WHY SHOULD LAWYERS CARE ABOUT INSTITUTIONAL DATA ON COURTS?

BY MAXWELL L. STEARNS

In the "U.S. Supreme Court Judicial Data Base: providing new insights into the Court," Professors Harold Spaeth and Jeffrey Segal provide a brief and valuable overview of the two Supreme Court databases, with a particular focus on how those databases might be of use to those with professional legal training, namely law professors, lawyers, and perhaps also judges.[1] In this comment, I will describe what I consider to be the limitations, and uses, of such data for those of us trained in law, and who most likely will lack the rigorous social science background familiar to most present users of the databases.

While I will begin by raising some concerns about the accessibility and scope of the databases for lawyers, it is important to state my conclusion up front: I believe that the two Supreme Court databases are of potentially great value to those of us trained in the law. In addition, I believe, and hope, that these databases create exciting opportunities for joint scholarly efforts between legal scholars and political scientists who can review both doctrine and data and develop new insights into the workings of the Supreme Court and its role within our system of governance.

MAXWELL L. STEARNS *is a professor at the George Mason University School of Law*

I will begin by explaining what I consider to be three limitations on the use of the databases for lawyers: (1) accessibility; (2) limited focus on the Supreme Court; and (3) the substantive content of the coded data. In the course of reviewing these limitations and their implications for legal research, I will also identify several potential uses of the databases for those of us trained in law.

Apparent inaccessibility

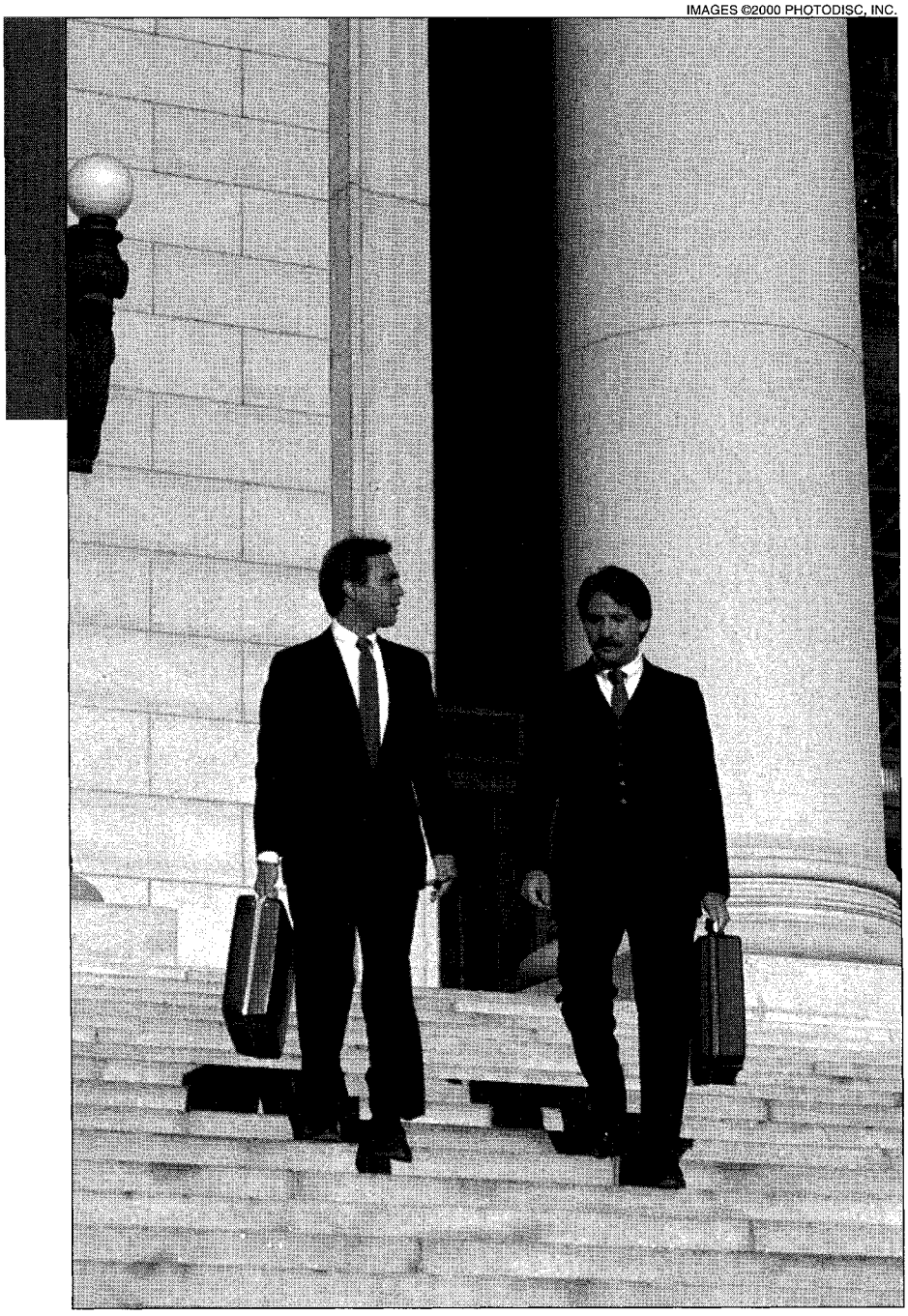
Among the most obvious difficulties for any lawyer who might contemplate using the databases is the nature of the presentation of the underlying data. The databases are very well organized, and with the use of the code book, quite accessible to those who are able to decipher the codes and follow the relevant commands. But for many lawyers—at least those who are without substantial formal training in statistics—the databases might well appear daunting or even impenetrable. That is simply because law schools do not provide the requisite training for accessing and evaluating this form of data.

