

CHAPTER ONE

Introduction

AMONGST OTHER PROTECTIONS, the First Amendment to the U.S. Constitution prohibits Congress from interfering with the right of individuals to assemble in a peaceful manner and speak their mind. The Fourteenth Amendment, the U.S. Supreme Court has determined, requires that the states also respect the freedoms of speech and assembly.¹ General constitutional protections, however, inevitably meet sticky factual circumstances in which there may not be a clear constitutional answer. Can a state's trespassing laws, for example, be used to restrict protest activities on property that is private but generally open to the public? Or, is this sort of activity protected by the First and Fourteenth Amendments?

This question was essentially the one presented to the U.S. Supreme Court in the case *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* (1968). After union members began picketing a nonunionized supermarket located in a Pennsylvania shopping center, a court granted an injunction prohibiting any union picketing on the grounds of the shopping center. The U.S. Supreme Court held that since the shopping center is generally open and accessible to the public, the First and Fourteenth Amendments prevent Pennsylvania's trespass laws being used to prohibit a peaceful demonstration or picket. Despite the shopping center being private property, the Court concluded that Pennsylvania could not stop the picketers as long as the exercise of their First Amendment rights did not interfere with the ability of others to access the property.

Supreme Court decisions do not just resolve immediate, narrow disputes; they also set broader precedent. The *Logan Valley Plaza* case was no exception, as it established that states, in general, could not restrict speech and assembly on private property if the property is open to the public. Four years after the Court decided *Logan Valley Plaza*, it revisited the precedent when deciding two new cases dealing with protest activity on private, commercial property. In these two decisions, the Court determined that the *Logan Valley Plaza* precedent does not apply to a situation

¹ The first applications of the freedom of speech and freedom of assembly protections to the actions of state legislatures occurred in *Gitlow v. New York* (1925) and *DeJonge v. Oregon* (1937), respectively.

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in which the private property in question is a stand-alone store (*Central Hardware Co. v. National Labor Relations Board* [1972]) or when the protest activity is unrelated to the private property (*Lloyd Corporation v. Tanner* [1972]).² As evidenced by the lower court rulings preceding the Supreme Court's decisions in these cases, it was possible to read the *Logan Valley Plaza* precedent as protecting the rights of the protesters in both situations. Nevertheless, the Court opted to limit the meaning and applicability of *Logan Valley Plaza* in a significant way and thus restrict the reach of the First and Fourteenth Amendments. In fact, the Supreme Court's interpretation of *Logan Valley Plaza* in the *Lloyd Corp.* decision was so critical that in a subsequent decision, *Hudgens v. National Labor Relations Board* (1976), the Court noted that *Lloyd* may have implicitly overruled *Logan Valley Plaza* (424 U.S. 507, 517–18).

The lesson to be drawn from *Logan Valley Plaza* is that Supreme Court precedents do not necessarily remain static over time. Instead, the meaning and scope of a precedent can change as the Supreme Court revisits and interprets it in future cases. Why and when will the U.S. Supreme Court alter the meaning of one of its precedents by negatively interpreting it, as the Court did with *Logan Valley Plaza*? Conversely, when will the Court interpret a precedent positively? By negative interpretation, we mean instances in which the Court chooses to restrict a precedent's reach or call into question its continuing legal validity. Positive interpretation occurs when the Court expressly relies on a case as part of the justification for the outcome of a dispute. This book is not about protest activity and the First and Fourteenth Amendments; it is about one important aspect of legal change at the Supreme Court—the interpretation of Court precedent. We seek to explain when and why the Court develops law through the interpretation of its precedent.

MAKING LAW AND POLICY AT THE U.S. SUPREME COURT

A Supreme Court decision contains two commonly recognized policy outcomes. First, there is the disposition in the case, which determines which litigant prevails in the legal dispute. Second, there is the legal principle announced by the Court that consists of the holding—the answer to the question raised in the case—and the legal reasoning that justifies the holding. The disposition obviously has direct implications for the lit-

² In *Lloyd*, the Court held that people could not hand out literature opposing the Vietnam War and the draft in a shopping mall. The war and the draft, the Court argued, were not related to the functions of the mall and thus the First Amendment did not protect their activities.

igants' immediate interests in a case. The legal reasoning, however, can have more far-reaching consequences by altering the existing state of legal policy and thus helping to structure the outcomes of future disputes.

