MOTIVATED REASONING IN LEGAL DECISION-MAKING

DISSERTATION

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By

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* * * *

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ABSTRACT

In this dissertation I identify a puzzle that was created, then largely ignored by behavioral scholars doing empirical work on the courts. The puzzle arises from the substantial disconnect between how judges characterize their reasoning processes and the demonstrated influence of policy preferences on the decisions they make. I discuss how the concept of motivated reasoning has been invoked to resolve the tension between legal and attitudinal accounts of decision-making and evaluate that claim in light of research on the role of motivation in other decision contexts.

I question the dominant assumption in behavioral research that judges are primarily policy oriented. I offer an alternative characterization of motives based on the idea that people who are trained in the legal tradition come to internalize norms consistent with idealized models of decision-making. Consistent with psychological findings demonstrating limits on motivated decision processes, I suggest accepted norms of decision-making serve as a constraint on the ability of decision-makers to reach conclusions consistent with their policy preferences.

I test two potential avenues of motivated reasoning in legal reasoning: analogical perception and the separability of preferences in cases involving multiple issues. Using an experimental approach I find that each is a potential avenue of attitudinal influence in legal decision-making. However, there is also substantial
evidence of constraint in studies testing both mechanisms. I conclude in with a summary of main findings and a discussion of implications for future research.
Dedicated to my parents Marlene and Murray I. Braman
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VITA

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INTRODUCTION

There is substantial evidence that the policy preferences of judicial decision-makers affect case outcomes. Starting with Pritchett’s seminal study of the Roosevelt Court (1948) researchers have been successful in demonstrating that judges are not the unbiased “discoverers of law” traditional notions of legal reasoning suggest. Social science literature shows that the political ideology of judges and their attitudes regarding the issues that are the subject of litigation play an important role in determining how judges vote in particular cases. (Schubert 1962, Segal and Spaeth 1993 and 2002, Rohde and Spaeth 1976, Ulmer 1960).

Most of the research tending to demonstrate the importance of preferences in legal decision-making has been conducted using existing case decisions. In studies of judicial decision-making researchers commonly correlate some measure of judicial preference, such as ideology, political party, or party of appointing president, with judges’ votes in particular cases. Not much has been done to investigate the specific mechanism by which judges who say, and probably believe, they are making decisions based on objective legal criteria disproportionately reach conclusions that are consistent with their policy preferences. Rather, scholars who study judicial behavior have treated the process of legal reasoning as a “black box,” content with demonstrating a connection between attitudes and case votes without fully understanding the cognitive processes that underlie the relationship.
Significantly, social scientists that study the courts differ in the degree of volition they attribute to judges engaged in policy oriented decision-making. Most are reluctant to say judges intentionally base their decisions on personal policy preferences rather than accepted sources of legal reasoning. Borrowing from psychological literature, Segal and Spaeth (1996b, 2002) offer what is probably the most widely accepted explanation for how judicial decision-makers disproportionately reach decisions consistent with their policy preferences. They suggest that judges engage in “motivated reasoning” (Kunda 1990), a biased decision process where decision-makers are unconsciously predisposed to find authority consistent with their preferences more convincing than cited authority that goes against desired outcomes. In offering this explanation, however, Segal and Spaeth do not provide any direct evidence of the phenomenon’s occurrence in legal decision-making. Moreover, they do not specify a precise mechanism to explain how judges would be unwittingly influenced by their own preferences.

In this dissertation I use experimental methods to investigate how policy preferences interact with case characteristics and the norms of decision-making to produce directed outcomes. The goal is to gain a more sophisticated understanding of the possible mechanisms for motivated reasoning and to discover their limiting conditions. I test two hypothesized mechanisms of motivated reasoning in the context of legal decision-making.

First, I investigate how case facts and policy preferences interact to influence perceptions of precedent. In this part of the study I draw on theories of analogical reasoning from cognitive psychology. Using an experimental design I compare how
lay citizens and subjects with legal training make judgments about the similarity of case law cited as precedent in relation to a specific “target” dispute.

Second, I investigate whether the policy preferences of legally trained decision-makers affect how they decide preliminary “threshold” issues in complex cases. Here I draw on literature concerning separable preferences, conceiving of judicial reasoning as a nested decision process. The goal is to see if there are differences in the way legally trained individuals decide a seemingly neutral threshold issue depending upon how they feel about more divisive policy matters concurrently raised in a complex fact pattern.

In the pages that follow I conduct the investigation as follows: in Chapter 1, I present a brief overview of the empirical evidence tending to demonstrate the importance of policy preferences in judicial decision-making. I discuss how motivated reasoning has been invoked to explain such findings and I critically evaluate the assertion that judges are engaged in motivated cognition in light of psychological findings concerning the role of motivation in other decision contexts.

In Chapter 2, I make the case for taking legal norms seriously in studies of attitudinal influence. I argue that strong socialization inherent in legal education and professional training cause those in the profession to accept and internalize rules of appropriate behavior. I argue that these norms act as a real constraint on decision-makers’ ability to conclude what they want in legal decision-making. Thus, it is essential to take such norms into account when considering the specific role policy preferences play in legal reasoning processes.
Chapter 3 is devoted to the investigation of the first hypothesized mechanism of motivated reasoning -- analogical perception. I present a model of perception that accounts for the influence of legal and attitudinal factors in judgments of case similarity. I describe the comparative experimental design I use to test the model using two distinct samples, undergraduates and law students. I set forth hypotheses that would confirm expectations about the role of policy attitudes in such judgments and present results from experiments testing the model. I compare results across the two samples to see how they comport with experimental hypotheses.

In Chapter 4, I investigate the second hypothesized mechanism of motivated reasoning -- separable preferences. Here I discuss the design and results of a third experiment done exclusively with legally trained participants. The experiment is unique because it involves giving law students a realistic legal brief in which case facts and legal arguments are controlled. The goal is to see how people with alternative preferences respond to identical legal arguments in different decision contexts. By pre-measuring participants attitudes about a number of policy issues raised in a complex fact pattern, I discover not only whether preferences make a difference in the seemingly neutral judgment participants are asked to make, but also which preferences matter from a number of possible alternatives.

I conclude in Chapter 5 with a summary of main findings and a discussion of what they suggest in terms of directions for future research.
CHAPTER 1

If the study of political jurisprudence is to move beyond its current comfort zone, we must develop a theory of judicial behavior that can accommodate political and jurisprudential influences without assuming away the judicial reasoning process (Rowland and Carp 1996, 136).

In this chapter I conduct a directed review of the literature demonstrating the importance of policy preferences in judicial decision-making. I describe how theory and methods from psychology’s behaviorist paradigm have influenced public law research so that our knowledge of the factors affecting legal reasoning has been shaped by a focus on judicial voting behavior. While this general approach has contributed to our understanding of the attitudinal forces influencing judicial decision making, it has also left us with a significant puzzle. We cannot explain how those forces come to bear on the mental processes of judges who say, and probably believe, they are using objective legal criteria to make decisions.

I discuss how behavioral scholars have attempted to invoke the concept of motivated reasoning to explain stable findings of policy oriented decision-making and critically evaluate that claim in light of findings on the role of motivation in other decision contexts. I conclude by arguing a more detailed understanding of the role that preferences play legal reasoning is necessary.
Directed Literature Review

Judges play a special role in our constitutional system; federal judges (and many state judges) are not elected, but appointed by other political actors. Judicial decision-makers suffer from what has been called a “democratic deficit.” Unlike elected officials they have no authority or mandate to act in accordance with their policy preferences in adjudicating specific disputes. We expect them to serve as impartial arbiters. Their decisions are supposed to be guided by the law, not personal preferences. Indeed, one of the most basic assumptions underlying traditional notions of legal reasoning is that judicial discretion is limited -- that judges are constrained by accepted sources of legal reasoning including text, precedent, and a reasoned inquiry into the intent of constitutional and elected drafting officials.

Over the past fifty years political scientists who study judges’ behavior have called the ideal of judicial impartiality into serious question. By focusing on what judges actually do, instead of what they say guides their decisions, behavioral researchers have been successful in demonstrating that judges are not the unbiased “discoverers of law” traditional notions of legal reasoning suggest. Today there is substantial evidence that judges vote disproportionately in favor of outcomes that are consistent with their policy views.¹

¹“Ideology,” “attitudes,” and “preferences” are all words that have been used to describe personal views judges have about cases they are called on to decide. The three terms are related and have, on occasion, been used interchangeably in the literature on judicial decision-making. It is important to understand, however, that they refer to distinct concepts. I discuss them here, specifically, as they are used in the context of research on judicial behavior.

In the public law literature “ideology” refers to political ideology, a coherent set of beliefs individual judges have about the proper role government in society. Ideology is usually operationalized in dichotomous terms; both judicial actors and case outcomes are categorized as liberal or conservative. Very generally, liberal judges favor more government regulation of the economy and less state interference in the lives of everyday citizens in civil liberties matters. Conservative judges have the opposite views. Because, ideology involves a very general orientation
Pritchett’s investigation of justices on the Roosevelt Court (1948) is widely considered the watershed study prompting judicial scholars to look at personal preferences as a major determinant of voting behavior. The study is often cited as signaling a break between judicial behavioralists and those who study legal decision-making using more traditional doctrinal techniques (Gibson 1991, Slotnick 1991).²

Pritchett analyzed voting behavior of justices on the Court from 1937 to 1947. Classifying cases as involving “labor” or “free speech,” he demonstrated that the justices could be systematically ordered in terms of their support for liberal outcomes in cases that were the subject of his investigation. The study was groundbreaking because it was first to analyze judicial voting behavior, rather than explanations the justices authored themselves and also the first to explicitly link observed voting patterns to the ideology of the justices.

When it was published, Pritchett’s study met with considerable criticism because of the challenge that findings posed to traditional notions of decision-making. It covers a wide range of issues judges may encounter in their decision-making.

Attitudes are more specific than ideology. They describe positive or negative feelings judges have toward a particular target (McGuire 1985). Attitudes may be influenced by ideology (for instance, conservatives like tax cuts) but the relationship is not perfect. Judges can have particular attitudes that are inconsistent with their ideology. Moreover, attitudes can be shaped by factors other than ideology such as personal experience with a particular issue or class of litigant.

Preferences are outcomes judges favor. Like attitudes they are more specific then ideology; the term preference implies judges are choosing from a set of alternatives in a particular choice domain (Velleman 1994). Individual judges may have preferences with regard to a given policy (such as when someone prefers tax cuts to tax hikes), or dispute (as when a judge prefers the plaintiff prevail instead of the defendant). An underlying assumption in judicial research is that judges prefer outcomes consistent with their attitudes and/or ideology. Ideology is often used to approximate judges’ preferences in cases they are called on to decide. Sometimes researchers have more specific indicators of judges’ attitudinal preferences with regard to cases involving particular issues.

² The term “judicial behavioralists” refers to the subset of public law scholars who study judicial decision-making using the behavioral techniques discussed herein. Most come form the discipline of political science. I refer to them as “judicial scholars” or simply “behavioralists” to distinguish them from scholars who study judges’ decision-making via textual analysis.
making. The most serious criticism came from legal scholars who argued that his approach was inadequate to capture the nuances of judicial decision-making. Early criticisms emphasized the fact that legal reasoning was highly contextual -- dependent on the facts and legal issues raised in particular cases. Legally trained scholars argued that merely looking at the way the justices voted, without considering the justification for their decisions was not adequate to understand the complex process of case-by-case decision-making. Critics also pointed out that judges on collegial courts often differ in their assessment of what authority should control the court’s analysis in cases involving multiple issues.

Despite these criticisms, numerous scholars followed Pritchett’s lead. There was a distinct rise in behavioral studies of judicial decision-making over the next two decades. This trend toward “behavioralism” was influenced by, but distinct from, the “behaviorist” movement that occurred in psychology (McGraw 2000). As part of this trend, judicial scholars continued to move away from legal doctrine, choosing to analyze case votes as the primary observable response to different types of case stimuli.

This movement away from doctrine was partly strategic; it allowed judges’ behavior to be analyzed across cases by focusing on the outcome choice common to all decisions. More significantly, it reflected a fundamental change in approach.

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3The two were similar because each focused on observable responses to stimuli in the environment. Ironically, starting in the 1950’s psychologists started to move away from behaviorism as researchers became interested in understanding the mental processes underlying observed patterns of behavior. As discussed further below, public law scholars never followed suit, but remained focused on the simple S–R (stimulus – response) relationship between cases and case votes.
where case votes were viewed as a more accurate indication of judicial proclivities than the doctrinal justifications judges gave for their own decisions (Schubert 1962).

Many judicial scholars came to view opinions written by judges as an imperfect account of decision-making (Pritchett 1941, Spaeth 1961). They argued that the reasons decision-makers gave for their outcome choices were subject to manipulation by judges concerned with self-presentation. Pointing to results of studies like Pritchett’s, they also raised the possibility that legal explanations may be the result of rationalization by judges, who themselves, were unaware of factors influencing their decisions.

As judicial scholars broke away from legal approaches to studying decision-making they increasingly relied on theory and methods from psychology. The first generation of behavioral studies focused on patterns of dissent and inter-agreement between justices on the Supreme Court. Findings from these studies showed that particular groups of justices often voted together in cases, while others tended to vote in opposition. Judicial scholars explained the existence of identifiable voting blocs using extra-legal factors. Specifically, they argued analyses of case votes did not generate the type of random variation one would expect if the justices were engaged in unbiased application of their common legal training. Instead, observed patterns were taken as evidence of attitudinal decision-making where like-minded justices voted in concert.⁴

⁴ Some of the most significant early studies using bloc analysis techniques include: Pritchett (1941) looking at patterns of agreement for all justices on the court from 1939 to 1941; Spaeth (1961) discussing levels of “ideational” agreement between particular pairs of justices and; Ulmer (1965) explaining sub-group formation in terms of fluid case “coalitions” and more stable policy “cliques.”
During the 1960’s researchers used scaling techniques explicitly developed in psychology to conduct more intricate analyses of judicial voting behavior. Originally attitudinal scales were developed as a series of questions in testing instruments to measure constructs like racial tolerance across survey respondents. One famous scale, for example, measured the degree of social interaction survey respondents were willing to accept between members of different races. Questions that described various levels of contact between people with distinct racial backgrounds were grouped together and ordered for analysis. Typically, survey respondents manifested a “breakpoint.” As the behavior in questions became more intimate, responses would shift from acceptant, to not acceptant of the interracial contact questions described. Different respondents manifested unique breakpoints. Individuals who demonstrated a willingness to accept a greater number of increasingly close interactions were categorized as having higher levels of racial tolerance.

In studies of judicial behavior researchers analyzed case votes rather than responses to survey questions, but the underlying logic was the same. According to this approach, cases involving different underlying issues represented distinct classes of stimuli. Similar cases could be grouped together and scaled like the questions on psychological testing instruments. Scaling studies demonstrated that, like participants in psychological survey research, the justices manifested unique breakpoints with regard to scaled cases involving similar legal issues.\(^5\)

\(^5\)Some of the most prominent research efforts demonstrating the importance of preferences in judicial voting behavior have used scaling techniques. Examples include Ulmer’s (1960) study looking at civil liberties cases in the 1950’s, Schubert’s (1962) study creating the “C” (civil liberties), “E” (economic...
In addition to individual voting patterns, interesting dynamics emerged across justices in scaling studies. For instance, Ulmer’s study (1960) showed that some justices voted disproportionately in favor of the government in civil liberties cases and others voted disproportionately in favor of individual plaintiffs. Justices that fit these extreme categories were portrayed as being on opposite sides of a single attitudinal dimension, roughly defined by how tolerant they were of governmental behavior which resulted in the “depravation of a claimed civil liberty.” (1960, 295).

Ulmer found that judges in these extreme groups seldom voted the same way on any civil liberties case; when they did, it almost always meant a majority for the winning side that included a “middle” group of justices that split their votes between the government and individual plaintiffs. Generally, it was the coalitional behavior of this middle group that determined who prevailed in any given case. Schubert (1962) formalized one of the first attitudinal theories of judicial behavior to explain such findings. Explicitly borrowing from psychology, he posited that case outcomes were determined by where in an attitudinal “issue space” a dispute fell in relation to the justices’ preferences.

Fueled by findings from these early studies, judicial scholars used more sophisticated statistical techniques and cast a wider net to establish the relationship between extra-legal factors and voting behavior. Starting in the mid-1960’s there was a second generation of research on judicial behavior investigating the influence of various background characteristics on judges’ case votes.

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Rohde and Spaeth’s (1976) book using cumulative scaling techniques to predict the votes of justices
Again, the earliest work looked at the behavior of justices on the Supreme Court focusing on factors like age, religion, and judicial experience (Grossman 1966, Ulmer 1973). Later studies turned their attention to analyzing the voting behavior of judges on lower courts to assess differences caused by more salient background characteristics like race and gender. Although these studies did uncover limited effects in specific issue areas, they were mostly noteworthy for findings of non-difference between judges with traditional and “non-traditional” backgrounds.6

During this second generation of research on judicial behavior, one significant finding did emerge. Variables reflecting judges’ personal policy preferences had a consistent and stable influence on voting behavior.7 Indeed, stable findings of preference-driven behavior caused public law scholars to devise their own theory of decision-making directly at odds with traditional notions of legal reasoning.

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6 See for example, Uhlman (1978), and Welch, Combs and Gruhl (1988) finding limited differences in the voting behavior based on race, and Goldman (1975), Gruhl, Spohn, and Welsh (1981), Walker and Barrow (1985), and Songer, Davis and Haire (1993) each looking at gender effects in judicial voting behavior.

7 The number of studies demonstrating the role of political preferences in judicial voting behavior is too broad to cover adequately in this chapter. Some prominent studies showing importance of preferences in the votes of Supreme Court justices include Tate’s (1981) “attribute model” demonstrating partisanship and appointing president were each significant in explaining liberal votes of individual justices in civil liberties and economics cases from 1946-1978; Segal and Cover’s (1989) study using independent measures of ideology to explain justices’ case votes in civil liberties cases from 1933 to 1988; and Sheehan, Mishler and Songer’s (1992) work looking at the Court’s pooled ideology as determinant of success for particular types of litigants in logit and time series analyses.

There were also a substantial number of studies showing policy preferences were significant in the voting behavior of judges on lower federal courts. Examples include Goldman (1975) and Songer and Haire (1992) each demonstrating ideology was significant in the votes of judges on circuit courts, and Rowland and Carp (1980) providing evidence that party affiliation was strongly correlated with the votes of judges on federal district courts.
As referenced earlier, Schubert (1962) was the first to offer a theoretical account of the influence of preferences in the justices’ voting behavior. Later Murphy (1964) offered an explanation incorporating the concept of goal-directed behavior by suggesting that judges act strategically to obtain desired outcomes. Rohde and Spaeth (1976) took this idea further adding the controversial insight that policy goals trump legal considerations in judges’ decision-making. To date, Segal and Spaeth’s “attitudinal model” (1993 and 2002) is the most comprehensive statement of the role policy preferences play in judicial decision-making. Their model builds on earlier theoretical works and adds substantially to them by offering a detailed account of how it is judges are free to make decisions that are consistent with their preferences, in direct contrast to the role they are expected to play in our constitutional system.

Explicitly invoking stimulus-response principals from behaviorist psychology, Segal and Spaeth argue that judicial voting behavior is driven by judges’ attitudinal responses to differential case stimuli (1993, 215). Justices’ choices are determined by their policy preferences concerning the issues raised in litigation. They argue that Supreme Court justices are free to act in accordance with their preferences because they are appointed for life and, therefore, not democratically accountable for their decisions. In making this argument, Segal and Spaeth turn democratic theory on its head. They argue that measures the Framers took to insulate judicial actors from politics, so they could make decisions based on

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8 Segal and Spaeth’s decision-making model is specifically designed to explain behavior of Supreme Court justices. The authors leave open the possibility, however, that the model has broader application stating, “it is our judgment that the attitudinal model will explain the decision-making of
their expert interpretation of the law have the exact opposite effect; they free judges to make decisions consistent with their policy preferences.

According to Segal and Spaeth, the law does not constrain judicial actors any meaningful way. Instead, the adversarial nature of our legal system facilitates policy-directed behavior because it allows judges to pick and choose authority from arguments made by competing parties. Thus, judges do not use legal authority to reason through cases; rather, it serves as a post hoc justification for choices consistent with their preferences.

Like Pritchett’s research, Segal and Spaeth’s account of decision-making has met with resistance from some scholars (e.g., Kahn 1994, Cross 1997). For many political scientists, however, Segal and Spaeth’s attitudinal model and the substantial evidence they amass to support it represent the culmination of fifty years of behavioral research on the role of attitudinal forces in judicial decision-making.
Current Trends, Lingering Questions

The role of policy preferences having been firmly established, the discipline seems to have moved on to a third generation of research in the last decade (Shapiro 1991). Scholars who study the courts have been influenced by the trend that is occurring in political science more broadly. They are increasingly turning to game theory and utility maximization models to explain judges’ behavior. As a result current research is influenced more by economic theory than psychology.

Today most political scientists take for granted that attitudinal considerations predominate in judges’ decisions. Investigating the law as a constraint on decision-making has taken a back seat to looking at how other institutions shape judges’ behavior. Rather than seeking to establish that personal preferences influence voting behavior per se, judicial scholars are interested in understanding how forces like decision-rules (Hall and Brace 1989), the preferences of other judges (Epstein and Knight 1998) or actors in other democratic branches (Spiller and Gely 1992) moderate the expression of judges’ policy-goals in decision-making.

This shift toward explaining judicial behavior with rational choice models leaves open a significant question scholars have not yet addressed, or more accurately, have “skipped over” in the rush to assess the influence of institutional forces on judicial behavior. Most of our knowledge of the variables influencing judicial behavior derives from studies in which researchers correlate some measure of judicial preference with how judges vote in particular classes of cases. Although this approach has yielded a major contribution to our understanding of the influences
on judicial voting behavior, it cannot explain how those forces come to bear on judges’ decision processes.

Rather, judicial scholars have treated the process of legal reasoning as a “black box,” content with demonstrating a connection between attitudes and votes without fully understanding the mental processes that underlie that relationship. The “black box” metaphor is borrowed from cognitive psychologists who argued that their own discipline should move beyond the stimulus – response (S-R) paradigm to achieve a richer understanding of the mental processes underlying observed patterns of behavior. Starting in the 1950’s, psychologists began to do just that, resulting in what is referred to as the “cognitive revolution.” Research on judicial behavior, however, never moved beyond the S-R paradigm. Instead, scholars continued to focus on votes as the primary response to differential case stimuli without delving further into how it is judges arrive at those responses in the process of complex decision-making.

In an especially thoughtful assessment of the contributions and limits of the behavioral paradigm, Rowland and Carp (1996) lament the failure of public law to make the leap from behavioral to cognitive approaches to understanding decision-making. They write:

Given the obvious implications of psychology’s cognitive perspective for judicial decision-making, one could have anticipated an explosion of inquiry that paralleled the parent discipline’s more general inquiry into social cognition…Unfortunately, however, the anticipated inclusion of cognitive processes into the attitudinal model never took hold in political science. (1996, 144).

There are several reasons judicial scholars did not make the transition from behavioral to cognitive approaches. First, investigating mental processes requires
researchers to “get inside the heads” of individuals they are interested in studying. Judges, as elite decision-makers, pose a knotty problem of access. Moreover, they are notoriously secretive about how they go about reaching decisions. Finally, strong norms that discourage judges from divulging policy views and rendering decisions in hypothetical cases make it highly unlikely they would be willing participants in the kind of experimental studies widely utilized in cognitive psychology.

To overcome similar obstacles, psychologists and political scientists have used content-analysis techniques to investigate the reasoning processes of other elites studied at a distance.9 Because judicial scholars remain highly skeptical of doctrinal explanations judges give for their own decisions, however, few have engaged in the rigorous content analysis of case opinions. (But see, Gruenfeld 1995, Gruenfeld, Kim and Preston 1998, Tetlock, Bernzweig and Gallant 1985).

Finally, as noted earlier, at precisely the time one may have expected scholars to delve deeper into decision-making processes, rational choice models took hold in the discipline. The assumption that judges were single-minded seekers of policy was calcified because it was convenient for scholars applying game theoretic models to judicial behavior. Consequently, the question of how judges arrived at those decisions seems to have been glossed over.

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The Puzzle

The failure to account for cognitive processes in the domain of legal decision-making is especially problematic because we have not resolved the tension between doctrinal and behavioral approaches to understanding judicial behavior. Attorneys, judges and many legal academics still function largely as interpretivists, conceiving of the law as it is portrayed in statutes and casebooks as a meaningful constraint on judges; many do not accept findings from behavioral studies or attitudinal theories of decision-making (see for example, Edwards 1998, Cross 1997). They act as if, and as if they believe the law matters. In contrast, political scientists act more like critical theorists. They stand somewhat removed from the domain they are studying, but insist it is supported by a kind of false consciousness – i.e., if legally-trained academics, judges, and practitioners actually believe the law matters, they are woefully misguided about what drives decisional behavior.10

Today, we are at a critical juncture in our understanding of judicial decision-making. Research demonstrates a strong connection between judges’ preferences and case votes, but not much has been done to investigate the specific mechanism by which judges who say, and probably believe, they are using objective legal criteria disproportionately reach conclusions consistent with their policy preferences. Our

10Actually, the lines of debate are not so strictly drawn. As detailed in the next chapter, a long tradition of legal scholarship takes a critical approach to legal reasoning. Most notably scholars from the schools of “legal realism” (Frank 1931a, Llewyellen 1962) and “critical legal theory” (Unger 1983) acknowledge that extra-legal forces like ideology and preferences come into play when judges make decisions. In recent years, behavioral studies have also appeared in mainstream law reviews (see for example, Ruger et al 2004, George 1998, Hall Brace and Langer 1999). Moreover, there are social scientists (Provine 1980) that believe legal authority can act as a meaningful constraint on judicial actors because of decisional norms and judicial role expectations. I draw the distinction because I think it is effective in capturing the difference in how the disciplines generally approach judicial behavior.
lack of understanding creates not only a gap in our knowledge, but also significant puzzle: If judges believe they are applying unbiased tools of legal reasoning to decide cases, how do attitudinal forces exercise such a consistent influence on outcomes?

The Theoretical Dilemma for Judicial Scholars: Tip-Toeing Around Intention

Over the years behavioral scholars have been vague about whether judges are acting with volition or whether they are unwittingly influenced by their preferences. This vagueness may stem from a reluctance to argue that policy-directed decision-making is intentional. Despite substantial evidence of attitudinal influence, accusations that judges are purposefully engaged in policy-oriented decision-making seems to exceed the bounds of what existing evidence can reasonably support.

At every level of our legal system, participants act as if the law matters. Lawyers fashion arguments in legal terms, judges invoke doctrinal explanations for their decisions, and law reviews publish extensive analyses of individual cases and lines of authority assessing implications for future litigation. To suggest that judges intentionally disregard the law when making decisions would imply all, or a significant subset, of the participants in the legal community are involved in a grand conspiracy to deceive the American people about the “true” nature of decision-making. If one were to take this idea seriously, it would mean admitting that the conspiracy has been largely successful, lasting over two hundred years without significant defection or the lines communication ever being discovered. Only a handful of behavioral (Brisbin 1996, 1006-9) and critical legal scholars (Unger 1983) seem willing to go that far.
Moreover, there is every indication that judges believe they are reaching decisions through the objective application of legal doctrine. Substantial evidence from behavioral studies shows that judges think they are using the law to reason through cases. Content analyses of legal briefs and judicial conference notes show that judges and attorneys speak about cases predominately in legal terms. (Spriggs and Wahlbeck 1997, Provine 1980, Epstein and Knight 1996, 1998). Moreover, studies based on judicial speeches (James 1968) and interviews (Gibson 1978, Rowland and Carp 1996) suggest that judges have a conception of the proper judicial role they play in our democratic system.

Within this role conception, individual judges may disagree about the extent to which courts should be involved in reviewing the acts of elected branches, or the desirability of relying on alternative sources of decision-making such as legislative intent or precedent. But, one thing common to this conception is the belief that judicial decisions must be based on the law; judges believe that to the extent they stray from accepted sources of legal decision-making, they exceed their authority in our democratic system.

Consistent with this conception of their own authority, judges become defensive when scholars suggest personal preferences drive decisions. Over the years judges have vehemently denied that their decisions are driven by attitudinal considerations (see, Johnson 1976, Edwards 1998). Indeed, accusations of preference-driven behavior appear to be taken as a personal affront by judicial decision-makers. Rowland and Carp (1996) report, for instance, that district court judges were “indignant” in personal interviews when faced with the slightest
suggestion that attitudes drive decision-making (1996, 190). Such strong reactions give additional weight to the idea that legally trained scholars believe judicial decisions should be grounded in appropriate sources of legal reasoning.\textsuperscript{11}

Epstein and Knight (1998) characterize representations that judges rely on the law made by judges, themselves, as inconclusive because judicial actors may be posturing – trying to appear like they are using legal sources of decision-making for the benefit of external audiences. Ironically, however, Epstein and Knight (1996, 1998) provide some of the strongest evidence that judges internalize appropriate norms of decision-making. Looking at the conference notes of Supreme Court justices, they discover that in the Court’s private conferences the justices spend a substantial amount time arguing about the relevance of precedent. This behavior, which occurs exclusively among the justices, cannot be fully explained by the need to account to external audiences; instead, it suggests the justices are speaking and thinking in legal terms because that is how they, themselves, believe they should decide cases.

Interestingly, judges seem to recognize patterns of preference-based decision-making in the behavior of their colleagues that they are unwilling to acknowledge in their own decisions. Prominent examples of Supreme Court justices who have accused their colleagues of preference-based decisions while claiming to adhere to the law themselves include justices Antonin Scalia and Felix Frankfurter.