Some lawyers will find the code book sufficient to enable them to construct and execute searches, but others will not. I would caution even those who have had some exposure to statistical analysis that they might benefit by employing an appropriate consultant. With the help of necessary experts, lawyers routinely mine complicated data from myriad outside disciplines (for example, medicine, psychology, and finance) and incorporate complex data into their work product. If anything, the data from the Supreme Court databases would appear all the more plausible

The author would like to thank Tracey George for her comments on an earlier draft.

1. The article on U.S. Supreme Court databases is short, and necessarily limited in its scope. For those seeking a more detailed analysis and overview, I strongly recommend the fuller treatment by the same authors, Segal and Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). Rather than explaining the uses of the databases, the book draws out the implications of the data and responds to the critics of the attitudinal model.

2. For a description of the databases, see generally Songer, *The United States Courts of Appeals Data Base Documentation* (8/26/96 draft) (on file with author). *See also* articles by George and Sheehan and Brace and Hall, included in this symposium.



The disciplines of law and judicial politics can greatly inform each other, and the Supreme Court databases, in the the hands of those able to employ them, are a wonderful place to start.

as fodder for practicing lawyers and for legal academics simply because lawyers who are interested in the Supreme Court will likely have well-developed intuitions against which to assess any empirical conclusions drawn from the underlying data.

Limited scope

These databases are obviously limited to the United States Supreme Court. Most lawyers do not litigate before the Supreme Court, and, with some important exceptions, those who do generally do so on only an occasional basis. It is worth noting here that other databases have been, and are being, developed for various federal circuit courts,[2] and some interesting academic work has already been accomplished reviewing that data.

The fact that the databases that Professors Segal and Spaeth describe are limited to the Supreme Court is no more a criticism than is the observation that the *U.S. Reports* only report Supreme Court decisions. After all, the databases are what they are, and they are going to be of use only to those who anticipate studying or litigating before the Supreme Court.

The limited focus of the databases raises a cautionary note, however, for law professors who might consider integrating the data into a classroom setting. Whereas law students study common law court decisions prior to, or simultaneously with, studying Supreme Court decisions in the stan-

dard law school curriculum, it is quite likely that most law students who have any exposure at all to these databases will not have exposure to databases on any other court. It becomes important, therefore, to ensure that students have an appropriate basis for contextualizing any conclusions drawn from that data, and not to assume that that which is true of the Supreme Court is generally true of all courts, whether state or federal.

The Supreme Court is a truly unique institution in several respects, some of which are noted in the article by professors Segal and Spaeth. The certiorari authority gives the Supreme Court nearly complete docket control. The Court also has the power to rid its docket of certain types of potentially problematic cases through any number of means, including dismissals on the ground that certiorari was granted improvidently (commonly referred to as DIGs); dismissals for lack of ripeness or standing, or due to mootness; or because the case presents a nonjusticiable political question or asks for an advisory opinion.

While this is all familiar ground for lawyers and political scientists who study courts, it is important for students to recognize that, individually and in combination, these vehicles substantially increase the power of the Supreme Court *relative to virtually any other court* to control both the intake of its cases and the outcome of its decisions. Simply put, data on full text opinions of the Supreme Court must not be confused with a statistical cross section of judicial data generally. This is especially important given that the databases code all opinions on an ideological basis,[3] and has been used to support the proposition that doctrine is sufficiently malleable that ideology becomes the predominant predictor of outcomes.[4]

Whether or not one accepts this argument as it applies to the Supreme Court, one thing is clear: the predictability of outcomes based on ideology, and the corresponding malleability of doctrine, are far more likely to be pronounced in the Supreme Court than in courts generally. In large part this is due to the fact that in lower courts, stare decisis is vertically imposed and thus places greater constraints upon judicial policy making. Because of the Supreme Court's unique role within the federal judicial system, and of the unique tools that the Court possesses with which to control its case intake and output, it ought not be surprising that the Court is far more likely to resolve cases with strong political content than do courts generally.

