

Models of Decision Making

The Attitudinal and Rational Choice Models

The legal model, as Chapter 2 explains, holds that the Supreme Court decides disputes before it in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, and the intent of the framers. We have shown that both litigants generally have precedents supporting them and each side typically alleges that either the plain meaning of the legal provisions at issue and/or the intent of the law makers supports its position. If various aspects of the legal model can support either side of any given dispute that comes before the Court, and the quality of these positions cannot be reliably and validly measured a priori, then the legal model hardly satisfies as an explanation of Supreme Court decisions. By being able to “explain” everything, in the end it explains nothing.

THE ATTITUDINAL MODEL

We move now to an alternative explanation of the Court’s decisions, the attitudinal model. The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics.¹ This 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.

¹ See Forrest Maltzmann, James Spriggs, and Paul Wahlbeck, *The Collegial Game* (New York: Cambridge University Press, 2000), ch. 1.

The Legal Realists

The attitudinal model has its genesis in the legal realist movement of the 1920s. The movement, led by Karl Llewellyn and Jerome Frank, among others, reacted to the conservative and formalistic jurisprudence then in vogue. According to the classical legal scholars of the time, law was

a complete and autonomous system of logically consistent principles, concepts and rules. The judge's techniques were socially neutral, his private views irrelevant; judging was more like finding than making, a matter of necessity rather than choice.²

Legal jurisprudence had hardly advanced since the great British jurist Sir William Blackstone wrote in the eighteenth century that judges "are the depositories of the laws; the living oracles, who must decide in all cases of doubt." He is sworn

to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law.³

Against this nescient theory of a static law that judges merely find rather than make, the legal realists argued that lawmaking inhered in judging. According to Karl Llewellyn, the first principle of legal realism is the "conception of law in flux, of moving law, and of judicial creation of law."⁴

Judicial creation of law did not result because bad jurists sought power for themselves, but as inevitable fallout from an ever-changing society. According to Jerome Frank:

The layman thinks that it would be possible so to revise the law books that they would be something like logarithm tables, that the lawyers could, if only they would, contrive some kind of legal sliderule for finding exact legal answers. . . .

² Yosai Rogat, "Legal Realism," in Paul Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan, 1972), p. 420.

³ Quoted in Walter F. Murphy and C. Hermann Pritchett, eds., *Courts, Judges and Politics*, 4th ed. (New York: Random House, 1986), pp. 14, 15.

⁴ Karl Llewellyn, "Some Realism about Realism - Responding to Dean Pound," 44 *Harvard Law Review* 1237 (1931).

But the law as we have it is uncertain, indefinite, subject to incalculable changes. This condition the public ascribes to the men of law; the average person considers either that lawyers are grossly negligent or that they are guilty of malpractice, venally obscuring simple legal truths in order to foment needless litigation, engaging in a guild conspiracy of distortion and obfuscation in the interest of larger fees. . . .

Yet the layman errs in his belief that this lack of precision and finality is to be ascribed to lawyers. The truth of the matter is that the popular notion of the possibilities of legal exactness is based upon a misconception. The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it – more confused than ever, in our kaleidoscope age.

Even in a relatively static society, men have never been able to construct a comprehensive, eternalized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times. . . . Our society would be straight-jacketed were not the courts, with the able assistance of lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions.⁵

If judges necessarily create law, how do they come to their decisions? To the legal realists, the answer clearly is not to be found in “legal rules and concepts insofar as they purport to describe what either courts or people are actually doing.”⁶ Judicial opinions containing such rules merely rationalize decisions; they are not the causes of them.

Without clear answers to how judges actually made decisions, the legal realists called for an empirical, scientific study of law,⁷ taking as dictum the statement of Oliver Wendell Holmes, Jr., that “the prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by law.” “The object of our study, then, is prediction.”⁸

The Behavioralists

Scholars responded only slowly to the call for scientific study of law. Jerome Frank attempted to use the theories of Sigmund Freud and Jean

⁵ Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1949), pp. 5-7.

⁶ Llewellyn, *op. cit.*, n. 4, *supra*, p. 1237.

⁷ Hessel Yntema, “Legal Science and Reform,” 34 *Columbia Law Review* 209 (1934).

⁸ Oliver Wendell Holmes, “The Path of the Law,” 10 *Harvard Law Review* 460-61, 457 (1897). While an effective counsel need not be able to explain decisions as long as he can predict them, for social scientists, explanation is paramount.

Piaget to explain judicial decisions, but understandably little has come of this line of work.

Meanwhile, the heretofore misnomered discipline of political science began to test its theories scientifically. This movement, known as behavioralism, argued that

1. Political science can ultimately become a science capable of prediction and explanation. . . .
2. Political science should concern itself primarily, if not exclusively, with phenomena which can actually be observed. . . .
3. Data should be quantified and "findings" based upon quantifiable data. . . .
4. Research should be theory oriented and theory directed.⁹

Among early behavioral works was a 1948 book by C. Herman Pritchett entitled *The Roosevelt Court*. It systematically examined dissents, concurrences, voting blocs, and ideological configurations from the Court's nonunanimous decisions between 1937 and 1947. Pritchett did not provide a theory of Supreme Court decision making, yet he made the assumptions behind his work quite explicit. "This book, then, undertakes to study the politics and values of the Roosevelt Court through the nonunanimous opinions handed down by the justices" and acknowledged that the justices are "motivated by their own preferences."¹⁰

The Psychological Influence

Glendon Schubert, drawing on the work of psychologist Clyde Coombs, first provided a detailed attitudinal model of Supreme Court decision making.¹¹ Schubert assumed that case stimuli and the justices' values could be ideologically scaled. 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 uncovers 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.

⁹ Albert Somit and Joseph Tanenhaus, *The Development of Political Science* (Boston: Allyn and Bacon, 1967), pp. 177-78.

¹⁰ (New York: Macmillan, 1948), pp. xii, xiii.

¹¹ Clyde Coombs, *A Theory of Data* (New York: Wiley, 1964); Glendon Schubert, *The Judicial Mind* (Evanston: Northwestern University Press, 1965). See also Glendon Schubert, *The Judicial Mind Revisited* (New York: Oxford University Press, 1974).

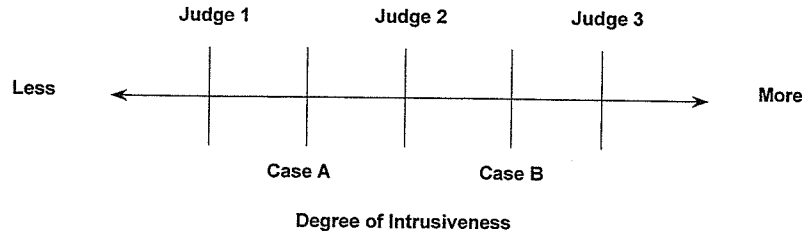


FIGURE 3.1. Justices and cases in ideological space.