Specialists in judicial politics overwhelmingly agree that the essence of the Court's policy-making power resides in its majority opinions (e.g., Epstein and Knight 1998; Epstein and Kobylka 1992; Maltzman, Spriggs, and Wahlbeck 2000, 5–6; Rohde and Spaeth 1976, 172; Segal and Spaeth 2002, 357). These opinions articulate legal principles and, in effect, public policies that affect the behavior of both governmental and non-governmental decision makers. Court opinions have such effects because they provide information about the possible outcomes of future disputes and signal sanctions for noncompliance (see Spriggs 1996; Wahlbeck 1997). In particular, these legal principles allow decision makers to forecast likely answers to legal questions and thus infer the consequences of their choices (Douglas [1949] 1979; Landes and Posner 1976; Powell 1990). As with policies or institutional rules more generally, Court opinions help actors to overcome uncertainty in their decision-making processes. Put simply, Court opinions create precedents that are relevant for future disputes and thus shape the behavior of forward-thinking actors.

The political science literature, however, manifests a significant disconnect between this common understanding of the importance of law and the state of knowledge regarding how law develops. What is most striking is the paucity of systematic theoretical or empirical studies that treat the law as a variable to be explained. Indeed, only a handful of studies directly seek to explain legal development at the Court, and even they provide somewhat inconsistent and potentially contradictory answers.³

Epstein and Kobylka (1992), for example, argue that the most significant variable affecting change in abortion and death penalty policy was the legal arguments put forward by organized interests in the cases, rather than the policy goals of the justices or the surrounding political climate. The overruling of precedent, one study concluded, is largely due to ideological considerations (Brenner and Spaeth 1995). McGuire and MacKuen (2001) suggest the Court's decision to follow a precedent also depends heavily on ideological considerations. And, in his examination of change in search and seizure policy at the Court, Wahlbeck (1997) discovers that

³ By contrast, the legal literature is replete with case studies of particular decisions or areas of the law (e.g., Freed 1996; Kahn 1999; Nalls and Bardos 1991; Schwartz 1996). Although interesting and informative, they manifest two drawbacks that limit their ability to answer the question we pose. First, they are generally descriptive in nature and thus do not present theoretical models of legal development that produce empirically falsifiable predictions. Second, they do not offer rigorous empirical tests of the hypotheses they do propose. See Epstein and King (2002) for a cogent discussion of these issues.

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ideological considerations matter, but finds some support for the influence of precedent.

Even recent research focusing on the choices the justices make while crafting opinions does not directly address how law develops. Most notable are studies regarding the assigning of majority opinions (Brenner 1982; Maltzman and Wahlbeck 1996), bargaining and negotiation among the justices (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000), and the justices' joining of opinion coalitions (Brenner and Spaeth 1988; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Wahlbeck, Spriggs, and Maltzman 1999). In their recent book, *Crafting Law on the Supreme Court*, Maltzman, Spriggs, and Wahlbeck (2000, 154), for instance, conclude by saying: "Although we present a theoretical and empirical case for the factors that shape judicial behavior, it is important to note that we have not made the final step, explaining the actual content of Court opinions. That task we leave to the future." Indeed, this is a task that nearly all scholars of judicial politics have left for future study.

One reason for the dearth of research treating the law as a dependent variable has been the near-hegemonic status of the attitudinal model of Supreme Court decision making. The arguments underlying this model—namely, that the justices' votes are exclusively a result of their ideological leanings—have led researchers to study the ideological nature of the individual votes of Supreme Court justices or the dispositions of cases, rather than the policy content of majority opinions. Researchers working in this tradition generally argue that the language in Court opinions constitutes post hoc justifications for the outcome preferred by the justices. Thus, they recommend that scholars study "what justices do [i.e., their votes]" rather than "what they say [i.e., their opinions]" (Spaeth 1965, 879). Although attitudinalists recognize that the "opinion of the Court . . . constitutes the core of the Court's policy-making process" (Segal and Spaeth 2002, 357), there continues to be an overwhelming tendency to study the justices' votes.

