972). From this perspective, judicial decisions are best understood as a response to case facts (the stimulus) based on the attitudes of the judge. Even as later work refined these ideas with work from economics (Rohde and Spaeth 1976), the attitudinal model of Segal and Spaeth (1993, 2002) retained its behavioral roots.²

The strategic perspective, especially as advanced by Murphy, was lost in the debate between the attitudinal model and the legal model. Murphy's work did not have the impact of similar early rational choice applications, such as Downs (1957) or Riker (1962). This was not just because the field was preoccupied with the attitudinal versus legal model debate, and by extension, the debate on how to conduct social science. As important and insightful as *The Elements of Judicial Strategy* remains fifty years later, it forgoes the type of formal analysis conducted by both Downs and Riker. In *Elements*, just about any decision a justice makes could be "strategic." It would be false to claim that predictions cannot be derived from Murphy, but the work as a whole is presented almost as a cautious hypothetical.³ Although the attitudinal model is also not derived from formal equilibrium analysis, it nonetheless provides falsifiable propositions that are amenable to empirical testing. This was a major early advantage for the behavioralist approach.

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By the time scholars brought their attention fully to the strategic model an impressive body of evidence for the attitudinal model had been amassed. The reintroduction of the strategic analysis of judicial decision-making acknowledged the attitudinal model as critical starting point but presented it as a fundamentally incomplete explanation. (p. 255) Judges, like all political actors, certainly have preferences and goals, but from a rational choice perspective, that claim by itself is not very interesting. Attitudes are essential, as strategic considerations do not make much sense absent clearly defined preferences.⁴ But the institutional rules and norms that constrain those attitudes and the interdependent nature of political choices are what matter most. Picking up where Murphy left off, Epstein and Knight (1998) argue that every aspect of Supreme Court decision-making should be viewed through a strategic lens. Justices have short-term goals, and the pursuit of these goals involves a series of interdependent choices. The strategic literature quickly developed along two largely separate lines of inquiry—models of strategic interaction between the justices (internal models) and models of the strategic interaction between the Court and non-judicial actors (external models). The internal models are primarily concerned with how justices constrain one another during the opinion-writing process (Maltzman, Spriggs, and Wahlbeck 2000). The external constraints literature focuses mostly on SOP games. The SOP literature developed rapidly in the late 1980s and was in fact responsible for launching the general interest in strategic models of judicial decision-making.

Not surprisingly, the foundations of the separation of powers model begin with Murphy's *The Elements of Judicial Strategy*. While much of his analysis concerns intra-Court politics, Murphy devotes two chapters in *Elements* to exploring how a justice might consider legislative or executive preferences when making a decision. Murphy identifies two broad dimensions of strategic considerations: ensuring a decision is followed and preventing a negative response. As already noted, Murphy avoids any precise behavioral predictions, but the innovation of Murphy's work was simply to acknowledge the possibility that the Court might anticipate Congressional or executive responses to its decisions. Many of Murphy's insights are still fundamental components of the strategic models of the Court's inter-branch relationships, but twenty-five years would pass before his insights were formalized.

Brian Marks's dissertation (1989) ignited widespread interest in the SOP model and strategic judicial decision-making more broadly. For Marks, the Court is actually non-strategic and has fully exogenous preferences; his focus was instead on why Congress was unable to overturn the Court's decision in *Grove City College v. Bell* (1986). But the "Marksist" framework was quickly used as the foundation for the classic statutory SOP model. The importance of the approach for the broader study of judicial behavior is obvious, as the statutory SOP model has critical implications for attitudinal model's predictions about the merits vote. Under the assumptions of the SOP model, voting sincerely on the merits will not result in the best possible policy outcome for the Court. Thus, the SOP model is framed as a more complete alternative to the attitudinal model.