According to Schubert, 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 3.1, where A represents the first search and B the second. Presumably, any search and seizure will locate on the line; depending on case characteristics 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 vs. car, or full search vs. 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 justices, 1, 2, and 3, who are respectively liberal, moderate, and conservative. They could easily be ranked 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 justice 1 is so liberal that he or she 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.¹² Thus we could place justice 1 to the left of case A. Justice 2 might not be quite so strict as justice 1; he or she would uphold the search of the home with a warrant, but would not uphold the warrantless search. Thus we could place justice 2 to the right of case A but to the left of case B. Finally, justice 3 might find the warrant requirement fairly unimportant and would uphold any search he or she considered reasonable. Since prob-

¹² See, e.g., Justice Douglas's concurrence in *Berger v. New York*, 388 U.S. 41 (1967), at 64.

able cause supported both searches, both are reasonable. Thus we could place justice 3 to the right of case B. The justices are placed in ideological space with the cases in Figure 3.1.

Schubert refers to the positions of the justices as their “ideal points” (i-points), though as we see below the term is a misnomer. According to Schubert, a justice would vote to uphold all searches that are dominated by (i.e., are to the left of) the justice’s ideal point and would vote to strike all searches that dominate (i.e., are to the right of) the justice’s ideal point. If this is the situation, though, the i-points represent not the ideal points of each justice, but the indifference point. Justice 1 upholds all searches to the left of her indifference point, rejects all searches to the right of her indifference point, and is indifferent whether searches at that point are upheld or overturned.

In addition to Schubert, Harold Spaeth investigated the influence of attitudes on the justices’ behavior in a series of articles and monographs. Relying on the work of psychologist Milton Rockeach, Spaeth defined his central concept, an attitude, as a relatively enduring “interrelated set of beliefs about an object or situation. For social action to occur, at least two interacting attitudes, one concerning the attitude object and the other concerning the attitude situation must occur.”¹³ The objects are the direct and indirect parties to the suit; the situations are the dominant legal issue in the case.

In focusing on attitudes, Spaeth’s work begins at a microanalytic level. For example, Spaeth and Peterson gather the Court’s decisions into discrete sets of cases, each of which is organized on the basis of the “attitude situation” within which the “attitude object” is encountered. These are categorized as specifically in content as the decisions of the Court permit. The theory on which the model is based assumes that sets of these cases that form around similar objects and situations will correlate with one another to form issue areas (e.g., criminal procedure, First Amendment freedoms, judicial power, federalism) in which an interrelated set of attitudes – that is, a value – will explain the justices’ behavior (e.g., freedom, equality, national supremacy, libertarianism).¹⁴

¹³ Harold J. Spaeth, *An Introduction to Supreme Court Decision Making: Revised Edition* (New York: Chandler Publishing, 1972), p. 65.

¹⁴ Harold J. Spaeth and David J. Peterson, “The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making,” 15 *American Journal of Political Science* 415 (1971).

The Economics Influence

While building on Spaeth's earlier psychological works, David Rohde and Harold Spaeth provide an explanation why the justices are able to engage in attitudinal behavior.¹⁵ Whereas Schubert viewed the attitudinal model as a general model of political decision making,¹⁶ Rohde and Spaeth, influenced by the application of economic notions of rationality to political decisions, recognize that decisions depend on goals, rules, and situations. While their definitions may have been updated in more recent years, the economics influence is obvious.

Goals

To Rohde and Spaeth, goals simply mean that "actors in political situations are outcome oriented; when they choose among a number of alternatives, they pick the alternative that they perceive will yield them the greatest net benefit in terms of their goals."¹⁷ To Rohde and Spaeth:

the primary goals of Supreme Court justices in the decision-making process are *policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.¹⁸

Rules

Next, they contend that an actor's choices will depend on the rules of the game, "the various formal and informal rules and norms within the framework of which decisions are made. As such, they specify which types of actions are permissible and which are impermissible, the circumstances and conditions under which choice may be exercised, and the manner of choosing."¹⁹

The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices enormous latitude to reach decisions based on their personal policy preferences. Members of the Supreme Court can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload. While the absence of these factors may hinder the personal

¹⁵ David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976).

¹⁶ Schubert, 1965, *op. cit.*, n. 11, *supra*, pp. 15-21.

¹⁷ Rohde and Spaeth, *op. cit.*, n. 15, *supra*, p. 70. ¹⁸ *Id.* at 72. ¹⁹ *Id.* at 71.

policy-making capabilities of lower court judges or judges in other political systems, their presence enables the justices to engage in “rationally sincere behavior.”²⁰

We start our elaboration of these issues with the fact that unlike most other appellate courts, the Supreme Court *controls its own docket*. While this does not guarantee that the justices will vote their policy preferences, it is a requisite for their doing so. Many meritless cases undoubtedly exist that no self-respecting judge would decide solely on the basis of his or her policy preferences. If a citizen sought to have President Clinton’s midnight pardons declared unconstitutional, and if the Supreme Court had to decide the case, we would not expect the votes in the case to depend on whether the justices favored the particular pardons. But because the Supreme Court does have control over its docket, the justices would refuse to decide such a meritless case. Those that the Court does decide tender plausible legal arguments on both sides.

Echoing our position on the discretion inherent in judicial lawmaking, Judge Richard Posner declares:

Where the Constitution is clear, for example in entitling each state to two senators regardless of population, there is no need for judicial review to determine whether there has been a violation. The violation would be obvious, and (save in an extraordinary crisis) the people would be indignant. Where the Constitution is unclear, judicial review is likely to be guided by the political prejudices and the policy preferences of the judges rather than by the Constitution itself. The text is so old, and the controversies over its meaning are so charged with political significance, that constitutional “interpretation” in doubtful cases (the only cases likely to be litigated) is bound to be creative and discretionary rather than constrained and interpretive.²¹

With regard to *electoral accountability*, many state court judges are subject to electoral sanctions. Such judges do indeed react to factors such as public opinion at least in highly salient areas.²² But in low visibility areas and especially in cases that contain a federal question, state supreme courts do not appear to follow public wants, according to a

²⁰ Jeffrey A. Segal, “Separation of Power Games in the Positive Theory of Law and Courts,” 91 *American Political Science Review* 28 (1997).

²¹ Richard A. Posner, “Appeal and Consent,” *The New Republic*, August 16, 1999, pp. 36–40 at 37.

