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Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-making

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[A]   The United States prides itself on its adherence to the rule of law. Although the phrase itself is mushy and susceptible to many definitions, surely one interpretation is that disputes are resolved on the basis of the facts and pre-existing legal rules. Law implies a certain regularity of process; it rests on the notion that like cases will be treated alike. As thus defined, the law plays prominent in countless litigated disputes every day, and transactions of all sorts occur in the law's shadow.

Yet many political scientists are deeply skeptical that law does, or even can, play the role claimed for it. Studies of judicial decision-making often seek to prove that forces beyond the legal doctrine control case outcomes. At the extreme, some political scientists seem prepared to state that law does not and cannot constrain judges, and that as a result legal disputes are resolved by such things as the ideological preferences of judges, or the pressures exerted on them by other political actors. Winning and losing in a court of law, to believe much of what one reads in political science, often depends primarily if not solely on whether the judge personally or ideologically favors your cause, on whether she worries how other governmental officials will respond to her decision, on whether she fears reversal, or perhaps even hopes for a promotion.

[A] Query to author: OK to delete the heading "Introduction"? SUPress prefers to avoid beginning a chapter with a subheading for design reasons (in this case the series design calls for a stick-up initial beginning the first paragraph that we would eliminate if there is a subheading here), and to avoid the label "introduction" for editorial reasons (on the ground that the opening section is automatically understood to be introductory). [OK]

One way to evaluate the disagreement between political scientists and those who believe in the efficacy of law and legal process is to model the process of legal decision-making. What follows is an effort at clarification and specification. Our goal is to guide those who are interested in modeling law, as well as to offer some gentle critique to some who think they have been, but have not. Many of our points are hardly earth-shattering ones, yet they often seem to go unrealized or misunderstood. For the most part they are derived from observations made by those in the legal profession. Here, we agree with Frank Cross that an "internal perspective can amplify the understanding provided by external observation" (Cross 1997, 284).

We begin by discussing why one might want to model law. This is an important starting point because the apparent motivation of much of the political science literature is to establish that law cannot possibly constrain judges. Yet to come at the problem in this way is already to betray a conception of what judges *do* that differs substantially from the view held by those *in* law. In the world of law, what typically is referred to as legal doctrine performs a number of functions. One is to guide and channel judicial decision-making so that judges, even if they have discretion, exercise it in a cabined way. Another function of law is to permit prediction about how disputes might be resolved, so that society can operate. Constraint plays some role in both of these functions, to be sure, but it is a far more modest and nuanced one than discussed in much of the literature of politics.

Next we argue that most of what claims to be a legal model in the political science literature (a) is not a model or (b) does not model law. Here we specify what it means to have a model of law, and we acknowledge the work of those scholars who have attempted to do so. There have been some recent promising steps toward modeling law, often as collaborative efforts among political scientists and legal academics. We distinguish these recent tentative steps from

the "legal model" that has been long discussed among some scholars of judicial behavior in political science.

We then seek to move forward the modeling of law in a modest way by drawing some distinctions that are prominent in internal understandings of the law. Although the concept of law is elusive, and precise definition is best left to scholars of jurisprudence, we believe these simple distinctions can offer guidance to those who seek to model law, or to test such a model empirically. In large part these distinctions serve to narrow the domain in which a simple descriptive or explanatory model of law might operate successfully.

We conclude by explaining that political scientists have been looking for law in (mostly) all the wrong places. The vast majority of political science studies of judicial behavior use as their domain constitutional or public law cases, where law is least determinate. They tend to bypass common law or statutory regimes, such as those involving contract or commercial law, where law's mechanisms seem to operate most effectively. By the same token, there is a tendency to study the decisions of the Supreme Court, or other high appellate courts, when intermediate appellate courts and trial courts—if not disputes that never make it to court—are the places in which one is most likely to find the regularity of law. Finally, although this is changing, most political science studies also look only at votes on the resolution of cases, rather than the opinions of the judges themselves, which may be appropriate to the study of judicial behavior, but not to law itself.

@H1:Constraint and Channeling[B]

In much of the political science literature, the question—sometimes overt, more often implicit—is whether law constrains judges. In one form or another, law is conceived of as a vise

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upon the discretion of the judges (Spaeth and Segal 1999; Wahlbeck 1997; Knight and Epstein[C] 1996). There are various theories as to why judges might adhere to this constraint voluntarily. For example, it might be because of the need to legitimize decisions (Hansford and Spriggs 2006, 22; Rasmussen 1994; Spaeth and Segal 1999). Or, judges might follow legal rules out of a fear of reversal by a higher court or a legislature (Cass 2003, 50; McNollgast 1995, 1643). Studies of judicial constraint many times seem to come up empty—in other words, these studies conclude that law does not constrain judges in the way political scientists would predict it should. This is a problem, some argue, because it means "other factors" (often deemed subtly or not so subtly illegitimate) are deciding cases.

The ability of law to constrain judges certainly is a reasonable concern. In a system dedicated to the rule of law, it seems critical that doctrine operates to decide cases, preventing other extraneous influences (Braman and Pickerill 2009; Braman 2010). Although constraint undeniably matters, there still is much nuance to the question that gets lost in the approach of political scientists. As we will discuss at greater length, courts and cases are not all alike. In some instances, we both need and expect a fair amount of constraint from judges. In others, we do not. Thus, for example, lawyers would not really expect to find precedent exercising much constraint in Supreme Court decisions in constitutional matters—and would not be particularly troubled by the fact. Yet, curiously, these are the cases most often plumbed by political scientists.

There is an entirely different way of looking at the role of law in judging, which presents many of the same sort of questions political scientists pose, but with a somewhat different focus. In this alternative conception, law serves what we might call a "channeling" function rather than

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[C] **{{Author: Not in Refs.}}** [This is in references: Knight and Epstein 1996, *AJPS*.]

a "constraining" one. Legal doctrine organizes the decision of future cases, rather than mandating specific resolutions. The standards and multipart tests of legal doctrine do not necessarily predetermine case outcomes, but they do rule in and rule out what it is appropriate for a judge to consider.