In the remainder of the chapter, I review the assumptions motivating different variants of the SOP model and detail a major empirical problem that must be solved if the model is to be tested. Along the way, I highlight several of the key findings from the literature and suggest possible avenues for future scholarship. (p. 256)

The Strategy of SOP

The basic insight of the SOP model relies on a straightforward application of spatial voting (Marks 1989; Ferejohn and Shipan 1990; Ferejohn and Weingast 1990; Gely and Spiller 1990; Spiller and Gely 1992). Figure 13.1 presents the simplest formulation of the SOP game. The medians of the Court (C), House (H), and Senate (S) are arrayed in a single policy dimension. A Court that finds itself located between the medians of both the House and the Senate is free to act sincerely. In this scenario, the Court's ideal point falls within the set of Pareto optimals and thus cannot be overturned without making one chamber worse off than the policy at the Court's ideal point. If the Court finds itself either to the right or to the left of both chambers, then Congress can overturn a decision rendered at the Court's ideal point. In the hypothetical arrangement in the bottom of Figure 13.1, the best the Court can do is to set policy at the Senate's ideal point. Otherwise, the House can offer an alternative that will be acceptable to the Senate but that is further away from the Court's ideal point than if the Court were to set policy at the Senate's ideal point. The SOP model may be presented with greater complexity without changing the general point that the Court faces constraints that may produce strategic decisions. For example, different pivotal players (committee chairs, filibuster veto points, executive preferences, etc.) can easily be added to the model without changing the basic predictions. Recent models have included public support for either the Court or a specific decision (Vanberg 2005; Clark 2011). The general contribution from this refinement is that if the public views the Court favorably as an institution, then the Court may be able to achieve better policy outcomes even when in conflict with the legislature. But all SOP models point to an unavoidable conclusion: a rational, policy-oriented Court's decisions are conditional on the alignment of the preferences of actors (political branches, public opinion) outside of the Court.

The setup of the basic SOP model requires a series of assumptions about the nature of the interaction between the Court and external actors. Two key core assumptions are (1) a common policy space across institutions and (2) perfect information about preferences. The legislature is usually given the last move and the costs of proposing and (p. 257) passing overriding legislation are assumed to be minimal. The legislature must also be able to overturn the Court's decision via regular legislation. This assumption can be recast slightly by recognizing that the Court usually cannot enforce its own decisions. Even if an unpopular decision is not overturned, it may simply be ignored and not implemented by the political branches. A variant of the standard SOP model posits that Congressional control over many of the sources of the Court's institutional power (appellate jurisdiction, funding, etc.) will ensure that the Court does not stray too far from legislative preferences. This formulation does not require that the Court makes precise predictions about the lo-

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cation of a potential policy response from Congress. Instead, the Court must gauge its ideological position relative to the rest of the political environment and determine whether a sincere decision would be divergent enough as to generate an attack on the Court itself.



Figure 13.1 Spatial representation SOP model

Source: Author.

The key difference between the attitudinal model and the strategic model involves a disagreement about how to understand the Court's institutional context. The attitudinal model finds fault with many of the standard SOP assumptions (Segal and Spaeth 2002: 105–10) and instead argues that the Court's control over its docket, its position at the top of the judicial hierarchy, its lack of electoral accountability, and its ability to review override attempts and to base its decisions on constitutional rather than statutory grounds all create a largely independent Court. The Court's institutional legitimacy is also mostly taken for granted in the attitudinal model. The key point (and one that is all too often forgotten in the literature) is that the attitudinal model does not deny that justices are strategic actors. Rather, the model argues that the Court's unique institutional position means that, more often than not, the Court's optimal strategy is strategic sincerity (Segal 1997; Segal and Spaeth 2002).

Previous work has carefully catalogued concerns regarding the assumptions underlying the strategic model (Segal 1997; Segal and Spaeth 2002), but it is nonetheless worthwhile to explore these various assumptions a little further. The key question at the heart of all strategic formulations of judicial behavior is whether or not judges are actually better off by voting in a manner contrary to their sincere preferences. The standard SOP model provides crisp predictions about when this will be the case and about the Court's optimal behavior. Working through the theoretical underpinnings of the SOP model helps us to understand how prevalent strategic behavior might be.