²² James Kuklinski and John Stanga, “Political Participation and Governmental Responsiveness,” 73 *American Political Science Review* 1090 (1979); James Gibson, “Environmental Constraints on the Behavior of Judges,” 14 *Law and Society Review* 343 (1980); Paul Brace and Melinda Gann Hall, “Neo-Institutionalism and Dissent in State Supreme Courts,” 52 *Journal of Politics* 54 (1990).

recent study.²³ The evidence on life-tenured federal court judges, however, suggests no such influence, including those who sit on the Supreme Court.²⁴

Relatedly, justices are virtually immune from *political accountability*. Congress can impeach Supreme Court justices, but this has happened only once and the vote to remove failed.²⁵ The Court's appellate jurisdiction totally depends on Congress and Congress may alter it as it sees fit. Rarely, though, has Congress used this power to check the justices.²⁶ Overall the negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court. Nevertheless, we do note that there is some evidence that two Justices, Roberts in 1937 and Harlan in 1959, reversed previously unpopular decisions in the face of threats by Congress, but such examples are rare indeed. Moreover, while the President appoints the justices, he has no authority over them once they are confirmed. *United States v. Nixon* forcefully illustrates this point, where three Nixon appointees joined a unanimous Court requiring the President to relinquish the Watergate tapes, and thus delivered the coup de grace that forced Nixon to resign.²⁷

This is not to say that a lack of political finality necessarily characterizes all Supreme Court decisions. Congress can overturn judicial interpretations of statutory language and amendments can undo constitutional interpretation. Nevertheless, the fact that the President and the Senate choose the justices means that the justices' preferences will rarely be out of line with that of the dominant political coalition at the time of their individual selection. And even if on some matters they are, the difficulty of overriding Supreme Court decisions, even statutory

²³ Sara C. Benesh and Wendy L. Martinek, "State-Federal Judicial Relations: The Case of State Supreme Court Decision Making in Confession Cases," paper presented at Federalism and the Courts: A National Conference, Athens, Ga., February 2001, and Sara C. Benesh and Wendy L. Martinek, "State Court Decision Making in Confession Cases," 23 *Justice System Journal* (2002) [forthcoming]. The authors' findings in both indicate that the new institutionalism may be relatively inoperative in other than high-salience areas like abortion and death penalty.

²⁴ E.g., Micheal Giles and Thomas G. Walker, "Judicial Policy-Making and Southern School Segregation," 37 *Journal of Politics* 917 (1975). See Chapter 10, *infra*, for further discussion.

²⁵ The justice was Samuel Chase, a Federalist, whom the Jeffersonians impeached in 1804.

²⁶ One such instance occurred after the Civil War when Congress denied the Court authority to hear appeals of persons detained by the military authorities. The Supreme Court complied with Congress's decision in *Ex parte McCordle*, 7 Wallace 506 (1869).

²⁷ 418 U.S. 683 (1974).

ones,²⁸ in a decentralized legislative environment means that the Court typically has little to fear from Congress. We detail these and other factors that protect the Court from Congress when we discuss the rational choice model, below.

Moreover, the supermajorities needed to propose and ratify an amendment make constitutional overruling vastly more difficult. Constitutional amendments have overturned only five Supreme Court decisions: the Eleventh Amendment (1798) overturned *Chisholm v. Georgia*,²⁹ which had allowed individuals to sue states in federal courts; the Fourteenth Amendment (1868) overturned *Scott v. Sandford*,³⁰ which had declared blacks ineligible for United States citizenship; the Sixteenth Amendment (1913) overturned *Pollock v. Farmer's Loan and Trust Company*,³¹ which had voided the federal income tax; the Nineteenth Amendment (1920) overruled *Minor v. Happersett*,³² which precluded the Fourteenth Amendment from guaranteeing women's suffrage; and the Twenty-sixth Amendment (1971) overturned *Oregon v. Mitchell*,³³ which had struck a federal law permitting eighteen-year-olds to vote in state elections.

With regard to *ambition*, lower court judges may desire higher office and thus be influenced by significant political others. Lobbying for a Supreme Court seat from the lower courts, through speeches or through written opinions, is not uncommon. One interested in reaching the High Court could hardly vote his or her personal policy preferences on abortion during the Bush administrations if those preferences were prochoice. Lower court judges might also be interested in other political positions besides the Supreme Court. Howell Heflin (D-Ala.) went from the Supreme Court of Alabama to the United States Senate. Thus we cannot assume that those interested in higher office will necessarily vote their personal policy preferences.

Efforts to seek higher office – assuming that such exists – is most improbable for today's justices. During the first decade of the Court's existence, members used the office as a stepping stone to run for positions such as governor,³⁴ but today few – if any – positions have more power, prestige, and security than that of Supreme Court justice. Three

²⁸ See Beth Henschen, "Statutory Interpretations of the Supreme Court," 11 *American Politics Quarterly* 441 (1983).

²⁹ 2 Dallas 419 (1793). ³⁰ 19 Howard 393 (1857).

³¹ 157 U.S. 429, 158 U.S. 601 (1895).

³² 88 U.S. 162 (1874). ³³ 400 U.S. 112 (1970).

³⁴ The first chief justice, John Jay, twice ran for governor of New York while on the Supreme Court and left the bench when he finally won.

times during the twentieth century members have resigned for alternative (or at least the potential of alternative) political positions, but in only one case was the move for a potentially higher office. That occurred in 1916, when Charles Evans Hughes resigned in order to seek the presidency. The other two cases occurred in 1942, when the exigencies of World War II led President Roosevelt to ask James Byrnes to become Director of Economic Stabilization, and 1965, when President Johnson convinced Arthur Goldberg to become United Nations Ambassador in order, Goldberg believed, to negotiate an end to the Vietnam War.

Finally, the Supreme Court is the *court of last resort*. Other judges are subject to courts superior to their own. Unless they wish to be reversed, they must follow the legal and policy pronouncements of higher courts. Though the evidence is mixed, examination of appellate court decisions in several different issue areas shows little overtly noncompliant behavior.³⁵ The Supreme Court, of course, sits at the pinnacle of both the federal and state judicial systems. No court overrules it.³⁶

Situations

Because few areas in political life can be well represented by unconstrained choice, judicial scholars have carefully limited the attitudinal model in its pure form to the one area where it most plausibly applies: the decision on the merits. More broadly, attitudinal works have gone beyond the unconstrained-choice model when examining factors such as the vote on certiorari, formation of the majority opinion, opinion assignment, and so on. In these areas, attitudinalists expect that attitudes will be a crucial factor shaping decisions, but not the only factor. Such works have extended the pure model by *starting* with notions of attitudes, values, and policy goals and intuitively deriving hypotheses therefrom based on the rules and situations facing the Court. Thus as far back as 1959 Glendon Schubert argued that the justices' certiorari decisions would depend on their beliefs as to what would happen on the

³⁵ See Donald R. Songer, "An Overview of Judicial Policymaking in the United States Courts of Appeals," in John B. Gates and Charles A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington, D.C.: Congressional Quarterly, 1990), and Sara C. Benesh, *The U.S. Court of Appeals and the Law of Confessions: Perspectives on the Hierarchy of Justice* (New York: LFB Scholarly Publishing, 2002).

