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THE ADOPTION AND REJECTION OF LEGAL DOCTRINES:
EXPLAINING THE CHOICES OF FEDERAL APPELLATE JUDGES

DISSertation

Presented in Partial Fulfillment of the Requirements
for the Degree Doctor of Philosophy in the
Graduate School of the Ohio State University

By

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1996

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ABSTRACT

The central question of the dissertation is: when and why do judges adopt new legal doctrines announced by other judges? I look specifically at judges of the United States Courts of Appeals. Drawing on studies of judges' decision-making, inter-court citation, and judicial compliance and concepts from political psychology, I first identify several goals that seem most likely to influence judges' decisional behavior and then derive from those goals a number of hypotheses to explain judges' reactions to new doctrines.

Data to test the hypotheses come from two main sources. The first is an analysis of about three hundred Court of Appeals decisions rendered between 1983 and 1995. The second is a set of personal interviews with twenty-four circuit court judges, conducted in 1995. These data are supplemented with secondary source material. The two main sources complement each other by filling gaps in content and compensating for methodological weaknesses.

When the results from both sets of data are considered together, there is strong evidence that the following factors affect judges' decisions whether to follow new precedents: the strength of support for the new doctrine among other circuits which have considered it; the distance between the ideological implications of the doctrine and the ideologies of the judges deciding; and the prior support or opposition of the judges' own circuit. Three other factors receive qualified support from the data. The evidence leaves some question about them but is supportive enough to justify continued scholarly attention. They are the prestige and expertise of judges already supporting or opposing the new doctrine and the presence of a dissenting
opinion in the decision announcing the new doctrine. There is also solid, though not definitive, evidence that the impact of previous circuit support is greater in more difficult, less salient fields of law, while the impact of ideology is less in those fields. Finally, the data reveal considerable variation across individual judges in the extent to which they are influenced by particular factors.

The findings also reflect back on the assumptions I make about judges' motivations. Although they are not conclusive, they indicate that, in addition to promoting their own policy preferences, judges also wish to make decisions that are legally correct in some more objective sense and that enhance the coherence and uniformity of federal law.
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CHAPTER 1
INTRODUCTION

In the 1988 case of Grappone, Inc. v. Subaru of New England, Inc., a three judge panel of the U.S. Court of Appeals for the First Circuit was confronted with a knotty problem of antitrust law, one with which three other circuit courts and the Supreme Court had struggled in recent years. The problem concerned the evidence necessary to prove an illegal "tying" arrangement.

Tying arrangements exist where a business conditions the sale of one item on the purchase of another; for instance, a computer manufacturer refuses to sell desired hardware to a customer unless the customer agrees to buy software as well. They are, in some circumstances, illegal under U.S. antitrust statutes. A party which considers itself injured by a tying arrangement may prove an antitrust violation in court under either of two standards—per se or rule of reason. Under the former, an arrangement which meets certain initial criteria will be judged illegal without further analysis. A plaintiff who fails to establish a per se violation may still prevail under the rule of reason by presenting more extensive evidence of a different sort.

In a confused and confusing 1984 decision, unanimous as to outcome but divided on rationale, the Supreme Court muddied the distinction between the two standards and left

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1 858 F.2d. 792 (1st Circuit, 1988).
unclear how the rule of reason should be applied to tying cases. One issue raised, but not settled by the decision, concerned plaintiffs' need to show that defendants possess "market power." This element—a demonstration that the seller has sufficient control in a particular market to force buyers to purchase products they do not desire—was traditionally required under the per se rule. Following the Supreme Court's decision, the question arose whether failure to show market power also doomed a plaintiff's rule of reason analysis.

In the next year, three federal courts of appeals from different circuits were called on to answer this question. Each court independently arrived at the same conclusion: market power must be shown for a claim to succeed under the rule of reason.4 So when the 1st Circuit confronted the same question in 1988, the rule that market power must be demonstrated enjoyed strong support. Nevertheless, the 1st Circuit panel, with Judge Stephen Breyer writing the opinion of the court, decided the other way. And it did so without a mention of the decisions to the contrary—indeed, without directly addressing the question.5

Later developments only added to the confusion. In 1992, the Grappone decision was itself cited and followed by the 3rd Circuit6, which recognized but explicitly rejected the decisions from the 6th, 7th, and 11th Circuits. The next court to address the question, a 5th

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4Amey, Inc. v. Gulf Abstract and Title, Inc., 158 F.2d. 1486 (11th Circuit, 1985); Will v. Comprehensive Accounting Corp., 776 F.2d. 665 (7th Circuit, 1985); Hand v. Central Transport, Inc., 779 F.2d. 8 (6th Circuit, 1985). Because the cases were decided at about the same time, each panel was probably unaware of developments in the other circuits.

5Grappone, 858 F.2d. 792. After rejecting the per se analysis for a failure to show market power, it then treated the rule of reason analysis separately and rejected it on different grounds, implying that market power was not a necessary ingredient of rule of reason analysis.

Circuit panel, ruled the same way as the 1st and 3rd Circuits, but without reference to any of the six cases just described.  

This example of policy-making in the U.S. federal court system points to a seeming contradiction at the heart of, and generated by the structure and rules of, that system. The twelve circuit courts of appeals construct legal policy from the same raw materials—the Constitution, federal statutes, and rulings of the Supreme Court. Furthermore, the policies they produce contribute, ostensibly, to a single common edifice—the federal law. One might expect, then, that the courts of appeals would make decisions in close consultation and coordination with each other. In fact, however, they operate with a substantial degree of autonomy. When confronting a legal problem, they are not obligated to heed, or even take note of, other circuits’ decisions in similar cases. And while the courts of appeals are technically bound by Supreme Court decisions, that Court’s meager docket and limited means of coercion leave circuit courts with considerable discretion to rule in areas where the Supreme Court has not spoken or to evade its direction. The implications of all this are: each court of appeals has considerable freedom to interpret and shape the federal law as it sees fit; and, consequently, the federal law may mean different things in different circuits.

Consider a second example, however. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) contains rules for the public and private clean-up of hazardous waste and for the apportionment of clean-up costs. Between 1988 and 1993, six circuits had to decide whether a corporation which has merged or consolidated with another corporation is liable for the costs of cleaning the latter’s hazardous waste. The issue first came before a panel of the Third Circuit. The judges ruled that the successor corporation

7Breaux Brothers Farms v. Teche Sugar Co., 21 F.3d. 83 (5th Circuit, 1994).
was liable. The five circuits to confront the issue after this all cited the 3rd Circuit opinion and adopted its rule.

As the second example shows, conflict among the circuits is not inevitable. In fact, the pattern depicted in the second example is more typical than that in the first. There is something of a puzzle here, as Howard (1981) has observed:

So strong are the forces of fragmentation, in fact, that the most challenging questions are: what keeps the federal judiciary from flying apart? Why is consensus actually more characteristic of circuit courts than conflict? (p.3)

One reason why conflict is not more pervasive is that judges, while essentially independent, nevertheless do not make their judgments in isolation. Researchers have shown that courts of appeals are often responsive to Supreme Court leadership. (Gruhl 1980; Songer 1987; Songer and Sheehan 1990; Songer and Haire 1992; Songer, Segal, and Cameron 1994) Furthermore, decisions of equal or even lower courts are frequently cited in lawyers' briefs and judges' opinions. Taking this evidence together with judges' own descriptions of their decision-making processes, it seems clear that judges do pay attention to what happens in other jurisdictions and are sometimes influenced by developments there; that is, they consider and sometimes follow precedents from other courts.

The decision whether or not to follow a precedent is often quite consequential. It may dictate a court's ultimate judgment as to what the law is, and so can have a profound impact on individuals and groups within a circuit. Furthermore, taken together the circuit courts' decisions determine the coherence and predictability of federal law as a whole. In short,

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10See, for instance, Howard (1981, Chapters 6 and 7) and, in chapter five of this dissertation, excerpts from interviews conducted by the author.
individual judges' and courts' reactions to precedents play a key part in shaping federal law within and across circuits. For this reason, the question of when and why the courts of appeals choose to follow precedents is an important one. Given the autonomy with which courts function, it is also a difficult one. It is the central focus of this dissertation.

In searching for answers, I have gathered data from two distinct sources: court decisions in selected areas of law, and interviews with circuit court judges. For the analysis of decisions, I examine developments from 1984 through 1995 in three areas of federal law: antitrust; search and seizure; and environmental law. (I explain why these areas were chosen in Chapter 2, where I address issues of data and methodology.) Because the concern of the dissertation is policy development, rather than routine decision-making, the data collection in each area began with a search for new legal rules. By new rules I mean either rulings on novel issues or applications of new legal rules to familiar matters. Once a decision containing a new rule was identified, all subsequent cases for which such a decision constituted a relevant precedent were then analyzed to determine how judges treated that decision. Did they take note of the precedent? If so, did they follow, reject, or distinguish the precedent?11

These cases form the basis for one set of explanatory analyses, as they are combined with data from secondary sources to test the various hypotheses set forth below. The other explanatory component of the dissertation relies exclusively on the interviews. In the interviews, judges offered observations about motivations, work styles, workload, role conceptions, judges' reputations, and, most importantly, attitudes toward and usage of precedent. I believe these two approaches to explanation complement each other well. The case analysis provides for more rigorous, objective, and, therefore, credible tests of the

11I will discuss coding rules in Chapter Two.
hypotheses. It has limitations, though—chiefly a narrow focus and tendency to identify commonalities among judges while obscuring differences. Because of their breadth, the interviews deliver contextually rich insights into dynamics generally, rather than just in three fields, reflect on the validity of the assumptions underlying my explanatory hypotheses, and, perhaps most importantly, reveal intriguing and significant differences among individual judges.

EXISTING RESEARCH

We know less about precedent-oriented behavior than might be imagined, given the abundant existing research on judicial behavior. In large part, this is because the question framed here has rarely been asked. Several areas of research relate to it in some way, and I draw on the theory and findings from these fields, but they seldom speak directly to the question.

Studies of the bases of judges' decisions have the greatest relevance for this project. This is not because their focus is similar to mine. They typically concentrate on case outcomes, not legal rules, and on the decisions of individual judges, rather than the outputs of their courts. In addition, most treat courts as isolated actors, disregarding the possible impact of other courts' decisions. Nevertheless, the choice whether to follow precedent can be seen as an integral element of judges' decision-making. Therefore, we should be able to

12Two important exceptions come to mind. One is Songer and Haire's (1992) study, in which they examine and find evidence for the impact of Supreme Court trends on the votes of Court of Appeals judges. The other is Swinford's (1991) analysis of education funding cases in state supreme courts. He asks whether the patterns of decisions in earlier cases influenced subsequent outcomes in other states. He finds no evidence that they did. I am not aware of any other study investigating the impact of parallel courts' decisions.
directly apply insights from decision-making research in analyzing the treatment of precedents.

Unlike decision-making studies, research into judicial impact does focus on precedents, albeit almost wholly in terms of compliance—lower courts' reactions to higher court decisions (especially the Supreme Court's). So important is the question of whether lower courts obey the Supreme Court that most studies have stopped short of asking why. However, some primarily descriptive works provide insights into judges' behavior (e.g., Peltason 1961), and a few studies are explicitly theoretical in approach (Tarr 1977; Johnson and Canon 1984; Johnson 1987). These works are instructive, and their logic can certainly be extended beyond the original contexts. For my purposes, they are especially helpful in drawing attention to certain broad categories of factors: the characteristics of the courts announcing new rules; the characteristics of the opinions in which they are announced; the environments of later judges considering those rules; the attitudes of those judges; and so on.

Of course, because the concern of compliance studies is with hierarchical relations, frameworks from those studies cannot be incorporated wholesale into research on relations between equal courts. The two kinds of phenomena are different and so, naturally, are the explanations of them. Thus, while some variables in my analysis are the same as (or very similar to) those in compliance studies, others have not interested compliance scholars. In addition, there are a number of variables from compliance studies that I do not include in my analysis. Some, such as opinion clarity, are omitted because they are likely to be of little explanatory value. Others, such as local environmental factors, are left out in the interest of theoretical simplicity and coherence.

Other bodies of research are more similar to this one in that they focus on the spread of precedents across courts of equal standing. This focus is quite common in law reviews,
where one frequently sees articles comparing the doctrinal positions of different circuits or tracing the evolution of legal rules across courts and time. Unfortunately, these articles typically concentrate on a single rule or set of rules in a purely descriptive manner. When they depart from description, it is more likely to be in favor of evaluation than explanation. So, while they are quite useful to political scientists for understanding specific developments, they are less so for understanding general phenomena.

Of greater theoretical interest are studies of policy diffusion and inter-court citation. In a way, diffusion studies, whether within judicial politics (Canon and Baum 1981) or without (e.g., Walker 1969; Leichter 1983), are the closest in spirit to this one. Diffusion scholars identify specific policies and attempt to say something about how they move from one body of decision makers to another. Broadly speaking, I try to do the same thing here. Nevertheless, there is a difference, subtle yet important, between the two types of research. Traditional diffusion researchers are interested less in the fates of specific policies than in the patterns of behavior of and among individual actors. My focus is reversed. I care more about why some policies diffuse and others do not than why some actors adopt them before others. The two approaches are, I think, entirely complementary, and both are probably indispensable to a complete understanding of policy diffusion. But neither is particularly helpful for addressing the questions at the heart of the other.

Like diffusion studies, citation studies (e.g., Friedman et al. 1981; Caldeira 1985) focus primarily on patterns of interactions across courts rather than on specific behaviors. Unlike diffusion studies, they do not deal explicitly with legal rules, new or otherwise. In this respect, they are further removed from this research project than are diffusion studies. But there is one crucial similarity between citation research and my own. Both are concerned at some level with inter-court influence. Neither citations nor rule adoptions necessarily
reflect the influence of one court on another—a point I will return to in a moment—but either might. If the two behaviors partly capture the same thing, some variables that help explain the one should help explain the other, too.

To summarize, then, in constructing the theoretical basis for my analysis I draw primarily on research into judicial decision-making, supplementing this with insights from compliance and citation studies. I will now turn to a description and justification of the core assumptions and hypotheses of the project, a task which will occupy the remainder of the chapter.

Before doing so, though, I should confront one possible objection to this entire enterprise. I mentioned earlier that judges frequently cite each other's decisions and treated the fact as evidence of inter-court influence. However, as I also just noted, citation does not necessarily reflect influence. Some argue that it very rarely does. Writing about the practices of the Court of Appeals for the Second Circuit in the 1940s, Schick (1970) contends that:

While it is commonplace to cite the law of another circuit, there is no evidence that what other circuits do contributes significantly to the result in the Second Circuit. The major function of intercircuit citation is to marshal support for a decision reached independent of such authority….Confirmation and not influence is the ordinary function of decisions from other circuits. (p. 132)

He is surely right that cited decisions frequently play no part in the present one. This being so, it would be fair to ask if the phenomenon I am investigating has any substance.

I have two responses. The first is that my primary focus is on the spread of rules, not on influence. Even if influence played no part, the rules still spread, and I would wish to know why. Influence does interest me, however. Fortunately, it seems highly likely that influence sometimes occurs. Schick concedes as much, seeing a potential for influence outside of routine cases, "when a court of appeals is faced with a novel issue on which its judges do not have any set ideas." (p.132) Moreover, his own reasoning leads to the
conclusion that opinions can be influential. Among whom do judges try to marshal support by citing other cases? Except in rare cases, the answer, presumably, is others in the legal profession. There is no reason to think that lawyers differ vastly from judges in their evaluation of decisions. And it would be inconsistent to argue that lists of citations in opinions can encourage others to agree with the opinions while maintaining that the writers of those opinions invariably arrive at their decisions independently of what other judges have done. In short, it is very difficult to understand why judges would cite other decisions so frequently if they never influenced judges' thinking. The evidence presented later from the case analysis and interviews suggests strongly that influence occurs.

ASSUMPTIONS: DESCRIPTION AND JUSTIFICATION

The critical question for the dissertation is: Why does or does not one set of judges follow the policy lead of another when the other's ruling can be viewed as a relevant precedent? As I mentioned earlier, it seems wise to draw on the decision-making literature to guide the analysis of such choices. We can begin with what that literature has to tell us about judges' motivations.

As Baum (1994) notes, "underlying this body of research are broad hypotheses and disagreements about what justices seek to achieve." It is no surprise that judges' motivations receive a good deal of scholarly attention; in fact, it is difficult to see how any analysis of decision-making could proceed without considering them. Judgeships—particularly on appellate courts—are highly prestigious, desirable, and desired positions. It seems fair to assume that most people holding those positions worked hard to reach them, devoting

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13 Although he is referring to research into Supreme Court decision-making, since that research makes up the bulk of the literature, the observation may be reasonably extended to cover the entire body.
substantial portions of their professional lives to the quest, and so must have been strongly motivated to pursue them. If so, we would expect at least some of the motivations which brought them there to be reflected in their behavior as judges, especially in that aspect of behavior lying at the core of the judicial function—decision-making.

For these reasons, the hypotheses as to why judges follow precedent are derived primarily from assumptions about their motivations. Primarily, but not wholly, for it is highly doubtful that motivations alone determine judges’ behavior. In a well-known formulation, Gibson (1983) has argued that "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." (p. 32) I do not follow Gibson's lead in all particulars, but I am convinced he is correct in arguing that judicial decisions arise from a complex interplay of forces. I attempt to capture some of this complexity by considering constraints on judges as well as several different and sometimes competing motivations.

Judges are most likely influenced by a large number of goals and constraints at various times. A full-blown theory of decision-making should incorporate as many of them as possible. For the purposes—and resources—of this project, however, such a theory would be too complicated. I must narrow the range of motivations considered to a critical few. In my reading of the decision-making literature in political science and law, four goals stand out as fundamentally important generally and as particularly relevant for this project. I begin the construction of hypotheses, therefore, by assuming that all judges wish to do at least one—typically more—of the following:

- Promote policies consistent with their policy preferences;
- Promote policies which are legally correct in some more objective sense;
- Contribute to the development of a coherent body of law; and
Dispose of cases as quickly as possible.\textsuperscript{14} I also assume that they are constrained in their pursuit of these goals by professional norms\textsuperscript{15} and cognitive limitations.

For the purposes of this project, I make one further assumption—that judges act sincerely, not strategically, to achieve their goals. Judicial scholars are increasingly paying attention to the role of strategy in judges' behavior (Baum forthcoming, Chapter 4). It is quite likely that judges who wish to promote their policy preferences (and perhaps those who wish to make good law) sometimes, after taking into account the positions and expected behavior of other actors, make choices that superficially appear to undercut their goals. Focusing on this kind of behavior seems especially sensible in areas such as individual decision making on collegial courts, opinion assignment, and case selection. It is less clear that it can be helpful in the analysis of collective decisions. For one thing, although for simplicity's sake we sometimes speak of collective bodies as acting, they are mere abstractions—not living beings—and so cannot do so. More importantly, even if we speak more properly of a majority of judges on a court acting in concert, it is difficult to see what incentive they would have to take insincere positions.

Most plausibly, strategic considerations could enter into collective decisions as efforts to avoid being reversed by a higher court. For the federal courts of appeals, two scenarios are relevant. In the first, a panel might go along with a rule it dislikes in order to avoid

\textsuperscript{14}These assumptions are defended below. As reported in Chapter 5, all of them receive explicit support from some of the judges interviewed for this project.

