The Justices Decide: Analyzing Attitudes, Politics and the Law reviewing Bailey and Maltzman, The Constrained Court, Stephen Engel, American Politicians Confront the Cour, and Pacelle, Curry and Marhsall's Decision Making by the Supreme Court

Kevin J. McMahon

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/11

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
As I was in the midst of writing this essay, the Supreme Court of the United States prepared to release its long awaited decision on the constitutionality of the Affordable Care Act of 2010, the legislative centerpiece of Barack Obama’s presidency. At 10 a.m. sharp on June 28, 2012, I turned on the television and awaited the news. A few minutes later, I saw CNN report what was surely a devastating ruling for the President with a banner proclaiming: Supreme Ct. Kills Individual Mandate. Thinking back to the three books under review in these pages, I thought that the attitudinalists had it right once again. In a 5–4 decision, the five most conservative Justices — all of whom were appointed by Republican Presidents — struck down one of the most important pieces of legislation passed by a Democratic Congress and signed by a Democratic President since the 1960s. In turn, the four most liberal Justices, all of whom were appointed by Democratic Presidents, dissented. With the remote in hand, I then switched channels to see how MSNBC was covering the decision. Curiously, the MSNBC anchors had yet to make an announcement, and suggested caution as their analysts reviewed the long

---


A few moments later, to my astonishment, they reported that the Court had in fact upheld the individual mandate and speculated that there would be great joy in the White House. Confused, I turned back to CNN. Their reporters and anchors were still holding tight to their version of events. ObamaCare was dead, constitutionally killed by a conservative Supreme Court. But soon the reporters acknowledged that their original reading of the “very confusing” opinion was actually incorrect. ObamaCare was alive. In fact, the Court, with Chief Justice John Roberts writing the 5–4 majority opinion, had upheld the legislation in large part.

But what to make of my initial take on the correctness of the attitudinal model in terms of understanding the ruling? Did that model fail to predict this most significant of decisions? Does law really matter more than many political scientists who analyze judicial decisions have long thought? What about the strategic model, a version of the attitudinal model that posits that the Justices may at times choose not to pursue their own policy preferences in a particular case out of concern that the Court might suffer at the hands of a vengeful President or Congress or to aid their ideological allies in the elected branches? Did Chief Justice Roberts, in joining with the four most liberal Justices, undertake an elaborate tactical move in upholding the law based on Congress’s tax power as opposed to its commerce power? Was the opinion a bold attempt to simultaneously avoid attacks on the Court for being overly partisan and boost the candidacy of Mitt Romney, the Republican presidential nominee, who had promised to repeal the health care law? Did Roberts really strive to have his cake and eat it, too?

Two of the books under review here are very relevant to these questions. Both of them find shortcomings in the explanatory power of the attitudinal model. For their part, Richard L. Pacelle, Jr., Brett W. Curry, and Bryan W. Marshall, authors of Decision Making by the Modern Supreme Court, argue that three leading explanations of Supreme Court decision-making — the attitudinal, legal, and strategic models — fail to capture the complexity of how the Justices reach their rulings. Using an “integrated model,” they seek to show how different conditions will influence the Justices’ decision-making. To be sure, for them, ideology, and in turn the attitudinal model, is still essential to understanding Supreme Court decisions. The authors also suggest that the Justices are not as free to behave as the attitudinalists argue. The authors write, “[w]e believe the [J]ustices are trying to exercise their policy preferences but that they are