The second reason that there has been little systematic research in which development of the law is the dependent variable is that it is a difficult concept to measure. For this reason, most research aimed at understanding legal change actually uses the ideological direction of case outcomes as the dependent variable (e.g., Baum 1988; George and Epstein 1992; Segal 1985).

As a result, while existing studies offer tremendous insight into how justices vote on case dispositions, the literature continues to present an underdeveloped theoretical and empirical understanding of why and when law changes. This situation persists in spite of recognition that "analyses of courts ought to center on the law that is established by judi-

cial decisions” (Knight and Epstein 1996, 1021). The goal of this book is to take up this charge and contribute to our understanding of legal change at the U.S. Supreme Court.

Quite obviously, the law is a complex and multifaceted phenomenon that includes a wide variety of components. Epstein and Kobyłka (1992, 5) point out this complexity when writing, “The phenomenon of legal change is hydra-headed, comprehending formal judicial actions, executive and legislative behavior, and the behavior of relevant publics. As a result, the concept is subject to definition and observation from a wide variety of perspectives.” Even when limiting the concept of law to formal judicial actions, it encompasses the Court’s interpretation of federal statutes and treaties, the U.S. Constitution, and the rules announced in previous Court opinions.

As elaborated below, we carve out one element of the law on which to focus—the Court’s interpretation of the precedents set by its prior opinions. Given the importance of the Court’s precedents as referents for behavior, and the fact that their meaning and scope can change over time, we think they are a good place to begin to analyze how law develops. Our central objective is to provide a systematic theoretical and empirical analysis of the Court’s decisions about when and how to interpret existing Court precedents. With this book, we hope to shed light on the Court’s most important task, the shaping of legal policy.

THE DEVELOPMENT OF LAW AND THE INTERPRETATION OF PRECEDENT

Political scientists, legal scholars, and practicing lawyers commonly recognize that precedent is one of the central components of the American legal system. By precedent, we mean the legal doctrines, principles, or rules established by prior court opinions. These legal principles indicate the relevance or importance of different factual characteristics for a dispute and set forth legal consequences or tests that attach to particular sets of these factual circumstances (Aldisert 1990; Richards and Kritzer 2002; Schauer 1987). In so doing, precedents convey information that allows decision makers to predict (within certain bounds) the likely legal consequences of different choices and infer the possible range of outcomes of potential disputes.

Importantly, the exact nature of the legal rule established by a Supreme Court opinion can change over time (Epstein and Kobyłka 1992; Levi 1949; Wahlbeck 1997). The Court rarely defines doctrine in a comprehensive or complete manner in any one opinion. It sometimes takes a series of opinions to clarify a rule, fill in important details, and define its

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scope or breadth (Ginsburg 1995, 2124; Landes and Posner 1976, 250). When Court opinions legally treat or interpret an existing precedent they shape it by restricting or broadening its applicability.⁴ Legal rules or precedents can thus evolve as the Court interprets them over time.

Broadly speaking, the Court's legal interpretation of precedent takes two forms; and it is these two forms of interpretation on which this book will primarily focus. First, the Court can interpret a precedent positively by relying on it as legal authority (Aldisert 1990; Baum 2001, 142; Freed 1996; Johnson 1985, 1986; McGuire and MacKuen 2001). When doing so, for example, the Court can follow the precedent by indicating that it is controlling or determinative for a dispute. The positive interpretation of precedent thus involves the Court's explicit reliance on the case for at least part of its justification for the outcome in the dispute before it. This treatment of precedent can invigorate its legal authority and possibly expand its scope.

Second, the Court can negatively interpret a precedent by restricting its reach or calling into question its continuing importance. The Court can, for example, distinguish a precedent by finding it inapplicable to a new factual situation, limit a case by restating the legal rule in a narrower fashion, or even overrule a case and declare that it is no longer binding law (see Baum 2001, 142; Gerhardt 1991, 98–109; Johnson 1985, 1986; Maltz 1988, 382–88; Murphy and Pritchett 1979, 491–95). With this kind of interpretation, the Court expresses some level of disagreement with the precedent and, as a result, may undercut the legal authority of a precedent and diminish its applicability to other legal disputes.