\textsuperscript{15}By norms, I mean rules of behavior that judges come to accept through socialization rather than through a calculation of interests. Some norms are helpful in pursuing goals, such as inter-judge harmony or on-court power. (That may be why they became norms.) But they need not be. Where norms and goals coincide, I am not sure it makes much difference what we call them. If, however, their effects are different in practice, I suspect that the influence of norms is more constant, less sensitive to context, than that of goals.
creating an inter-circuit conflict. Note that in this case attempts to place doctrine at a point acceptable to the Supreme Court would be unsuccessful. Any point deviating from that of the other circuit creates a conflict. If the Supreme Court is moved by the existence of conflict to grant *certiorari*, it will set policy at the point it desires. More importantly, it is hard to see how adopting the unwanted precedent could benefit the panel. One could argue that it makes a trade-off, accepting inferior policy in its own circuit as the price for keeping that policy from being imposed across the country. This argument does not hold up under scrutiny, though. For each circuit confronting the issue must make the same decision in turn. Either it accepts the precedent or rejects it and invites a Supreme Court reaction. Ultimately, the precedent becomes law in all affected circuits. In reality, the trade-off comes down to this: impose unwanted policy on your own circuit (rather than take a chance that you will not be reversed by the Supreme Court) as the price for—perhaps—slowing the spread of the precedent to other circuits. This hardly seems strategic.

The other scenario is even less likely. Here a circuit rejects a rule it favors in order to take a position close to the Supreme Court's. The obvious problem with this tactic is that it creates a circuit conflict, making it likely that the Supreme Court will take over, anyway. It would make more sense for the court to adopt the precedent and hope the Supreme Court continues to look the other way.

I do not mean that strategy can play no part in the treatment of precedents. It might, especially as it affects the votes of individual judges. But strategic behavior is complicated and difficult to identify. This project represents a first effort to tackle a tricky question, and it makes sense to minimize complexity somewhat. If the more streamlined model developed here appears effective, it could be expanded in later research to incorporate strategic behavior.

Returning to the goals, the first three are what Baum calls content-oriented. These
types of goals are almost surely the most consistently salient for most judges. The fourth is just one among many non-content goals, but it seems most likely to have an impact on the treatment of precedent.

The notion that judges act to further their policy preferences was advanced by early scholars of judicial behavior in both law  and political science (Pritchett 1948; Schubert 1965; Rohde and Spaeth 1976) and has gained considerable currency over the last few decades. The attitudinal model—as it is called—is firmly rooted in theory and strongly supported by empirical data, especially at the Supreme Court level. It is now established almost beyond doubt that justices’ policy preferences frequently drive their voting decisions.

The environment in which circuit court judges operate differs somewhat from that of the Supreme Court, however. As Segal and Spaeth (1993) note: the Supreme Court’s docket is composed almost entirely of difficult cases, where the law is unclear; the Supreme Court is not bound by the rulings of, nor can it be reversed by, a higher court; and Supreme Court justices rarely possess ambition for higher office. While opportunities for justices to promote their policy preferences abound and disincentives are few, the same is not true for lower court judges.

The differences should not be overstated, though. Like Supreme Court justices, judges on the Courts of Appeals are not electorally accountable. Furthermore, as all of the judges interviewed for this project attest, not all of the cases which reach the circuit courts are

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16See Fisher, Horwitz, and Reed (1993), especially the essays in Chapter 6.

17Support comes from works too numerous to name. Segal and Spaeth (1993) provide the most definitive exposition and testing of the attitudinal model.
governed by precedent from the Supreme Court or the circuit. Finally, as Llewellyn (1951) explains and illustrates, the judge who wishes to distinguish an apparently controlling precedent can often do so without much strain. Of course, by doing so the judge runs the risk of reversal and any attendant embarrassment or damage to career prospects. But this risk is slight, since the Supreme Court hears so few appeals. In short, circuit court judges frequently encounter cases where their policy preferences are likely to come into play and where the costs of heeding them are acceptable. These considerations and a number of empirical studies point to the same conclusion: circuit judges' policy preferences affect their decision-making.

As with political scientists, it has become common for judges writing about the decision-making process to admit that personal values enter into some decisions (Friendly 1961; Newman 1984; Edwards 1991). Some even argue in defense of such subjective considerations. Writing in 1959, a Louisiana appellate judge noted that "Although a great preponderance of an appellate judge's caseload...involves routine application of precedent and word-logic, fairly soon in the life of the new judge the moment comes when he realizes that there are some cases in which he (or no one) [sic] can find 'the law'." In such cases the judge should "decide on the basis of what is best for the community...that is, on the basis of policy considerations." (Tate 1959, pp. 62-63) More recently, Judge Wald (1992) of the DC Circuit has written:

So what, if any judicial philosophy should a judge adopt? The closest approximation I can espouse is something that some of my colleagues roundly denounce: a pragmatism

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18This is, of course, especially true for the types of cases analyzed here—those dealing with new doctrines. The goal of furthering policy preferences is likely to play an even larger role in these cases than in routine ones.

19See, for example, Goldman (1975); Howard (1981); Johnson (1987); Songer and Haire (1992); Songer, Segal, and Cameron (1994).
that decides cases on the merits, what Judge Posner calls "practical reason," that takes all the circumstances including precedent, real-world significance and institutional relationships with the other branches into consideration, tempered on occasion by compassion. (p. 181)

Where most judges differ from many political scientists is in their firm belief that they should and do try to make good law, meaning (at least) something other than law consistent with their own policy views. The following quotation from Judge Newman (1984) is representative:

I am not so naive to deny that some judges in some cases permit personal predilection to determine the result... I do assert, however, that the facile description of "result oriented" decision making must be applied with caution, for its wholesale invocation is simply false. The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree. They do this every day. Distasteful statutes are declared constitutional and applied according to the legislators' evident intent; unwise decisions of administrative agencies are enforced... (p. 204)

Even judges who view the influence of subjective considerations as legitimate place limits on it. Shortly after the excerpt quoted in the last paragraph, Judge Wald continues: "For our citizens to have confidence in the courts' decisions they must be convinced that judges are impartial as to litigants, including the state, and that we are not embarked on personal ideological crusades. That is the closest I have been able to come to a judicial philosophy." (1992, pp. 181-82) She thus joins a number of other writers with realist perspectives who, over the years, have also suggested that some methods of arriving at solutions are more proper than others. (see, e.g., Cardozo 1921; Levi 1948; Posner 1990)

Political scientists give some credence to the notion that judges try to make good law. Among those scholars who have argued and/or presented evidence that legal goals matter to judges are Becker (1966); Brigham (1978); Johnson (1987); Swinford (1991); and Epstein and Kobylka (1992). But it is probably more common for them to take a skeptical view, disparaging judicial lamentations that personal predilections must yield to the dictates of the
law.\textsuperscript{20} I agree that skepticism is called for, but only a temperate skepticism (even at the Supreme Court level). For even if we were to accept the implausible notion that judges freely publish outright lies, we would still have to confront the issue of why they do so. Logically, it must be to impress or satisfy an audience—an audience in all probability composed of the legal community. But if the legal community is the intended audience, we must conclude that the community places some value on the legal rightness of decisions. (Otherwise, why bother with the protestations?) Judges are prominent members of that community. Is it reasonable to suppose that none of them share this value? I think not. This line of reasoning in no way proves that judges ever make objectively good law or even that such a thing exists, but it does suggest that the desire to produce good law should be considered an important motivation.

Before leaving this issue, I wish to make a final point. Students of judicial behavior, when they address the importance of legal considerations, typically describe them as constraints (e.g., Gibson 1983; George and Epstein 1992). By writing about the goal of legal correctness, I mean to distinguish between this approach and my own. I believe it highly likely that at least some judges find the search for right answers to legal questions intrinsically rewarding. The opportunity to engage in this activity differentiates judging from other occupations in legislatures, executives, or the private sector far more clearly than any disparities in prestige or policy influence.

After interviewing 48 county court judges, Sarat (1977) concluded that they could be categorized according to the types of incentives that led them to become judges. Of the four categories he constructed, the "game" incentive was the most common. According to Sarat, the judges in this category:

\textsuperscript{20}See, for example, Segal and Spaeth (1993).
derive their satisfaction from the activities and behaviors which are associated with judging. They enjoy these behaviors in and of themselves and not because they associate them with the achievement of particular substantive results. Judging is a difficult and challenging vocation, and these people get pleasure out of overcoming the difficulties and meeting the challenges. They see value in the rituals and rules which govern the operation of courts and seek to master and apply those rituals and rules. (pp. 376-77)

I find Sarat's analogy compelling, and so begin by treating both legal and policy considerations as goals, rather than assuming in advance the primacy of the latter.

The third assumption—that judges wish to further the coherence and consistency of law—is familiar from judges' opinions and introductory legal textbooks. As Merryman (1954) notes, consistency helps not only potential litigants, who can undertake actions with greater certainty about outcomes, but also judges themselves, whose work becomes easier as an area of law becomes more settled. In addition, consistency can be of indirect benefit to judges insofar as it bolsters the integrity and legitimacy of the judicial system (Johnson and Canon 1984, pp. 37-8). Research demonstrating the importance of inter-circuit conflict as a determinant of certiorari decisions (Ulmer 1984; Caldeira and Wright 1988; Perry 1991) also points to the value of consistency. It suggests that even judges who cared nothing for consistency in itself might adopt it as an instrumental goal to avoid reversal by the Supreme Court. More importantly, it provides strong evidence that some federal court judges (the justices) care about reducing conflict as an end in itself. If some federal judges care, it is likely others do too.

Finally, the comments of one judge interviewed for this project suggest that consistency can win the approval of other judges:

I think you should measure circuit excellence by the uniformity of the law it promulgates...There are lots of good judges all over—some who make no effort to get attention, others who do lots to. I evaluate by asking if the circuit stays fairly current and generates a coherent, consistent, cohesive body of law.
Taking all these points into account, it seems highly likely that at least some judges value coherence and consistency.

The fourth assumption about judges' goals would seem hardly to need defending. The caseloads of the federal courts have grown dramatically in the last few decades. Between 1972 and 1992, the number of appeals filed per year rose from 13,694 to 43,481, a 218% increase, while the number of active judges grew only 57% (Federal Judicial Center 1993). Even before this dramatic jump, some judges felt pressed for time. Judge Oakes (1975) recounts how, as a law review editor, he looked forward to becoming a lawyer in order to have more time to study cases in depth, and, as a lawyer, looked forward to judging for the same reason. He continues: "When I became a judge, I dreamed that I was once again a law review editor and had the time to do the research that really needs to be done in every single case that we have, to get to the underlying rationale of each principle of law." (p. 2) Even if judges care little about promptness as an end in itself, they must decide cases quickly to avoid being swamped by their caseloads. Of course, for many of them promptness is an important goal, as the interviews quoted in Chapter Five will show.

Turning to constraints, I assume that judges are inclined to follow professional norms. The concept of norms is well-established in other areas of political science and social science more generally. Legislators and bureaucrats are commonly thought to respect the "folkways" of their institutions, and observation suggests that norms in the legal community might be even more fundamental and pervasive. Furthermore, empirical research on judicial role orientations, while revealing substantial variation across judges, confirms that judges think in normative terms about their jobs and that their orientations influence their decision-making. (Gibson 1978; Howard 1981; Scheb, Ungs, and Hayes 1989).
Some judicial norms may have already been captured in the three preceding assumptions, and there are others which cannot be incorporated here. We can, however, investigate the effects of one other: that decisions of one's own circuit should carry more weight than those of another (Howard 1981).²¹

Finally, all human beings possess cognitive limitations which generally prevent them from giving intelligent and thorough consideration to all possible options when called on to make decisions (Fiske and Taylor 1991). Judges are no exceptions. Certainly their extensive training and practice in decision-making should help to partially overcome these limitations, but time constraints reinforce them. This is why caseloads and the goal of prompt decision-making matter. According to Judge Oakes, "[w]e work in time frames and with the pressure of statistics. We cannot always articulate all of the major, let alone the minor premises."

(1975, p. 3) Shapiro (1965) has suggested that, in a legal realist world, cognitive constraints are the most plausible explanation for respect for precedent. I share his belief that a great deal of what judges do (especially below the Supreme Court level, but even there²²) reflects these constraints. Notice, for instance, that preference-maximizing judges should create novel solutions to problems except where following precedent yields the best possible result. This kind of behavior, it must be admitted, is rather rare.

**HYPOTHESES**

Having set out the key assumptions, I will now describe several hypotheses following from them. (The hypotheses are listed in Table 1, but are discussed more fully below.)

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²¹One might object that this is actually a formal rule, not just a norm. However, it is all but unenforceable, and so compliance with it is primarily dependent on judges’ beliefs that they should comply.

²²See Segal (1986).
First, if judges do care about furthering their policy preferences, we would expect that they would be more likely to adopt a legal rule from a relevant precedent, the greater the probability that adoption of the rule would lead to a policy outcome they support. In operational terms:

\[ \text{H1)} \] The probability of adopting a relevant precedential rule should vary inversely with the distance between the ideology of judges currently deciding and the ideological direction of the rule.

Assuming that judges wish to make good law naturally leads us to hypothesize that they follow precedents which they believe to be legally correct. But this is hardly a workable hypothesis. The problem is that "good law" is extremely difficult to conceptualize. Without getting inside judges' psyches, how can we determine what looks legally right to them? Having posed such a question to a number of judges with frustrating results for both parties, I am inclined to believe there is no way we can. Still, we can attempt to get at the concept indirectly.

One way—perhaps the ideal way—would be to evaluate the opinions in which new rules are announced. In their studies of compliance with Supreme Court decisions, Tarr (1977) and Johnson (1987) attempted something of this sort, coding the opinions in terms of clarity and simplicity. These variables made more sense in their analyses than they would here, as they should matter more to a court trying its best to follow a precedent than to one weighing the merits of it. Since in neither study were the variables influential, it is highly doubtful they could matter to this one.

What would be very helpful is a variable measuring the quality of legal arguments in an opinion. It may be possible to isolate some aspects of an opinion that make it more or less persuasive. For instance, Schaefer (1966) has written:
it remains true that an opinion which does not within its own confines exhibit an awareness of relevant considerations, whose precedents are concealed, or whose logic is faulty is not likely to enjoy either long life or the capacity to generate offspring. (p. 11)

But I can think of no way to develop measures of such characteristics without introducing an unacceptable amount of coder subjectivity. So I employ no measures based on opinion characteristics. Rather, I look at the characteristics of different judges, for the reasons given below.

Previous studies of inter-court dynamics have suggested that courts are accorded varying levels of prestige by their fellows and that more prestigious courts are more often cited by others (e.g., Merryman 1977; Friedman, et al. 1981; Caldeira 1985). As already mentioned, citations do not necessarily indicate influence—cited decisions may have little impact on citing decisions—but there is good reason to think that prestigious courts or judges can influence colleagues who care about producing good law. For one thing, unless their reputations are undeserved, their opinions are likely to display particular insight, logic, craftsmanship, or some other similar quality, and so be more persuasive than the average opinion. That is, prestigious judges probably have greater ability to convince other judges of the accuracy or wisdom of their positions through superior opinions. Alternatively, judges currently confronting an issue might be moved, not by the arguments of earlier judges, but by their reputations alone. Research in social psychology suggests that "sources of greater status or prestige influence the receivers of their messages." (Brembeck and Howell 1976, p.258)

This reasoning leads to the following hypotheses:

H2a) The probability of judges adopting a precedential rule should increase if it has already been supported by high-prestige judges and decrease if it has been rejected by high-prestige judges.

Another, similar, hypothesis also follows from the "good law" assumption. For a judge wishing to construct a legally sound solution to a problem, just as it is logical to consult
the work of a prestigious court, it also makes sense to look to judges thought to have special expertise in a particular area of the law. Not only should expert judges' opinions be consulted; they should also be persuasive. Here, again, work in social psychology provides empirical support for intuitions (see Petty and Cacioppo 1981, pp.235-37).

Thus:

H2b) The probability that judges adopt a rule should increase if it has already been supported by judges perceived to be experts and decrease if it has been rejected by perceived experts.

Some legal questions are easier than others. In cases where no solution is clearly legally correct, the chances of a judge dissenting from the majority decision grow. So does the likelihood that panels will disagree with each other. Thus, the presence of a dissent in the rule-announcing decision, because it may indicate legal difficulty, should predict dissension among circuits. In addition, the dissent might itself affect the behavior of later judges by alerting them to possible weaknesses in the majority opinion. Johnson's (1987) finding that dissent in Supreme Court decisions negatively affected compliance among lower courts lends further support to the expectation that:

H2c) The probability that judges adopt a rule should be less if the court announcing the rule is not unanimous in supporting it.

Obviously, the goals of furthering policy preferences and making good law sometimes directly conflict with each other. Which goal prevails probably depends in part on the judge deciding, but also is almost certainly affected by the type of issue involved. It must be harder for judges to ignore their policy preferences in cases where they care a great deal about the outcome than in ones where their preferences are less intense. These considerations lead to another hypothesis:

23In the words of one judge interviewed: "Sometimes I look at the dissent. If there's a dissent and the majority doesn't address its point well, I begin to see a rat."
H3) The impact of the ideological differences between judges and rules on treatment of precedential rules should be greater in more salient fields of law.

Insofar as judges value coherence and consistency in law, we should expect them to go along with dominant trends in their treatment of precedential rules. Therefore:

H4) The probability of adopting a rule should vary positively with the strength of support for that rule among relevant prior cases.

Another simple hypothesis grows from the assumption that judges are constrained by professional norms. As already explained, the one norm I can explicitly test for is that of avoiding intra-circuit conflict. I hypothesize that:

H5) The probability of following a precedential rule should increase if the present court's own circuit has adopted that rule and decrease if the circuit has rejected it.

The final hypotheses are derived from the assumptions that judges possess cognitive constraints and that the constraints are reinforced by the desire to decide cases promptly. Psychologists have found that people employ different methods of information processing in different situations. Where they are highly motivated to reach a correct decision and where doing so would not be too cognitively burdensome, they typically engage in "systematic processing." When these conditions are not met, they are likely to use "heuristic processing."

"Heuristic processing is conceptualized as a more limited mode of information processing that requires less cognitive effort and fewer cognitive resources than systematic processing." When in this mode, people look for "heuristic cues"—"any variable whose judgmental impact is hypothesized to be mediated by a simple decision rule" such as "experts' judgments can be trusted." (Eagly and Chaiken 1993)

Cue-taking has received little attention in judicial research, and that primarily in the area of docketing decisions.24 Legislative scholars, however, have studied it more closely,

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24See Perry (1991) for a review. I am aware of only one major study examining the use of cues in decisions on the merits: Segal (1986) finds some evidence that they matter.
finding that legislators do frequently rely on cues in making decisions (Fiellin 1962; Matthews and Stimson 1975; Kingdon 1981; Hurwitz 1988) Especially if judges are motivated by a desire to dispose of cases speedily, it is reasonable to conclude that they, too, sometimes rely on cues.

Two factors should influence the extent of cue-taking. The first is the nature of the issue to be resolved. Judges should be most likely to engage in cue-taking when confronted with issues particularly low in salience or high in difficulty. For instance, a judge should be more likely to employ cues in deciding a minor tax issue or a complicated patent case than in deciding a controversial First Amendment case. The logic here is that the amount of cognitive effort required rises with case difficulty, while the incentives to put forth the effort diminish as issues become less salient. The second factor is individual expertise. A judge with expertise in a certain field should have less difficulty with it (and probably care more about it) than other judges and so should be less likely to rely on cues than non-experts. This last expectation is strongly supported by Baum's (1994) findings that the specialized Court of Customs and Patent Appeals was much less likely to cite Supreme Court patent decisions than were the generalist circuit courts.

What cues judges employ should depend on what they seek to accomplish. In considering the effects of cognitive constraints, then, it makes sense to proceed through the goal assumptions in order. The first goal is furthering preferred policies. I suspect that cues play an insignificant part in judges' pursuit of this goal. In coding cases, I did not find a single instance where it was unclear which party was favored by the rule. If such instances are rare, then for the most part if judges cannot tell what outcome would be consistent with their preferences, it must be because their preferences are not well-formed. In such cases it
GOAL: Promoting Policy Preferences

H1) Probability of adopting rule decreases as distance between ideology of rule and ideology of deciding judges increases.