\textsuperscript{11} In fact, one could argue that the consistency and fervor with which judges express adherence to the law shows that they not only believe, but have also internalized appropriate norms of decision-making. The reason challenges to legal notions of decision-making are taken so personally is because these deeply held beliefs dictate the standards to which judges hold themselves and each other accountable.
One could argue that this demonstrates that judges are being disingenuous, that if they can see other judges as policy-driven, they must be aware of such influences in their own decisional behavior. Psychological theory indicates, however, that this is not necessarily true.

There is a phenomenon in social psychology that is so pervasive in human relations it is referred to as the “fundamental attribution error” (Heider 1958; Ross 1977; Ross, McFarland and Fletcher 1985). It holds that when people observe others they are likely to attribute behavior to internal, dispositional forces. When accounting for their behavior, however, they are much more likely to cite external, situational forces. Thus, judges observing other judges that are acting in ways that may be classified as improper are likely to believe that observed decision-makers are “bad judges” or that they are fundamentally policy-driven. Yet, they will sincerely account for similar patterns in their own decision-making as dictated by the “state of the law” in the particular set of cases they are asked to decide.

**Considering Motivated Reasoning in the Judicial Context**

If we take seriously the idea that judges feel constrained by norms of judicial behavior, a second way of explaining findings of policy-oriented decision-making is that judges believe they follow the law, but somehow their preferences bias their reasoning processes. Segal and Spaeth have suggested this explanation (1996b, 1999, 2002). Borrowing from research in psychology, they posit that judges may engage in “motivated reasoning” (Kunda 1990, 1999), a biased decision process in
which judges are unconsciously predisposed to find evidence consistent with their preferences more convincing than legal authority contrary to preferred outcomes.\textsuperscript{12}

Using motivated reasoning to explain policy-oriented decision-making is attractive for several reasons. First, it reconciles the tension between jurists’ claims that they are following the law and the observed role of preferences in determining outcome choices. Second, it allows judicial scholars to criticize judges without accusing them of acting intentionally, a proposition, which as discussed above, does not fit with indicia that judges act as if, and as if they believe, the law matters. Finally, from a normative standpoint, the idea that judges may be unconsciously engaged in directed decision-making removes some of the blame inherent in behavioral accounts of decision-making. Although attitudinal forces are characterized as determining behavior, judges are less culpable because they are not aware preferences may be creeping into their legal decision-making processes.

There are, however, good reasons to be skeptical that motivated reasoning is occurring in this particular domain. First, this explanation is entirely post hoc. Thus far, scholars have used motivated cognition to explain existing findings of attitudinal

\textsuperscript{12} To be clear, motivated reasoning is by no means central to Segal and Spaeth’s theory of decision-making. In fact, they do not mention motivated reasoning in their initial book on the attitudinal model. It is first mentioned in a symposium where they pit the model against more traditional modes of decision-making (Segal and Spaeth, 1996b). Moreover, when they introduce the concept they do not fully commit to the idea. True to the vagueness about intentionality that has characterized attitudinal theories of decision-making they write, “we must never under estimate the ability of humans to engage in motivated reasoning. For all we know the justices actually believe that they resolve disputes by appropriate modes of legal analysis” (1996b, 1075).

In subsequent work they specifically state “the attitudinal position on motivated reasoning is one of agnosticism. What matters is that the justices’ ideology directly influences their decisions. Whether they do so with self-awareness…doesn’t matter” (2002, 433). Despite this rather tepid treatment of the concept, Segal and Spaeth consistently mention motivated reasoning in work describing their model (1996b, 1999, 2002). Moreover, other judicial scholars have invoked the concept of motivated cognition in accounts of judicial decision-making (Rowland and Carp 1996, Baum 1999).
behavior without presenting any independent evidence that it is occurring in the realm of legal decision-making. Second, they have failed to specify a precise mechanism by which judges would be unwittingly influenced by their policy preferences.

Perhaps the most serious reason to question whether motivated reasoning occurs in this context is that scholars have invoked what seems like a very attractive explanation for policy-oriented behavior, without taking seriously evidence suggesting that judicial decision-making may not be the most hospitable environment for motivated cognition to occur. Literature in psychology documents a number of biases that can occur in a variety of contexts. Research on motivated reasoning embodies a broad range of psychological studies involving self-perception, interpersonal impression formation and evaluation of scientific evidence (see, Kunda 1990, MacCoun 1998, Taber, Lodge and Glathar 2001 for reviews of this substantial body of literature).

Judicial scholars have not been careful about specifying which biases may be operating in legal decision processes. They have also failed to acknowledge that many of the biases documented have been explained by researchers as involving highly personal needs of study participants to maintain a positive self-image (Cooper and Fazio 1984, Tesser and Cambell 1983) or consistent world-view (Lord, Ross and Lepper 1979; Ross, McFarland and Fletcher 1985). It is unclear whether the same ego-protective mechanisms are relevant for judges routinely engaged in adversarial decision-making.
Moreover, judicial scholars have not adequately dealt with evidence demonstrating that when individuals are made aware of the way specific biases operate (Fischhoff 1977) or asked to consider that methods used in obtaining evidence may have resulted in opposite results (Lord, Lepper and Preston 1984), the effects of motivated reasoning are attenuated. This is significant because judges have what may be characterized as a “chronic” awareness of potential biases. They are cognizant that their own attitudes may inappropriately influence their reasoning and they are specifically trained to guard against such biases. Although psychological findings suggest mere awareness of a potential bias may not be enough to forestall motivated decision processes (Lord, Ross and Lepper 1979, Fischhoff 1977) the fact that judges have specific decision-rules to help them reduce attitudinal influences means they may not be as vulnerable to motivated decision processes as some behavioral researchers suggest.

There is a distinction between “directional” and “accuracy” goals in the psychological literature. Research demonstrates that the nature of motivated decision-making depends on the goal of the individual making the judgment. In what is probably the most widely cited piece on motivated decision-making, Kunda describes the distinction as follows:

The motivated reasoning phenomena fall into two major categories: those in which the motive is to arrive at an accurate conclusion, whatever it may be, and those in which the motive is to arrive at a particular directional conclusion … [B]oth goals affect reasoning by influencing the choice of beliefs and strategies applied to a given problem. But accuracy goals lead to the use of those beliefs and strategies that are considered most appropriate, whereas directional goals lead to the use of those that are considered most likely to yield the desired conclusion. (Kunda 1990, 480-481).
Judicial scholars generally attribute directional goals to judges. They assume that judges seek to make decisions to influence policy in ways that are consistent with their personal policy preferences. One may question, however, whether this assumption is justified, in light of the strong socialization that individuals trained in the legal profession experience which specifically holds that such behavior is inappropriate for judges engaged in adversarial decision-making.

Baum (1999) has suggested an alternative characterization of judicial goals. He argues that judges may not be as narrowly focused on directional policy goals as some scholars suggest; instead judges may have a mixture of goals they are trying to achieve. Alluding to the strength of legal socialization, Baum posits that one of the goals of judges in reaching decisions is the desire to achieve “legal accuracy” (1999, 62). Psychological research tells us that when striving for accuracy, decision-makers do not blindly accept evidence that supports their views, but rather seek out the decisional criteria that are most appropriate for the judgment they are making. For judges this means looking to legitimate sources of legal reasoning. This characterization of motives suggests legal authority may be more of a constraint than envisioned by attitudinal theories of decision-making.

No doubt, Segal and Spaeth’s retort to this argument would be that because legal decision-making occurs in an adversarial context, there is appropriate authority to support whatever conclusion judges want to draw. This assumes, however, equality among arguments in litigation. Many who have been schooled in the legal tradition would take issue with this assumption. There are criteria lawyers and judges are trained to recognize which make some legal arguments more persuasive
than other arguments. When applying precedent, for instance, the best authority is case law decided by a court whose opinions are directly binding on the judge presiding with facts closely resembling those in pending litigation. This authority, if it exists, should act as a constraint on accuracy-seeking judges despite the availability of alternative arguments.

That the law may constrain judges comports with findings from psychology demonstrating limits on our ability to engage in motivated cognition. As Kunda writes, “people are not at liberty to conclude what they want simply because they want to…[they] will come to believe what they want only to the extent that reality permits” (Kunda 1990, 482-3). Moreover, the notion that decisional norms can meaningfully constrain behavior is being adapted by researchers who study judges and other politically relevant actors (see e.g., Sniderman 2000, Stone-Sweet 2002 each calling for incorporation of role-appropriate conceptions of behavior in game theoretic models).

There are also institutional protections that should limit the role of unconscious policy motivations in judges’ decision-making. Despite Segal and Spaeth’s claim that judges are not accountable, they must justify their decisions to litigants, legal audiences and the public. Lerner and Tetlock (1999) present evidence that accountability, specifically operationalized as having to justify decisions to others, causes people to engage in more detailed processing, making motivated reasoning less likely to be a factor in decisions. Moreover, the collective nature of

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They demonstrate that decision-makers evidence more integrative complexity when asked to explain their decisions; they are more likely to acknowledge and consider alternative arguments and viewpoints, thus, diminishing the effect of unconscious biases in their decision-making.
decision-making, especially the presence of dissent, is a strong institutional mechanism guarding against the operation of unconscious biases (see generally, Moscovici (1980) Nemeth (1986); see also, Gruenfeld (1995), Gruenfeld Kim and Preston (1998) for evidence that the presence of dissent causes judges in the majority to be more integratively complex).

A final problem with motivated reasoning as portrayed in the judicial literature is that behavioral scholars have not done a very good job of integrating motivated cognition into larger theories of decision-making. As discussed in the next chapter, the concept of motivated reasoning has been invoked in two distinct ways in the realm of judicial behavior. Segal and Spaeth suggest a “top down” process where outcome decisions come first and drive legal explanations that appear to, but do not actually, dictate voting. According to this characterization legal reasoning is more rationalization than deliberation, although judges may convince themselves otherwise.

Other judicial scholars, including Baum (1999) have suggested a “bottom-up,” information-processing, approach where attitudes act as information filters, exercising their influence by affecting micro-decisions that occur in the process of legal reasoning. The information-processing approach is more compatible with traditional characterizations of legal reasoning; it assumes judges really do use the law in thinking through cases, though their preferences may influence the kinds of arguments and evidence they are likely to accept.

Clearly, these are two very different conceptions of the role preferences play in decision-making. Both involve the concept of motivated cognition, but they have
very different implications for the potential of the law to act as a meaningful
c constraint in legal reasoning. Most significantly, although each characterization is
entirely plausible, neither has been subjected to rigorous empirical investigation.

This Project

Despite the criticisms raised in this chapter about how motivated reasoning
has been used in the judicial literature, it remains the best explanation we have to
reconcile findings of directed behavior with indicia that judges use, or believe they
are using, legal criteria to make decisions. The time has come to get a more
sophisticated understanding of how judges reach decisions that are consistent with
their preferences in the context of complex decision-making.

Toward this end, I suggest a different approach to studying attitudinal
influence in legal reasoning. The goal is to see how attitudes affect the cognitive
processes of decision-makers as they make choices within the confines of accepted
decisional norms. Starting with the premise that decision-makers believe they are
employing appropriate tools of legal reasoning, I investigate how decision-makers
with different views make legal judgments given identical case information. In the
next chapter I flesh out the theoretical underpinnings of this approach in more detail
and make the case for why it is important to take legal norms seriously in studies of
judicial behavior.
CHAPTER 2

[C]areful statistical analysis, cautiously interpreted, may conceivably shed some light on judicial decision-making. But serious scholars seeking to analyze the work of courts cannot simply ignore the internal experiences of judges as irrelevant or disingenuously expressed.

Harry T. Edwards, Chief Judge
United States Court of Appeals for the District of Columbia
(1998, 1338)

Traditional notions of legal decision-making are rooted in two distinct but related concepts: first, the idea that judges, as third-party arbiters between litigants, must be impartial; second, the notion that, as unelected officials, they have limited authority to decide disputes that is based primarily on their specialized training. These ideas combine to form an often caricatured picture of judges using expert knowledge objectively to discern what the law requires in particular cases. The prototype is often referred to as “legal formalism”; some use the more pejorative term “mechanical jurisprudence.”

Legal formalism, in its strictest sense, is hard to defend but essential to understand for studying decision-making behavior. Few believe judges can perfectly separate their personal preferences from their reasoning processes. Yet the “impartial judge” remains the ideal-type on which legal training is based and conceptions of appropriate behavior are grounded. In the first part of this chapter, I explore why this idealized notion of decision-making persists despite evidence it does not
accurately reflect judicial behavior and arguments within the legal community that practitioners would be better served by a more realistic understanding of the influences on judges’ decision processes. I suggest two reasons for adherence to this ideal-type: first, democratic justifications of judicial authority *require* formalistic notions of decision-making; and, second, idealized notions of decision-making persist because they serve an important purpose in the training of new attorneys.

In the second part of this chapter, I consider the implications of the ideal-type. I argue that strong socialization inherent in the education and professional development of attorneys cause those in profession to accept and internalize norms consistent with this idealized model of decision-making. This has important implications for how those who are trained in this tradition think about the tasks they perform in our legal system. Therefore, it is essential for those who study decision-making to take such norms into account when considering the specific role preferences play in legal reasoning.

**Law and Not Law**

Many years ago legal realist Jerome Frank asked, “Are Judges Human?” in an article questioning our expectation that judges strictly separate their preferences from the decisions they make in our democratic system (Frank 1931a, 1931b). In this two-part article Frank describes a debate between legal scholars at the turn of the century about what the study of law should encompass. One side is embodied by a quote from Oliver Wendel Holmes: “the prophecies of what courts will do in fact, and nothing more pretentious is what I mean by law” (Frank 1931a, 17 quoting Holmes 1897, 460-461). Embedded in this simple definition are influences
behavioralists have been pointing out for the last fifty years -- including attitudinal and strategic considerations -- forces that other legal minds at the start of the twentieth clearly deemed “external” to the law.

On the other side, Frank includes a set of scholars who argue for separation between legal rules and these other influences. He quotes an early work of Roscoe Pound, Dean of the Harvard Law School for many years:

Everywhere we find two antagonistic ideas at work in the administration of justice – the technical and the discretionary. These might almost be called the legal and the anti-legal (Frank 1931a, 19, 49 quoting Pound 1905, 20).

According to this conception, the law is what judges find in statutes and casebooks, the technical tools of the trade. The discretion or “individualization” judges demonstrate in particular cases is not “the law” but ancillary to its administration. Moreover, legal rules and reference to reason were specifically adopted to cure the arbitrary element in the discretionary administration of justice (Pound 1913). Thus, in training new practitioners, law schools properly focus on legal rules and not discretion or alternative influences.¹⁴

Frank contends that legal scholars who draw a distinction between legal rules and discretion, law and “not-law,” do so at a significant cost. At the very least, he argues, lawyers trained to believe that “the law” is the only thing that matters will be less equipped to serve their clients than if they had a more nuanced picture of the

¹⁴In using Dean Pound as his foil, Frank takes his writing out of context. Pound was a proponent of liberalizing legal education in support of his call for “sociological jurisprudence.” According to Frank, however, the logical result of Pound’s distinction was to give other legal academics the fuel to dismiss alternative influences in law school curricula as essentially “non-legal.” Frank writes, “‘That other stuff’ of which Pound spoke was not law. Pound not only admitted as much, he proclaimed it…So Pound became his own most insidious foe…and nullified his own best work” (1931, 20).
factors that go into judges’ decision calculus. Taken to its logical extreme, Frank warns, the approach could result in self-loathing:

One fears that the law student who believes the fable will be mislead to his detriment. He will make for himself an oversimplified picture of the judicial process. He will ignore the immense importance, the inescapable operation of the personal element in court justice. As practitioner he will be needlessly baffled by coping with it…If he becomes a judge…he will pretend to think in that artificial way, pretend to others – and worst of all pretend to himself. He will be ashamed of the way his mind works humanly despite his efforts. He will waste precious hours attempting to think unhumanly… (Frank1931a, 23-24).

My purpose in setting forth the general contours of the debate is not to demonstrate that legal scholars were struggling with these issues before behavioralists ever entered the picture; but, more significantly, to demonstrate the fallacy in asking Frank’s rhetorical question in the first place. The relevant question is not whether judges are human -- no one, even at the time Frank wrote the article, claimed the contrary. Pound’s statement clearly acknowledges a human element in the administration of justice. In fact, Pound suggests it is inevitable by alluding to its pervasiveness in the endeavor.

The relevant question for those interested in understanding judges’ decision-making, is why does the dominant legal culture (then and now) insist on the separation between the legal and the “non-legal” if both are present in the way judges render decisions? Why do law schools that train practitioners continue to

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15Although, clearly they were. In fact, the second part of Frank’s article foreshadows the important contribution behavioral scholars would make in studies of judicial decision-making (Frank 1931b, 242-246). Murphy and Tanenhaus (1972) review the work of other academic lawyers who questioned doctrinal notions of decision making in the 1920s and 30s, including Powell (1918); Haines (1922); Cushman (1925); and Corwin (1934). See also, Aieche (1990) for a concise discussion of the different strains of legal realism through the twentieth century; Kalman (1986) and Schlegel (1979) for summaries of the evolution and influence of legal realism at Yale.
adhere to a fiction that everyone acknowledges is unobtainable – especially when, as Frank points out, doing so poses significant costs?

The answer must be that the notion of judicial impartiality serves some purpose. Moreover, its persistence -- despite the criticisms raised by legal realists such as Frank and contrary evidence collected by behavioralists including Pritchett -- suggests that whatever purpose the fiction serves is more important than the potential harm it causes.

Next, I suggest two functions judicial impartiality serves that may help explain its continued dominance in norms of appropriate legal behavior. More, important for understanding my approach, however, is that this idealized model of decision-making has implications for how those in the legal community think about the tasks they perform in our judicial system. I expand on this argument later in this chapter.

**Why Mechanical Jurisprudence Persists in a Complicated World**

**(1) Democratic Justification of Judicial Authority**

The first reason the ideal of impartiality persists is that is it necessary to justify judicial authority in our constitutional system. Put simply, democratic theory necessitates strict adherence to formal notions of decision-making. Federal judges, and many state judges, are not elected but appointed by other political actors. They do not have the same democratic authority to act in accordance with their policy preferences. This raises a critical dilemma because judges are unavoidably human. They are bound to have personal preferences -- shaped by their ideology, attitudes and personal experience -- with regard to the cases before them.
The dilemma is solved by reference to the unique knowledge judges acquire through their specialized training. We abide their substantial influence in our democratic system because of the expertise they possess as interpreters of the law. Thus, judges are not free to decide cases according to their personal views because they are constrained by appropriate sources of legal reasoning and cannons of interpretation. Technical training in the tools of legal analysis enables judges to separate reason from personal biases in their deliberations; and it is the predominance of reason that endows judge-made law with legitimacy in our constitutional democracy.

This notion of expertise as a source of judicial authority is uniquely reflected in our constitutional structure. Federal judges are insulated from politics. They serve for life during “good behavior.” The democratic justification for this protection is not to allow judges to pursue their policy preferences unchecked -- although notable judicial scholars have argued such behavior is the result of this particular institution – but rather, to allow judges to apply their expertise without having to worry about pleasing particular constituencies or government officials. Such concerns, it is assumed, interfere with judges’ expert interpretation of what the law requires in particular cases.16

The Framers saw, and specifically portrayed, the creation of an independent judicial branch that allowed judges the freedom to make decisions consistent with their expertise, as a democratic good unique to the system of government they

16As Alexander Bickel put it, ”judges have or should have the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government” (1986, 25-6).
created (Hamilton, Federalist 78). Although this may seem like a naive justification for an independent judiciary, it is the one that was given at the time of the framing, further demonstrating the close connection between impartiality and notions judicial authority inherent in the American political framework. If there were widespread acknowledgement that judges could never achieve this ideal, we would have to reassess the assumptions underlying some of our most basic and necessary governmental forms. This might be troubling for all citizens, but perhaps especially for those who depend on the fiction the most: judges who justify their status based on their expertise.

This could explain why, within the legal community, judges seem to adhere to traditional notions of decision-making with the most fervor (Rowland and Carp 1996, Edwards 1998). There are differences in the degree to which other legal professionals adhere to formalistic notions of decision-making. Austin (1998) notes that legal academics, on average, are much more willing to admit to the influence of alternative forces than are members of “the bench and bar” (Austin 1998,12). Kalman (1996, 230-46) refers to the tension between how some law professors believe judges make decisions and their deep-felt obligation to teach traditional doctrinal techniques as a “crisis” in legal education.

In the next section I discuss how idealized notions of decision-making are part and parcel of legal education, such that those who want to learn the law must “buy in” to the formal model of decision-making to some extent. I argue that the strong socialization inherent in legal education causes those trained in the tradition to internalize norms consistent with this ideal-type. The process is strongest (and more
or less universal) in the early stages of professional training. Later, individuals can selectively “opt out” of the fiction depending on their circumstances, experience, and intellectual style. Consistent with Austin’s characterization, however, few involved in the daily functioning of the judicial system do so. As described more fully in the following pages, judges and practitioners are especially likely to adhere to traditional notions of decision-making because it shapes the tasks they perform on a daily basis.

(2) Functional Requirement of Training New Practitioners

A second reason why the notion of impartiality persists is because it serves a pedagogical function in training new practitioners. Specifically, objectivity is a necessary assumption for teaching law as a science -- the philosophy underlying the case-method used at most law schools (Sheppard 1999; Aichele 1990).

Schweber (1999) describes the history of “legal science” and how ideas that first took root in the natural sciences influenced legal philosophers as far back as the seventeenth century. He describes how early legal philosophers including Sir Francis Bacon and Sir Edmond Coke turned away from religious conceptions of law and gravitated toward scientific logic. The earliest forms of such thinking held that there were “first principles,” like those in occurring nature, expressed through enduring custom and discoverable through prior judicial pronouncements. This thinking laid the groundwork for modern norms of decision-making such as the rule of stare decisis. Later, Blackstone and others elaborated on these ideas and emphasized the

17 “A rule could be demonstrated to be in force by virtue of its having been articulated by a judge in a common law court” (Schweber 1999,611).
importance of legal education as a means of acquiring the skills necessary to engage in doctrinal analysis.

Conceptions of law as a science, according to Schweber, received a warm welcome in America because claims of exceptionalism were part of the political culture, and technological advances helped to legitimize those claims. Although, the goals of legal practitioners were not directly compatible with goals in the natural sciences, many of the tenets of the scientific approach translated quite readily. That there were guiding first principles gave continuity to doctrinal endeavors; it enabled citizens to develop expectations about the consequences of actions based on existing interpretations of what such principles required under similar circumstances. The need for expertise and objectivity was an idea especially well suited for American legal scholars concerned with the impartial administration of justice and how to legitimize the decisions of unelected judges.

The diffusion of these ideas in the United States resulted in a professionalization of the legal community that paralleled professionalization in the scientific community. Each was characterized by “a ‘movement upward’ within society toward elite status; followed by a ‘turning inward’ away from the larger public sphere, as institutional gate-keeping mechanisms and an increasingly internalist discourse came to dominate the activities of scientific and legal educators” (Schweber 1999, 607). In the legal arena, the first stage emphasized the importance of specialized training that enabled practitioners to identify first principles and use induction in doctrinal analysis. Aspiring legal professionals in the
mid-nineteenth century argued that this training resulted in “moral uplift” and entitled them to elevated status in society.

During the second, “turning inward,” stage attorneys secured their position as the practice of law became increasingly esoteric. Wide acceptance of the case-method developed by Langdell in American law schools facilitated this advance.18 The case-method explicitly drew on logic from the physical sciences portraying nature as a “complete and closed system.”

Langdell’s legal science above all depended on retention of the strictly bounded inductivism of earlier scientific models. Deprived of the possibility of drawing first principles from the order of the universe or of the human soul, Langdell turned the focus of the discourse inward… Extra-legal principles were entirely banished from consideration: the law was referential only to itself.

... 

Langdell drew his students’ attention only to those few cases that he knew to be accurate and clear demonstrations of principles that were known to him to be correct… The difference between [the natural science approach] and that used by Langdell was that the science classes were intended to teach a method that could later be used to make new discoveries, while Langdell’s students were introduced to a landscape with well surveyed-boundaries. The law case was fundamentally an object of contemplation, not analysis. (Schweber 1999, 631-2).

Fundamental to this contemplation was the idea that cases illustrated guiding principles and judges could discern what the law required by looking at lines of authority without preconceptions (Schewber 1999, 610). Personal attitudes and values were biases external to this system, their influence to be guarded against by adherence to controlling legal doctrine.

18Langdell’s method spread very quickly through American law schools charged with training new practitioners. Schweber writes that the case-method created by Langdell in the 1870’s was the dominant mode of instruction at American law schools by the turn of the twentieth century (Schweber, 608). The result was that legal education in the United States was largely standardized in terms of approach.
The case method continues to dominate legal education (Stevens 1983, Kalman 1996). To become conversant in modes of argumentation, law students must accept the assumptions implicit in the model: first, the rules they are studying have authoritative force; second, individual cases build on one another in a more or less coherent manner; and finally, there is an inherent logic in legal decision-making discoverable through doctrinal techniques that enable decision-makers to identify what guiding principles require in particular cases.

These assumptions give meaning to the pursuit of specialized legal training. If legal professors acknowledged the role of idiosyncratic forces in judges’ decision-making, the notion of constraint imposed by guiding principles would be illusory. Thus, formal notions of decision-making serve an important function for neophytes in the law, especially in the earliest stages of their training. Later, students can, and sometimes do, develop a more complex understanding of the influences on judicial behavior. Early on, however, acknowledging influences outside the case-method’s “closed system” interferes with learning the doctrinal skills they will employ as practitioners.19

19 Modern legal minds echo this sentiment. For example, federal judge Harry T. Edwards comments, “[l]aw schools have exhibited a disturbing trend toward teaching abstract theory, and have eschewed their obligation to teach the skills necessary for the practice of law”(Edwards 1997, 569; See also Edwards 2002).
Implications of the Ideal-Type

The ideal of judicial impartiality serves functions that may account for why it is so well entrenched in conceptions of appropriate decision-making behavior. More important for understanding the motivation behind this project is that, regardless of why such notions endure, the persistence of this ideal-type has implications for how those who are trained in the legal tradition go about their work.

Those in the legal community take seriously the idea the judicial legitimacy is different from that of other government officials – to the extent judges stray from accepted sources of decision-making they exceed their authority in our constitutional system. This basic assumption underlies all legal training. Because judges are constrained by text, intent, and precedent those who want to participate in the legal community must learn the appropriate rules of analysis. Here I argue that the strong socialization inherent in legal training makes practitioners internalize norms consistent with this idealized model of decision-making.

Most citizens understand from an early age that judges should act impartially. As referees between parties, their decisions should be guided by their reasoned interpretation of the law, rather than personal feelings about particular issues or litigants. Those who choose to enter the legal profession not only understand this basic principle – they probably see some beauty in it. Thus, there is a self-selection process where people who are positively predisposed toward this notion of judicial authority start down the road to law school.\(^{20}\)

\(^{20}\) See Eagly and Johnson (1990) for discussion of self-selection processes.
Once they arrive, much of the education and socialization legally trained individuals experience is specifically aimed at reducing the role of personal attitudes in legal decision-making. Law school is not merely professionalization – it is resocialization in which students’ old ways of thinking are extinguished and replaced by reference to legally appropriate arguments and considerations. The goal is to change the way students think about disputes between adverse parties. Students come to understand that the substance of legal argument is fundamentally different from other types of argumentation. It never involves a naked plea to a judge’s sympathy or ideology; instead legal argument references relevant facts and controlling authority. Students learn the appropriate sources of legal decision-making. They study how judges reason from case to case and develop lines of authority.

At the very earliest stages of this training special attention is given to the fact that judges are constrained, not only by the law, but by the specialized roles they play in our democratic system. Not all disputes are appropriate for judicial resolution. The first week of civil procedure focuses on jurisdiction, limits on authority over particular persons or subject matters. First year constitutional law

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21 Resocialization is a term used in sociology to describe the process by which certain institutions indoctrinate new members. In its most extreme form it can involve an attempt to “break down” prior personality traits, beliefs and/or modes of behavior and replace them with role appropriate traits, beliefs and behavior. Many law schools still use the Socratic Method to accomplish this task (which some consider only slightly less harrowing than techniques used by the military to resocialize new recruits).

Admittedly, the resocialization that occurs in law school is not as all encompassing as that which might occur in other institutions. The comparison is not wholly inappropriate. Moreover, it is not entirely original (See for example, Scott Turow’s *One L* for popular account of the resocialization that occurs in the first year of law school).
covers issues of justiciability, or the notion that disputes must meet specific criteria in order to be appropriate for judges to decide.

Students are steeped in the notion of judicial restraint and deference to the popularly elected branches. They learn that judicial decisions should be narrowly tailored to the facts giving rise to a particular dispute so that judges do not exceed their authority by addressing more than necessary to resolve particular matters, and that there is a specific hierarchy of grounds judges must consider when rendering decisions (commonly referred to as the *Ashwander* rules) so their rulings cause the least possible disruption to existing governmental forms.

All of these concepts are covered early in the legal socialization process, typically in the first semester of one’s first year in law school. Over and above the primacy effect such early lessons are likely to have in shaping views of the judicial role, students are taught that issues related to judicial authority are *overarching* concerns that judges should consider in every dispute they are asked to decide. Unlike more narrow concepts that may be useful in specific legal domains, like contracts or criminal law, role considerations are always relevant when parties seek judicial resolution of disputes.

Moreover, these issues are not only considered as an academic exercise in the first year of law school. Practitioners routinely use arguments related to jurisdiction and justiciability to argue on behalf or their client’s interests. There are court rules, like Rule 8 of the Federal Rules of Civil Procedure, that require that a party bringing a dispute to specifically state the grounds for jurisdiction in his or her complaint,
thus, giving opposing parties the opportunity to challenge the purported grounds in their answers.