The case with which this chapter began, *Logan Valley Plaza*, provides a clear example of a precedent that the Court negatively interpreted. For an illustration of both positive and negative interpretations of Court precedent, in a very different subject area, consider *Warren Trading Post v. Arizona Tax Commission* (1965), where the Court overturned an Arizona statute that taxed a retail trading business operated on an Indian reservation but owned by a non-Indian. The Court ruled that federal law regarding trading on Indian reservations was “all-inclusive” and designed to ensure that “no burden shall be imposed upon Indian traders for trading with Indians on reservations” except as authorized by Congress (380 U.S. 685, 691). The Court argued that the state's tax on gross income in this case would result in such a burden by creating financial hardships for those taxed that would “disturb and disarrange” the federal regulatory scheme (380 U.S. 685, 691). The Court therefore concluded that the state tax was preempted by federal legislation.

⁴ We use the terms “legal treatment” and “interpretation” synonymously throughout this book.

The Court has on several occasions interpreted or treated this precedent in the context of deciding other disputes. For instance, in *White Mountain Apache Tribe v. Bracker* (1980), the Court scrutinized Arizona's decision to apply license and tax regulations to non-Indian corporations doing business on an Indian reservation. In holding that federal law preempted Arizona's actions, the Court expressly anchored its decision on *Warren Trading Post*: "Both the reasoning and result in this case follow naturally from our unanimous decision in *Warren Trading Post*" (448 U.S. 136, 152). This positive interpretation of *Warren Trading Post* therefore serves to reinforce its ruling. In fact, in their dissenting opinion, Justices Stevens, Stewart, and Rehnquist disagreed with what they saw as an inappropriate extension of this precedent, calling it "disturbing" (448 U.S. 136, 159).

By contrast, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* (1976), the Court declared that *Warren Trading Post* did not apply to the question of whether a state could require an Indian trader to collect taxes on items sold to non-Indians. The Indian Tribe argued that *Warren Trading Post* was controlling and led to the conclusion that the taxation scheme at issue intruded on their "freedom from state taxation" (425 U.S. 463, 482). The Court, however, read the precedent more narrowly than the Tribes, saying that because the two taxation schemes differed in substantial ways, *Warren Trading Post* "does not apply" (425 U.S. 463, 482). The Court's distinguishing of *Warren Trading Post* therefore represents a negative interpretation of the precedent.

Most recently, in *Department of Taxation and Finance of New York v. Milhelm Attea and Bros.* (1994), the Court negatively interpreted *Warren Trading Post* and further narrowed its reach. At issue was New York's adoption of regulations that, among other things, limited the quantity of untaxed cigarettes that wholesalers could sell to Indian tribes and tribal retailers. The regulations were adopted to combat the problem of non-Indians purchasing untaxed cigarettes on the reservations. Relying on the legal principle from *Warren Trading Post*, the New York Court of Appeals determined that federal law preempted New York's ability to regulate the activities of the licensed Indian traders. In reversing the lower court's judgment, the Supreme Court wrote that "Although broad language in our opinion in *Warren Trading Post* lends support to a contrary conclusion, we now hold that Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes" (512 U.S. 61, 75). This negative interpretation of *Warren Trading Post* clearly curtails its reach by reading it to say that there is no blanket immunity for Indian traders.

As evident, the precise meaning of the legal principle from *Warren*

Trading Post did not remain static but changed over time as the Court used it in deciding subsequent legal disputes. In each case, the Court revisited the legal principle and interpreted it in ways that had clear implications for its continuing role in structuring future outcomes. The positive or negative interpretations of this precedent therefore helped to shape the law, and in so doing, potentially influenced a state's ability to collect revenue, the relationship between states and tribes, and the relationship between states and the federal government.

The negative interpretation of *Warren Trading Post* in *Milhelm Attea*, for instance, has had real influence in this area of the law. Since this interpretation of the *Warren Trading Post* precedent, lower courts have on at least five occasions explicitly followed *Milhelm Attea* and adopted its view, rather than that put forward in *Warren Trading Post*. As the Court of Appeals for the Tenth Circuit put it (213 F. 3d. 566, 582), *Milhelm Attea* "narrowed its [the Supreme Court's] interpretation of the [Indian] trader statutes." As a result, the Tenth Circuit in this case rejected the Indian Tribes' argument that a Kansas motor fuel tax was illegal because it was preempted by federal law.

