Contemplating Courts

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10 Decision Making on the U.S. Courts of Appeals

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The courts of appeals occupy a pivotal position in our political system, the "vital center of the federal judicial system" (Howard 1981, 8). Since their creation in the 1890s, they have been responsible for ensuring the uniformity of national law in a diverse republic in which sectional pressures constantly seek to undermine that uniformity. More recently, they have become the principal means of supervising the myriad federal regulatory agencies. In both these roles, they are important policy makers: the final authoritative interpreters of federal law and the Constitution in the overwhelming majority of all civil and criminal cases filed in the federal courts.[1]

We consider decision making on the U.S. courts of appeals by examining three different models of behavior—the legal model, the attitudinal model, and the hierarchical model. Briefly, the legal model, as its name suggests, holds that judges make decisions based on legal factors such as the intent of the framers of the Constitution and precedent. Alternatively, the attitudinal model holds that judges make decisions based on their own attitudes and values. Finally, the hierarchical model holds that judges on the courts of appeals have attitudes and values but, as intermediate-level players in a complex judicial hierarchy, are limited in their ability to pursue their values. Hence, the hierarchical model combines elements of the other two and encompasses them as extreme cases. We examine these models using a sample of search and seizure cases decided by the U.S. courts of appeals between 1961 and 1990.

Models of Judicial Decision Making

Before we describe these models in greater detail, it may be useful to discuss what a model is and why judicial scholars use them.[2] We start with the premise that the real world is extraordinarily complex. Consider, for instance, the decision of one judge in just one case. What factors influence her decision to rule for one party instead of the other? Those

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interested in answering such a question might first consider the facts of the case. They would piece together information from dozens of witnesses to determine what the appellee or defendant may or may not have done and what his intent might have been if and when he did what was alleged. In criminal cases the researchers would have to put together similar information about the police, and in civil cases they would do the same for the appellant. Second, they would consider the beliefs and values of the judge. Is she a Republican or a Democrat, liberal or conservative? Does she have positive or negative feelings toward blacks, whites, Jews, Christians, males, females, senior citizens, handicapped persons, labor, business, or any other type of litigant involved in the suit? Is the judge happy with her job, or is she hoping to get promoted to a higher court or thinking of running for public office? Third, what are the preferences of higher courts, and do they have the ability to impose their preferences on the lower courts? What have higher courts said in cases similar to this? Are the rulings consistent, or is there leeway for the judge? If the rulings are consistent but dated, might new upper courts favor differing interpretations? Will a higher court have the opportunity to review and reverse the lower court? Fourth, what is the political and economic environment like? Is crime a hot issue? Is unemployment up? Do citizens believe local courts are too lenient on crime?

Certainly we could go on. It is, after all, possible to write entire books about particular cases. These typically involve monumental cases such as *Brown v. Board of Education* (1954 [Kruger 1975]) and *Gideon v. Wainright* (1963 [Lewis 1964]), but presumably the same innumerable influences (minus journalistic and scholarly attention) go into decisions in lesser cases as well.[3] One approach to learning, then, is to attempt to learn all you can about as little as possible. Two problems result from this approach. First, human behavior is often so complex that you could spend an entire course studying a particular decision and still in the end not fully understand it. Even a judge might not fully understand all the factors that influenced his or her own decision. Moreover, most of the facts you learn about a single decision are easily forgotten. Second, you are left wondering how generalizable the study of one particular case is to the rest of judicial decision making. You might try to study all the factors that influenced *Roe v. Wade* (1973), but which of those give any clue as to the factors that influenced *Furman v. Georgia* (1972)?[4] Some of the factors that influenced *Roe* probably influenced other decisions as well, but which ones? The detailed study of a single event might provide a useful *description* of events, but it does not and cannot constitute an *explanation* of events that can confidently be carried over to other areas.

An alternative approach is to recognize the complexity of the world around us and to accept the fact that trying to learn everything about one thing may not always be the best way to acquire knowledge. Instead, we can try to examine the most explanatory aspects of a wider set of decisions. Learning the most important factors that influence thousands of

decisions might be far more beneficial than learning as much as is humanly possible about a single decision.

This is where models come in. A model is a simplified representation of reality; it does not constitute reality itself. Models purposefully ignore certain aspects of reality and focus instead on a selected set of crucial factors. Such simplifications give us a useful handle for understanding the real world that we could not obtain from more exhaustive and descriptive strategies. For instance, journalistic accounts of presidential elections discuss thousands of factors that might have influenced the final results (for example, White 1961). But if 80 percent of the variance in postwar presidential elections can be explained by changes in real disposable income, then a simplified real-disposable-income model gives us an extraordinarily useful tool for explaining and understanding not just one but a series of presidential elections.

The value of this method of understanding courts has long been appreciated. For example, Oliver Wendell Holmes, in his famous essay "The Path of the Law," advanced a "prediction theory" of the law. Holmes noted that lawyers must be able to predict what judges will do in order to advise their clients appropriately. In fact, Holmes put such stress on prediction that he *defined* the law itself as nothing more than predictions about the behavior of judges. Predictions require models. Hence, models of judicial behavior can be seen as closely connected with the concept of law itself.

From the viewpoint of a social scientist, a successful model achieves two often contradictory goals: it explains the behavior in question, and it does so simply and parsimoniously. A model that does not validly and reliably explain and predict the behavior in question, be it the votes of citizens or the decisions of circuit court judges, is obviously of little value. But an unduly complex model that explains behavior may be almost as worthless, for it fails to give us the grasp on reality that we need from models. Unfortunately, the goals of explanation and parsimony are often contradictory, for the more complex one's model, the more behavior one can "explain." For instance, a judge's vote in a particular criminal procedure case may be based on his or her knowing one of the attorneys well, or knowing a victim of the crime in question. A vote in another case might depend on a different random occurrence. Nevertheless, a good model ignores such idiosyncratic factors and highlights instead variables that explain a high percentage of the behavior in question.