³⁶ In approximately one fifth of the decisions in which it overruled its own precedents, the Warren, Burger, and Rehnquist Courts *affirmed* the lower court's decision that overruled it! See Malia Reddick and Sara C. Benesh, "Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework," *21 Justice System Journal* 117 (2000).

merits.³⁷ In the 1970s Rohde and Spaeth examined the likelihood of minimum winning opinion coalitions while incorporating the anomaly of decision making under threat situations.³⁸ And in this book's predecessor volume we showed that opinion writers frequently have to move beyond their sincere preferences if they hope to obtain a majority opinion, especially in closely divided cases. On the merits, though, the attitudinal model has produced clear and convincing evidence of the overwhelming importance of the justices' attitudes and values, as we demonstrate in Chapter 8.

THE RATIONAL CHOICE MODEL

The final model we consider is the rational choice model, which we discussed briefly above in terms of its influence on the attitudinal model. The rational choice paradigm represents an attempt to apply and adapt the theories and methods of economics to the entire range of human political and social interactions. Because of the scope of this paradigm, innumerable rational choice models that rest on a common set of assumptions exist. While scholars might quibble about the core of rational choice, we adopt William Riker's statement of its essence:

1. Actors are able to order their alternative goals, values, tastes and strategies. This means that the relation of preference and indifference among the alternatives is transitive. . . .
2. Actors choose from available alternatives so as to maximize their satisfaction.³⁹

The first statement requires that individuals can rank alternatives, such that an individual either prefers one alternative to another or is indifferent between them. For example, a justice might prefer, say, reversing a lower court decision to not hearing the case (i.e., denying cert), and might prefer not hearing the case to affirming it. Moreover, individual

³⁷ Glendon Schubert, *Quantitative Analysis of Judicial Behavior* (Glencoe, Ill.: Free Press, 1959).

³⁸ Rohde and Spaeth, *op. cit.*, n. 15, *supra*, chs. 8 and 9.

³⁹ William H. Riker, "Political Science and Rational Choice," in James E. Alt and Kenneth A. Shepsle, eds., *Perspectives on Positive Political Economy* (New York: Cambridge University Press, 1990), p. 172. We note, additionally, that there may be serious differences among rational choice theorists about noncore assumptions. We rely primarily, though not exclusively, on the writings of William Riker, who more than anyone created the field of positive political theory (the application of rational choice theory to political phenomena).

The Decision on the Merits

The Attitudinal and Rational Choice Models

In Chapters 2 and 3 we examined three models of Supreme Court decision making: legal, attitudinal, and rational choice. While there potentially may be any number of ways for rational choice theorists to model the decision on the merits, overwhelmingly, the most prominent application is the separation-of-powers model. We continue our look at the Court's decision on the merits with examinations of the attitudinal and separation-of-powers models.

THE ATTITUDINAL MODEL

Recall from Chapter 3 that the attitudinal model holds that the justices base their decisions on the merits on the facts of the case juxtaposed against their personal policy preferences. We thus examine the influence of case facts (or case stimuli), which are central to both attitudinal and legal models; attitudes, which are central only to the former; and the interaction between the two.

Facts

Case stimuli or facts are central to the decision making of all judges. Trial judges and juries must determine, for example, whether criminal suspects committed the deeds alleged by the prosecution. Appellate courts often must decide, based on the facts of the case as determined by the trial court judge and jury, whether the defendant's conviction was obtained in violation of the Constitution. Determinations of whether a given conviction or a given law violates constitutional rights necessarily

depend on the facts of the case. Speaking out against the President is not the same as exposing nuclear secrets. Nor is libeling the President the same as libeling a private individual. Prohibiting abortion after conception is not the same as prohibiting abortion after viability.

To phrase the matter from the standpoint of attitude theory, behavior may be said to be a function of the interaction between an actor's attitude toward an "object" (i.e., persons, places, institutions, and things) and that actor's attitude toward the situation in which the object is encountered.¹ Insofar as judicial decision making is concerned, attitude objects are the litigants that appear before a court, while attitude situations consist of the "facts," that is, what the attitude object is doing, the legal and constitutional context in which the attitude object is acting. The examples in the preceding paragraph illustrate the situational context. "Objects," on the other hand, include indigents, businesses, persons accused of crime, women, minorities, labor unions, juveniles, and so on. As far as the Supreme Court is concerned, research has shown that situations predict behavior much better than objects.² Indeed, matters could hardly be otherwise. Responses to a survey of people's attitudes toward students, for example, lack meaning unless the inquiry is placed in a specific context: Students doing what? Rioting in the streets or studying in the library?

To a greater extent than attitude objects, situations are subjectively perceived. Justices not uncommonly dispute the facts of a case. Sometimes the justices accept as true what is empirically false. Consider the Court's acceptance of the lower court's finding in *Buck v. Bell*³ that the Buck family had produced three generations of imbeciles. Contrary to the "facts" of the case, Carrie Buck was a woman of normal intelligence

¹ Milton Rokeach, *Beliefs, Attitudes, and Values* (San Francisco: Jossey-Bass, 1968), pp. 112-22.

² Harold J. Spaeth and Douglas R. Parker, "Effects of Attitude toward Situation upon Attitude toward Object," 73 *Journal of Psychology* (1969), 173-82; Milton Rokeach and Peter Kliejunas, "Behavior as a Function of Attitude-toward-Object and Attitude-toward-Situation," 22 *Journal of Personality and Social Psychology* (1972), 194-201; Harold J. Spaeth et al., "Is Justice Blind: An Empirical Investigation of a Normative Ideal," 7 *Law and Society Review* (1972), 119-37.

Bush v. Gore serves as the most prominent example of the attitude-toward-object (presidential contenders Bush and Gore) dominating the attitude-toward-situation (court-ordered recounts under a feigned equal-protection argument). So, too, the First Amendment appears to have lesser protections for antiabortion protesters. See, e.g., *Madsen v. Women's Health Center*, 512 U.S. 753 (1994).

