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Nancy Scherer
Wellesley College

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50 TULSA L. REV. 659 (2015)

TESTING THE COURT: DECISION-MAKING UNDER THE MICROSCOPE

Nancy Scherer*

RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (2012). Pp. 192. Paperback \$ 29.95.

RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, *ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE* (2012). Pp. 160. Hardcover \$ 60.00.

PAM CORLEY, AMY STEIGERWALT, & ARTEMUS WARD, *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* (2013). Pp. 216. Hardcover \$ 50.00.

For decades there has been a debate among political scholars of law and courts as to what drives Supreme Court decision-making. The predominant paradigm is the attitudinal model; it holds that each justice votes in accordance with her personal policy preferences and the facts of the case.¹ This is possible because members of the Court have no higher office to achieve, nor do they stand for election.² For strict attitudinalists, nothing else comes into the decision-making process. As Segal and Spaeth state, “the attitudinal model is a complete and adequate model of the Supreme Court’s decisions on the merits.”³ They even go on to criticize the conviction that law matters in the Court’s decision-making as “fatuousness characteristic of Pollyanna.”⁴

In the wake of Segal and Spaeth’s ground-breaking research, other political scientists began to question whether the attitudinal model was enough to fully explain why justices vote the way they do.⁵ Critically, none of these scholars questioned the basic principle of the attitudinal model, but believed that, under certain circumstances, there was

* Associate Professor of Political Science, Wellesley College.

1. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

2. *Id.* at 69.

3. Jeffrey A. Segal & Harold J. Spaeth, *The Authors Respond*, 4 *LAW AND COURTS* 11 (1994).

4. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 1 (2002).

5. Mark J. Richards & Herbert M. Kritzer, *Legal Regimes and Doctrines in Supreme Court Decision Making* (Oct. 1998), available at <http://users.polisci.wisc.edu/kritzer/research/supcourt/spsa1998.htm> (“The unabashed nature of the claims for the attitudinal model leaves many political scientists (to say nothing of many, if not most, legal academics, political leaders, and attentive citizens) very troubled.”). See also Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision-Making*, 96 *AM. POLITICAL SCI. REVIEW* 305

more to explain judicial behavior beyond personal policy preferences. For example, Epstein and Knight demonstrated that, in certain cases, justices vote strategically.⁶ Examining the notes taken by several members of the Court, they discovered evidence that justices forego their true policy preferences when they learn in post-argument conferences that they do not have the five votes to prevail on the merits. Under these circumstances, justices compromise with more moderate justices, and agree to sign onto an opinion stating their second policy preference, rather than seeing no majority form at all, or worse, that their least favored preference becomes the law of the land.⁷

Another major contribution to the literature on Supreme Court voting behavior is the theory that justices take into consideration institutional norms or contexts when deciding how to vote.⁸ People ascribing to this belief are often referred to as “new-institutionalists.”⁹ Here, scholars argue that rather than focusing solely on individual justices’ behavior, we should treat the Court as one institution¹⁰:

[W]hile Supreme Court justices certainly act in accordance with a set of beliefs . . . it may be the case that the justices also believe that certain kinds of attitudes—such as a decision to promote the well-being of political allies—would be an inappropriate or risky basis for decision-making, either because the exhibition of such attitudes violates a sense of institutional propriety or because of a strategic calculation that the justices would have to pay too high a price for exhibiting these attitudes. . . . [T]here is a second, and perhaps more important, reason why it is essential for Supreme Court scholars to attend to institutional contexts and not just judicial attitudes. Individuals who are associated with particular institutions often come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities.¹¹

Still other political scientists continued to believe that law and precedent are relevant to justices’ decisions, a principle the attitudinal model explicitly rejects.¹² Most notably, Kritzer and Richards introduce a new theory to understand the relationship between legal precedent, the facts of a case, and decision-making.¹³ They propose that courts treat the law differently than elected bodies do, and that scholars must cease treating law as a “mechanistic, autonomous force.”¹⁴ Instead, they propose that institutional norms impact

(2002) [hereinafter Richards & Kritzer, *Jurisprudential Regimes*].

6. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

7. *Id.*

8. SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 2-3 (Cornell W. Clayton & Howard Gillman eds., 1999).

9. *Id.* at 6.

10. *Id.* at 3.

11. *Id.* at 4.

12. *Id.* at 5.