SOP models begin with the assumptions that the Court and other political actors are operating on the same policy dimensions and all actors have perfect information about each player's preferences. Usually the model is presented as a single policy dimension, but this is certainly not a requirement (Gely and Spiller 1990). The key is that the SOP model only makes sense if all of the actors understand the policy space in the same basic terms. This is generally not a point of contention between the attitudinal and strategic perspectives, but the low-dimensional, shared policy space assumption has serious implications for the viability of SOP models. If the Court's decision-making space consists of a large number

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of dimensions, then the assumption of perfect information about preference alignments is harder to maintain. Even with perfect information, the strategic considerations facing all of the actors become increasingly complex as the number of (p. 258) dimensions grows. Recent work by Lauderdale and Clark (2014) identifies twenty-four politically relevant dimensions to Supreme Court decisions.⁵ The median of the Court may or may not be the same across these dimensions (see also Lauderdale and Clark 2012), and many of the individual cases may be a mix of issues (Lauderdale and Clark 2014: 765). A high dimensional policy space is not necessarily incompatible with SOP models, but at the very least, it would provide an opportunity for the Court to combine issues strategically in order to avoid reversal, thus minimizing the relevance of SOP considerations.

The assumption of a low dimensional policy space does have a great deal of empirical support. A single dimension seems to explain a large percentage (80–90 percent) of both Congressional and Supreme Court decisions (Poole and Rosenthal 1997; Grofman and Brazil 2002; Martin and Quinn 2002). Yet even if this is the case, the dimension may not be identical for each branch. This is most relevant for reconciling legal models of decision-making with SOP models. Judges who are meaningfully constrained by legal values but who are simultaneously constrained by Congress pose an interesting problem. In the most methodologically sophisticated study of the legal model to date, Bailey and Maltzman (2008, 2011) identify three legal values (*stare decisis*, judicial restraint, strict constructivism) that constrain judicial decision-making. Judicial restraint means judges will defer to electorally accountable branches of government and is compatible within the SOP framework. Less clear is the fit of *stare decisis* and strict constructivism. Consider a case where justice makes a decision that is unpalatable to Congress but is in line with a strict constructivist interpretation. Neither the legal model nor the SOP literature offers clear predictions for the case when legal values require judges to make decisions contrary to the preferences of the legislative branch. A strategic judge might use the language of *stare decisis* or strict constructivism to ward off a legislative response, but that shifts legal values from a general constraint on judicial behavior to a strategic tool that enables the realization of preferred policy outcomes.

Another requirement of the SOP model is that the Court needs complete and perfect information about legislative preferences. The Court must also make a prediction about how those preferences translate into policy outputs. The Court's ability to identify the policy preferences of pivotal players in the legislative process is likely an innocuous assumption. Reasonably anticipating the outcome of legislative process is far more challenging. The basic SOP model in Figure 13.1 omits all internal structure within Congress, omits the president as a veto player, and assumes that opportunity and transaction costs of passing legislation are negligible enough for the Court to think an override would be imminent. These assumptions all concern the relative ease with which legislation can be passed. With respect to the internal structure of Congress, Congressional scholars still have no consensus on whether gatekeeping power exists in Congress or if it does, who has it (Cox and McCubbins 2005; Crombez, Groseclose, and Krehbiel 2006; Shepsle and Weingast 1987). Empirical tests of SOP models tend to account for this by operationalizing a wide range of legislative models (Bergara, Richman, and Spiller 2003; Segal, West-

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erland, and Lindquist 2011), but the general point is that committee chairs, party leaders, filibusters in the Senate, and the presidential veto all enable the obstruction of (p. 259) legislation. The more veto points in the process, the harder it will be to enact an override. A rational, strategic Court might very well look at the legislative process and decide it is willing to take its chances on an override.

If an override does manage to pass, SOP models further assume that this action ends the SOP game. But there is no substantive reason to give Congress the last move. Override legislation is still potentially subject to review by the Court. In fact, a Court with the last move could effectively constrain Congressional decision-making, which is consistent with the findings of Martin (2001). Further, Carrubba and Zorn (2010) show that the president's role in implementing policy makes the executive branch a plausible last mover in the SOP game. This leads to an increase in the Court's discretion if the president's ideal point is outside the Congressional Pareto set. Assuming Congress has the last move also obscures the fact that the Court has nearly complete control over its docket. The Court might strategically delay hearing a case with the hopes of facing a more sympathetic legislature. This would have a substantial effect on the strategy of deciding what cases to hear (Owens 2010), though the vote on the merits would still end up as sincere.