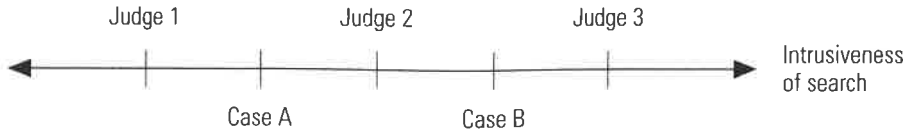
With this explanation in mind, let us now consider the models that may characterize decision making on the U.S. courts of appeals: the legal, attitudinal, and hierarchical models.[5] We do not expect any of the models to be able to tell us everything about judicial decision making; rather, we hope that they will help students of the judiciary better understand how decisions get made.

The Legal Model

We start with the legal model, which postulates that the decisions of courts are based on the facts of the case in light of the plain meaning of statutes and the U.S. Constitution, the intent of the framers, and precedent. Of the three, we focus on precedent, for in our sample of cases (search and seizure decisions), we do not find text or intent to be useful guides to how judges actually resolve disputes.[6] At the level of the U.S. Supreme Court, precedent means deciding cases based on previous high court rulings. This is often not a reliable guide because most attorneys can readily find Supreme Court precedents on either side of the case they are arguing. And even when precedents typically fall on one side only, the Court feels free to ignore them, particularly in constitutional cases.[7] For lower courts, the decision calculus is substantially different: they are supposed to follow the policy preferences set into law by the Supreme Court. The obligation to follow the precedents set by the courts above is a fundamental assumption of our legal system that is constantly reinforced for judges by their law school training, bar associations, and their colleagues on the bench. Without respect for Supreme Court decisions, federal law would mean something completely different in every circuit. And if district courts ignored the circuit courts, federal law would mean something different in every state within a circuit and, in states that had more than one district court, something different in different regions of a state. We are thus not surprised to find evidence that the norm of *stare decisis* has been internalized by most judges. More than 90 percent of the appeals court judges interviewed in one study maintained that when precedent was "clear and relevant" it would have a significant effect on their decision (Howard 1981, 164). Thus, as Supreme Court decisions change, lower courts are obliged to follow suit.

One strand of empirical evidence suggests that this is in fact the case. The decisional trends of both the district and appeals courts shifted to decidedly more liberal patterns in economic policy following the 1937 Supreme Court switch (Songer and Reid 1989; Stidham and Carp 1982). The appointment of Democratic judges to the lower courts before the Supreme Court's policy shift had no substantial effect on policy making in the lower courts. In areas other than criminal procedure (Songer, Rowland, and Carp 1984; Songer and Sheehan 1990), changes in the decisional tendencies of the courts of appeals and district courts likewise followed major changes in policy making in the Supreme Court (Baum 1980; Songer 1987; Songer and Reid 1989; Songer and Sheehan 1990). Still, large-scale noncompliance with Supreme Court decisions has been found by some researchers, thus suggesting that factors other than precedent determine decision making in the lower courts (Beatty 1972; Canon and Kolson 1971; Manwaring 1968; Peltason 1961; Tarr 1977). These studies have typically focused on the school desegregation cases or on other controversial civil liberties decisions of the Warren Court.

Figure 10-1 Justices and Cases in Attitudinal Space



The Attitudinal Model

In contrast to the legal model, the attitudinal model holds that judges decide disputes in light of the facts of the case, given their ideological attitudes and values (Schubert 1965; Segal and Spaeth 1993).[8] To illustrate, imagine a search and seizure whose constitutionality the Court must determine. Assume the police searched a person's house with a valid warrant supported by probable cause. There were no extenuating circumstances. The search uncovered an incriminating diary. Now imagine a second search, similar to the first in that probable cause existed, but in which the police failed to obtain a warrant. Again, there were no extenuating circumstances.

According to the attitudinal model, one can place these searches in ideological space. Since the search without a warrant can be considered less libertarian than the search with the warrant, we place the first search to the left of the second search. This is diagrammed in Figure 10-1, where A represents the first search and B the second. Presumably, any search and seizure will locate on the line; depending on the characteristics of the case, the search will be to the left of A, between A and B (inclusive), or to the right of B. The less prior justification (probable cause or warrant) and the more severe the intrusion (home as opposed to car, or full search as opposed to frisk), the further to the right the search will fall. The more prior justification and the less intrusive the search, the further to the left it will be. The points on the line where the searches lie are referred to as *j*-points.

Next, we place the justices in ideological space. Consider three judges, 1, 2, and 3, who are, respectively, liberal, moderate, and conservative. They could easily be rank-ordered on an ideological scale, with 1 on the left, 2 in the middle, and 3 on the right.

With some additional information we might be able to go a bit further and say that Judge 1 is so liberal that he would not even uphold the search in the first case, perhaps because he believes that police may not search and seize "mere evidence," such as papers and diaries. Thus, we could place Judge 1 to the left of Case A. Judge 2 might not be quite so strict as Judge 1; she would uphold the search of the home with a warrant, but would not uphold the warrantless search. Thus, we could place Judge 2 to the right of Case A but to the left of Case B. Finally, Judge 3 might find the warrant requirement fairly unimportant and would uphold any search he considered reasonable. Since probable cause supported both searches, both are reasonable. Thus, we could place Judge 3 to the right of Case B. The judges are placed in ideological space with the cases in Figure 10-1.