In part this difference in approaches reflects differing assessments of the motives of judges. A distinction between the entirely willful and the rule-abiding judge is important. Political science studies often see the judge as intent on avoiding the bonds of law (Clayton 1999). In the alternative conception, however, judges actually *want* to do a good job at judging. They are rule-abiding and want the system to work (Gibson 1978).

Introspective judges, even those who are realists about the determinacy of legal doctrine, regularly point to this affirmative channeling function of law, just as they acknowledge its imperfections. Henry Friendly said that the goal was to avoid decision by "hunch," meaning an "intuitive sense of what is right or wrong," and rather to be concerned with what legal criteria mandated (1961, 230).

This channeling function of law is precisely the quality that allows people and businesses to order their affairs. One might skeptically reply to all the above that the constraint and channeling functions are two sides of a coin. If law channels in any meaningful way, it must constrain. However, the metaphor is problematic. If constraint is the issue, judicial discretion represents a failing. But if channeling is the issue, some judicial discretion may not be quite so devastating. There still may be enough cabining of discretion to allow the channeling function to operate among judges who wish to follow rules, thereby allowing a social system to operate.

There is manifold evidence that people can and do order their affairs in reliance on this modest understanding of the rule of law (Chiappori and Salanié 2003). For example, a party who

wants to seal a contractual deal can know the basic principles: that "acceptance" of an "offer" forms a contract, so long as there is "consideration." Indeterminacy surely plagues each of those terms, but still there is a rule by which one can plan to avoid trouble. Similarly, the police officer who wants to avoid the risk of seized goods being excluded by a judge before trial can obtain a warrant in advance. True, ex post even some "warranted" searches prove invalid, but as a predictive matter, following the warrant procedure greatly increases the odds against suppression.

Prediction, as Oliver Wendell Holmes explained so fittingly in "The Path of the Law" (1897), is what the endeavor is about. Holmes endeavored to strip the normative romanticism from law, and he steadfastly denied the notion that law students and lawyers were charged (or should be) with finding out what was "right" or "wrong" in the law. Rather, they should imagine their client as a "Bad Man" who wants to get away with all he can (459). Still, even such a "Bad Man" might want to avoid legal liability for his acts. The channeling function of law allows the Bad Man (along with others with better motives) to order his affairs. The channeling function of law permits people to predict what will be the consequences of their actions.

The possibility of making firm predictions is complicated by the fact that the law also must be able to evolve. Holmes understood this as well as anyone (ibid.). As we explain at some length below, the common law has a Janus-faced quality, because it must in order to function effectively. It has to provide sufficiently clear rules to allow society to order its affairs. By the same token, it has to take account of the felt necessities of the times.

@H1:"Modeling" "Law"

Here we examine the various models of judging "tested" by political scientists (the reason for our use of scare quotes will be readily apparent in a moment). We constrain our

discussion to studies of the U.S. Supreme Court—certainly the court most studied by political scientists. Although we only review literature looking at this court, the arguments we make below are equally—if not more so—applicable to studies of lower courts as well.

The abstract of just about any empirical study of the Supreme Court published in a political science journal, and increasingly so in the law reviews, would read something like this: @ext:Decisions made by the justices on the U.S. Supreme Court in issue area *X* are very important for reasons *Y*. These decisions can be explained by the attitudinal, strategic, or legal model of decisionmaking. Using data collected under conditions *Z*, we find no evidence whatsoever for the legal model; thus, we conclude that the justices behave politically. (And that they are, therefore, nothing more than legislators in robes.)[D]
@tae:Taken collectively, the literature suggests the existence of three distinct models that one can invoke to explain the behavior of Supreme Court justices: the "legal," the attitudinal, and the strategic. These models are tested, and believed to apply, to votes on the merits, decisions on *certiorari,* opinion assignment practices, and so on. The goal of the statistical analysis in this empirical scholarship of judging is to determine which of these models is best supported by the data. Not surprisingly, the political models of judging—the attitudinal and so-called strategic model—enjoy the greatest empirical support. The substantive take-home message is that the jurists acting at the top of the judicial hierarchy are*, gasp,* politicians.

But do existing studies actually model law in a meaningful way? Before critically reviewing the literature, we must first determine what a model is and how to distinguish between effective and ineffective models.

@h2:What Are Models and How Should One Judge Them?

[D] **{{Author: Is this a quotation? Source?}}** [This is not a quotation; this is our prose. We want it set as a quotation because it is a prototype abstract.]

Models—whether used by social scientists to study courts or by children to entertain themselves—are objects. One example of a model is a map, a two-dimensional physical object that incompletely represents a small piece of the surface of the earth. Another example is a toy car, which represents on a far smaller scale a fully functional automobile. So, too, is a model of judging, such as the "attitudinal model," which reduces decision-making on the merits to the interplay between the judge's attitudes and the stimulus provided by cases.

In broad terms, Clarke and Primo define models as "a kind of system whose characteristics are specified by an explicit (and sometimes elaborate) definition" (2007, 742). In political science, the purpose of modeling is to explain some observed political phenomena of interest. We use models to offer those explanations because they are internally logically consistent and let us abstract away features of the object of study that are not of interest. Models are important because they force us to be explicit about all of our assumptions (Epstein 2008, 13). Because models are objects, we would never claim that they are true or false (King, Keohane, and Verba 1994, 49), just as we would never say a pipe wrench is true or false. Objects do not carry truth value, they just exist.

Political scientists sometimes distinguish between theoretical models and empirical models. Theoretical models, whether stated using language or represented mathematically, contain statements about how observable and unobservable characteristics of the object of study are related to one another. The relationships might be as simple as when X goes up we would expect Y to go down. Or the relationships might be quite complicated, with various conditions. Many theoretical models are developed from axioms or assumptions that are known to be false— for example, rational choice models that make Herculean assumptions about the computing capacity of humans. Empirical models, on the other hand, are used to "evaluate a hypothesis or

set of hypotheses about the real world" (Morton 1999, 61). These models allow us to simplify an oftentimes enormous amount of data and draw inferences about the existence or nonexistence of particular patterns. Many good empirical models allow us to establish the efficacy of different theoretical models. The so-called legal model of judging is a theoretical model, as are the attitudinal and strategic models. Ideally, our empirical models would distinguish among them.