The original formulation of the SOP model is also limited to the Court's statutory decisions (Eskridge 1991a, 1991b; Ferejohn and Weingast 1992). As a result, one of the key initial critiques of the statutory SOP model is that the Court can simply shift its decision from statutory to constitutional grounds (Segal 1997). This has the effect of insulating the decision from override because Congress cannot reverse the decision with simple legislation (but see Meernik and Ignani 1997). However, subsequent models indicate that the constitutional SOP game poses a more serious problem for the Court (Epstein, Knight, and Martin 2001). While the Court's constitutional decisions may be safe from legislative overrides, the Court's institutional power may be at risk. The costs of an institutional attack on the Court are certainly higher than whatever loss the Court might realize if a lone decision is overturned. Congress has a wide range of tools with which it attacks the Court (Rosenberg 1992), including the ability to withdraw appellate jurisdiction or to cut the judiciary's budget. Congressional attempts to curb the Court's power are not uncommon (Chutkow 2008; Clark 2009), and even if Congress does not ultimately pass court-curbing legislation, the mere introduction of such laws might provide important signals that the Court's legitimacy might be at risk (Clark 2011). The constitutional SOP thus reformulates the statutory model by focusing on the motivation of the Court to maintain its institutional power and status rather than the Court's worry about legislative preferences over a particular decision (Segal, Westerland, and Lindquist 2011).

Formal presentations of the constitutional SOP model generally include public opinion as an additional component of the game, though the basic logic is in no way limited to constitutional decisions (Clark 2011). Unlike the elected branches, the Court cannot make appeals to a democratic mandate to marshal support for its decisions. This suggests that the maintenance of diffuse (institutional) support is an essential concern for the Court. Decisions that stray too far beyond what is acceptable to the public may erode the Court's

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public standing. For Vanberg (2005), public opinion provides the (p. 260) opportunity for either the legislature or the Court to ignore the preferences of the other branch, at least as long as the public is in a position to know about the Court's decisions. In a transparent policy environment, a Court that diverges from legislative preferences can oppose the legislature if the public supports the Court's position. While public opinion is fixed in Vanberg's model, Staton (2010) allows judicial decisions to influence public opinion, and Clark (2011) does the same for legislative decisions. To be sure, identifying and disentangling the causal links between the outputs of political institutions and public opinion is a major challenge, but these models do not necessarily hinge on assumptions about the formation of public opinion. As long as the Court believes that it lacks support in the broader political environment, it will need to bring its decisions in line or risk losing its institutional legitimacy.

Before turning to the assumptions and predictions of the attitudinal model, a general point of clarification about the differences between the statutory and constitutional SOP models is necessary. The initial SOP models account for the possibility of a Congressional override. Since the Congress cannot readily override Court decisions with simple legislation, the SOP game made sense as a model of statutory decisions. But as the literature has developed, the two general types of SOP models are better conceptualized as an override/rational anticipation model and an institutional legitimacy model. A Court constrained by fear of Congress overturning the Court's specific policy, whether in statutory or constitutional decisions, is motivated by the classic, "statutory" SOP model. A Court that fears losing its legitimacy or incurring a costly attack on its institutional powers, again regardless of whether it is a constitutional or statutory decision, is motivated by the institutional maintenance model.

For the attitudinal model, the Court's institutional protections (no electoral or political accountability, life tenure, docket control, no ambition for other offices) promote institutional independence (Segal and Spaeth 2002: 92–7). The forward-thinking, rational justice in the attitudinal model surveys the political landscape and sees no credible threats either to a specific decision or to the institutional legitimacy of the Court. Additionally, given that the Senate must confirm a presidential nominee to the Court, the likelihood that the Court will have preferences that diverge from that of the other branches is quite low (Dahl 1957). As a result, the Court will be free to be strategically sincere.

We are left with three competing predictions from the SOP and attitudinal models. If the classic statutory model holds, the Court will need to account for legislative preferences over the policy at stake before the Court. The Court is motivated by preventing a worse policy outcome upon legislative review of the Court's decision. The constitutional/institutional legitimacy model suggests that the Court will not necessarily be attentive to specific Congressional preferences but will instead be concerned with its overall relative ideological position in the American political system. A Court that diverges generally from public opinion and/or the preferences of the political branches will have to limit its decisions or risk losing institutional legitimacy and power. The attitudinal model argues that Court's institutional position is likely to be relatively secure and that the political branch-

es will be unable to respond effectively to the Court's decisions. As a result, (p. 261) knowing judicial policy preferences (and case facts) will be sufficient; non-judicial preferences will not constrain the Court.