In addition, while Supreme Court decisions are relatively more prone to possessing an ideological dimension than those of other courts, even in the Supreme Court there is some danger that by requiring in the vast majority of cases that each opinion be coded on ideological grounds, the ideological nature of the data will become a self-fulfilling prophecy. Like a boy with a hammer wrongly assuming each surface to be a nail, it is quite possible that those employing available codes might allow the codes themselves to affect the manner in which they construe the cases. Simply put, while academics employing any number of judicial models will find value in the databases, the value they derive will in part be affected by the reality that the databases were constructed in reference to, and in large part with confidence in, the attitudinal model. It is possible, for example, that those coding the data might be seeking an ideological cast that would elude a more dispassionate outside reader. If so, some, perhaps many, Supreme Court decisions might be forced into ideological categories to make them fit the database, rather than having the database reflect the true ideological content of the cases.[5]

Substantive nature of the data

For most lawyers, the databases employ coding that will appear quite foreign, not only in terms of linguistic convention, but also in substance. This is evident from the manner in which attitudinal scholars, who are among those most involved in the development and use of the databases, characterize the tools of traditional legal method. Professors Spaeth and Segal, for example, contrast the attitudinal model, which predicts case outcomes based on judicial ideology,[6] with what they describe as the formalist legal model. While one might question whether legal formalism is indeed a model,[7] to the extent that it can be so characterized, these authors present it as requiring the formalistic, literal, and neutral application of doctrine, without regard to where such an application might lead.

Because doctrine is indeed malleable, outcomes are often in tension with what literal statements of doctrine might be understood to imply about future rulings. In marked contrast, attitudinalists claim, rigorous statistical analysis of the databases bears out the intuition that case outcomes can be more meaningfully correlated with a large host of identified variables, judicial ideology foremost among them.

For the lawyer or legal scholar, this

3. The database does contain a miscellaneous category for cases in which the subject matter lacks obvious ideological content. This category is insufficiently comprehensive, however, to cover cases in other subject matters, but in which the majority coalition includes a mix of liberal and conservative justices, cases in which the opinions cannot be cast along a single issue dimension, or cases in which despite an outcome favoring or disfavoring a party associated with a political ideology, the basis for the victory or loss was a straightforward application of statutory construction.

4. It may well be that while the ideology variable is the most significant to political scientists, other variables will prove more significant to lawyers. For example, lawyers could use the database to determine how local governments have fared before the Supreme Court or to identify the nature of cases in which local governments have filed amicus briefs.

5. Rather than considering the political disposition of the majority ruling, those constructing the database sometimes back into an ideological categorization by contrasting it with the vote of a particularly liberal justice, for example, William O. Douglas. But what if Justice Douglas simply disagrees with the manner in which the majority has defined the relevant case issues? This raises the problem of dimensionality in judicial decision making.

6. *See generally,* Segal and Spaeth, *supra* 1 (contrasting formalist and attitudinal models).

7. For an interesting essay that distinguishes formalism (deductive reasoning), realism (policy analysis), and Landellism (the process of smuggling the conclusion into the premise in the course of formalist reasoning), see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution,* 37 CASE W. RES. L. REV. 179 (1986).

is all likely to have an element of caricature. Indeed, few legal scholars today would take seriously the notion that judicial decisions, especially in the Supreme Court, are the product of an entirely dispassionate application of free standing doctrine. And yet, most would likely agree to the following: To a considerable extent, and with some notable exceptions, those trained in law might take legal doctrine a bit too seriously, while, subject to the same caveat, those trained in judicial politics might not take legal doctrine quite seriously enough. But rather than viewing this as a cause of academic tension, it should best be viewed as a basis for academic opportunity. The disciplines of law and judicial politics can greatly inform each other, and the Supreme Court databases, in the hands of those able to employ them, are a wonderful place to start.

Different approaches

Before identifying potential collaborative efforts, it might be helpful to consider the different approaches that lawyers and judicial politics scholars would take in pursuing related research. Assume that following a judicial finding of past discriminatory practices, and pursuant to a reduction in force, a school board has chosen to fire a white teacher rather than an African-American teacher, where both were equally qualified and equally senior.[8] Further assume that after the termination decision was upheld in the lower courts, the Supreme Court grants certiorari, and that none of the efforts to dismiss the suit, for example, based upon justiciability, are likely to prove successful. In other words, assume that the case will be resolved on the merits.