How should one go about evaluating the efficacy of a model? For nearly fifty years social scientists have viewed prediction as the sine qua non of modeling. Milton Friedman wrote that "[t]he ultimate goal of a positive science is the development of a 'theory' or 'hypothesis' that yields valid and meaningful . . . predictions about phenomena not yet observed" (1953, 7). Friedman was correct about not focusing on axioms when judging model quality, but his view of the purpose of modeling is too narrow. In their attempt to reconcile current practice in political science with contemporary philosophy of science, Clarke and Primo (2007) argue that a model can be judged only in the context of its purpose. For example, a map would be judged by the ability of the tourist to transport herself successfully from Battery Park to Grand Central Station, while a toy car would be judged by how much it looks like its full-size analogue. The responsibility of the modeler is to ascertain the ways in which the models are similar "*and dissimilar* to the real-world systems they seek to explain" (743).

Different types of models require different means to assess those similarities. The purposes of the models used in empirical studies of the Supreme Court are either *explanatory*, where the goal is to account for observed phenomena of all sorts; or *predictive*, where future decisions or cases are to be forecast (see the Clarke and Primo [2007] typology for other purposes). A model can be explanatory and thus useful without any predictive capacity; Epstein (2008) highlights plate tectonics as an example of a model that accounts for the dynamics of an

earthquake but has no predictive power. A useful explanatory model is one that makes the most sense out of the observed data, while a useful predictive one would perform best in out-of-sample forecasting.

When faced with a scientific choice of model, Clarke and Primo argue for "usefulness" as the metric by which to judge model quality. A model is useful if it furthers an intellectual goal. This is similar to the notion of model adequacy discussed in the statistical literature (Gelman et al. 2004), where models are judged as to whether and to what extent they could support the observed data. An important implication of this method of judging model quality is the explicit rejection of the hypothetico-deductive model that permeates most political science scholarship. The theoretical models offered in political science, such as the attitudinal model, typically do offer hypotheses about observables—for example, votes on the merits cast by a Supreme Court justice. But no empirical analysis can ever "falsify" a theoretical model because models are simply objects. Nor does any empirical analysis ever show that a model is correct. Rather, empirical analysis informs the conditions under which one model is more or less useful at understanding the phenomena of interest.

Modeling is at the heart of the scientific study of judging. Models provide logically consistent ways to understand the world. Ideally, empirical studies of judging would gauge how useful a particular model of judging is to understanding a particular behavior. But this begs the question as to whether the "models" so often referred to in the political science literature are, in fact, models at all.

@h2:Attitudinal and Strategic Models of Judicial Behavior

The field of judicial behavior has been shaped by two predominant explanatory models: the attitudinal and strategic models. The attitudinal model has its intellectual roots in Pritchett's

The Roosevelt Court (1948) and Schubert's profound methodological contributions over the following twenty years (see Schubert 1965 as an example). The attitudinal model is best articulated in the work of Segal and Spaeth (2002). Segal and Spaeth provide an explanatory model that has two components: the attitudes of the justices and the stimulus presented by each case they confront. Their model suggests that the interaction of these attitudes and the case stimuli will produce a vote on the merits. The attitudinal model "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal" (86). Segal and Spaeth clearly note that the domain of the attitudinal model is the Supreme Court, or courts in similar institutional positions (which in the United States would only include state courts of last resort on matters of state law).

As an explanatory model of merits votes and case outcomes the model performs quite well when tested empirically. The major methodological difficulty was in finding an exogenous measure of attitudes that could be used to model votes—that is, something other than votes in prior cases. Segal and Cover (1989) solved this problem by providing measures created only from newspaper editorials at the time of confirmation.

The attitudinal model does a good job of explaining past decisions, but does not predict future ones. Even if we knew the justices' attitudes with certainty, many coalition structures in actual decided cases would be consistent with the predictions of the model (including a unanimous Court, a 5–4 Court in one direction, or a 7–2 Court in another). At best, the attitudinal model gives us a sense of where the justices stand compared to one another in policy space: it tells us nothing about where they would divide on the merits of any given case. Indeed, the

attitudinal model is only a partial explanatory model because it does not touch at all upon the

process by which the justices decide which cases to hear in the first place, let alone why those

cases even reach the Court.

The strategic analysis of judging spawned another class of models, which recently

entered the study of judicial politics. It is important to note at the outset that there is no *single*

strategic model of judicial decision-making. Strategic models are a *class* of models that share

common axioms. As an empirical matter, one can only judge the usefulness of a particular

strategic model rather than the entire class of models.

Strategic models are part of the rational choice tradition in political science, and were

first discussed in the judicial politics field by Walter Murphy in *Elements of Judicial Strategy*

(1964). Strategic models begin with the explicit assumption that actors are motivated by

preferences. These preferences might be over policy—similar to the attitudinal model—but in

principle can be over anything. Actors are assumed to act instrumentally to pursue their

preferences in an interdependent choice context. Various equilibrium concepts are used to

generate predictions about observed behavior. Much of the strategic literature is reviewed by

Spiller and Gely (2008).

Some strategic models, the separation of powers models in particular, are geared toward

explaining votes on the merits. In variants of this model, judges wish to influence policy

consistent with their preferences, but most take into account the possible reactions of actors in

the legislative or executive branches (see Epstein et al. 2001; Harvey and Friedman 2006; Segal

1997). Other strategic models examine bargaining among the justices, opinion assignment

practices, and the like (see Maltzman et al. 2000). The empirical support for various strategic

models is mixed. While there are several well-known cases, such as that involving the Supreme

Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), where strategic

explanations seem persuasive, systematic empirical studies on merits votes show little support

for one separation of powers model (Segal 1997) and limited support for another (Epstein et al.

2001; Harvey and Friedman 2006) Other models of intracourt bargaining and decision-making

have more convincing support (for example, Epstein and Knight 1997; Maltzman et al. 2000).

At one level, the attitudinal model can be thought of as a strategic model where the

justices are motivated solely by policy and because of institutional independence can simply vote

their policy preferences. That is to say, because Supreme Court justices seem unconstrained by

other forces, they need not consider strategic considerations. Both the attitudinal model and

various strategic models are powerful, useful models of judicial behavior. However, because

they only explain votes on the merits or other discrete choices made by the justices, these models

are not necessarily models of law.

