13 The Attitudinal Model

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What explains why judges, at least those on the U.S. Supreme Court, decide cases the way they do? To answer this question we need to focus on judges' decisions rather than on the reasons they give in their opinions for deciding the way they have. For the explanations that persons—including judges—give for what they have done do not necessarily correspond to their actions. If human beings have any unlimited capability, it is their capacity to rationalize their behavior. We all desire to put the best face on our deeds, public officials no less than anyone else. Indeed, the authoritative character of government action and the need that public officials have for public acceptance, if not approval, commonly causes them to take special pains to justify their decisions and make them palatable to those who are governed by them.

Since the onset of our constitutional system, and even well before then, judges at all levels of the judicial system have unfailingly justified their decisions exclusively in terms of the legal model of decision making. This model holds that judges make decisions on the basis of the facts in the cases before them, as these facts pertain to one or more of the following considerations: (1) the language of the applicable law, (2) the intentions or motivations of those who made the law, (3) the precedents established in previously decided cases, and (4) a balancing of societal interests. As discussed below, the legal model fails to explain judicial behavior, at least insofar as the U.S. Supreme Court is concerned. As a result, scholars have formulated an alternative model—the attitudinal model—that does explain the Court's behavior. In contrast to the legal model, the attitudinal model states that the Court's decisions are based on the facts of a case in light of the ideological attitudes and values of the participating justices; in other words, on the basis of the individual justice's personal policy preferences.

In this chapter, I examine both the legal and the attitudinal models of judicial decision making. My conclusion is straightforward and unequivocal: evidence overwhelmingly supports the attitudinal model and, equally overwhelmingly, fails to support the legal model as an explanation of why the justices decide their cases as they do. The remainder of this chapter documents the accuracy of this nonobvious assertion.
Some Preliminaries: Models and Judicial Decision Making

What is a model and why is it useful? A model does not reflect reality; it only represents it. A model focuses only on the most explanatory aspects of the activity in question, while ignoring less revealing ones. Models have two objectives: to explain the behavior in question and to do so parsimoniously. These objectives commonly conflict with one another. A relatively full account of some phenomenon—such as judicial voting—may contain a large number of variables. It is axiomatic, of course, that one may explicate any phenomenon if the number of variables used in the explanation equals the number of times the phenomenon has occurred. Thus, if the reasons given for the Court’s decisions in the 1992 term differ for each of the cases the justices decided, we have learned nothing systematic about the justices’ voting. All we know is unique—idiosyncratic—to each case.

A good model does not function in this fashion. It focuses, rather, on a small number of factors—variables—common to all or most of the observed phenomena that explain a high proportion of the behavior in question. The test of whether a model provides a valid and reliable explanation is its ability accurately to predict future outcomes.

The Legal Model

With this in mind, I turn first to the legal model. As mentioned, this model contains four major variants: plain meaning, legislative and framers’ intent, precedent, and the balancing of societal interests. Each has its own adherents, some being more popular than others. Apart from precedent, no one of them is more empirically testable than the others. As a result, it is not possible to present their deficiencies in any systematic fashion. I can only illustrate their subjectivity anecdotally and in no particular order of importance. Because the focus of this chapter is the U. S. Supreme Court, I exemplify the shortcomings of the legal model by reference to the Court’s own decisions. I also employ this focus in my treatment of the attitudinal model.

Plain Meaning

This version of the legal model applies not only to the language of statutes and constitutional provisions but also to that of judicially created rules. It simply holds that judges rest their decisions on the plain meaning of the pertinent language. So if Article I, Section 10, of the Constitution declares that no state shall pass any law impairing the obligation of contract, then the Court will strike down any law that does so. Alternatively, courts should not judicially create rights that the Constitution does not explicitly contain.

In one regard, plain meaning may be said to be the preferred aspect of the legal model. Excerpts from decisions of a recent term indicate that the justices all agree that resolution
of their cases "begin with the text" (Gollust v. Mendel, 1991, 118). "In deciding a question
of statutory construction, we begin of course with the language of the statute" (Demarest v.
Manspeaker, 1991, 614). "When we find the terms of a statute unambiguous, judicial in-
quiry should be complete except in rare and exceptional circumstances" (Freytag v. Com-
mmissioner of Internal Revenue, 1991, 776). And if "the plain language . . . disposes of the
question before us," intent will not be assessed (Toibb v. Radloff, 1991, 151).