³ 274 U.S. 200 (1927).

whose daughter made the first-grade honor roll.⁴ Conversely, what is empirically true the justices may assert to be false. Consider, for example, its unanimous decision that Long Island is not an island but an extension of the mainland.⁵

With these caveats in mind, we examine the role of case stimuli or facts in the decisions of the Supreme Court. We choose search and seizure as our substantive area of investigation, and we do so for two reasons. First, the situational context – the facts – in which law enforcement authorities conduct searches are readily identifiable and limited in number. Second, search and seizure is one of the many areas about which justices and scholars bewail the Court's alleged inconsistencies.⁶ The question of whether a given search or seizure violates the Fourth Amendment is also of great substantive importance, for as of this writing, evidence seized in violation of the Constitution may not be used in criminal trials.⁷ Thus, in the immortal words of Benjamin Cardozo, "the criminal is to go free because the constable has blundered."⁸

Specification

In determining what variables to include for analysis, we consider those facts that relate to the prior justification for the search (warrant and probable cause), the place of the intrusion (e.g., home or car), the extent of the intrusion (full searches vs. lesser intrusions, such as frisks), and various exceptions to the warrant requirement, including searches incident to arrest.⁹

The most basic requirements for the reasonableness of a search are a warrant and probable cause. Probable cause is generally required whether there is¹⁰ or is not a warrant,¹¹ though evidence from warrants issued without probable cause can be used in court if the police officers acted in good faith.¹²

⁴ Stephen Jay Gould, "Carrie Buck's Daughter," *Natural History*, July 1984, p. 14.

⁵ *United States v. Maine*, 469 U.S. 504 (1985).

⁶ See Jeffrey A. Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981," 78 *American Political Science Review* 891 (1984), at 891.

⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961). But see *United States v. Leon*, 468 U.S. 897 (1984), creating a "good-faith" exception to the exclusionary rule.

⁸ *People v. Defore*, 242 N.Y. 13 (1926), at 21. ⁹ See Segal, *op. cit.*, n. 6, *supra*.

¹⁰ *United States v. Harris*, 403 U.S. 573 (1971).

¹¹ *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹² *United States v. Leon*, 468 U.S. 897 (1984).

For a search to be unreasonable it generally must occur at a place where the accused has an expectation of privacy.¹³ The greatest expectation of privacy is in one's home. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹⁴ Commercial premises are likewise given great protection. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries."¹⁵ Yet, "commercial premises are not as private as residential premises."¹⁶ Still receiving protection, but to a lesser degree, are one's person¹⁷ and one's car (or other motorized vehicle),¹⁸ but the protection afforded them is nevertheless great compared with places where one has no property interest,¹⁹ such as the home of a third party.

The type of search can be as determinative of reasonableness as the place of the search. Limited intrusions such as stop and frisks or detentive questioning require less prior justification than do full searches.²⁰

Finally, there are well-established exceptions to the warrant requirements. The most important of these is the right to search incident to a lawful arrest.²¹ This right generally extends to immediate searches of the arrestee and the area under his or her control. Lesser authority exists for arrests that follow upon but are not incident to lawful arrests.²² Other exceptions include searches of evidence in plain view,²³ searches with the permission of those having a property interest in the area being searched,²⁴ searches after hot pursuit,²⁵ searches at fixed or functional borders,²⁶ searches explicitly authorized by Congress,²⁷ and searches for evidence to be used at noncriminal trials or hearings.²⁸

¹³ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴ *Silverman v. United States*, 365 U.S. 505 (1961), at 511.

¹⁵ *See v. Seattle*, 387 U.S. 541 (1967), at 543.

¹⁶ Wayne LaFave, *Search and Seizure* (St. Paul: West, 1978), I, 338.

¹⁷ *Davis v. Mississippi*, 394 U.S. 721 (1969).

¹⁸ *Carroll v. United States*, 414 U.S. 132 (1925).

¹⁹ *United States v. Calandra*, 414 U.S. 338 (1974).

²⁰ *Terry v. Ohio*, 392 U.S. 1 (1968). ²¹ *Chimel v. California*, 395 U.S. 752 (1969).

²² *Chambers v. Maroney*, 399 U.S. 752 (1970).

²³ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

²⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

²⁵ *Warden v. Hayden*, 387 U.S. 294 (1967).

²⁶ *United States v. Ramsey*, 431 U.S. 606 (1977).

²⁷ *Colonade Catering v. United States*, 397 U.S. 72 (1970).

²⁸ *United States v. Calandra*, 414 U.S. 338 (1974).

Methods and Results

We examine all Supreme Court decisions dealing with the reasonableness of a search or seizure from the beginning of the 1962 term through the end of the 1998 term ($N = 217$). The independent variables are the facts of the case discussed above. We note here that it may be improper to rely on the Supreme Court's written opinion to ascertain the facts of the case. Thus, the Court may assert that certain variables are or are not present, such as probable cause, in order to justify its decision. Occasionally, opinions even differ about "objective" determinations, such as where the search took place. For instance, in *California v. Carney* the California Supreme Court considered the warrantless search of the respondent's motor home to be akin to a search of a home,²⁹ while the U.S. Supreme Court considered it closer to a search of a car, and thus found the search reasonable.³⁰ To guard against the possibility that the Supreme Court's statement of facts is influenced by the decision it desires to reach, we use the lower court record to determine the facts of each case.³¹

Our dependent variable is the decision of the Supreme Court whether or not to exclude evidence or find a search unreasonable. A liberal decision is one that prohibits the use of questionably obtained evidence; a conservative decision is one that admits such evidence. Overall, the Court ruled in a liberal direction in 36 percent of the cases.

We begin by examining the percentage of liberal or conservative decisions based on the presence or absence of the fact in question. We initially consider the nature of the search, which involves the locus of the search and the extent of the intrusion. As expected, the Court gave greatest protection to one's home, upholding only 53 percent of the searches conducted there. Less protection is given to places of business, where 59 percent of searches have been upheld. One's person receives still less protection (65 percent upheld), while searches of one's car or other motor vehicle are very likely to be upheld (74 percent). The least protection is

²⁹ 668 P.2d 807 (1983). ³⁰ 471 U.S. 386 (1985).

³¹ Certain facts cannot be ascertained independently of the Court's decision, such as whether the case concerns statutory construction or constitutional interpretation. Similarly, unobserved preferences that underlie the justices' decisions, such as whether the decision supports or opposes considerations of federalism (i.e., state action) or upholds or overturns administrative agency action. Although such factors have an ideological component that exists independent of and prior to any given decision, they can be measured only concomitantly with that decision. See Timothy M. Hagle and Harold J. Spaeth, "The Emergence of a New Ideology: The Business Decisions of the Burger Court," 54 *Journal of Politics* (1992), 120-34.

given to places where the suspect does not have a property interest (81 percent upheld).

The extent of the intrusion involves the difference between full searches and lesser intrusions, such as detentive questioning or a stop and frisk. Overall, 61 percent of full searches have been upheld, as compared with 81 percent of limited intrusions.