H3) This relationship is stronger in salient fields of law.

GOAL: Making Legally Correct Decisions

H2a) Probability of adopting increases with support for rule from earlier high-prestige judges.

H2b) Probability of adopting increases with support for rule from earlier expert judges.

H2c) Probability of adopting is lower where there is a dissent from the opinion announcing the rule.

GOAL: Generating coherent, uniform law

H4) Probability of adopting increases with number and unanimity of circuits supporting rule.

CONSTRAINT: Professional norms

H5) Probability of adopting is higher where own circuit supports precedent, lower where opposes.

CONSTRAINT: Cognitive limitations (combined with goal of deciding promptly and goal of producing legally correct decisions.)

H6a) Effects from H2a and H2b are greater in less salient, more difficult fields.

H6b) Effects from H2a and H2b are greater where deciding judges are not experts.

H6c) Effect from H4 is greater in less salient, more difficult fields.

H6d) Effect from H4 is greater where deciding judges are not experts.

Table 1.1: Assumed goals and constraints, and hypotheses derived from them.
seems highly doubtful that judges look to others for ideological cues; other goals and norms almost certainly assume primacy.

I have already argued that, for judges interested in making good law, opinions by expert or prestigious judges are likely to be especially persuasive. In addition to being persuaders, distinguished judges may be cue-givers. Judges looking for "good law" cues may choose to follow the leads of expert or prestigious judges even without being fully persuaded by their opinions, in the belief that those judges are likely to be right. If so, we would expect that:

H6a) The effects of earlier judges’ prestige and expertise on the probability that judges will adopt the precedential rule should be greater in less salient, more difficult areas of law.

H6b) The effects of earlier judges’ prestige and expertise on the probability that judges will adopt the precedential rule should be less if the present judges are experts.

Judges who wish to promote consistency in the law need no cognitive shortcuts to pursue their goal. The more unified the circuits are in their treatment of a rule, the more likely such judges should be to go along with the majority. Nevertheless, the pattern of prior adoptions and rejections can serve as a cue—in fact, a very powerful one, for judges whose goal is making good law. Imagine a panel of judges who find themselves unable to assess the merits of a rule. They look to see what other circuits have done and find that five have adopted the rule while none have rejected it. What could be a more natural—or meaningful—cue? Presumably most judges are regarded as serious and intelligent by their colleagues.

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25According to Macey (1989): "Well-known jurists such as Henry J. Friendly, John Harlan, and Richard Posner are distinguished for their love of the law as well as for their reasoning ability. Their name on an opinion has a signalling effect that magnifies its value." (p. 111)
When those colleagues see that a number of judges all agree, they are likely to conclude that the consensus position is correct. This reasoning leads to the final two hypotheses:

H6c) The effect of the number and unanimity of circuits adopting a rule should be greater in less salient, more difficult areas of law.

H6d) The effect of the number and unanimity of circuits adopting a rule should be less if the present judges are experts.

The reader may notice that some of these hypotheses could be accounted for by goals other than those with which they are linked. I will return to this point in the concluding chapter. For now, let me emphasize that the chief function of the goal assumptions is to identify factors likely to affect judges' behavior. The fact that other goals might point to the same factors in no way undermines those factors; if anything it does the opposite. The linkage between assumptions and hypotheses becomes relevant when we ask what the results tell us about the assumptions. That is an interesting question, but not the primary one of this project, and discussion of it can wait until Chapter Six.

In the next chapter, I explain how the hypotheses are operationalized and describe in greater detail the data with which they are tested. Chapter 3 is primarily descriptive and exploratory. The incidence and patterns of adoptions and rejections of rules are examined, with comparisons made across legal fields and, especially, across circuits. At several points in the chapter, analyses will diverge from the main focus of the project, as I take time to consider particularly interesting findings. In Chapters Four and Five, I test the hypotheses, first through a statistical analysis of the case decisions, then through an examination of judges' own understandings of how they work. I conclude, in Chapter Six, by discussing implications of the research presented here and suggesting potentially valuable areas for further research.
CHAPTER 2

The analyses in this project are based primarily on two distinct bodies of data: case studies of federal Court of Appeals decisions involving new legal rules, and interviews with federal Court of Appeals judges. In this chapter, I explain how the case analysis was conducted, describe the supplementary data used in the causal analysis of these cases, and then turn to the interviews.

CASE STUDIES

The case studies cover a period from 1984—or, in a few instances, 1983—through 1995. The period stretches back far enough to include a good mixture of Republican- and Democrat-appointed judges. It also ensures an adequate number of cases for analysis and an undistorted picture of policy development, since few lines of cases are truncated. A longer period would increase the danger of independent variables in the causal analysis being time-bound: for example, prestige, expertise, and ideologies of judges, and perhaps even the ideological direction of decisions, as issues change in nature.

Three areas of law are examined: antitrust, search and seizure, and environmental law. The fields were chosen according to four major criteria. First, they are broadly representative of the work of the federal courts. The fields examined here encompass statutory and regulatory, as well as constitutional, law. Second, they have widespread impact; decisions in these fields matter, often to a large number of people. The third and fourth
common characteristics are that the fields are neither so immature that the courts are
unfettered by Supreme Court precedent nor so settled that the courts of appeals lack discretion
in decision-making.26

Within each field, cases announcing new policies have been identified. New policies
are defined as rulings on novel issues or applications of new legal rules to familiar matters.
To discover cases in which new policies were announced, I consulted casebooks, law review
articles, and research supplements such as the American Law Reports (ALR) and West's
Federal Digest. Other cases came to my attention as I read court opinions. All cases meeting
the definition just given and succeeded by at least one case from another circuit involving the
same legal rule have been included in the case analysis.

In all probability, these searches failed to uncover some cases. And as the sampling
procedure was not random, some bias may have been introduced. In particular, it is likely
that legal rules which provoked no controversy or were not cited in later cases are
underrepresented in this sample. Results should be viewed with this caveat in mind, but the
importance of the possible bias should not be exaggerated; it is almost certainly quite small.

Another possible source of bias is the exclusion of unpublished opinions. Most
unpublished circuit court opinions were not available on electronic databases until the early
1990s, and only five are included in my case analysis. While the great majority of
unpublished cases involve routine application of settled law, not all deal with trivial matters,
as evidenced by the fact that the Supreme Court sometimes votes to grant certiorari in such
cases. Moreover, unpublished decisions represent a significant portion of circuit courts’

26To a degree, the first and last of these criteria conflict. By all accounts, much of the
work of courts of appeals consists of routine application of firmly established law, and so a
focus on unsettled law will necessarily result in an unbalanced picture of their general
decision-making. But this drawback is unavoidable and is consistent with the study’s
emphasis on the generation and diffusion of new policies, rather than routine decision-making.
output. If unpublished decisions differ in some way from published decisions in their
treatment of precedent, then an analysis limited to the latter may produce biased results.

I do not find this possibility overly worrisome. The non-routine nature of the cases in
this study guarantees that most will be published. There is some risk of courts refusing to
publish in order to conceal conflicts they have created (Gardner 1975). However, it is hard to
believe that this could happen with any frequency. For one thing, it makes little sense.
Presumably, the motivation to conceal would be a desire to avoid being reversed (by the
circuit en banc in a case of intra-circuit conflict, or by the Supreme Court in a case of inter-
circuit conflict). But, of course, a conflict-creating decision might be affirmed. And, by the
rules of the circuits, unpublished decisions have no precedential value. So judges who engage
in these types of tactics trade a chance to shape circuit or national law for the certainty of
determining one case outcome. It is reasonable to suppose that such a tradeoff sometimes
appears attractive, but it cannot be often. More importantly, there can be no certainty of
outcome. Even if all the judges on a case agree to hide a conflict, the parties are likely to see
it and request a rehearing en-banc or petition the Supreme Court for certiorari, thus leaving
the judges no better off than had they published. In short, I see little reason for concern
about the exclusion of unpublished opinions. But the issue should still be borne in mind.

The next step after identifying initial decisions announcing new rules was to find all
cases for which these decisions were relevant precedents—cases raising issues essentially
identical to those covered by the precedential rule. This was accomplished through the use of
Shepard's Citations, West's Federal Digest, and Lexis citation and key word searches.
Identification of relevant subsequent cases typically presented little difficulty, as in most such
cases the issues in question were explicitly addressed and the precedent-setting case or another
succeeding it was cited and discussed. Occasionally, however, a court confronting a case
apparently similar to earlier ones mentioned those cases only in passing or neglected them and the shared issue altogether. In such instances, I proceeded by first framing the precedential rule as the answer to a particular question. I then considered whether, with unrelated issues left aside, asking and answering that question in the present case could affect the case outcome. If not, the present case was discarded; if so, it was added to the line of cases for analysis.

Once I determined that a decision belonged in a particular line, I coded its treatment of the precedential rule, the critical issue being whether the rule was adopted. Viewed a certain way, this could be quite a difficult judgment to make. As legal scholars have long noted, the level of generality at which a legal rule operates is always open to question. No two cases are precisely the same, and judges often evade predecessors' influence by showing where the facts of the cases differ in significant ways, explaining why the rules previously laid down must be narrowly construed, and dismissing more general formulations as dicta. In short, a rule as stated by one court may differ from the rule as interpreted by another. Consequently, it is impossible to say in absolute terms what constitutes the vital legal rule of a decision.

But as much trouble as this indeterminacy might cause legal scholars, it poses no real obstacle for this project. Given that the research is motivated by curiosity about policy development and the way judges influence each other, it is proper to define the legal rule from the perspective of the precedent-setting court. That court, for whatever reason, has chosen to advance a particular policy. What interests us is whether other courts cooperate to establish that policy. Our best evidence of precisely what the policy is comes from the first court's own words—its legal rule, as announced.
The fundamental coding question, then, is whether the current court's decision is consistent with the legal rule as stated by the precedent-setting court. Does the current court ask the rule-question? If so, does it give the answer required by the rule? If it does, the court's treatment of the rule is coded as favorable; otherwise it is coded as unfavorable.

There are two small groups of decisions that do not fall within this dichotomy. First are those which fail to address the rule directly but resolve issues in a way consistent with what application of the rule would require. These cases can certainly not be understood as unfavorable treatments, but they also add nothing to the authority of the rule. The second group consists of just one case, in which a precedent was distinguished—i.e., adjudged irrelevant to the dispute before the court. In studying cases I found that in most instances where precedents are distinguished the distinctions are clearly correct. Such cases were excluded from the analysis from the start. In some others, the distinctions appear as efforts to elude the reach of applicable but unwanted rules. With my emphasis on the rule-as-stated, I code such cases as unfavorable treatments. The one troublesome case does not clearly fall into either category.

Not all opinions cite relevant precedents. Some omit mention of the original precedent but cite other cases which discuss it. Others fail to cite any cases on point. This suggests another dimension on which to divide cases, resulting in the following final coding scheme (omitting the two categories described in the last paragraph):

1) Court cites original precedent and/or another case discussing it and adopts the rule;  
2) Court fails to cite cases on point but adopts an essentially identical rule;  
3) Court fails to cite cases on point and takes action inconsistent with the rule;  
4) Court cites original precedent and/or another case discussing it and rejects the rule.
CAUSAL ANALYSIS

In this section, I will describe the dependent variables of the causal analysis and explain how the independent variables are operationalized, restating the hypotheses in terms of the operationalized variables.

Two different dichotomous dependent variables are used. One is formed by collapsing categories 1 and 2 (scored "1") and categories 3 and 4 (scored "0"). I call this variable "adopting" (the variable name is ADOPT), as its sole concern is with the treatment of rules, not reactions to specific decisions. The other variable, which I refer to as "following" (FOLLOW), is limited to cases linked to the original precedent through citation. Rule-decisions in category 1 are coded "1", those in category 4 are coded "0". All others are missing.

ADOPT is the variable that particularly interests me. I want to know why a rule is or is not adopted, regardless of whether it is cited. Yet, as I show in the next chapter, not all rules are cited in subsequent cases, and it is not clear why some are while others are not. Without an understanding of why rules are cited or not, it is impossible to state with complete confidence that the factors affecting adoption in the general run of cases have the same impact for cited rules alone. Including analyses using FOLLOW as a dependent variable will permit the comparisons necessary to resolve this issue.

For the independent variables, I begin with the ideological direction of the rule ("rule ideology" for short). Leaving aside other issues in a case, repeated applications of a legal rule should tend to produce case outcomes with similar ideological implications. As is the norm in judicial politics studies, I define ideological direction in terms of the party favored by the rule. Thus, in search and seizure cases, liberal rules are those which favor criminal defendants. These cases presented no difficulty.
In environmental cases liberal rules favor environmental groups, government (except where it is the polluter), and private plaintiffs in actions to recover for costs of environmental cleanup. A few environmental rules—involving the application of criminal provisions—were problematic. Three of them concerned scienter requirements, whether defendants could be convicted of violations of which they were unaware. The other dealt with the extent of participation in an illegal act necessary to establish guilt. In these four instances I departed from the general coding scheme, scoring as liberal rules benefitting defendants, in the belief that defendant rights liberalism trumps environmental protection liberalism. Although at first it might seem controversial, this is in fact a very easy decision to defend. Liberals surely abhor murder and rape more than pollution, yet we have no difficulty in labelling rules protective of murder and rape defendants liberal. Why would the logic be any different for environmental criminals? The issue might be a bit cloudier from the perspective of conservative judges, for whom the belief in deference to the government in criminal cases may clash with opposition to government regulation of business. But even if so, this suggests a weakness not so much in the particular coding choice, but in measures of ideology more generally, as I discuss below.

Generally speaking, conservative rules in antitrust favor defendants accused of engaging in anti-competitive actions (Kovacic 1991). I follow this rule strictly in coding. In doing so, I differ from Kovacic, who codes cases involving certain types of immunity in the opposite way, noting that in such cases defendants present First Amendment claims. He readily admits the difficulty of classifying these cases and the argument he makes is not terribly strong. I find it unconvincing, but only on intuitive, not logical grounds. My doubt is reinforced by his finding that Carter and Reagan appointees both ruled in liberal directions.
in a large majority of their cases, in almost precise opposition to their behavior in all other antitrust cases.

The rule ideology variable is dichotomous: liberal (1) or conservative (5). This coding is not optimal. Ideological direction in reality is a continuous variable. For any rule a judge makes, one can almost always formulate another more liberal or conservative. Fortunately, however, a dichotomous variable captures reasonably well what occurs in actual practice. Judges very rarely simply pluck new rules from the air. Rather, they decide between competing arguments—between the rule and an alternative. In reading cases, I had little difficulty determining the relative ideological directions of rules and their most plausible alternatives. Thus, I am confident that all scores correctly reflect the side of the continuum on which the rules fall. However, it is fairly certain that some rules fall closer to the ideological extremes than do others with the same scores. As my measure cannot pick up these differences, it may lead to an underestimate of the importance of ideology in the causal analysis.

Turning from rules to the people who make them, judges ideologies' are coded on a traditional five-point scale, from one (very liberal) to five (very conservative). The variable for the ideological distance between judges and rules (DISTANCE) is the absolute value of the difference between the rule ideology and the mean ideology of the judges on the court considering that rule. (This is why rule ideology is coded as 1 or 5.)

Most individual judges' ideologies are coded from information in the Almanac of the Federal Judiciary. Over the past several years, the editors of the Almanac have occasionally surveyed local lawyers active in the federal courts to get their reactions to courts and individual judges. A sample of lawyers' comments and the editors' general summary of
comments are included for almost all active and senior judges.\textsuperscript{27} I code ideologies by informally averaging the comments, taking into account the editors' summaries, and choosing the more moderate alternative in doubtful cases. Judges for whom no \textit{Almanac} ratings are available are classified by taking the nearest integer to the mean \textit{Almanac} ratings of judges appointed by the same president. In practice, this means that all unrated appointees of Republican presidents are given a score of "4", while Democratic appointees receive a score of "2."

This method of assessing judges' ideologies is unusual. I adopt it because it seems to be the best option within the limits of feasibility. Two often-used alternatives would be to rate judges according to their own political parties or those of the presidents who appointed them. The trouble with these measures is they simply seem to contain less information. In the aggregate, judges ideologies' surely correlate with these measures, but many individual judges deviate from the norm.

Another option would be to rate judges according to their voting histories. But we do not know that voting histories are shaped only by policy preferences. Treating them as surrogates for preferences entails assuming what we are supposed to be testing empirically. Furthermore, it creates a bias in analyses, increasing the predictive strength of ideology relative to other variables.

The most attractive option would be to create measures of pre-appointment ideology. Danelski (1966) and Segal and Cover (1989) have succeeded in doing so for Supreme Court justices, through content analysis of speeches (Danelski) and newspaper editorials (Segal and

\textsuperscript{27}Excluded are judges who have not been on the bench long enough to develop a reputation and judges who hear few cases.
Unfortunately, there was no chance of replicating either method for the several hundred judges included in this analysis.

While the measure employed here appears to be the best available, it is not perfect. For one thing, it is somewhat tainted by the same circularity problem as voting histories, since lawyers' comments partially reflect judges' voting. The taint is less, though, since the lawyers also base their evaluations on other aspects of judges' behavior, such as questioning in oral argument and style of opinions.

A more important weakness of the measure is its breadth. It treats ideology as unidimensional, when in fact it is multi-dimensional, as recognized by judicial scholars going back at least to Schubert (1962; See also Rohde and Spaeth 1976; Ducat and Dudley 1987; Epstein and Mershon 1996). This is the same problem encountered in the discussion of rule ideologies. To put the matter concretely, just as a single rule might implicate attitudes toward the environment and defendants' rights, a judge might be liberal on issues of search and seizure, moderate in environmental law, and conservative in antitrust. The broad label is probably inaccurate for some judges in some cases. Consequently, the effect of ideology on the treatment of precedents will probably appear smaller in the statistical analysis than it is in reality.

Judges' prestige/quality scores are also drawn from lawyers' assessments in the Almanac, specifically from their comments about judges' overall ability and their opinion-writing in particular. The eight-point quality scale ranges from "below average" (0) to "excellent" (7). High-prestige judges are those rated at "6" or "7." Expertise ratings are dichotomous. Judges who published at least one law review article in an area of law prior to

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28It should be noted that the choice of value labels reflects the language used by lawyers. The median judge falls not in the "average" category, but in the "good/very good" category.
1995—as determined by a subject and title word search of the Index to Legal Periodicals—are considered experts in that area.

To construct the variable for support for a rule among expert judges prior to a given case, I begin with the initial case in each line, count the number of expert judges authoring opinions (either majority or dissenting) in favor of the rule, and subtract the number writing opinions inconsistent with the rule. The variable for support among high-prestige judges is calculated the same way.

I had originally intended to measure prestige and expertise at the level of the circuit, not the individual judge. But early in the process of interviewing judges I realized that this would be unwise. Almost without exception, the judges told me that they did not perceive important differences among the circuits in these respects. Several explained that the circuits are now too large and have too much turnover to possess any general character. They did see differences among judges, however.

The dissent variable is straightforward, coded "0" if the court announcing the rule unanimously agreed to the rule and "1" if a judge dissented from the rule.

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29 Here are representative comments from two different judges, the first discussing expertise, the second, general excellence:

"I don't even like the use of the term "expertise." Maybe if you substituted something else. If you said "Are there any that come to mind as having a higher number of cases [in antitrust]?" I would probably say the 2nd and DC probably have more although I haven't looked this up. Certainly, I would look to them for precedent—but not for expertise—because of the larger number of cases."