The primacy accorded plain meaning does not detract from the legal model. The prob-
lem lies in the model's failure to specify the point at which plain meaning terminates and
one of the other variants begins. As an example, consider a case that required the Court to
determine the meaning of the phrase "noncurriculum related student group," which ap-
ppears in a congressional statute requiring public schools to give student religious groups
the same access to school facilities that nonreligious extracurricular student groups have.
The majority and dissenting opinions both noted that the law failed to define "noncurriculum related student group," and that even the law's sponsors did not know
what the phrase meant. In dissent, Justice Stevens observed that

the word "noncurriculum" is not in the dictionary. Neither Webster nor Congress has authorized us
to assume that "noncurriculum" is a precise antonym of the word "curriculum." "Nonplus," for
example, does not mean "minus" and it would be incorrect to assume that a "nonentity" is not an
"entity" at all. (Westside Community Schools v. Mergens, 1990, 207, 211, 236, 242)

The majority, instead, focused on the word curriculum, which the act does not use. Finding
that word also inadequate, the majority turned to the act's purpose. This they also found
"less than helpful" (208). To decide the case, the majority used a third variant of the legal
model, precedent, resting its decision on the "logic" of a 1981 decision.

Even more distressing than the legal model's failure to provide empirically grounded
rules governing the propriety of one variant rather than another is the matter of ambiguity.
Almost every word in the English language has an abundance of different meanings, some
of which contradict one another. Sanction, for example, may mean to reward as well as to
punish. When words are strung together, the probability of ambiguity increases exponen-
tially. Consider, for example, the operative language of the Mann Act, which prohibits the
transportation of females across a state line for any "immoral purpose." The Court se-
quentially held that this language applied to the transportation of one's mistress across a
state line, that it did not apply to a madam who took two of her employees with her on a
vacation to Yellowstone National Park, and that it did apply to polygamous Mormons who
traveled from one state to another with their several wives (Caminiti v. United States,
1917; Mortensen v. United States, 1944; Cleveland v. United States, 1946). Of the twenty-six
justices who participated, only the bare minimum that was needed to produce an opinion
of the Court concurred in each of these cases.

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The use of plain meaning does not preclude the Court from writing its own definitions. Consider the word *citizens* in Article III of the Constitution.Chief Justice John Marshall ruled that the word encompassed corporations even though no dictionary defined it so broadly (*Bank of the United States v. Deveaux*, 1809). And though the justices may resort to the dictionary to determine statutory or constitutional meaning, they do not necessarily agree on which dictionary is appropriate. In *Sullivan v. Stroop* (1990), for example, the majority used the *Random House Dictionary of English Usage*, second edition, while the dissenters resorted to *Black’s Law Dictionary*.

Neither does plain meaning prevent the Court from denying what the law clearly states. In *Maryland v. Craig* (1990), the majority ruled that the Confrontation Clause of the Sixth Amendment does not mean what it says—"in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"—if the witness is a child in a child abuse case. Clearly, explicit constitutional language may be subordinated to currently favored public policy if a majority so rules, as Justice Antonin Scalia in dissent pointed out.

Finally, the Court’s own words can sometimes be found to render false “plain meaning” as a reliable guide to why the justices decide the way they do. In an important freedom-of-communication case, the majority initially cited seven of its precedents, which arose in seven different contexts, that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its contents.” The operative constitutional language after all is “make no law.” The Court, however, immediately qualified the quoted language:

This statement . . . read literally . . . would absolutely preclude any regulation of expressive activity. . . . But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions. (*Young v. American Mini Theatres*, 1976, 65)

The Court has a second string to its bow whereby it may qualify plain meaning. This tactic allows plain meaning to be discounted by offsetting it against the intent of those who proposed or enacted the law in question. The justification for so doing is “a familiar rule,” several centuries old, “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers” (*Church of the Holy Trinity v. United States*, 1892, 459). A classic illustration of its use occurred in *Steelworkers v. Weber* (1979), which upheld a collectively bargained affirmative action plan notwithstanding the plain language of Title VII of the 1964 Civil Rights Act, which prohibits an employer or a labor union to “discriminate against any individual because of his race.” A union and employer had agreed to establish a training program to eliminate the racial imbalance that resulted because jobs had traditionally been reserved for whites.
Clearly then, plain meaning does not explain why the justices vote as they do because the justices simply do not mean what they say in the opinions that are supposed to explain their decisions. Furthermore, the justices provide us with no meaningful criteria that indicate which of their statements are true and which are false.