13. Richards & Kritzer, *Jurisprudential Regimes*, *supra* note 5.

14. *Id.* at 305.

decision-making through the mechanism of “jurisprudential regimes” (well-established legal doctrine or precedent in a particular area of law).¹⁵ These regimes in turn structure which facts of a case the Supreme Court will use in the decision-making process:

[B]y establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors Justices then apply regimes in subsequent pertinent cases. After a new regime is established, we expect case factors to matter to the justices in a manner distinct from their influence in cases decided prior to the establishment of the regime.¹⁶

There is a large body of research building on Richards and Kritzer’s theory that law and precedents are still relevant to Supreme Court decision-making.¹⁷ But, what is critical, is that the attitudinal model remains the holy grail of decision-making models.

I would place the research at the heart of all three books under review in this essay with other scholars who concede that the attitudinal model still stands at the heart of understanding the justices’ decisions, but who contend that, standing alone, the attitudinal model does not fully explain Supreme Court decision-making. Two of the books, *The Solicitor General and the U.S. Supreme Court: Executive Branch Influence and Judicial Decisions*,¹⁸ and *Oral Arguments and Coalition Formation on the U.S. Supreme Court: A Deliberate Dialogue*,¹⁹ add to our knowledge about strategic voting. Meanwhile, the third, *The Puzzle of Unanimity: Consensus on the United States Supreme Court*,²⁰ is a major contribution to our knowledge about law’s independent role in Supreme Court decision-making.

Given that these books employ quantitative empirical research and statistical modeling, I was curious as to why these authors did not just publish their work in political science journals. What ever happened to the adage regarding research in American Politics generally and Public Law specifically—those who engage with quantitative methods publish articles in journals, those who do qualitative research largely write books? In all likelihood, the authors of these books would like to see their work disseminated to a wider

15. *Id.* See BRUCE ACKERMAN, WE THE PEOPLE, VOL. I: FOUNDATIONS 58-80 (1991) (identifying “constitutional regimes”).

16. Richards & Kritzer, *Jurisprudential Regimes*, *supra* note 5, at 305-06.

17. See e.g., MICHAEL A. BAILEY & FOREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS THAT JUSTICES MAKE (2008) (discussing how legal doctrines, and the norm of adherence to precedent, impacts Supreme Court decision-making, in conjunction with policy preferences); Saul Brenner & Marc Stier, *Retesting Segal and Spaeth’s Stare Decisis Model*, 40 AM. J. POL. SCI. 1036 (1996); Richard A. Brisbin Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. OF POL. SCI. 1104 (1996) (moderate justices follow the doctrine of stare decisis); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices’ Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049 (1996); RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993 (1994); but see Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273 (2010) (arguing that little evidence supports precedents affect Supreme Court voting behavior).

18. RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS (2012).

19. RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012).

20. PAM CORLEY, AMY STEIGERWALT, & ARTEMUS WARD, THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT (2013).

audience than they would otherwise gain from publication in a single journal, in which articles tend to use quantitative methods either too complex, or simply not interesting, for a broader audience.

Given the interdisciplinary focus of this volume, it seems that one important factor must be accounted for before proceeding to a review of the book. Does the book explain its quantitative methods in a manner that is accessible to a broader audience? In other words, if only the “quants” can follow a book’s methods, models, and results, then it would seem the appetite for these books would not extend beyond their core audience. Once the authors are successful in achieving this goal of accessibility, they have an advantage over other fields in American Politics, for the audience would now add not only qualitative-oriented political scientists and their graduate students, but legal scholars as well.

Furthermore, in assessing these empirically-driven books, as with any book, we want to assess whether there is a “big” research question, a novel theory underlying the hypotheses, and empirical research that adequately tests their hypotheses. In other words, does it contribute significantly to the extant research? While I found all three books successfully explained their methods, results, and data in a manner accessible to a wider audience, the books varied in terms of the degree by which they met the three determinants of a successful book.