"No. There's a dichotomy between the public and judges. Most federal judges would feel that no one circuit is better than the others. The reasons: First, composition changes rapidly. There may be good judges on it now but bad ones may join or the good leave... Second, the difference in size of circuits. Some are so big they can't have a single reputation."
To examine the role of cognitive constraints I wish to distinguish among the fields in terms of difficulty and salience. These concepts being purely subjective, there is no certain way to measure them. I rely on the interviews. The judges were asked: a) if any of the three fields stood out as having the easiest or most difficult cases to decide; and b) if they could rank the three according to their interest in them. Although it is difficult to say for sure whether antitrust or environmental law was perceived as more difficult, the judges almost invariably rated both as more difficult than search and seizure.

No field was clearly more or less interesting than the others, but it is likely that search and seizure cases are generally more salient. Consider the following answer from a judge asked to rate the fields by difficulty:

They're all difficult for different reasons. Antitrust because of the economic analysis and complexity of case backgrounds. Environmental often because the record is so immense. Search and Seizure is difficult because it's so human. In a very close where each side's interests are so strong, you're torn and agonize over it more than Polaroid v. Xerox.

It is interesting to note that this judge was one of the few to not explicitly rank search and seizure as the easiest field. But it is clear that he does not equate it with the others in terms of cognitive demands.

Taken together, the judges' comments reveal a clear distinction between search and seizure on the less cognitively burdensome and more salient side and antitrust and

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30 Interest and salience are not the same, of course. In constructing the interview protocols I tried to avoid language that might offend the judges or cause them to become evasive. After seeing how willing they were to answer other tough questions, I believe I may have been too cautious in this one.

31 Further evidence comes from Wasby's (1979) finding that intra-circuit conflict in the 9th Circuit was particularly common in search and seizure cases. The judges he interviewed attributed this in part to the impact of ideologies on decisions in this area.
environmental on the other. Accordingly, difficulty/salience is coded as one dichotomous variable.

There are several possible ways to represent treatment of the rule in cases prior to the current one. The most obvious alternatives are to: simply count the number of circuits adopting the rule; take the difference between the number adopting and the number rejecting; or divide the number adopting by the total number adopting or rejecting, to yield the proportion adopting. None of the alternatives is wholly satisfactory. The first is clearly inappropriate. Surely a rule adopted by two circuits and rejected by none should carry more weight than one adopted by two and rejected by seven. The second measure is better, but still appears flawed, unless a rule adopted by three circuits and rejected by none really carries no more weight than one adopted by five and rejected by two. Similarly, the third measure weights a 1-0 and a 9-0 consensus equivalently.

The measure I settled on is a hybrid of the last two alternatives: the difference multiplied by the proportion, with both including the original precedent. This yields an intuitively attractive weighting of different circuit splits, so that, for instance, a 2-0 consensus is valued higher than a 1-0 or a 4-2 split.

Finally, the current court's own circuit precedent is coded as a trichotomy: uniformly supportive (1); split (0); or uniformly opposed (-1) to the rule. A split can only be caused by a panel. An en banc decision nullifies any earlier decisions to the contrary, producing a uniform circuit position, unless it is disregarded by a subsequent panel.

Table 2.1 summarizes the information from this section.
Hypotheses

The probability of ADOPT or FOLLOW equalling 1 increases as:

H1. DISTANCE decreases;
H2a. PRESTIGE increases;
H2b. EXPERTS increases;
H2c. DISSENT decreases;
H3. CIRCUITS increases;
H4. OWN CIRC increases.

H5. The relationship in H1 should be stronger in search and seizure than in the other fields.

H6a. The relationships in H2a and H2b should be weaker in S&S than in the other fields.

H6b. The relationships in H2a and H2b should be weaker when expert judges decide cases than when non-experts do.

H6c. The relationship in H4 should be weaker in S&S than in the other fields.

H6d. The relationship in H4 should be weaker when expert judges decide cases than when non-experts do.

Variable | Description | Sources*
--- | --- | ---
ADOPT | Dependent variable. Equals 1 if court adopts rule from earlier case, regardless of whether cites. 0 if adopts inconsistent rule. | C
FOLLOW | Dependent Variable. Only counts cases with citation connection to leading case. 1 if adopts rule, 0 if not. | C
DISTANCE | Difference between ideological direction of rule (1 = liberal; 5 = conservative) and mean ideology of judges on panel (same coding). | C, A
PRESTIGE | Number of high prestige judges (scoring in highest two categories created from Almanac descriptions) supporting rule minus number opposing it. | C, A
EXPERTS | Same as PRESTIGE, but counting experts (judges with published law review article in area). | C, O
DISSENT | 1 if a judge dissented from the rule announcement in initial case, 0 if not. | C
CIRCUITS | Product of: a) number of circuits supporting rule minus number opposing it; and b) percentage of circuits supporting. | C
OWN CIRC | 1 if own circuit has already supported rule, -1 if it has already rejected it, 0 if has taken no or conflicting positions. | C

*C = cases; A = Almanac of the Federal Judiciary; O = Other source

Table 2.1: Restatement of hypotheses, operationalization of variables.
THE INTERVIEWS

The interviews have two primary functions: as checks on my assumptions about judges' goals; and as independent and more general, if less direct, tests of the explanatory hypotheses.

The interviews were semi-structured and consisted entirely of open-ended questions. (The text of the questionnaire is presented in Appendix A.) This format was chosen to facilitate rapport and allow for illuminating digressions down unforeseen paths. They ranged in length from about one-half hour to an hour and a quarter, averaging about forty-five to fifty minutes. Twenty-four active and senior judges were interviewed. Ten of them sit on the Sixth Circuit (comprising Michigan, Ohio, Tennessee, and Kentucky); the other fourteen are spread around the eastern half of the U.S.

Obviously, the sample is geographically unrepresentative. Accordingly, it would be improper to attempt any precise generalizations based on it. Still, because of the size and diversity of the sample, as long as this limitation is kept in mind, the interviews should provide a valuable window into the thoughts and actions of federal appellate judges.

Questions from the interviews fall into three main categories. First are those which inquired into judges' motivations. Judges were asked what considerations are most important to them in making their decisions and, as a more subtle way of getting at the same point, what audiences they have in mind when writing opinions. For instance, whereas most judges

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32 Senior judges can be thought of as semi-retired. Many of them continue to participate regularly on panels (they cannot sit in en banc cases). All of the senior judges interviewed were still actively involved in deciding cases, and a number of them had been on active status at some point during the period examined here.

33 Specifically, of the other fourteen: five are from the 3rd Circuit; four from the 7th; two from the 1st; two from the 11th; and one from the 4th.
would refuse to admit that policy-preferences drive their decisions, they might be more willing to concede the importance of "just" outcomes.

The second set of questions was directed at identifying the elements of several key concepts. What qualities contribute to the prestige of a court or judge? What considerations go into a judgment about expertise? What is good law? How can it be distinguished from bad law? Each of these questions was designed to elicit information beyond that available from the case studies and thus provide richer context in which to make sense of the case studies' findings.

The final group of questions focused most directly on the project's critical relationships. Here, I asked how important the decisions of other courts are in judges' decisions and whether characteristics of earlier opinions or the judges writing or the responses of other circuits influence their decisions whether to follow a precedent. At times I employed prompts to get at particular points. (e.g., Does it matter how comfortable you are with a particular area of law? Would it make a difference whether previous circuits are lined up 3-0 or 2-1 in support?)

I harbor no illusions that answers to this last set of questions offer highly valid tests of the hypotheses. Like anyone else, judges possess fallible memories and limited powers of self-analysis. Moreover, their answers can hardly avoid being colored by their expectations about what judges should do and how they should sound. Nevertheless, their answers contribute to the study in several important ways. First of all, taking the above qualifications into account, they are still reasonably solid measures of the key variables and speak to the credibility of the case study results. Furthermore, judges can address questions with a depth not captured by the empirical indicators discussed above and so disclose nuances and complexity missing from the case study analysis. And finally, along the same lines, the
interviews reveal the kind of variation across individual judges which is obscured by the case study analysis.

I conclude with a note on the presentation of interview material. All the judges who participated were promised anonymity. I feel there is little that could be gained from identifying judges’ sex, race, regions, or other background characteristics, especially since claims about subgroups cannot be generated from this sample. Accordingly, I have chosen to avoid any risk of betraying the judges’ trust by presenting their comments without identification or description.
In this chapter I will take an initial, exploratory look at judges' treatment of precedents. After presenting and discussing summary information about the cases and dependent variables, I will concentrate for most of the chapter on variation—across fields of law and, especially, across circuits. Along the way I will pause to highlight unexpected or otherwise interesting results. Where possible, I will attempt to explain the results. However, where findings are not amenable to explanation through the hypotheses from Chapter One, they typically lie outside the central focus of the dissertation and so can be considered only in passing.

The search for new rules yielded a total of eighty-five: twenty-seven in antitrust, twenty-nine each in search and seizure and environmental law. The similarity in numbers across fields is unintended and somewhat surprising. I chose no arbitrary halting point for the searches, stopping only when I ran out of leads for new rules.

The numbers would have been closer still had I not been forced to omit two possible lines of antitrust cases. The problem with these rules is that they appeared to simply die once announced; neither was ever mentioned by another circuit. Including them in an analysis would distort the general picture, exaggerating the effect of previous circuits' actions, since all of them rejected the rules.\(^4\) Because not a single circuit cited the original decisions, we

\(^4\)Here, as elsewhere, I use the term "reject" loosely. It is not meant to imply explicit rejection of a rule, only failure to adopt it.
have no evidence that anyone ever heard of them. I would like to understand why this occurred. But the question of why some legal rules are never recognized differs from the question of why a visible rule is adopted or rejected, and so lies outside the scope of this project.

The 85 rules generated 301 codable subsequent cases, for an average of about 3.5 per line. The rules varied greatly in fertility, with the number of subsequent cases ranging from one to eighteen. The modal line contains just one subsequent case, while the median line contains three.^^

This is an intriguing amount of variation. Some of it can surely be explained by the relative frequency of different circumstances. For example a ruling that the EPA may regulate internal waste treatment waters^® produced only one subsequent case, while the pretextual stop rule discussed in Chapter One led to eighteen. The disparity is almost certainly due to the fact that contestable traffic stops are far more common than the regulation of internal waste treatment waters. Other factors contributing to the variation are definitive rulings by the Supreme Court, legislation by Congress, or changes in regulations or behavior by agencies, each of which can override or moot rules before they have time to spread. Although I did not systematically investigate these factors, I found at least one instance of each truncating a line of cases.

Even taking all this into account, there is probably still considerable variance to explain. An important question is raised: Why, in cases where circumstances are appropriate and a rule is still live, would judges not consider the rule? A few possible answers come to

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^^The complete breakdown was as follows: One case-24; Two-15; Three-14; Four-11; Five-4; Six-7; Seven-2; Eight-4; Nine-2; Twelve-1; Eighteen-1.

mind. It may sometimes happen that lawyers implicate a rule by raising an issue but the judges dismiss the issue as irrelevant. In comparing briefs and opinions, Marvell (1978) found evidence that this occurs. Of course, knowing this is not knowing much, and we are led to ask how judges reach their conclusions.

Another possibility, which I would suspect is more common, is that lawyers fail to mention the necessary issue. They may do so intentionally, convinced they would receive an unfavorable ruling. This may explain why I found only three cases in which criminal defendants claimed to have a reasonable expectation of conversational privacy in the back seat of a police car.\(^{37}\) But there must also be instances where lawyers are simply unaware of new rules from other jurisdictions which would benefit their clients. Understanding why this occurs, while outside the scope of this dissertation, would be an important step for scholars interested in the development of law.

Turning now to how judges respond to rules when relevant issues reach them, table 3.1 displays frequencies for the original treatment variable and the two dependent variables derived from it. Adoption and rejection are the primary concerns of the dissertation, but I wish to first consider what the results indicate about citation and the transmission of precedent.

CITATION—GENERALY

Categories 2 and 3 of the original variable include only cases lacking citation connections to initial rule-making cases. When I say they lack citation connections, I mean not only that they fail to cite the initial case, but that they do not cite that case or any other

### Table 3.1: Frequencies for dependent variables, by field.

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<tr>
<th>TREATMENT</th>
<th>Antitrust</th>
<th>S &amp; S</th>
<th>Envir.</th>
<th>TOTAL</th>
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<td>71</td>
<td>70</td>
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<td>52.3%</td>
<td>60.7%</td>
<td>72.9%</td>
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<td>12</td>
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<td>24</td>
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</tr>
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<td>3. No citation connection, inconsistent with rule</td>
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<td>9</td>
<td>4</td>
<td>25</td>
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<td></td>
<td>13.6%</td>
<td>7.7%</td>
<td>4.2%</td>
<td>8.3%</td>
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<td>4. Citation connection, rule rejected</td>
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<td>25</td>
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<td>65</td>
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<tr>
<td></td>
<td>25.0%</td>
<td>21.4%</td>
<td>18.8%</td>
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<td>117</td>
<td>96</td>
<td>301</td>
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<td>100.0%</td>
<td>100.1%</td>
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<td>34</td>
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<tr>
<td></td>
<td>38.6%</td>
<td>29.1%</td>
<td>22.9%</td>
<td>29.9%</td>
</tr>
<tr>
<td>1. YES (1 and 2 from above)</td>
<td>54</td>
<td>83</td>
<td>74</td>
<td>211</td>
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<td></td>
<td>61.4%</td>
<td>70.9%</td>
<td>77.1%</td>
<td>70.1%</td>
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<tr>
<td>TOTAL</td>
<td>88</td>
<td>117</td>
<td>96</td>
<td>301</td>
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<td></td>
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<td>25</td>
<td>18</td>
<td>65</td>
</tr>
<tr>
<td></td>
<td>32.4%</td>
<td>26.0%</td>
<td>20.5%</td>
<td>25.8%</td>
</tr>
<tr>
<td>1. YES (1 from above)</td>
<td>46</td>
<td>71</td>
<td>70</td>
<td>187</td>
</tr>
<tr>
<td></td>
<td>67.7%</td>
<td>74.0%</td>
<td>79.6%</td>
<td>74.2%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>68</td>
<td>96</td>
<td>88</td>
<td>252</td>
</tr>
<tr>
<td></td>
<td>100.1%</td>
<td>100.0%</td>
<td>100.1%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Table 3.1: Frequencies for dependent variables, by field.
case citing it or any case citing a case that itself cites the initial case, and so on. Judges in these cases evidence no awareness that a new rule has been announced. These cases make up one-sixth of the entire sample.

This strikes me as a surprisingly large proportion, and I believe it would be even more surprising to some of the judges I interviewed. While I did not specifically ask a question about this, several judges volunteered the opinion that they rarely missed relevant cases from other circuits. No judge said anything very much to the contrary.

Yet the numbers show clearly that precedents are frequently overlooked. Why should this be so? The dissertation was not designed to answer this question, so I can only offer speculation based on what I have learned. One possible explanation is that judges are aware of new rules and disagree with them, but do not wish to make the effort to explain their disagreement in print or prefer to avoid calling attention to the conflict. Although their motivations are hidden, there is actually evidence in the cases I analyze of this occurring. In at least two cases, relevant rules were not cited in majority opinions but were mentioned in dissents. Because dissents are circulated, we know that the judges in the majority knew about the rules and chose to ignore them. I would think that they are even more likely to do this when there is no dissent to point out the fact. Even if so, however, this factor only helps explain the cases in category three.

Another possible explanation applies to new approaches to familiar issues. Since by definition new rules cannot be the same as existing ones, these kinds of new rules compete with established ones in some circuits and so may never be noticed. Of course, like the last one, this explanation is limited in that it accounts only for cases in the third category. Furthermore, while it is understandable that judges might not bother looking outside the
circuit when their own has a settled rule, it is strange that lawyers (especially those with clients disadvantaged by existing rules) would be so lackadaisical.

Perhaps in some of these cases lawyers and judges do not really think in terms of legal rules. As I read many opinions, it became apparent that judges often care more about the resolution of particular disputes than the pronunciation of general rules. This point was brought home in the following exchange from an interview:

DK: Does the judge or circuit an opinion comes from matter to you?
Judge: Not to me personally. It might influence some judges. I'm interested in the facts and how they are reasoned.
DK: Does that vary for different types of cases?
Judge: No, I don't think so. You and most people tend to put lots of emphasis on the law, but facts are so important...Different facts govern a lot of how you go. Of course you look to the law, but...[Here the judge trailed off.]

It may be that lawyers share this emphasis in some cases and so attempt to fit facts within existing rules rather than pressing for the adoption of new rules.

Alternatively, the neglect of rules may be attributable less to the emphases or incentives of later lawyers and judges than to the rules themselves and the judges who create them. As Cates and McIntosh (1995) have illustrated, some judges are policy entrepreneurs, pushing for the adoption of favorite legal rules or methodologies. Some neglected legal rules may represent failed attempts at entrepreneurship. Especially if an issue is fairly well settled across the circuits, it may simply not occur to later lawyers and judges that there is a new rule to consider, unless they run across it in a law review or newsletter.

ADOPTION AND FOLLOWING--GENERALLY

Unsuccessful entrepreneurship may also be reflected in some explicit rejections of rules. I will return to this point in a moment, but first let us consider the extent of adoption and rejection, as shown in Table 2.1. A new rule was treated favorably (it or an essentially
identical rule was adopted) in 70% of the subsequent cases. In the other 30%, the case was decided in a way inconsistent with the rule. Of those cases with citation connections to the original rule, in 74% the rule was followed; in 26% it was rejected.

It is conceivable that these measures exaggerate the amount of conflict in the circuits. Perhaps a large number of rejections came in a few lines of cases, where rules were overwhelmingly rejected. Alternatively, the measures could understate the degree of conflict, if disagreements were spread thinly across many lines. The truth lies somewhat closer to the second scenario. The initial rule was rejected in 36 of the 85 lines, or 42%.

I am not sure whether this should be considered an excessive amount of conflict. Certainly the data reaffirm that the circuits are not an entirely cohesive unit, constantly aware of each other's actions and moving in tandem to develop the federal law. At least when new rules are handed down, the federal law frequently comes to mean something different in different states. This raises troubling questions of fairness and efficiency. On the other hand, the data also establish that, even in developing areas of law, policy agreement among circuits is the rule, dissension the exception. Since, to reiterate, the circuits are not obligated to follow each other's leads, the rate of agreement might be seen as surprisingly high.

The hypotheses outlined in Chapter One and to be tested in the next two chapters should help explain the rates of adoption and rejection. However, the prevalence of agreement brings to mind a possibility that cannot be adequately tested in this project. It is that even outside of settled law some issues are easy. The issue of privacy in the back seat of a police car is probably a good example.

An issue may be easy in two ways—legally, when the correct interpretation of a statute, precedent, or other source of law is fairly obvious; or attitudinally, when the adoption or rejection of a rule would produce outcomes outside the ideological boundaries of almost all
judges. Both kinds of easy issues exist, but I believe the first is much more important in explaining agreement among judges. We can readily think of cases that are ideologically hard but legally easy. These cases can arise any time proponents of one side of a controversial issue win a decisive policy victory. Some people continue to disagree with the rule, but the rule is clear. It is no harder to imagine cases that are easy in both legal and ideological terms. But it is difficult to picture the circumstances that can generate legally hard, ideologically easy cases. These types of cases must be much rarer.

ADOPTION AND FOLLOWING—VARIATION ACROSS FIELDS

Returning to table 3.1, we see interesting differences across fields of law. There is a straight progression from antitrust to environmental law in the likelihood of a rule being adopted (only 61% of the time in antitrust versus 77% in environmental). The differences are perhaps even more striking when viewed in terms of case lines. Of the 27 new rules in antitrust, 14—or about 52%—were rejected at least once. 45% (13 of 29) were rejected in search and seizure. Only 31% (9 of 29) of the lines in environmental law developed conflicts.