4. See NewsyPolitics, supra note 2.
5. See id. As I later learned, FOX News also initially reported that the Court had struck down the legislation. Id. Although, their anchors corrected the error more quickly than CNN.
9. PACELLE, CURRY & MARSHALL, supra note 3.
10. Id. at 9.
11. Id. at 51.
12. Id. at 53.
13. Id. at 46–49.
constrained."\textsuperscript{14} The Justices are constrained by a variety of forces, including the limits "the Framers imposed on them," the boundaries of the Court’s "physical and moral authority," and the "powerful institutional rivals that care about many of the issues just as much as they do."\textsuperscript{15} To display these constraints, the authors seek to place the Court’s decisions in the context in which they were decided.\textsuperscript{16} In doing so, they create four scenarios based on whether a case is statutory or constitutional and the "salience of the issue" in question.\textsuperscript{17} For example, the authors suggest a constitutional case that is highly salient should display the "dominance of attitudinal variables."\textsuperscript{18} A statutory case with low issue salience should show the "dominance of legal variables."\textsuperscript{19} The other two scenarios should exhibit different types of strategic behaviors.\textsuperscript{20} In crafting this typology, the authors do much to advance the discussion of the relative importance of the Justices’ policy preferences in reaching their decisions.

There are still areas of concern, however. One particularly interesting but potentially problematic concept the authors employ in their analysis is issue salience. Instead of using salience as political scientists traditionally do — namely, whether an issue is prominent or important to the voting public and therefore on the radar screens of politicians seeking elected office at a specific moment in time — they consider whether an issue is salient "to the [J]ustices" themselves.\textsuperscript{21} As they write, "[p]art of our justification for this assertion is that presidents have made such issues litmus tests for their nominees to the Court."\textsuperscript{22} Given the time period under consideration (1937–2000), they are right to suggest that civil rights and civil liberties are such salient issues.\textsuperscript{23} And while it is reasonable to consider whether particular issues are important to Presidents and ultimately their nominees for the Court, such a measurement is not without its pitfalls.

Consider the issue of abortion, which the authors discuss in the paragraph immediately following the quote directly above.\textsuperscript{24} For example, what are we to make of President Nixon with regard to the abortion issue? After all, Nixon showed little interest in attempting to move the Court in either direction both before and after it announced its \textit{Roe v. Wade} decision in 1973.\textsuperscript{25} In fact, his first Solicitor General, Erwin Griswold, did not even file a brief in the case.\textsuperscript{26} His second Solicitor General, the very conservative

\begin{thebibliography}{9}
\bibitem{14} Id. at 64 (citation omitted).
\bibitem{15} Id. (internal citations omitted).
\bibitem{16} Id. at 51.
\bibitem{17} Id. at 52–53.
\bibitem{18} Id. at 52.
\bibitem{19} Id.
\bibitem{20} Id. at 52–53.
\bibitem{21} Id. at 80.
\bibitem{22} Id. at 80–81.
\bibitem{23} See id. at 81.
\bibitem{24} Id. (citation omitted).
\bibitem{25} See id. at 80–81.
\bibitem{26} Id. (citation omitted).
\bibitem{27} See id. at 81.
\bibitem{29} See id. at 177.
\end{thebibliography}
and very eager Robert Bork, did little to change the course of abortion law either.\textsuperscript{27} For his part, Nixon did not utter a word in public about the issue throughout his presidency.\textsuperscript{28} Moreover, as is well known, three of his four Justices voted in the majority in that case, with his second Justice, Harry Blackmun, writing the historic opinion.\textsuperscript{29} To be sure, Nixon was interested in moving the Court in a conservative direction on other civil rights and liberties questions, particularly school desegregation and rights of the accused.\textsuperscript{30} And as the authors point out, the abortion issue became a much more salient one after the election of Ronald Reagan.\textsuperscript{31} But how are we to evaluate the salience of the abortion issue for Nixon's Justices? The evidence certainly suggests that it became important to them. But the President did not use any sort of abortion "litmus test" when he chose them for the Court.\textsuperscript{32} Attitudinalists would certainly suggest that \textit{Roe} is clearly a case where the policy preferences of the Justices prevailed.\textsuperscript{33} Whether or not that is true, the authors' treatment of this issue, which certainly falls within the civil rights and civil liberties rubric, does not seem to capture the reality of the situation in assessing presidential influence on the Court.