**Legislative and Framers’ Intent**

“Legislative and framers’ intent” refers to construing statutes and the Constitution according to the preferences of those who originally drafted and supported them. The sole substantive difference between these two types of intent is that the former pertains to the interpretation of statutes, whereas the latter applies to constitutional provisions.

Hence, like plain meaning, intent governs statutory construction as well as constitutional interpretation. But unlike plain meaning, where the legal language is empirically delimited by a finite set of words, almost any aspect of the historical record leading up to the enactment of the provision in question may be considered grist for the mill of intent. Three problems inhere in this approach. First, the historical record is often sketchy and sometimes nonexistent. We know little about the Constitutional Convention except for the contents of a carelessly kept journal; James Madison’s notes, which he edited for publication thirty-two years after the event; and a few written comments from eight other delegates to the Convention (Farrand 1966, xi-xxv). Virtually no records exist from the state ratifying conventions, on whose approval the adoption of the Constitution depended. Similar situations also obtain for much current legislation, state as well as congressional. Furthermore, existing records are not necessarily accurate. Until 1978, for example, members of Congress were free to add, delete, insert, and edit the remarks they made—or ostensibly made—on the floor of the House and Senate. Members, for example, filled 112 pages of the *Congressional Record* on a day when the Senate met for only eight seconds and the House not at all (Hunter 1985).

Second, who are the “framers”? Very few of the delegates to the Constitutional Convention stayed the course. Many came and went. Only thirty-nine signed the final document. What about those elected to the state ratifying conventions? How about the intentions of those who elected these delegates? At the legislative level, should only the motives of those who voted for the bill be assessed? What about the desires of those who voted them into office in the first place?

Third, and most perplexing, how is intent determined? One legislator’s motive may be antithetical to the purpose of another. Even assuming complete and accurate records, fathoming intent is an exceedingly risky enterprise even at the individual level. As the abundance of psychiatrists and therapists evidences, people often do not know why they do what they do. To assume, at the group level, that all who vote or respond similarly possess a common motivation is simply absurd. Two current members of the Court have so stated,

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Justices Scalia and John Paul Stevens. Scalia has been an especially harsh critic of this aspect of the legal model. Although he was most tellingly so in the highly charged context of teaching “creation science” in the public schools, his acerbic comments apply across the board.

The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill’s sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and entirely unmotivated when the vote was called, or he may have accidentally voted “yes” instead of “no,” or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Putting that problem aside, however, where ought we to look for the individual legislator’s purpose? We cannot . . . assume that every member present . . . agreed with the motivation expressed in a particular legislator’s pre-enactment floor or committee statement . . . Can we assume . . . that they all agree with the motivation expressed in the staff-prepared committee reports . . . [or] post-enactment floor statements? Or post-enactment testimony from legislators, obtained expressly for the lawsuit? . . . media reports on . . . legislative bargaining? All these sources, of course, are eminently manipulable.

. . . If a state senate approves a bill by a vote of 26 to 25, and only one intended solely to advance religion, is the law unconstitutional? What if 13 of 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to “balance” the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill’s sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else’s intent was pure, what they produced was the fruit of a forbidden tree. (Edwards v. Aguilard, 1987, 636-638)

Scalia’s colleagues essentially disagree with his anti-intent position because “common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it” (Wisconsin Public Intervenor v. Mortier, 1991, 547 n. 4).

At least one commentator suggests that Scalia’s opposition to intent governs only his construction of statutory language:

When interpreting statutes, Scalia claims to be a “textualist,” refusing to look beyond the “plain
meaning" of the words for evidence of the original intention of the Congress. When interpreting the Constitution, however, Scalia claims to be an "originalist," insisting that each provision should be interpreted in light of the original understanding of its framers and ratifiers. (Rosen 1993, 20)

Rosen, however, adds that in some cases Scalia's "passions lead him to betray his principles" (1993, 21).