Thus, concerns about the appropriate exercise of judicial authority start early and continue throughout one’s legal career. At first, learning the concepts and incorporating them into one’s thinking may be necessary to get through a particular course in law school – later, they become instrumental as a tool practitioners can use on behalf of clients.

From a psychological standpoint the routine use and consideration of arguments related to the appropriateness of judicial authority is significant because such conduct has the potential to shape beliefs about judicial roles. Much of the work on attitudes that is done in political science is interested in how attitudes shape behavior. Psychologists who study attitudes, however, have discovered the directional arrow often goes in the other direction (McGuire 1985) – i.e., routinely making arguments about appropriate judicial behavior has the potential to shape what students, practitioners, and judges, themselves, believe about those roles.

Finally, the concept of “sunk costs” (Arkes and Blumer 2000) should not be underestimated in shaping practitioners views of appropriate legal behavior. Learning the tools of legal reasoning involves a significant investment in doctrinal conceptions of decision-making. Law students spend a good deal of time, money and effort learning the appropriate modes of interpretation. Few who have been trained in the legal tradition would be willing to admit, even to themselves, that their substantial investment was wasted because the law does not matter in how judges reach decisions. More likely, the time and effort expended causes them to believe
the norms of decision-making actually matter in how judges render decisions (see, Stone-Sweet 2002 for a similar argument).

Because of these experiences, individuals in the legal community not only act as if the law matters, they sincerely believe it does. The socialization that starts in law school and continues throughout one’s legal career causes those who are trained in this tradition to accept and internalize appropriate norms of decision-making. These norms, in turn, become the standard to which judges and other practitioners hold themselves and each other accountable.

**Implications for Studies of Legal Decision-Making**

The most significant implication of this process for research on decision-making is that it renders one of the assumptions behind existing studies subject to significant question: the idea that judges are primarily pursuing policy goals (Rohde and Spaeth 1976; Segal and Spaeth 1993; Epstein and Knight 1998). Put simply, this characterization of judicial motives is wholly at odds with how judges view themselves. It is not only inconsistent with traditional notions of what is appropriate in an adversarial context, but also directly contrary to conceptions of what unelected judges should be doing in our democratic system.

Baum’s (1999) characterization of judges striving to achieve “good law” is more consistent with the processes outlined above. According to this view, strong socialization emphasizing formal notions of decision-making instills the desire to make accurate legal judgments as a chronic goal in the minds of those trained in the tradition. Professional experience reinforces this idea as attorneys make predominantly legal arguments to judges. By the time decision-makers reach the
bench conceptions of appropriate decisional behavior are well entrenched. Although other goals may be present in the way judges render decisions, the desire to make sound legal decisions is foremost in their awareness. It shapes the types of arguments judicial actors are willing to entertain and utilize in their decisions.  

Posner (1995) presents a more pragmatic argument about why professional socialization leads judges to follow accepted norms. He argues that there is a purely consumptive value for judges voting in cases. According to Posner, this value is much like the value individual citizens derive from voting in elections, although the chances that they can influence outcomes are infinitesimally small. He argues that judges are motivated to protect this value, which is based, in part, on their ability to call on their legal expertise when presiding over cases. Judges take pleasure in the fact that professional norms differentiate them from ordinary individuals and other governmental decision-makers. Posner writes,

The pleasure of judging is bound-up with compliance with certain self-limiting, rules that define the “game” of judging…[I]t is by doing such things that you know you are playing the judge role, not some other role.

... The judicial game has rules that lawyers learn in law school and then in practice or teaching. Both self-selection and the careful screening of federal judicial candidates help to ensure that most lawyers who become federal judges will be lawyers who enjoy this particular game. They are therefore likely to adhere, more or less to the rules limiting the considerations that enter into their decisions (Posner 1995, 131 and 133).

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22 That legal scholars are constantly arguing about what “legal accuracy” entails does not render it meaningless as decisional aspiration. Moreover, that different judges may have their own conception of what “good” decision-making entails, in general, and in particular cases, does not mean it is entirely subjective. Indeed, one of the objects of the present study is to test the limits of decisional differences as participants with different views make legal judgments under different levels of constraint.

23 Political scientists refer to this as the d-term or “duty” term in models of voting behavior. Of course, judicial votes generally yield more influence. Therefore, the utility judges derive from voting is a composite of values, one of which, is purely consumptive.
According to Posner, the value of judging would be significantly diluted if judicial decision-makers consistently eschewed legal rules in favor of their personal preferences. For the most part, judges sincerely follow accepted rules of decision-making because that is part of what they enjoy about judging.

One problem with much of the research on judicial behavior is that it fails to take seriously the idea that judges believe they are using appropriate legal criteria to reach decisions. Many behavioral scholars have assumed from overwhelming evidence of attitudinal influence that policy preferences are driving decision processes. They have failed to consider the possibility that such findings could be a reflection of the fact that there are many ways attitudes can influence legal reasoning as decision-makers try to use legal criteria to achieve norm appropriate ends.

Within the confines of legal reasoning there is plenty of room for biased perceptions and interpretation. Given the exact same facts and legal authority, different judges can, and often do, reach different conclusions. Gillman (2001) argues that rather than assuming bare preferences drive findings of policy-oriented decision-making, scholars should take seriously the idea that “ideologically influenced legal considerations” operate in judges’ decisions (2001, 490). As he points out, the difference between the approaches is not “merely semantic.” Gillman’s conception of ideological influence acknowledges that judges use legal criteria in reaching and rendering decisions; the conclusion many behavioral scholars draw from findings of directed behavior is that they do not.
The distinction between “top-down” and “bottom-up” conceptions of attitudinal influence is directly relevant here. As alluded to in the previous chapter, there are two views of how motivated reasoning occurs legal decision-making. Top-down models posit that outcome choices come first and legal explanations follow “in service” of those decisions. Bottom-up conceptions are more consistent with traditional notions of decision-making. They assume judges use appropriate criteria in making judgments but acknowledge that personal preferences can influence their decision processes.\(^{24}\)

Gillman’s notion of ideologically influenced considerations is decidedly bottom-up. Moreover, when legal academics talk about attitudinal influence they are usually referring to a similar causal mechanism where preferences shade, rather than determine decisions (Frank 1931a & b, Lewellyn 1962). Top-down models of judicial behavior are more of an affront to practitioners who adhere to traditional notions of decision-making. They conjure up a picture of policy-oriented judges doing exactly what they should not in the context of adversarial decision-making and they render the notion of constraint imposed by law illusory by characterizing judges’ reasoning processes as a post hoc justification, rather than, a meaningful basis for outcome choices.

The substantial disconnect between how top-down models portray judicial decision-makers and how judicial decision-makers characterize their own reasoning processes is theoretically important. Judges explain how they reach decisions via

\(^{24}\) As Baum puts it, “attitudes may serve ‘as information filters or intermediaries that influence the cognitive processes of perception, [and] memory…rather than as direct basis for choice’” (Baum 1999, 139 quoting Rowland and Carp 1996, 150).
appropriate legal criteria in decisions that take up thousands of pages in case reporters. Top-down models of attitudinal influence are not only unwilling to lend credence to these accounts, they are extremely vague in offering any alternative explanation as to how judges come to construct these decisions which they characterize as “rationalizations” for policy-driven outcome choices.

Segal and Spaeth, for instance, do not outline any cognitive process except to say that judges will use whatever authority gets them to preferred outcomes. Their model does not explain at what point in judges’ decision-making we are likely to see the effects of motivated bias. When judges decide which party is entitled to relief in an adversarial dispute, they make many legal judgments that presumably drive the outcome decision. In a case involving more than one legal issue, for instance, judges must decide which issue is determinative and what legal authority should control their reasoning. Answering these questions usually involves making numerous judgments about whether facts in a case resemble, or are distinguishable from, those in other cases cited as authority, and to what extent a judge’s own reasoning should be guided by decisions characterized by competing parties as more and less authoritative.

It is not clear which of these choices are subject to motivational bias, especially where seemingly impartial judges are not free to ignore alternative evidence and arguments. Although judges do not have to make every decision that the parties request in litigation, they must, at the very least, address competing arguments (see, Seudfeld and Tetlock 1977 demonstrating that considering alternative arguments reduces biases in decision-making).
Presumably, some of the decisions judges “want” to make will be harder to justify than others given particular case facts and prevailing legal authority. Top-down theories assert that the availability of alternative arguments and legal grounds facilitates preference-driven behavior, but they fail to elaborate on how this happens. They do not state, for instance, whether judges, individually or collectively, have preferred avenues of motivated decision-making, or specify what decision-makers might do if such avenues are closed to them.25

Bottom-up models are only slightly better on this front. Baum (1999, 66) uses the distinction between “easy” and “hard” cases (Cardozo 1924, 60; Easterbrook 1982, 105-7) to argue that judges may have more latitude to make decisions consistent with their preferences when there is “ambiguity” in the law. These terms, however, defy concrete definition and have eluded effective operationalization in extant studies of judicial decision-making.

In this study I take a decidedly different approach to research on decision-making. The aim is to discover how motivated reasoning happens in this complex domain as well as the objective limits on biased decision-processes. In the next chapters I propose two mechanisms of motivated reasoning: the first, involving analogical perception, is consistent with bottom-up, characterizations of motivated behavior, the second, involving the separability of preferences, is more closely related to Segal and Spaeth’s top-down conception of the role motivation plays in policy-driven decision-making.

25 Segal and Spaeth acknowledge, but never really address, limits on people’s ability to construct justifications in service of their preferences. Taking this proposition a bit more seriously than they do would suggest that the law can serve as a constraint on specific decisions judges make there is “no
As detailed more fully in the chapters that follow, my approach assumes that the best way to gain leverage on motivated decision-processes is to look at how decision-makers with alternative policy views respond to identical case information. Experiments have their shortcomings too, which I also address at some length in describing each aspect of the study. The general argument for using such methods is that the benefits outweigh the costs at this point in our collective knowledge – to advance our understanding of policy-oriented decision-making we need to get inside the heads of decision-makers to discover how they reach decisions consistent with their preferences.

In conducting this investigation, I take seriously evidence of attitudinal influence without dismissing the strong socialization judges and practitioners experience as wholly irrelevant or inconsequential. I purposefully avoid the unsustainable argument that legal rules always determine outcomes, in favor of the much more tenable proposition that legally relevant case facts and norms of decision-making put real limits on decision-makers’ ability to make judgments consistent with their policy preferences.

Finally, because simply demonstrating the phenomenon of motivated reasoning via hypothesized mechanisms would not be particularly interesting, or enlightening, I incorporate the notion of constraint into the designs I use to test analogical perception and the separability of preferences. The question is not only whether policy preferences matter but when they are likely to matter, how they influence decision processes, and which ones come into play as decision-makers deal seemingly reasonable justification to support [them]." (Segal and Spaeth 1996b, 1075, quoting Kunda
with cases involving competing values. The intent is to move beyond the false dichotomy between law and not law toward a more sophisticated understanding of attitudinal influence in legal reasoning processes.
CHAPTER 3

We may try to see thing as objectively as we please. None the less, we can never see them with any eyes except our own.

Benjamin N. Cardozo
*The Nature of the Judicial Process*
(1971, 13)

This chapter describes two experiments designed to assess how policy preferences interact with case characteristics to influence the perception of legal precedent. Using Holyoak and Thagard’s (1995) theory of analogical reasoning, I propose a mechanism of motivated decision-making involving analogical perception. I put forth a model in which the role of policy preferences in shaping perceptions is greatest in a middle range of cases which are neither too similar to, nor very different from, disputes decision-makers are currently considering.²⁶

I describe a comparative experimental design testing the model for 208 lay observers of judicial outputs (Experiment Number 1) and 77 law students (Experiment Number 2). Participants in each experiment read a mock newspaper article about a “target case,” involving unlawful discrimination. Embedded in the article was a description of a “source case” cited as legal precedent where the target

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²⁶ Although this chapter is written in the first person I must acknowledge Thomas E. Nelson and Stephanie Maruska who appear as co-authors on conference papers describing aspects of this research (Braman, Nelson and Maruska 2002, Braman and Nelson 2003). Their contribution was especially important in creating the design for the first experiment, which was used as a template for the second.
of discrimination, the entity accused of discrimination, and the outcome of the case were experimentally manipulated.

Results of these experiments indicate that participants in both studies were more likely to find analogous source cases with outcomes that supported their policy views in the target dispute. As predicted, however this effect was constrained by the manipulation of case characteristics bearing on similarity. Findings also indicate that lay participants who were supportive of gay scout leaders used more lenient criteria in judging case-similarity than did those who were opposed. Contrary to expectations, legal socialization did not attenuate the effect of policy preferences in judgements of similarity.

Model of Analogical Perception in Legal Reasoning

Analogy is pervasive in legal reasoning. Attorneys shape legal arguments by citing precedent, or prior judicial decisions, as authority for the outcomes they seek. Norms of judicial decision-making dictate that judges must use prior judicial opinions to guide their reasoning in current disputes by drawing connections between cases. The Latin phrase expressing the authoritative force of previous case law is *stare decisis*, “let the decision stand.” The phrase embodies one of the central tenets of legal decision-making: to the extent previous case law involves similar facts, litigants and/or legal issues, judges are bound to follow the rules and logic set forth in prior judicial pronouncements when adjudicating current disputes.

Analogy is not only a way judges structure their decision-making, but it is also a key way they legitimize it. Legal scholars have delineated some of the benefits of reasoning by analogy (Sunstein 1993, Sherwin 1999). Deciding disputes
in this manner ensures equal treatment of similarly situated litigants; it also helps to create expectations about the consequences of future behavior; and the use of analogy is important because it allows for gradual evolution of doctrine based on the reasoned application of legal principles to new situations.

Ironically, the central role of analogy in American jurisprudence has been alternatively characterized as a virtue of our democratic system and a force that works to undermine it. At the center of these different characterizations is a fundamental disagreement about whether analogical reasoning acts as a meaningful constraint on the decisions of judicial actors. The debate, born out of the subjectivity inherent in case-based reasoning, is fundamentally important given the special role judges play in our constitutional democracy.

Case-based reasoning involves a complex form of analogical thinking where decision-makers reason between situations that share some, but not all, features. Under these circumstances, expert decision-makers may differ about which aspects of a situation are most important when choosing among analogical alternatives. Moreover, even if decision-makers agree about which aspects of a situation are important, they may disagree about whether or not these features are, actually, similar across cases. The decision to accept a specific analogy when reasoning from case to case is, therefore, largely subjective.

This study seeks to test empirically whether the differential perception of precedent by people with distinct policy views serves as a mechanism of motivated reasoning in the context of legal decision-making. The goal is to set forth and test a model of analogical perception that attributes an important – but circumscribed –
role to policy preferences in shaping judgments of similarity. The underlying logic is based on findings from psychology demonstrating that our ability to engage in motivated reasoning is limited.

In the domain of legal reasoning I hypothesize the primary factor limiting motivated cognition is objective case similarity: the degree to which two cases share an identity of facts, parties, and legal issues. The logic is simple. Where cited precedent involves case facts that are very similar to facts in the pending litigation, all decision-makers, regardless of policy views, should consider the cases to be similar; where case facts are very different, all decision-makers, regardless of policy views, should conclude the cases are dissimilar.

The role of policy preferences should be evident in a middle range of cases where there is some ambiguity involved in deciding whether to accept or reject a precedent as authoritative; in this middle range of cases the preferences of decision-makers should influence perceptions of similarity. Under these circumstances, decision-makers should judge cases with outcomes that support their preferences in pending litigation as more similar to current case facts than cases that do not support their preferences; and they should find cases that go against their preferences as less similar.

Because legal training and socialization may inhibit the role of policy preferences in making such judgments, my model predicts that the same effect will be present but attenuated for decision-makers with legal training. Figure 3.1 illustrates the model of analogical perception I propose and test in this chapter.
Role of Preferences
In Shaping Perceptions

Figure 3.1: Model of Analogical Perception
Testing the Model

This model of analogical perception posits there are three distinct classes of cases, characterized by how much they have in common with facts in the pending litigation: cases that are very similar, cases that are very dissimilar and those that fall between these two extremes. The lines between these categories are not fixed or obvious. Moreover, in the real world, it would be difficult to categorize a particular case in one category or another.

I propose, however, that the multidimensional nature of legal disputes provides an opportunity to operationalize and test this model of perception in an experimental setting. By systematically manipulating the identity of parties and the nature of relationships in cases cited as precedent in relation to a specific “target” dispute, I can create a measure of “analogical distance” that will enable us to assess how policy preferences affect judgments in each of these categories of cases.

This was the specific strategy I used in creating an experimental design to test the model with two samples: undergraduates and law students. The structure of the experiments done with each sample was identical, although the instruments given to lay subjects and law students described different legal disputes.27

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27 As covered in more detail later, Boy Scouts of America v. Dale 530 U.S. 640 (2000) was used as the target case in the experiment done with undergraduate participants. Because of the potential for legally trained subjects to know about this decision, a different discrimination dispute involving similar values (equal treatment vs. free association) was used in the experiment done with the law student sample.
Each experiment involved giving subjects a journalistic account of a discrimination dispute pending in the judicial system (“target case”). Embedded in the mock article was also the description of a “source case,” a prior judicial decision which the article stated “may guide the judges’ reasoning” in the target dispute. Case facts and the outcome of the source cases were manipulated in order to assess their effects on judgments of similarity. Appendix A includes the exact wording of the articles and the variations comprising the manipulations.

In the real world cases can vary on any number of factual dimensions. Thus, the decision about which facts experimentally to manipulate is somewhat arbitrary. Holyoak and Thagard’s (1995) theory of analogical reasoning was especially influential in shaping the manipulations and hypotheses for this experiment. Holyoak and Thagard suggest three things are important in choosing to accept or reject a proffered analogy as authoritative: (1) the similarity of the objects in the target and source domains, (2) the similarity of the relationship between the objects in each domain, and (3) the goal of the decision-maker making the analogy, or the purpose for which the decision-maker wants to use the analogy.

In the realm of legal decision-making, this theory presents a useful way to consider how case facts and policy preferences may interact to shape perceptions of precedent. First, one legal criterion judges consider in assessing the applicability of precedent to a pending matter is whether the cited case involves similar class of litigant. For instance, if a discrimination claim involves a gay man, all else being equal, precedent cited involving other gay plaintiffs should be more influential than cases involving litigants complaining of other types of discrimination.
Second, the relationship between the parties to a dispute is another important legal consideration. A claim of discrimination by a gay man against his private employer is not the same as a claim of discrimination against a government agency or a private membership organization. Even though each involves the same wrongful behavior (discrimination) toward the same type of individual (gay male), the legal obligations of the potential defendants are different because each has a different relationship to the claimant.

Finally, Holyoak and Thagard’s third insight about how the goals of the decision-makers shape perception provides a useful way to think about how policy preferences may come into play. If a decision-maker wants to make a decision in favor of a particular party, the theory suggests she will be more likely to see precedent that supports that result as analogous to the case under consideration than cases that do not support that goal.

Of course, it is difficult to pinpoint the goals of a particular decision-maker in any particular case. Based on the substantial evidence demonstrating preference-consistent decision-making, many behavioral scholars have assumed that judges are primarily motivated by directional policy goals (Segal and Spaeth 1993; Epstein and Knight 1998). Others (Baum 1999) suggest professional accountability and the desire to “get it right” may be important in judges’ motivations. In this experiment I test the former conception of goals by measuring how preferences interact with outcomes to influence similarity judgments; but I also allow for the latter, hypothesizing the interaction will influence perception in some, but not all, cases.
Each experiment used a 3 x 3 x 2 factorial design, where the target of
discrimination, the entity accused of discrimination, and the outcome of the source
case were experimentally manipulated. The first two manipulations combined to
create nine distinct source cases varying in their objective similarity to the target
dispute. The final manipulation varied the source case outcome to create cases that
were consistent or inconsistent with participants’ preferences in the target litigation.
Based on the specific combination of facts in each source case, they were classified
as close, medium distance, or far from the target dispute.

**Specific Hypotheses**

Manipulations of case facts regarding the target of discrimination and the
relationship between the parties to the litigation are expected to each have significant
effects on subjects’ judgments of similarity. Moreover, there should be an
interaction between subjects’ policy preferences and the outcomes of cited authority
such that subjects should be likely to view cases that support the outcomes they
prefer in pending litigation as more similar to the target dispute than those that do
not. Because objective case similarity is expected to act as a constraint on motivated
perception, however, this interaction should *occur only in the middle range of cases*.

Finally, because legal socialization may inhibit the influence of attitudes in
such judgments, the biasing influence of preferences should be attenuated in the
legally trained sample compared to participants in the undergraduate sample. Stated
more formally, the experimental hypotheses are as follows:
Hypothesis 1: Role of Legal Considerations

Manipulations of facts relating to the target of discrimination and the relationship between the parties will have significant effects on subjects’ judgments of similarity. Generally speaking, cases designated as close should be judged to be most similar to the target case; those far away, least similar; and those in the middle, between these two extremes.

Hypothesis 2: Role of Attitudinal Considerations (Motivated Perception)

Subjects will be more likely to find cases that support their preferences similar to the target case than cases that do not. Specifically, we should see an interaction between the outcome of the source case and the policy preferences of decision-makers such that subjects will be more likely to find analogous cases that support their views than those that do not.

Hypothesis 2A: Limits on Motivated Perception (Case Facts)

Objective similarity will constrain motivated perception as follows: (1) preferences will not play a role in cases with fact patterns that are very similar to the target case. Facts will dominate; all subjects will judge these cases to be similar; likewise, (2) preferences will not play a role in cases with facts very different from the target case – again, facts will dominate; all subjects will judge this class of cases dissimilar.

Hypothesis 2B: Limits on Motivated Perception (Legal Socialization)

Due to norms discouraging policy-oriented decision-making, the effect of preferences on judgments of legally-trained subjects will be present but attenuated.
The Experimental Approach

I will now describe two separate experiments where I tested this model of analogical perception on 208 lay subjects and 77 law students. Prior to the specifics of the design, I discuss the benefits and limits of using an experimental approach to study legal decision-making.

Most of the research on judicial behavior has involved applying statistical techniques to existing decisions. Although this approach has contributed greatly to our understanding of variables influencing judges’ votes in particular cases, it cannot explain how those forces come to bear on the cognitive processes involved in legal reasoning. Experimental methodology provides a particularly promising avenue to begin this inquiry. By measuring how subjects with different preferences perceive identical case facts, we should be able to gain some leverage in explaining how those preferences shape the processes involved in legal decision-making.

Obviously, the decision processes involved in making simple judgments of similarity are not the same as those involved in choosing which party is entitled to relief in a lawsuit; but they are related. Defining the zone of cases where attitudes operate in shaping simple perceptions may help us to understand where the law may serve as a meaningful constraint on the behavior of judicial actors and where policy preferences are likely to have the greatest impact in decision-making.

Of course, experimental methodology is not perfect or universally accepted in the realm of judicial behavior. Critics of experimental methods argue that they distill complex processes to their bare essence via operationalizations with little resemblance to the real-world phenomena researchers are trying to investigate. I
argue, this is not necessarily true. The simplification of complex processes tested under controlled conditions can be quite useful in parsing out the influence of various forces hypothesized to influence complex choices. I believe that the design I use in this study strikes an appropriate balance between real-world feasibility and the isolation of causal variables hypothesized to influence legal decision-making.

Apart from justifying the experimental approach, the use of undergraduates and law student subjects as participants also deserves particular attention. Ideally, I would like to have used judges in this experiment testing analogical perceptions. Practically, that was not feasible; judges are notoriously secretive about influences on specific decisions; and, there are strong judicial norms against disclosing personal political views and making decisions in hypothetical cases where there are no real interests at stake. Thus, it was unlikely that I could recruit enough judges to make valid causal inferences about the influence of policy preferences on perceptions.28

Undergraduates are not judges, they are not attorneys, they have no legal training, and, therefore, are unlikely to be familiar with complex decision rules legal practitioners use when thinking about cases. Nonetheless, undergraduates are an appropriate sample to test this model of analogical perception. The decision tasks I am using as dependent variables involve making simple judgments about the similarity of previous case law to a pending case. These decisions do not require special knowledge of complex decision rules. Moreover, such decisions are completely familiar to lay citizens. When reading media accounts of judicial

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28 Some, but not all, of the barriers to using judges as experimental subjects are breaking down. One very impressive effort to recruit federal magistrates resulted in findings demonstrating that they were subject to prospect-theory biases in making decisions about damage awards (Guthrie, et al. 2001).
decisions, for instance, citizen observers probably make mental judgments about the similarity of cases cited as precedent when assessing the quality of judicial outcomes. Although these judgments may never be communicated, they probably effect evaluations of specific court outputs and, perhaps, more general orientations toward judicial institutions.

Finally, testing my model on lay participants will provide a “baseline” to compare results from experiments on legally-trained subjects. Drawing this contrast should help us to understand whether legal education and socialization makes a difference in how preferences influence legal decision-processes.

**Experiment Number 1: The Undergraduate Sample**

**Instrument and Target Case**

In designing an experiment to test how lay citizens judge the similarity of prior case law, I sought to create a decision task that was relatively familiar to undergraduate participants. Rather than ask them to read briefs or judicial opinions, which most people do not encounter in their everyday lives, the case information was presented in the context of a journalistic account of a dispute pending in the judicial system. My goal in choosing a target case was to select a dispute that undergraduates could readily understand; it was also important to pick a legal issue that would allow for theoretically based manipulations of case facts to create analogical distance between source and target cases. The Supreme Court’s recent jurisprudence informed my choice.

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Significantly, however, that study did not ask participant judges to disclose information about their personal policy preferences.
In June 2000 the Court decided Boy Scouts of the United States of America v. Dale, 530 U.S. 640 (2000), which involved a clash of civil rights and civil liberties in which a gay male claimed to be the victim of unlawful discrimination by a national scouting organization. Specifically, James Dale was relieved of his duties as youth leader and dismissed from the Boy Scouts because of his sexual orientation. He claimed that the conduct of the Boy Scouts was illegal under a New Jersey statute prohibiting discrimination against homosexuals in places of “public accommodation.”

In opposition, the Boy Scouts argued that the Court should declare the New Jersey statute unconstitutional as applied to them, because it violated their right to free association under the First Amendment. The Scouts contended that despite its focus on civic values and its close connection with public education, it was not a public organization but a private membership organization. The Court, in an opinion by Chief Justice Rehnquist, agreed, holding that as a voluntary organization, the Scouts’ members had a right to “expressive association” which included the power to exclude people who did not share the values the organization sought to promote.

Specific Manipulations: Creating Analogical Distance

Boy Scouts of America v. Dale clearly involves a dispute about which most people are likely to hold an opinion. Moreover, because it involves a claim of discrimination on the basis of sexual orientation, this case provides an opportunity to create manipulations of facts that take advantage of theories of analogical perception.
Using Holyoak and Thagard’s theory as a guideline, I created a 3 x 3 x 2 between-subjects factorial design in which the facts and outcomes in the source cases were experimentally manipulated. Specifically, I manipulated the target of discrimination, so that each source case involved a claim of discrimination by either a gay male, a female, or a black male; the entity accused of discrimination -- subjects learned that the claim of discrimination was either against another scouting organization, an employer, or an insurance company for a denial of benefits; and finally, the outcome of the source case, so that half the subjects were told cases cited resulted in a finding of unlawful discrimination, and the other half, that the defendant was found to have “acted within its legal rights.” The exact wording of the article and each manipulation appears in Appendix A.

These manipulations generated nine source cases with distinct facts where there was either a finding of discrimination or no discrimination. Each of the nine cases was classified, a priori, into three categories based on their “analogical distance” from the target case. Table 3.1 summarizes the a priori classification scheme. As one moves down the chart and to the right, manipulations make it likely cases will be viewed as dissimilar.

<table>
<thead>
<tr>
<th>Target of Discrimination</th>
<th>Scouting Organization</th>
<th>Employer</th>
<th>Insurance Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gay Male</td>
<td>Close</td>
<td>Close</td>
<td>Medium</td>
</tr>
<tr>
<td>Female</td>
<td>Close</td>
<td>Medium</td>
<td>Far</td>
</tr>
<tr>
<td>Black Male</td>
<td>Medium</td>
<td>Far</td>
<td>Far</td>
</tr>
</tbody>
</table>

Table 3.1: A Priori Classification of Source Cases Analogical Distance from Target Case as Function of Target and Relationship, Experiment Number 1
All else being equal, subjects should see source cases involving gay males and/or scouting organizations as most similar to the target case based on the identity of parties and issues involved. Also, cases involving female targets of discrimination should be seen as more similar to the target dispute than those involving black male plaintiffs. This was the prediction I was most unsure of – especially in the context of a discrimination dispute where race may be especially salient. The intuition was guided, in part, by the fact that in legal analysis, there is a hierarchy of standards judges use in discrimination disputes. Distinctions based on sexual orientation are generally entitled to less scrutiny than racial or gender classifications. Gender classifications are entitled to what is called “intermediate” scrutiny, while distinctions based on race are subject to “strict” scrutiny because they are inherently suspect. Thus, gender is “closer” to sexual orientation in legal terms. Of course it is hard to say whether this technical classification scheme will translate to lay perceptions. Still, it seems quite reasonable to think that discrimination based on sexual orientation will be seen as substantially related to gender discrimination by lay participants.

Finally, cases involving employment discrimination should be seen as more similar to the target case than cases involving claims of discrimination against an insurance company for denial of benefits.
Procedure

In March 2002, two hundred and eight undergraduates were recruited from political science classes at a major mid-western university to take part in this experiment; all participants were given extra credit as incentive to participate.