@h2:The Legal "Model"

In contrast to the attitudinal or strategic models of decision-making, political scientists

oftentimes invoke the "legal model" as a competing explanation. The legal model in political

science finds its roots in late-nineteenth- and early-twentieth-century formalist explanations of

mechanical jurisprudence (Tamanaha 2009). The term "legal model" was first mentioned by

Beverly Cook in the *American Journal of Political Science* in 1977. She defines the model as

follows:

@ext:In the traditional legal model, judges use as their guidelines the standards set in

constitution, statute, precedent, or court rule. Inputs are carefully screened to avoid the personal

and subjective in favor of the neutral and objective. (Cook 1977, 571)

@tae:In addition to relying on the guidelines described by Cook, a number of other legal factors are included in common understandings of the legal model. Brenner and Spaeth (1995) refer to particular interpretive methods: "According to the legal model, Supreme Court justices decide cases based on the facts of the case in light of the plain meaning of the relevant legal provision, the intent of the people who framed the provision, *stare decisis*, and the balancing of social interests" (73). Knight and Epstein (1996) explicitly add past precedent to the list of factors included in the legal model, arguing that precedent is mechanically used to further policy goals when those goals are in accordance with existing precedent, and serve as constraints otherwise.

Taken together, the legal model as referenced in the political science literature has some commonalities. The model begins with an internalist perspective on law (Cross 1997, 225), and judicial behavior is explained presumably as a result of the nature of legal education. Brisbin (1996) asserts that the model "assumes that judicial votes result from the application of use of professional interpretive techniques, or modes of reasoning from legal principles as taught in law schools, to the interpretations of various sorts of legal texts" (1004). While particulars vary, the legal model includes precedent, intent, plain meaning, and neutral rules as explanatory variables. At its base, the model suggests that various neutral principles are used to account for behavior.

While it may be the case that each of these factors affect judging in particular ways, for the most part the "legal model" discussed in much of the literature—and in contrast to attitudinal and strategic approaches—does not constitute a model. Asserting that condition *X matters* to an outcome is an incomplete explanation. *How* condition *X* should matter, and under what *circumstances* and with what *limitations*, are important components of positing an explanatory model. Without rigorously sorting out these expectations, what is described as the legal model is

not an explanatory object but rather is a collection of indeterminate factors. As Canon (1993) persuasively argues:

@ext:The legal "model" is not scientific. . . . It is not a model at all in the research sense of the term. It is merely a list of things such as textual meaning, drafters' intent and precedent that judges are said to consider when making decisions. Because no one can say what weight each of the legal components should contribute or how a judge should select the most relevant precedent (or the most relevant evidence of intent, etc.) from among those urged upon him or her, it is impossible to assess the strength of the legal model. (99)

@tae:Significantly, in most if not all Supreme Court cases none of the factors or conditions mentioned as a part of the legal model are likely to be determinative—that is, condition *X* could just as easily account for an affirmance as a reversal. As such, even a wholly specified legal model of votes on the merits would not be useful at all.

The legal model has been severely criticized even by those working within the political science paradigm. In his critique of Segal and Spaeth's *The Supreme Court and the Attitudinal Model,* Rosenberg (1994) argues that the legal model highlighted in the book is a straw. In its stead he offers the "Legal Model Properly Understood," which "draws a bright line distinction between an a priori commitment to policy preferences or outcomes, as the Attitudinal Model postulates, and an a priori commitment to a set of interpretive principles" (7). Of course, the justice's politics might influence the interpretive methodology any given justice uses to reach decisions. Rosenberg's model could show how politics and the nomination process affect case outcomes, but it has not been tested empirically. Smith (1994) agrees that the legal model is an unconvincing construct, and argues that no jurisprudential scholar would articulate such a model. Cross (1997) finds the legal model to be ill defined and contradictory, both features that lead us

to not consider it a model at all. Cross further argues that the written word and legal opinions are important for a whole host of reasons, and as such, looking solely at the merits votes is problematic. He also suggests that politics and a variety of legal factors are strongly related to one another, making empirical comparisons quite difficult.

Perhaps the most damning criticism of the legal model comes from Harold Spaeth, who claims that the legal model is not falsifiable (Benesh 2003)—that is, any outcome can be explained using the model. Although we differ substantially from Spaeth on what to take away from this, on the central point we could not agree more. The legal model is not falsifiable because it is not a model at all. Indeed, as we discuss above, models can never be confirmed or disconfirmed, because they are objects. All one can say is that a model does a better or less good job at explaining or predicting what it set out to explain or predict. Thus, what is important is to judge the usefulness of a model to some scholarly goal. A model that produces predictions that are consistent with everything is not useful at all. With some notable exceptions, the so-called legal model is wholly useless theoretically and empirically, a point to which we turn next.

@h2:The Usefulness of the Legal Model

Taken collectively there is little support for the legal model in the empirical scholarship on the U.S. Supreme Court. We reviewed every published large-N empirical study in which the legal model was invoked, and only in a small handful are the findings consistent with a legal model. Again, we differ from what many political scientists believe this means. A common conclusion is that because the legal model cannot predict outcomes, something else—typically politics—must. We, however, believe the lack of empirical support is a function of the fact that the legal model is not a model at all.

On the other hand, we can identify three empirical studies that show some promise in using legal variables to model votes on the merits or case outcomes. The first study, ironically, was published by Jeffrey Segal (1984), who today is most associated with the attitudinal model and profound legal skepticism. In his 1984 study, however, Segal tested an explicit "legal" model of Supreme Court decisions in search and seizure cases from 1962 to 1981. The key independent variables in the study are legal factors: the nature of the intrusion, the extent of the intrusion, prior justification for the intrusion, whether the intrusion was related to a lawful or unlawful arrest, and exceptions such as whether the search and seizure were after a hot pursuit. The model also takes into account the changing composition of the Court. Segal's empirical model performs quite well in classifying outcomes within the sample. Thus Segal used these legal factors in his systematic empirical model to offer some insight into the workings of a confusing area of law.[1]

Similarly, George and Epstein (1992) published an important study of Supreme Court death penalty cases from the 1971 though 1988 terms. They modeled the justices' decisions on whether or not to uphold a judgment imposing death. The authors hypothesize that case outcomes will be influenced by a number of doctrinal factors: whether the killing was intentional, whether the jury was selected to be biased in favor of the death penalty, whether results of state-initiated psychiatric examinations were considered, and whether the mitigating or aggravating circumstances of a particular case had been considered. George and Epstein found that the Court reacted consistently to doctrinal cues as hypothesized, indicating that in this area, using the variables they identified, over some of the cases in their domain, a legal model is effective in explaining outcomes.