In *The Solicitor General and the United States Supreme Court*, the authors pose the question: do the Solicitor General (hereinafter “SG”) and his office (hereinafter “OSG”) influence the Supreme Court more than other attorneys?²¹ This is an important question, but it is not the first time scholars have examined the relationship between the Court and the OSG.²² The authors’ theory is that the OSG has a higher success rate than other litigants because the Supreme Court justices view the attorneys in that office as “*consummate professionals*”²³ and OSG “has built up a reputation as a truth-telling law firm.”²⁴ Pursuant to this theory, the OSG’s success arises from its relationship with the Court, and perhaps more important, from the professionals it employs.²⁵ “By placing professionals in key positions – with the ability to take a long-term perspective – policy makers make a credible commitment to broader goals of justice and efficiency. . . .”²⁶ The support for this theory comes from several aspects of the office’s duties. For example, the OSG will acquiesce to certiorari, even when it prevailed at the Court of Appeals level, if it believes the question presented should be answered definitively by the Court.²⁷ The OSG also confesses error when it believes that the grounds for lower federal court decision are erroneous.²⁸ The OSG screens cases for the Court, refusing to appeal cases it deems are based “on twisted legal logic or issues that might significantly impair the Court’s legitimacy”²⁹ In turn, empirical evidence suggests that the less political the OSG appears, the more likely the

21. BLACK & OWENS, *supra* note 18.

22. *Id.* at 5.

23. *Id.* at 32 (emphasis added).

24. *Id.* at 48 (whether or not the OSG is a “truth-telling law firm” is an empirical claim with no empirical evidence to support it).

25. *Id.* at 32.

26. *Id.* at 91.

27. *Id.* at 33.

28. *Id.* at 20 n.17.

29. *Id.* at 33.

Court will rely on its information.³⁰

Acknowledging that previous scholars have attempted to unravel this puzzle, and that their theory is not entirely novel,³¹ the authors argue that such questions have never been *adequately* tested before. What they really mean is that “matching methods” were not used to analyze data. Matching methods balance the data between cases with the Solicitor General and those without, and allows the authors to gain greater purchase on how the Court would have acted absent the SG.³² These quantitative-oriented scholars thus maintain that their book is unique, not for their “professionalism” theory, but for the “matching methods” they applied to newly collected data sets.³³ Through use of these matching methods, the authors contend that we will gain a more accurate understanding of the relationship between OSG and the Court. By rejecting former theories about the OSG-Court relationship, the authors are able to do just that.

Prior theories about the relationship between OSG and the Court include principal-agent theory (in part, the professionalism theory, as the OSG as seen as an agent of the Court),³⁴ ideology (the SGs, like the justices, promote their own ideological preferences, and the closer the arguments are to the median justice, the more likely the SG will prevail),³⁵ attorney experience (repeat players have more success over one-time players),³⁶ resource advantage (the government has significantly more resources than its opponent),³⁷ quality of the attorney (the OSG hires the best and the brightest lawyers),³⁸ a separation of powers theory (the Court wants to avoid backlash from the elected branches),³⁹ and biased case selection (the OSG purposefully chooses to participate in cases that it knows it can win).⁴⁰

Chapters Four through Seven explore the various ways in which the OSG enjoys an advantage over other attorneys. It should be noted that at each phase of the decision-making process, the authors find that judicial ideology is a statistically significant predictor of the extent to which the OSG commands special treatment from the Court, consistent with the attitudinal model.

In Chapter Four, the authors look at the certiorari process. Relying on Justice Blackmun’s private papers, in which he recorded the votes of his fellow justices on the decisions to grant certiorari, they find that the OSG has the most success in influencing the agenda-setting stage of the process when its briefs are filed at the request of the Court, rather than voluntarily. This is consistent with the professionalism theory, for it is in such cases that the OSG is least likely to take a political position on the case. At the same time, this evidence is inconsistent with the strategic selection theory, the attorney experience

30. Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General’s Office*, 71 J. OF POL. 224 (2009).

31. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 175 (1984).

32. BLACK & OWENS, *supra* note 18. I found the presentation of the results of the regression models with matched data to be somewhat confusing, but after several readings, I eventually made sense of the post-estimate analyses provided.

33. *Id.* at 32-34.

34. *Id.*

35. *Id.* at 40-42.

36. *Id.* at 34-35.

37. *Id.* at 35.

38. *Id.* at 39-40.

39. *Id.* at 42-44.

40. *Id.* at 44-45.

theory, and separation of powers theory, allowing the authors to reject these prior theories of SG influence.

In Chapter Five, the authors turn to the merits stage of a case and seek to establish whether OSG wins more cases than a matched non-OSG lawyer. The authors match OSG attorneys with those of equal experience, equal resources, the same amount of amici briefs, and ideological distance from the Court's median justice. They find that the SG wins more often than other parties, all else being equal.