The study was conducted using a computer program where participants were asked to read articles that appeared on an electronic monitor and answer questions about the information presented in those articles. Subjects were told they were taking part in a study investigating how clearly news media presented information about legal disputes. All subjects in the experiment were given a mock newspaper article describing Boy Scouts of America vs. Dale and stating that the matter was currently pending before the Supreme Court.29

Dependent Variable

After reading the article, subjects were asked to judge on a four-point scale how similar they thought the cited authority was to the target case. The response to this question is the dependent variable in the analyses reported in this chapter.

29 The case was actually decided over a year before the experiment took place. Admittedly, this is a potential problem because subjects who were aware of the decision may be inclined to see things as the Court did in hindsight. I decided to use the case anyway, reasoning that most undergraduates would not be aware of the specifics of Supreme Court jurisprudence; although they may have had some awareness of the case when it was decided, they were probably not familiar with the details of the Court’s decision. Moreover, subjects may not have been aware of the stage the case was in when they heard about it and, thus, believe that it was still pending in the judicial system. Finally, even if subjects knew the case had been the subject of a final determination in favor of the Boy Scouts, it is not clear exactly how such knowledge would influence perceptions of similarity.

As a precaution I controlled for political interest to see whether there was a significant difference between those who were likely to know about the case and those that were not in a supplemental regression analysis included at Appendix B. As it turned out this variable was not a significant in the analysis.
Measuring Policy Preferences

To assess participants’ views of the underlying issue in the target case, I asked them to rate the extent to which they viewed it as acceptable to have a gay man serve as leader in the Boy Scouts. Responses were anchored at 1, “completely unacceptable,” and 6, “completely acceptable.” In conducting the data analysis, I split the sample at the median (4 on this measure) to create a variable to compare the responses of those who expressed substantial support for a gay scout leader to those who did not.\(^{30}\)

Other Measures

To control for their influence on judgments of similarity I measured subjects’ responses to questions about political ideology, partisan identification, and level of political interest.\(^{31}\)

\(^{30}\) I also asked subjects several questions about their views of homosexuality and the government’s role in preventing discrimination on the basis of sexual orientation. I use subjects’ response to the gay scout leader question as the measure of predisposition, however, because it the most specific indication of how participants felt about the issue underlying the target case. The logic behind this decision is that answers to general policy questions predict attitudes about specific disputes less well than more targeted questions. Knowing how someone feels about gay rights, in general, may not tell us much about how that individual will respond to a specific instance when it is in conflict another democratic value, in this case, free association.

\(^{31}\) These variables figure in regression analyses that confirm the ANOVA results presented in this chapter. See Appendix B. None of the additional measures were significant in the analyses of similarity judgements. This, in itself, is not too surprising a there is a very specific measure of policy preference in the analysis. Moreover, inclusion of these variables does not change the pattern of results in the full or disaggregated samples for the primary variables of interest.
Results

Analysis of variance (ANOVA) is the main method of data analysis used to test the effects of the manipulations and the influence of policy attitudes on judgments of similarity. First, I tested the influence of variables on judgments made by subjects in all treatment groups to assess the effect of manipulations on subjects’ ratings of source cases. Second, because I expected an interaction between policy preferences and case outcomes only in the middle range of cases, I disaggregated the sample to test the effects of those variables in close, medium distance, and far cases.

ANOVA Results: All Cases

I conducted univariate analyses of variance on subjects’ judgments of similarity; specifically the analysis considers the effects of four distinct variables: the target of discrimination in the source case, the relationship between parties in the source case, the outcome of the source case, and the policy preferences of the decision-maker. Table 3.2 summarizes the observed main effects.
<table>
<thead>
<tr>
<th>Target</th>
<th>Mean Similarity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gay male (n=72)</td>
<td>2.63</td>
</tr>
<tr>
<td>Female (n=74)</td>
<td>2.39</td>
</tr>
<tr>
<td>Black male (n=62)</td>
<td>2.52</td>
</tr>
</tbody>
</table>

F (2, 206) = 3.5*

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Mean Similarity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scouting Organization (n=68)</td>
<td>2.91</td>
</tr>
<tr>
<td>Employer (n=77)</td>
<td>2.36</td>
</tr>
<tr>
<td>Insurance Company (n=63)</td>
<td>2.25</td>
</tr>
</tbody>
</table>

F (2, 206) = 8.0***

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Mean Similarity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination (n=101)</td>
<td>2.36</td>
</tr>
<tr>
<td>No Discrimination (n=107)</td>
<td>2.65</td>
</tr>
</tbody>
</table>

F (1, 207) = 6.2**

<table>
<thead>
<tr>
<th>Policy Preference</th>
<th>Mean Similarity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support Gay Scout Leader (n=102)</td>
<td></td>
</tr>
<tr>
<td>Oppose Gay Scout Leader (n=106)</td>
<td></td>
</tr>
</tbody>
</table>

F (1, 207) = 6.0**

N 208
R-Squared .31
Adjusted R-Squared .17

*indicates p< .05  **indicates p< .01  ***indicates p< .001 (2 tailed test)

Table 3.2: ANOVA Results – Main Effects of Manipulations and Policy Preferences on Judgments of Case Similarity (All Cases), Experiment Number 1
**Expected Main Effects**

**Target of discrimination.** Changing the target of discrimination had a significant effect on subjects’ judgments of similarity \[F(2, 206) = 3.5, \ p<.03\]. Cases involving gay males were found to be most similar to the target case. Contrary to my initial intuition, however, subjects tended to see cases involving black male plaintiffs as more similar to the target case than cases involving allegations of gender discrimination.

**Relationship Between the Parties.** Altering the relationship between the target and the entity accused of discrimination also had a significant effect on ratings of similarity \[F(2,206) = 8.0, \ p< .001\]. The relative position of the relationship ratings was as predicted, with cases involving scouting organizations judged to be most similar, followed by cases involving employers, and then cases with insurance companies as defendants.

**Unexpected Main Effects**

I hypothesized an interaction between outcomes of source cases and the preferences of decision-makers in the middle range of cases. I did not expect a main effect for either of these variables. Yet, strong main effects obtained for both in judgments of similarity. The findings were as follows:

**Outcome.** Undergraduate participants were significantly more likely to see cases as similar to the target dispute where there was no finding of discrimination \[F(1, 207) = 6.2, \ p<.003\]. This held for all participants, even those who supported gay scout leaders. This was surprising. In hindsight, the choice of a highly sympathetic defendant in the target case may have driven this finding. It could be
that participants who have a positive view of the Boy Scouts saw cases that supported the Scouts’ position as more similar to the target dispute, notwithstanding their stated policy views. I did not think to control for attitudes toward the Boy Scouts to test this hypothesis.32

**Policy Preference.** There was also an unexpected main effect for policy preference. Subjects who supported gay scout leaders were more likely to find all source cases similar to the target dispute, regardless of outcome \[F(1,207) = 6.0, p<.004\]. Although this finding was not predicted, with the benefit of hindsight, it is easier to explain. People who support gay scout leaders may be more likely to see judicial outputs, in general, as a legitimate source of rights; and as such, may use more lenient criteria in assessing similarity of case law than do subjects who are less supportive of courts as conveyers of rights.

If this intuition is correct, it would be evidence of a bias for which I was not explicitly looking, but one that is familiar to psychologists who study the influence of preferences on decision-making (see, MacCoun 1998 discussing use of differential judgment criteria as a form of motivated bias). Moreover, if I am right about what is driving this effect, it should be confined to lay decision-makers; I would not expect this same result for legal sophisticates with different policy preferences who routinely deal with court outputs.

Finally, there was no a significant interaction between outcome and policy preferences in judgments of similarity in the analysis of all cases \[F(1,207) = .37,\]

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32 An alternative explanation that has been suggested involves the possibility that undergraduate subjects were trying to anticipate how a conservative Supreme Court would ultimately come out in
n.s.]. This was not surprising. The prediction was that the interaction would be present in *only the middle range* of cases. To test this hypothesis I did separate analyses on each of the three categories of close, medium distance and far cases constructed using manipulations of case facts.

**Disaggregating Results: Findings for Close, Medium, and Far Cases**

**Manipulation Check**

Before testing the significance of the variables hypothesized to affect perceptions of source cases in the three categories, it is important to assess whether the *a priori* classification of cases as close, medium distance, and far from the target adequately captured subjects’ perceptions. Figure 3.2 sets forth the mean similarity ratings for each of the three categories of cases. The classification scheme did well. Cases classified as close were judged by subjects to be most similar to the target case (mean similarity rating = 2.68); cases classified as far away were judged to be least similar (mean similarity rating = 2.29); and cases designated as falling in between these two categories scored in the middle on similarity ratings (mean similarity rating = 2.52).
Dissaggregated Analyses

Because categories were built using manipulations of case characteristics, these factors drop out in the analysis of variance on close, medium and far cases. Specifically, analyses look at the effects of outcome and policy predisposition on perceptions of source cases in each category. Table 3.3 sets forth the results for the ANOVAs on similarity judgments.
In close cases neither the outcome nor the policy predisposition of decision-makers has a significant influence on judgments of similarity. Moreover, the interaction between the two is not significant. Thus, case facts seem to be driving the relatively high ratings subjects are giving to cases in this category.

The pattern of results for medium cases is as predicted. The interaction between preferences and outcome is statistically significant for judgments of similarity \([F(1,60) = 4.61, p<.036] \). There are no significant main effects for outcome or policy predisposition. Figures 3.3 shows the observed pattern of similarity judgments for decision-makers with different policy preferences.

Table 3.3: ANOVA Results -- Effects of Outcome and Policy Predisposition on Judgments of Similarity in Close, Medium, and Far Cases, Experiment Number 1

<table>
<thead>
<tr>
<th></th>
<th>Close (n = 79)</th>
<th>Medium (n = 61)</th>
<th>Far (n = 68)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcome</td>
<td>F (1,78) = .577</td>
<td>F (1, 60) = 2.68</td>
<td>F (1,67) = 4.14*</td>
</tr>
<tr>
<td>Policy predisposition</td>
<td>F (1,78) = .027</td>
<td>F (1,. 60) = 1.37</td>
<td>F (1,67) = 18.59**</td>
</tr>
<tr>
<td>Outcome x Policy predisposition</td>
<td>F (1,78) = .689</td>
<td>F (1, 60) = 4.61*</td>
<td>F (1,67) = .750</td>
</tr>
<tr>
<td>R Squared</td>
<td>.017</td>
<td>.129</td>
<td>.258</td>
</tr>
<tr>
<td>Adjusted R Squared</td>
<td>-.022</td>
<td>.083</td>
<td>.223</td>
</tr>
</tbody>
</table>

* indicates p<.05, **indicates p<.01 (2 tailed test)
In medium cases, subjects who supported gay scout leaders found cases consistent with their preferences more similar than cases that were not (mean similarity rating for cases where there was a finding of discrimination was 2.71; mean similarity for cases where there was a finding of no discrimination was 2.61). The opposite pattern emerged for subjects who did not express substantial support for gay scout leaders and the difference was more pronounced (mean similarity ratings for cases with no finding of discrimination was 2.85; similarity rating for cases with finding of discrimination was 1.93).
The pattern of results in far cases was somewhat surprising. I expected all subjects would see cases in the same manner as relatively dissimilar to the target dispute. As predicted, there was no significant interaction between outcome and predisposition. Yet, it was in this category of cases that the unexpected main effects for outcome and preferences were most evident. People who supported gay scout leaders tended to find all distant cases, regardless of outcome, more similar to the target dispute than participants who do not support gay scout leaders \([F(1,67) = 18.59, p<.000]\); and all subjects tended to see cases with no finding of discrimination more similar to the target dispute than cases with findings of discrimination \([F(1,67) = 4.14, p<.046]\).

**Discussion – Experiment Number 1**

What does this study tell us about analogical perception among lay citizens? First, in simple judgments of similarity, legal criteria seem to matter. Manipulations of the target of discrimination and the relationship between parties had significant effects on subjects’ ratings of source cases. Second, it is equally clear that participants’ policy preferences played a role in these judgments; as expected, there was an interaction between the outcome of cited authority and the predisposition of decision-makers. Significantly, the interaction was not significant in all classes of cases, but only for a specific category of cases that were neither too close, nor too far away, from the target dispute.

Over and above these anticipated results, preferences seemed to influence judgments in other ways as well. First, people who supported gay scout leaders tended to use more lenient criteria judging all cases, regardless of outcome. And all
subjects tended to see cases with outcomes involving no finding of discrimination more similar to the target dispute than cases with discrimination outcomes. This may have been due to subjects’ favorable views of this highly sympathetic defendant; unfortunately, I could not test this intuition with the data available from the experiment. Interestingly, both of the unexpected main effects were most prominent in the distant category of cases, suggesting that preferences may have more room to operate in these respects as cited authority gets further away from specific facts presented in a dispute.

**Experiment Number 2: The Law Student Sample**

**Choosing the Target Case**

To test the hypothesis about the effect of legal socialization on motivated perception, I conducted a similar experiment with law students. The structure of the experimental design was identical, although the specific target case used with the law student sample differed. I was less confident law students would not know of the *Dale* decision; it is commonly covered in constitutional law and civil liberties classes. As a precaution I decided to use a more obscure discrimination case.

The case I chose, *Wazeerud-Din v. Goodwill Home and Missions Inc.* 737 A.2d 683 (N.J Super. AD 1999), involves the same New Jersey public accommodation statute that was initially at issue in *Dale*, although the context was somewhat different. *Wazeerud-Din* concerns the right of faith based treatment services to exclude clients that do not share their religious views. Currently, the line between public and private assistance is becoming blurred with the introduction of programs like President Bush’s “Faith Based Initiative.” The legal implications of
such programs are, as yet, unsettled. Thus, *Wazeerud-Din* is a particularly interesting case to use with the law student participants. Moreover, because the case involves a value conflict similar to one at issue in the *Dale* case -- equal treatment vs. free association -- the comparison across samples is appropriate.\(^{33}\)

The plaintiff, Wazeerud-Din, was an Islamic man denied admission to a Christian-administered drug treatment program. Although the program received no direct government assistance, it accepted money from social security checks and food stamps issued by the government to its clients to subsidize costs. Wazeerud-Din argued that the program’s refusal to admit him on the basis of his religious beliefs violated his right to equal treatment under the New Jersey’s public accommodation statute. Defendant Goodwill Homes argued that, as a religious based program, it had a right to exclude individuals who did not share the organization’s views. Goodwill Homes also pointed out that successful participation in the program required an openness to Christian teachings which the plaintiff did not demonstrate. The Court ultimately held in favor of the defendant, ruling that under the facts of the case, the organization qualified for a statutory exemption as an “educational facility operated by a bona fide religious institution.” *Wazeerud-Din* at 687.

\(^{33}\) *Wazeerud-Din* involves the additional layer of values concerning separation of church and state. This is, in part, is what makes it such a useful dispute for this experiment. It involves a novel legal issue about how far the Supreme Court’s free association holding in *Dale* should extend: Does it include religious treatment programs receiving indirect assistance from the government? Presumably law students will have some opinion on this issue although it is not yet clear how it will be resolved in the courts. Testing whether there are systematic differences in similarity judgments based on these opinions would provide compelling evidence of motivated perception.
Manipulations: Creating Analogical Distance

Because I wanted to keep manipulations in each experiment as similar as possible, law students were also presented with a journalistic account of what they were told was a dispute pending in the legal system. I changed some of the facts of the case to suit experimental purposes and went into more detail in the law student article because participants were told it came from a trade periodical (see Appendix A for specific wording of the instrument).

In Experiment Number 2, manipulation of the target of discrimination involved telling law students that the plaintiff in the source case was either an Islamic man, a gay man, or a black man. The entity accused of discrimination was a religious treatment program, a community service organization (Kiwanis), or an insurance company. Once again, the outcome of the source case was manipulated so that half of the subjects were told cited authority resulted in a finding of discrimination; the other half were told there was a finding of no discrimination.

Again I classified the nine fact patterns created by manipulations, *a priori*, into three distinct categories based on their analogical distance from the target case. A summary of this classification scheme appears in Table 3.4.
Once more the most challenging aspect of classifying cases was ranking the targets of discrimination on their relative similarity. Because the target dispute involved religious discrimination closely related to belief systems and moral values, I expected participants to view claims involving sexual orientation as more closely related to the target case than claims of discrimination based on race. I also hypothesized that participants would view cases involving community service organizations as more similar to the target dispute than those involving insurance company defendants.

**Procedure**

In May 2003, law students at a large-midwestern university were sent an email solicitation asking them to participate in the study and also recruited via a table in the lobby of the law school. Participants were offered twenty dollars as incentive to participate in this study and another experiment. Once participants agreed to take part, they set up an appointment to do both studies, which typically took less than an hour. Each was administered through traditional paper and pencil techniques.

Table 3.4: *A Priori* Classification of Source Cases Analogical Distance from Target Dispute as Function of Target and Relationship Manipulations, Experiment Number 2

<table>
<thead>
<tr>
<th>Target of Discrimination</th>
<th>Religious Organization</th>
<th>Community Service Organization</th>
<th>Insurance Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Islamic Male</td>
<td>Close</td>
<td>Close</td>
<td>Medium</td>
</tr>
<tr>
<td>Gay Male</td>
<td>Close</td>
<td>Medium</td>
<td>Far</td>
</tr>
<tr>
<td>Black Male</td>
<td>Medium</td>
<td>Far</td>
<td>Far</td>
</tr>
</tbody>
</table>

83
Seventy-seven law students participated in the experiment; their demographic characteristics are included in Appendix A. Although I made a special effort to recruit students well along in their training, I included all students who had completed at least one year of law school. This was the minimum participation requirement because I wanted to make sure participants had been exposed to law school socialization, the brunt of which occurs during students’ first year (Stevens 1983, Sheppard 1999).34

Students were told they were participating in two distinct studies. So that I could administer policy questions without raising suspicions, participants were informed that they were participating in a study comparing the views of law students with other professional students on campus. The question that measured preferences concerning the target dispute was asked in a survey with other politically relevant questions. Then subjects were given the article containing manipulations under the guise of a study designed to investigate how clearly legal periodicals reported cases pending in the judicial system.

**Dependent Variable**

After reading the article, subjects were asked to judge on a seven-point scale how similar they thought the cited authority was to the target case.

**Measuring Policy Preferences**

In order to find out participants’ preferences on the underlying issue in the target case, I asked them to rate the extent to which they agreed with a policy

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34 The sample contains more “rising 2L’s” than I would have preferred, still I am confident that the substantial socialization students undergo during their first year of law school justifies their inclusion
statement indicating that faith-based organizations should have the right to restrict
treatment or charitable services to clients who share their religious beliefs.
Responses ranged from 1, “disagree strongly,” to 6, “agree strongly.” In conducting
the data analysis I split the sample at the median (3 on this measure) to create a
variable to compare the responses of those who thought religious treatment
organizations should have the right to exclude individuals of other faiths with
participants expressed the opposite view.

Other Measures

To control for their influence on judgments of similarity I measured subjects’
responses to questions on political ideology, party identification and level of political
interest. I also included a question measuring how often participants attended
organized religious services.\textsuperscript{35}

Results

ANOVA Results: All Cases

Table 3.5 presents findings results for the ANOVA analysis done on all
cases.

\textsuperscript{35} Again these variables were used in OLS regression analyses that confirm ANOVA results presented
here. Results from the regression are included in Appendix B. None of these measures were
significant in the analyses of law students' judgments. They do not alter the observed pattern of
results reported here.
<table>
<thead>
<tr>
<th>Target</th>
<th>Mean Similarity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Islamic Male (n=27)</td>
<td>3.74</td>
</tr>
<tr>
<td>Gay Male (n=26)</td>
<td>3.38</td>
</tr>
<tr>
<td>Black Male (n=24)</td>
<td>3.62</td>
</tr>
<tr>
<td></td>
<td>F (2, 75) = .37</td>
</tr>
<tr>
<td><strong>Relationship</strong></td>
<td></td>
</tr>
<tr>
<td>Religious Organization (n=25)</td>
<td>3.88</td>
</tr>
<tr>
<td>Community Service Organization (n=28)</td>
<td>3.96</td>
</tr>
<tr>
<td>Insurance Company (n=24)</td>
<td>2.83</td>
</tr>
<tr>
<td></td>
<td>F (2, 75) = 6.12**</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td></td>
</tr>
<tr>
<td>Discrimination (n=39)</td>
<td>3.46</td>
</tr>
<tr>
<td>No Discrimination (n=38)</td>
<td>3.71</td>
</tr>
<tr>
<td></td>
<td>F (1, 76) = .006</td>
</tr>
<tr>
<td><strong>Policy Preference</strong></td>
<td></td>
</tr>
<tr>
<td>Support Restriction of Benefits (n=44)</td>
<td>3.57</td>
</tr>
<tr>
<td>Oppose Restriction of Benefits (n=33)</td>
<td>3.60</td>
</tr>
<tr>
<td></td>
<td>F (1, 76) = .000</td>
</tr>
<tr>
<td>N</td>
<td>77</td>
</tr>
<tr>
<td>R Squared</td>
<td>.58</td>
</tr>
<tr>
<td>Adjusted R Squared</td>
<td>.24</td>
</tr>
</tbody>
</table>

*indicates p< .05  **indicates p< .01  ***indicates p< .001 (2 tailed test)

Table 3.5: ANOVA Results – Main Effects of Manipulations and Policy Preferences on Judgments of Case Similarity (All Cases), Experiment Number 2
Expected Main Effects

**Target of discrimination.** Changing the target of discrimination in cases cited as authority did not have a significant effect on judgments of similarity in the law student sample \[F(2, 75) = .36, \text{n.s.}\]. In fact, law students tended to see source cases involving all three types of plaintiffs as substantially similar.

Given the choice of target manipulations, this result is not as surprising as one may think for legally trained participants. As ascribed characteristics, religion and race are each subject to “strict scrutiny” for the purposes of legal discrimination analysis. That study participants rated cases involving Islamic and black plaintiffs substantially similarly in reference to the target dispute may actually be taken as evidence they were using legally relevant criteria in an appropriate manner. Classifications on the basis of sexual orientation are subject to a different, “rational basis” test. The fact that participants rated cases involving gay men as only slightly less similar than the other categories is likely driven by the substantial similarity of values involved in the context of this particular target dispute.

**Relationship Between the Parties.** Altering the relationship between the target and the entity accused of discrimination had a significant effect on ratings of similarity \[F(2,75) = 6.12, p< .005\]. The relative position of relationship manipulations was a bit different than predicted, with cases involving civic organizations judged to be most similar, followed very closely by cases involving religious treatment programs. Subjects seemed to draw a sharp distinction between those cases and source cases with insurance company defendants which on average
were rated significantly less similar to the target case than either of the other
categories.

**Outcome and Preferences.** The unexpected main effects for outcome and
preferences observed in Experiment Number 1 were not manifest in the experiment
done with the law students.

The interaction between outcome and preferences was significant in the
analysis done on all cases. \(F(1,76) = 7.83, p< .008\). This strong effect, which was
not observed in the experiment with undergraduates, seems contradictory to the
hypothesis that legal training should attenuate the role of attitudes in similarity
judgments. Moreover, the presence of this interaction in the analysis done on all
cases raises concerns regarding my hypothesis about the role of objective similarity
as a constraint on motivated similarity judgments.

As detailed in the next section, however, the disaggregated analyses
demonstrate that the expected interaction between predispositions and case outcomes
is statistically significant *only in the middle range of cases*. The significant strength
of the effect, however, is contrary to predictions about the role of legal socialization
as a factor attenuating motivated perception.
Disaggregating Results: Findings for Close, Medium, and Far Cases

Manipulation Check

Once again the relative ratings of similarity for cases in each category seems to indicate the classification of cases as close, medium and far from the target dispute was on the mark. Figure 3.4 sets forth the mean similarity ratings for each of the three categories of cases. Cases classified as close were judged by subjects to be most similar to the target case (mean similarity rating = 4.04); as far away, least similar (mean similarity rating = 2.83); as falling in between these two categories, in the middle on similarity ratings (mean similarity rating = 3.81).

Figure 3.4: Mean Similarity Ratings for Cases Designated as Close, Medium Distance and Far From the Target Dispute, Experiment Number 2
Table 3.6 sets forth the results for analysis of variance done on similarity judgments in close, medium and far cases.

<table>
<thead>
<tr>
<th></th>
<th>Close (n = 27)</th>
<th>Medium (n =26 )</th>
<th>Far (n = 26 )</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcome</td>
<td>F (1,26) = .006</td>
<td>F (1,25) = .894</td>
<td>F (1,25) = .018</td>
</tr>
<tr>
<td>Policy predisposition</td>
<td>F (1,26) = 2.20</td>
<td>F (1,25) = .777</td>
<td>F (1,25) = .222</td>
</tr>
<tr>
<td>Outcome x Policy predisposition</td>
<td>F (1,26) = .937</td>
<td>F (1,25) = 11.0**</td>
<td>F (1,25) = 2.16</td>
</tr>
<tr>
<td>R Squared</td>
<td>.118</td>
<td>.380</td>
<td>.109</td>
</tr>
<tr>
<td>Adjusted R Squared</td>
<td>.003</td>
<td>.295</td>
<td>-.025</td>
</tr>
</tbody>
</table>

**indicates p<.01 (two-tailed test)

Table 3.6: ANOVA Results -- Effects of Outcome and Policy Predisposition on Judgments of Similarity in Close, Medium, and Far Cases, Experiment Number 2

Again, results substantially bear out hypotheses concerning the role of case facts as a constraint on motivated perception. In close cases, neither the outcome nor the policy predisposition of decision-makers has a significant influence on judgments of similarity. Moreover, the interaction between the two is not significant. The same pattern holds in the analysis of distant cases.
Figure 3.5: Similarity Judgments of Participants with Alternative Views on Restrictions Experiment Number 2

The results for cases in the middle category indicate a significant interaction between policy preferences and outcome \( [F(1, 25) = 11.0, p < .003] \). Figure 3.5 illustrates this effect. Legally-trained subjects who thought religious organizations should not be entitled to restrict services to clients who share their religious beliefs perceived cases where there were findings of discrimination as more similar to the target dispute than cases without findings of discrimination (mean similarity ratings were 4.80 and 3.57, respectively). The opposite pattern holds for law student participants who favored the restriction of benefits to individuals who have religious beliefs consistent with the organization providing the benefits; the mean similarity
ratings were 2.62 and 4.83, respectively. This strong interaction effect is contrary to the hypothesis that legal socialization would act to attenuate the role of preferences in similarity judgments in the middle range of cases.

**Discussion – Experiment Number 2**

Findings from the experiment with law students confirm expectations about the objective similarity limiting motivated perception. The interaction observed in the middle range of cases, however, casts doubt on the hypothesis about legal socialization attenuating motivated perceptions.

**General Discussion**

Results from this study contribute to our knowledge in several important respects. First, findings provide substantial evidence that the differential perception of precedent by decision-makers with different policy preferences may be a mechanism of motivated reasoning in legal decision-making. We also saw, however, that motivated perceptions were constrained by the objective similarity of cases cited as authority in relation to the target dispute.

In both samples the expected interaction between policy attitudes and case votes was statistically significant only in the middle range of cases. Moreover, in each experiment similarity judgments for cases that were designated as close to the target dispute were not influenced by policy preferences. The same was true for cases designated as far from the target dispute in our legal sample. Thus, consistent with findings in psychology, there seem to be limits imposed by reality on the ability of decision-makers to “see what they want” in the context of legal decision-making.
Because the target case used in each experiment was different, it is impossible to say that one sample of participants was more biased than the other sample. I can say with confidence that both samples exhibited evidence of motivated reasoning and in both samples there was evidence of objective constraint. I can also draw a rough comparison between results from each experiment with a statistic commonly used in psychology that approximates effect size, partial Eta Squared.\textsuperscript{36}

Partial Eta Squared for the interaction between predisposition and outcome in the middle range of cases was .08 in the undergraduate sample and .33 in the law student sample. Thus, the interaction accounted for more variance in the experiment done with the law students. This finding suggests that specialized legal training may have served to accentuate rather than attenuate biased perceptions. This could be because law students were more aware of the implications of finding cases similar than participants in the undergraduate sample. Although contrary to my original hypothesis about the role of legal training in attenuating motivated decision processes, this is a possibility that should not be ignored and perhaps one that may be tested more directly in future research.

Taking a cue from findings on policy-oriented decision-making I was looking for one very specific type of motivated perception in this study -- an interaction between case outcomes and policy preferences. The findings indicate that preferences influenced judgments in unanticipated ways as well. Results from the first experiment suggest two other types of biases may operate in lay perceptions of judicial outcomes: bias driven by sympathy toward particular types of litigants and

\textsuperscript{36} The measure is akin to R-Squared, in that, it reveals the proportion of experimental variance
bias driven by the use of differential judgement criteria by people with distinct policy views.

These unexpected effects were especially pronounced in cases that were furthest away from the target dispute, suggesting that attitudes may be most likely to influence judgments in these respects where there is substantial latitude for them to operate. Significantly, neither of these main effects was present in the sample of legally trained decision-makers. This could be because legal training helps to prevent such biases, but it could also be a function of the particular cases used in each study. Further testing needs to be done to test the reliability of these observed differences.

The study contributes to our knowledge of the forces underlying findings of directed judicial behavior. It tells us analogical perception is a potential avenue of attitudinal influence in legal decision-making and that there are real limits on motivated decision processes -- a proposition that most judicial scholars have thus far, failed to seriously consider. Moreover, from a psychological perspective, the findings are noteworthy in at least two respects. First, the observed influence of policy attitudes in this context provides empirical support for Holyoak and Thagard’s (1995) theory about the effect of decisional goals on analogical reasoning. Second, consistent with previous studies (Gentner 1998), findings in both experiments indicate that manipulations of the relationship between the parties affected judgments of similarity more powerfully than target manipulations.

accounted for by particular treatments and/or interactions (Keppel 1982).
Results from this study reinforce the contention that research on the perception of legal precedent can be informed by findings from psychology concerning analogical perception processes. Taken as a whole, I believe that this research demonstrates the utility of adapting theory and methods from cognitive psychology to studies of legal decision-making -- for both disciplines.
While the Court gives lip service to the principle, oft repeated in recent years, that standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal, in fact, the opinion which tosses out of court almost every conceivable kind of plaintiff who could be injured by activity claimed to be unconstitutional, can only be explained by an indefensible hostility to the claim on the merits.