The final study, by Richards and Kritzer (2002), offers an alternative to the standard legal model. They argue that "the central role of law in Supreme Court decision making is not to be found in precedents that predict how justices will vote in future cases. Rather, law at the Supreme Court level is to be found in the structures the justices create to guide future decision making" (306). This is precisely akin to the channeling function we describe above. Richards and Kritzer offer the concept of a jurisprudential regime, which refers to "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area" (ibid., 308). Based on their reading of the freedom of expression law, they suggest that two 1972 cases—*Chicago Police Department v. Mosley* (408 U.S. 92, 1972), and *Grayned v. City of Rockford* (408 U.S. 104, 1972)—established the speech-protective content-neutrality regime. Using a handful of political variables and jurisprudential variables, with interactions at the time of the regime shift, their empirical models show that these two cases fundamentally shifted the jurisprudential approach in this area of law. A companion study shows that *Lemon v. Kurtzman* (403 U.S. 602, 1971) established a new jurisprudential regime in Establishment Clause jurisprudence.

In all three of the studies the authors carefully develop a tailored legal model that provides precise hypotheses in a particular area of the law. Although much of what the authors find would not be surprising to lawyers working in these doctrinal areas, the point is that these authors used legal factors to explain case outcomes in empirical models. Not coincidentally, all of these studies were published in the *American Political Science Review,* the leading journal of the discipline. None of these studies rely on the general notion of precedent or canons of interpretation to predict case outcomes. These are explanatory models, all of which show that an interaction of what we would consider law and politics affects outcomes. None of these models

are predictive, although Segal (1984) does use the model to forecast cases in the 1981 term.

These studies do not offer a global legal model that accounts for all decision-making, but rather a specific model in a single area of the law. Of course there is much more to modeling law than what is done in these studies, and we offer some suggestions below.

Further support for a legal model in the empirical literature is quite slim. The only exceptions we could find are the work of: Sheehan (1990), which argues that the legal model is supported because social and economic administrative agencies enjoy the same success rate in cases before the Supreme Court; Kearney and Merrill (2000), who show that amicus briefs and the arguments therein affect case outcomes; and Lim (2000), who finds evidence of what he calls individual stare decisis in cases when it applies, and general stare decisis in cases when it does not, ultimately concluding that both the legal and attitudinal model are complementary. None of these studies offer a fully formed legal model that could be judged for its adequacy.

Ultimately, the debate among the three "models"—attitudinal, strategic, and legal—is about the scholarly burden of proof. Segal and Spaeth (2002) argue strongly that the attitudinal model is important because it disproves the legal model. We agree that the attitudinal model is important, not only because it is a model with clear predictions but also because it enjoys such strong empirical support. At the same time, we think they err—as many political scientists err—in concluding that this or a strategic model disproves a legal model. We concede that we possess an intuitive bias. We believe that it is simply implausible that, in a culture steeped in law, politics and only politics affects what Supreme Court justices—let alone lower court judges—do. Rather than framing studies as politics vs. all else—which is the norm in political science—scholars should be seeking models with superior explanatory or predictive power. Sorting out how to

model law systematically and empirically remains the grand challenge, which is where we next

turn.

@H1:Finding Law

In sum, we have observed two things. First, although discussions of a "legal model" are

common, for the most part those seeking to gain purchase on the law have no model for doing so.

Models must be logically consistent, systematic, and clear, and must be able to map observables

(sometimes called independent variables—that is, those doing the explaining) to other

observables (sometimes called dependent variables—the thing we wish to explain). The

collection of varied factors commonly referred to as the legal model do not reach this standard.

Second, there assuredly are political science studies that contain perfectly good models, such as

the basic attitudinal model. But none of those models is actually modeling anything remotely

close to law. At best they are predicting the *outcome* of a certain set of cases[E] or a *vote* by a

justice on the merits, without controlling for law in any way. Were these studies perfectly

predictive, and were we confident that the independent variable in those studies was not collinear

with law, we could safely say law played no role. However, neither of those things is true. We

plainly have learned that in some courts it is possible to predict the outcomes of disputes in some

number of cases. This tells us something about the forces that operate in that subset of disputes.

None of what we have learned brings us any closer to knowing how law operates, or precisely

what role it plays when it is playing a role.

There is a reason for such modest progress: law and the legal process are by their nature

extremely difficult to model. With so many moving parts, it is no surprise that a successful

model has yet to emerge. Here, we try to offer some insight into what law is (and is not), and

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[E] **{{Author: OK?:** a certain sets of case**.}}** [No – corrected above.]

where law can be expected to have impact (and where not). We reason primarily by distinction. Our reasoning helps to explain why most studies of the legal model are looking for law in all the wrong places.

@h2:Types of Law

The first point is that there is no one unified thing we might call "law," at least as some political science studies seem to envision it. Rather, law is a practice (Gillman 2001, 485) in which there are many differing substantive bodies of rules, as well as various procedures and processes, each of which might be called "law," and each of which might independently be modeled. Choosing among these will depend, naturally, on what one is trying to achieve or explain with any given model.

More specifically, there are different types of law. At one pass, there is constitutional law, statutory law, administrative law, and the common law. Yet it is also possible to divide the types of law differently. It is common, for example, to distinguish between public law (the rules as between the government and private entities or individuals) and private law (the rules governing relationships between private entities or individuals). These are the sorts of distinctions that models sometimes elide, which leads to further criticisms that "[p]olitical scientists often have an unduly cramped vision of the legal model" (Cross 1997, 291).