The placement of the judges on the scale constitutes their *i*-points, or indifference points. A judge will vote to uphold all searches that are dominated by, or are to the left of, the judge's indifference point and will vote to strike all searches that dominate, or are to the right of, the judge's indifference point. Thus, Judge 1 upholds all searches to the left of 1, rejects all searches to the right of 1, and is indifferent whether searches at 1 are upheld or overturned.

Indirect support for the attitudinal model comes from the fact that lower courts have on occasion simply refused to follow Supreme Court precedents (Beatty 1972; Canon and Kolson 1971; Manwaring 1968; Peltason 1961; Tarr 1977). Moreover, the decisions of lower-court judges correlate well with factors such as the judges' partisanship and region (Carp and Rowland 1983; Scigliano 1971; Songer and Davis 1990). The most plausible explanation for such findings is that these variables influence decisions indirectly by working through the judges' ideological predispositions.

The Hierarchical Model

Arguably, the pure attitudinal model has particular relevance for decision making on the Supreme Court. The Supreme Court is a court of last resort whose decisions cannot be overturned by other courts. Supreme Court justices lack electoral or (for the most part) political accountability and have no ambition for higher office. In general, then, they need please no one but themselves.[9] Finally, the Court controls its own jurisdiction and thus can weed out frivolous suits in which text or intent or precedent might be perfectly clear.

These arguments have limited applicability to the judges who sit on the U.S. courts of appeals. First, ambition might be a constraint on the decisions of circuit court judges. Whereas Supreme Court justices have little room to improve their job stature, the same is not true of circuit court judges. We have no accurate count, but it strikes us as reasonable to assume that many of these judges dream of being promoted to the Supreme Court.[10] Thus, the politically acceptable might impinge on the personally preferable. Second, decisions made in circuit courts can be appealed to the Supreme Court. Lower-court judges must then at least consider the preferences of courts above them, although as we shall see, the extent to which they must do so is not always clear. Finally, lack of docket control means that circuit court judges get some cases to decide in which legal discretion is at a minimum, perhaps because of the clarity of a statute or the settling of the issue by the Supreme Court.[11] Although it is impossible to know how often appeals court judges feel that the law or precedents are so clear that any judge would feel constrained to reach the same conclusion, one study estimated that such constraint may exist in as many as 62 percent of their cases (that is, judges may have substantial discretion in only a little over a third of their cases [Songer 1982]).

How might one construct a model of judicial decision making by judges who are con-

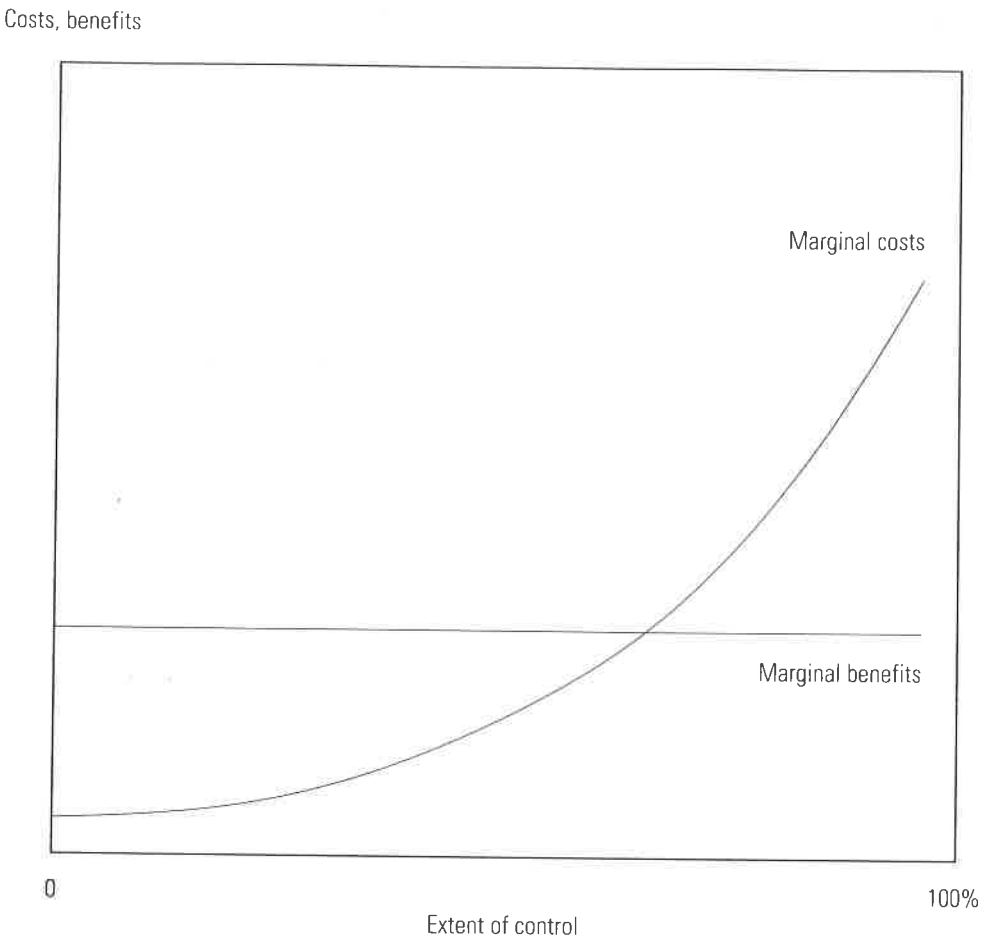
strained by their location in the judicial hierarchy? A detailed answer is far beyond the scope of this chapter; nevertheless, one way to proceed is to use insights from what social scientists refer to as "principal-agent" theory, a theory of strategic decision making within hierarchical settings. Principal-agent theory focuses on situations in which subordinates have different preferences from their hierarchical superiors and the ability to take hidden actions or exploit hidden information relevant to the decisions. According to the theory, monitoring, auditing, and sanctioning become critical in such situations; the theory provides tools for analyzing these and other features of hierarchies.