This example of *Milhelm Attea*'s effect demonstrates a broader point. Court opinions matter because they help determine societal opportunities and constraints, providing advantages to some actors relative to others. Court opinions are not neutral but serve to redistribute resources in society. By changing the law, the Court can cause distributional consequences in society by helping to structure the outcomes of future disputes and thus affect who wins and loses in society. The Supreme Court's precedents influence the disposition of cases in lower courts (e.g., Comparato and McClurg 2003; Johnson 1987; Songer, Segal, and Cameron 1994; Songer and Sheehan 1990), structure the policy choices of bureaucratic agencies (Spriggs 1996, 1997), influence the issues on which the media focus (Flemming, Bohte, and Wood 1997), affect public opinion (Hoekstra 2000, 2003; Johnson and Martin 1998), and influence the behavior of private parties (e.g., Bond and Johnson 1982; Cooter, Marks, and Mnookin 1982; Priest and Klein 1976). In short, the interpretation of precedent is an important legal and political event that can help structure the future behavior of both governmental and nongovernmental decision makers.

The puzzle arising from this discussion becomes why the Court chose to interpret this precedent when and how it did. Why did the Court, for example, positively interpret *Warren Trading Post* in *Bracker* but negatively treat it in *Moe* and *Milhelm Attea*? More generally, the key theoretical question is the following: Why and when does the Court interpret its precedents positively or negatively? That is the question we take up in this book.

A BRIEF ACCOUNT OF EXISTING ANSWERS

Earlier in this chapter, we noted that few systematic studies of the Supreme Court directly focus on the development of the law. Nevertheless, existing research does have something to say about Supreme Court decision making more generally. Here, we briefly review existing theoretical approaches to Court decision making and the limited number of studies that use these approaches to study legal change at the Court. Our goal is to give the reader an overview of the current state of the literature and situate our study accordingly.

Broadly speaking, the literature on Supreme Court decision making is dominated by two competing paradigms (see Clayton and Gillman 1999; Segal and Spaeth 2002). One tradition contends that justices are primarily motivated by concerns about substantive policy outcomes. The attitudinal model, for example, proposes that the justices vote for the liberal or conservative outcome in a case exclusively as a function of their ideological predispositions (Segal and Spaeth 2002). Rational choice explanations predicting that the justices act strategically when deciding cases also start from the premise that judges are policy-oriented decision makers (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). The common denominator among these scholars is their assumption that justices have one overriding goal—to set legal doctrine that will result in policy outcomes that reflect their preferences.

The second perspective guiding the study of the Court, the legal model, emphasizes that the justices are motivated by a sense of duty or obligation to follow particular legal principles, rights, and norms (e.g., Gillman 1999; Kahn 1999; Wechsler 1959). In contrast to the prior approach, this viewpoint contends that judges seek to adhere to these rules or norms irrespective of the substantive policy outcomes that will result from their application. Scholars in this tradition argue, for example, that judges strive to adhere to precedent (e.g., Dworkin 1978) or decide cases consistent with certain conceptions of rights or theories of constitutional interpretation (Kahn 1999), such as the Founders' notion of appropriate policy making (Gillman 1993). In short, this perspective contends that judges are jurisprudentially oriented decision makers who respond to normatively relevant legal factors.

One of the central debates in the social scientific study of the Court today is whether Supreme Court justices are motivated by law or policy. A series of recent books (Clayton and Gillman 1999; Segal and Spaeth 2002; Spaeth and Segal 1999) and journal articles (Brenner and Stier 1996; Segal and Spaeth 1996; Songer and Lindquist 1996) seeks to defend one of these two positions. While many (if not most) scholars rec-

ognize that the justices probably respond to both of these concerns (e.g., Baum 1997), the literature nonetheless tends to present them as competing explanations. According to Segal and Spaeth's (2002, 53) recent treatise on the attitudinal model, for example, "the legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision making process." Kahn (1999, 197), by contrast, concludes that the legal model is "a more credible and useful" approach than a policy-based model. One contribution we make in this book is to show that policy goals and legal concerns are not competing explanations but are inextricably linked to one another as the Court interprets precedent.