While the foregoing point is trivial at one level, it is utterly consequential at another. Each of these types of law is expected to (and we suspect that each does) operate somewhat differently than the others. The kinds of tests or tools used to find the law or interpret the law in one area may bear little relationship to another (Levi 1949). The Constitution often is "interpreted" by looking to the text and framing era intentions. There is some commonality here with statutory interpretation, which also cares about texts and intentions. Yet constitutional tests

are quite varied and also include balancing, means-end analysis, least restrictive alternatives, and the like. Common law decision-making (to which we devote a great deal of attention below) is an entirely different creature altogether (Newman 1984, 200). Any discussion of modeling "law" necessarily must take into account the heterogeneity of law itself.

We suspect that for the most part when political scientists talk about a legal model what they have in mind is common law decision-making. In other words, they are focused on the process by which courts read from one case to the next, and on the constraint imposed (or not imposed) on these judges by prior precedents. In the U.S. context, there is almost always a body of common law that develops, even around statutes and constitutions, in all courts including the Supreme Court.

A superficial commonality in interpretive methodology across areas of the law can give rise to confusion in the political science literature regarding the "legal model." Yet the various categories of law have their own norms and practices, typically driven by some underlying theory regarding what each area of law is trying to accomplish. Take, for example, the contrasting role of stare decisis in constitutional and statutory cases. Political scientists interested in the role of constraint often look in constitutional cases of various sorts for judicial adherence to prior precedents (Romero 2000, 298; Laird 1994; Segal and Spaeth 2002; Brenner and Stier 1996; Segal 1984). But this is an exceedingly peculiar place to look. An explicit part of the interpretive background in the constitutional context is that prior precedents should carry less force, that the doctrine of stare decisis should be ameliorated, precisely because constitutional rules cannot easily be altered in any way other than by overturning precedent. This point was noted by Justice Brandeis in a dissent he authored in *Burnet v. Coronado Oil & Gas Company* (1932), in which he famously wrote that stare decisis was not a "universal inexorable command."

What is sometimes overlooked was that Brandeis specifically focused on "cases involving the Federal Constitution, where correction through legislative action is practically impossible" (285 U.S. 393, 407–10). Brandeis's insight into stare decisis was picked up almost sixty years later in the Supreme Court's *Payne v. Tennessee* (1991) decision. Referring to Brandeis's "inexorable command" language, the *Payne* majority elaborated: "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible" (501 U.S. 808, 828).

Statutory precedents, on the other hand, are thought to be more durable. Again, the Supreme Court gives us guidance. In *Illinois Brick Co. v. Illinois* (1977), the majority noted that "[in] considering whether to cut back or abandon [the established] rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation" (431 U.S. 720, 736).[2] In interpreting statutes, courts can adhere to them, even if seemingly illogical, because such precedents are open to legislative revision. The same consideration applies to common law cases, where statutory "corrections" can alter judge-made law. Some have cast this point in terms of democratic ideals, arguing that we want a particularly strong rule of stare decisis in statutory cases in order to foster democratic participation from the other branches. Clear and stable judicial interpretations of statutes provide a clear background against which legislative bodies can operate (Sunstein 1999).

When it comes to the relative force of prior precedents and the stability of the doctrine, a similar dichotomy exists as between public law and private law. Public law decisions are often thought to be somewhat less obdurate than private law decisions precisely because the government requires a certain amount of flexibility in its actions, and perhaps because fewer

reliance interests are likely to be at stake. In contrast, in private law, particularly with regard to commercial transactions, much greater stability of the law is required (Greene 2005, 1404). Even within public law, there are differences. Because of the seriousness of criminal penalties, and the concomitant need for "notice" to potential criminal defendants, one might expect more precedential stability in criminal law cases than other public law cases. Similarly, Jon Newman, a prominent U.S. Court of Appeals judge, noted that some statutes, such as the tax code, are revisited by Congress every year, whereas others remained untouched for decades; Newman argued that this likelihood that Congress would attend to the work of courts also influenced his decision-making (Newman 1984, 209).

Once again, whether these theoretical distinctions actually hold up in the doctrine is an empirical question. There might be plenty of projects here for the willing. But if one is looking to model law—or, in particular, if one is looking for constraint in law—private law cases would be the place to look, not constitutional cases. Alas, that has not been the practice.

@h2:Hierarchies of Precedent

As the foregoing suggests, there are different types of precedents. One way to think of this, as demonstrated in the prior section, is as across substantive categories or types of law. Another way to think of it is structurally—that is, to look at the binding force of precedents within and across differing court systems.

In modeling common law decision-making, one of the most important distinctions may be that between vertical and horizontal stare decisis. Horizontal stare decisis refers to the binding effect that is given to a prior decision when the court applying a precedent case is the same as the one that rendered it. In a sense, horizontal stare decisis is about decision-making over time. Many political science studies look for constraint along this horizontal axis (Hurwitz and Stefko

2004; Segal and Spaeth 1996; Spriggs and Hansford 2002). Vertical stare decisis, in contrast,

refers to the influence of a precedent case when that case is being applied by a court below the

court that rendered a precedent case in a judicial hierarchy (Kornhauser 1995). Thus, when the

Supreme Court of the United States considers the binding effect of its own precedents in a later

case, that is horizontal stare decisis; when a federal court of appeals considers the effect of a

Supreme Court decision, that is vertical stare decisis.

In law, it is a commonplace that vertical stare decisis is supposed to be much greater than

horizontal. The Supreme Court has recognized this difference explicitly. In a 1989 case,

Rodriguez de Quijas v. Shearson/American Export, the Court took the opportunity to castigate a

lower court that had ignored a Supreme Court precedent. While the Court ultimately affirmed the

lower court decision, the Court noted:

@ext:We do not suggest that the Court of Appeals on its own authority should have taken the

step of renouncing [the Supreme Court precedent]. If a precedent of this Court has direct

application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

Court of Appeals should follow the case which directly controls, leaving to this Court the

prerogative of overruling its own decisions. (490 U.S. 477, 484)

@tae:By contrast, as we saw above, the Supreme Court takes varying approaches to how bound

it is by its own precedents.