*Warth v. Seldon* 422 U.S 490, 520  
(1975) Justice Brennan, *dissenting*

In his chapter I consider the separability of preferences in legal decision-making. Employing an experimental design, I investigate whether decision-makers are able to separate their views on three distinct policy issues from a neutral threshold decision they are asked to make in a case involving multiple issues.

Law student participants were given a mock legal brief containing identical legal arguments on both sides of a standing dispute in a case where the spouse of municipal firefighter was challenging an ordinance restricting the political expression of public employees. The experiment involved a 2 x 2 factorial design. Experimental manipulations involved the content of the political expression at issue (pro-life vs. pro-choice) and the jurisdiction where the case was pending (with direct controlling authority vs. without direct controlling authority). Participants' policy views on abortion, free speech, and restrictions on the political expression of public employees were measured to assess how they influenced the standing decision.
The findings demonstrate that, in line with traditional notions of legal reasoning, participants were able to separate their views on restrictive ordinances from the standing decision. Opinions on free speech, however, influenced judgments in a manner consistent with attitudinal hypotheses. Also, participants’ opinions on abortion interacted with speech content to influence decisions -- but in a manner not wholly consistent with legal or attitudinal accounts of decision-making.

**Introduction**

Legal reasoning is complex reasoning. Although our judicial system requires judges to make a dichotomous choice between adverse litigants, this seemingly simple decision is often embedded in complex fact patterns where several issues are raised which could each serve as the basis for deciding a case one way or the other.

Cases with multiple issues are common because litigation arises from complicated real-world situations and attorneys are trained to present all legal arguments favoring their client’s position. Attorneys routinely “argue in the alternative,” or emphasize different aspects of a case at different points in their argument, even if doing so seems inconsistent. The goal is to provide judges with as many legal grounds as possible to make a decision favorable to their client’s interests.

Surprisingly, much of the social science research on decision-making treats cases as if they were unidimensional. Scaling studies, for instance, assume that cases involve a single “dominant” issue and that outcomes can be explained or predicted by ordering the justices’ preferences along that dimension (Schubert 1962, Rohde and Spaeth 1976, Segal and Spaeth 1993). Critics of scaling techniques raise
questions about studying judicial decision-making in this manner. Tanenhaus (1966) argues that, at best, scaling techniques lose information about alternative issues that judges may consider and, at worst, they can result in the mischaracterization of votes judges cast for other reasons. Mendelson (1963) echoes this sentiment. Citing an instance where Justices Brandeis cast his vote on procedural rather than substantive grounds in a case that was included in Pritchett’s (1948) analysis of First Amendment decisions, he wrote “to count that vote as against free speech is to pretend that red is green” (1963, 595).

Treating cases as if they involve a single issue also ignores the possibility that there is a connection between issues raised in litigation. How decision-makers view one legal issue may influence their reasoning with respect to another. This possibility is especially intriguing in the context of disputes involving “threshold” issues that often accompany substantive disputes between parties.

A threshold issue is one the court must decide before it can consider a matter or invoke a particular mode of analysis. Some threshold issues, including jurisdiction and the family of issues relating to justiciability, concern the appropriateness of using judicial authority to resolve particular disputes. Other threshold issues involve preliminary matters judges sometimes need to address to determine what rules will guide the analysis of substantive claims raised in litigation, as when a judge decides if a claim falls under a specific statutory scheme or requires a certain standard of review. Norms of decision-making dictate that threshold issues

37 Specifically, jurisdiction involves whether or not a court has the constitutional and statutory authority to hear a case. Justiciability issues concern whether adversarial disputes meet certain
must be decided first in litigation -- before judges consider the “merits” or substance of a claim.

Decisions on threshold issues are fundamentally important in determining outcomes. The preliminary decision about whether to apply a particular standard of review can substantially tip the scales in favor of one side or another. Moreover, decisions on threshold issues often determine whether litigants are entitled to the judicial resolution of disputes they are seeking. If a court decides it does not have jurisdiction to hear a matter, for instance, the only thing for the court to do is dismiss the claim. Under such circumstances, the plaintiff will not get the relief she is seeking or even the opportunity to have her complaint heard.

An assumption in traditional characterizations of judicial decision-making is that judges’ reasoning across issues is independent. How a judge views a claim on the merits should not affect her reasoning on threshold issues involving jurisdiction or justiciability. Given the potential for decisions on threshold matters to shape outcomes, however, it is not unreasonable to think judges’ preferences on threshold issues may be related to how they view other issues raised in litigation. Judges who look favorably on a plaintiff’s substantive claim may be more likely to conclude the plaintiff meets the requirements necessary to litigate the matter; conversely, decision-makers who sympathize with the defendant on the merits may be more likely to dismiss the matter on preliminary threshold grounds.38

criteria making them appropriate for judicial resolution. There are actually several separate doctrines related to justiciability including standing, mootness/ripeness and the political question doctrine.

38These examples set forth a “sincere” use of the threshold doctrine where judges’ decision on the threshold issue allows them to hear claims they believe have merit and dismiss claims that do not. There are also suggestions in the literature that judges may use threshold issues more strategically to
The potential for such behavior in the context of nested decision-making is problematic. Threshold matters are generally classified as “procedural” or technical issues; they do not attract a great deal of attention compared to substantive claims in litigation. It has been suggested that the ability of judges to dispose of controversial claims with which they disagree on such technical grounds may be a tempting way for judges to make decisions consistent with their preferences while flying “under the radar.”

Segal and Spaeth (1993) are among scholars who have argued that the availability of different lines of authority facilitates attitudinal decision-making on the part of judges. Without conducting any empirical analysis on the subject, they assert that Supreme Court judges use threshold issues to allow them to reach the merits in cases involving issues they want to address and avoid doing so in cases they do not. Epstein and Knight (1998) have also suggested that judges may use alternative legal issues to achieve policy goals. In their analysis of the strategic behavior of justices on the Supreme Court, they explicitly state “interjection of an additional dimension to a case can be a rational course of action for a policy minded justice” (1998, 89).

These arguments from behavioral scholars recognize that judicial reasoning does not occur in a vacuum. The complexity of decision-making increases with the number of contentious arguments in litigation, but so do the justifications decision-
makers can use to support their outcome choices. Viewed in this light, the nested nature of decision-making in cases with threshold issues represents an opportunity for decision-makers seeking to justify distributive outcomes.

This characterization of judges actively using alternative lines of authority to justify policy outcomes, however, is directly at odds with more traditional portrayals of judicial decision-making in cases involving multiple issues. Legal characterizations of decision-making maintain that the professional training judges experience enables them to use appropriate rules of legal reasoning. One of these rules involves strict adherence to the norm that judges should separate their personal feelings about particular claims or litigants from their reasoning about disputes. Another involves the well-established rule that distinct issues in litigation should be considered independently.

This study investigates the relationship between issues in complex litigation. Specifically, I test whether decision-makers’ preferences with regard to substantive policy issues raised in litigation influence their decision on a seemingly neutral threshold question. My aim is to gain a more sophisticated understanding of another possible mechanism of motivated reasoning in legal decision-making and discover its limiting conditions.

In considering how policy views may affect decision-makers, I draw loosely on literature concerning separable preferences (Lacy 2001, Schwartz 1992). In the next section I flesh out the theoretical considerations underlying this proposed

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39 Specifically, they argue this occurs in litigation concerning the division of labor between and state and federal judicial systems involving issues like national supremacy, comity, sovereign immunity, and choice of law (1993, 19-31).
mechanism in more detail. Then I outline the specifics of an experimental design
done with legally trained participants I used to test the separability of preferences in
the context of a concrete legal dispute.

Theoretical Underpinnings: Considering the Separability of Preferences in the
Context of Legal Decision-Making

The idea that the preferences of citizens and public officials may be related
across choices they make in our political system is not new. The concept of
separable preferences has been employed by political scientists to explain the
behavior of voters (Hinch and Munger 1997), citizens responding to political surveys
(Lacy 2001) and members of Congress (Schwartz 1977).

The concept of separable preferences has also been invoked the judicial
literature. Schwartz (1992) developed a formal model of judicial decision-making
based on his intuition that judges’ preferences for policy outcomes are related to how
much precedential authority they want cases to have. According to his model, judges
who agree with outcomes in particular cases want those cases to yield substantial
authority in future litigation involving similar issues. Likewise, judges who disagree
with results seek to limit the application of those cases to future litigation.

Schwartz’s insight about the relation between policy preferences and the
authoritative force judges want cases to have is extremely compelling, but distinct
from how I use the concept of separable preferences here. Specifically, this study
looks at the separability of preferences across issues in complex litigation. It does
not suggest any formal model of behavior. Instead, I conduct an empirical
investigation of the extent to which policy preferences may influence decision-
makers as they consider issues assumed to be independent in legal accounts of decision-making.

Preferences are separable if “a decision-maker’s preferences along any particular issue dimension does not depend on her preference along any other dimension” (Schwartz 1992, 220). This characterization of the relationship between preferences comports nicely with how legally-trained scholars believe legal reasoning occurs in cases involving multiple issues. Distinct issues are to be considered independently in terms of relevant facts and authority judges bring to bear on their decisions. Moreover, according to traditional notions of decision-making, policy preferences should not affect judicial reasoning processes. How a decision-maker feels about the parties or alternative claims raised in litigation should not come into play when deciding independent threshold matters.

In practice, decision-makers may fall short of this ideal. As the quote from Justice Brennan at the beginning of the chapter illustrates, even judges acknowledge the potential for issues to “bleed” into one another in the process of legal decision-making. One does not have to look hard, or long, to find similar accusations suggesting improper motives, concerning judges’ views of substantive claims in litigation, drive threshold decisions that deprive particular parties of their “day in court.”

Given rules of decision-making which dictate threshold matters must be considered first in litigation and the potential for threshold issues to shape outcomes, there is no question that judges could act to avoid substantive questions in this manner. Whether they do so intentionally is another matter. Although behavioral
scholars have suggested that this is a plausible strategy for policy driven judges, one may question whether this characterization is appropriate given widely shared norms that such behavior is wholly inappropriate for judicial actors engaged in adversarial decision-making.

Indeed, when acting in ways that may be classified as strategic with regard to threshold matters, judges do not demonstrate any awareness that they are acting improperly. When making threshold decisions, judges never say they are dismissing claims because of how they feel about particular litigants or other issues raised in complex cases; they do so through the seemingly neutral analysis of doctrine relating to the threshold question. Moreover, judges become defensive when people accuse them of making threshold decisions on improper attitudinal grounds. This sort of response belies the idea that judicial decision-makers intentionally act strategically on threshold issues; instead, it suggests they, themselves, believe they are making threshold determinations based on their objective analysis of legal authority bearing on the threshold question.

That judges may believe they are using appropriate sources of legal reasoning, however, does not end the inquiry into whether such decisions are entirely objective. Borrowing from findings in psychological literature, Segal and Spaeth (1996 and 2002) have suggested that judges may engage in motivated reasoning, a biased decision process where decision-makers are unconsciously predisposed to

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40For example, Justice Powell’s majority opinion in Warth v. Seldon, 422 U.S. 490 (1975) specifically denied the Court’s determination on the standing issue was related to the merits of the plaintiff’s claim. 422 U.S. 490 at 500.
find authority consistent with their attitudinal preferences more convincing that cited
authority that goes against desired outcomes.

One way this could occur is in reasoning about threshold matters. Here, I
propose and test a mechanism of motivated reasoning involving the relationship
between issues in complex cases. I hypothesize that the relationship may be more
fluid than traditional characterizations of decision-making suggest. I employ an
experimental design to test whether the decisions of legally-trained participants
regarding a hypothetical threshold issue are influenced by their views on other policy
matters concurrently raised in a complex fact pattern. In the next section, I describe
the specific design I used to test the separability of preferences in the context of a
concrete legal dispute.

Design Specifics

Basic Intuition

Standing is a threshold issue that involves whether the person who files a
complaint is an appropriate party to litigate the matter. The requirement is that the
injury the plaintiff claims to have suffered must be what is referred to in legal jargon
as an “injury in fact.” This means the injury must be personal to the plaintiff and not
commonly shared by others in the population.41 Although there are several “sub-
parts” to the standing doctrine, the most important for the purposes of understanding
the design used in this experiment is the requirement that the alleged injury be
“personal” to the plaintiff.

41 The requirement arises from the “case and controversies,” language in Article III of the
Constitution and also from prudential considerations judges have developed about what makes
disputes appropriate for judicial resolution. The logic behind the standing doctrine is that it is
Standing is especially useful for an experiment like this because it can arise in a variety of factual contexts. Whenever it is raised the question of standing is always embedded in a larger substantive dispute. Moreover, from a legal standpoint, how a judge views the substantive issues raised in litigation should not affect the determination of the standing issue.

To test the relationship between issues in complex litigation I drafted different versions of a hypothetical case brief involving a standing issue that has been the subject of conflicting rulings by federal circuit courts. Law student participants were presented with this brief in which case facts and legal arguments related to a standing issue were experimentally controlled.

The model for the case described in the brief was a decision from the United States Court of Appeals for the Eighth Circuit: *International Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002). The case involved a local ordinance with provisions akin to the Hatch Act restricting the political activity of public employees. The city ordinance stated that municipal employees would be subject to disciplinary action or dismissal if they were involved in supporting candidates for municipal office directly or indirectly. In *City of Ferguson*, the wife of a city firefighter challenged the provision when her husband’s job was threatened after she tried to run for municipal office. Her claim was that the ordinance improperly restricted her political conduct because she was fearful her husband could lose his job on account of her activities.

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important for the person litigating the matter to have a substantial interest in its outcome so she will have incentive to present the best arguments in the context of an adversarial proceeding.
The defendant, city employer, raised the issue of standing, arguing that because the provision did not threaten the plaintiff spouse directly, but only indirectly through the loss of her husband’s employment, she did not have standing to challenge the ordinance. The Court of Appeals for the Eighth Circuit decided the issue in favor of the plaintiff; it held that the plaintiff suffered a legally cognizable injury that was personal to her because it was her own political expression that was inhibited by the operation of the ordinance. The court reasoned that she had a reasonable apprehension that her husband could lose his job, which would cause economic harm to her entire family.

In ruling for the plaintiff on the standing issue, the Eighth Circuit reversed the decision of a Missouri federal district court. It also contradicted the decisions of two other federal circuit courts that have decided the same standing issue, *Biggs v. Best, Best and Kreiger*, 189 F.3d 989 (9th Cir. 1997) and *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998). Each of these cases also involved challenges to restrictive ordinances raised by spouses of public employees. In both cases the circuit court specifically held that harm alleged by the plaintiff spouse was “too indirect” to confer standing to challenge the ordinance at issue.

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*42 Such ordinances are actually quite common. Their purpose is to protect public employees from undue pressure from local political candidates and to preserve the appearance of impartiality in the provision of government services.*
The Mock Brief

The issue raised in this line of cases presents an excellent opportunity to test the separability of preferences in a concrete legal dispute. Experimental conditions were created where participants were given identical legal authority to make a decision on the standing issue in different contexts. Significantly, from a legal standpoint, variations in the fact pattern across treatment conditions should have no bearing on participants’ reasoning on the standing issue, although they may significantly alter how participants view the larger dispute in which the threshold issue is embedded.

Traditional notions of legal decision-making suggest that decisions on multiple issues in complex cases should be independent, so there should be no difference in how participants make decisions, provided relevant case facts and controlling authority on the standing issue are identical. Systematic differences across conditions would suggest evidence of motivated reasoning, demonstrating that participants’ views on other issues raised in the hypothetical fact pattern shaded their reasoning on the standing issue.

All participants were given a “Summary Legal Brief,” which they were told was a new format some jurisdictions were considering to promote timely motion decisions. This brief was a ten-page document setting forth the facts and legal arguments submitted by each side to a hypothetical dispute, Denise Brunell v. City of Gayson and Rick Humphry, City Manager. Each side submitted arguments regarding the defendants’ Motion to Dismiss. The basis of the defendants’ motion was a standing issue similar to the one raised in the federal cases described above.
The brief described a dispute in which a city ordinance prohibited public employees from supporting local candidates for mayor or city council. The plaintiff was the wife of a city firefighter; her husband was threatened with disciplinary action after she posted a campaign sign on their property in the midst of a “hotly contested” campaign for city council that “centered on the controversial issue of abortion.” After she discussed the matter with her husband, the couple removed the sign, but the plaintiff wife brought an action challenging the ordinance as an improper restriction on her right to political expression.

The experiment involves a 2 x 2 factorial design in which the content of the political expression was manipulated. Half the participants read a brief in which the plaintiff expressed support for the pro-life candidate in the election for city council; the other half, a brief in which she expressed her support for the pro-choice candidate. The jurisdiction in which the case was pending was also subject to experimental manipulation. Half the participants read a brief claiming the matter was pending in a district court in the Eighth Circuit, where there is direct legal authority in favor of the plaintiff (City of Ferguson); the other half, that the case came from a district court in the Third Circuit, in which no federal case law is directly on point but the weight of authority goes in the opposite direction – i.e., cases from three other federal courts that have decided the spousal-standing issue including Biggs and Horstkoetter.

A copy of the brief with alternative wordings appears in Appendix C. After a rendition of the facts, the brief presents the legal arguments of each side on the standing issue. The authority each side cited in support of its position was identical
across conditions; the only differences in the facts given to subjects in each
treatment involved the content of the message on the campaign sign and the state in
which the hypothetical city of Gayson was situated to locate the dispute within the
geographic jurisdiction of the relevant circuit.

Because the alleged “injury” to plaintiff spouse and the authority bearing on
that question is identical across conditions, the standing analysis should be the same
regardless of the content of plaintiff’s political expression. The critical question this
experiment is designed to answer is whether participants are more likely to conclude
the plaintiff has standing when the content of the political speech she expresses is
consistent with their views on abortion.

There are behavioral studies that indicate that judges disproportionately
decide cases in favor of parties with whom they are ideologically aligned (Sheehan,
Mishler and Songer 1992). From a legal perspective, this should not happen. By
seeing whether there are systematic differences in the way people with alternative
views decide the standing issue we will be able to make valid causal inferences
about the extent to which participants’ abortion attitudes influence their decision-
making behavior.43

43In each case the plaintiff alleged that her husband was being retaliated against because the current
city manager was averse to the political views she was expressing in the campaign. The allegation
was consistent across all treatment groups. It was made when the plaintiff was expressing support for
the pro-life candidate and when she was supporting the pro-choice candidate. Although it could be
argued that this argument sensitized participants to the content of the political message more than
they would have been had the allegation not been included, the claim adds to the realism of the brief.
Allegations of retaliatory disciplinary conduct are not uncommon in the real world. Raising such
concerns is, in fact, what effective representation entails where the seeds of such an argument are
there to be made. The important question is whether decision-makers with different policy views
respond to the argument in systematically different ways.
Although the manipulations relate most directly to opinions on abortion, the hypothetical case raises two other policy issues that could also influence participants’ view of whether the plaintiff spouse has suffered an injury sufficient to challenge the ordinance. Participants who support the type of government action at issue -- the ordinance restricting the speech of public employees -- may be less likely to conclude that the plaintiff spouse has suffered an injury sufficient to allow her to challenge the ordinance. Conversely, those who support free speech, in general, may be more likely to conclude she has standing regardless of whether or not they agree with the specific content of the political message she is expressing. By measuring participants’ attitudes on each of these potentially relevant dimensions, as well as the abortion issue, we can determine not only whether policy preferences influence decision-making behavior but also which preferences influence decisions on the standing issue from a number of plausible alternatives.

Finally, legal accounts of decision-making suggest the law should be a limit on the ability of decision-makers to make decisions consistent with their preferences. Yet, judges often operate under different levels of constraint. The fact that the standing issue has been the subject of conflicting rulings by the federal circuits creates an opportunity to test how preferences influence legal reasoning under different levels of constraint.

By manipulating the jurisdiction where the case is pending, we can observe how preferences operate in constrained versus relatively unconstrained conditions. In the Eighth Circuit, there is direct controlling authority on the spousal standing issue suggesting the plaintiff should have standing; in the Third Circuit there is no direct
authority on point but the weight of authority is in the opposite direction. As set forth
more fully below, three alternative patterns of behavior were hypothesized based on
competing theories of how the law acts to constrain legal decision-making processes.

**Experimental Hypotheses**

**Attitudinal Hypotheses**

The questions of interest are whether and how participants’ views on
abortion, ordinances restricting the political activity of public employees, and free
speech influence their decision on the standing issue. The “attitudinal” hypotheses
are as follows:

1. participants should be more likely to find the plaintiff has standing to
   challenge the ordinance when the content of the message on the
   campaign sign is consistent with their views on abortion;

2. participants who oppose restrictions on the political activities of public
   employees should be more likely to find standing regardless of content
   and;

3. participants who support free speech should be more likely to find
   standing to challenge the ordinance regardless of content.

All or none of the foregoing hypotheses may gain support. A finding of no
systematic differences would show that decision-makers were able to separate their
preferences on issues, in line with traditional notions of decision-making; significant
differences would suggest evidence of motivated reasoning, in that, participants
could not strictly separate their preferences on the standing issue from these other
issues.
Hypotheses Regarding the Law as a Constraint on Motivated Decision-Making

There are three alternative patterns of behavior that may be observed based on a legal model, an attitudinal model, or a “constrained attitudinal” model of decision-making behavior. Specific hypotheses and a graphic illustration of the pattern of the behavior each model predicts are set forth more fully below.

(1) Pure Legal Model Predictions

Legally, decision-makers should be less likely to make preference-based decisions where there is direct controlling authority limiting their ability to do so. Under conditions in which there is direct controlling authority – the Eighth Circuit conditions -- it favors the plaintiff. As a matter of law, then, subjects should decide in her favor under those conditions. It is also important to keep in mind that the authority in the brief is "stacked” in favor of the defendants. Most of the legal authority in the mock brief is on one side -- three federal court cases to one holding that spousal plaintiffs do not have standing to challenge ordinances restricting the political speech of public employees. Thus, where there is no direct authority on point -- the Third Circuit conditions -- legal models of decision-making would predict a decision in defendants' direction (against standing) because the weight of authority goes in that direction. Figures 4.1 and 4.2 illustrate the pattern of results predicted in the Eighth and Third Circuit conditions, respectively.
Figure 4.1: Pure Legal Model Predictions for Participants with Alternative Views on Abortion -- Eighth Circuit Conditions

Figure 4.2: Pure Legal Model Predictions for Participants with Alternative Views on Abortion -- Third Circuit Condition
(2) Pure Attitudinal Model Predictions

Alternatively, according to attitudinal models of decision-making, the law should not inhibit preference-based judgements. We should observe behavior in line with attitudinal the hypotheses set forth above in both the constrained (Eighth Circuit) and unconstrained (Third Circuit) conditions. Figure 4.3 illustrates the pattern of results predicted by the pure attitudinal model in the Eighth and Third Circuit conditions in relation to participants’ abortion attitudes.

Figure 4.3: Pure Attitudinal Model Predictions for Participants with Alternative Views on Abortion – Eighth and Third Circuit Conditions
(3) Constrained Attitudinal Model Predictions

There is a third possibility, a “constrained attitudinal” conception of legal decision-making. According to this model decision-makers should follow their attitudes where they are relatively free to do so and resist the temptation to make preference-based decisions when they are not. This conception predicts decision-making consistent with legal hypotheses in the constrained condition (Eighth Circuit) and patterns of behavior consistent with the attitudinal model in the unconstrained condition (Third Circuit). Figures 4.4 and 4.5 illustrate the pattern of results predicted by the constrained attitudinal model in the Eighth and Third Circuit conditions, respectively.

Figure 4.4: Constrained Attitudinal Model Predictions for Participants with Alternative Views on Abortion – Eighth Circuit Condition
Procedure

Experiments were conducted in June and September of 2003. All students who successfully completed their first year of training at a major mid-western law school were contacted via an email solicitation and a table in the lobby of the law school. One hundred fifteen law students participated in this study; a summary of sample characteristics appears in Appendix C.

Participants were paid twenty dollars to participate in what they believed were two distinct studies. Participants were told that “Study A” was a survey that was being conducted to compare the political views of various graduate and
professional students on campus. The survey included eight policy questions and measures of background characteristics. The three questions that were used as the relevant policy measures were embedded in the survey. Participants indicated, on a six point scale, the degree to which they supported statements concerning abortion, restrictions on the political activity of public employees, and criminal sanctions for flag-burning, which was used as the general measure of support for free speech. Exact wordings of the questions are included in Appendix C.

After completing the survey, participants moved on to “Study B.” A cover story was embedded in the instructions stating that the purpose of the study was to get feedback on a new “Summary Brief” format some jurisdictions were considering to expedite motion practice. Participants were informed that under the new format adversarial parties made legal arguments in a single document with strict page limits. Participants were also told that the brief was an actual legal document submitted to a federal district court in either Missouri, a state situated in the Eighth Circuit, or Pennsylvania, situated in the Third Circuit.

To put participants in a decision-making mode, they were asked to read the brief “as if they were the judge responsible for rendering a decision on the motion.” Moreover, they were instructed, “[a]t the end of the brief you will be asked how you would decide the motion and what information from the Summary Brief led you to your decision.” Thus, participants knew they would be asked to justify their decisions as judges do when choosing between parties.

Participants then read the brief containing the experimental manipulations. Each brief cited identical legal authority on the standing issue. At the end of the brief
participants were asked a series of closed and open-ended questions including how they would decide the standing issue, how confident they felt in that judgment, and what facts and legal argument in the brief led them to their decision.\textsuperscript{44} Exact wording of the instructions, “Summary Brief,” and instrument for “Study B” appear in Appendix C.

After they completed the instrument law students were debriefed as to the true nature of the study and compensated for their participation.

**Summary Statistics with Appropriate Caveats**

To present a general idea of results, I briefly summarize statistics describing the distributions for the standing decision and relevant measures of preferences in this study. Table 4.1 summarizes the distribution on the standing question in each of the treatment conditions.

In this sample, 75% of participants (86 out of 115) indicated that the plaintiff should have standing and 25% (29 of 115) said that she should not.

<table>
<thead>
<tr>
<th>Condition</th>
<th>Standing</th>
<th>No Standing</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit/Pro-life Content</td>
<td>24</td>
<td>5</td>
<td>29</td>
</tr>
<tr>
<td>8th Circuit/Pro-choice Content</td>
<td>20</td>
<td>9</td>
<td>29</td>
</tr>
<tr>
<td>3rd Circuit/Pro-life Content</td>
<td>20</td>
<td>9</td>
<td>29</td>
</tr>
<tr>
<td>3rd Circuit/Pro-choice Content</td>
<td>22</td>
<td>6</td>
<td>28</td>
</tr>
<tr>
<td>Total</td>
<td>86</td>
<td>29</td>
<td>115</td>
</tr>
</tbody>
</table>

Table 4.1: Distribution of Standing Decisions Across Treatment Conditions

\textsuperscript{44} This chapter analyses answers to the closed-ended questions. Answers to the open ended questions have not yet been analyzed. They were included to see what part of the brief participants with different views cited in support of their decisions.
At first glance these results, demonstrating participants were three times more likely to conclude that the plaintiff had standing than not, were quite surprising and a bit troubling. There was a concern that the brief, itself, may have biased results in favor of the plaintiff. According to participants’ answers to questions concerning the clarity and objectivity of the document, however, the brief does not appear to have had this unintended effect. Ninety-five percent of participants said the information in the brief was presented clearly; 90.4% stated the facts were presented objectively; and 91.2% said the legal arguments were balanced. These responses suggest that something other than the way the brief was drafted may be driving the pattern of observed results.

Indeed, the distribution of two of the policy measures suggests participants may have been sympathetic to the plaintiff on attitudinal grounds. Table 4.2 summarizes the distributions of the three policy measures relevant to this study. There was strong evidence of support for free speech in this sample; 75% of participants said they disagreed with criminal sanctions for flag-burning. Moreover, 71% of participants expressed opposition to governmental regulations that limit the political activities of public employees. The substantial level of support for free speech and opposition to regulations that limit political expression suggest, at least on the surface, that participants’ preferences may be underlying the pattern of aggregate results observed in this sample.
Table 4.2: Distribution of Relevant Opinion Measures

Participants’ views on abortion, in and of themselves, do not suggest any particular direction on the standing question without taking into account the content of the speech in the condition to which they were assigned. The distribution on the abortion variable, however, is especially important for understanding the pattern of results in this study. Most of the participants in the sample expressed pro-choice views. Specifically, 71.3% (82 out of 115) expressed opposition to the idea that the government should have substantial authority to regulate women’s access to abortion services. Not only were there fewer participants in the sample that expressed pro-life views (33 out of 115), unfortunately they did not distribute as evenly as they might have across treatment conditions.
Table 4.3 Distribution of Participants with Pro-life and Pro-choice Views Across Treatment Conditions

Table 4.3 shows how pro-lifers and pro-choicers were distributed across the four treatment conditions. Although subjects were randomly assigned to conditions, the significant skew in this variable resulted in smaller n’s for pro-lifers -- especially in conditions where the plaintiff was expressing pro-choice views. This is a problem in a study like this for two reasons. First, the unequal size of the treatment groups impedes our ability to find significant results because differences between groups must be quite large to register as statistically significant. Second, where differences are large enough to achieve significance, there may be a concern that results are driven by outliers in the small treatment groups who are not representative of the larger population we are trying to learn about (in this case people with pro-life views).45

45 As set forth more fully below, because of legitimate concerns about small group size, I collapse the predisposition variable with the speech content variable in a manner that is wholly consistent with testing my experimental hypotheses. I also conducted a three way ANOVA with predisposition, speech content and circuit as individual factors, using the small treatment groups. Results from the three-way ANOVA are substantively the same as those observed in the logit analysis, presented herein.
This is addressed in the ANOVA analysis by collapsing subjects with different views into a single variable indicating whether the content of the campaign speech in the condition to which they were assigned was consistent or inconsistent with their own view on abortion. In a logit analysis, however, where I attempt to make finer distinctions about how people with different views react to content, the small n’s are associated with large standard errors for predictions involving pro-lifers, especially in the conditions where the plaintiff is expressing support for the pro-choice candidate. This impedes my ability to say whether some of the observed differences, which look quite substantial, are, in fact, significant. I elaborate on this issue in more detail below as I describe the specific analyses used to test experimental hypotheses.