Against the nature of the search the Court must consider the prior justification for the search, that is, a warrant and probable cause. Even though cases with warrants typically involve questions as to the validity of that warrant, the Court still upholds more cases with warrants (72 percent) than without (63 percent). Alternatively, the lower court's decision as to whether probable cause exists negatively correlates with the Supreme Court's decisions. Some 61 percent of cases with probable cause are upheld, as compared with 66 percent without. This suggests that the Supreme Court views lower court probable cause decisions rather subjectively.

Next, we consider the exceptions to the warrant requirement, the most important of which is a search incident to a lawful arrest. The Supreme Court upheld 90 percent of the searches that the lower court ruled took place incident to a lawful arrest. Surprisingly, the Court did not uphold more searches after, but not incident to, a lawful arrest (63 percent) than it did searches after arrests that the lower court considered unlawful (67 percent).

Other exceptions to the warrant requirement rarely occurred; so we simply note that the Court upheld all of the nine searches when two or three exceptions were present, 75 percent of those containing one exception, and only 57 percent of those without any exceptions.

More interesting than the bivariate effect of facts on the Court's decision is the independent influence of each fact when the influence of every other fact has been controlled. To examine this, we conducted a logit analysis of the Supreme Court search and seizure decisions. We used the decision of the Court in each case as our dependent variable and the facts of the case identified above as our independent variables. Because of the Court's tendency to reverse the decisions it reviews, we include the direction of the lower court decision as a control variable that should negatively associate with the Supreme Court's decision. The results are presented in Table 8.1.

The coefficients show the change in the log of the odds ratio for a conservative decision given the presence of each variable. As this is not readily interpretable to those unaccustomed to logit analysis (and even

TABLE 8.1. *Logit Analysis of Search and Seizure Cases*

Variable	Maximum likelihood estimate	Standard error	Impact ^a
House	-2.96***	0.83	-0.45
Business	-2.45**	0.87	-0.42
Person	-1.84**	0.77	-0.36
Car	-1.74**	0.82	-0.35
Search	-1.24**	0.56	-0.28
Warrant	1.82***	0.56	0.36
Probable cause	-0.09	0.42	-0.02
Incident arrest	3.13**	1.19	0.46
After arrest	0.75*	0.55	0.18
After unlawful	0.43	0.56	0.11
Exceptions	1.45***	0.38	0.31
Lower Ct Dec	-1.42***	0.35	-0.31
Constant	3.45***	1.04	-
% predicted correctly	77		

^a Impact equals change in probability of a liberal decision when the fact is present for a search with a 50% chance of being upheld. * $p < 0.10$; ** $p < 0.01$; *** $p < 0.001$; $n = 216$.

to most who are accustomed to it), we provide under the column "impact" the estimated increase or decrease in the probability of a conservative decision when the variable in question is present. The impact estimate assumes that the search otherwise has a 50-50 chance of being upheld. Note that the places where searches occurred are all compared with a search where one does not have a property interest, and that the arrest estimates are all compared with a search that was not preceded by an arrest. Thus, a search that the lower court found to be after, but not incident to, an arrest, has a 0.18 greater probability of being upheld than a search that did not follow an arrest.

We see from the maximum likelihood estimates (MLEs) that every variable has a significant impact on the likelihood of a search being upheld except probable cause and unlawful arrest. All four places we examine (home, business, person, and car) decrease the probability of a search being upheld when compared with a search where one does not have a property interest.³²

³² Though logit's S-shaped specification suggests that the impact of home is not much different than the impact of the other "place" variables, measuring the impact at prior levels higher than 50-50 would show a much stronger effect.

The only substantive difference between the bivariate and multivariate results is that the latter show a clear ordering in terms of searches following arrests: Searches incident to arrest receive the most leeway; searches after lawful arrests receive less leeway; while searches after unlawful arrests receive virtually no additional leeway.

The model predicts 77 percent of the Court's cases correctly for a 30 percent reduction in error over the null model.³³ Though the facts presented do strongly influence the Court's decisions, obviously, other considerations also enter the equation. One problem with pure fact-based models is that they are static. That is, they do not consider how changing membership on the Court influences decisions. For instance, if we add a variable that counted each time a Warren Court appointee was replaced by a Nixon, Ford, or Reagan appointee,³⁴ we get a highly significant variable ($MLE = 0.20, p < 0.01$) that indicates that the current Court evaluates search and seizure cases much more leniently than did the Warren Court. This suggests that the exclusionary rule may soon be overturned directly or simply made irrelevant because so few searches are ruled unreasonable. This also betokens a need to explicitly consider the attitudes and values of the justices as a factor affecting their decisions.

Facts obviously affect the decisions of the Supreme Court, but on that point the attitudinal model does not differ from the legal model. The models differ in that proponents of the legal model conjoin facts with legalistic considerations such as the intent of the Framers, the plain meaning of the law, and prior decisions of the Court, while proponents of the attitudinal model describe the justices' votes as an expression of fact situations applied to their personal policy preferences. Unfortunately, there exists virtually no systematic evidence for the legal model, as we demonstrated in the previous chapter.

Focusing on facts to evidence the operation of the attitudinal model has its own set of problems, however. First, we do not know for certain that facts explain the justices' behavior except in those areas where they have been identified. Outside of search and seizure, only a handful of other subjects have successfully been put to such a test.³⁵ Whether facts

³³ For these data, the null model is that every decision is decided conservatively.

³⁴ We also subtract one for the replacement of Blackmun, a Nixon appointee, with Stephen Breyer, a Clinton appointee.

³⁵ Sara C. Benesh, "Principal Agency in American Courts: Perspectives on the Hierarchy of Justice," Ph.D. diss., Michigan State University, 1999, pp. 58-72 (involuntary confession cases); Timothy M. Hagle, "But Do They Have to See It to Know It? The Supreme

cause the justices to vote as they do in areas such as antitrust litigation, state taxation, national supremacy, First Amendment, and so on has not been determined. Furthermore, certain justices in certain areas may deem "facts" irrelevant. Justice Harlan, for example, never once supported a judicially imposed legislative apportionment plan, asserting that it was a matter that the Supreme Court had no authority to resolve.

Attitudes

Measuring the attitudes of political elites is a difficult task, as senators, justices, and Presidents are unlikely to fill out survey questionnaires provided by scholars, no less fill them out honestly. One type of solution, commonly used to this day in the congressional literature, is to use either interest group ratings from selected votes, as is done by the Americans for Democratic Action (ADA), or data reduction techniques from all votes, as in the NOMINATE scores, which are derived from the totality of nonunanimous congressional roll-call votes. In either case, these scores are then frequently used to "explain" the congressmen's votes in particular subsets of cases. Thus, Senator Ted Kennedy is measured as a liberal because he votes liberally, and he votes liberally because his ideology, as measured by his vote-derived ADA or NOMINATE scores, identifies him as a liberal. While such scores can provide a useful description of congressional behavior, the circularity inherent in using such scores should properly prevent their use as an explanation of such behavior.