Even this straightforward distinction masks significant subtleties. Horizontal stare decisis

is not the same on every court. On the Supreme Court it is quite weak (Posner 2008, 14; Edwards

1985, 621). It is puzzling, then, why so many studies invoke the importance of precedent when

modeling Supreme Court decisions (see Baum 2006, 4–5). On the federal Court of Appeals it

varies depending upon whether a precedent is from within the same circuit or not (Kim 2007;

Caminker 1994a; Caminker 1994b). As for vertical stare decisis, there is reason to imagine that the precedential effect might be stronger as between intermediate appellate courts and trial courts, than as between high courts and intermediate appellate courts (Caminker 1994a, 843). That is because the trial courts are thought to be charged primarily with applying precedents to sets of facts, not formulating broad rules of general application. They are resolving disputes. On the other hand, intermediate appellate courts do develop broad rules, and may be delegated authority by high courts to flesh out general rules (ibid., 846).

These nuances become greater yet when one considers the federal system in the United States. First, state courts have their own rules of stare decisis, which may operate differently from those of the federal courts (Lindquist 2009, 11; Lindquist and Pybas 1998). Second, there are special intersystem rules as well. State courts are not bound by federal circuit court precedents (Posner 2008; Hiscock 1924); they are bound by Supreme Court decisions. Federal trial courts sitting in diversity cases do consider themselves bound by the decisions of state high courts. Some modelers have suggested that cases in which states decline to follow the decisions of the Supreme Court in interpreting their own constitutions undermine claims of precedential effect (McClurg and Comparato 2004, 3). Jumping to this conclusion fails to recall that the system is purposely designed to be, in the words of Judge Posner, "a decentralized, quasi-competitive system of lawmaking" (Posner 2008, 277).

Even where the rules are seemingly rigid, there still may be divergence—and principled divergence at that. Court systems function to resolve ordinary disputes, but they also are part of a political system of governance. Thus, breakdowns in what look to be structured rules of stare decisis may reflect intersystemic struggles, or reflect a means of moderating them short of outright conflict. Although the ostensible purpose of a tiered system of appellate review is to

develop a coherent body of law (Kornhauser 1995; Rogers 1995), the Supreme Court sometimes

permits divergence precisely so that it can observe the range of possibilities for resolution of an

issue. This is the frequently documented technique of "percolation" (Kornhauser 1995, 1625;

Caminker 1994b, 57; Estreicher and Sexton 1984, 732).

The Norms of Different Courts

It should be readily apparent at this point that all courts are not the same, and yet this

point deserves a moment of attention. When conducting studies of judicial behavior, political

scientists often focus on the Supreme Court (Kim 2007). This is understandable, as the Supreme

Court is of a higher profile than other courts and its work seems both more interesting and more

important. A similar bias can be found in work of the legal academy as well (Baum 2006, 4–5).

Nonetheless, given the purposes of studies of judicial behavior and the endeavor of

modeling law, the Supreme Court may prove to be the least promising body to study. A large

part of its workload is constitutional, which is—as we have seen—already the most

indeterminate or flexible area of the law. The Court takes very few cases a year. At the risk of

grievous overstatement, the cases can be divided into those with open legal questions in need of

resolution, high-profile public cases, and a small set of cases in which the lower courts have gone

badly astray and require correction. The nature of the Court's caseload, as at least two of these

categories indicate, is such that there will be strong legal (and perhaps other) arguments on both

sides. Open questions are, by definition, those in which the precedents do not constrain.

By contrast, the federal circuit courts see a steady fare of common law, criminal,

statutory, and administrative cases. As federal appellate judge Harry Edwards notes, the type of

law before the court also varies between the appeals courts and the highest courts in the land; the

"staple business of the courts of appeals is not constitutional adjudication, but statutory

interpretation, review of administrative action, and oversight of the federal district courts"

(Edwards 1985, 621). Many of these are far more ordinary than the cases that make their way to

the Supreme Court, and often the doctrine appears far more settled.

The state courts receive relatively little attention when it comes to modeling law, but

there are many advantages to using them as grounds for study. State courts see a great variance

in types of cases: matters of criminal law, state and federal statutory and administrative, and state

constitutional law (Friedman 2004; Hershkoff 2001). In addition, the state courts hear a much

higher percentage of common law matters, including ordinary commercial disputes. Finally, they

also have different selection procedures for their judges, providing the possibility of natural

experiments.

@h2:The Dynamic Nature of Precedent

A foundational difficulty exists with modeling law, which relates to its dynamism. The

dynamism of the common law is most likely the reason that some of the studies we identify as

truly modeling law see the predictive ability of their models decline over time (see George and

Epstein 1992; Richards and Kritzer 2002). Not only do many political science studies overlook

the dynamism of the common law, they also seem to affirmatively believe case law is stable.

Understandably, it seems in the nature of rules that they should remain relatively stable. The

nature of the common law, however, is that subsequent cases alter prior precedential cases,

yielding a new rule. That is because, as we explained above, the common law must mediate two

things at once: the stability needed for ordering of affairs, and the ability for the law to change so

that it accommodates the needs of the times.

A famous example of the evolutionary face of the law comes from the doctrine of privity,

particularly with respect to products liability. Privity refers to the relationship between tortfeasor

and victim required for the law to allow liability. When privity was applied strictly, for example, a seller could be held liable only for a product defect if the buyer had bought directly from the seller. This worked fine in a market without middlemen, but the doctrine strained as the national economy shifted to mass production and the stream of commerce lengthened such that buyers rarely dealt with the manufacturer.[3] As a result of this strain, the privity doctrine began to shift, first using legal fictions about who exactly was party to the contract and what the terms were. The pressures of the mass market continued, however, until, in a series of important cases starting with *MacPherson v. Buick Motors* (1916), state courts abandoned the privity restriction and opened the doors to modern-day products liability (111 N.E. 1050, 1053). *MacPherson* was written by Benjamin Cardozo, who later sat on the Supreme Court of the United States and was considered one of the masters at managing this tension between stability and change. In Cardozo's opinions the law could change mightily, and yet the decision effecting the change would be neatly woven into prior law so that the rate of change was barely evident.

A "rule" in the common law is not some abstract principle of law, but the interaction of an abstract principle with the facts of the present case. Later cases necessarily refashion the prior rule, in part by their application of new facts, but in part as well by the way later cases describe the prior one. What may seem dicta in a prior case becomes rule later, and vice versa.