Application of principal-agent theory to the federal judiciary suggests a "hierarchical model" of circuit courts. At the level considered here, the hierarchical model is mainly conceptual; exact predictions depend on the detailed procedures followed in the hierarchy. For example, tightening or loosening the certiorari process used by the Supreme Court might well alter the decisions coming from the circuit courts. One very general prediction, however, is common across a wide variety of hierarchical models: *superiors rarely find it in their interest to control the behavior of subordinates completely.* The reason may be understood through reference to Figure 10-2.

Figure 10-2 shows the marginal benefits and marginal costs to a higher court of controlling the decisions of a lower court. Costs include greater effort put forth in scrutinizing cases as well as hearing more cases. Benefits include greater conformity between the lower court's doctrine and the upper court's preferences. Marginal costs and benefits are the incremental effect on total costs or benefits of slightly increasing or decreasing the extent of control. As shown, we assume the marginal cost of control increases: at low levels of control an incremental increase in control is likely to require relatively little additional effort because noncompliance is so flagrant that detecting and correcting it is easy. At very high levels of control, however, the few remaining cases of nonconformity probably involve subtle deviations that require considerable effort to detect. We assume that marginal benefits of control are constant across the range of control (arguably, they might fall). The intersection of the cost and benefit curves represents the optimal level of control from the perspective of the higher court: if control were less, an incremental increase in control would bring benefits that exceed costs and would thus enhance the welfare of the higher court. Conversely, if control were greater than the optimal point, a decrease in control would result in a reduction in costs that would more than offset the reduction in benefits. In general, if marginal costs increase while marginal benefits fall or are constant, the two curves will intersect at less than 100 percent control. Accordingly, a general prediction over many hierarchical models is that decision making in the circuit courts depends both on the preferences of the nominal superiors, the Supreme Court, and those of the nominal subordinates, the circuit court judges.

Few studies have directly measured what we call the hierarchical model, but one study

Figure 10-2 The Hierarchical Model: Perfect Control Is Not Optimal



comes reasonably close. Songer and Reid (1989) examined decision making on the U.S. courts of appeals following doctrinal changes by the Supreme Court in 1936 in substantive due process cases and during the 1950s and 1960s in First Amendment cases (see also Songer, Segal, and Cameron 1994). In so doing they compare two models. The first states that appellate policy making will change as the result of presidential appointments to the appellate courts. If liberals are appointed, the court will become more liberal; if conservatives are appointed, the courts will become more conservative. In our framework, this implies attitudinal decision making. The second model, the legal model, recognizes that circuit court judges are in the middle of a judicial hierarchy and that such judges will more or less faithfully follow the principles of law set down by the Supreme Court.

Songer and Reid found strong support for the legal component of their model. Decision making in the circuit courts did not get more liberal as Roosevelt made appointments between 1933 and 1936. It was not until after the Supreme Court switched its position that

the circuit courts started doing the same. Similarly, the circuit courts followed Supreme Court trends on the First Amendment more recently, voting conservatively in the 1950s, liberally in the 1960s, and conservatively again in the 1970s.

Methodological Concerns

Although this analysis and others have added to our understanding of lower-court responsiveness, all the studies previously cited have been hindered by a failure to take into account variation in the factual context in which different courts respond to decisions that announce new precedent. Recall first that fact patterns, or case stimuli, are crucial components of both the legal and attitudinal models. More important, a failure to consider changes in the types of cases courts hear can lead to misleading results. For example, an analysis of agenda change in five state supreme courts shows that the type of issues raised on appeal changed dramatically in response to the decisions in *Mapp v. Ohio* (1961) and *Miranda v. Arizona* (1966). A survey conducted in 1994 by Donald R. Songer revealed that the frequency with which briefs filed for defendants challenged the admissibility of incriminating statements and the frequency with which constitutional errors were alleged in trial court proceedings more than tripled in each state in the ten years following *Mapp*. Since the agendas of appellate courts may change in response to changed Supreme Court policy, analyses of the decisional trends of those courts are difficult to interpret without the addition of controls for changing fact patterns and changing issues. For example, if trial courts, following *Miranda*, severely restricted the ability of prosecutors to introduce confessions while appellate courts encouraged defense attorneys to challenge very subtle forms of coercion, the policy reflected in appeals court decisions might be significantly more liberal than it was prior to *Miranda* although the percentage of appeals court decisions that would be coded as liberal might actually decline. Thus, an analysis of the decisional trends of the courts of appeals that did not take into account the changed facts confronting the appeals court judges would be likely to produce a seriously distorted interpretation of responsiveness. We next examine, then, how we can test our models more carefully.

Hypotheses about Circuit Court Decision Making

The legal, attitudinal, and hierarchical models make different predictions about the factors influencing the decisions of circuit court judges. These differences create the opportunity to test the models. In Table 10-1 we summarize the different predictions.

The first thing to glean from Table 10-1 is that case facts are crucial to all three models. The legal model holds that judges consider the facts of the case in light of text, intent, and precedent. The attitudinal model holds that judges consider the facts of the case in light of their own personal policy preferences. The hierarchical model combines both perspectives: judges consider the facts of the case in light of their own personal policy preferences but

Table 10-1 Factors Affecting Circuit Court Decisions: Predictions from Three Models

	Prediction		
Model	*Case facts matter*	*Supreme Court doctrine matters*	*Circuit court preferences matter*
Legal	yes	yes	no
Attitudinal	yes	no	yes
Hierarchical	yes	yes	yes

are likely to be somewhat constrained by text, intent, and precedent, depending on the tools available to higher courts to control lower ones. Because all three models agree about the importance of case facts, fact variables cannot be used to test the models. Instead, fact variables must serve as control variables. That is, the inclusion of facts in our model will allow us to make sure that any results we achieve with regard to legal and attitudinal variables are the result of those factors and not changes in the types of cases heard by the courts of appeals.[12]

The situation differs concerning the influence of Supreme Court doctrine. The legal model and the hierarchical model suggest that the decisions of circuit court judges are affected by Supreme Court doctrine. In contrast, the attitudinal model suggests that Supreme Court doctrine plays little role in the decision making of the circuit court judges. So the importance of Supreme Court doctrine can be used to test the legal and hierarchical model versus the attitudinal model, but not against each other. In other words, if Supreme Court doctrine proves to be important in circuit court decision making, the data reject the attitudinal model as a complete explanation of circuit court decision making.