One potential resolution to the circularity problem uses *past* votes as a measure of the justices' ideology.³⁶ While this does, in fact, resolve the

Court's Obscenity and Pornography Decisions," 45 *Political Research Quarterly* 1039 (1992); Tracey George and Lee Epstein, "On the Nature of Supreme Court Decision Making," 86 *American Political Science Review* 323 (1992)(death penalty cases); Robin Wolpert, "Explaining and Predicting Supreme Court Decision-Making: The Gender Discrimination Cases, 1971-1987," paper delivered at the 1991 annual meeting of the Midwest Political Science Association, Chicago, Ill.; Joseph A. Ignagni, "Explaining and Predicting Supreme Court Decision-making: The Establishment Clause Cases, 1970-1986," Ph.D. diss., Michigan State University, 1990; Kevin McGuire, "Obscenity, Libertarian Values, and Decision Making in the Supreme Court," 18 *American Politics Quarterly* 47 (1990); Jeffrey Segal and Cheryl Reedy, "The Supreme Court and Sex Discrimination: The Role of the Solicitor General," 41 *Political Research Quarterly* 553 (1988).

³⁶ Lee Epstein and Carol Mershon, "Measuring Political Preferences," 40 *American Journal of Political Science* 261 (1996).

circularity question, and provides useful tests for the stability and predictability of judicial attitudes (see below), it nevertheless begs the question as to what explains the justices' past votes. If justice A votes liberally in the 1999 term while justice B votes conservatively, their past preferences, as measured by the 1999 term, may well predict their behavior in the 2000 term. But we still don't have independent evidence as to what caused their behavior in the 1999 term. Thus, though past votes may offer an excellent description of the justices' current preferences, they cannot qualify as an explanation of the justices' behavior.

Our attempt to create an exogenous measure of the justices' attitudes independent of their votes focuses on the judgments in newspaper editorials that characterize nominees prior to confirmation as liberal or conservative insofar as civil rights and liberties are concerned.³⁷ Although this measure is less precise than past votes, it nonetheless avoids the circularity problem, is exogenous to the justices' behavior, and is reliable and replicable. As a result, it provides crucial evidence in testing the behavioral existence of the attitudinal model.

Segal and Cover originally created this measure by analyzing editorials about nominees from selected newspapers that appeared between the time of their nomination by the President until their confirmation by the Senate.³⁸ The scores of the confirmed justices are reprinted in Table 8.2.

We believe that the scores accurately measure the perceptions of the justices' values at the time of their nomination. While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are expectedly the most liberal, while Scalia and Rehnquist are the most conservative. Harlan and Stewart come out liberal because the debate about them centered around their support for the overriding issue of the day, segregation. Goldberg is not perceived to be as liberal as Fortas or Marshall because of an evenhandedness at the Department of Labor that even

³⁷ David Danelski suggested coding the qualitative content of speeches made by Justices Brandeis and Butler prior to their appointment to the Court as a measure of their attitudes. He found that support for or opposition to laissez-faire correlated with the direction of these two justices' dissents in economic cases. "Values as Variables in Judicial Decision-Making: Notes Toward a Theory," 19 *Vanderbilt Law Review* 721 (1966).

³⁸ Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," 83 *American Political Science Review* 557 (1989). See Chapter 6 for details.

TABLE 8.2. *Justices' Values and Votes*

Justice	Values ^a	Votes ^b	Justice	Values ^a	Votes ^b
Warren	0.50	78.6	Powell	-0.67	37.4
Harlan	0.75	43.6	Rehnquist	-0.91	21.8
Brennan	1.00	79.5	Stevens	-0.50	64.2
Whittaker	0.00	43.3	O'Connor	-0.17	35.5
Stewart	0.50	51.4	Scalia	-1.00	29.6
White	0.00	42.4	Kennedy	-0.27	36.9
Goldberg	0.50	88.9	Souter	-0.34	59.9
Fortas	1.00	81.0	Thomas	-0.68	25.7
Marshall	1.00	81.4	Breyer	-0.05	61.1
Burger	-0.77	29.6	Ginsburg	0.36	64.4
Blackmun	-0.77	52.8			

^a Updated from Segal and Cover, *op. cit.*, fn. 38 *supra*. The range is -1.00 (extremely conservative) to 1.00 (extremely liberal).

^b Percentage liberal in civil liberties cases, 1953-99 terms.

the conservative *Chicago Tribune* could support. O'Connor comes out as a moderate, given her previous support for women's rights and abortion. Indeed, the only hint of opposition to her nomination came from right-wing interest groups and the arch-conservative senator Jesse Helms (R-N.C.).

Measures of perceived attitudes are obviously imperfect measures of those the justices actually possess. Given the impossibility of surveying the justices themselves (even if one rashly assumed that such surveys would be scientifically valid and reliable), content analysis has its place. To the extent that measurement error exists in the data, we will undoubtedly find weaker correlations than would otherwise be the case.³⁹ Therefore, the correlation between ideological values and votes that we present is almost certainly lower than the true correlation.

Because statements in newspaper editorials deal almost exclusively with support by the justices for civil liberties and civil rights, we use as our dependent variable the votes of all justices appointed since the beginning of the Warren Court in all formally decided civil liberties cases from the beginning of the 1953 term through the end of the 1999 term, as derived from the Original U.S. Supreme Court Judicial Database. Civil

³⁹ William D. Berry and Stanley Feldman, *Multiple Regression in Practice* (Beverly Hills: Sage, 1985).

liberties issues are those involving criminal procedure, civil rights, the First Amendment, due process, and privacy. Liberal decisions are (1) pro-person accused or convicted of crime, (2) pro-civil liberties or civil rights claimant, (3) proindigent, (4) pro-Indian, and (5) antigovernment in due process and privacy, except for takings clause cases.⁴⁰ The data are presented in Table 8.2.

The results are straightforward: The correlation between the ideological values of the justices and their votes is 0.76 ($r^2 = 0.57$, adjusted $r^2 = 0.55$). Regressing votes on our measure of values yields a constant of 53.4 and a slope of 23.5 ($t = 5.06$). The largest residuals belong to Goldberg, who is 23 percentage points more liberal than expected, and Harlan, who is 27 points more conservative than expected. Alternatively, Scalia and Powell are less than one point from their expected scores. Given the fact that our correlation is attenuated by the measurement error that no doubt exists in the independent variable, the results supply exceptional support for the attitudinal model as applied to civil liberties cases.