Historians of the Court will also come across some head-scratchers in reading \textit{Decision Making by the Modern Supreme Court}.\textsuperscript{34} For example, the authors write that "[President Franklin D.] Roosevelt was famous for putting people on the Court and then convincing them to leave so he could move them elsewhere."\textsuperscript{35} Of course, Jimmy Byrnes, F.D.R.'s sixth Justice, did leave the Court after only one year of service.\textsuperscript{36} But Roosevelt's other seven Justices and his Chief Justice served at least nineteen years or died while on the bench.\textsuperscript{37} Moreover, Byrnes left the Court not because of some predetermined calculation on the part of the President, but because the United States had entered World War II, and Byrnes thought he could better serve the nation as the "assistant president."\textsuperscript{38} More importantly, Pacelle, Curry, and Marshall's view of the Stone, Vinson, and early Warren Courts — given the time period they analyze — is far

\begin{footnotesize}
\textsuperscript{27} Id. at 178.
\textsuperscript{28} Id. at 178–79.
\textsuperscript{29} \textit{Roe}, 410 U.S. at 116.
\textsuperscript{30} \textit{See generally McMahon, supra note 25.}
\textsuperscript{31} \textit{Pacelle, Curry & Marshall, supra note 3, at 81.}
\textsuperscript{32} \textit{See generally Lee Epstein & Jeffrey A. Segal, Advise and Consent: The Politics of Judicial Appointments} (2005) (discussing how the various goals of Presidents affect their Supreme Court nominations and appointments).
\textsuperscript{33} \textit{See Roe}, 410 U.S. 113.
\textsuperscript{34} The authors also made the unfortunate decision to repeatedly cite the work of the lead author, Richard E. Pacelle, Jr. While all scholars like to see their work cited — indeed I rely on my own work here — in \textit{Decision Making by the Modern Supreme Court} the citations were often forced, and at times ignored other, more relevant, works of scholarship. In all, according to the index, Pacelle's publications (either single or co-authored) were cited on more than a third of the book's 217 pages, and frequently multiple times on each page. \textit{Pacelle, Curry & Marshall, supra note 3, at 261.}
\textsuperscript{35} Id. at 164–65. For more information on Roosevelt's Court, see generally Kevin J. McMahon, \textit{Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown} (2004).
\textsuperscript{36} \textit{McMahon, supra note 35, at 1.}
\textsuperscript{38} \textit{McMahon, supra note 25, at 1 (citations omitted). See also David Robertson, Sly and Able: A Political Biography of James F. Byrnes} 311 (1994).
\end{footnotesize}
too limited and does not sufficiently account for the external forces pushing the Justices to reconsider their doctrinal treatment of civil rights and civil liberties issues. Consider, for example, the great weight they give to footnote four of Carolene Products\(^{39}\) (more on this footnote later). As they write, “[f]ootnote Four would change the Supreme Court and the nation in significant ways.”\(^{40}\) And as they rightly add, the constitutional vision outlined in that note would lead to decisions like its 1954 decision in Brown v. Board of Education.\(^{41}\)

But at the same time, the authors suggest that several influential Justices — appointed both before and immediately following Brown — were not chosen for their commitment to protecting civil rights and liberties.\(^{42}\) Specifically, they write,

> Until the mid- to late 1960s, few [J]ustices were chosen because of their views on civil rights and individual liberties. Previous civil libertarians such as [William] Douglas, [Hugo] Black, and [William] Brennan were selected because of their views on economic regulation, to embarrass the Supreme Court, and to help Republicans make inroads into the Catholic vote.\(^{43}\)

While these aspects of the appointments are not untrue, the authors’ failure to consider other aspects of them undervalues the forces of the Democratic political regime that were pushing the Court in a liberal direction and thereby gives far too much credit to the individual views of the Justices themselves. Put another way, the authors do not properly place the Justices in the larger political regime from which they emerged. For example, it is true that F.D.R. did not appoint jurists to the Court with the specific intention of advancing the rights of African Americans.\(^{44}\) But it is also true that he nominated individuals to the Court who were both liberal and committed to a rights-centered brand of judicial thought. With Black, for instance, F.D.R. sought to stick it to Southern Democrats who had helped defeat the Court-packing plan, as the authors suggest, but he also knew he was selecting a nominee who was thought to be “the most radical man in the Senate” and would be committed to seeking justice for the least privileged in American society.\(^{45}\)