In Chapters Six and Seven, the book turns to an analysis of how often the OSG's written briefs and legal arguments find their way into the majority decision of the Court. Not surprisingly, they again find the language used in the OSG's briefs and the legal arguments promulgated therein are more likely to appear in a final decision of the Court than that of non-OSG lawyers. Indeed, even when the OSG loses a case, the Court is more likely to adopt their language than a winning non-OSG party.

These empirical chapters are strong, assuming one knows something about matching techniques. Of the three books under review in this essay, this book's presentation of the results will be the most confusing to a broader audience. Many of the charts, for instance those which demonstrate how much improvement the matched model has over an unmatched model, could have been placed in the appendix because they do not add to understanding the substantive results of the regression models. However, the methods are unique compared to prior studies on the OSG, and the results are able to debunk the theories of attorney experience, attorney quality, resource advantage, biased case selection, and the separation of powers theories. In the end, none of the models enable them to reject the null hypothesis concerning the theory of professionalism, which was the ultimate goal of the book.

I would offer only one critique regarding the evidence presented in support of the professionalism theory. In one of the models presented in the book,⁴¹ depicted in Figure 5.2, the authors compare cases in which the SG himself argues a case and those in which a Deputy SG appears before the Court. The results show that the actual SG wins cases more than his deputies do. But, part of the professionalism theory is based on the fact that three of the four Deputy SGs are not political appointees of the current presidential administration, as the SG is, but are career lawyers for the OSG. It is these individuals who provide the OSG with the appearance of non-partisanship and who take a long-term view of the cases in which they are involved. In other words, it is the career Deputy SG's who give the appearance of professionalism to the OSG. If this fact were true, then why do the authors find that the SG is more likely to prevail in a case than a Deputy SG? It should be the other way around if we are to buy in to the "professionalism" argument.

In the end, I would say that the research contained in the book will unlikely appeal to a broader audience because of the somewhat complicated presentation of the matching methods, but for those who have previous knowledge of matching methods, the book indeed contributes to our previous understanding about the relationship between the Court and the OSG. The background research is well-done and the empirics flawless. But, as the authors concede, the big question—why does the Court treat the OSG differently than

41. *Id.* at 85.

other attorneys—remains elusive.

In *Oral Arguments and Coalition Formation on the U.S. Supreme Court*, the authors ask: why do oral arguments matter?⁴² This body of research on oral arguments finds its genesis in the work of Timothy Johnson, Paul Wahlbeck, and James F. Spriggs II.⁴³ In their ground-breaking article, they found that the quality of the oral argument (as measured by Justice Blackmun in his private notes) influenced the outcome of a Supreme Court case. Here again, building on the attitudinal model, their novel theory hypothesizes that oral arguments, or more specifically, the questions posed to the attorneys as well as the “conversations” between justices during oral arguments, provide the justices with their first pieces of evidence as to what their colleagues’ thinking is on the legal issue at hand. Theoretically, justices then use this information to begin forming coalitions that best reflect their own personal policy preferences.

In Chapter Two, the authors flesh out their theory. They look to sociology scholarship about coalition formation and the importance of face-to-face conversations in that process, and how initial interactions shape later debate.⁴⁴ When justices ask questions to an attorney, other justices can glean what the questioner’s likely policy preference is. When they interrupt each other, they are really beginning a conversation among the justices. One interrupts another justice not only to learn about his position, but also to steer the conversation in a different direction, hoping to set the agenda for like-minded justices as well as the median justice. Oral arguments really begin a policy debate, and set the contours of later debate and deliberation. They also allow justices an opportunity to surmise with whom they can ally, and what the other side’s arguments are. Justices may even use questioning at the oral argument to predict the likely outcome of the case. Using a database consisting of the text of all oral arguments during the 1998 through 2007 terms, the authors can calculate descriptive statistics about interrupting behavior. Here, they look for patterns of interruptions. Among other things, they find that interruptions occur about eight times per oral argument, and that interruptions are most likely made by the most ideologically distant justices from the speaker.

In Chapter Three the authors turn to listening patterns. What are these justices trying to learn from oral argument? By calling upon the notes taken at oral argument by Justices Powell and Blackmun, the authors gain much insight into how these justices approached oral argument. They model the number of times each of these justices record notes about the comments of their colleagues using negative binomial regression analysis, which takes into account the fact that the dependent variable will always take on a positive value.⁴⁵ Their findings here are fascinating. Justice Blackmun’s notes reflect a justice on the liberal end of the ideological continuum; his notes indicated he was interested in the opinions of ideologically distant justices, presumably those whose arguments he must counterattack in seeking to form a majority. Justice Powell’s notes reflect a median justice; he was taking notes on others in the middle of the ideological spectrum, presumably those with whom he can ally. Both, ultimately, reflect two justices concerned with coalition formation.