Testing the SOP Model

The early SOP models generated clear predictions about the need for the Court to consider legislative preferences, but the empirical evidence from these studies is mixed at best. In part, this is because initial examinations were limited in the scope of case selection and the type of evidence used to test the model. Most importantly, comparable, cross-institutional preference measures had not been fully developed. Testing the SOP model requires accurate placement of the actors within the policy space. Without comparable preference measures, conclusions about the SOP model are nearly impossible to make.

The initial formalizing of the SOP game usually was not accompanied by empirical tests of the model. The supporting evidence for the early SOP models tended to involve the application of the model only to one or two Supreme Court cases or issue areas. As noted earlier, Marks's (1989) classic study shows why the alignment of preferences in Congress delayed an override of the Court's decision in *Grove City College v. Bell* (1986). Gely and Spiller (1990) expand Marks's formal specification and apply it to both *Grove City* and *MVMA of the United States v. State Farm Mutual Automobile Insurance et al.* (1983). Eskridge (1991a, 1991b) examines civil rights cases, but his qualitative account of a constrained Court does not necessarily support the conclusions of the SOP model (see Segal and Spaeth 2002: 327–31). In the early large-scale, comprehensive statistical analyses, the statutory SOP model did not fare well, especially in comparison to attitudinal explanations of Supreme Court decisions (Segal 1997; Segal 1999; Segal and Spaeth 2002).

Caution is warranted in drawing strong conclusions from these early tests because directly comparable preference measures are a necessary requirement for a systematic test of the SOP model. This is the most daunting challenge to designing valid tests of the SOP model. The earlier literature relied primarily on Americans for Democratic Action (ADA) scores to measure legislative preferences combined with some type of imputation method to generate ADA scores for the Court (Spiller and Gely 1992). Another approach is taken by Segal (1997), whose study assumed that ADA scores are directly comparable to the Segal-Cover (1989) measures of Supreme Court ideology. If an ADA score of 15 does not have precisely the same meaning as a Segal-Cover score of 15, then we cannot identify when the Court actually is constrained by Congress. Without the development of preference measures that allow an apples-to-apples comparison across time and institutions, empirical tests of the SOP model have only limited utility (see Bailey 2007).

Two more recent solutions to the scaling problem have been adopted in the SOP literature. Epstein, Martin, Segal, and Westerland (2007) bridge Martin-Quinn Supreme (p. 262) Court ideal point estimates into Poole and Rosenthal's Common Space (Martin and Quinn 2002; Poole and Rosenthal 1997; Poole 1998). Nominees to the Supreme Court who fall under Moraski and Shipan's (1999) unconstrained regime are assigned the

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president's first-dimension Common Space score for their first year on the Court. By regressing a nonlinear transformation of that Common Space score on the corresponding Martin-Quinn score (MQ) for the unconstrained nominees, a bridging equation that maps the Martin-Quinn space to the Common Space is estimated.⁶ The Common Space scores are explicitly designed to be directly comparable across time and across the House, Senate, and the president, just as the MQ scores are directly comparable across time. The resulting Judicial Common Space (JCS) scores provide reliably comparable measures that can be used to test SOP models.

The technique advanced by Bailey (2007) relies on positions taken by Supreme Court, Congress, and the president in order to generate a set of "bridging" observations. The logic is that if a member of Congress files an amicus brief in a Supreme Court case, we can assume we know how that member would decide the case if he or she sat on the Supreme Court. The bridging observations are then incorporated into a larger data set with Supreme Court votes and Congressional roll call votes. The full data set allows the estimation of ideal points that are directly comparable across time and space.⁷ Bailey (2007) finds that the Court is almost never the ideologically extreme branch. The exceptions to this are "rather short lived or minor" (Bailey 2007: 443). Beyond generating directly comparable measures of revealed preferences, the underlying statistical model can be extended to incorporate parameters for legal or political constraints (Bailey and Maltzman 2008, 2011).