The attitudinal model and the hierarchical model suggest that circuit court decision making will be affected by the attitudes of the judges on the case, independent of the policy or doctrinal trends on the Supreme Court. The legal model, however, suggests that attitudinal variables play little role in judicial decision making. Therefore, attitudinal variables can distinguish the attitudinal and hierarchical model from the legal model. In other words, if attitudinal variables prove important, the data reject the legal model as a complete explanation of circuit court decision making.

Combining these tests implies the following: if either the attitudinal or the doctrinal variables prove unimportant, the data reject the hierarchical model. If both prove important, both the attitudinal and legal models are dominated by the hierarchical model as an explanation of circuit court decision making.

Research Design

We test the three models on a stratified random sample of votes by circuit court judges in search and seizure cases between 1961 and 1990.[13] Critical variables are the facts of the case, contemporary Supreme Court doctrine, and the attitudinal predisposition of the particular judge.

As discussed earlier, all three models consider the facts of the case to be important. Consistent with the models, we employ the fact-pattern model developed by Segal (1984). Segal's model examined the place of the intrusion (for example, home, business, car), the extent of the intrusion (full search or lesser intrusion), the prior justification (warrant and probable cause), and various exceptions to the warrant requirement (for example, searches incident to arrest).

The legal and hierarchical models suggest that the decisions of circuit court judges are affected by *contemporary* Supreme Court doctrine (Howard 1981; Richardson and Vines 1971), which may or may not be the same as previous doctrine. Therefore, we need to assess how Court doctrine has changed during our sampling period. We accomplished this by the following procedure. First, we estimated the search and seizure fact-pattern model discussed above on the decisions of the Supreme Court between 1961 and 1990 (see Segal and Spaeth 1993, chap. 6, for details). We then added a variable to capture how the Supreme Court's decision-making balance might have changed during this period. We hypothesized that each replacement of a Warren Court justice with a Republican appointee made the Court more conservative. Thus, the variable for Supreme Court change takes the value "zero" during the Warren Court and increases by one each time a Warren Court justice is replaced by a Republican appointee. This variable, which we call "Change," will measure circuit court responsiveness to changing Supreme Court preferences.

The attitudinal and hierarchical models suggest that decision making in the circuit courts is affected by the attitudes of the judges on the case, independent of the policy or doctrinal trends on the Supreme Court. Although much evidence suggests that lower-court judges are responsive to Supreme Court precedent, such studies have their limits, as noted above. Moreover, these studies contradict the overwhelming finding that federal judges' decisions correlate reasonably well with the judges' party identification (Goldman 1966, 1975; Howard 1981). If circuit court judges were merely proxies for the Supreme Court, their own attitudes and backgrounds simply would not matter.

One test of the attitudinal approach to circuit court decision making would add to our model a variable representing the ideology of each judge voting on the particular case. After we controlled for the facts of the case and the policy trends of the Supreme Court, this would tell us how much the judges' own preferences mattered. Unfortunately, we do

not have direct, independent measures of the ideology of hundreds of circuit court judges, nor is it feasible to obtain them. We can, however, use two separate indicators that should correlate with their ideology. Those indicators are the party identification of the judge's appointing president (Carp and Rowland 1983; Scigliano 1971; Tate 1981; Tate and Handberg 1991) and whether the judge is from the South (Songer and Davis 1990; Tate, 1981; Tate and Handberg 1991).

Results

We first present the results from the basic fact-pattern model, which is a shared component of all three models. Our dependent variable, the variable we are trying to explain, is whether each judge voted to allow or disallow the search in question. The independent variables (those that are supposed to explain the dependent variable) are the facts of the case as originally modeled by Segal (1984). These include the extent of the intrusion and the prior justification for the search. The extent of the intrusion includes, first, where the search took place—such as one's home, one's business, one's car, or one's person—and second, the actual extent of the intrusion, which distinguishes between full searches on the one hand and stop-and-frisks and other limited intrusions on the other. The prior justification variables include the arrest, probable cause, and warrant variables. We measure whether searches are incident to a lawful arrest, after a lawful arrest, or after an unlawful arrest. Searches incident to arrest are those that take place at the time and place of an arrest. Searches after a lawful arrest are those that take place following an arrest, but not at the immediate time and place. *Unlawful arrests* are those that are deemed unlawful by the court from which the appeals court case was appealed. The variable *warrant* represents the existence of a warrant, and *probable cause* represents the determination by the court below the appeals court as to the existence of probable cause. Finally, the *except* variable measures certain exceptions to the warrant requirement, such as border searches or consent searches (see Segal 1984 for details).

We use these independent variables in our statistical model to try to predict our dependent variable, whether the judge voted to uphold the search or not.[14] We report our results in Table 10-2. The column labeled MLEs, or maximum likelihood estimates, represent changes in the likelihood that the search will be upheld when the variable in question is present.[15] The most important thing to know about the MLEs is that a positive MLE indicates that the variable in question increases the probability of a search being found reasonable, whereas a negative coefficient decreases the probability of a search being found reasonable.