42. BLACK ET AL., *supra* note 19.

43. Timothy Johnson, Paul Wahlbeck, & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 100 (2006).

44. BLACK ET AL., *supra* note 19, at 17-18.

45. *Id.* at 82-83.

Chapter Four examines how oral arguments help the justices build road maps as to who they believe will join their coalitions, and on what grounds they can find consensus, taking mere listening to arguments to actual coalition formation. Here, however, the authors rely only on the notes of Justice Blackmun, taken at oral argument, who sometimes reflected in his notes how he believed the votes would fall based on the questions being posed, and arguments being made by the justices. Because there were three possible outcomes in this model (Blackmun makes no prediction, Blackmun makes correct prediction or Blackmun makes incorrect prediction), the authors' model simultaneously estimates, first, the likelihood of whether or not Blackmun made a prediction regarding a particular justice, and second, how accurate the prediction is.⁴⁶ The authors find a strong and positive correlation between the frequency with which he records notes about a justice and first, the likelihood of his making a prediction about the justice's vote, and, second, the more likely he is to predict the vote accurately.⁴⁷

In sum, regarding this book, I find the empirical chapters thoroughly and clearly explained, and the tables and figures easy to understand. In addition, I found the application of the sociology literature about conversations and decision-making to Supreme Court decision-making to be a novel contribution to the literature. Finally, the book is a model for future researchers who wish to use archival data in their scholarship.

My only critique of the book, a not insignificant one, is that the research suffers from a generalizability problem. This is because, at this point in time, the authors can draw only from the notes of two justices. We have no way of knowing whether Blackmun and Powell represent all liberal and moderate justices, respectively. But, the evidence in the book nonetheless gives us a unique insight into the strategic use of the oral arguments by Supreme Court justices. For that reason alone, I highly recommend this book.

In *The Puzzle of Unanimity*, the authors ask: why does the Supreme Court ever reach unanimous consensus, given its members' widely divergent ideological views?⁴⁸ This is a very timely book, as there seems to be much attention paid recently to this question.⁴⁹ And, as Liptak, Sunstein, and the authors all concur, there seem to be rampant misconceptions among the public about the impact of the Court's great partisan divide.

Chapter One is an informative piece of legal history. From 1801 to approximately 1941, there was a clear norm of consensus, with dissents occurring rarely. Ninety percent of cases were unanimous.⁵⁰ Relying primarily on the papers of Chief Justice Harlan Stone and Associate Justice William O. Douglas, the authors argue that the increase of dissenting opinions was the product of historical developments outside the court coupled with institutional changes within the court in the late 1930s and 1940s.⁵¹ Chief Justice Stone's per-

46. *Id.* at 95-96.

47. *Id.* at 105-06.

48. CORELY ET AL., *supra* note 20.

49. Adam Liptak, *Justices Agree to Agree, at Least for the Moment*, NY TIMES (May 27, 2013), available at <http://www.nytimes.com/2013/05/28/us/supreme-court-issuing-more-unanimous-rulings>; Cass Sunstein, *Unanimity and Disagreement on the Supreme Court* (Harv. Law. Sch., July 21, 2014), available at <http://ssrn.com/abstract=2466057>.

50. CORELY ET AL., *supra* note 20, at 14-48.

51. *Id.* at 14. These include the external developments the authors identify include the increased discretion the justices had over their docket as a result of the Judges Bill of 1925, the rising importance of civil liberties

sonal style, marked by confrontation, exacerbated this change in the Court's norm of consensus. By the end of the Chief Justice Stone era (1941-1946), the norm was essentially dead. Dissent rates climbed to forty-five percent of cases, and remain fairly stable to this day.⁵² The authors call this metamorphosis the "dissensus revolution."⁵³

Their most interesting finding involves the interaction of attitudes and legal certainty. As others have previously observed,⁵⁴ the theory states:

[W]hen the level of legal certainty is high, and thus the level of certainty about the strongest legal answer is greatest, the justices are constrained from voting their attitudes. . . . [O]ur conceptualization suggests that unanimity and consensus result in cases where the level of legal certainty is great. However, when uncertainty exists as to which legal answer is strongest, dissensus is much more likely because this uncertainty enhances the justices' ideological discretion.⁵⁵

Their models to test this theory contain variables that consider not only law and attitudes, but alternative explanations as well, including strategic considerations (including whether the Chief Justice writes the unanimous decision),⁵⁶ institutional constraints (such as docket size and the number of law clerks available to each justice),⁵⁷ and the presence of certain case factors (such as the type of issue being litigated and the political salience of the issue).⁵⁸

Chapter Two provides an overview of the theory, and a summary of their quantitative data. Broadly, their theory is a combination of prior voting theories, including the legal model, the attitudinal model, and the strategic model, along with institutional and case-level characteristics. Their theory builds on prior research by Baum, Brandon, Kerr, and Bartels,⁵⁹ among others, who all argue that, under certain circumstances, law and precedent constrain the justices' ability to decide cases based only on their policy preferences, as the attitudinal model posits.

Here, the authors refine these other theories, and proffer that "legal certainty" acts as a mediator between precedent and attitudes. Legal certainty is defined by a five-factor index (cases involving a lack of legal complexity, amicus participation, legal conflict, legal dissensus in the lower court, as well as statutory cases).⁶⁰ When legal certainty is high,

cases, and the influence of legal realism. The internal developments the authors identify include the increasingly hostile nature of the justices' conferences following oral argument, additional time between oral argument and opinion hand-downs, and a more academic mind-set on the part of certain justices. *Id.* at 29-31.

52. *Id.* at 97.

53. *Id.* at 47.

54. *Id.* at 66.

55. *Id.*

56. *Id.* at 110-11.

57. *Id.*

58. *Id.*

59. LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 66 (1997); Brandon Bartels, *The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court*, 103 AM. POL. SCI. REV. 474 (2009); Orin Kerr, *Legal Ambiguity, Empathy and the Role of Judicial Power*, THE VOLOKH CONSPIRACY (May 13, 2009, 5:51 PM), <http://www.volokh.com/posts/1242251518.shtml>.

60. BAUM, *supra* note 59, at 62-76.

personal policy preferences are constrained; when legal certainty is low, the justices proceed to vote based on their personal policy preferences. According to their theory, “even the most ideologically polarized Court finds agreement in cases in which the available information strongly points to a single legal answer.”⁶¹ To elucidate their theory, the authors turn to a metaphor of the “jaws of a vise”:

If the jaws are sufficiently tight, the object does not fit through or does so only such that the vise subsequently shapes it. However, when the jaws are open the object passes through unimpeded and in its original form. In terms of judicial decision making, we view the object as the justices’ attitudes and the vise as the law.⁶²

The authors, thus, see the law as having an indirect effect on the justices’ decisions. As they posit: “[A]ttitudes are the principal force but [] they can be constrained by legal forces in certain cases.”⁶³

Chapters Three and Four comprise the critical empirical testing of the book. Examining all Supreme Court cases from the Warren, Burger, and Rehnquist Courts (1954-2004 terms), the authors do, in fact, find that a combination of the law, strategy, and ideology explain why the justices vote unanimously, and adopt unanimous opinions, in some cases but not others.

The Puzzle of Unanimity is a well-written book. Its methods are clear and easily accessible to a wide audience, and the authors’ findings contribute significantly to prior studies on Supreme Court decision-making. Unlike the other two books, the authors provide strong and generalizable evidence consistent with their theory. For me, one of the main contributions of the book is the authors’ operationalization of the concept of legal certainty through the creation of a five-factor index. Future research on Supreme Court decision-making will surely incorporate this metric. My only critique of the book is that, in several places the authors suggest that a unanimous decision is seen as more legitimate than a divided decision. In fact, what little evidence there is on this legitimacy claim refutes the proposition.⁶⁴

61. CORLEY ET AL., *supra* note 20, at 111.

62. *Id.* at 66.

63. *Id.* at 109.

64. See Michael F. Salamone, *Supreme Court Unity and Public Opinion: An Experimental Study* (APSA Toronto Meeting Paper, 2009), available at <http://ssrn.com/abstract=1450847>; Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RES. Q. 320 (2014); see also Sunstein, *supra* note 49, at 1 (claiming that “arguments in favor of higher levels of consensus . . . rest on fragile empirical foundations”).