**Precedent**

Also known as *stare decisis*, the word *precedent* in law means adherence to what has been decided. Like plain meaning and intent, precedent applies to the interpretation of constitutional provisions as well as to the language of statutes. Unlike plain meaning and intent, however, all courts cite previously decided cases to justify their decisions. As a result, this aspect of the legal model appears far more often than the others. But the mere fact that a court cites precedent provides no evidence that precedent actually determines the outcome of the case. Certainly not at the appellate level. Precedents support the contentions of both parties to the lawsuit. As federal judge Frank M. Coffin points out: "Precedent is certainly real and we learn to live with it. But if precedent clearly governed, a case would never get as far as the Court of Appeals: the parties would settle." Similarly, Judge Frank H. Easterbrook: "Given that litigation is so expensive, why are parties willing to take their cases up? . . . It's because precedent doesn't govern. Precedent governs the major premise. But the mind-set of the judge governs the minor premise" (Greenhouse 1988).

Because precedents lie on both sides of appellate court controversies, *stare decisis* provides no sure guide to decision. A court will choose those precedents that support the majority's contention, while disregarding or disparaging those to the contrary. The most irrefutable evidence that this is the case may readily be had by simply consulting a decision that contains a dissenting as well as a majority opinion. Both will likely contain a roughly equivalent number of citations to previously decided cases. Reference to these will show that they do indeed respectively support the contrary contentions of the disputants.

One way to test the extent to which the justices adhere to precedent is by determining whether those who dissent from landmark decisions subsequently adhere to them. Analysis of a random sample of such decisions decided between the beginning of the Warren Court and the end of the 1992 term shows that the justices who dissented in these highly important cases overwhelmingly refused, in subsequent decisions, to adhere to the precedents they established. Of 148 votes cast by those initially opposed to the precedent, only 15 (or 10.1 percent) acceded to the precedent in question in subsequent cases. Of the fourteen justices involved, only Potter Stewart and Lewis F. Powell, Jr., were even moderately influenced by precedent, while seven others unfailingly voted against precedent at every opportunity (Segal and Spaeth 1994).
Accordingly, precedent really appears to be only a matter of style rather than a substantive limit on a judge's discretion. Good legal form merely requires that judges lard their opinions with citations to previously decided cases. And on those rare occasions when a court finds itself confronted by a restrictive line of precedents, devices exist that allow judges to avoid adherence to what has been decided, all of which comport with good legal form:

1. Obiter dicta, commonly known as dicta, allow a judge to declare portions of a previous opinion to be surplus verbiage and thereby not part of the precedent that this opinion established. Thus, for example, the Supreme Court had initially held that an act of Congress that denied the president power unilaterally to remove officials in the executive branch of the federal government was unconstitutional. The Court subsequently qualified this language by ruling that the president could remove only those officials whose duties were exclusively executive and who were not protected by civil service (Myers v. United States, 1926; Humphrey's Executor v. United States, 1935).

2. A court may distinguish a precedent; that is, it simply asserts that the facts of the case to be decided are sufficiently dissimilar from those of a precedent the court does not wish to follow. This tactic is less drastic than declaring part of an earlier opinion to be dicta. In no way does the court alter the scope of the precedent; it merely says that because of factual dissimilarities the early decision does not control the outcome of the case at hand. Inasmuch as facts always differ from one case to another, precedents may be distinguished at will. All the court need do is specify the factual differences. Thus, for example, in a pair of Louisiana cases involving the inheritance rights of illegitimate children, the Supreme Court initially ruled that wrongful death actions could not be prohibited if they involved intimate familial relationships. But a state may nonetheless treat illegitimate offspring differently when it seeks to establish, protect, or strengthen family life (Levy v. Louisiana, 1968; Labine v. Vincent, 1971). I will not dispute a judgment that these purposes merely amount to variant ways of saying the same thing. But the fact remains that the one formulation sustains the law's constitutionality, the other does not.

3. A court may limit a precedent in principle. More drastic than distinguishing a precedent, its effect closely approximates declaring language to be obiter dicta. The difference is that when a precedent is limited in principle, it permanently loses its original scope. When a court distinguishes a precedent, it only says that it is not applicable to the case at hand. Its original scope remains intact. The constitutional right of a woman to an abortion nicely illustrates this device. The Supreme Court originally ruled that during the first six months of pregnancy a woman could secure an abortion so long as it was performed by a competent person in a sanitary environment. Subsequently, the Court qualified this decision, ruling that a woman only had a right to an abortion without undue government