The high level of agreement in environmental law is consistent with my assumptions about time and cognitive constraints. Environmental cases frequently involve complex factual situations and complicated, sometimes poorly written\textsuperscript{35}, statutes. And while the issues involved can have great policy significance, they often lack the visceral immediacy of criminal cases. It follows that precedent-following, as a kind of cue-taking, would be common in environmental cases.

\textsuperscript{35}It seems that no opinion in a CERCLA pollution clean-up case is complete without an annoyed reference to the haste and confusion surrounding the writing and passage of the statute.
The results for antitrust cases, on the other hand, are puzzling. Antitrust law is about as cognitively burdensome and probably less ideologically loaded than environmental for most judges. Yet it generated much more disagreement. The analyses of the next two chapters should shed some light on why this is so. For now, I can speculate about a factor which is not picked up in those analyses.

The environmental cases analyzed here are concerned almost entirely with the interpretation of statutes of fairly recent origin. Search and seizure law goes back much further, as it is primarily constitutional. But it exploded in importance in the 1960s, after the Supreme Court extended the reach of the 4th Amendment to the states. This means that during the time period of my analysis, judges in environmental and search and seizure cases were still being exposed to new situations, so that they could not help but make new rules.

The antitrust cases are different. The statutes involved are old and familiar, as are most case fact patterns. Consequently, most new legal rules in antitrust embody novel approaches to old questions. Judges were sometimes forced to create them in order to interpret new Supreme Court rulings. But this only accounts for a handful of rules. It appears to me that many of the new rules in antitrust—certainly more than in either of the other fields—were products of judicial entrepreneurship. As I mentioned above, entrepreneurial rules may encounter some difficulty being recognized. Even if they are

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39Of the seven key environmental statutes identified by O’Leary (1993), all were passed in the 1970s, except for the Clean Air Act, first passed in 1965, and CERCLA, enacted in 1980.

40According to Kovacic (1991), federal judges began reshaping antitrust law in a conservative direction in the late 1970s. The appointment of conservative antitrust scholars like Richard Posner, Robert Bork, Frank Easterbrook, and Ralph Winter was expected (and surely meant) to continue this trend.
noticed, they are, by definition, more likely to conflict with apparently settled doctrine than are new-issue new rules.

Furthermore, pioneering judges in antitrust tended to be prominently identified with an analytical approach known as law and economics. This approach, with its emphasis on economic efficiency as a criterion for judging legal rules, has engendered a good deal of distrust and opposition among judges with more traditional approaches. Consider the following comment from an interviewed judge. I asked him whether in deciding whether to follow a precedent he cared who authored the precedent. The exchange continued this way:

Judge: I mentioned antitrust; there's some effect there.
DK: It seems the effect is negative?
Judge: Yes, I know I generally disagree with Posner and Easterbrook's market force analysis, so I generally don't follow them.

Unless this judge is alone in feeling this way (which is doubtful), this explanation, along with those in the previous paragraph, probably helps account for the relatively poor performance of antitrust rules.

CITATION AND ADOPTION/FOLLOWING—VARIATION ACROSS CIRCUITS

In addition to this variation across fields of law, we might expect to find some across circuits. Research into citation practices of state supreme courts has uncovered patterns suggesting that courts differ in their capacity to influence others and their propensity to be influenced (Merryman 1977; Friedman, et al. 1981; Caldeira 1985). Differences can be investigated in several ways with the data collected here. I begin with a straightforward look at citations.41

41It should be borne in mind that this study does not parallel the citation studies just mentioned. They are concerned with the frequency of citation, generally. I only ask about citations to particular relevant cases.
<table>
<thead>
<tr>
<th>CIRCUIT</th>
<th>INITIAL</th>
<th>LATER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(All cases)</td>
<td>(Own excluded)</td>
</tr>
<tr>
<td>1 Percent</td>
<td>81.8 (11)</td>
<td>81.8 (11)</td>
</tr>
<tr>
<td>2 Percent</td>
<td>95.8 (24)</td>
<td>95.2 (21)</td>
</tr>
<tr>
<td>3 Percent</td>
<td>75.0 (72)</td>
<td>73.1 (67)</td>
</tr>
<tr>
<td>4 Percent</td>
<td>73.1 (26)</td>
<td>70.8 (24)</td>
</tr>
<tr>
<td>5 Percent</td>
<td>78.6 (28)</td>
<td>76.9 (26)</td>
</tr>
<tr>
<td>6 Percent</td>
<td>75.0 (4)</td>
<td>50.0 (2)</td>
</tr>
<tr>
<td>7 Percent</td>
<td>92.9 (28)</td>
<td>91.7 (24)</td>
</tr>
<tr>
<td>8 Percent</td>
<td>84.6 (26)</td>
<td>83.3 (24)</td>
</tr>
<tr>
<td>9 Percent</td>
<td>67.7 (34)</td>
<td>64.3 (28)</td>
</tr>
<tr>
<td>10 Percent</td>
<td>— (0)</td>
<td>— (0)</td>
</tr>
<tr>
<td>11 Percent</td>
<td>68.8 (48)</td>
<td>65.1 (43)</td>
</tr>
<tr>
<td>DC Percent</td>
<td>— (0)</td>
<td>— (0)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>75.8 (310)</td>
<td>73.5 (279)</td>
</tr>
<tr>
<td>CIRCUIT MEAN</td>
<td>79.3 (10)</td>
<td>75.2 (10)</td>
</tr>
</tbody>
</table>

Note: The left half of the table displays reactions to the numbered circuits' precedents (first from all circuits including the numbered one, then just from other circuits). The right half displays the numbered circuit's reactions to precedents.

Table 3.2. Citations of own and others' precedent-setting cases, by circuit.
The first two columns of table 3.2 list the percentage of times a particular circuit's decisions announcing new rules were cited when relevant in subsequent cases. Column one contains all later cases; column two excludes those where the initial and later circuit are the same. The third and fourth column show the circuit's citations of rule-announcing cases, from all circuits and then only from other circuits.

The table reveals what appear to be substantial differences, although they may be due to chance. (For column 2, chi-square = 14.50, p = .11; for column 4, chi-square = 11.92, p = .37.) The precedent-setting decisions of both the 2nd and 7th Circuits were cited in more than 90% of the out-of-circuit cases for which they were relevant. On the other hand, 9th Circuit cases were cited only about 64% of the time by other circuits. The 11th Circuit fared little better, at 65%.

Any thought that these disparities reflect rewards or reprisals from other circuits is dispelled with a quick glance at the right side of the table. With the sole exception of the 5th Circuit, the 7th is the least generous in citing other courts. The 2nd Circuit likewise falls well below the mean. In contrast, the 11th Circuit cites others more often than does the average circuit, while the 9th Circuit lies just below the mean. There is no evidence of reciprocity here.

Tables 3.3 and 3.5 offer somewhat more direct evidence of influence relationships among circuits. Both contain two sets of columns, the first set covering only reactions to precedent-setting cases, the second encompassing all responses to prior cases in a line. Table 3.3 lists other circuits' agreement and disagreement with the prior positions of the circuit listed.

The differences in success rates appear highly significant in both substantive and statistical terms. As with citation rates, the measure of agreement gives evidence of rough
<table>
<thead>
<tr>
<th>LEADING CIRCUITS</th>
<th>INITIAL</th>
<th>RULE</th>
<th>ALL</th>
<th>CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Circuits Agreeing</td>
<td>Other Circuits Disag'g</td>
<td>Percent Agreeing</td>
<td>Other Circuits Agreeing</td>
</tr>
<tr>
<td>1</td>
<td>7</td>
<td>4</td>
<td>63.6</td>
<td>29</td>
</tr>
<tr>
<td>2</td>
<td>17</td>
<td>4</td>
<td>81.0</td>
<td>41</td>
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<td>3</td>
<td>39</td>
<td>28</td>
<td>58.2</td>
<td>45</td>
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<td>4</td>
<td>16</td>
<td>8</td>
<td>66.7</td>
<td>44</td>
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<td>20</td>
<td>6</td>
<td>76.9</td>
<td>62</td>
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<td>2</td>
<td>0</td>
<td>100</td>
<td>39</td>
</tr>
<tr>
<td>7</td>
<td>21</td>
<td>3</td>
<td>87.5</td>
<td>34</td>
</tr>
<tr>
<td>8</td>
<td>19</td>
<td>5</td>
<td>79.1</td>
<td>34</td>
</tr>
<tr>
<td>9</td>
<td>18</td>
<td>10</td>
<td>64.2</td>
<td>48</td>
</tr>
<tr>
<td>10</td>
<td>0</td>
<td>0</td>
<td>-</td>
<td>25</td>
</tr>
<tr>
<td>11</td>
<td>21</td>
<td>22</td>
<td>48.8</td>
<td>43</td>
</tr>
<tr>
<td>DC</td>
<td>0</td>
<td>0</td>
<td>-</td>
<td>13</td>
</tr>
<tr>
<td>TOTAL</td>
<td>180</td>
<td>90</td>
<td>67.7</td>
<td>457</td>
</tr>
<tr>
<td>CIRCUIT MEAN</td>
<td></td>
<td></td>
<td>72.6</td>
<td></td>
</tr>
</tbody>
</table>

Chi-square = 18.96; p = .026
Chi-square = 26.34; p = .006

Table 3.3: Subsequent agreement with circuit positions, initial rules and all cases.
treatment of the 11th Circuit by its fellows. It is the only circuit to have its new rules rejected in over half of the subsequent cases from other circuits. Staying with the left half of the table, we see that the 9th Circuit, too, is again on the wrong side of the mean, although this time it is joined by the 1st, 3rd, and 4th Circuits. The 7th and 2nd Circuits again appear as the most successful. Their new rules are not only cited, but are adopted as well.

The right half of Table 3.3 looks a little different. Some circuits—the 7th and 8th especially—have more success with new rules than with the general run of decisions. For others—particularly the 1st and 11th Circuits, the reverse is true. In addition, the DC Circuit, which established none of the new rules in this sample, weighs in with a dramatic 93% agreement rate over all cases. The general picture, however, remains much the same, with wide variation as the most prominent feature.

A number of different factors may contribute to this variation. Given this project’s emphasis on the rule decision as unit of analysis, a full-blown examination of court-level variables would be inappropriate here. However, two fit comfortably in the framework. First, the prestige of courts may affect the likelihood of their positions being adopted by other courts, as evidence from citation studies suggests (Merryman 1977; Friedman, et al. 1981; Caldeira 1985).

As I discussed in the last chapter, the judges I interviewed routinely denied that some circuits are more prestigious than others. Still, in one very interesting—and to me, quite surprising—way, other comments they made undercut this proposition a bit. In about half of the interviews, judges spontaneously remarked on the tarnished reputation of the Ninth Circuit. Here are some examples of their comments:

The only time I weight [a precedent according to the circuit or judge it came from] is if I hear the 9th Circuit did something, I usually do the opposite. The sign of the 9th Circuit is negative.
The 9th Circuit of course, though it has great individual judges, is so large and its jurisprudence is so diversified over a tremendous area, that it doesn't have the same jurisprudential integrity I think we have.

A lot of us think that a lot of what has happened to stretch constitutional law started in the 9th Circuit.

Some judges on this court would probably tend to derogate 9th Circuit decisions for several reasons: maybe because they're more liberal, they have conflicting precedents, or because it's so big. Some people say: "Oh, hell, that's just the 9th Circuit." I suppose it's because it's so big and all over the ideological spectrum, so people suppose it may be brushed off.

I've seen a tendency on the part of judges to recoil from, reject anything from the 9th Circuit, because they're way out there, do a lot of experimenting with the law. There are a lot of knee-jerk reactions by other judges; they tend to discount any precedent from the 9th—consider it too liberal, activist.

Taking into account the wording of some of the comments and the fact that two of the first three were made by judges generally thought of as conservative, it is evident that ideology plays a part in negative reactions to the 9th Circuit. This effect will be investigated more closely in the next chapter. But there is more to it than this, as the second and fourth comments suggest by pointing to concerns about legal correctness and uniformity.

So the relative prestige of circuits may weigh more heavily than the judges generally thought. Still, the prestige of individual judges is likely to play a more important role in guiding treatments of precedent. If so, its effect will be uncovered in Chapter Four.

A second factor relates to opinion quality. As Caldeira (1985) has noted, caseloads may affect the quality of opinions produced by a court. The greater the load, the less able judges may be to generate attractive, well-reasoned opinions. If this is so, we would expect to find an inverse relationship between the caseload of an earlier court and agreement of other courts with the former's decisions. Caldeira found no support for this hypothesis in his analysis, but it is worth investigating here.
Table 3.4 displays the percentages from Table 3.3 along with the average number of case filings per judge in each circuit in 1988 and 1989. There is some clustering of higher percentages with lower caseloads and lower percentages with higher caseloads, but the pattern is irregular. The Pearson correlation of initial rule percentage and caseload has the expected sign, at -.37, but it might easily be due to chance (p > .29). When the scores for the outlying 11th Circuit are dropped, the correlation is actually slightly positive. For all cases, r = -.46 and p < .14. Without the 11th Circuit, r = -.29 and p < .39. So the evidence for a caseload effect is slim. Still, the remarkable numbers for the 11th Circuit discourage outright rejection of the hypothesis. It may be that the effect only occurs once a certain caseload is reached, or perhaps it is masked by the influences of other factors. More systematic examinations might prove worthwhile.

<table>
<thead>
<tr>
<th>LEADING CIRCUITS</th>
<th>% AGREEING (INITIAL CASES)</th>
<th>% AGREEING (ALL CASES)</th>
<th>CASELOAD</th>
</tr>
</thead>
<tbody>
<tr>
<td>DC</td>
<td>--</td>
<td>92.9</td>
<td>168</td>
</tr>
<tr>
<td>10</td>
<td>--</td>
<td>61.0</td>
<td>222</td>
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<td>7</td>
<td>87.5</td>
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<td>82.9</td>
<td>232</td>
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<tr>
<td>9</td>
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<td>82.0</td>
<td>255</td>
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<td>3</td>
<td>58.2</td>
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<td>262</td>
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<td>8</td>
<td>79.1</td>
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<tr>
<td>11</td>
<td>48.8</td>
<td>59.7</td>
<td>359</td>
</tr>
</tbody>
</table>

Table 3.4: Circuit success rates (initial rules and all cases) and caseloads.
<table>
<thead>
<tr>
<th>LATER CIRCUITS</th>
<th>INITIAL</th>
<th>RULE</th>
<th>ALL CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Adopts</td>
<td>Rejects</td>
<td>Percent</td>
</tr>
<tr>
<td>1</td>
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<td>4</td>
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<td>61.5</td>
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<tr>
<td>11</td>
<td>7</td>
<td>7</td>
<td>50.0</td>
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<tr>
<td>DC</td>
<td>3</td>
<td>2</td>
<td>60.0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>180</td>
<td>90</td>
<td>67.7</td>
</tr>
<tr>
<td>CIRCUIT MEAN</td>
<td></td>
<td></td>
<td>64.5</td>
</tr>
</tbody>
</table>

Chi-square = 5.52; $p = .903$

Table 3.5: Circuit agreement with positions of other circuits, initial rules and all cases.
Table 3.5 displays the listed circuit's agreement and disagreement with cases decided earlier by other circuits. The variation in treatment of initial rules is not as great as we saw in Table 3.3. The range is considerable (over 27 percentage points), but most scores are bunched between 60 and the low 70s. As the chi-square shows, the differences could easily arise from sampling error.

When we look at the variation for all cases we see a more marked dispersion of scores. And since the number of cases involved is also considerably greater, it is highly probable that the results reflect real differences. I am surprised by the magnitude of these differences. We would probably expect that some individual judges are more willing than others to swim against doctrinal currents, but the results indicate more than that. They suggest that judges' attitudes toward precedential rules are in part a function of the circuits to which they belong.

I do not know why this should be so. One possibility that comes to mind is that caseloads play a part here too. Some court observers worry that as judges' caseloads grow, they lose track of decisions from other courts, decide their own cases more hastily, and, consequently, more often generate rules that conflict with those from other circuits. To test for the possibility that caseloads negatively affect courts' treatment of outside precedents, I regress the percentages from Table 3.5 on the circuits' caseload scores. While for both columns (initial rules and all cases) the sign is negative, as expected, the effects are quite small and do not approach statistical significance (p > .58 for each column).

Other similar factors may better explain the inter-circuit variation uncovered here. Or, it may be that we are seeing evidence of different circuit cultures. Whatever the cause, the amount of variation is intriguing and worthy of more attention than I can give it in this project.
RELATIONSHIPS BETWEEN CIRCUITS

We have found that circuits differ from each other at both ends of the process—in their success at promoting their own positions and in their willingness to adopt the positions of others. It seems reasonable to ask whether this kind of variation extends to the level of circuit pairs. For instance, is the agreement rate between the 1st and 4th circuits very different from that of the 3rd and 6th?

Table 3.6 reveals a good deal of variation. Each cell contains the agreement rate between two circuits when the circuit to the left decides first and the circuit at top decides second. Looking down columns or across rows one can see big jumps from one cell to another. Of course, some such variation is inevitable, given the differences we have already found. Going across a row we should expect to see larger numbers in the columns of those circuits, like the 10th, that generally follow other courts’ leads. Within columns, cells should reflect the differential success rates of the circuits in the rows.

To determine the extent to which the differences across cells reflect the inter-circuit variation, I regress the percentage in each cell on the success rate (from Table 3.3) of the leading circuit and the agreement rate (from Table 3.5) of the following circuit, while suppressing the constant term. If the inter-pair differences were due entirely to the differences across circuits, then this equation would explain the variance in the dependent variable perfectly; R-squared would equal 1.0. In actuality, R-squared is a little above .91. Thus, only a small portion of the variation across cells is unexplained.