Critics of the attitudinal model might present the following alternative scenario: If judges and justices base decisions on legal values (e.g., precedent or the intent of the Framers) and not political values, editorials on nominees with lower court experience would be based on those legal values. Our measures will correlate with their votes on the Supreme Court because as justices they are again basing their votes on their legal values. But if this were the case, lower court experience would provide crucial information that does not exist for those without such experience: the legal (as opposed to political) values of the nominees. If the editorials provided information on legal values and if such values were relevant to the justices' decisions, the correlation for those with such information should be higher than the correlation for those without such information. This is clearly not the case. Though the *N*s are small, the correlation between values and votes for those with lower court experience is 0.67 (adjusted $r^2 = 0.40$), while the correlation

⁴⁰ This specification of direction (i.e., liberal or conservative) is determined by reference to the issue variable to which the case pertains. Hence, anti-affirmative action plaintiffs who successfully allege that the program deprives them of civil rights does not make them or the case outcome liberal since a pro-affirmative action outcome is defined as liberal. See Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-1999 Terms* (East Lansing, Mich.: Program for Law and Judicial Politics, Michigan State University, 2000), pp. 51-53.

for those without lower court experience is 0.92 (adjusted $r^2 = 0.81$). If anything, the voting record of lower court judges, who *are* bound by Supreme Court precedents, might constitute *disinformation* about their true values and thus their likely voting behavior once on the Supreme Court.

Prediction

As we noted in Chapter 3, an attitude is a relatively enduring set of inter-related beliefs. Thus, if attitudes are the proximate cause of the votes of Supreme Court justices, their votes must be relatively stable and consistent. Quite a bit of research has demonstrated the stability and predictability of judicial attitudes. For example, Spaeth was able to predict accurately 88 percent (92 out of 105) of the Court's decisions between 1970 and 1976 and 85 percent of the justices' votes.⁴¹ In a looser test, we accurately predicted the majority and dissenting coalitions in 19 of 23 death penalty cases, and similar percentages of other civil liberties cases.⁴²

Combining Facts and Attitudes

Consistent with the attitudinal model, we have seen that both facts and attitudes affect the decisions of the Supreme Court. The attitudinal model, though, does not hold that these are separate influences on the Court's decisions. Rather, it holds that facts or case stimuli are juxtaposed against the attitudes of the justices in determining how any particular justice reaches a decision in any particular case.

We thus come to our most specific test of the attitudinal model by using as our dependent variable the decision of each justice in each search and seizure case from the 1962 through 1998 terms ($N = 1,900$). The independent variables are the facts of each case plus each justice's attitudes.

We first entered only attitudes into the equation and achieved a 70 percent prediction rate, for a 32 percent reduction in error over the justices' mean of 56 percent. We then entered just the twelve fact-based variables described above and achieved a 62 percent prediction rate, for a relatively low 14 percent reduction in error. This suggests that in pre-

⁴¹ Harold J. Spaeth, *Supreme Court Policy Making: Explanation and Prediction* (San Francisco: W. H. Freeman, 1979), pp. 122-23, 154-64.

⁴² Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), ch. 6.

TABLE 8.3. *Logit Analysis of Search and Seizure Cases with Attitudes*

Variable	Maximum likelihood estimate	Standard error
House	-1.53***	0.24
Business	-1.43***	0.26
Person	-1.27***	0.23
Car	-1.24***	0.24
Search	-0.87***	0.17
Warrant	0.86***	0.17
Probable cause	0.09	0.13
Incident arrest	1.05***	0.28
After arrest	0.21	0.18
After unlawful	0.11	0.17
Exceptions	0.83***	0.10
Attitudes	-1.35***	0.08
Constant	1.75***	0.26
% predicted correctly	71	

* $p < 0.10$; ** $p < 0.01$; *** $p < 0.001$; $n = 1,900$.

dicting votes, one is clearly better off knowing the attitudes of the justices than the facts of the case. Finally, we combined the attitude measure with the fact variables into a single model. The results are presented in Table 8.3. Some 71 percent of the individual justices' decisions were predicted correctly for a 34 percent reduction in error. Nine of the twelve variables were significant at $p < 0.001$.

Results from the model can be presented in visual form as in Figure 8.1, which places the case stimuli and justices' values in attitudinal space. Any justice should vote to uphold any search to the left of his or her indifference point and will vote strike any search to the right of his or her indifference point. For instance, the search for evidence in *Mapp v. Ohio* at 0.65 would be allowed in court by Rehnquist (1.23), but not by Breyer (0.07) or Brennan (-1.35).⁴³ As this is an empirical model, prediction errors will occur. Nevertheless, with 71 percent of the

⁴³ Scale points for the justices are created by multiplying their factor scores by the slope coefficient for attitude in Table 8.3. Scale points for case stimuli is -1 times the predicted log of the odds ratio of upholding the search given the facts of the case and an attitude score of 0.

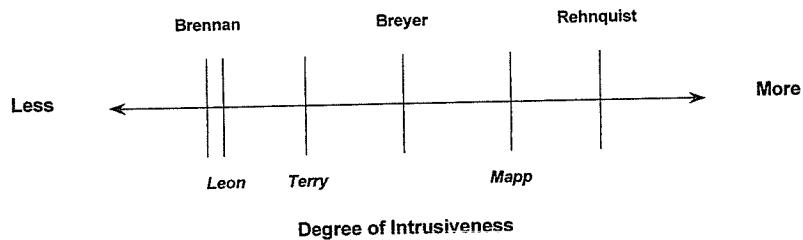


FIGURE 8.1. Justices and cases in ideological space.

individual-level votes predicted correctly, the model demonstrates the overall validity of the attitudinal model.⁴⁴

THE SEPARATION-OF-POWERS MODEL

Applications of rational choice theory to the Supreme Court, as noted in Chapter 3, may be divided into an internal program, which focuses on intra-Court strategies, and an external program, which focuses on constraints imposed by other political actors. For the decision on the merits, internal models have concentrated on voting fluidity, the changing of votes from the conference vote to the report vote. As we report in Chapter 7, most voting fluidity is completely consistent with attitudinal considerations. We also are not aware of any equilibrium-based formal models of voting fluidity.

The external program, on the other hand, has focused on the so-called separation-of-powers model. Recall from Chapter 3 that this model posits that the Supreme Court will often need to defer to congressional/presidential preferences in order to prevent its decisions from being overturned. Because these models are equilibrium-based (typically, Nash equilibria, in that the Court's behavior is a best response to Congress and the President's best response), because numerous articles claim empirical support for the model, and because these models directly contradict the attitudinal model's claim of rationally sincere behavior on the

⁴⁴ There are several causes of error in the model, including measurement error on the attitudinal variable, incomplete specification of relevant case stimuli, and measurement error of case stimuli (caused by measuring case stimuli by the lower court record). Others sources of error might include excluding nonattitudinal factors, such as the presence of the United States as a party to the suit or excluded role values. To the extent the first set of problems exists, the attitudinal model is stronger than our empirical model demonstrates.