When turning to existing research on the interpretation of precedent and legal change, we see that it tends to put forward hypotheses drawn from one or both of these two traditions. First, many studies suggest that the interpretation of precedent depends at least in part on the justices' policy goals (e.g., Brenner and Spaeth 1995; Johnson 1986, 1987; McGuire and MacKuen 2001; Spriggs and Hansford 2001, 2002).⁵ When taken together, these studies offer some support for the influence of the justices' ideological points of view, but their results differ from one another in some important respects. Johnson (1986), for instance, concludes that ideological considerations did not influence how the Court interpreted the precedents in his study. Epstein and Kobyłka (1992) conclude that ideology played little role in the Court's interpretation of precedent in the area of abortion rights and the death penalty. Wahlbeck (1997) and Brenner and Spaeth (1995) find, however, that ideological considerations matter, respectively, in change in search and seizure policy at the Court and the justices' decisions to overrule precedent. Additionally, McGuire and MacKuen (2001) present data showing that the ideological distance between the Court and a precedent influences the positive interpretation of precedent.⁶

These studies share a common problem that may in part account for their discrepant results: they put forward the hypothesis of ideological

⁵ Studies of lower federal court responsiveness to the Supreme Court put forward similar claims (see Benesh 2002; Benesh and Reddick 2002; Klein 2002; Songer, Segal, and Cameron 1994).

⁶ There is also a literature on the citation of court opinions and patterns of citations across courts. Although these articles are interesting, most of them provide limited leverage for this book because their theoretical focus is not on legal development or the interpretation of precedent. First, many of them are interested in the influence of particular judges, measured by the number of citations to a judge's prior opinions, rather than in how law changes (e.g., Kosma 1998; Landes, Lessig, and Solimine 1998; Merryman 1954, 1977). Second, studies examining patterns of citations across courts have been mainly interested in how characteristics of the courts (e.g., geographical location or size of caseload) or particular judges (e.g., expertise or reputation) affect citations (e.g., Caldeira 1985, 1988; Harris 1985).

influence without considering how it fits into a more general theory of the development of law. Indeed the conjecture of ideological voting principally derives from the attitudinal model, which, as its leading proponents make clear, does not apply beyond the justices' final votes on the merits (i.e., the choice to affirm or reverse the lower court decision) (Segal and Spaeth 2002, 96). Thus, while the hypothesis that legal change is a function of the ideological motives of the justices makes intuitive sense (and certainly plays a role in this process), absent a model of the interpretation of precedent its exact role remains underspecified.

Second, scholars have invoked legal norms as representing one element in the development of law (e.g., Johnson 1985, 1986; McGuire and MacKuen 2001). In so doing, they draw on the legal model of judicial decision making. Again, this perspective seeks to explain Court decisions as a function of legally relevant concerns, such as the factual characteristics of cases and the state of the law as embodied in statutes, the U.S. Constitution, and precedent. Existing accounts provide preliminary support for a relationship between legal variables and the development of the law. For example, studies indicate that the nature of the Court's prior interpretation of a precedent (Spriggs and Hansford 2001, 2002; Ulmer 1959; Wahlbeck 1997), the need to legitimize policy choices (Walsh 1997), and the legal arguments put forward by organized interests (Epstein and Kobylka 1992) influence the law.⁷ We emphasize the word "preliminary" because many of these studies conclude that their evidence for these effects is somewhat mixed (see McGuire and MacKuen 2001; Spriggs and Hansford 2002; Wahlbeck 1997) or underwhelming to nonexistent (Segal and Spaeth 2002; Spaeth and Segal 1999).

The hypotheses drawn from the legal tradition have also been put forward without fitting them into a model of the interpretation of precedent or legal change. In addition, many studies of the influence of precedent (e.g., McGuire and MacKuen 2001; Richards and Kritzer 2002; Spriggs and Hansford 2001; Wahlbeck 1997) are susceptible to the criticism that their results are spurious, resulting from the endogeneity of precedent. That is, if one shows that the Court's prior behavior is correlated with its