Still, there is enough left over to allow for a look at one interesting issue. Researchers studying citation practices have found evidence that state supreme courts cite the cases of geographically close courts more often than those of distant ones (Friedman, et al. 1981; Caldeira 1985). On the other hand, in their study of tort law innovation, Canon and
<table>
<thead>
<tr>
<th>SECOND</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>DC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 % Agree (n)</td>
<td>—</td>
<td>50 (2)</td>
<td>100 (4)</td>
<td>100 (3)</td>
<td>75 (4)</td>
<td>83 (6)</td>
<td>100 (2)</td>
<td>75 (4)</td>
<td>80 (5)</td>
<td>100 (1)</td>
<td>67 (3)</td>
<td>100</td>
</tr>
<tr>
<td>2 % Agree (n)</td>
<td>100 (1)</td>
<td>—</td>
<td>100 (5)</td>
<td>100 (3)</td>
<td>86 (7)</td>
<td>50 (4)</td>
<td>100 (1)</td>
<td>88 (1)</td>
<td>62 (8)</td>
<td>100 (1)</td>
<td>—</td>
<td>100 (3)</td>
</tr>
<tr>
<td>3 % Agree (n)</td>
<td>100 (1)</td>
<td>50 (6)</td>
<td>—</td>
<td>70 (10)</td>
<td>57 (7)</td>
<td>58 (12)</td>
<td>25 (4)</td>
<td>67 (9)</td>
<td>64 (13)</td>
<td>67 (4)</td>
<td>43 (1)</td>
<td>100</td>
</tr>
<tr>
<td>4 % Agree (n)</td>
<td>100 (3)</td>
<td>86 (7)</td>
<td>67 (6)</td>
<td>—</td>
<td>100 (4)</td>
<td>83 (12)</td>
<td>67 (3)</td>
<td>80 (10)</td>
<td>29 (7)</td>
<td>100 (2)</td>
<td>100 (1)</td>
<td>67</td>
</tr>
<tr>
<td>5 % Agree (n)</td>
<td>50 (2)</td>
<td>100 (5)</td>
<td>100 (4)</td>
<td>70 (10)</td>
<td>—</td>
<td>83 (12)</td>
<td>67 (6)</td>
<td>100 (15)</td>
<td>60 (10)</td>
<td>80 (3)</td>
<td>—</td>
<td>100</td>
</tr>
<tr>
<td>6 % Agree (n)</td>
<td>33 (3)</td>
<td>75 (8)</td>
<td>100 (4)</td>
<td>63 (8)</td>
<td>100 (3)</td>
<td>—</td>
<td>67 (3)</td>
<td>100 (4)</td>
<td>71 (7)</td>
<td>86 (7)</td>
<td>50 (1)</td>
<td>100</td>
</tr>
<tr>
<td>7 % Agree (n)</td>
<td>0 (1)</td>
<td>67 (6)</td>
<td>50 (2)</td>
<td>100 (2)</td>
<td>75 (4)</td>
<td>75 (8)</td>
<td>—</td>
<td>100 (6)</td>
<td>63 (12)</td>
<td>100 (5)</td>
<td>100 (1)</td>
<td>100</td>
</tr>
<tr>
<td>8 % Agree (n)</td>
<td>67 (3)</td>
<td>50 (2)</td>
<td>67 (3)</td>
<td>60 (5)</td>
<td>100 (4)</td>
<td>80 (10)</td>
<td>100 (1)</td>
<td>—</td>
<td>58 (12)</td>
<td>80 (5)</td>
<td>50 (2)</td>
<td>50</td>
</tr>
<tr>
<td>9 % Agree (n)</td>
<td>83 (6)</td>
<td>40 (5)</td>
<td>67 (3)</td>
<td>77 (13)</td>
<td>60 (5)</td>
<td>47 (15)</td>
<td>33 (3)</td>
<td>71 (14)</td>
<td>—</td>
<td>83 (6)</td>
<td>67 (3)</td>
<td>50</td>
</tr>
<tr>
<td>10 % Agree (n)</td>
<td>50 (2)</td>
<td>50 (4)</td>
<td>0 (1)</td>
<td>33 (3)</td>
<td>100 (3)</td>
<td>50 (8)</td>
<td>50 (4)</td>
<td>83 (6)</td>
<td>78 (9)</td>
<td>—</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>11 % Agree (n)</td>
<td>33 (3)</td>
<td>71 (7)</td>
<td>0 (2)</td>
<td>58 (12)</td>
<td>71 (7)</td>
<td>57 (14)</td>
<td>40 (5)</td>
<td>83 (6)</td>
<td>56 (9)</td>
<td>83 (6)</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>DC % Agree (n)</td>
<td>—</td>
<td>100 (1)</td>
<td>100 (3)</td>
<td>100 (1)</td>
<td>100 (1)</td>
<td>50 (2)</td>
<td>—</td>
<td>100 (1)</td>
<td>100 (2)</td>
<td>100 (2)</td>
<td>100 (1)</td>
<td>—</td>
</tr>
</tbody>
</table>

Table 3.6: Inter-circuit agreement rates, all cases.
Baum (1981) found little evidence of regional patterns of influence. As Baum (1991) points out, in neither type of study is influence measured directly. High numbers of citations may say more about courtesy than influence. An absence of diffusion patterns may indicate weak regional influence, but it may also reflect courts’ dependence on litigants and circumstance for opportunities to innovate.

A third measure of influence can add more evidence to the discussion. The one I use in this project is arguably a somewhat more precise indicator of influence than are the other two. It looks beyond citations to the substantive treatment of precedents. And, because it is conditional—asking only about judges who have opportunities to address new rules—it eliminates some of the complexity of pure diffusion studies.

To investigate the impact of geographical proximity, I essentially follow Caldeira (1985). Where he created a variable equal to the distance between state capitals, mine measures the distance between circuit seats. Like him, I also include a variable for distance squared, expecting that the negative impact of distance lessens after a certain point. The variables perform reasonably well. When they are added to the equation given above, their coefficients are correctly signed and statistically significant ($t = -2.910$ for distance; $t = 2.290$ for distance squared). The coefficients are rather small, though: -.0003 for distance, .00000007 for distance squared. The results give some support to the citation study findings (and, incidentally, to the assumption that citations reflect influence), but they do not suggest anything more than a modest role for geographical proximity.\[^2\]

\[^2\]Two judges interviewed mentioned that they sometimes give more weight to the precedents of neighboring circuits. The first—a 6th Circuit judge—responded to a direct question from me (I did not ask the question in later interviews); the second brought up the point himself.

"Yes, I would look more closely at the 7th and 3rd than at the 10th. The problems are more similar, the context is more similar. Yes for environmental, but I think it goes beyond that too. If you're from the same region there are often similar ways of thinking even if
As a final matter, I wish to return briefly to the question of reciprocity. Landes and Posner (1976), among others, have argued that it is sometimes in a judge’s best interest to adhere to disliked precedents, since to do otherwise would undercut the general system of stare decisis and eventually weaken the judge’s own precedents. As they point out, though, there is a free-rider problem here. Any one judge can benefit from the general practice without actually following it. One effective way to reduce free-ridership would be for courts to punish maverick judges by rejecting their precedents and rewarding more cooperative judges by following theirs.

As we saw early in the chapter, reciprocity appears to play no part in citation practices. Nor does it have any effect on actual adoptions generally. The correlation between a circuit’s agreement with the precedents of other circuits and other circuits’ agreement with the precedents of that circuit is a puny .01. Still, the best chance for finding signs of reciprocity should be at the level of circuit pairs. It seems quite reasonable to suppose that if Circuit A more often than not rejected the precedents of Circuit B, the judges in Circuit B would view precedents from Circuit A more skeptically. Again, though, the supposition receives no support from the data. The correlation between Circuit A’s support for Circuit B and Circuit B’s support for Circuit A is actually slightly negative. There is no evidence whatsoever in this sample that judges consider the behavior of other judges when deciding whether to follow their precedents.

“Then there is this bit with expertise. If it’s an oil and gas case, I’d think the 5th Circuit would have something to say. If it’s security or corporate law, I would look strongly to the 2nd because Newark and New York City are just across from each other and I don’t want to create friction.”
CONCLUSION

If this chapter has one central theme, it is variation. We have seen that rules differ greatly in visibility and the way they are treated when visible. Judges’ reactions to rules seem to differ from one field of law to another. Some circuits are much more successful than others in having their precedents followed by other courts. Some circuits are much more likely than others to follow outside precedents. Some of this variation was expected; some was not. Some of it can probably be explained; some cannot. In the next chapter, I begin the effort to make sense of this confusion, through statistical tests of the project’s hypotheses.
CHAPTER 4

In this chapter and the next I test the hypotheses introduced in Chapter One and operationalized in Chapter Two. The interviews provide the data for testing in the next chapter. In this one, I continue the analysis of decided cases, beginning with bivariate results and moving on to full models.

According to the first hypothesis, the dependent variables should vary negatively with the distance between rule ideologies and judges' ideologies. (The reader may remember that there are two dependent variables. A circuit can "adopt" a rule explicitly or tacitly. The baseline for percent adopting is the entire sample of codable subsequent cases. For the variable "FOLLOW", only cases with citation connections to the original are counted.) Table 4.1 shows the percentage of cases in which rules are adopted and followed at different distances.

<table>
<thead>
<tr>
<th>DISTANCE</th>
<th>ADOPT</th>
<th>FOLLOW</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>0 - .99</td>
<td>21</td>
<td>0</td>
</tr>
<tr>
<td>1 - 1.99</td>
<td>63</td>
<td>31</td>
</tr>
<tr>
<td>2 - 2.99</td>
<td>100</td>
<td>39</td>
</tr>
<tr>
<td>3 - 3.99</td>
<td>27</td>
<td>17</td>
</tr>
<tr>
<td>4 - 5</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>90</td>
</tr>
</tbody>
</table>

Tau-B = -.105 p < .05  
Tau-B = -.113 p < .05

Table 4.1: Rates of adoption and following at different ideological distances.
Although the relationship is not uniform, in broad outline it goes in the expected direction. Percentages do not decrease monotonically through the middle categories, nor are these categories very well differentiated, but the variable performs well at the highest and lowest values. Particularly striking is the finding that not a single rule was rejected by panels with average ideologies within one point of the rule's.

The second hypothesis states that rates of following and adoption should be higher the more well-respected judges there are supporting a rule and the fewer there are opposing it. Table 4.2 provides strong initial evidence for the hypothesis. In this sample, rules are more often than not rejected if the balance of prestigious judges weighs against the rule. Rejection is quite rare for rules endorsed by three or more high-prestige judges.

<table>
<thead>
<tr>
<th>PRESTIGE</th>
<th>ADOPT</th>
<th>% Yes</th>
<th>FOLLOW</th>
<th>% Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>-2</td>
<td>3</td>
<td>5</td>
<td>37.5</td>
<td>2</td>
</tr>
<tr>
<td>-1</td>
<td>7</td>
<td>10</td>
<td>41.2</td>
<td>4</td>
</tr>
<tr>
<td>0</td>
<td>80</td>
<td>33</td>
<td>70.8</td>
<td>77</td>
</tr>
<tr>
<td>1</td>
<td>83</td>
<td>29</td>
<td>74.1</td>
<td>73</td>
</tr>
<tr>
<td>2</td>
<td>21</td>
<td>11</td>
<td>65.6</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>15</td>
<td>2</td>
<td>88.2</td>
<td>14</td>
</tr>
<tr>
<td>4</td>
<td>2</td>
<td>0</td>
<td>100.0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>90</td>
<td>70.1</td>
<td>187</td>
</tr>
</tbody>
</table>

Table 4.2: Rates of adoption and following by support/opposition of prestigious judges.

The same kind of relationship is predicted by the third hypothesis, in this case between the positions of expert judges and rates of following and adoption. Interestingly,
only negative reactions of expert judges appear to have much effect. Whether experts are neutral or favorable toward a rule seems to matter little to other judges.

<table>
<thead>
<tr>
<th>EXPERTS</th>
<th>ADOPT</th>
<th>FOLLOW</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No % Yes</td>
</tr>
<tr>
<td>-1</td>
<td>1</td>
<td>6 14.3</td>
</tr>
<tr>
<td>0</td>
<td>160</td>
<td>68 70.2</td>
</tr>
<tr>
<td>1</td>
<td>50</td>
<td>16 75.8</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>90 70.1</td>
</tr>
</tbody>
</table>

Table 4.3: Rates of adoption and following by support/opposition of expert judges.

The next hypothesis, H3, is simple: judges should be less likely to adopt rules originally announced over a dissent. The results shown in Table 4.4, while not dramatic, conform with this expectation.

<table>
<thead>
<tr>
<th>DISSENT</th>
<th>ADOPT</th>
<th>FOLLOW</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No % Yes</td>
</tr>
<tr>
<td>0 (No)</td>
<td>193</td>
<td>76 71.8</td>
</tr>
<tr>
<td>1 (Yes)</td>
<td>18</td>
<td>14 56.3</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>90 70.1</td>
</tr>
</tbody>
</table>

Table 4.4: Rates of adoption and following by presence of dissent in original case.

If Hypothesis 4 is correct, the dependent variables should increase in tandem with the variable CIRCUITS (which reflects the number and unanimity of circuits supporting a rule). They clearly do so, as shown in table 4.5. When a majority of circuits oppose a rule, the
deciding circuit more often than not rejects it too. When the circuits are evenly split, the
deciding circuit is roughly as likely to go one way as the other. Support for a rule drives up
the likelihood of subsequent adoptions until they become virtually certain at the highest levels
of support.

<table>
<thead>
<tr>
<th>CIRCUITS</th>
<th>ADOPT</th>
<th>FOLLOW</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>-5.7 (2-9) -3 (2-6)</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>-2.8 (3-7) -1.3 (2-4)</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>-.7 (1-2) -.6 (3-4)</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>0 (Even split)</td>
<td>16</td>
<td>15</td>
</tr>
<tr>
<td>.6 (5-4) -1 (1-0)</td>
<td>84</td>
<td>37</td>
</tr>
<tr>
<td>1.3 (4-2) -2 (2-0)</td>
<td>38</td>
<td>11</td>
</tr>
<tr>
<td>2.4 (4-1) -4 (4-0)</td>
<td>42</td>
<td>4</td>
</tr>
<tr>
<td>4.3 (6-1) -7 (7-0)</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>211</td>
<td>90</td>
</tr>
</tbody>
</table>

Table 4.5: Rates of adoption and following by strength of support among other circuits.

Also as expected, earlier action by the same circuit is a powerful predictor of the
deciding court's treatment of precedent. A court almost never rejects a rule that has
previously been endorsed by its own circuit. Strangely, though, the circuit's previous
rejection of a rule is a far less reliable indicator of what the later court does. I am not sure
why, but the most likely general explanation is that the factors which make an initial rejection of a rule more probable also increase the likelihood of intra-circuit disagreement.

<table>
<thead>
<tr>
<th>OWNCIRC</th>
<th>ADOPT</th>
<th>FOLLOW</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>-1 (Con)</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>0 (Neutral)</td>
<td>154</td>
<td>80</td>
</tr>
<tr>
<td>1 (Pro)</td>
<td>51</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>90</td>
</tr>
</tbody>
</table>

Table 4.6: Rates of adoption and following by own circuit’s position.

So far, all of the straightforward hypotheses have received at least some support from the data. It is now time to turn to the more complicated hypotheses, those which posit different effects across fields and judges. The first of these, H3, holds that the negative effect of ideological distance should be greater in search and seizure than in either antitrust or environmental law. Table 4.7 shows, by field, the percent adopting at various distances.

The data are consistent with the hypothesis, with the pattern for search and seizure cases quite a bit cleaner than that for the others.

Hypothesis 6a predicts that the characteristics of judges already approving or opposing a bill should have less effect in search and seizure than in the other two fields. The results for judges’ prestige are displayed in Table 4.8, those for expertise in Table 4.9. There is no support for either hypothesis.

43For simplicity, I omit the results for FOLLOW in this and the following few analyses. The results for FOLLOW and ADOPT do not differ in any important way.
Nor is there any more support for the next two hypotheses—namely that judges' prestige and expertise should have less effect on judges who are themselves experts. There are too few cases from expert judges in Table 4.10 to properly compare the importance of prestigious prior judges. The few there are mirror closely the cases from non-experts.

| 0 - .99 | S & S | 0 | 100.0 | ANT/ENV | 8 | 0 | 100.0 |
| 1 - 1.99 | 25 | 9 | 73.5 | 38 | 22 | 63.3 |
| 2 - 2.99 | 39 | 16 | 70.9 | 61 | 23 | 72.6 |
| 3 - 3.99 | 6 | 7 | 46.2 | 21 | 10 | 67.7 |
| 4 - 5 | 0 | 2 | 0 | 0 | 1 | 0 |
| Total | 83 | 34 | 70.9 | 128 | 56 | 69.6 |

Table 4.7: Effects of DISTANCE on ADOPT in search and seizure versus in other fields.

| -2 | S & S | 1 | 0 | 100.0 | ANT/ENV | 2 | 5 | 28.6 |
| -1 | 2 | 4 | 33.3 | 5 | 6 | 45.4 |
| 0 | 28 | 15 | 65.1 | 52 | 18 | 74.3 |
| 1 | 44 | 14 | 75.9 | 39 | 15 | 72.2 |
| 2 | 7 | 1 | 87.5 | 14 | 10 | 58.3 |
| 3 | 1 | 0 | 100.0 | 14 | 2 | 87.5 |
| 4 | 0 | 0 | 0 | 2 | 0 | 100.0 |
| Total | 83 | 34 | 70.9 | 128 | 56 | 69.6 |

Table 4.8: Effects of PRESTIGE on ADOPT in search and seizure versus other fields.
<table>
<thead>
<tr>
<th>EXPERTS</th>
<th>S &amp; S ADOPT</th>
<th>ANT/ENV ADOPT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>-1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>0</td>
<td>65</td>
<td>33</td>
</tr>
<tr>
<td>1</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>83</td>
<td>34</td>
</tr>
</tbody>
</table>

$\text{Tau-B} = .231 \ p < .001 \quad \text{Tau-B} = .056 \ p > .20$

Table 4.9: Effects of EXPERTS on ADOPT in search and seizure versus other fields.

<table>
<thead>
<tr>
<th>PRESTIGE</th>
<th>EXPERT ADOPT</th>
<th>NON-EXP. ADOPT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>-2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>-1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>0</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>1</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>7</td>
</tr>
</tbody>
</table>

$\text{Tau-B} = .127 \ p < .05 \quad \text{Tau-B} = .122 \ p > .20$

Table 4.10: Effects of PRESTIGE on ADOPT for experts versus other judges.
The data in Table 4.11, if anything, directly contradict the hypothesis. The positions of expert judges seem more important to other specialists than to their non-expert colleagues.

<table>
<thead>
<tr>
<th>EXPERTS</th>
<th>ADOPT</th>
<th>% Yes</th>
<th>EXPERTS</th>
<th>ADOPT</th>
<th>% Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>No</td>
<td>% Yes</td>
<td>Yes</td>
<td>No</td>
<td>% Yes</td>
</tr>
<tr>
<td>-1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>0</td>
<td>7</td>
<td>5</td>
<td>58.3</td>
<td>153</td>
<td>63</td>
</tr>
<tr>
<td>1</td>
<td>8</td>
<td>1</td>
<td>88.9</td>
<td>42</td>
<td>15</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>7</td>
<td>68.2</td>
<td>196</td>
<td>83</td>
</tr>
</tbody>
</table>

Table 4.11: Effects of EXPERTS on ADOPT for experts versus other judges.

The impact of previous circuits' actions should be least in search and seizure and for expert judges, if the last two hypotheses hold true. I will not present the results for expert and non-expert judges, since the few cases from expert judges are spread too thinly across categories to allow for meaningful comparison. The data for differences across fields are presented in Table 4.12. While the relationship holds up well for all fields, it does appear to be stronger in antitrust and environmental law than in search and seizure.

**SIMPLE MODEL OF ADOPTING AND FOLLOWING**

These bivariate results are suggestive and hopefully serve to clarify the hypotheses, but they do not provide adequate tests of them. For this purpose, we must turn to multivariate analysis. In this section I estimate probit models to determine the effects of the different independent variables considered simultaneously.
<table>
<thead>
<tr>
<th>CIRCUITS</th>
<th>S &amp; S</th>
<th></th>
<th></th>
<th></th>
<th>ANTI/ENV</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td>% Yes</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>% Yes</td>
<td></td>
</tr>
<tr>
<td>-5.73 - -3</td>
<td>1</td>
<td>2</td>
<td>33.3</td>
<td></td>
<td>0</td>
<td>2</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>-2.8 - -1.3</td>
<td>3</td>
<td>4</td>
<td>42.9</td>
<td></td>
<td>1</td>
<td>5</td>
<td>16.7</td>
<td></td>
</tr>
<tr>
<td>-.67 - -.57</td>
<td>2</td>
<td>3</td>
<td>40.0</td>
<td></td>
<td>5</td>
<td>6</td>
<td>45.5</td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>9</td>
<td>3</td>
<td>75.0</td>
<td></td>
<td>7</td>
<td>12</td>
<td>36.8</td>
<td></td>
</tr>
<tr>
<td>.56 - 1</td>
<td>28</td>
<td>15</td>
<td>65.1</td>
<td></td>
<td>56</td>
<td>22</td>
<td>71.8</td>
<td></td>
</tr>
<tr>
<td>1.33 - 2</td>
<td>13</td>
<td>4</td>
<td>76.5</td>
<td></td>
<td>25</td>
<td>7</td>
<td>78.1</td>
<td></td>
</tr>
<tr>
<td>2.4 - 4</td>
<td>17</td>
<td>2</td>
<td>89.5</td>
<td></td>
<td>25</td>
<td>2</td>
<td>92.6</td>
<td></td>
</tr>
<tr>
<td>4.29 - 7</td>
<td>10</td>
<td>1</td>
<td>90.9</td>
<td></td>
<td>9</td>
<td>0</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>83</td>
<td>34</td>
<td>70.9</td>
<td></td>
<td>128</td>
<td>56</td>
<td>69.6</td>
<td></td>
</tr>
</tbody>
</table>

Table 4.12: Effects of CIRCUITS on ADOPT in search and seizure versus other fields.