Both approaches have been used to test SOP models. For example, Segal, Westerland, and Lindquist (2011) employ the JCS scores to compare the rational anticipation and institutional maintenance versions of the constitutional SOP model. The mapping of MQ scores into Poole-Rosenthal's Common Space allows for three important quantities to be calculated. First, it becomes possible to estimate the probability that a member of the Court would have voted for the challenged legislation when proposed. Second, the probability that the contemporaneous Congress would still support the enacted legislation can be estimated. Finally, the relative ideological positions of the Court and Congress can be identified. Segal, Westerland, and Lindquist find clear support for both the attitudinal model and the institutional maintenance model, but none for the rational anticipation model. While the Court's preferences are a consistent and strong predictor of the decision to strike federal legislation, the Court is less likely to do so as it becomes more ideologically distant from Congress, the president, and the judiciary chairs in both chambers, regardless of the legislative preferences over the enacted legislation. Another example of the use of JCS scores to test the SOP model is the Owens (2010) study, which finds no evidence that the SOP model constrains the Court's decisions to hear cases. Owens argues persuasively that the agenda stage is most likely to reveal strategic SOP considerations, which makes this an especially important finding. Hall (2014) recasts the SOP model as a concern over policy implementation. Lateral cases, defined by Hall as all non-criminal or civil liability cases, require support from non-judicial actors for (p. 263) implementation purposes and as a result, the Court is hypothesized to be more constrained in these types of cases. Hall tests this theory with the JCS scores and finds that fear of nonimplementa-

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tion, rather than fear of an explicit institutional attack, serves to constrain Supreme Court decisions.

Bailey and Maltzman (2008, 2011) use the scaling mechanism outlined in Bailey (2007) to test both the legal model and SOP model. Concerning the SOP model, they find that many justices' revealed preferences are constrained by Congress and the president in both constitutional and statutory cases. If the Court median is outside the Pareto set, some justices seem to moderate their overall preferences. As with their tests of the legal model, Bailey and Maltzman find substantial variation across justices for the effect of the SOP constraint. Clark (2009) uses the Bailey scores to supplement his test of whether or not an increase in the frequency of introduced court-curbing legislation reduces the likelihood that the Court will strike legislation. Court-curbing legislation is hypothesized to serve as a crucial signal to the Court about the status of its legitimacy, a conclusion that Clark's findings support. Segal and Westerland (2005) also test the constitutional SOP model with an early version of Bailey scores but do not find any evidence of legislative constraint. The JCS and Bailey scores are still relatively new, but both approaches have already allowed for sounder empirical tests of the SOP model.

So what conclusions can be drawn from the SOP literature? The combination of increasingly persuasive formalizations of the SOP game with more robust empirical tests has resulted in substantial advances in the literature. Overall, the classic statutory SOP model still has extremely limited empirical support. We have almost no systematic evidence that Court anticipates an override based on specific legislative preferences in either statutory or constitutional cases. Spiller and Gely (1992) and Bergara, Richman, and Spiller (2003) find systematic evidence that the Court is constrained by Congress in statutory decisions. However, neither paper controls for contemporary Congressional preferences over the enacted legislation and both have serious research design issues (see Segal and Spaeth 2002: 331–41). The general absence of support for the statutory SOP model is not for a lack of testing; Segal (1997, 1999), Spriggs and Hansford (2001), Sala and Spriggs (2004), Owens (2010), Segal, Westerland, and Lindquist (2011) all fail to find support for the override model. Harvey and Friedman (2006) find support for the override constitutional model, but the effects of Congressional constraint are not strong.

While the empirical evidence for the classic override/statutory SOP model remains limited, the institutional maintenance SOP model has fared better (Clark 2009, 2011; Segal, Westerland, and Lindquist 2011). The initial tests of these models suggest a Court that is constrained by its political environment but in a clearly different way than is assumed by the classic SOP model. The tests of the institutional maintenance model suggest a Court that worries about its institutional standing but generally does not fear having its decisions overturned. Clark (2011) finds support for his institutional legitimacy model in both statutory and constitutional decisions. This highlights the importance of being clear about whether the Court is constrained by the override game or the institutional legitimacy game, regardless of whether or not the study involves constitutional or (p. 264) statutory decisions. For example, Bailey and Maltzman (2011) find systematic evidence of Congressional constraint in both models of statutory cases and all cases. These results are moti-

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vated by the classic statutory override SOP model, but their operationalization and interpretation of their model are far more in line with institutional maintenance models. Bailey and Maltzman include an SOP measure in their ideal point model that is coded as 1 if the Court median is to the left of Congress, -1 if to the right, and 0 otherwise. Their results show that some justices will moderate their views toward Congressional preferences if the Court median is out of the Pareto set.⁸ Bailey and Maltzman argue that at least for the justices with a significant (and correctly signed) SOP effect, fear is motivating the deference to Congress. But is it fear of having the decision overturned or fear of an institutional attack? The Bailey and Maltzman analysis supports the latter, not the former. Nothing in their model demonstrates fear of a specific override. However, the finding that some members of the Court will moderate their preferences if the Court is an ideological outlier is fully compatible with the institutional legitimacy SOP model.