⁷ There are two other sources of possible evidence on this point. First, research indicates that the outcomes of cases at various courts depend in part on factual circumstances of the cases (see Richards and Kritzer 2002; Segal 1984; Traut and Emmert 1998). Second, research demonstrates that lower courts tend to be responsive to higher courts (e.g., Pacelle and Baum 1992; Songer and Sheehan 1990; Traut and Emmert 1998; Wahlbeck 1998); and their responsiveness varies according to legal considerations (Johnson 1987; Klein 2002), such as the factual characteristics (Benesh 2002; Songer, Segal, and Cameron 1994) and nonfactual attributes (e.g., the age, ambiguity, and complexity) of a precedent (Benesh and Reddick 2002; Comparato and McClurg 2003).

current behavior, it might not be clear whether this effect is causal (i.e., the prior behavior actually influences the current behavior) or spurious (i.e., the same set of unobserved and unmeasured forces that influence prior Court behavior influence the current Court). As a result, it remains unclear whether and how legal norms enter into this aspect of Court decision making. We agree with Epstein and Kobylka's (1992, 302) assertion that "The law and the legal arguments grounded in law matter, and they matter dearly." But, we contend that the way in which legally relevant considerations matter remains something of a mystery.

Taken as a whole, the literature suggests that the justices' policy goals and legal norms influence the development of law at the Court.⁸ We agree that these are the most important variables influencing legal development. Existing treatments of them, however, do not well specify the role they play in this process. In particular, we submit that in order to understand this important aspect of Court decision making, it is necessary to rethink how both the justices' policy preferences and the law help shape legal development. Only by embedding them into a general model of the interpretation of precedent can we understand how they help produce this particular form of legal change.

To address this significant gap in our understanding of the Court, we make two principal contributions to the literature. First, we develop a parsimonious theoretical model that lays bare the essential variables influencing the Court's decision to interpret precedent positively or negatively. To preview, we argue that the justices have two primary reasons to interpret precedent: (1) the justices treat precedent in order to maximize the extent to which the Court's body of precedent reflects their own policy preferences; and (2) the justices use precedent in an effort to legitimize their current policy choices and thus foster the influence of their opinions. We contend that both of these motivations relate to the justices' overriding desire to affect distributional consequences—such as the relative bargaining advantage of different actors and the distribution of resources in society—in ways they prefer.

By elaborating how these two goals combine to influence the Court's choices, we offer a new way of thinking about their role in Supreme Court decision making. Much of the literature asserts (at least

⁸ Scholars sometimes suggest that aspects of the litigation or political environment, such as the resources or experience of litigants and counsel or the preference of elected political decision makers, may influence the law (e.g., George and Epstein 1992). For example, Wahlbeck (1997) shows that change in search and seizure policy at the Court depended in part on the level of experience of the counsel arguing the case, the presence of *amici curiae*, and the preferences of the president. Spriggs and Hansford (2001), however, demonstrate that the president and Congress apparently have no influence on the overruling of precedent.

implicitly) that precedent acts either as a constraint that operates across the board (e.g., Knight and Epstein 1996; Wahlbeck 1997) or as a “cloak” that never actually influences the Court (Segal and Spaeth 1993, 2002; Spaeth and Segal 1999). By contrast, we argue that while precedent can operate as a constraint on the justices’ decisions, it also represents an opportunity. It represents a constraint in that justices may respond to the need to legitimize their policy choices and thus gravitate toward some precedents rather than others. It represents an opportunity in the sense the justices can utilize precedent to constrain other actors, thereby promoting the outcomes they prefer. By specifying the benefits the justices receive from interpreting precedent positively or negatively based on both the desire to make existing precedent compatible with their policy preferences and their need to justify and legitimize their holdings, we gain a better handle on how these variables influence the Court. As will become clear, our theoretical model also helps to overcome the problem of the potential endogeneity of precedent, allowing us to develop a much clearer test of the causal force of precedent.

The second contribution of this book is empirical in nature. We endeavor to offer rigorous tests of our model’s predictions and thus provide a substantive understanding of how our theoretical variables of interest affect the Court’s treatment of precedent. We examine how, through 2001, the Court positively or negatively interpreted all of the precedents set by the orally argued cases decided between the Court’s 1946 and 1999 terms. By focusing on a large number of cases (6,363) over a considerable period of time (56 years), we can provide an understanding of systematic influences leading to variation in the presence and timing of the Court’s interpretations of its precedents. This research design stands in contrast to most social scientific work on this question, which exclusively analyzes particular issue areas (e.g., Epstein and Kobylka 1992; McGuire and MacKuen 2001; Wahlbeck 1997), a small number of cases (e.g., Johnson 1985, 1986), or sensational but infrequent forms of interpretation such as the overruling of precedent (e.g., Brenner and Spaeth 1995; Spriggs and Hansford 2001).