\( \text{Tau-B} = .294 \ p < .001 \)

\( \text{Tau-B} = .385 \ p < .001 \)
Probit, a maximum likelihood estimation technique, assumes a non-linear relationship between independent and dependent variables, specifically, one where the effects of independent variables are greatest toward the middle values of the dependent variables and least at the extremes. Such a relationship is especially likely to hold for dichotomous dependent variables that can be understood in terms of probabilities, like the ones examined here. For such variables, probit is a more reliable technique than ordinary least squares or variants that attempt to correct for violations of OLS assumptions (Aldrich and Nelson 1984).

I begin by examining only main effects, leaving aside interactions (the more complicated hypotheses) for the moment. Table 4.13 shows the probit results for each dependent variable with the following independent variables:

DISTANCE: Ideological distance between rules and judges (+). Expected sign = -;
PRESTIGE: Support (+) or opposition (-) of high-prestige judges. Expected sign = +;
EXPERTS: Support (+) or opposition (-) of expert judges. Expected sign = +;
DISSENT: Existence of dissent from original rule decision (+). Expected sign = -;
CIRCUITS: Strength of support (+) or opposition (-) to rule among other circuits. Expected sign = +;
OWNCIRC: Support (+) or opposition (-) of court’s own circuit. Expected sign = +.

Significance levels shown are for one-tailed tests where signs are consistent with expectations, and two-tailed where they are counter to expectations or no sign was predicted.

Probit coefficients cannot be interpreted as easily as those in a linear regression. They represent the effect of a unit change in the independent variable, not on the dependent variable itself, but on the hypothetical distribution underlying the dependent variable, measured in terms of Z-scores. For instance, the coefficient for DISTANCE in the ADOPT model indicates that a one unit increase in DISTANCE drops the Z-score for ADOPT by .281. A more meaningful way of thinking about the effect is that it lowers the probability of
<table>
<thead>
<tr>
<th>Coefficient</th>
<th>ADOPT</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
<th>FOLLOW</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DISTANCE</strong></td>
<td>-.281</td>
<td>.110</td>
<td>.005*</td>
<td>.260</td>
<td>.122</td>
<td>.017*</td>
<td></td>
</tr>
<tr>
<td><strong>PRESTIGE</strong></td>
<td>-.057</td>
<td>.096</td>
<td>.556</td>
<td>-.060</td>
<td>.116</td>
<td>.600</td>
<td></td>
</tr>
<tr>
<td><strong>EXPERTS</strong></td>
<td>.155</td>
<td>.210</td>
<td>.230*</td>
<td>.098</td>
<td>.236</td>
<td>.340*</td>
<td></td>
</tr>
<tr>
<td><strong>DISSENT</strong></td>
<td>-.406</td>
<td>.260</td>
<td>.059*</td>
<td>-.456</td>
<td>.295</td>
<td>.061*</td>
<td></td>
</tr>
<tr>
<td><strong>CIRCUITS</strong></td>
<td>.349</td>
<td>.064</td>
<td>&lt; .001*</td>
<td>.341</td>
<td>.069</td>
<td>&lt; .001*</td>
<td></td>
</tr>
<tr>
<td><strong>OWNCIRC</strong></td>
<td>.857</td>
<td>.219</td>
<td>&lt; .001*</td>
<td>.787</td>
<td>.242</td>
<td>&lt; .001*</td>
<td></td>
</tr>
<tr>
<td><strong>Constant</strong></td>
<td>.706</td>
<td>.262</td>
<td>.008</td>
<td>.814</td>
<td>.300</td>
<td>.008</td>
<td></td>
</tr>
</tbody>
</table>

-2LL = 74.70  
P < .0001 
N = 301

-2LL = 56.13  
P < .0001 
N = 252

Table 4.13. Simple probit models for ADOPT and FOLLOW.
ADOPT being equal to 1. But, of course, the probability change associated with any particular change in Z-score is dependent on the original Z-score. The .281 decrease would have little effect on probability for a Z-score already below -2, but the effect would be considerable for a Z-score around 0. Thus, to show the variables' effects on probabilities, one must choose arbitrary starting points. In the next table, I show the probability that ADOPT = 1 at selected values of each significant variable, holding the others constant at their means. 44

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>VALUE:</th>
<th>PROBABILITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td>0:    .894</td>
<td>2: .752</td>
</tr>
<tr>
<td>DISSENT</td>
<td>0:    .761</td>
<td>1: .622</td>
</tr>
<tr>
<td>CIRCUITS</td>
<td>-1.5: .371</td>
<td>0: .575</td>
</tr>
<tr>
<td>OWNCIRC</td>
<td>-1: .382</td>
<td>0: .709</td>
</tr>
</tbody>
</table>

Table 4.14: Effects of independent variables on probability of adopting.

Three of the independent variables—ideological distance, the previous actions of other circuits, and the previous actions of the deciding court's own circuit—perform just as expected. Their effects are correctly signed, highly significant in statistical terms, and substantively large. The sign for DISSENT is also correct, its impact is moderate, and it borders on traditional levels of statistical significance. The two measures of judges' characteristics are less impressive. Neither approaches statistical significance, and the apparent effect of PRESTIGE is the opposite of what it should be.

44The probit results for ADOPT and FOLLOW are quite similar. Therefore, for the sake of simplicity, I will discuss only ADOPT when interpreting or manipulating results.
Some caution is in order, though, before the last two variables are discarded. As in linear regression, multicollinearity in probit equations can throw off estimates of coefficients and standard errors (Aldrich and Nelson 1984, p.49). Here there is some collinearity between PRESTIGE, EXPERTS, and CIRCUITS. (For PRESTIGE and EXPERTS, $r = .38$; for PRESTIGE and CIRCUITS, $r = .45$; for EXPERTS and CIRCUITS, $r = .22$.) While these numbers are not dangerously large, they may be large enough to throw off estimates. Indeed, when the model is re-estimated with CIRCUITS and one of the other two variables omitted, in both instances the third is correctly signed with a p-value below .025. The problem of collinearity having been recognized, the task now is to seek its cause, to determine if the effects of EXPERTS and PRESTIGE are purely spurious. If they are, it is proper that their impact wash out in the statistical analysis. If they are not, however, the results of the model may be misleading.

The real object of concern here is the relationship between CIRCUITS and the other two variables. A good part of the collinearity between EXPERTS and PRESTIGE is surely due to the correlation between expertise and perceived quality ($r = .30$). Expert judges are more likely to enjoy high prestige than are other judges. But there is no reason to believe that either characteristic always dominates the other.

In contrast, there is one possible explanation of the high correlation between CIRCUITS and the other variables which, if true, would clearly indicate spuriousness. It is as follows: expert and high-prestige judges make up a certain percentage of all judges. As the total number of judges supporting (or opposing) a rule rises, so does the likelihood that the rule is supported (or opposed) by prestigious or expert judges. If this is so, the bivariate results that apparently show a relationship between adoption and EXPERTS and PRESTIGE may really reflect the importance of CIRCUITS alone.
However, there is also another possible explanation, just as plausible and with very
different implications. If the positions of expert and highly respected judges affect the
decisions of other judges, the circuits will line up accordingly. Under this scenario, the
apparent effect of CIRCUITS is exaggerated, since it reflects in part the impact of judges’
characteristics.

I doubt this issue can be resolved definitively, but I have found one way to shed some
light on it. According to the first explanation, the characteristics of judges are unimportant;
they only seem to matter since they appear most often under circumstances already favoring
certain outcomes. This logic is in no way limited to the effects of high prestige and expertise.
If it is correct, then any characteristic distributed unequally among judges should appear to
significantly affect rates of adoption and following.

To test for this I constructed two new prestige variables, PRES2 and PRES4, identical
to PRESTIGE except that they count judges with low and average quality scores, respectively,
instead of high scores. I then ran the original model for ADOPT, but with CIRCUITS,
EXPERTS, and PRESTIGE replaced by first PRES2 alone, then PRES4 alone, then both
together. In the first case, the results for PRES2 were: coefficient = .201; st. error = .179;
p = .13. In the second, for PRES4: coefficient = .130; st. error = .115; p = .13. In the
third, for PRES2: coefficient = .173; st. error = .182; p = .17. For PRES4: coefficient =
.118; st. error = .117; p = .17. I then separately added PRESTIGE and EXPERTS back
into the equation. The results are shown in Table 4.15.

These findings raise serious doubts about the first explanation. It retains some
credibility; after all, it would be difficult to account for the positive effect of PRES2 if it were
entirely wrong. But were it entirely correct, neither PRESTIGE nor EXPERTISE should
perform any better than PRES2 or PRES4. In fact, they should not even approach statistical
significance, with two other variables included to control for the weight of sheer numbers. They clearly do, though. And so, it seems that the bivariate results reflect, at least in part,

<table>
<thead>
<tr>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td>-.247</td>
<td>.104</td>
<td>.009*</td>
<td>-.268</td>
<td>.103</td>
</tr>
<tr>
<td>DISSENT</td>
<td>-.407</td>
<td>.253</td>
<td>.054*</td>
<td>-.392</td>
<td>.257</td>
</tr>
<tr>
<td>OWWNCIRC</td>
<td>.929</td>
<td>.209</td>
<td>&lt; .001*</td>
<td>.964</td>
<td>.211</td>
</tr>
<tr>
<td>PRES2</td>
<td>.121</td>
<td>.187</td>
<td>.260*</td>
<td>.202</td>
<td>.184</td>
</tr>
<tr>
<td>PRES4</td>
<td>.100</td>
<td>.117</td>
<td>.195*</td>
<td>.091</td>
<td>.118</td>
</tr>
<tr>
<td>PRESTIGE</td>
<td>.162</td>
<td>.080</td>
<td>.021*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EXPERTS</td>
<td></td>
<td></td>
<td></td>
<td>.376</td>
<td>.185</td>
</tr>
<tr>
<td>Constant</td>
<td>.877</td>
<td>.246</td>
<td>&lt; .001</td>
<td>.814</td>
<td>.300</td>
</tr>
</tbody>
</table>

N = 301

Table 4.15: Testing for the impact of PRESTIGE on ADOPT with CIRCUITS omitted.

real effects of previous judges’ traits on the treatment of precedents. The complete disappearance of those effects in the multivariate analysis is due to the overpowering presence of CIRCUITS. Therefore, the variables will be retained in the model.

**COMPLEX MODELS**

The remaining hypotheses all posit interactions between independent variables. To test each I first create an interaction term by multiplying together the two variables involved. I then add the interaction term to the original model for ADOPT and, through a likelihood ratio test (Aldrich and Nelson 1984, p. 59), determine whether it adds significantly to the
explanatory power of the model. By way of example, in Table 4.16 I show the equations for the field/ideological distance interaction. For the other terms, I will just report the results of the likelihood ratio test.

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td>-.282</td>
<td>.110</td>
<td>.005*</td>
<td>-.535</td>
<td>.190</td>
<td>.003*</td>
</tr>
<tr>
<td>PRESTIGE</td>
<td>-.057</td>
<td>.096</td>
<td>.550</td>
<td>-.038</td>
<td>.097</td>
<td>.699</td>
</tr>
<tr>
<td>EXPERTS</td>
<td>.161</td>
<td>.211</td>
<td>.222*</td>
<td>.149</td>
<td>.212</td>
<td>.241*</td>
</tr>
<tr>
<td>DISSENT</td>
<td>-.443</td>
<td>.271</td>
<td>.051*</td>
<td>-.497</td>
<td>.275</td>
<td>.036*</td>
</tr>
<tr>
<td>CIRCUITS</td>
<td>.350</td>
<td>.064</td>
<td>&lt; .001*</td>
<td>.336</td>
<td>.065</td>
<td>&lt; .001*</td>
</tr>
<tr>
<td>OWNCIRC</td>
<td>.852</td>
<td>.220</td>
<td>&lt; .001*</td>
<td>.900</td>
<td>.224</td>
<td>&lt; .001*</td>
</tr>
<tr>
<td>FIELD</td>
<td>-.093</td>
<td>.182</td>
<td>.610</td>
<td>-.965</td>
<td>.545</td>
<td>.039*</td>
</tr>
<tr>
<td>FIELD * DISTANCE</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>.406</td>
<td>.237</td>
<td>.044</td>
</tr>
<tr>
<td>Constant</td>
<td>.769</td>
<td>.291</td>
<td>.008</td>
<td>1.325</td>
<td>.452</td>
<td>.003</td>
</tr>
</tbody>
</table>

Log Likelihood

-146.136       -144.623

N   301          301

Table 4.16: Test for the importance of FIELD/DISTANCE interaction.

The difference in log likelihood is -1.513, which multiplied by -2 yields 3.026. For this value, with one degree of freedom, .05 < p < .10. This level of significance is sufficient, in my view, to warrant including the interaction term in the final model. This

45The test takes the following form: -2(logL2 - logL1), where logL2 is the logged likelihood for the model before the interaction term is added and LogL1 is the logged likelihood for the model with the interaction term. The equation follows a chi-square distribution, and significance levels are calculated accordingly. (Aldrich and Nelson 1984)
position is buttressed by the numbers in the table. The effect of the interaction is in the expected direction (indicating that ideological distance has a less powerful negative effect on adoption in antitrust and environmental law). In addition, the ratio of coefficient to standard error is now higher for DISTANCE than it was, suggesting that its effect is being gauged more precisely.

The interaction of FIELD and CIRCUITS also makes a substantial impact, as predicted in H6c. The result of the likelihood ratio test with the interaction included is 4.614, p < .05. The sign of the interaction is, as expected, positive, indicating that the strength of circuit support for a position affects later judges more in antitrust and environmental cases than in search and seizure.

I also predicted that strength of circuit support should matter more to experts than to non-experts (H6d). This hypothesis is not supported by the data. The coefficient for the interaction term, EXPERT*CIRCUITS, is not correctly signed and shows no effect on the model (-2LL = 0.19, p > .50).

In the bivariate results presented earlier we found no support for the four expectations encompassed by H6a and H6b (namely, that the importance of prestige and expertise should vary across fields and judges.) The hypotheses fare no better in the multivariate analysis. To give them a fair chance for success I exclude CIRCUITS from the equations used to calculate their impact. The results are shown below in Table 4.16. The first column displays the coefficients for the interaction terms. Standard errors for the coefficients are in the second column. The third gives the values for the likelihood ratio tests, with significance levels for the tests in the fourth column.

All four coefficients are incorrectly signed. These results actually suggest that: a) the prestige and especially the expertise of earlier judges matter more in search and seizure cases
than in the other, harder fields; and b) expert judges are influenced more by the
characteristics of earlier judges than are their colleagues. Only the field/expertise interaction

<table>
<thead>
<tr>
<th>INTERACTIONS</th>
<th>Coeff.</th>
<th>St. Err.</th>
<th>-2LL</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIELD * PRESTIGE</td>
<td>-.309</td>
<td>.205</td>
<td>2.31</td>
<td>p &gt; .10</td>
</tr>
<tr>
<td>FIELD * EXPERTS</td>
<td>-1.724</td>
<td>.617</td>
<td>10.52</td>
<td>p &lt; .01</td>
</tr>
<tr>
<td>EXPERT * PRESTIGE</td>
<td>.222</td>
<td>.485</td>
<td>0.24</td>
<td>p &gt; .50</td>
</tr>
<tr>
<td>EXPERT * EXPERTS</td>
<td>.930</td>
<td>.681</td>
<td>2.13</td>
<td>p &gt; .10</td>
</tr>
</tbody>
</table>

Table 4.17: Results of tests for PRESTIGE and EXPERTS interactions.

is statistically significant, but even so, these hypotheses must be reckoned dismal failures.

Any serious attempt at post-mortem runs the risk of descending into abject ad hocery.

Yet the failures here are dramatic enough to justify an effort. Moreover, some of the
evidence we have already uncovered points toward a single primary culprit—namely, antitrust.

As I discussed in the last chapter, rules in antitrust may have been more often
entrepreneurial than those in the other fields. Judicial entrepreneurs do not rely only on case
opinions to spread their views; they also do so through, among other media, law review
articles (Cates and McIntosh 1994). It is no surprise, therefore, that the percentage of new
rules announced by expert judges is quite a bit higher in antitrust (29.6%) than in search and
seizure (10.3%) or environmental (0%). This disparity is surely due in part to the greater
number of antitrust experts identified by the particular measure I employ, but it still implies
more pioneering among antitrust experts than among experts in the other fields. If this image
is correct, then in antitrust the positive influence of expertise may be counteracted by the
negatives associated with entrepreneurship. And, because, as I mentioned before, expert
judges are more likely to be accorded great respect, the effect of prestige may be undercut in the same way.

Whatever the reason, it is clear that the strange results are largely attributable to antitrust. Consider the simple tables below, displaying the percentage of adoptions at different levels of expertise and prestige in antitrust and environmental law. For both variables, the relationship with adoption is much clearer in environmental law than in antitrust.

<table>
<thead>
<tr>
<th>EXPERTS</th>
<th>ANTITRUST</th>
<th>ENVIRONMENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% Adopting</td>
<td>% Adopting</td>
</tr>
<tr>
<td></td>
<td>(n)</td>
<td>(n)</td>
</tr>
<tr>
<td>-1</td>
<td>16.7</td>
<td>0.0</td>
</tr>
<tr>
<td></td>
<td>(6)</td>
<td>(1)</td>
</tr>
<tr>
<td>0</td>
<td>63.2</td>
<td>77.2</td>
</tr>
<tr>
<td></td>
<td>(38)</td>
<td>(92)</td>
</tr>
<tr>
<td>1</td>
<td>65.9</td>
<td>100.0</td>
</tr>
<tr>
<td></td>
<td>(44)</td>
<td>(3)</td>
</tr>
</tbody>
</table>

Tau-B = .142  
\[ p < .20 \]

Table 4.18: Effect of EXPERTS on ADOPT in antitrust versus environmental.

For a more rigorous examination we can return to the multivariate analysis. Instead of a single dummy variable for search and seizure versus antitrust/environmental (FIELD), two are now included—one for search and seizure (SS) and one for antitrust (ANT), leaving environmental as the baseline. Two new interaction terms are created for each independent variable. The new models are displayed in Table 4.19. Note that for each equation I present

87
not the log likelihood, but the likelihood ratio test figure (-2LL). The baseline log likelihood (from the original model with ANT and SS added) is -142.691. Significance levels are for

<table>
<thead>
<tr>
<th>PRESTIGE</th>
<th>ANTITRUST %</th>
<th>ENVIRONMENTAL %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(n)</td>
<td>(n)</td>
</tr>
<tr>
<td>-2</td>
<td>66.7 (3)</td>
<td>0.0 (4)</td>
</tr>
<tr>
<td>-1</td>
<td>0.0 (3)</td>
<td>62.5 (8)</td>
</tr>
<tr>
<td>0</td>
<td>66.7 (24)</td>
<td>78.3 (46)</td>
</tr>
<tr>
<td>1</td>
<td>61.3 (31)</td>
<td>87.0 (23)</td>
</tr>
<tr>
<td>2</td>
<td>55.6 (18)</td>
<td>66.7 (6)</td>
</tr>
<tr>
<td>3+</td>
<td>77.8 (9)</td>
<td>100.0 (9)</td>
</tr>
</tbody>
</table>

Tau-B = .057
p > .20

Table 4.19: Effect of PRESTIGE on ADOPT in antitrust versus environmental.

two degrees of freedom, since two interaction terms are tested in each model.