**Testing Hypotheses**

To test the hypotheses about the separability of preferences in cases involving multiple issues, data were analyzed in two ways. First, to assess whether subjects were more likely to decide the plaintiff had standing when she was expressing views consistent with their own, I conducted an analysis of variance (ANOVA) to see how participants responded to messages that were consistent and inconsistent with their views on abortion in each circuit. Second, I conducted a logit analysis of the standing decision to test the influence of the other potentially relevant policy attitudes and additional control variables.
(1) ANOVA Analysis

The dependent variable for the ANOVA was a scaled version of the standing decision which was created by combining participants’ responses to the standing question with reports of how confident they were in that judgment.\textsuperscript{46} This scale ranged from one to six, with the lowest values for subjects who were extremely confident in their decision that the plaintiff did not have standing to challenge the ordinance and high scores for those who were extremely confident in their decision that she did have standing.

Two variables were used in the analysis. The first captured whether participants were in a condition where the content of the political message on the campaign sign was consistent, or inconsistent, with their own views on abortion\textsuperscript{47}; the second, the jurisdictional condition where the decision was made (Eighth vs. Third Circuit).

Relevant means and the results of F tests from the ANOVA appear in Table 4.4.

\textsuperscript{46}I needed to create this scaled measure for the ANOVA analysis. Admittedly, it is somewhat contrived because decision-makers do not generally indicate their confidence level when rendering judgments. I am confident, however, the measure captures a meaningful underlying construct. Moreover, the distribution of responses to the confidence question was substantially similar for participants who concluded the plaintiff had standing and those who did not. This suggests the scaled measure influenced participants on both sides of issue in the same way. I use what some may consider the more theoretically justifiable dichotomous standing judgement as the dependent variable in the logit analysis that follows.

\textsuperscript{47}This variable was created by splitting responses the abortion question at its midpoint; participants who expressed pro-choice views (1-3 on the abortion scale) were classified as having consistent attitudes when they were in a condition where the plaintiff was expressing pro-choice views. Similarly, those who expressed pro-life views (4-6 on the abortion scale) were classified as having consistent attitudes when they were in conditions where the plaintiff was expressing pro-life views. Participants were classified as having inconsistent views where their expressed abortion opinion was incongruent with the speech of the plaintiff in the condition to which they were assigned.
<table>
<thead>
<tr>
<th>SPEECH CONSISTENCY</th>
<th>Mean of Standing/Confidence Variable</th>
<th>F-Test Result</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consistent</td>
<td>4.60</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inconsistent</td>
<td>4.11</td>
<td>2.41+</td>
<td>0.06</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CIRCUIT CONDITION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th Circuit</td>
<td>4.52</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd Circuit</td>
<td>4.30</td>
<td>1.07</td>
<td>0.15</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SPEECH CONSISTENCY x CIRCUIT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th Circuit/Consistent</td>
<td>4.49</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th Circuit/Inconsistent</td>
<td>4.57</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd Circuit/Consistent</td>
<td>4.72</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd Circuit/Inconsistent</td>
<td>3.71</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.37*</td>
<td>0.04</td>
</tr>
</tbody>
</table>

+ indicates significant at .10 level, * indicates significance at .05 level (one tailed test)

Figure 4.4: ANOVA Results for Separable Preferences Experiment

![Figure 4.4: ANOVA Results for Separable Preferences Experiment](image)

Figure 4.6: Observed Means for Standing Decision Across Treatment Conditions

![Figure 4.6: Observed Means for Standing Decision Across Treatment Conditions](image)
Table 4.4 indicates there was a significant interaction between speech consistency and circuit \[F(1,114) = 3.37, \ p< .04\]. There is also a marginally significant effect for speech consistency. Because the speech consistency variable is embedded in a significant higher level interaction, however, it eludes substantive interpretation (Keppel 1982).

Figure 4.6 illustrates the observed interaction. In the Eighth Circuit participants decided the standing issue similarly when the plaintiff expressed views that were consistent with their opinions on abortion and when she expressed views that were inconsistent with their views. The mean for the standing/confidence variable is slightly higher where the view the plaintiff expressed was inconsistent with decision-makers’ view on the issue (4.57 vs. 4.49 where plaintiff is expressing a view consistent with participants’) but this difference is not statistically significant.

In the Third Circuit more of a difference is evident. Participants were more likely to decide that the plaintiff had standing when the view she expressed was consistent with their own. The mean for the standing/confidence variable was 4.72 where speech was consistent and 3.71 where speech was inconsistent with participants’ views. This difference is significant at the .01 level in a one-tailed t-test \[t = - 2.6 (df=55)\].

Moreover, the results demonstrate that participants treated the plaintiff differently when she expressed a view on the abortion that was inconsistent with theirs, depending on the jurisdiction where the case was pending. In the Eighth Circuit participants were more likely to find the plaintiff had standing when her view

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48 I use a one-tailed test to test the explicitly directional hypotheses.
on abortion was inconsistent with theirs compared to participants in the Third Circuit. The mean for the standing/confidence variable in the Eighth Circuit was 4.49 where plaintiff was expressing inconsistent views compared to 3.71 in the Third Circuit. This difference is significant in a one-tailed test \[ t = 1.8(\text{df}=43), p<.04 \].

The first thing to note about results from the ANOVA analysis is that participants’ views on abortion influenced their decisions on the standing issue in systematic ways depending on the content of the view expressed by the plaintiff -- but this was only true in the Third Circuit. In the Eighth Circuit, law students decided the standing issue the same way regardless of their agreement with the content of the views expressed by the spousal plaintiff. Also, in the Eighth Circuit conditions participants were significantly more likely to conclude that the plaintiff had standing when she expressed views that were inconsistent with their own, in line with direct controlling authority in that circuit. The results from this analysis come closest to the pattern that would be predicted by a “constrained attitudinal” model of legal decision-making.

The ANOVA results, however, only tell us how participants were acting in relation to speech that was consistent or inconsistent with their preferences on abortion. To test the influence of the other policy preferences that are potentially relevant to the standing decision, I conducted a logit analysis using the participants’ responses to the dichotomous standing question as the dependent variable. In the analysis I include several additional control variables, as well as content and preference specific variables for the abortion measure to see if I can make finer
distinctions about how participants with alternative views are responding to particular speech content.
(2) Logit Analysis

Logit Model Specification

Dependent Variable

The dependent variable is participants’ response to the standing decision question. The variable takes on a value of 0 when participants indicated that the plaintiff did not have standing to challenge the ordinance and 1 when they decided that she did have standing.

Independent Variables

The speech content and jurisdiction manipulations were included as dichotomous variables in the analysis. Speech content takes on a value of 0 where plaintiff was expressing support for the pro-life candidate, 1 where she was expressing support for the pro-choice candidate. Circuit takes on a value of 0 where participants were told they were deciding a case that was pending in a district court in the Eighth Circuit; 1 if it was pending in a court within the jurisdiction of the Third Circuit.

Each of the measures of policy preference was also included in the model. The Abortion Opinion measure is dichotomous. It takes on a value of 0 for participants expressing pro-choice views, 1 for participants expressing pro-life views. The Flag-burning Sanctions variable was measured on a six-point scale with higher numbers indicating support for criminal sanctions. The Pro-Hatch variable was also measured on a six-point scale with higher numbers indicating support for regulations that restrict the political activity of public employees.
Opinions on abortion do not predict how participants will decide the standing issue, in and of themselves. The question is how participants’ attitudes on abortion interact with the content of the speech in the condition to which they are assigned. Thus, the model includes a two-way interaction between Abortion Opinion and Speech Content.

The three-way interaction between Abortion Opinion, Speech Content and Circuit is also theoretically relevant. As demonstrated in the ANOVA analysis, participants may act differently in response to content with which they disagree under different levels of constraint. Including the three-way interaction allows us to test this possibility. All of the two-way interactions that are nested in the three-way interaction are also included in the model.49

There are two additional interactions in the model. The Flag-burning variable, representing participants’ level of support for free speech and the Pro-Hatch variable were each interacted with the Circuit manipulation. Again, this allows for the possibility that participants may be more inclined to act in accordance with their attitudes in the Third Circuit where they are relatively free to do so because there is no direct legal authority on the standing question.

Finally, participants’ ideology [seven-point scale (extremely conservative-extremely liberal)], year in law school [three-point scale (2L, 3L and recent graduate)], and gender (1 male, 2 female) were included in the model as control variables.

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49 These include interactions for Circuit x Speech Content and Circuit x Abortion Opinion, as well as the Content x Abortion Opinion interaction.
<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLES</th>
<th>Coefficient</th>
<th>Robust SE</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>3.974*</td>
<td>2.478</td>
<td>0.05</td>
</tr>
<tr>
<td>Ideology</td>
<td>0.232+</td>
<td>0.160</td>
<td>0.08</td>
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<tr>
<td>Law Year</td>
<td>-0.343</td>
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</tr>
<tr>
<td>Gender</td>
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<td>0.552</td>
<td>0.25</td>
</tr>
<tr>
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<td>1.584</td>
<td>0.02</td>
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<tr>
<td>Speech Content</td>
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<td>0.935</td>
<td>0.10</td>
</tr>
<tr>
<td>Abortion Opinion</td>
<td>-0.596</td>
<td>1.360</td>
<td>0.33</td>
</tr>
<tr>
<td>Flag-burning Sanctions</td>
<td>-0.598**</td>
<td>0.265</td>
<td>0.01</td>
</tr>
<tr>
<td>Pro-Hatch</td>
<td>0.298</td>
<td>0.474</td>
<td>0.42</td>
</tr>
<tr>
<td>Circuit x Flag-burning Sanctions</td>
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<td>0.335</td>
<td>0.29</td>
</tr>
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<td>0.298</td>
<td>0.473</td>
<td>0.27</td>
</tr>
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<td>Circuit x Content</td>
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<td>1.275</td>
<td>0.03</td>
</tr>
<tr>
<td>Circuit x Abortion Opinion</td>
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<td>1.647</td>
<td>0.07</td>
</tr>
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<td>-1.603</td>
<td>1.407</td>
<td>0.13</td>
</tr>
<tr>
<td>Circuit x Content x Abortion Opinion</td>
<td>0.389</td>
<td>2.105</td>
<td>0.43</td>
</tr>
</tbody>
</table>

Wald Chi Squared (14) 17.16
Log Likelihood Ratio (14) 24.26*
Count R Squared 0.84
Adjusted Count R Squared 0.35

+= significant at .10 level *= significant at .05 level, ** significant at .01 level (one tailed test)

Table 4.5  – Logit Coefficients for Law Students’ Standing Decision in Hypothetical Case
Logit Model Results

Coefficients for all the independent variables with robust standard errors are presented in Table 4.5. Because all of the variables, except for the control variables, are embedded in interactions, the coefficients from the model do not tell us much about their effect across the various treatment conditions. 50 Separate hypothesis and joint hypothesis tests were conducted to test their influence in various theoretically relevant circumstances. These are set forth more fully below in the section where I discuss the statistical and substantive significance of particular variables.

None of the control variables were significant except ideology, which was marginally significant. Its direction indicates that liberal participants were more likely to find that the plaintiff had standing to challenge the ordinance than conservative participants. This makes sense and may reflect the fact that the preference measures did not capture all of the ideological variance that could potentially impact the standing decision. Generally speaking, liberals are more likely to support broad conceptions of court access than conservatives; I suspect the observed effect of the ideology variable reflects this difference.

I turn now to a discussion of results concerning the main variables of interest. I start with the Hatch Act and free speech attitudes and save the pattern of results observed for people with different views on abortion for last.

---

50 For instance, the fact that the Flag-burning variable is statistically significant only tells us about its effect where the Circuit variable takes on a value of 0 (i.e. in the Eighth Circuit conditions). To test the effect of this variable in the Third Circuit (where the variable takes on a value of 1) a separate joint hypothesis test is necessary, accounting for the additive influence the interaction.
Hatch Act-Opinions

Participants’ views on regulations restricting the political speech of public employees did not influence their decision on the standing question in the hypothetical case.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Predicted Probability</th>
<th>Standard Error</th>
<th>Low (95%)</th>
<th>High (95%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro Hatch Restrictions</td>
<td>0.81</td>
<td>0.226</td>
<td>0.18</td>
<td>0.99</td>
</tr>
<tr>
<td>Anti Hatch Restrictions</td>
<td>0.85</td>
<td>0.098</td>
<td>0.59</td>
<td>0.97</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro Hatch Restrictions</td>
<td>0.77</td>
<td>0.173</td>
<td>0.31</td>
<td>0.97</td>
</tr>
<tr>
<td>Anti Hatch Restrictions</td>
<td>0.43</td>
<td>0.163</td>
<td>0.14</td>
<td>0.75</td>
</tr>
</tbody>
</table>

Table 4.6 Predicted Probabilities of Standing Decision for Decision-Makers with Alternative Views on Hatch Act Restrictions

Figure 4.7: Predicted Probabilities Regarding Hatch Act Opinions
Table 4.6 sets forth the predicted probabilities of a standing decision for participants who expressed strong support and opposition to such regulations. Figure 4.7 illustrates that, in the Eighth Circuit, the effect of the variable is quite small but in the predicted direction; participants who support such restrictions were less likely to decide the plaintiff has standing. In the Third Circuit conditions the effect of the variable is more pronounced, but in the wrong direction. Table 4.7 shows the result of hypothesis and joint hypothesis tests demonstrating that the effect of this variable was not significant in either condition.

Thus, findings indicate that participants were able to separate their preferences on this issue from the standing decision in line with traditional notions of legal decision-making.

<table>
<thead>
<tr>
<th>Is Hatch Act Opinion Significant?</th>
<th>Hypothesis Test</th>
<th>Wald Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit</td>
<td>Pro-Hatch = 0</td>
<td>0.04</td>
<td>0.42</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td>Pro-Hatch + Circuit x Pro-Hatch = 0</td>
<td>1.37</td>
<td>0.12</td>
</tr>
</tbody>
</table>

Reported significance is for one-tailed test

Table 4.7: Hypothesis and Joint Hypothesis Test for Hatch Act Opinion Variable Across Conditions
Support for Free Speech

In contrast, participants’ level of support for free speech did influence the standing decision in both the Eighth and Third Circuit conditions. Table 4.8 and Figure 4.8 set forth the predicted probabilities of a standing decision for participants who expressed strong support and opposition for flag-burning sanctions. The effect of the variable is consistent with attitudinal hypotheses in both conditions.

Participants who expressed support for free speech (opposition to sanctions) were more likely to conclude that the plaintiff had standing than those who did not support free speech. In the Eighth Circuit conditions, participants who expressed strong opposition to criminal sanctions for flag-burning had a .91 probability of concluding the plaintiff had standing compared to .49 for participants who expressed strong support for such sanctions. The corresponding predictions for participants with similar views in the Third Circuit conditions were .68 and .27.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Predicted Probability</th>
<th>Standard Error</th>
<th>Low (95%)</th>
<th>High (95%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti Sanctions</td>
<td>0.91</td>
<td>0.091</td>
<td>0.63</td>
<td>0.99</td>
</tr>
<tr>
<td>Pro Sanctions</td>
<td>0.49</td>
<td>0.21</td>
<td>0.12</td>
<td>0.89</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti Sanctions</td>
<td>0.68</td>
<td>0.127</td>
<td>0.40</td>
<td>0.89</td>
</tr>
<tr>
<td>Pro Sanction</td>
<td>0.27</td>
<td>0.172</td>
<td>0.05</td>
<td>0.68</td>
</tr>
</tbody>
</table>

Table 4.8: Predicted Probabilities of Standing Decision for Decision-Makers with Alternative Views on Flag Burning
Contrary to expectation, the effect of this variable was not greater in the Third Circuit conditions. The magnitude of the difference for people with different views on free speech is almost identical in each circuit (42 in the Eighth Circuit vs. 41 in the Third). Table 4.9 sets forth the hypothesis and joint hypothesis test for the free speech variable and demonstrates that the observed effect was statistically significant in both the Eighth ($p<.01$) and Third Circuit ($p<.05$) conditions.
Is Free Speech Opinion Significant?

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Hypothesis</th>
<th>Wald Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit</td>
<td>Flag-burning Sanctions = 0</td>
<td>5.08**</td>
<td>0.01</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td>Flag-burning Sanctions + Circuit x Flag-</td>
<td>2.67*</td>
<td>0.05</td>
</tr>
<tr>
<td></td>
<td>burning Sanctions = 0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* significant at .05 level, ** significant at .01 level (one tailed test)

Table 4.9: Hypothesis and Joint Hypothesis Test for Free Speech Opinion Variable Across Conditions

At first glance, the influence of free-speech preferences on participants’ response to the standing question seems to lend support to attitudinal accounts of decision-making. This finding, however, can also be explained by legal accounts of decision-making. Specifically, although we know that free speech attitudes influenced participants’ standing decisions we do not know the precise nature of the influence; we cannot tell whether free speech attitudes drove decisions from the “top-down,” or influenced participants’ reasoning processes from the “bottom up.”

From a legal standpoint, it would be improper if participants’ attitudes about free speech influenced their decisions in a “top-down” manner, that is if they decided the case the way they did because they were sympathetic (or hostile) to plaintiff’s claim the ordinance unjustly infringed her right to free expression.

The influence of the variable, however, could also have been “bottom-up.” Recall that the specific legal test for standing is whether or not the plaintiff suffered an “injury” sufficient to challenge the ordinance. When considering this specific question, participants who supported free speech might have been more inclined to see the restriction of her speech as a cognizable legal harm.
Of course, from a strict legal standpoint, one may question whether this more benign “bottom-up” influence should have occurred in the presence of controlling authority on the issue. Still, this characterization of the variable’s influence is more compatible with traditional notions of legal decision-making. Since results are consistent with both “top down” and “bottom up” explanations, we cannot say which processes is operating with regard to the observed influence of free speech attitudes in this study.

**Opinions on Abortion**

To test the influence of participants’ attitudes about abortion on the standing decision, four separate hypothesis tests were conducted to measure the influence of the Abortion Opinion variable in each treatment condition. The results of those tests appear in Table 4.10. Table 4.10 also presents results of eight additional hypothesis tests measuring the effect of the Speech Content manipulation for participants with different views in each circuit, and the effect of the Circuit manipulation for participants with different views given different speech content. The results of these tests, read in conjunction with the predicted probabilities set forth in Table 4.11 (and graphically illustrated in Figures 4.9 and 4.10), tell a different story about how participants with alternative views are reacting to content across the jurisdictional conditions.
### Is Abortion Opinion Significant?

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Hypothesis Test</th>
<th>Wald Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit/Pro-life Content</td>
<td>Abortion = 0</td>
<td>0.19</td>
<td>0.33</td>
</tr>
<tr>
<td>8th Circuit/Pro-choice Content</td>
<td>Abortion + Abortion x Content = 0</td>
<td>2.36+</td>
<td>0.06</td>
</tr>
<tr>
<td>3rd Circuit/Pro-life Content</td>
<td>Abortion + Abortion x Circuit = 0</td>
<td>2.63*</td>
<td>0.05</td>
</tr>
<tr>
<td>3rd Circuit/Pro-choice Content</td>
<td>Abortion + Abortion x Content + Abortion x Circuit + Abortion x Circuit x Content = 0</td>
<td>0.26</td>
<td>0.31</td>
</tr>
</tbody>
</table>

### Is Speech Content Significant?

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Hypothesis Test</th>
<th>Wald Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit/Pro-choicers</td>
<td>Content = 0</td>
<td>1.73+</td>
<td>0.10</td>
</tr>
<tr>
<td>8th Circuit/Pro-lifers</td>
<td>Content + Abortion x Content = 0</td>
<td>3.91*</td>
<td>0.02</td>
</tr>
<tr>
<td>3rd Circuit/Pro-choicers</td>
<td>Content + Circuit x Content = 0</td>
<td>2.39+</td>
<td>0.06</td>
</tr>
<tr>
<td>3rd Circuit/Pro-lifers</td>
<td>Content + Abortion x Content + Circuit x Content + Abortion x Circuit x Content = 0</td>
<td>0.01</td>
<td>0.49</td>
</tr>
</tbody>
</table>

### Is Circuit Significant?

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Hypothesis Test</th>
<th>Wald Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-choicers / Pro-life Content</td>
<td>Circuit + Circuit x Free Speech + Circuit x Pro-Hatch = 0</td>
<td>4.34*</td>
<td>0.02</td>
</tr>
<tr>
<td>Pro-choicers / Pro-choice Content</td>
<td>Circuit + Circuit x Free Speech + Circuit x Pro-Hatch + Circuit x Content = 0</td>
<td>0.01</td>
<td>0.47</td>
</tr>
<tr>
<td>Pro-lifers / Pro-life Content</td>
<td>Circuit + Circuit x Free Speech + Circuit x Pro-Hatch + Abortion x Circuit = 0</td>
<td>0.02</td>
<td>0.45</td>
</tr>
<tr>
<td>Pro-lifers / Pro-choice Content</td>
<td>Circuit + Circuit x Free Speech + Circuit x Pro-Hatch + Abortion x Circuit + Circuit x Content + Abortion x Circuit x Content = 0</td>
<td>1.8+</td>
<td>0.09</td>
</tr>
</tbody>
</table>

+ significant at .10 level, * significant at .05 level (one tailed test)

Table 4.10: Hypothesis and Joint Hypothesis Tests for Abortion Opinion, Speech Content and Circuit Manipulations Under Various Theoretically Relevant Conditions
<table>
<thead>
<tr>
<th>Decision Characteristics</th>
<th>Predicted Probability</th>
<th>Standard Error</th>
<th>Low (95%)</th>
<th>High (95%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th Circuit/Pro-life Content</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro-choicers</td>
<td>0.86</td>
<td>0.113</td>
<td>0.55</td>
<td>0.98</td>
</tr>
<tr>
<td>Pro-lifers</td>
<td>0.80</td>
<td>0.142</td>
<td>0.44</td>
<td>0.97</td>
</tr>
<tr>
<td>8th Circuit/Pro-choice Content</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro-choicers</td>
<td>0.71</td>
<td>0.092</td>
<td>0.51</td>
<td>0.86</td>
</tr>
<tr>
<td>Pro-lifers</td>
<td>0.27</td>
<td>0.211</td>
<td>0.01</td>
<td>0.77</td>
</tr>
<tr>
<td>3rd Circuit/Pro-life Content</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro-choicers</td>
<td>0.57</td>
<td>0.112</td>
<td>0.33</td>
<td>0.77</td>
</tr>
<tr>
<td>Pro-lifers</td>
<td>0.86</td>
<td>0.118</td>
<td>0.52</td>
<td>0.98</td>
</tr>
<tr>
<td>3rd Circuit/Pro-choice Content</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro-choicers</td>
<td>0.80</td>
<td>0.099</td>
<td>0.57</td>
<td>0.94</td>
</tr>
<tr>
<td>Pro-lifers</td>
<td>0.47</td>
<td>0.309</td>
<td>0.01</td>
<td>0.97</td>
</tr>
</tbody>
</table>

Table 4.11 Predicted Probabilities of Standing Decision For Decision-Makers with Alternative views on Abortion
Figure 4.9  Predicted Probabilities of Decision-Makers with Alternative Views on Abortion for Different Speech Content in the Eighth Circuit

Figure 4.10: Predicted Probabilities of Decision-Makers with Alternative Views on Abortion for Different Speech Content in the Third Circuit
Pro-Choicers

Participants with pro-choice views seem to be following a constrained attitudinal model of decision-making, consistent with results from the ANOVA analysis. In the Eighth Circuit, they made similar decisions when the plaintiff was expressing pro-choice views and when she was expressing pro-life views. In fact, pro-choice participants were slightly more likely to conclude that the plaintiff had standing where she was expressing views inconsistent with theirs in the Eighth Circuit. The predicted probability of a standing decision Eighth Circuit given pro-life content was .86 compared to .71 where the plaintiff was expressing pro-choice views. The result of the hypothesis test tells us that this effect was marginally significant (Wald = 1.73, \( p < .10 \)) in a one-tailed test but not in a two-tailed test (\( p < .19 \)) which is more appropriate here where the influence of the variable is contrary to directional hypotheses.

In the Third Circuit pro-choicers acted in accordance with their preferences. Participants who expressed pro-choice views had a .80 probability of deciding the plaintiff had standing when the content of the campaign sign was consistent with their views, compared to .57 when it was inconsistent. The relevant hypothesis test demonstrates that the effect of content is marginally significant for pro-choicers in the Third Circuit (Wald = 2.39, \( p < .06 \)). Moreover, in the Third Circuit conditions, pro-choicers were less likely to decide the plaintiff had standing when she was expressing pro-life views than participants who expressed pro-life views. In the Third Circuit conditions the predicted probability of a standing decision for pro-choicers was .57 where plaintiff was expressing pro-life views compared to .86 for
pro-life participants. The hypothesis test indicates that the effect of abortion attitudes was significant in the Third Circuit when there was pro-life speech content (Wald = 2.63, $p < .05$).

Perhaps the best evidence that participants with pro-choice views were following a constrained attitudinal model of decision-making is the different way they treated pro-life content across conditions. In the Eighth Circuit the predicted probability of pro-choicers saying the plaintiff had standing where she expressed pro-life views inconsistent with theirs was .86. The corresponding probability in the Third Circuit was .57. Thus, participants were more likely to say that the plaintiff had standing when she was expressing a view that was inconsistent with their own where there was direct authority on the standing question favoring the plaintiff. The relevant test indicates the effect of the Circuit manipulation was significant where pro-choicers were in conditions where the plaintiff was expressing pro-life views (Wald = 4.34, $p < .02$).

**Pro-lifers**

Results suggest that participants with pro-life views were acting in accordance with their preferences in the constrained and unconstrained conditions. In both circuits, pro-lifers were more likely to find plaintiff had standing where she was expressing pro-life views then when she was expressing pro-choice views. The predicted probability of a standing decision for participants who expressed pro-life views in the Eighth Circuit was .80 where plaintiff was expressing pro-life views compared to .28 where she was expressing pro-choice views. The corresponding probabilities in the Third Circuit conditions were .86 and .47. Hypothesis test results
indicate that the effect of content was significant for pro-lifers in the Eight Circuit conditions (Wald = 3.91, \( p<.02 \)), but the large standard errors noted above prevent us from saying the same is true about the difference observed in the Third Circuit conditions (Wald = .01, n.s.).

These results stand out in the analysis for several reasons. First, the finding that pro-lifers in the Eighth Circuit were being attitudinal, and indeed may have been more attitudinal than participants with similar attitudes in the Third Circuit, is at odds with experimental hypotheses suggesting participants should have been be constrained by controlling authority. In direct contrast to expectations, it suggests pro-life participants were reacting against authority where it favored a plaintiff who was expressing views contrary to their own. It could be that the specific combination of factors (contrary speech with controlling authority favoring the plaintiff who is expressing those views) caused pro-lifers, to buck prevailing authority under the precise conditions where they should have evidenced constraint.

Of course, the small n associated with the conditions where pro-lifers were given pro-choice content influences the confidence with which I can generalize this result to any group other than the law students in the sample. This is important to note because the experimental survey revealed that most of the law students were liberal on abortion and other social issues. Participants willing to express, less popular, pro-life views may be individuals who are especially likely to go against the prevailing wisdom and challenge authority. Thus, further testing needs to be done to determine if the result would obtain in a sample where pro-lifers comprise a more critical mass.
If the finding is reflective of a more generalizable phenomenon there are two possible explanations that may account for such behavior. It could be that pro-lifers see themselves as a “legal minority” because they are currently on the loosing side of the abortion issue; the Supreme Court has recognized and reaffirmed a woman’s fundamental right to choose. This perceived minority status might cause pro-lifers to resist controlling legal authority, where they believe courts have not done a good job on the issue, especially when the issue is salient -- as it was in the hypothetical fact-pattern where the plaintiff was expressing pro-choice views.

The second possible explanation concerns the ideology of experimental participants with pro-life views. There is psychological evidence suggesting that people with conservative views may be especially prone to motivated decision processes (Jost, et al. 2004). Thus, the jurisdictional manipulation that inhibited pro-choicers from making decisions consistent with their preferences may not have been effective to curb motivated decision processes among the more conservative pro-lifers in the sample.\(^{51}\)

Because I cannot say which of these alternative processes is driving this unexpected result, or even that the finding would be replicate in other samples, I will leave it as an intriguing observation inviting further investigation and consideration. It is important to note, however, that if pro-lifers and pro-choicers are responding to controlling authority in different ways, it would involve a more complex story than extant theories of legal decision-making can currently account for. There simply is

---

\(^{51}\) This explanation somewhat consistent with the findings in the analogical perception experiments from Chapter 3, demonstrating that perceived differences were more pronounced among participants with conservative views on discrimination.
no theory that would predict such an outcome. Even though the way participants
distributed in this study prevents us from making conclusive statements about
whether this would happen on a broader scale, the possibility that it could, suggests
that we should consider the potential for differential responses to constraint in future
research.