OUTLINE OF THE BOOK

In the following pages, we seek to provide answers to the main question posed above—why and when does the U.S. Supreme Court interpret its precedents positively or negatively? Chapter 2 sets forth the theoretical model we use to explain the Court’s interpretation of precedent. In chapter 3, we define in detail the manner in which we measure the interpretation of precedent, as well as present descriptive data on its frequency and

timing. In chapters 4 through 6, we provide empirical tests of the predictions from our theoretical model. In chapter 4, we specifically examine why and when the Court subsequently interprets a precedent either positively or negatively in the years following the creation of the precedent. In chapter 5 our focus turns to explaining the most dramatic form of negative legal treatment, the Court's overruling of a precedent. Chapter 6 shifts the unit of analysis used in chapters 4 and 5, as we ask how, in a given case, the Court legally interprets existing precedent. That is, while in chapters 4 and 5 the focus is on the precedent, the focus in chapter 6 is on the case that interprets the precedent. Chapter 7 tests empirically our underlying assumption that the Court's interpretation of precedent has meaningful consequences by examining how lower federal courts respond to the Supreme Court's interpretation of its own precedents. Finally, in chapter 8 we review our theory and empirical results and discuss their implications for Supreme Court decision making.

Before moving on, we want to be clear about the scope of this study and the breadth of the conclusions we can draw from it. First, we do not suggest that, either theoretically or empirically, we will provide *the* answer to how law develops. As already indicated, the concept of legal change is broad and multidimensional, and no single study of it can do justice to its full richness and complexity. We therefore chose to focus on a phenomenon that scholars commonly recognize as constituting one important aspect of the law, the interpretation of precedent. This focus, we contend, is a good starting point for understanding legal development, but it most certainly does not capture all of its aspects.

Second, we do not suggest that our empirical focus on the positive or negative treatment of precedent is the only way to examine how their meaning changes over time. We chose these indicators for two principal reasons. They capture in broad terms how the Court does in fact treat its prior opinions and thus provide a nice starting point for addressing this issue. We also chose this conceptualization of interpretation to enhance the reliability of our measures of it. As chapter 3 makes clear, the coding protocols used to generate these dependent variables are replicable and valid and thus meet a necessary requirement for good social science.

We are, however, cognizant of their potential to mask some variation in the treatment of precedent. Some will therefore criticize these measures because they do not tap explicitly the precise way in which the meaning of a precedent changes with each successive interpretation. To capture completely such nuances, one would need to use case studies (e.g., Epstein and Kobylka 1992; Kahn 1999; Nalls and Bardos 1991), which usually limit one's ability to generalize results. We wish to draw broad generalizations and therefore choose to test our theory on a wide range of Court precedents decided over a considerable length of time.

We thus trade off the ability to capture nuances in the content of law as it changes over time for the ability to test rigorously the predictions from our theoretical model.

Third, we wish to be clear that our goal is *not* to test whether Supreme Court justices change their votes due to the norm of *stare decisis* (the norm requiring adherence to precedent), which has been a dominant focus among studies of precedent in recent years (see Brenner and Stier 1996; Lim 2000; Segal and Spaeth 1996; Songer and Lindquist 1996; Spaeth and Segal 1999). Those analyses have most certainly helped us to understand the question of whether precedent leads justices to cast votes they otherwise would not. However, we contend that when one's focus turns to the interpretation of precedent, it is necessary to adopt a different point of view that does not see precedent merely as a constraint. This is not to say that these other studies are asking the wrong question with regard to votes. Rather, we merely point out that our substantive focus and theoretical model lead us to ask a different question.

With these caveats and clarifications in mind, we are hopeful that this study does what all good social science strives to do—articulate a well-defined, parsimonious theory and subject its predictions to rigorous empirical analyses. With this book, we strive to come one step closer to answering the most important question facing judicial scholars: What explains the development of the law?