4. Finally, a court may formally overrule a case it or an inferior court has decided. Courts tend to avoid overrulings because they jar the notion that the law is fixed and stable. A recent study identifies only 115 decisions in which the Supreme Court formally altered precedent during the forty-six-year period between 1946 and 1992, an average of two and one-half times per term (Brenner and Spaeth 1995). Unlike the other three limitations on precedent, overruling is amenable to empirical analysis. Brenner and I have shown that liberal Courts, such as that presided over by Earl Warren, overrule conservative precedents, and conservative Courts—those of Warren E. Burger and William H. Rehnquist—alter liberal precedents. Within the analyzed Courts, liberal and conservative justices behaved similarly. Liberal justices voted to overrule conservative precedents; conservative justices the opposite. Justices aligned with neither wing fall on both sides of the divide. These patterns of behavior, of course, conform to the attitudinal model of decision making rather than the legal model.

**Balancing**

The final aspect of the legal model manifests itself in an opinion that sets off the interests of society—that is, the common good, the national interest, the general welfare—against the life, liberty, or property interests of individual persons. Sometimes a conflict occurs between private interests, as when one person’s freedom of communication conflicts with another’s right to a fair trial. The Supreme Court uses either an ad hoc or a definitional approach to balancing. The latter resorts to specific rules, tests, or principles to justify a decision, while ad hoc balancing features the facts of the case without reference to any previously formulated rule or test.

When the Supreme Court resorts to balancing, it does not hesitate to label it as such. Balancing may be viewed as a surrogate for reasonableness—the concept that dominates decision making in trial courts. Both types of balancing provide courts and judges with a degree of decisional flexibility that enables them to decide cases on the basis of their individual merits. As such, balancing appears preferable to its variants, the rigid rule and the subjective utility tests. The former straitjackets the facts into a decision-making framework in which the rules are applied literally—no matter how foolish the resulting decision. For example, a law that prohibits noise above a certain decibel level after 10:00 p.m. is clearly silly in a community with a population density of one person per square mile, or in most college dormitories. Subjective utility, in contrast, bases decision on the intensity of likes and dislikes. Hence, the person who passionately dislikes rock music should be compensated more for a disturbance of the peace than those who object only to the noise.
Of course, what one person deems reasonable, another finds unreasonable. Nonetheless, it is hard to fault a decision that a court justifies as reasonable. Furthermore, notwithstanding the inherent subjectivity of the concept, judges and legal analysts commonly label it as an objective criterion.

Conclusion

Neither the Supreme Court nor any lower court has provided empirically identifiable criteria to indicate when it will use one of the aspects of the legal model rather than another. Precedent, of course, appears in virtually every opinion the justices write. Not uncommonly, precedent will be conjoined with plain meaning, intent, or balancing. Nor has the Court formulated any criteria for using any of the limitations on precedent. Although analysts may validly and reliably identify their use after the fact, the Supreme Court, at least, has provided no systematic guide to their application in advance of decision. Any objective observer, therefore, necessarily must conclude that at the very least the legal model cannot be tested because its key concepts, except for precedent, cannot be specified or defined in any evenhanded fashion. As an explanation of Supreme Court behavior, it does not even marginally pass muster. Not uncommonly, the majority and dissenting opinions will both use the same aspect of the legal model—say, plain meaning or intent—to support their antithetical conclusions. This, of course, does not gainsay the utility of the legal model as a cloak to conceal the real bases for the justices’ decisions and to provide them with means to rationalize their votes. Commentators and legal scholars endlessly squabble about the respective value of these normative factors, but their bickering does nothing to further our understanding of why the justices decide as they do.

The Attitudinal Model

The attitudinal model differs from the legal in several respects. First, it rests on a common set of assumptions; namely, that the justices decide their cases on the basis of the interaction of their ideological attitudes and values with the facts of a case. Justice William J. Brennan, Jr., decided cases as he did because he was liberal; Justice William Rehnquist or Warren Burger, because they were conservative. In other words, the justices vote as they do because they want their decisions to reflect their individual personal policy preferences. Attitudinal modelers differ among themselves in the level of generality with which they conduct their analyses. Some proceed microanalytically, examining behavior in narrowly defined issue areas; the death penalty, commercial speech, affirmative action. Others proceed more globally, investigating, for example, the justices’ voting in such broad areas as civil rights or business regulation. Analysts also disagree about the source of attitudes—whether an individual acquires them genetically or as a result of environmental experi-