**General Discussion**

This study produced some interesting findings about the ability of law
student participants to separate their preferences on substantive issues from the
standing decision they were asked to make in this experiment. First, participants
were clearly able to separate their views on regulations restricting the political
activity of public employees from their reasoning about the standing issue.

It is equally clear that participants’ level of support for free speech influenced
their decisions in systematic ways. Participants who supported free speech were
more likely to conclude the spousal plaintiff had standing. As detailed above, this
particular finding is consistent with purely attitudinal “top-down” accounts of
decision-making as well as more legally justifiable “bottom-up” accounts of
influence.

Results of this study are somewhat mixed with respect to participants’
abortion attitudes. Findings from the ANOVA were most consistent with idea that
participants were following a constrained attitudinal model of decision-making.
When we looked at how participants with different views responded to particular
content, however, it appears those results may have been driven by participants with
pro-choice views in our sample.
Taken as a whole, the findings provide good evidence that the three-fourths of the sample that expressed pro-choice opinions were following a constrained attitudinal model of decision-making with respect to their opinions on abortion. Although it appears that the pro-lifers were acting in accordance with their preferences in both the constrained and unconstrained conditions, I have less confidence in that finding given the unequal distribution of participants with such views across treatment conditions.

Finally, a few words about the costs and benefits of using an experimental approach to study legal reasoning processes are appropriate. The first and most obvious issue some people will have with a study like this is that participants were law students, not judges or attorneys. Admittedly, there are legitimate concerns about the extent to which findings can be generalized to more sophisticated legal populations. Making such generalizations, however, was not the primary goal of the study. Although many of the intuitions motivating this inquiry were taken from findings about judicial behavior, the primary goal of this study was to test a specific mechanism by which attitudes can influence legal reasoning processes. Because law students are trained to follow the rules of legal decision-making, they were an appropriate sample to test experimental hypotheses.\footnote{This is not an entirely new idea. See Becker (1964 and 1966) for an example of a study where intuitions about decision-making were first tested on law students, then investigated further in a survey of Hawaiian trial judges.} Now that we have some evidence that attitudes can, in fact, influence legal reasoning processes in this
manner, further studies can be done to see if findings replicate with more sophisticated samples.\footnote{Of course, given strong judicial norms against disclosing policy attitudes and making decisions in hypothetical cases, it may be impractical to think judges (or even experienced attorneys) would be willing participants in such a study. Thus, it could be that law student “proxies” represent our best hope of discovering the specific influence of attitudes in legal reasoning processes.}

It is also worth noting that by giving participants identical legal authority to make the standing decision the experimental approach used in this study involved a degree of control which has not been achieved in previous studies of decision-making. Most behavioral studies compare how judges vote across a large number of cases, each involving their own distinct facts and legal authority. Large n studies assume that individual differences between cases “wash out” in the aggregate; that if consistent patterns of behavior are observed, they are indicative of judicial voting proclivities, not withstanding differences between individual cases.

Under such circumstances, however, it is impossible to tell if decision-makers would have decided cases differently in the absence of the specific facts and legal authority before them. This is the precise advantage of employing experimental methods for studying legal reasoning. Controlling the facts and legal authority allows us to make relatively clean causal inferences that it was participants’ preferences driving predicted patterns of behavior rather than numerous other factors that can differ across legal disputes.

Finally, because the experimental design used issue specific, rather than gross ideological measures of preference, we were able to get a much richer understanding of how particular attitudes influenced decision-making behavior. The
analysis told us not only that preferences mattered, but *which ones* and *under what theoretically relevant circumstances*.

The intent of the study was to elaborate on our current knowledge of attitudinal influence in legal decision-making. I hope that in conducting the inquiry as I did we have “advanced the ball” a little in terms of understanding how attitudes can influence decision-makers -- even as they try to reason objectively.

Experiments, in general, provide an excellent avenue to pursue this inquiry. Although such techniques are not appropriate to investigate everything, they have a great deal of potential to advance our knowledge of precisely how (and when) attitudinal factors influence legal decision-making.
CHAPTER 5

CONCLUSION

In this chapter I conclude by discussing why motivated reasoning provides an especially useful framework to examine the relationship between accepted norms of decision-making and personal preferences in legal reasoning processes. I argue that in invoking this framework, judicial scholars need to be more explicit about the relative influence of different kinds of goals and factors that may serve to facilitate and/or inhibit their realization.

I summarize findings from this inquiry into the mechanisms behind motivated reasoning. Consistent with psychological studies, we saw that the influence of policy preferences was real, but not without boundaries. Both bottom-up and top-down avenues of influence were borne out, but there was also evidence of constraint in each study. Overall findings demonstrate that investigating the cognitive processes of legal decision-makers is fertile ground for future empirical work.

Many years ago, Theodore Becker wrote a book calling for a more detailed enumeration of the factors influencing legal reasoning processes. In it he observed,

The assumption which has grounded much of the work thus far done by the political behavioralists does little more than insist that a judge’s personal viewpoints on a particular aspect of the world will affect his legal decision. The political behavioralist, by and large, has only given lip-service to the judicial factors. He has hardly embarked on the difficult task of separating out those features which may have a significant enough impact on the decision as to necessitate [their] description and to demand an accurate understanding of [their] determinative role and perhaps [their] functions or dysfunctions to society [sic]. Though movement has begun in that direction, it is as yet perceivable only as distant rumblings (Becker 1964, 38).

I first became aware of Becker’s attempts to integrate empirical methods with more traditional conceptions of decision-making about half way thorough my dissertation process. I remember having two responses roughly equal in their intensity. The first was a combination of admiration and relief, the feeling someone gets when they find a work that summarizes their unstated beliefs so succinctly that just reading it makes those ideas more concrete. Becker’s methods were experimental and though they were far from perfect, they resembled techniques I was using in my own research. Most importantly, his theoretical insights spoke exactly to the questions I was most interested in, having to do with the interaction between judges’ personal values and norms of appropriate decision-making behavior -- and how that dynamic could be effectively captured in an empirical framework.

The second reaction came when I realized how long ago Becker wrote what was, in my mind, a seminal contribution to the judicial literature. Amazingly, in
forty years no one has seriously attempted to take up the inquiry he initiated.\textsuperscript{54} As a student halfway through a dissertation seeking to investigate the issues he raised, this was not an especially settling thought. The feeling of elation I had in finding a predecessor was quickly followed by uneasiness; I questioned why the “distant rumblings” Becker referred to hadn’t become loud thunderclaps given as much time as they had to evolve.

The first answer that came to mind involved the trajectory of research I described in Chapter 1. Following Pritchett’s seminal study (1948), judicial scholars took pride in their critical stance in demonstrating that policy preferences were a strong determinant of judicial voting behavior. Fueled by consistent finding of attitudinal influence, they were dismissive of doctrinal accounts of decision-making; behavioral scholarship developed without caring much about the legal factors judges cited as determinative.

Once behavioral researchers stated to go in this direction, I believe they may have lacked the empirical framework to bridge the gulf that developed between legal and attitudinal accounts of decision-making. Political scientists became as invested in policy driven explanations as legal theorists were in doctrinal accounts. Scholars became entrenched in their home discipline’s assumptions and methodologies; thus,

\textsuperscript{54} Of course, there have been behavioral scholars who have argued that more attention should be paid to judges’ views of their institutional roles (James 1968, Provine 1980) and attempts to incorporate legal criteria to explain decisions of judges in particular policy domains (Gibson 1978, Segal 1984, George and Epstein 1992). But no one has really undertaken the type of grand enumeration Becker called for to so many years ago.
two fields that purported to explain the same decisional phenomenon grew further apart.\footnote{This trend has reversed itself a bit in the last ten years as studies employing behavioral methods have started to make their way into law reviews (See for example, Ruger et al. 2004, George 1998, Hall, Brace and Langer 1999). For the most part, however, differences between the disciplines remain largely in tact. It is important to note that progress in this respect is not just a question of when legal theorists will “come around” to behavioral ways of thinking. Consistent with one of the main arguments motivating this inquiry, judicial scholars need to take judges’ doctrinal accounts more seriously if they want to understand how policy attitudes come to influence the outcome choices that are the focus of their analyses.}

Although I have been somewhat critical of behavioral scholars, especially Segal and Spaeth, for invoking motivated reasoning in a superficial manner, I have to credit them with coming up with the insight that offers an empirical framework to bridge the gap between legal and attitudinal accounts of decision-making.

Motivated reasoning allows for the influence of alternative goals in legal decision processes; therefore, researchers do not have to assume that judges are exclusively seeking accuracy or purely motivated by policy. The framework accommodates the distinct possibility that decisions are a result of a complex interaction between decision-makers’ conscious desire to “get things right” and unconscious policy motivations. It provides a way for scholars to consider doctrinal accounts without having to take decision-makers at their word or accuse them of being disingenuous.

Moreover, motivated decision-making has been studied by psychologists for many years. Thus, we have a rich field of knowledge from which to draw theoretical insights. Most importantly these insights can be empirically tested. In this dissertation I employed experiments, but using motivated reasoning as an empirical framework does not mean judicial scholars have to limit themselves to the laboratory.
or decision-makers at the earliest stages of their legal training. I am quite confident that researchers concerned about the sacrifice in external validity experimental methods entail, can think of creative ways to test hypotheses related to motivated decision processes with alternative methods and available decisional data in future research.

In using this framework, however, researchers will need to be more explicit about the mixture of conscious and unconscious goals in the minds of decision-makers. They will need to acknowledge that pursuing some goals may interfere with the realization of others. Viewed in this light, following accepted norms of decision-making in pursuit of “good law” may constrain decision-makers’ ability to make preference-oriented decisions. Alternatively, the predominance of directional policy goals can prevent decision-makers from making “accurate” legal judgments if they are motivated to distinguish controlling legal authority and have the latitude to do so.

The vagueness that has characterized the issue of intention in legal decision-making can no longer stand, particularly now that we have a framework that allows for the influence of alternative goals. We need to be more explicit about the role of alternative motives and the factors that can limit their realization in our theories of decision-making. Rather than assuming accuracy or policy goals always prevail, researchers need to identify specific choices where the two are in tension, make predictions about the observable implications of each and conduct analyses to ascertain the relative influence of competing motives in those choices.  

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56 Case votes are probably not the optimal decisions to start with for this purpose. As referenced earlier there are many component choices judges make that are supposed to dictate outcome decisions. Segal and Spaeth may be right when they argue that judges are free to convince
Consistent with findings from this study, my best guess is that such research will portray a more complex picture of decision-making than purely legal or purely attitudinal models of decision-making suggest. The influence of preferences may be more resistant to constraining decisional norms in some issue areas than others. As suggested in the experiment on the separability of preferences, there could be individual differences in how decision-makers respond to controlling authority.

As with all empirical inquiries, researchers invoking this framework will need to be explicit about their expectations, allow for the distinct possibility that those expectations are wrong and that other factors may come into play in unexpected ways. All of these things happened here. In the next section, I briefly summarize the main findings concerning each of the proposed mechanisms tested in this dissertation.
Summary of Main Findings

In this study I tested two distinct avenues of attitudinal influence in legal reasoning. The first mechanism, analogical perception, was consistent with bottom-up characterizations of motivated decision-making. Specifically, the experiments in Chapter 3 tested how participants reasoned across cases by drawing analogies to prior litigation cited as authoritative.

Hypothesizing that attitudes could influence simple perceptions of precedent, I tested whether outcomes interacted with preferences in predictable ways to shape the similarity judgments of lay decision-makers and participants with legal training. In both samples there was a significant interaction between outcome and preferences; participants viewed cases consistent with their preferences as more similar to target litigation than cases with outcomes contrary to those preferences. Significantly, this interaction was not observed for all cases, but only for those with facts that were, neither too close, nor too far away, from the specific target matter participants were considering.

This pattern of results demonstrates that, consistent with hypotheses, perceptions of similarity were influenced by policy preferences -- but the influence was not unlimited. Manipulations of facts bearing on objective similarity constrained the role of policy preferences in participants’ judgments. Contrary to expectations, participants with legal training did not demonstrate less evidence of motivated perception than undergraduate participants. In fact, the comparison of effect size across the two samples showed that the interaction between outcome and
preferences in the middle range of cases explained a greater proportion of the variance in experiment conducted with the law students.

There was also evidence of preferences affecting similarity judgments in unanticipated ways. The unexpected main effects for outcome and preferences among undergraduates suggested two other types of biases played a role in their similarity judgments: bias based on sympathy toward particular types of litigants and bias created by differential use of decision criteria by people with alternative views. Neither of these effects was observed in the law student sample. This could be because legal training helps to prevent such biases, but it could also be a result of the particular cases used in this study. Further testing needs to be done to test the reliability of these observed differences.

The second hypothesized mechanism of motivated reasoning was consistent with top-down conceptions of attitudinal influence. The experiment in Chapter 4 investigated how motivated reasoning influenced decisions as participants reasoned about a case involving multiple issues. Specifically, I tested whether legally trained decision-makers were able to separate their preferences about alternative issues from a standing decision they were asked to make in a case that involved the restriction of political speech in a campaign centering around the issue of abortion.

Significantly, from a legal standpoint, there was no justifiable reason participants’ agreement with the plaintiff’s views on abortion should have influenced their determination of the standing issue. Also, by measuring participants’ views on two other issues made salient by the hypothetical fact pattern, Hatch Act ordinances
and free speech, I sought to assess the relative influence of those policy preferences on the standing decision.

Findings showed that participants were able to separate their views on restrictive ordinances from the standing judgment they were asked to make. Free speech opinions did, however, influence the decisions in line with experimental hypotheses. As discussed more fully in the analysis chapter, the precise nature of this influence was indeterminate because it was consistent with alternative, “top down” and “bottom up,” characterizations of influence.

Most significantly, consistent with top-down conceptions of motivated reasoning, findings revealed that participants were more likely to say the plaintiff had standing when she expressed abortion opinions that were consistent with their own. The ANOVA analysis indicated, however, that this effect was constrained by the jurisdictional condition in which the standing decision was made. Participants were more likely to decide the plaintiff had standing when she was expressing views that were consistent with their own opinions in the Third Circuit conditions where there was no direct controlling authority. In the jurisdiction when there was controlling authority, there was no difference in participants’ decisions based on their agreement with the political views she expressed.

The logit analysis, however, showed that findings must be viewed in light of the significant skew in abortion opinions among participants in the study. Attempts to make finer distinctions about how people with particular viewpoints were responding to content revealed different patterns for people with alternative views on abortion. The pattern of behavior described above was consistent with the responses
of three fourths of the sample who expressed pro-choice views. Findings suggested that participants with pro-life views, however, made decisions consistent with their preferences in the constrained and unconstrained jurisdictional conditions. In fact, evidence suggested that the small number of pro-lifers assigned to conditions where there was controlling authority that was contrary to their views were especially likely to make attitudinal judgments against the plaintiff, in direct conflict with that authority.

This differential response to constraint by people with alternative views was not something that was anticipated. Although, the unequal distribution of people with alternative views across treatment conditions suggests findings should be treated with caution, the significant result raises the possibility that there are systematic differences in decision-makers’ response to constraint. This is an idea that is not addressed in extant theories of decision-making. The potential for such behavior could merit further consideration and empirical investigation.

**Implications and Directions for Future Research**

Overall this study revealed significant evidence of attitudinal influence in legal reasoning processes. Moreover, the two avenues investigated do not exhaust ways preferences can influence legal decision-making. Legal decision-makers, for instance, often choose between multiple issues and sources of authority which suggest alternative outcomes. Evidence from this study supporting both top-down and bottom-up mechanisms of influence suggests the potential for preferences to influence other choices made in this complex domain is quite real. Testing the
influences of policy preferences in other choices made in the context of legal
decision-making should prove fertile ground for future empirical work.

Evidence of constraint was also present in studies of both of the hypothesized
mechanisms. Just as this study does not test all possible avenues of preference based
decision-making, it does not exhaust the factors that may constrain motivated
decision processes. Significantly, many of the institutional protections against the
operation of unconscious goals that I mentioned in the first chapter, including
professional accountability and group nature of decision-making, remain to be
investigated.

Clearly, we have just begun to scratch the surface of discovering the
cognitive mechanisms behind findings of preference oriented decision-making. It is
inquiry that would benefit from the contributions of researchers with varied interests
and expertise. I hope that findings in this study will be of significant interest to
scholars across sub-fields in political science. Besides being directly relevant for
those interested in courts and judicial decision-making, the questions addressed
should speak to political scientists interested in political psychology and the effect of
goals on politically relevant behavior - especially in the presence of norms designed
to reduce their influence. I also believe that this subject manner has the potential to
reach across disciplinary lines. Findings here may of particular interest to
psychologists interested in a direct application of analogical reasoning to a
politically relevant domain and legal scholars who show signs of becoming
increasingly open to social science techniques.
Although legal scholars have been slow to take up the systematic investigation of attitudinal influence, it is an inquiry they avoid at their own peril. Those who are trained in traditional modes of decision-making are especially well equipped to test avenues of attitudinal influence and their limits. Their failure to do so allows researchers from other disciplines to set the research agenda and characterize findings in their own way. Rather than dismissing evidence tending to demonstrate policy oriented behavior, I believe legal scholars should confront the issue head-on; their failure to take up this inquiry represents a missed opportunity at this critical stage in our collective knowledge.

Just as important, behavioral scholars, who have been the forerunners in contributing to our understanding of the role preferences play in legal decision-making, should reassess the excessively critical stance they have taken in favor of a more complex understanding of attitudinal influence. At the very least, they should take a step back to consider why preferences matter as much as they do in legal decision processes.

I believe this study advances our knowledge of how preferences interact with case facts and norms of decision-making in legal decision processes. I hope we will see attempts to understand the interaction of these forces in future research. Motivated reasoning provides an excellent framework to pursue this inquiry; moreover, the pursuit of such research has potential to yield findings with important implications on many theoretical fronts.
APPENDIX A

MATERIALS RELATED TO EXPERIMENTS ON ANALOGICAL PERCEPTION
UNDERGRADUATE SAMPLE CHARACTERISTICS

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Table A.1: Undergraduate Sample Characteristics Analogical Perception
Experiment 1
ARTICLE DESCRIBING THE TARGET CASE – EXPERIMENT 1

Supreme Court Will Hear Case about Gay Boy Scout Leader

WASHINGTON – Today the United States Supreme Court agreed to hear arguments in the case of *Boy Scouts of America v. Dale*. The case arises from plaintiff James Dale’s claim that the Boy Scouts engaged in unlawful discrimination when they removed him as scout master of a troop in New Jersey and revoked his membership upon learning he was a homosexual.

Gay rights activists argue that the conduct of the scouting organization was a violation of Dale’s civil rights and that his sexual orientation does not affect his ability to serve as a scout master. Lawyers for the Boy Scouts of America argue that they are a voluntary organization, and are free to restrict membership in a manner consistent with their beliefs and values.

It is difficult to predict how the justices will decide the *Boy Scouts* case, but some legal experts point to a previous decision that might guide the Court’s reasoning: *Indian Guides v. Henman*. In that case the Court ruled that the Indian Guides, a national boys’ organization, engaged in unlawful discrimination [or acted within its legal rights] when they refused to let a gay man [or woman or black man] serve as a youth leader. [SOURCE CASE MANIPULATION – SEE FOLLOWING]

The Court will hear arguments in *Boy Scouts v. Dale* in late April and should issue its decision before the end of the current term.
EXAMPLES OF MANIPULATIONS USED IN EXPERIMENT 1

RELATIONSHIP MANIPULATIONS

Scouting/Gay/Discrimination

It is difficult to predict how the justices will decide the *Boy Scouts* case, but some legal experts point to a previous decision that might guide the Court’s reasoning: *Indian Guides v. Henman*. In that case the Court ruled that the *Indian Guides, a national boys’ organization*, engaged in unlawful discrimination when they refused to *let* a gay man *serve as a youth leader*.

Employer/Gay/Discrimination

It is difficult to predict how the justices will decide the *Boy Scouts* case, but some legal experts point to a previous decision that might guide the Court’s reasoning: *Henman v. Selko Inc.*. In that case the Court held that *Selko Inc., an advertising company that produces commercials for NASCAR auto races*, engaged in unlawful discrimination when they refused to *hire* a gay man *for a management position because of his sexual orientation*.

Insurance/Gay/Discrimination

It is difficult to predict how the justices will decide the *Boy Scouts* case, but some legal experts point to a previous decision that might guide the Court’s reasoning: *Manson Insurance Co. v. Henman*. In that case the Court held that *Manson Insurance, a company that provides health insurance coverage to individuals*, engaged in unlawful discrimination when they *systematically denied coverage for illnesses that affect gay men*. 
RELEVANT QUESTIONS – EXPERIMENT 1

Similarity Questions

Similarity Question -- Scouting Organization

How similar would you say the case of Dale v. the Boy Scouts is to the other case mentioned in the news article which involved a boy’s organization that would not allow a gay man (or woman, or black man) to be a youth leader?

very dissimilar    fairly dissimilar    fairly similar    very similar

Similarity Question -- Employer

How similar would you say the case of Dale v. the Boy Scouts is to the other case mentioned in the news article which involved an advertising company that would not hire a gay man (or woman, or black man) to be a manager?

very dissimilar    fairly dissimilar    fairly similar    very similar

Similarity Question – Insurance Company

How similar would you say the case of Dale v. the Boy Scouts is to the other case mentioned in the news article which involved an insurance company that would not offer coverage for illnesses that affect gay men (or women, or black men)?

very dissimilar    fairly dissimilar    fairly similar    very similar
Relevance Question

How relevant is this previous case to the Dale case?
not relevant slightly moderately quite extremely
at all relevant relevant relevant relevant

Scout Leader Question

In your opinion is it acceptable or unacceptable for a gay man to be a Boy Scout Leader?
completely moderately slightly slightly moderately completely
unacceptable unacceptable unacceptable acceptable acceptable acceptable
# LAW STUDENT SAMPLE CHARACTERISTICS

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Table A.2: Law Student Sample Characteristics Analogical Perception Experiment 2
ARTICLE DESCRIBING THE TARGET CASE – EXPERIMENT 2

NJ Supreme Court Will Hear Case about Access to Religious Based Treatment Program

TRENTON  2/1/03 – The New Jersey Supreme Court is scheduled to hear arguments next week in the case of Wazzer-Din v. Goodwill Home and Mission of Passaic. The case arises from a claim that the Goodwill Home and Mission engaged in unlawful discrimination when it denied plaintiff, Wazzer-Din, admission to its domestic abuse treatment program because of his religious views.

The main issue in the case is whether the Goodwill program qualifies as a “public accommodation” under New Jersey’s anti-discrimination statute (also known as the LAD – Law Against Discrimination). The New Jersey statute is one of the broadest in the country, protecting individuals from discrimination on the basis of race, religion, and sexual orientation in a number of contexts.

Specifically, the LAD defines “places of public accommodation” by illustration. The list of places subject to the New Jersey law includes, “any tavern, hotel, motel, camp or resort whether for entertainment of guests or accommodation of those seeking health or relaxation; as well as any producer, manufacturer, or concession of any kind dealing with goods and services of any kind.” N.J.S.A.10:5-4.

The list also includes “hospitals” and “clinics.” The New Jersey Supreme Court has held that “other accommodations similar to those enumerated were intended to be covered.” Fraser v. Robin Day Camp, 210 A.2d 208 (1965). There is a specific exemption, however, for “educational facilities operated by a bona fide religious or sectarian institution.” N.J.S.A. 10:5-12(f).
Plaintiff Wazzer-Din argues that the Home’s refusal to treat him because of his Islamic faith is a violation of his civil rights under the LAD. The Goodwill program is acknowledged to be most successful of its kind in the area. Participants live at the home during three weeks of intensive treatment and therapy. Wazzer-Din’s lawyers emphasize that the program has admitted people of other faiths in the past and that it often accepts contributions from residents in the form of publicly funded food stamps and income from supplemental social security checks.

Lawyers for the Goodwill Home emphasize that the program receives no direct government funding. They acknowledge that the program has admitted people of different faiths in the past, but assert that because the program is based, in part, on religious instruction, all residents, regardless of faith, must express an openness to Christian teachings. They argue that under the First Amendment’s guarantee of free association, the faith-based Home should be free to restrict program participants in a manner consistent with its values and beliefs.

It is difficult to predict how the New Jersey Supreme Court will decide the Wazzer-Din case, but some legal experts point to a recent public accommodation decision that might guide the Court’s reasoning: Promised Hope v. Lafon, 742 A.2d 536 (2001). In that case the court ruled that Promised Hope, a Christian organization, engaged in unlawful discrimination [or acted within its legal rights] when it refused to let an Islamic [or a gay or a black] man take part in its residential drug treatment program.
The court will hear arguments in *Wazzer-Din v. Goodwill Home and Mission of Passaic* next Tuesday and should issue its decision before the end of the current term.

Service Organization Manipulations

It is difficult to predict how the New Jersey Supreme Court will decide the *Wazzer-Din* case, but some legal experts point to a recent public accommodation decision that might guide the Court’s reasoning: *Cherry Hill Kiwanis v. Lafon*, 742 A.2d 536 (2001). In that case the court ruled that a local chapter of the Kiwanis organization, a civic group that encourages community service, engaged in unlawful discrimination [or acted within its legal rights] when it refused to let an Islamic [or a gay or a black] man become a member.

Insurance Company Manipulations

It is difficult to predict how the New Jersey Supreme Court will decide the *Wazzer-Din* case, but some legal experts point to a recent public accommodation decision that might guide the Court’s reasoning: *Marine Insurance Co. v. Lafon*, 742 A.2d 536 (2001). In that case the court ruled that Marine Insurance, a company that provides health care insurance to individuals, engaged in unlawful discrimination [or acted within its legal rights] when it systematically denied coverage for illnesses that affect Islamic [or gay or black] men.
RELEVANT QUESTIONS -- EXPERIMENT 2

Similarity Questions

Similarity Question -- Religious Organization

How similar is the Wazzer-Din case described in the article to Promised Hope v. Lafon (the case where the religious organization was found to have engaged in unlawful discrimination [or to have acted within its legal rights] when it refused to let an Islamic [or gay or black] man take part in its drug treatment program)?

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Similarity Question – Community Service Organization

How similar is the Wazzer-Din case described in the article to Cherry Hill Kiwanis v. Lafon (the case where the community service organization was found to have engaged in unlawful discrimination [or to have acted within its legal rights] when it refused to let an Islamic [or gay or black] man become a member)?

Similarity Question – Insurance Company

How similar is the Wazzer-Din case described in the article to Marine Insurance Co. v. Lafon (the case where the community service organization was found to have engaged in unlawful discrimination [or to have acted within its legal rights] when it refused to let an Islamic [or gay or black] man become a member)?
Relevance Question

How relevant do you think the *Promised Hope [or Cherry Hill Kiwanis or Marine Insurance Co.]* case is to the New Jersey Supreme Court’s decision in *Wazzer-Din*?

Policy Question

Some people believe that when religious organizations provide treatment services or charity to the underprivileged they should do so without regard to religious beliefs; others believe that faith-based organizations should be able to offer preferential services to their members if they want.

Please indicate the extent to which you *personally agree or disagree* with the following statement:

Faith based organizations should have the right to restrict their services to clients who share their religious beliefs.

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Demographic Questions – Used in Both Samples

Are you male or female?

How would you describe your general political views? Would you call yourself a liberal or a conservative? (7 point scale)

What about your political party preference? Do you consider yourself a Democrat, a Republican or an Independent? (7 point scale)

What racial or ethnic group do you consider yourself to be a member of
1- black, African American
2- white, European American
3- Asian
4- Hispanic
5- American Indian
6- Arab, Arab American
7- Mixed
APPENDIX B

SUPPLEMENTAL REGRESSION ANALYSES FOR ANALOGICAL PERCEPTION EXPERIMENTS
Supplemental Regression Analyses

In the chapter 3, where I analyze findings from the analogical perception experiments I use analysis of variance because it is the appropriate (and predominant) method for analyzing observed differences in experimental studies (Kempel 1982). I also conducted a multivariate analysis of experimental results and include them here to show the effect of various control variables and demonstrate that results concerning the primary hypotheses are identical using regression techniques.

Tables B.1 and B.2 set forth the analyses in experiments 1 and 2 for all cases and cases in each distance category. Outcome manipulations are coded dichotomously (0 for discrimination/1 for no discrimination). Preferences of decision makers are also dichotomous (0 for oppose gay scout leader/1 for support gay scout leader in the undergraduate sample; 0 for oppose right to exclude, 1 for support right to exclude in the law student sample). The distance variable in the analysis of all cases is ordinal reflecting whether source cases were close (1) medium distance (2) or far (3) from the target dispute. I include controls for ideology (1-7 very conservative to very liberal) gender (0 male/1 female) and race (1 black/0 non black) and also included a test of the main alternative hypotheses in each experiment in the analysis done on all cases (see discussion below).

In both experiments the distance variable is significant in the analysis of all cases demonstrating that participants were more likely to find cases that were designated as close to the target dispute similar to that litigation consistent with the mean differences presented in the body of the dissertation. Moreover, in each set of
analyses the interaction between outcome and participants’ preferences is only significant in the middle range of cases – again confirming results from the ANOVA results in the study.

In the first model in each table (designated as “all cases”) I took the opportunity to test my primary alternative hypothesis in each experiment. In the undergraduate sample this was the idea that participants who knew about the Dale decision were more likely to find source cases with findings of no discrimination similar to the target case in line with the Court’s actual decision in the case. To do so I controlled for political interest (coded on a 1-7 scale/ extremely interested to not at all interested) and interacted the term with the outcome in the source case. (Admittedly the political interest measure is a bit blunt to test this hypothesis – but it is the best measure I have because asking about particular knowledge of the case may have sensitized participants to the purposes of the study). The model demonstrates that although people who were interested in politics tended to find cases with no discrimination more similar to the target case than participants who were less interested, the difference was not significant.