Finally, it must be noted that the one inescapable conclusion from the SOP literature is the importance of judicial policy preferences. The individual variation observed with respect to the influence of strategic considerations does not hold for ideological preferences. Even in models that find support for the SOP model, judicial ideology is still a statistically significant and substantively meaningful predictor of judicial decisions (Clark 2011; Segal, Westerland, and Lindquist 2011).

Remaining Puzzles and Future Directions

One of the themes that arises in the work on strategic constraints of judicial behavior is that justices vary greatly in the extent to which their decisions appear constrained, and the SOP literature is no different. This poses two related questions about strategic judicial decision-making. First, if it is strategic for a particular justice to be constrained, then why is it not strategic for all justices to be constrained? One of the clear advantages of the formal specifications of the SOP game is that the predictions are applicable to all justices. But the empirical findings are consistent only with respect to the inconsistency with which justices are constrained. Bailey and Maltzman (2011) believe that this heterogeneity is “common sense” because “justices are influenced in different ways by any given factor” (p. 106). But if it is rational to anticipate Congressional preferences, why do so many justices seem oblivious to this constraint? The literature has yet to offer any good solution to this puzzle. We do not yet have a good answer for why some justices are strategic and others are not, but trying to answer that question quickly leads to a related concern. A theory that requires nine specifications for the Court at any given time is not a theory of anything. Reconciling a general approach to Supreme Court behavior with a coherent way of understanding the cross-justice variation is a non-trivial problem (p. 265) for the strategic literature. Of course, the same variation on the effect of ideology on Supreme Court behavior is not observed, as policy preferences consistently explain the decisions of all of the justices.

We also need a better empirical understanding of the development of institutional legitimacy and how it fluctuates over time. The Court’s independence has certainly not been

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constant. Strategic accounts of decisions such as *Marbury v. Madison* (1803) demonstrate perfectly the logic of the SOP model in action (Clinton 1994; Knight and Epstein 1996), but the Marshall Court faced a very different set of institutional constraints than the modern Court. Is the type of strategic calculation in *Marbury* less likely once the Court reaches some threshold of legitimacy (Gibson, Caldeira, and Baird 1998)? Recent formal work shows how initial restraint by a judiciary can lead to greater independence and legitimacy (Carrubba 2009). The prevailing historical account of the institutional development of the American judiciary suggests that strategic politicians used courts to entrench policies or to accomplish goals that otherwise might have been difficult to realize (Gillman 2002; Crowe 2012). What implications, if any, might that have for how SOP games evolve over time?

The SOP literature is also just beginning to account for the strategic interplay between the Court and public opinion. Ura and Wohlfarth (2010) show that the Court's institutional growth is a function of public support. This potentially recasts the institutional maintenance model as a game of proactively building and growing legitimacy rather than fearing its loss. The Court also seems to have some ability to change public opinion. Ura (2014) finds that the Court is capable of shaping long-term public opinion even when the Court suffers a short-term backlash from a specific decision. Of course, many others find that the causal arrow moves in the opposite direction (McGuire and Stimson 2004; Friedman 2009). The SOP literature can do more to account for the strategic interplay between the Court and public opinion. A notable exception is Staton's (2006, 2010) work on the strategic use of going public with decisions.