Edward Levi called this process "the indispensable dynamic quality of law," and acknowledged how puzzling it might seem to those fixated on rules (Levi 1949, 2). Levi, a well-respected University of Chicago law professor, was tapped by Gerald Ford to be attorney general at a period when the country—following the Watergate scandal—needed to restore its faith in law. Many years before his time of government service, he wrote a well-known and admired text for law students endeavoring to learn this aspect of the legal process. "[It] cannot be said," wrote

Levi, "that the legal process is the application of known rules to diverse facts." Rather, he explained, "the rules are discovered in the process of determining similarity or difference." He acknowledged—indeed, emphasized—that "the classification changes as the classification is made. The rules change as the rules are applied" (ibid., 3).

It is the process of defining similarity and difference that allows the common law to move with the times. Analogy is what makes the common law go, but the appropriate analogies between and among cases do not exist in some absolute, preordained sense. They emerge only through the reasoning of many judges looking at the same problem. "If the society has begun to see certain significant similarities or differences, the comparison emerges with a word. When the word is finally accepted, it becomes a legal concept. Its meaning continues to change" (ibid., 8).

Despite the evidence to support the dynamic nature of common law, the research design of even those studies of judicial behavior that truly manage to model the law tends to be static, which explains some difficulties in the studies' explanatory capacity. This is true, for example, of the George and Epstein (1992) and Richards and Kritzer (2002) studies. These authors identify the variables that seem to count in resolving the cases. In the short term, their studies show some explanatory power, and yet this deteriorates over time. What these authors are seeing is that the dynamic nature of the common law renders certain aspects of a case less crucial as one moves away from the time of the case. Thus, George and Epstein look at various factors present in death penalty cases that seem determinative in the early cases but eventually faded in explanatory value, such as particularized circumstances and aggravating factors (George and Epstein 1992, 329). But no wonder; given the dynamic nature of the common law, this is to be expected. The factors that spelled success in early cases, factors that were both necessary and

sufficient, become merely necessary over time as further refinement of the law introduced new variables that were determinative.

@h2:Outcomes *v.* Opinions/Rule

Finally, we mention the distinction between the *outcome* of a case, and the *opinion* drafted by the court in that case. This is a distinction that has drawn attention in the literature (see Carrubba et al. 2008; Maltzman et al. 2000; Friedman 2006). Yet many studies—hampered no doubt by coding problems—continue to focus only on outcomes, as though that is all there is to law.

When a court decides a case, it does two things. First, it awards a judgment. Second, it explains how or why it reached that judgment, often in a written opinion. As we have explained above, much work in political science seems devoted to the proposition that the opinions themselves are disguises to cover up a decision reached in a different way. Opinions *are* justifications, but they also provide rules for the future. Whether an opinion is persuasive or not in explaining why a court did what it did, it nonetheless provides a rule for the decision in future cases.

One might doubt that opinions ever are truly rules for the future. One might suspect that the judge in a subsequent case will decide on factors other than the rule in the prior case. Of course, for this to be true—that is, for the precedents to have *no* weight—one would have to argue that this always happens. This is an empirical proposition, and one might properly be skeptical that it will ever prove out. But no study of which we are aware has come remotely close to doing so.

Moreover, even if judges regularly departed from precedents in some cases, those precedents still might be ordering the affairs of many actors outside courts. As we indicated

earlier, judicial opinions contain tests and standards that govern the application of the law. They

tell observers what counts. Out of the set of all possible disputes, many never occur because of

general agreement that the tests in opinions were appropriate and govern (Priest and Klein 1984).

Court decisions are a subset of these possible disputes, the subset in which something broke

down.

What is important to point out for present purposes is that to the best of our knowledge,

no study has ever even attempted to predict what the content of the *opinion* in a subsequent case

will be. In other words, studies regularly try to predict outcomes in later cases from prior

precedents. But if one is trying to model how the law operates, then outcomes may be the wrong

dependent variable. What one might want to attempt to do is predict when and how *rules* will be

changed.

@h1:Conclusion: What One Might Model

There are many reasons one might seek to model law. What should be clear by now is

that whatever the reason, the types of studies most commonly conducted are likely to be the least

promising ones. In a sense, students of judicial behavior have been looking for "law" where one

is least likely to find it.

The Supreme Court is the realm for a huge proportion of political science studies of

judicial behavior. The Court's decisions in constitutional law or civil rights play a particularly

big role. There are famous studies that look mostly to the Supreme Court's Fourth Amendment

or "civil rights" jurisprudence (Segal 1984; Segal and Spaeth 1996; Romero 2000; Hensley and

Smith 1995; Murphy 1958). (We use scare quotes because modern studies typically are

conducted using the Spaeth database, and the coding of cases as such, yet the category itself is

quite broad and suffers from some serious difficulties [see Harvey and Woodruff 2011; Shapiro 2009].)

Yet there has been remarkably little attention given to areas that might prove quite profitable. If one wanted to guess in which cases precedent was most determinate, and where tacit and explicit overruling would be least likely—that would be in the mill run commercial cases. One might study these in the federal courts (in diversity cases), though state courts undoubtedly are the predominant forum for these kinds of cases.

Indeed, if one really wanted to know how law operates, one might not study cases at all. There is a very real problem of selection bias in this obsession with litigated disputes. After all, countless contracts are formed every day and do not make their way to litigation. Numerous actors in the public and private arena daily make decisions based on a prediction of how courts would resolve disputes should those decisions ultimately find their way into a court. It is possible that in reaching these predictions regarding dispute resolution, those making them take into account the ideology or attitudes of judges, and the strategic milieu in which they operate. It is more likely, however, they look simply to the law.

There is something to the law that works. Precisely what this is has eluded many political science studies over time. There may be many reasons for this, but the most obvious is that for the most part, those studies are simply not modeling law at all.

@h1:Notes

1.<n#>Only later did Segal deem these legal factors case stimuli (Segal and Spaeth 2002, 312; Segal, Spaeth, and Benesh 2005, 38), and thus consistent with the attitudinal model. But in the culture of law, Segal was right (in 1984) and wrong thereafter: his variables are indeed legal factors (Friedman 2006).

2.<n#>See also *Patterson v. McLean Credit Union* (1989), in which the Court noted that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done" (491 U.S. 164, 172).

3.<n#> The effect of the Industrial Revolution on privity contracts is best captured in *Henningsen v. Bloomfield Motors* (161 A.2d 80–81, 83–84, 1960).

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