In the law student sample the main alternative hypothesis tested was that participants who were more religious would be likely to find cases where there was a finding of no discrimination similar to the target dispute compared to participants who were less religious. I controlled for frequency of religious attendance (coded on a 1-7 scale/ regular attendance at religious services to never attend services) and again interacted the variable with the outcome in the source case. Results indicate that participants who attend services regularly were more likely to find cases with no
discrimination as similar to the target dispute – but again the difference was not statistically significant.
<table>
<thead>
<tr>
<th>Variable</th>
<th>All Cases</th>
<th>Close Cases</th>
<th>Medium Cases</th>
<th>Far Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>2.28**</td>
<td>2.57**</td>
<td>1.11</td>
<td>2.30**</td>
</tr>
<tr>
<td></td>
<td>(.38)</td>
<td>(.55)</td>
<td>(.66)</td>
<td>(.56)</td>
</tr>
<tr>
<td>Ideology</td>
<td>-0.01</td>
<td>0.04</td>
<td>-0.08</td>
<td>-0.004</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
<td>(.07)</td>
<td>(.07)</td>
<td>(.06)</td>
</tr>
<tr>
<td>Gender</td>
<td>0.16</td>
<td>0.23</td>
<td>0.65*</td>
<td>-0.41</td>
</tr>
<tr>
<td></td>
<td>(.14)</td>
<td>(.21)</td>
<td>(.28)</td>
<td>(.22)</td>
</tr>
<tr>
<td>Race</td>
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<td>-0.27</td>
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<tr>
<td></td>
<td>(.21)</td>
<td>(.37)</td>
<td>(.54)</td>
<td>(.25)</td>
</tr>
<tr>
<td>Interest</td>
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<td>0.05</td>
<td>0.09</td>
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<td></td>
<td>(.09)</td>
<td>(.11)</td>
<td>(.13)</td>
<td>(.09)</td>
</tr>
<tr>
<td>Outcome</td>
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<td>0.05</td>
<td>1.10**</td>
<td>0.22</td>
</tr>
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<td></td>
<td>(.40)</td>
<td>(.29)</td>
<td>(.37)</td>
<td>(.25)</td>
</tr>
<tr>
<td>Predisposition</td>
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<td>0.65</td>
<td>0.67**</td>
</tr>
<tr>
<td></td>
<td>(.18)</td>
<td>(.31)</td>
<td>(.35)</td>
<td>(.26)</td>
</tr>
<tr>
<td>Outcome x Predisposition</td>
<td>-0.13</td>
<td>0.21</td>
<td>-1.17*</td>
<td>0.37</td>
</tr>
<tr>
<td></td>
<td>(.25)</td>
<td>(.42)</td>
<td>(.47)</td>
<td>(.37)</td>
</tr>
<tr>
<td>Outcome x Interest</td>
<td>-0.19</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>(.12)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distance</td>
<td>-0.20**</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>(.08)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

N = 208  79  61  68

R-Squared = 0.11  0.10  0.26  0.32

* indicates p<.05, ** indicates p<.01 (two-tailed test)

Table B.1: Ordinary Least Squares Regression on Similarity Judgments Experiment Number1
<table>
<thead>
<tr>
<th>Variable</th>
<th>All Cases</th>
<th>Close Cases</th>
<th>Medium Cases</th>
<th>Far Cases</th>
</tr>
</thead>
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<tr>
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<td>4.76**</td>
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<td>4.64**</td>
<td>3.78*</td>
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<tr>
<td></td>
<td>(.85)</td>
<td>(1.52)</td>
<td>(1.34)</td>
<td>(1.64)</td>
</tr>
<tr>
<td>Ideology</td>
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<td>0.06</td>
<td>-0.09</td>
<td>0.06</td>
</tr>
<tr>
<td></td>
<td>(.10)</td>
<td>(.23)</td>
<td>(.21)</td>
<td>(.17)</td>
</tr>
<tr>
<td>Gender</td>
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<td>0.51</td>
<td>0.43</td>
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<td>(.33)</td>
<td>(.67)</td>
<td>(.58)</td>
<td>(.71)</td>
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<tr>
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<td></td>
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<td>(.85)</td>
<td>(1.73)</td>
<td>(1.06)</td>
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<td>-0.08</td>
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</tr>
<tr>
<td></td>
<td>(.18)</td>
<td>(.28)</td>
<td>(.22)</td>
<td>(.27)</td>
</tr>
<tr>
<td>Outcome</td>
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<td>-0.59</td>
<td>-1.23</td>
<td>-1.09</td>
</tr>
<tr>
<td></td>
<td>(.80)</td>
<td>(.91)</td>
<td>(.90)</td>
<td>(.83)</td>
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<tr>
<td>Predisposition</td>
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<td>0.38</td>
<td>-2.28*</td>
<td>-1.11</td>
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<tr>
<td></td>
<td>(.45)</td>
<td>(.92)</td>
<td>(.87)</td>
<td>(.95)</td>
</tr>
<tr>
<td>Outcome x Predisposition</td>
<td>1.86**</td>
<td>1.25</td>
<td><strong>3.43</strong></td>
<td>1.93</td>
</tr>
<tr>
<td></td>
<td>(.61)</td>
<td>(1.24)</td>
<td><strong>(1.14)</strong></td>
<td>(1.15)</td>
</tr>
<tr>
<td>Outcome x Religiosity</td>
<td>-0.42</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>(.25)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distance</td>
<td>-0.65**</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>(.19)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>N</th>
<th>77</th>
<th>27</th>
<th>26</th>
<th>24</th>
</tr>
</thead>
<tbody>
<tr>
<td>R-Squared</td>
<td>0.33</td>
<td>0.20</td>
<td>0.42</td>
<td>0.29</td>
</tr>
</tbody>
</table>

* indicates p<.05, ** indicates p<.01 (two-tailed test)

Table B.2: Ordinary Least Squares Regression on Similarity Judgments Experiment Number 2
APPENDIX C

MATERIALS RELATED TO EXPERIMENT ON THE SEPARABILITY OF PREFERENCES
### LAW STUDENT SAMPLE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Gender</th>
<th>Number in Sample</th>
<th>Percentage</th>
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</thead>
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<tr>
<td>Male</td>
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<td>44</td>
</tr>
<tr>
<td>Female</td>
<td>64</td>
<td>56</td>
</tr>
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</table>

**Ideology**

<table>
<thead>
<tr>
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<th>Number in Sample</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberals</td>
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<td>43</td>
</tr>
<tr>
<td>Conservatives</td>
<td>47</td>
<td>41</td>
</tr>
<tr>
<td>Moderates</td>
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<td>16</td>
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</table>

**Party Affiliation**

<table>
<thead>
<tr>
<th>Party Affiliation</th>
<th>Number in Sample</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democrats</td>
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<td>38</td>
</tr>
<tr>
<td>Republicans</td>
<td>49</td>
<td>43</td>
</tr>
<tr>
<td>Independents</td>
<td>22</td>
<td>19</td>
</tr>
</tbody>
</table>

**Race**

<table>
<thead>
<tr>
<th>Race</th>
<th>Number in Sample</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>White</td>
<td>94</td>
<td>82</td>
</tr>
<tr>
<td>Asian</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Hispanic</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Mixed</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

**Year in Law School**

<table>
<thead>
<tr>
<th>Year in Law School</th>
<th>Number in Sample</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2L</td>
<td>48</td>
<td>42</td>
</tr>
<tr>
<td>3L</td>
<td>46</td>
<td>40</td>
</tr>
<tr>
<td>Graduate</td>
<td>21</td>
<td>18</td>
</tr>
</tbody>
</table>

Table C.1: Law Student Characteristics – Separability of Preferences Experiment
RELEVANT POLICY MEASURES

ABORTION MEASURE

Some people believe that state governments have a valid interest in restricting a woman’s access to abortion in order to protect the life of an unborn child; others believe restrictions on abortion interfere with a woman’s right to determine what happens to her own body.

Please indicate the extent to which you personally agree or disagree with the following statement:

State governments should have substantial authority to regulate women’s access to abortion services.

1 disagree disagree disagree agree agree agree

strongly somewhat slightly slightly somewhat strongly

HATCH ACT MEASURE

Some people believe the government should be able to restrict the political activities of public employees such as postal workers and police officers in order to preserve impartiality in the provision of government services; others believe such policies are an unjustified restriction on employees’ rights to political expression.

Please indicate the extent to which you personally agree or disagree with the following statement:
Government should be able to restrict political activities of public employees.

1  2  3  4  5  6
disagree disagree disagree agree agree agree
strongly somewhat slightly slightly somewhat strongly

FREE SPEECH MEASURE

Some people believe the American flag is an important symbol that should be treated with respect and that people who burn the flag should be subject to criminal sanctions; others believe criminalizing such behavior would unjustly violate citizens’ right to express dissatisfaction with the government.

Please indicate the extent to which you **personally agree or disagree** with the following statement:

People who burn the American flag should be subject to criminal sanctions.

1  2  3  4  5  6
disagree disagree disagree agree agree agree
strongly somewhat slightly slightly somewhat strongly
INSTRUCTIONS: STUDY B (Estimated Time: 40 Minutes)

In this study we are looking at reactions to a new kind of legal brief. Due to high case volume many state and federal jurisdictions have proposed using a “Summary Brief” format where parties agree to strict page limits within a single document submitted to the court in order to get expedited decision on motions.

What follows is an actual Summary Brief submitted to the Federal District Court for the Eastern District of Missouri (located in the 8th Circuit) [or Eastern District of Pennsylvania (located in the 3rd Circuit)] as part of a pilot study.

Please read the brief carefully, as if you were the judge responsible for rendering a decision on the motion. At the end of the brief you will be asked how you would decide the motion and what information from the Summary Brief led you to your decision. You may mark up the brief if you wish.
THE Mock Brief

DENISE BRUNELL, Plaintiff,

vs.

CITY OF GAYSON and RICK HUMPREY, CITY MANAGER,

Defendants.

Case No. 5:01CV00876 ERW

ISSUE: Does the spouse of a city firefighter have standing to challenge an ordinance prohibiting public employees from engaging in campaign activity on behalf of local candidates?

SUMMARY OF MOTION PROCEEDINGS:

This action was brought pursuant to 42 U.S.C. § 1983. Plaintiff, Denise Brunell, is seeking injunctive relief, damages, and a declaratory judgment that a Gayson City ordinance, §7.2 of the City Charter, violates her right to political expression under the First Amendment. This matter is currently before the court on the defendants’ Motion for Summary Judgment.

Defendants, the City of Gayson and City Manager Rick Humphrey, argue in this Summary Brief that plaintiff’s claims should be dismissed because she has not suffered an injury in fact. Plaintiff has submitted an Argument in Opposition stating that she has suffered the requisite injury to challenge the ordinance.
STATEMENT OF FACTS:

The City of Gayson is located in St. Louis County, Missouri [or Chester County, Pennsylvania]. In 1994 the city approved the current charter with the following provision:

§7.2 – Employees. Participation in City Elections

Neither the City Manager nor any person holding an administrative office or position under the city manager’s supervision shall be a candidate for mayor or city council member or engage, directly or indirectly in sponsoring, electioneering or contributing money or other things of value to any person who is a candidate for mayor or city council. All such persons shall retain the right to vote as they choose and to express their opinions on all political subjects. Any person violating the provisions of this section shall be removed in the manner provided by the personnel code.
The provision was adapted from a model charter drafted by the National Civic League. It was designed to protect city employees from undue coercion by local candidates for public office. The City Manager, Rick Humprey, stated in his deposition that the provision has been important in maintaining a degree of impartiality for city government in what has been a somewhat volatile political environment. [Humprey Deposition (Hump. Dep.) at 78].

Plaintiff’s husband, John Brunell, is employed as a city firefighter in Gayson. The couple has lived in the city since 1998. Prior to moving to Gayson, plaintiff was active in city politics. She previously worked on the campaign of a councilwoman in the town where she used to reside. She has also made telephone calls on behalf of local political candidates. [Brunell Deposition (Brun. Dep.) at 8]. Although not directly subject to disciplinary action herself, Denise Brunell claims that she has been reluctant to engage in political campaign activity since moving to Gayson because she is fearful that her husband will lose his job.

The most recent election for city council in the City of Gayson was hotly contested. The campaign centered on the controversial issue of abortion. Candidates debated a proposed zoning ordinance that would have had the effect of closing down a clinic that performed abortion services within the city. The Democratic incumbent, Ruth Bandree, declared that she would not support the ordinance because it would make it more difficult for city residents to obtain legal abortion services. The Missouri [Pennsylvania] Right to Life Party sought to sponsor a candidate for Gayson City Council who supported the proposed ordinance. Based on this single issue they were able to get enough signatures to win a place on
the election ballot. Rita Moray entered the race for city council running as the Right to Life candidate.

Although she did not become active in campaigning activities during the election, plaintiff demonstrated her support for the (Right to Life OR Democratic) candidate by placing a sign in her front yard, reading: (“SUPPORT LIFE -- VOTE MORAY FOR CITY COUNCIL” OR “SUPPORT CHOICE – VOTE BANDREE FOR CITY COUNCIL”).

When her husband’s supervisor learned of the sign he told John Brunell he would have to remove it or be subject to disciplinary action under §7.2 of the City Charter. John Brunell explained that his wife posted the sign in the yard and that although he generally agreed with his wife’s political views, it was an expression of her political support for the candidate, not his. His supervisor reiterated the order emphasizing that the charter provision prohibits city employees from supporting candidates for city council, “directly or indirectly.”

After discussing the matter with his wife, John Brunell removed the sign from the front yard to avoid adverse disciplinary action. He also registered a complaint with his union, the International Association of Firefighters for St. Louis County (Local 2665), and his wife, Denise Brunell, filed this action challenging the constitutionality of §7.2. Specifically, plaintiff argues that the ordinance infringes upon her First Amendment rights to political expression by threatening her husband’s employment. She also asserts that her husband has been unfairly targeted because the current city manager is personally opposed to the political views she sought to express in the sign that was posted on the couple’s property.
[NOTE -- The following sections of the Summary Brief were submitted by each of the parties to the dispute. They encompass the legal arguments each party makes in support of their stated position. Arguments are strictly limited to 1500 words. Each side was able to review the argument of the other side before making their final submissions. Both parties have agreed that these arguments may be considered by the Court in the interest of getting an expedited ruling on the Motion.]

LEGAL ARGUMENT:

Defendant’s Summary Argument in Support of Motion to Dismiss

The facts in this case are clear. There is no issue of material fact that would preclude summary judgment in this matter. *Cellotex Corp. v. Catrett* 477 U.S. 317, 91 L. Ed. 265, 106 S. Ct. 2548 (1986). Defendants are entitled to summary judgment because plaintiff has not suffered any cognizable injury that would give her standing to challenge § 7.2 of the City Charter. Any and all injuries she claims to suffer through the operation of the provision are speculative and indirect.

The weight of applicable legal authority clearly supports defendants’ position. At least two United States courts of appeal and one federal district court have held that the type of injury plaintiff claims to have suffered is insufficient to confer standing. These cases expressly hold that spouses do not have standing to
challenge narrowly tailored ordinances that restrict the political activity of public employees. Therefore, plaintiff’s claims should be dismissed in their entirety.

Provisions similar to the one in this case have been upheld as a limited restriction on public employees’ right to engage in political behavior. *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 548 (8th Cir. 1984); *Margill v. Lynch*, 733 F.2d 22 (1st Cir. 1977). Federal judges have recognized that “when the government deals with an employee in its role as and employer it has broader latitude in First Amendment matters than when it deals with citizens in its role as sovereign.” *Firefighters, Local 3808 v. Kansas City* 220 F.3d 969, 973 (8th Cir. 2000) (citing *Wabanausa County v. Umbehr*, 518 U.S. 668, 135 L.Ed. 2d 843, 116 S. Ct. 2342 (1996)).

Narrowly tailored provisions limiting the political activities of public employees in local elections have been justified as a rational way for municipalities to “(1) protect against the erosion of public confidence in the impartiality of the provision of government services (2) preserve fairness in city elections and (3) preserve the efficiency of the operation of the city.” *Reeder* at 542. The political climate surrounding the last city council election in Gayson makes it clear § 7.2 was fundamentally important in achieving all of these valid municipal interests.

Plaintiff’s assertion that her husband was unfairly targeted because the City Manager does not share her views on abortion is not only irrelevant to the standing issue raised in this motion, it is completely unfounded. The ordinance is content free on its face and in its application. Moreover, § 7.2 is narrowly tailored. It only applies to election activity on behalf of local candidates for mayor and city council.
By its express terms §7.2 applies only to city employees. There is no question that plaintiff, herself, is not a city employee, and therefore not subject to direct disciplinary action under the Charter. The only injury plaintiff could suffer through the operation of the provision is entirely indirect through the loss of her husband’s employment. Although indirect injury can sometimes constitute injury in fact, such injuries do not confer standing where they are “speculative and incidental.” Ben Oehreleins & Sons v. Hennepin County, 115 F.3d 1372 (8th or 3rd Cir. 1997).

At least three federal courts have held the type of injury plaintiff alleges is not sufficiently direct to confer standing. In Biggs v. Best, Best & Kreiger, 189 F. 3d 989 (9th Cir. 1999) the husband and daughter of a city attorney were vocal community activists regarding a local environmental issue. A city council member informed the attorney that she would be fired unless “members of her family were silenced” on the issue. Biggs at 996. The attorney, her husband, and her daughter all brought claims against members of the city council in federal court. The claims of the husband and daughter were dismissed by the trial judge.

Upon review, the Court of Appeals for the Ninth Circuit upheld the decision, stating that the husband and daughter did not have standing to raise claims on their own, but only to raise, derivatively, the same claims as the city attorney. The Court noted that “although the loss of [the city attorney’s] salary was not insubstantial” in terms of its effect on the family’s economic condition, the injuries to her husband and daughter were “too indirect” for them to have standing to raise separate individual claims. Biggs at 998.
The Tenth Circuit issued a similar ruling in *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998). In that case a state trooper’s wife challenged a policy prohibiting troopers from engaging in political campaign behavior. Her husband was threatened with disciplinary action because she wanted to post a campaign sign in their yard. The court noted that under the policy there was no possibility of disciplinary action against the spouse herself. It acknowledged that the trooper’s wife was *indirectly injured* by the application of the policy to her husband because she was faced with a loss of income that would have affected the entire family. However, the court ruled that the wife had no claim of her own because her injuries were “speculative and incidental.” *Horstkoetter* at 1279. The Court reasoned that if the law was valid as to the activities of the husband, it would also be valid to discipline him on account of the activities of his wife.

Plaintiff cites *International Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002) in support of her argument. Several things are noteworthy about the Court’s ruling in that case. First, it stands alone as the *only* Court of Appeals decision finding spousal standing to challenge the constitutionality of restrictions on political behavior of public employees. Second, the case is factually distinguishable from the current matter.

In *City of Ferguson*, a plaintiff spouse interested in running for local office wrote several letters to the mayor asking if her husband, a city firefighter, would be subject to discipline under a local ordinance if she ran for city council. After three of her letters went unanswered, she filed an action in federal court seeking a declaratory judgment that the ordinance interfered with her First Amendment rights.
A Missouri District Court dismissed her claim for lack of standing but the Eighth Circuit reversed the ruling, holding she could maintain the action under the circumstances presented.

The facts giving rise to this case are clearly distinguishable from City of Ferguson. First, plaintiff in this matter is not seeking political office. She sought to post a sign on property that was jointly owned by her and her husband, a municipal employee. There is no question that public employees may be disciplined under such circumstances (see, Horstkoetter, supra). Moreover, Denise Brunell did not directly inquire as to whether her husband would be subject to discipline for her conduct before she posted the campaign sign. Had she done so the City Manager would have promptly responded to her inquiry. Thus, there is no history of indifference toward plaintiff’s First Amendment rights on the part of the city as was the case in City of Ferguson.

Finally, in Knoll v. City of Chesterfield, 71 F. Supp. 959 (W.D.N.Y. 1999) the court ruled that the wife of a city police officer did not have standing to challenge an ordinance prohibiting public employees from campaigning on behalf of mayoral candidates. In that case the plaintiff’s husband was threatened with disciplinary action unless he remove a campaign sticker that his wife put on their family car. In dismissing the wife’s First Amendment claim the Court soundly reasoned:

Plaintiff’s pleadings do not allege the imminent threat of injury by the city upon Lynette Knoll. While Robert’s choices have ramifications impacting
Lynette… the city’s alleged conduct is not directed at Lynette and threatens no direct injury to her.

To expand the concept of standing to encompass familial economic interdependence would allow, for example, an employee’s spouse and dependents to bring derivative causes of action in almost any suit based on the employee’s termination or suspension without pay. Knoll at 961.

As the court’s decision in Knoll suggests, expansion of the doctrine of standing to encompass the type of injury alleged by the plaintiff in this case is, not only illogical, but dangerous. It would open the door to a multitude of litigation based on indirect economic injury when spouses lose their jobs. Rather than start down the slippery slope the plaintiff’s argument ultimately entails, this court should abide by the reasoning of the majority of federal courts that have considered this issue and dismiss plaintiff’s claims for lack of standing.

**Plaintiff’s Argument in Opposition to Motion to Dismiss**

Plaintiff, Denise Brunell, respectfully files this Argument in Opposition to Defendants’ Motion for Summary Judgment. It is clear that plaintiff has suffered an injury in fact, giving her sufficient standing to challenge §7.2 of the Gayson City Charter. Contrary to the arguments raised by defendants, Denise Brunell’s injuries are real and personal to her. Moreover, the claims raised by plaintiff in this action are distinct and separate from those of her husband.

Currently there is a conflict among the federal circuits concerning whether or not the spouses of public employees have standing to challenge provisions like §7.2.
based on allegations that such provisions violate their own First Amendment rights. The most recent decision on the matter is *International Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002), *cert. denied*, 2003 LEXIS 602 (January 13, 2003). In that case the United States Court of Appeals for the Eighth Circuit recognized that spouses of public employees suffer “real and tangible” injury when inhibitory provisions like § 7.2 overreach to infringe on their rights of political expression. 283 F.3d at 975.

*This district lies in the Eighth Circuit, making City of Ferguson controlling legal authority.* OR The issue of spousal standing has not yet been litigated in the Third Circuit where this district is located. Thus, regardless of where the “weight of authority” lies, this court is free to follow whatever precedent it finds most compelling under the circumstances raised by this litigation. Plaintiff respectfully argues that the court should follow the sound logic of the Eighth Circuit in *City of Ferguson.*]  Defendants’ attempts to distinguish this case from *City of Ferguson* are entirely unsuccessful. The material facts giving rise to the current dispute are, in fact, more similar to *City of Ferguson* than any other case where spousal standing has been at issue. In that case the plaintiff spouse of a city firefighter was reluctant to run for local office where a municipal ordinance threatened her husband’s employment for “endorsing or campaigning or supporting candidates for city office in any manner.” *City of Ferguson* at 970. The wife challenged the ordinance in federal court, claiming it was over-broad because it inhibited her willingness to run for office as she was fearful her husband could loose his job on account of her political activities.
In holding that the plaintiff had standing to challenge the provision, the Eighth Circuit specifically stated that she had suffered an injury in fact. The court reasoned that it was *her own political rights* that were inhibited by the threat of substantial economic harm that would come to her (and her entire family) should her husband lose his job. Specifically, the court reasoned, plaintiff’s “apprehension that the city might act aversely if she exercised her…[First Amendment] rights was not unreasonable. The threatened consequence of her exercising the rights, the discipline or discharge of her husband, would substantially damage her life and economic condition.” *City of Ferguson* at 973.

The situation is exactly akin to this case. John Brunell’s livelihood was threatened because of a sign his wife posted expressing *her personal* political beliefs. Later plaintiff agreed to the removal of the sign – effectively silencing her political voice – because of the direct threat to her family’s only means of support. Defendants’ implication that it was the type of political activity plaintiff sought to engage in (running for office vs. posting a sign) that was important in *City of Ferguson* is completely misleading. It was the fact that plaintiff’s First Amendment rights were inhibited that was important, not the specific sort of activity she sought to engage in.

Moreover, in this case, as in *City of Ferguson*, the plaintiff has a substantial history of engaging in local political activity. Denise Brunell’s efforts on behalf of candidates for municipal office in the city where she used to live were frequent and extensive. Upon moving to Gayson, plaintiff testified that her willingness to engage in local election activity was inhibited by the threat to her husband’s employment.
She stated at her deposition that she was reluctant to work on behalf of local candidates because of the ordinance. [Brun. Dep at 14.] Federal courts have held that where municipal provisions act to inhibit the First Amendment rights of citizens, this “chilling” effect coupled with a realistic apprehension of state action, is sufficient to confer standing. *Shaggs v. Carle* 110 F.3d 831 (Fed. Cir. 1997).

Here not only was there a reasonable apprehension that plaintiff’s husband would lose his job if plaintiff exercised her First Amendment rights, her political voice was effectively silenced when John Brunell’s supervisor ordered that the sign she posted be removed from the couple’s property. Under these circumstances it can hardly be argued that the injury was “speculative.” Rather, the threat of imminent disciplinary action was made clear to the plaintiff and her husband.

Contrary to the defendants’ assertions, the political context surrounding the order is hardly irrelevant. Plaintiff has long been a supporter of the Right to Life [Abortion Rights] Movement. In May of last year she volunteered for an organization involved in the cause. She testified at her deposition that she was an active and visible participant in the organization for several months prior to posting the campaign sign. [Brun. Dep. at 43].

Plaintiff believes that she and her husband have been unfairly targeted in an effort to silence her politically. At his deposition City Manager, Rick Humphrey, denied such targeting occurred, but he did state that he was aware of plaintiff’s activity prior to the posting of the campaign sign and that he was “diametrically opposed” to her views on abortion. [Hump. Dep. at 97]. At the very least Humphrey’s comments raise the real possibility that § 7.2 was applied in a
discriminatory manner to prevent plaintiff from expressing deeply held political beliefs that were unique and personal to her. This clearly belies defendants’ argument that plaintiff’s injuries are wholly derived from her husband’s claims and bolsters plaintiff’s assertion that she has suffered a real and substantial injury in her own right.

In *City of Ferguson* the court clearly agreed with this characterization of the plaintiff spouse’s claims. It stated that plaintiff’s claims were not “merely duplicative” of her husband’s, noting that the plaintiff spouse had “an interest of her own to defend. Not only is it *her own* political activity that she seeks to protect, but *her own* personal and economic status as well.” *City of Ferguson* at 973.

In this case John Brunell’s income acts as the primary and exclusive means of support for the Brunell family. Any depletion of his earnings as a result of disciplinary action or dismissal would prove catastrophic to the economic condition of plaintiff and her entire family. As the court said in *City of Ferguson*, “plaintiff is herself injured by having to give up or hesitating to exercise her First Amendment rights and by the consequent loss of her husband’s ability to provide the mutual support that the law imposes as a duty on both spouses.” *Id.* at 973.

Finally, it is worth noting that two of the cases cited by defendants are distinguishable from this matter in a very important respect. In *Horstkoettler v. Department of Public Safety*, 159 F.3d 1279 (10th Cir. 1998) the home where the state trooper’s wife posted the campaign sign was exclusively owned by her husband. Likewise the car in *Knoll v. City of Chesterfield*, 71 F. Supp. 959 (W.D.N.Y. 1999) belonged to the public employee spouse. Thus, in each of these
cases the government argued that disciplining public employees for political material that was posted on property was justifiable.

In this case the property where the sign was posted is jointly owned by John and Denise Brunell. John Brunell could not legally prohibit his wife from posting a sign on property she has an equal right to use and enjoy. Likewise the city ordinance should not inhibit her use of the property because it is jointly owned with her husband. The *Horstkoetter* court itself acknowledged this fact, suggesting that it would be unfair to discipline employees for spousal activity they had no legal right to control. *Horstkoetter* at 1279.

While it is true that federal courts have recognized that municipalities have a limited interest in curbing the political speech of public employees, this interest *does not extend* to violating the First Amendment rights of their spouses. It is clear that here plaintiff has suffered a substantial injury though the operation of a provision that overreaches to inhibit her First Amendment rights. The injury is quite real and entirely personal to her. Plaintiff respectfully asks this court to abide by the Eighth Circuit’s sound reasoning in *City of Ferguson* and deny defendants’ Motion to Dismiss.
INSTRUMENT

Please answer all of the following questions regarding your response to the information presented in the Summary Brief.

1. Was the information in the Summary Brief presented clearly?

   1  2  3  4  5  6
   very unclear  very clear

2. Were the facts in the STATEMENT OF FACTS section of the Summary Brief presented objectively?

   1  2  3  4  5
   biased in favor  presented  biased in favor
   of Plaintiff  objectively  of Defendants

3. Generally speaking, was the LEGAL ARGUMENT section of the brief balanced?

   1  2
   yes  no

4. Based on your reading of the Summary Brief, do you think the Court should find that the plaintiff, Denise Brunell, has standing to challenge the city ordinance?

   1  2
   yes  no
5. On the following scale please rate how confident you feel about your answer to the previous question, based on the facts and legal argument presented in the Summary Brief.

1 2 3
not very somewhat extremely confident confident confident

6. How much of a role did the FACTS presented in the Summary Brief play in your decision?

1 2 3 4 5
no role major role

7. How much of a role did the LEGAL ARGUMENTS cited by the parties play in your decision?

1 2 3 4 5
no role major role

8. In the blank space below, briefly indicate (in a few sentences) what FACTS influenced your decision and how they influenced you as they did.

9. In the blank space below, briefly indicate (in a few sentences) what LEGAL ARGUMENTS, influenced your decision and how they influenced you as they did.
BIBLIOGRAPHY


*Biggs v. Best, Best and Kreiger*, 189 F.3d 989 (9th Cir. 1997).


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*Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998).

*International Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002).


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