The entire discussion thus far has either implicitly or explicitly assumed that "the Court" in the SOP game is the U.S. Supreme Court and "the legislature" is Congress. When limited in this way, the debate between competing models is over the consequences of a fixed institutional context. Moving beyond the Supreme Court-Congress case has the result of varying the institutional arrangements. The SOP literature can expand in at least two ways from a narrow casting of the field. First, we might consider the SOP model for other American courts. Within the federal court system, many assumptions of the SOP model should apply to Courts of Appeals judges as well. The preliminary work on Congressional constraint on Courts of Appeals decision-making has mixed findings (Cross and Tiller 1998; Brent 1999; Revesz 2001; Cross 2007). A part of the difficulty is the need to identify a theoretical account of SOP considerations in conjunction with the judicial hierarchy models. State courts also have promise for the study of SOP models (Brace, Hall, and Langer 2001; Langer 2002), but the institutional legitimacy model has yet to be tested at the state level. State judicial elections have fascinating implications for judicial legitimacy (Gibson 2012), but how this might translate into a state-level SOP game remains unknown.⁹

(p. 266) Even more importantly, the study of the SOP model in a cross-national context has a great deal of potential. This is not to suggest a new avenue but rather a recognition of how important the comparative study of SOP models has been (and likely will be moving forward). Some of the most important contributions to the SOP literature in the past ten

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to fifteen years have been developed outside of the American institutional context. Vanberg's (2005) influential model of judicial review is tested with the German Constitutional Court, and Staton (2010) builds on the Vanberg model and applies it in Mexico. Using data from Argentina, Helmke (2002) shows that the Argentine Supreme Court strategically defects from regimes that begin to lose power. These studies all have unique formal specifications of the SOP game and careful empirical tests of the models, and as a result, constitute major contributions to our general understanding of judicial institutions.

Conclusion

One way to characterize the debate about judicial behavior is as a direct competition between attitudinal and strategic models. The progress from Murphy's seminal account of judicial strategy to now is remarkable. The strategic analysis of judicial behavior and SOP games has generated both sophisticated models and empirical tests. So what is the lesson from the SOP literature? Is the Supreme Court primarily attitudinal or strategic? The most consistent finding in the SOP literature is the major role attitudes play in explaining decisions. Acknowledging that political preferences matter to Supreme Court justices is far from path breaking, but that does not mean it is any less valid. We simply do not have evidence that the Supreme Court ignores its political preferences because of SOP considerations. This is not to minimize the importance of strategic considerations, but instead is to reaffirm the centrality of the attitudinal model for the U.S. Supreme Court.

At the same time, a growing consensus is emerging regarding the institutional legitimacy variant of the SOP model. The strategic maintenance of judicial power and institutional legitimacy seems to clearly shape U.S. Supreme Court behavior. One of the more interesting points from the SOP literature is the great irony that the Court's pursuit of political preferences is likely contingent on the perception of the Court as a neutral apolitical institution (Clark 2011). The implications of the strategic pursuit of judicial independence have not been fully explored, but this is just one example of the continuing vibrancy of the study of strategic judicial behavior.

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Notes:

(1.) See Epstein and Knight (2000).

(2.) Consider Segal and Spaeth's summary of their version of the attitudinal model: "Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way did because he was extremely liberal" (Segal and Spaeth 2002: 86).

(3.) The preface in *Elements* is largely a reassurance that Murphy is not destroying the rule of law by using the words like "bargaining" or by using the papers of deceased justices for data.

(4.) It is likely not an accident that the strategic models rose to prominence only after decades of extensive empirical testing of the attitudinal model. After all, if we cannot agree that Supreme Court justices have preferences in the first place, it is hard to have a conversation about strategic decision-making.

(5.) These techniques have yet to be applied to Congressional roll-call data, but there is no reason to expect the legislative policy space to have many fewer dimensions than the Supreme Court's policy space.

(6.) More precisely, a tangent transformation of the Common Space score for the regression is used. The transformation is necessary because CS scores are bounded between -1

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and 1, while the MQ scores are theoretically unbounded. See Sala and Spriggs (2004) for an example of a linear transformation of MQ scores into Common Space.

(7.) See Bailey (2013) for a comprehensive comparison of his scores with the MQ scores and Ho and Quinn (2010) for a review of conceptual and statistical issues in using MQ scores.

(8.) Interestingly, some justices, most notably Frankfurter, have a positive SOP effect, meaning they vote more liberally when the SOP model predicts they should vote more conservatively.

(9.) A hurdle (to say the least) to studying SOP models at the state level is the difficulty with generating directly judicial and legislative preference measures over a substantial period of time.

Chad L. Westerland

Chad L. Westerland is Associate Professor of Political Science at the University of Arizona.