The column labeled "Sig ($p < x$)" presents the significance levels of the different variables. Significance levels tell us how likely it is that the MLEs we observe could have oc-

Table 10-2 Logistic Regression of Search and Seizure Fact Pattern Model, 1962-1990

Variable	*MLE*	*S.E.*	*Sig (p<x)*	*Impact*
Home	–0.60	0.31	0.03	–0.15
Business	–0.91	0.42	0.02	–0.22
Car	–0.31	0.32	n.s.	–0.08
Person	–0.47	0.37	0.10	–0.12
Incident	0.48	0.22	0.02	0.12
After	0.33	0.27	0.02	0.08
Unlawful	–1.42	1.08	0.10	–0.31
Warrant	0.67	0.23	0.01	0.16
Probable cause	1.03	0.22	0.01	0.22
Extent	–0.22	0.37	n.s.	–0.05
Except	0.70	0.19	0.01	0.17
Constant	–0.59	0.45	—	—

Note: Percentage predicted correctly: 66.0; $N = 573$. MLE = maximum likelihood estimate; S.E. = standard error; Sig = significance level; n.s. = not significant; dash = not applicable.

curred by chance. Consider, for example, asking a sample of people their party identification. If we observed fifty Democrats and fifty Republicans it would be reasonable to assume that the sample came from a population in which half the people were Democrats and half the people were Republicans. If we observed sixty Democrats and forty Republicans, it is still possible that the sample could have come from a population in which there was an even split between Democrats and Republicans. But if we observed eighty Democrats and twenty Republicans it would be highly unlikely that our sample came from a population with an even partisan split. In our example, significance levels tell us the probability *(p)* that the MLE we observe could have come from a population in which the true MLE is zero, that is, in which the variable in question has no effect on the judges' decisions. Typically, we like significance levels to be below .05, or at the very least, below .10. A significance level of .05 (that is, $p < .05$) tells us that there is less than a 5 percent chance that the MLE from our sample could have come from a population with a true value of zero (that is, a population in which the variable has no influence on the dependent variable).

The final column in the table, "Impact," represents the change in the probability that a search will be found reasonable when the variable in question is present and the search otherwise has a 50 percent chance of being upheld. Thus when a search has a 50 percent chance of being upheld, a search of one's home lowers the probability that a search will be found reasonable by .15.

Table 10-2 presents us with the following information. First we examine the place of the

search. Here, the variables are all compared to a baseline category of a place where one does not have a property interest. Thus, searches of one's home and one's place of business significantly decrease the probability that a search will be found reasonable compared with a search of a place where one does not have a property interest, such as the home of a friend. One's person receives slightly more protection than the baseline category, whereas one's car does not receive significantly more protection than a place in which one does not have a property interest. We will see shortly, though, that in our more complete models the variable crosses the threshold into statistical significance.

We next consider the arrest variables, which are all compared to a baseline where no arrest took place. Searches incident to a lawful arrest are much more likely to be upheld than exactly similar searches that were not preceded by an arrest. In contrast, searches that are after but not incident to a lawful arrest just miss the .10 significance level. Searches after unlawful arrests slightly decrease the probability that the search will be found reasonable.

The existence of warrants and probable cause strongly and significantly increases the probability of a finding that a search was reasonable. Both variables are significant at $p < .005$.[16] That is, the probability that these results are due to chance is less than 1 in 200. Full intrusions, compared with lesser intrusions, do not appear to receive more stringent treatment from courts of appeals judges. Finally, various exceptions to the warrant requirement significantly increase the probability that a search will be found reasonable.

Overall, the model is significant at $p < .001$. We predict the outcome of 66 percent of the judges' votes correctly.[17] This suggests that case stimuli, important to both the legal and the attitudinal models, do influence circuit court decisions. Moreover, our model suggests that we have done a fairly good job of controlling for the facts of the case and thus can examine additional factors with a reasonable degree of confidence.

We next consider whether circuit court judges are responsive to changes in decision making by the U.S. Supreme Court, as suggested by the legal model. We accomplish this by adding to our fact-pattern model a variable that represents changing Supreme Court preferences from the end of the Warren Court through 1990. The results are presented in Table 10-3.

The results of the fact pattern are essentially the same as in the first model. One important difference, though, is that the "Car" variable is now significant at the .10 level and remains significant through subsequent models. More important, the variable "Change" demonstrates that circuit court judges did get more conservative in search and seizure cases as the Supreme Court got more conservative. The estimate for change is significant at $p < .001$, and the MLE suggests that a search that had a 50 percent chance of being upheld in 1969 would have a 75 percent chance of being upheld in 1990 after controlling for the facts of the case.[18] Nevertheless, the percentage of the judges' decisions predicted correctly barely improves, rising from 66.0 percent to 67.2 percent.

Table 10-3 Logistic Regression of Search and Seizure Fact Pattern Model Plus Supreme Court Change, 1962-1990

Variable	*MLE*	*S.E.*	*Sig (p<x)*	*Impact*
Home	–0.69	0.31	0.02	–0.16
Business	–1.10	0.43	0.01	–0.25
Car	–0.41	0.32	0.10	–0.10
Person	–0.56	0.37	0.07	–0.14
Incident	0.88	0.25	0.01	0.21
After	0.52	0.28	0.04	0.13
Unlawful	–0.98	1.08	n.s.	–0.23
Warrant	0.73	0.24	0.01	0.17
Probable cause	1.00	0.22	0.01	0.23
Extent	–0.12	0.38	n.s.	0.03
Except	0.63	0.20	0.01	0.15
Change	0.16	0.04	0.01	0.25
Constant	–1.33	0.49	—	—

Note: Percentage predicted correctly: 67.2; $N = 573$. MLE = maximum likelihood estimate; S.E. = standard error; Sig = significance level; n.s. = not significant; dash = not applicable.