Such points might appear to be unfair quibbles, but understanding presidential intent in the construction of an administration’s judicial policy is central to fairly evaluating presidential influence on Supreme Court decision-making — something the authors set out to accomplish. In this sense, even while questioning the power of the attitudinal model, the work exists in what might be called an attitudinal bubble. The result is a book that convincingly questions the assumptions of the attitudinal model, but does not necessarily offer a full portrait of the forces that shaped the modern Supreme


\(^{40}\) Pacelle, Curry & Marshall, supra note 3, at 65.


\(^{42}\) Pacelle, Curry & Marshall, supra note 3, at 102.

\(^{43}\) Id. (internal citations omitted).

\(^{44}\) See id. at 194 (stating Roosevelt’s main motivation behind his appointments was economic).

\(^{45}\) Joseph Alsop & Turner Catledge, The 168 Days, at 301 (1938); see Pacelle, Curry & Marshall, supra note 3, at 209.
Court’s decision-making. To be sure, Pacelle, Curry, and Marshall’s main intent is to convince political scientists specifically, and legal scholars generally, of the weaknesses of the attitudinal model, as well as the legal and strategic models, and the strengths of their integrated model. In this task, they generally succeed.

The attitudinal model also takes center stage in Michael A. Bailey and Forrest Maltzman’s *The Constrained Court: Law, Politics and the Decisions Justices Make*.46 And as their title suggests, they agree with the authors of *Decision Making by the Modern Supreme Court* about the limitations of that model. As they write in the conclusion, “[f]irst, [J]ustices are influenced by more than just the policy preferences emphasized by the attitudinal model. Second, law matters for [J]ustices. Third, the influence of specific legal doctrines varies across [J]ustices.”47 In addition, they argue that the Justices are influenced by the democratically elected branches and the Solicitor General, the so-called “tenth [J]ustice.”48 What I found most impressive in this smartly argued book is that Bailey and Maltzman, in confronting attitudinal thinking, employ innovative models that will force even seasoned scholars of the Court to consider old questions anew. For this reason the authors do not seem stuck in that attitudinal bubble referred to above. Consider, for example, when, in an attempt to “separate preference change from agenda change,” they examine Andrew Martin and Kevin Quinn’s claim that the Supreme Court reached its apex of conservatism in 1973.49 Alternatively, Bailey and Maltzman conclude that while “the Court did indeed become more conservative in the early 1970s[,] . . . it was still relatively moderate and instead of becoming markedly more liberal over the 1970s (as in Martin and Quinn’s estimates) it became gradually more conservative over time.”50 Of course, one does not need to be a keen Court-watcher to reach this assessment of the trajectory of the Court’s ideology, but Bailey and Maltzman give the force of their modeling to support their conclusions.

Another example of Bailey and Maltzman’s willingness to question well-received conclusions arising from the attitudinal model can be found in their treatment of the separation-of-powers model. In an attempt to break through the stale discussion of whether or not the Justices might be constrained by external political forces — for reasons of principle or fear — Bailey and Maltzman construct their own model and test whether there is any justification for separation-of-powers assertions. In doing so, they compare the voting record of relevant Justices to those of relevant Senators. Here is just a taste of that analysis:

---

47. Id. at 143.
48. Id. at 124 (citation omitted).
49. Id. at 17–18.
50. Id. at 40.
51. Pacelle, Curry, and Marshall agree on this point, writing “if [the J]ustices pursue their policy designs without regard to political consequences or institutional constraints, they run the risk of weakening the Court.” PACELLE, CURRY & MARSHALL, supra note 3, at 26.
The model predicts that if the Court was in fact constrained before 1960 there should be a shift downward (in a liberal direction) for [the] Justices relative to members of Congress and the [P]resident. . . . For every [J]ustice, except Hugo Black, this is the pattern we see. And two of the [J]ustices, Charles Whittaker and Potter Stewart, changed significantly. Stewart was more conservative than Senators [Everett] Dirksen and [George] Aiken before the 1960 election and more liberal than those senators afterward. Whittaker was more conservative than Dirksen before 1961 and more liberal afterward.52

Of course, such a comparison raises questions about the consistency of the voting records of the senators themselves, and some defenders of the Court would surely scoff at the idea of comparing the Justices' votes to those "mere" politicians sitting across the street in the Senate. Immediately following the election of a President of another party, it might be expected for the voting record of someone like Everett Dirksen to become more conservative. But even with this concern, Baily and Maltzman, through their novel approach, have convincingly shown that this perceived constraint on the Court exists and therefore helps to define the Justices' decision-making.53

As the authors point out, many have questioned the validity of the separation-of-powers argument, particularly advocates of the attitudinal and legal models.54 To these skeptics, the "[J]ustices are immune from the influence of the elected branches."55 Indeed, even one of the best examples of the Justices' retreat in the face of retaliation raises questions about the actual constraints they encounter in challenging Congress and the President. Of course, I am referring to the Court-packing episode of the 1930s.56 After all, once F.D.R. released the plan in early February 1937, mere months after his historic landslide reelection victory, the Court still controlled its own fate.57 If it decided, as expected, to strike down F.D.R.'s second New Deal — which included popular laws like the Social Security58 and National Labor Relations Acts59 — it would have almost certainly ensured the passage of the Court-packing plan and the addition of new Justices to its bench. Instead, the Court altered its course and declared the second New Deal, for the most part, constitutional.60

What lesson might the Justices take from this episode? Defenders of the separation-of-powers argument suggest that it is a clear example of the Justices cowering to the power of a democratically elected majority, fearful of their status and authority

52. BAIley & MaltzMan, supra note 46, at 112.
53. See id.
54. See id. at 101–03.
55. Id. at 119.
56. See generally MCmahon, supra note 35.
57. Id. at 70.
within the political structure. But one might view the episode differently. Indeed, the Justices could rightly conclude that the Court’s authority, while not quite supreme, will be able to withstand significant political challenges. In the worst-case scenario, if the Court steps too far out of line with the dominant political coalition, it has a simple solution. It can retreat. In short, as opposed to instilling fear in the Justices, the Court-packing episode might deepen the Justices’ resolve to stand by their decisions, knowledgeable of the fact that it took a very popular President, fresh off a historic election victory and with an overwhelming majority in Congress, to even consider seeking to undermine the Court’s authority. And after the President did so, he was widely denounced for his action. 

While Bailey and Maltzman take such arguments seriously, they seek to move beyond these uncertainties, and in doing so, they present evidence that persuasively shows that “many [J]ustices are constrained by the [P]resident and Congress” on not only statutory cases, but “on all cases, including constitutional ones.” Like Pacelle, Curry, and Marshall, Bailey and Maltzman also utilize the concept of salience in their analysis. Unlike the former authors, they do so in a more traditional sense. Specifically, in their separation-of-powers chapter, they test whether political salient cases are likely to constrain the Justices, and there is some evidence that salience matters. Still, I was left wondering how much their model captures the effect of salience. After all, a quick scan of any major newspaper during a presidential election will show that many judicial issues do not usually capture the headlines. However, for some groups — typically those forming the electoral base of a political party — such issues matter greatly. Leaving this and other concerns aside, Bailey and Maltzman’s exploration of whether the Justices are constrained is both fresh and full of wonderful insights.