The lawyer representing the petitioner, the fired white employee, will likely engage in the following process. She will begin by identifying the governing principles of law, as the various justices are likely to employ them. In this case, our lawyer will discover the following: A group of conservative justices, Rehnquist, Scalia, Thomas, and Kennedy, will apply strict scrutiny to any use of race, and will use that test to strike down virtually any use of race, benign or otherwise. In contrast, a group of liberal justices, Ginsburg, Breyer, Souter, and Stevens, are likely to be somewhat more receptive to the so-called benign use of race and to favor the use of the more relaxed standard, intermediate scrutiny, under which, with appropriate findings, they would likely uphold certain affirmative action programs.

Finally, and perhaps most importantly, in a critical group of cases, Justice O'Connor has claimed that the relevant test to employ in such a case is strict scrutiny, but that the test should not necessarily be fatal.[9] The lawyer will then try to identify which circumstances, if any, would suffice for Justice O'Connor to sustain the benign use of race. All of this research would be conducted with traditional lawyer's tools, such as LEXIS, WESTLAW, and Shepard's. Based on this research, petitioner's counsel will discover that the case is very likely to turn on the vote of a single justice, namely Justice O'Connor, who has provided rather limited information as to what would justify an exception to the otherwise fatal application of strict scrutiny in the benign use of race.

For the judicial politics scholar, this is all a rather roundabout — and perhaps even misleading — process, at least inasmuch as it assumes the choice among malleable standards of review to control the case outcome.[10] This scholar will pursue the following alternative logic. Affirmative action is an issue readily cast in ideological terms, with liberals in favor and conservatives opposed. As applied to this issue, the present court has five conservatives: Rehnquist, Scalia, Kennedy, Thomas, and O'Connor. While some might question whether O'Connor or Kennedy are reliably conservative, using the databases with respect to the issue under review, it would be easy to determine that they have consistently voted in favor of those challenging the state's use of race in employment decisions. Thus, for purposes of this issue, these justices can be characterized as conservative. As a result, because there are five conservatives out of nine, the petitioner is likely to prevail.

In this example, both approaches lead to the same outcome, and the attitudinalists are likely correct that ideology is the predominant factor influencing the outcome of the case. Moreover, the databases would have provided the legal scholar with an easy way to confirm the result of her more traditional research.

But those trained in law must be sensitive to the fact that not all cases will necessarily work out in this manner. Especially in recent years, several high profile opinions have produced coalitions that have thwarted traditional assumptions about liberal to conservative judicial ideology.[11] While we might regard such cases as unusual, or even as statistical outliers, the databases almost invariably require that these cases be cast along one end or the other of a single dimensional spectrum, based on political ideology. The databases

(continued on page 276)

8. The reader will no doubt recognize this as a stylized presentation of *Piscataway Twp. Bd. of Educ. v. Taxman*, which settled after the Supreme Court took certiorari, *see* 522 U.S. 1010 (1997) (dismissing certiorari).

9. The researcher will discover that in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice O'Connor had applied strict scrutiny to a municipal set aside program for construction workers, and that in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), she authored a 5-4 opinion applying the same standard to federal race-based set aside programs, thus overturning *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), to the extent that it applied the more relaxed intermediate scrutiny test to federal race based set asides. In *Adarand*, Justice O'Connor stated that strict scrutiny need not necessarily be fatal in fact. *See Adarand*, 515 U.S. at 236.

10. For a discussion and analysis of cases in which the Supreme Court has applied strict scrutiny to sustain challenged laws and rational basis scrutiny to strike down challenged laws, see Stearns, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECSION MAKING, chapter 1 (forthcoming, U. Mich. Press, 2000).

11. *See, e.g.*, Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc., 2000 U.S. LEXIS 501 (majority coalition of Ginsburg, Rehnquist, Stevens, O'Connor, Kennedy, and Souter); Clinton v. City of New York, 574 U.S. 417 (1999) (majority coalition of Stevens, Rehnquist, Kennedy, Souter, Thomas, and Ginsburg); Miller v. Albright, 523 U.S. 420 (1999) (fractured majority coalition of Stevens, Rehnquist, O'Connor, Kennedy, Scalia, and Thomas); Saenz v. Roe, 526 U.S. 489 (1999) (majority coalition of Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer); Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) (majority coalition of Kennedy, Rehnquist, O'Connor, Stevens, and Souter).