Our next test concerns attitudinal variables. Although we do not have direct measures of the judges' ideology, we know at least two factors related to their ideology. First, we know the partisanship of their appointing president. Innumerable studies have demonstrated that Republican presidents on average choose more conservative judges than do Democratic presidents (Carp and Rowland 1983; Scigliano 1971; Tate 1981, 1991). We also know the region of the judge. Again, we know that southern judges tend on average to be more conservative than nonsouthern judges (Songer and Davis 1990; Tate 1981, 1991). We added these attitudinal surrogates to our fact-pattern model from Table 10-2 and present the results in Table 10-4.

Both variables are in the proper direction, are highly significant, and substantively meaningful. A search that has a 50 percent chance of being upheld by a Republican appointee has only a 28 percent probability of being upheld by a Democrat. Alternatively, a search that has a 50 percent chance of being upheld by a northern judge would have a 70 percent chance of being upheld by a southern judge. Knowing these factors increases our ability to predict the judges's decisions from a 66 percent baseline (fact patterns only) to 71.2 percent. Thus, knowing factors related to the judges' ideology not only significantly increases our ability to predict their decisions, it offers a substantially greater improvement than did the legal variable, Supreme Court change. That is, it is much more important in understanding these decisions to know the circuit court judges' preferences than it is to

Table 10-4 Logistic Regression of Search and Seizure Fact Pattern Model Plus Attitudinal Measures, 1962-1990

Variable	*MLE*	*S.E.*	*Sig (p<x)*	*Impact*
Home	–0.64	0.32	0.03	–0.15
Business	–1.08	0.44	0.01	–0.25
Car	–0.43	0.33	0.10	–0.11
Person	–0.41	0.39	n.s.	–0.10
Incident	0.68	0.24	0.01	0.16
After	0.50	0.29	0.05	0.12
Unlawful	–1.63	1.09	0.07	–0.30
Warrant	0.79	0.24	0.01	0.19
Probable cause	0.97	0.23	0.01	0.23
Extent	–0.28	0.39	n.s.	–0.07
Except	0.68	0.20	0.01	0.16
Democratic president	–0.94	0.20	0.01	–0.22
Southern	0.84	0.22	0.01	0.20
Constant	–0.25	0.49	—	—

Note: Percentage predicted correctly: 71.2; $N = 559$. MLE = maximum likelihood estimate; S.E. = standard error; Sig = significance level; n.s. = not significant; dash = not applicable.

know the Supreme Court's preferences.

Finally, we combine our legal and attitudinal variables into a single model to create the hierarchical model. Thus, we can statistically determine whether attitudinal and legal factors exert independent influence on circuit court decisions after each is controlled for the other. Note the following: Between 1969 and 1990, the Supreme Court became increasingly conservative because of the appointments by Richard Nixon, Gerald Ford, Ronald Reagan, and George Bush. So too did the circuit courts become more conservative, for essentially the same reasons.[19] The hierarchical model allows us to determine whether the conservatism of the circuit court judges was due to their own conservatism, the Supreme Court's conservatism, or both. We present the results in Table 10-5.

The results indicate that our legal variable, Supreme Court Change, and our attitudinal variables, measuring region and party, continue to exert a strong influence on the decisions of circuit court judges. All are significant below the .01 level, and all have the ability to shift dramatically the likelihood that a search will be upheld.

Returning to Figure 10-2, we can now draw some conclusions about the three models. The data reject the legal model as a complete explanation of circuit court decisions because the attitudes of circuit court judges clearly have an effect on their decisions, even when there is a control for the facts in the cases. The data also reject the pure attitudinal model as

Table 10-5 Logistic Regression of Search and Seizure Fact Pattern Model Plus Supreme Court Change and Attitudinal Measures, 1962-1990

Variable	*MLE*	*S.E.*	*Sig ($p<x$)*	*Impact*
Home	–0.72	0.32	0.02	–0.17
Business	–1.23	0.45	0.01	–0.27
Car	–0.50	0.33	0.07	–0.12
Person	–0.48	0.39	n.s.	–0.12
Incident	1.02	0.27	0.01	0.24
After	0.66	0.30	0.02	0.16
Unlawful	–1.22	1.09	n.s.	–0.27
Warrant	0.83	0.25	0.01	0.20
Probable cause	0.94	0.23	0.01	0.22
Extent	–0.21	0.39	n.s.	–0.05
Except	0.63	0.21	0.01	0.15
Change	0.13	0.04	0.01	0.21
Democratic president	–0.93	0.20	0.01	–0.22
Southern	0.78	0.22	0.01	0.19
Constant	–0.86	0.53	—	—

Note: Percentage predicted correctly: 72.3; $N = 559$. MLE = maximum likelihood estimate; S.E. = standard error; Sig = significance level; n.s. = not significant; dash = not applicable.

a complete explanation of their decisions because changes in Supreme Court doctrine affect the decisions of circuit court judges, even when there are controls for facts and attitudes. Instead, the data demonstrate that the hierarchical model, as applied to circuit court decisions, dominates both alternatives: as predicted by that model, both attitudes and Supreme Court doctrine matter. Of course, this does not mean the hierarchical model is "true" in some transcendental sense. But the hierarchical model does provide a simple and useful starting place for understanding the decision making of lower-court judges. Clearly this class of models deserves more attention.