Whereas the first two books are almost consumed by the question of how much policy preferences matter when the Justices make their decisions, Stephen M. Engel’s American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power, focuses on a different, much broader, question. And in contrast to the first two books, Engel’s excellent study focuses on the actual politics of the interaction between the courts and the rest of the political system. As he writes, “[t]he central question of this book is how can the recurrence of anti-judicial hostilities over American history be squared with repeated scholarly and journalistic assessments that judicial power has grown, is secure, and is even supreme.” In seeking to answer this question, he takes his readers on a historical tour — from the Jeffersonian period to the present day — of partisan attacks against what is seemingly an ever more powerful federal judiciary. In doing so, he seeks to show the interconnectedness of the Court and

61. See McMahon, supra note 35, at 70.
63. Id. at 117–19.
64. Id.
66. Id. at 4.
party development, arguing that "anti-judicial animus reflects politicians' changing ideas about the threat posed by formed, stable, and permanent opposition." Engel's treatment of the Court in the political context — given his historical institutional approach — differs sharply from the previous two books. In short, his "thick description" of these conflicts offers a fuller elaboration of the Court's place in the broader political world, and the political and theoretical origins of its decisions.

Consider, for example, Engel's treatment of Carolene Products' footnote four. As noted above, Pacelle, Curry, and Marshall stress its importance, but do not do much to elaborate the origins of the doctrinal path outlined in that footnote. Engel does. Read his words:

Through this footnote, the Court recognized the political process as pluralist, that is, as a competitive forum of represented interests. In so doing, it adopted a construction of politics that Lincoln had begun to articulate.

The Court went further than Lincoln. By recognizing that certain groups might not have equal access, the Court identified power differentials within interest-based pluralism that Lincoln had not.

Earlier in the book, Engel writes of the decision, "[t]hrough Carolene, the Court became a political branch in its own right, entrenched in the assumptions and values of liberal pluralism." Of course, Engel is not the first to elaborate on the democratic theory that gave life to Carolene Products' footnote four, but his treatment of it serves as a fine example of how he weaves together the political, legal, and theoretical aspects of judicial development.

Another example can be found in his discussion of President Richard Nixon's criticism of the Court's decisions during both the 1968 election campaign and his presidency. While Engel too easily accepts conventional wisdom of Nixon's opposition to busing as part of his Southern strategy — in fact there was more desegregation of the schools during Nixon's administration than during any of his predecessors — his larger point about the busing episode is spot on. As Engel writes, "[t]he Nixon administration attempted to harness judicial power beyond using it to legitimize its position on busing. It also sought to pass accountability to the Court and thus to maintain the Court as a potential scapegoat." More broadly, Engel uses this example to display how "the polity is fully developed for harnessing the judiciary for political ends." Such descriptions of the shifting partisan hostilities toward the

67. Id. at 8.
69. ENGEL, supra note 65, at 277.
70. Id. at 66.
71. See id. at 311-17.
72. Id. at 312.
73. For more information on the Nixon administration's desegregation efforts, see McMahan, supra note 25, at 65-82.
74. ENGEL, supra note 65, at 313.
75. Id. at 334.
judiciary give force to the central claim of the regime politics scholarship; namely, that law is “politically constructed.” And while the first two books largely ignore this scholarship, Engel deserves great credit for producing a very worthy addition to it.

Sitting atop Capitol Hill, and at times at the center of the nation’s political world, the Supreme Court continues to fascinate and attract the attention of scholars seeking to understand both the Justices’ decision-making process and the origins and consequences of their decisions. Of course, the Court’s decision in National Federation of Independent Business v. Sebelius upholding the Affordable Health Act of 2010 has brought renewed attention from the larger public as well. Not since its 2000 decision in Bush v. Gore has the Court captured the eyes of so many Americans sitting in front of their television sets and computer screens. And while it is certainly important to understand how and why the Justices make a decision, it is also essential to move beyond those types of analyses by examining the Court and its decisions in their proper political context. By not doing so, scholars miss the opportunity to fully explain both how politics shapes law and also how law may shape politics.