Conclusion

From an empirical standpoint, several elements are prominent. First, our data show that circuit court judges consistently respond to case stimuli or fact patterns in deciding cases, at least in search and seizure law. Plus, the similarity in the way judges on the courts of appeals and the Supreme Court respond to these fact patterns is remarkable. This finding raises two possibilities: (1) either the long-term precedents established by the Court (for example, that a search pursuant to a warrant should carry a greater initial presump-

tion of validity than a similar search without a warrant) have a substantial effect on the decisions of the appeals court, or (2) the attitudinal filters that appeals court judges use to evaluate cases are similar to those employed by the justices on the Supreme Court. That is, the extreme similarity in appeals court and Supreme Court decision making may reflect either institutional constraints imposed on lower courts or attitudes shared by higher and lower courts. Because of the inherent ambiguity of the fact-pattern analysis, efforts to distinguish between the two possibilities must move beyond case stimuli. We do so here by examining changing Supreme Court preferences and the attitudinal predispositions of the judges. Both sets of factors add to our understanding of circuit court decisions. But substantially more explanatory power comes from the attitudinal factors than the legal factor.

Obviously, care must be taken in interpreting these findings. First, we have useful but imperfect measures of legal and attitudinal variables. Stronger measures might lead to stronger results. Second, we have examined only one set of issues, search and seizure cases. We cannot be sure our discovered mix of legal and attitudinal influences would hold in other areas of the law, nor even whether these factors would continue to explain circuit court decisions at all.

Nonetheless, the findings have interesting implications for theories of judicial decision making. Judicial scholars have long debated the relative merits of the legal and the attitudinal models for understanding Supreme Court decision making. At the level of the Supreme Court, the evidence supporting the attitudinal model is strong (Segal and Spaeth 1993). Nonetheless, many scholars believe that legal factors must be important, if only in subtle ways (Epstein and Kobylka 1992; George and Epstein 1992; Rogers Smith 1988). Our evidence for the hierarchical model can be seen as bolstering this view, at least for judges below the apex of the judicial hierarchy. In addition, we believe our brief discussion of the hierarchical model—viewing lower-court judges as value driven, as in the attitudinal model, but constrained by institutional rules and procedures from the free exercise of those values—hints at a productive way to move the theoretical debate.

Finally, despite the inherent limits of studying only one branch of the law, the results may be more generalizable than they first appear. Previous research has suggested that controversial civil liberties decisions of the Warren Court are among those that lower courts are *least* likely to comply (Baum 1978). Thus, our finding of responsiveness to the Supreme Court in civil liberties law may suggest even greater responsiveness in other areas.

Notes

1. Fewer than one-half of 1 percent of the decisions of the courts of appeals are reviewed by the Supreme Court (Songer 1991).

2. For more on models, see Chapter 1 of this book.

3. The *Brown* decision outlawed the "separate-but-equal" system of racially segregated schools. The *Gideon* decision guaranteed all defendants accused of a felony in state courts the right to court-appointed counsel if they could not afford it.

4. *Roe v. Wade* created a constitutional right to abortion that could not be abridged through the first two trimesters of pregnancy. *Furman v. Georgia* struck down capital punishment laws as then imposed in the United States. The Supreme Court allowed states to reinstitute the death penalty in a series of decisions in 1976.

5. In Chapter 13, Harold J. Spaeth considers the applicability of legal and attitudinal models to decision making on the U.S. Supreme Court.

6. The Fourth Amendment details the requirements for a warrant but does not state when a warrant is required. The amendment's prohibition is on *unreasonable* searches and seizures, a term that it does not define. Nor do we find the intent of the framers useful in explaining how the circuit courts actually answer questions regarding telephone wiretaps, border searches, drug testing, or other modern problems.

7. See *South Carolina v. Gathers* (1989) at 892 [Scalia dissenting] and *Payne v. Tennessee* (1991) at 737.

8. This section relies on Segal and Spaeth 1993, 67-68.

9. Congress can overturn the Court's statutory decisions, but the extent to which the Court actually considers such future actions in its decisions is not clear.

10. These dreams may be fed by the knowledge that fourteen of the last twenty people nominated for the Supreme Court were appeals court judges at the time of their nomination.

11. For example, when David Windsor filed suit claiming that he sought to foil Saint Peter who was actually the Black Devil and the father of Judas Iscariot and that therefore the authorities should arrest the widow of Martin Luther King (alias Matilda Winfield) before she could destroy the Roman Catholic Church by installing herself as a "Black Popess," the court of appeals presumably felt it was compelled by precedent to affirm the ruling of the district court that Windsor lacked standing to bring his suit *(Windsor v. Pan American Airways,* 1984).

12. For example, it could be that cases in the 1980s, when the Supreme Court was more conservative, were more likely to contain warrants. Conservative lower-court decisions could be the result of a more conservative Supreme Court or more reasonable searches by the police. By controlling for whether warrants existed, we can determine whether it was a more conservative Supreme Court that led to changes in lower-court decisions.

13. We used Westlaw, a computerized legal information service, to identify all published decisions of the courts of appeals that considered the admissibility of evidence secured through a search and seizure of evidence. A random sample of forty cases per year was selected from these decisions. But since our dependent variable (whether the search was upheld) would be seriously skewed in such a sample, we selected a subset of cases for analysis that consisted of all cases in which the court declared the evidence from the search inadmissible and an 11 percent random sample of those in which the validity of the search was upheld.

14. For more on the statistical tool used in this chapter, see Appendix B of this book.

15. MLEs represent the change in the log of the odds ratio of finding a search reasonable. See Segal and Spaeth (1993, appendix) for a discussion.

16. We report only through the .01 level in the tables.

17. The mean of our stratified sample is .503, for a 32 percent reduction in error.

18. We report the effect of this variable in the tables as it changes over its full range of 0 to 7.

19. Although the Democrat Jimmy Carter made no Supreme Court appointments, he did make fifty-six circuit court appointments. Thus the conservative tide on the courts of appeals was temporarily reversed from 1977 to 1980.