With the effects of antitrust analyzed separately, the relationships are more in line with expectations, especially for expertise. Inclusion of the EXPERT interactions significantly enhances the explanatory power of the model. The coefficients indicate that expertise has a large effect in environmental law, a substantially smaller one in search and seizure, and none at all in antitrust. Of course, these numbers should be interpreted with great caution, as a very few cases account for most of the impact. Still, they indicate that the antitrust variable and interactions should be included in the full model.
<table>
<thead>
<tr>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td>-.341</td>
<td>.115</td>
<td>.002*</td>
<td>-.343</td>
<td>.115</td>
</tr>
<tr>
<td>PRESTIGE</td>
<td>.142</td>
<td>.173</td>
<td>.211*</td>
<td>-.001</td>
<td>.099</td>
</tr>
<tr>
<td>EXPERTS</td>
<td>.469</td>
<td>.243</td>
<td>.027*</td>
<td>6.695</td>
<td>.269</td>
</tr>
<tr>
<td>DISSENT</td>
<td>-.394</td>
<td>.279</td>
<td>.079*</td>
<td>-.568</td>
<td>.291</td>
</tr>
<tr>
<td>CIRCUITS</td>
<td>.282</td>
<td>.067</td>
<td>&lt; .001*</td>
<td>.290</td>
<td>.066</td>
</tr>
<tr>
<td>OWNCIRC</td>
<td>.967</td>
<td>.231</td>
<td>&lt; .001*</td>
<td>.978</td>
<td>.229</td>
</tr>
<tr>
<td>ANT</td>
<td>-.513</td>
<td>.265</td>
<td>.053</td>
<td>-.542</td>
<td>.256</td>
</tr>
<tr>
<td>SS</td>
<td>-.286</td>
<td>.252</td>
<td>.256</td>
<td>-.294</td>
<td>.227</td>
</tr>
<tr>
<td>ANT*PRES.</td>
<td>-.313</td>
<td>.216</td>
<td>.148</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>SS*PRES.</td>
<td>-.008</td>
<td>.262</td>
<td>.977</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>ANT*EXP.</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>-6.65</td>
<td>--</td>
</tr>
<tr>
<td>SS*EXP.</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>-5.53</td>
<td>.627</td>
</tr>
<tr>
<td>Constant</td>
<td>1.087</td>
<td>.318</td>
<td>.001</td>
<td>1.135</td>
<td>.318</td>
</tr>
<tr>
<td>-2LL</td>
<td>2.724</td>
<td></td>
<td></td>
<td>6.276</td>
<td></td>
</tr>
<tr>
<td>Sig.</td>
<td>p &gt; .20</td>
<td></td>
<td></td>
<td>p &lt; .05</td>
<td></td>
</tr>
</tbody>
</table>

Table 4.20: Probit models of ADOPT with individual field dummies and interactions.
THE FULL MODEL

The final model, therefore, includes the original six independent variables plus the following variables and interaction terms:

- **ANT**: Dummy for antitrust field. No expected sign;
- **SS**: Dummy for search and seizure. No expected sign;
- **SS * DISTANCE**: Expected sign = - (meaning the effect of DISTANCE is greater in S&S than in the other fields);
- **SS * CIRCUITS**: Expected sign = - (meaning the effect of CIRCUITS is less in S&S than in the other fields);
- **SS * EXPERTS**: Expected sign = - (meaning the effect of EXPERTS is less in S&S than in environmental);
- **ANT * EXPERTS**: No expected sign.

Results for the full model for ADOPT and FOLLOW are shown in Table 4.21.

The expanded equation provides a more detailed, refined picture of the relationships between independent and dependent variables. Now we can calculate the effects of the five significant variables at different values in different fields. I present some examples in Table 4.22. The far left column lists the variables and selected values. The other columns give the probability that ADOPT = 1 at those values, with other variables held at their means. The numbers for DISTANCE, EXPERTS, and CIRCUITS are calculated using main effect and interaction terms where appropriate.

DISCUSSION

Before offering final judgments on the performance of specific variables and the model as a whole, I will return briefly to the dependent variables. We saw in Table 4.13 that the simple model results for ADOPT and FOLLOW were virtually identical. Differences are somewhat greater in the final model (for CIRCUITS and its interactions, for instance) but still quite small. Only one difference is dramatic: the effect of the antitrust dummy is pretty strongly negative for ADOPT but negligible for FOLLOW. This is of only minor importance for the current project. The remaining differences are narrow enough for us to conclude that
<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>ADOPT</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
<th>Coefficient</th>
<th>FOLLOW</th>
<th>Standard Error</th>
<th>P (*One-Tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td>-.226</td>
<td>.151</td>
<td>.068*</td>
<td></td>
<td>-.202</td>
<td>.173</td>
<td>.121*</td>
<td></td>
</tr>
<tr>
<td>PRESTIGE</td>
<td>-.011</td>
<td>.103</td>
<td>.913</td>
<td></td>
<td>-.024</td>
<td>.127</td>
<td>.850</td>
<td></td>
</tr>
<tr>
<td>EXPERTS</td>
<td>6.424</td>
<td>.275</td>
<td>&lt; .001*</td>
<td></td>
<td>6.322</td>
<td>.634</td>
<td>&lt; .001*</td>
<td></td>
</tr>
<tr>
<td>DISSENT</td>
<td>-.597</td>
<td>.295</td>
<td>.022*</td>
<td></td>
<td>-.668</td>
<td>.343</td>
<td>.026*</td>
<td></td>
</tr>
<tr>
<td>CIRCUITS</td>
<td>.431</td>
<td>.106</td>
<td>&lt; .001*</td>
<td></td>
<td>.557</td>
<td>.143</td>
<td>&lt; .001*</td>
<td></td>
</tr>
<tr>
<td>OWNCIRC</td>
<td>.994</td>
<td>.234</td>
<td>&lt; .001*</td>
<td></td>
<td>.938</td>
<td>.263</td>
<td>&lt; .001*</td>
<td></td>
</tr>
<tr>
<td>ANT</td>
<td>-.417</td>
<td>.264</td>
<td>.115</td>
<td></td>
<td>-.061</td>
<td>.312</td>
<td>.846</td>
<td></td>
</tr>
<tr>
<td>SS</td>
<td>.779</td>
<td>.601</td>
<td>.195</td>
<td></td>
<td>.938</td>
<td>.671</td>
<td>.162</td>
<td></td>
</tr>
<tr>
<td>SS*DIST.</td>
<td>-.365</td>
<td>.249</td>
<td>.071*</td>
<td></td>
<td>-.348</td>
<td>.277</td>
<td>.104</td>
<td></td>
</tr>
<tr>
<td>SS*CIRC.</td>
<td>-.279</td>
<td>.133</td>
<td>.019*</td>
<td></td>
<td>-.444</td>
<td>.168</td>
<td>.004*</td>
<td></td>
</tr>
<tr>
<td>ANT*EXP.</td>
<td>-6.472</td>
<td>--</td>
<td>--</td>
<td></td>
<td>-6.666</td>
<td>.730</td>
<td>&lt; .001</td>
<td></td>
</tr>
<tr>
<td>SS*EXP.</td>
<td>-4.976</td>
<td>.670</td>
<td>&lt; .001</td>
<td></td>
<td>-4.848</td>
<td>--</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>.713</td>
<td>.386</td>
<td>.065</td>
<td></td>
<td>.575</td>
<td>.458</td>
<td>.210</td>
<td></td>
</tr>
</tbody>
</table>

|             |             |       |                |                |             |       |                |                |
| -2LL        | 94.93       |       |                |                | 75.69       |       |                |                |
| Sig.        | p < .0001   |       |                |                | < .001      |       |                |                |
| N           | 301         |       |                |                | 252         |       |                |                |

Table 4.21: Full probit models of ADOPT and FOLLOW.
<table>
<thead>
<tr>
<th>Field</th>
<th>ANTITRUST</th>
<th>SEARCH &amp; SEIZURE</th>
<th>ENVIRONMENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISTANCE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>.788</td>
<td>.976</td>
<td>.951</td>
</tr>
<tr>
<td>2</td>
<td>.637</td>
<td>.785</td>
<td>.885</td>
</tr>
<tr>
<td>4</td>
<td>.456</td>
<td>.348</td>
<td>.773</td>
</tr>
<tr>
<td>EXPERTS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-1</td>
<td>.670</td>
<td>.189</td>
<td>.001</td>
</tr>
<tr>
<td>0</td>
<td>.652</td>
<td>.716</td>
<td>.841</td>
</tr>
<tr>
<td>1</td>
<td>.633</td>
<td>.978</td>
<td>.999</td>
</tr>
<tr>
<td>DISSENT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>.659</td>
<td>.821</td>
<td>.875</td>
</tr>
<tr>
<td>1</td>
<td>.425</td>
<td>.626</td>
<td>.709</td>
</tr>
<tr>
<td>CIRCUITS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-1.5</td>
<td>.236</td>
<td>.644</td>
<td>.405</td>
</tr>
<tr>
<td>0</td>
<td>.472</td>
<td>.722</td>
<td>.659</td>
</tr>
<tr>
<td>1.5</td>
<td>.719</td>
<td>.794</td>
<td>.855</td>
</tr>
<tr>
<td>4</td>
<td>.951</td>
<td>.885</td>
<td>.983</td>
</tr>
<tr>
<td>OWNCIRC</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-1</td>
<td>.224</td>
<td>.363</td>
<td>.512</td>
</tr>
<tr>
<td>0</td>
<td>.591</td>
<td>.739</td>
<td>.849</td>
</tr>
<tr>
<td>1</td>
<td>.891</td>
<td>.950</td>
<td>.978</td>
</tr>
</tbody>
</table>

Table 4.22: Probability estimates for ADOPT at selected variable values, by field.
it is safe to analyze all cases together; they do not give a distorted picture of dynamics. Accordingly, in discussing specifics I will continue to concentrate on the equation for ADOPT.

As the data in Table 4.22 reveal, four of the independent variables—DISTANCE, CIRCUITS, OWNcirc, and DISSENT—affect adoption in all three fields. The last two variables are straightforward in terms of both measurement and interpretation, and I believe their numbers require no explanation or qualification. Judges are required by the rules of their circuits to follow precedents of their circuit colleagues unless the court meets en banc to overrule them. It is no surprise, therefore, that the previous actions of their own circuits have a consistently powerful impact on judges’ treatments of precedential rules. It is less obvious that dissents in initial cases should affect later judgments, but the results indicate that they do. The impact of DISSENT is not as powerful as that of OWNcirc, but it is just as consistent.

As predicted, the further the ideological direction of a rule is from the ideologies of judges considering it, the less likely it is that those judges will adopt the rule. The impact of DISTANCE is substantial, although it varies across fields. I suspect that, if anything, its effect is understated in the results. As I mentioned in Chapter Two, ideological distance is particularly difficult to measure. The measure I use is itself constructed from two somewhat crude measures. The chief weaknesses of it are these: rule ideologies are dichotomized rather than graduated; and ideology is treated as unidimensional. If rules differ from each other in the force of their ideological implications or if judges and rules can be liberal or conservative in different ways, then the measure may fail to reflect variance that affects judges’ actions. To the extent it fails, the connection between ideology and adoption is underestimated.

The problem with CIRCUITS is different. I believe the concept—the strength of circuit support for a rule—is captured well by the measure. The difficulty comes in
interpreting its coefficient. I have already discussed the two issues of primary concern. The first is that CIRCUITS may be stealing some of the credit that actually belongs to PRESTIGE. If so, its effect is exaggerated in the results.

The other concern is that its effect may be attributable in part to easy cases. Easy issues, by definition, should all be decided the same way. So when a court decides an easy issue, it normally decides consistently with other courts that have confronted that issue. Yet the previous judges' actions in themselves have no effect on the decision. When this happens, we cannot speak of circuit support as having an impact on decisions.

It appears, then, that if we wish to know what that impact is we should discount the coefficient for CIRCUITS somewhat. I cannot say precisely what the discount should be, but I believe it should be limited. Certainly it would be unreasonable to suppose that PRESTIGE accounts for more than a small part of the variance attributed to CIRCUITS. And while easy cases can account for a more substantial chunk, they cannot explain all of it. As reported in the last chapter, conflict develops in more than two-fifths of all case lines. To label the decisions involved in these "easy" would seem perverse. They may appear to later judges to be easy, but if so, it is likely because consensus has formed around one position or the other.

In short, the effect of CIRCUITS is so large that one can hardly doubt that what other circuits have done often matters to judges confronting a new rule. Why it matters is an open question, one that I will return to in the final chapter.

The other two main independent variables performed more erratically. If the final results are to be taken at face value, the support or opposition of prestigious judges has no effect on later judges, while the impact of expert judges is huge (in environmental law and search and seizure). Neither result is terribly credible. I have already explained why I
believe the effect of PRESTIGE is underestimated. As for EXPERTS, its effect is almost
certainly overstated given the tiny number of cases involved.

Still, even if the numbers for EXPERTS are exaggerated, I think they yield an
important insight, one that is probably applicable to PRESTIGE as well. The characteristics
of judges are unlikely to have a consistent effect on the decisions of other judges. Much of
the time judges will be concerned entirely with the content of rules, not the names of those
supporting or opposing them. Sometimes, however, a name may jump out at them. In such
cases, the impact of the name is likely to be powerful. This kind of infrequent yet important
effect is difficult to uncover through statistical analysis. Therefore, while the analyses in this
chapter lend no great support to the hypotheses concerning expertise and prestige, I believe it
would be unwise to reject them outright. Evidence presented in the next chapter reinforces
this position.

It would have been buttressed even further had the hypotheses about differences in
cognitive effort across fields and judges been borne out more fully. The interactions
involving CIRCUITS and DISTANCE behaved as expected. What previous circuits have
done appears to matter more in the more difficult fields, and ideological distance seems to
have greatest impact in the most salient field. On the other hand, none of the interactions
involving PRESTIGE and EXPERTS turned out as expected until antitrust was separated from
environmental law.

Although the performance of these variables is only middling, it is far from
disappointing once we consider the difficulties involved in measuring salience and cognitive

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The differences for DISTANCE may be artificially large. Of the three areas of law, it
is in search and seizure that ideology is most likely to fall along the traditional single
dimension. In other words, the better performance of DISTANCE in search and seizure cases
may result partly from better measurement.
difficulty. Ideally, the researcher would measure the salience and difficulty of each case for each judge. Some search and seizure cases are hard, some antitrust cases are easy. A case which completely engages one judges' interest may bore another. Yet for this project I had to be content with broad generalizations. The fact that these variables worked at all suggest strongly that the results begin to capture an underlying truth.

Taken as a whole, the model does a fairly good, though not spectacular, job of explaining decisions to adopt precedential rules. In table 4.23, I present actual and predicted values for ADOPT, the latter calculated from the final probit model. If we use a predicted value of .5 as a cutoff point, 77.1% of the cases are predicted correctly. Had we predicted in advance that rules would be adopted in every case, we would have been right 70.1% of the time. So by this traditional measure—reduction in error—the explanatory power of the model is modest.

<table>
<thead>
<tr>
<th>Actual Value</th>
<th>Predicted Value</th>
<th>0</th>
<th>1</th>
<th>% Correctly Predicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - .300</td>
<td></td>
<td>22</td>
<td>2</td>
<td>91.7</td>
</tr>
<tr>
<td>.301 - .400</td>
<td></td>
<td>9</td>
<td>5</td>
<td>64.3</td>
</tr>
<tr>
<td>.401 - .500</td>
<td></td>
<td>7</td>
<td>10</td>
<td>41.2</td>
</tr>
<tr>
<td>.501 - .600</td>
<td></td>
<td>14</td>
<td>20</td>
<td>58.8</td>
</tr>
<tr>
<td>.601 - .700</td>
<td></td>
<td>18</td>
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<td>59.1</td>
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<td>.701 - .800</td>
<td></td>
<td>7</td>
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<td>82.5</td>
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<td>.801 - .900</td>
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<td>31</td>
<td>77.5</td>
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<td>.901 - 1.00</td>
<td></td>
<td>4</td>
<td>84</td>
<td>95.5</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>90</td>
<td>211</td>
<td>77.1</td>
</tr>
</tbody>
</table>

Table 4.23: Comparison of predicted and actual values for ADOPT.
Of course, a comparison of a theoretically based model to a post hoc atheoretical prediction is a somewhat strange test of a theory. I believe that if we wish to make something of predictions, it is best to look more closely. No theory can take into account all the factors that affect any one outcome, so some mistakes are inevitable. What we can demand of a good theory is that its firmest predictions be its best. If even the best theory were to yield a prediction of a .54 probability for a certain outcome, we would not be surprised by a different outcome. But we would expect the theory to be in error very seldom when it predicted a .95 probability for a certain outcome. As shown in Table 4.23, for the final model predictive accuracy generally increases as the predictions get more extreme. Accuracy is especially high for the extreme 112 cases; well over 90% of these are predicted correctly.

CONCLUSION

In this chapter I have drawn from several hypotheses to construct a model to explain the treatment of precedential rules. The model performs well enough to give a researcher some satisfaction and has enough of both strengths and weaknesses to encourage further study. In the future, the measures employed here can hopefully be refined and improved on. In addition, other important influences can be measured and added to the model. I will expand on this discussion of future research in the final chapter, after considering some of these other influences in Chapter Five.

Returning to the specific elements of the model, the evidence collected here creates a complex picture of court/rule dynamics. On the one hand, there are forces that tend to produce conflict. The data show clearly that judges are influenced by their deeply held individual attitudes. They tend to stick with judges of their own circuit, regardless of what others do. A dissent in an initial decision increases the likelihood that later courts will reject
the rule laid down. On the other hand, judges do not appear to make their decisions in perfect isolation. We have seen firm evidence that the strength of support for a rule among other circuits influences later judges. The data also suggest, albeit weakly, that judges with certain characteristics can exert an influence on those who come after them.

Viewed from another perspective, the data indicate that both policy-oriented and more legalistic considerations enter into judges’ decisions whether to follow precedents. Some of the hypotheses were derived from assumptions about the importance of these considerations, and so their success reflects back on the assumptions. Of course, how brightly they reflect depends on how closely tied they are to the assumptions. I will return to this issue in Chapter Six, considering alternative explanations for the relationships uncovered in the analyses.

Finally, the picture revealed here is one of variation across fields. The variation is neither as consistent nor as clean as predicted, but it seems to be real and substantial. It seems reasonable to view the variation as associated with cognitive complexity and salience, although the support for this view is only moderate. What is fairly certain is that the likelihood of adoption and the impact of different factors on that likelihood differs from one field to another.

This theme of complexity comes across strongly in the interviews as well. I turn to those now.
CHAPTER 5

To this point, the interviewed judges have made only scattered appearances. This chapter is given over entirely to them. The hypotheses remain the same, but now, instead of testing them against case statistics, I test them against judges' own perceptions of how they do their work. This chapter does not parallel the last precisely, since the two kinds of data are so different. Some of the factors examined in the case analysis could not be discussed adequately in the interviews, while the interviews bring to light some factors not included in the case analysis.

CAVEATS AND OTHER CONSIDERATIONS

In a sense, of course, the tests in this chapter are far less rigorous than those in the last. I mentioned a couple of reasons in Chapter Two. The most important is that judges' perceptions may be wrong. It is very difficult for people to step outside themselves and analyze their own behavior, especially in the rather artificial context of an interview. There is a kind of chaotic, spontaneous quality to everyday thinking that probably gets refined in recollection. Also, people forget things. It is doubtful that any of the judges were able to recall all the factors affecting their decisions.

Furthermore, interviewees' answers may reflect the emphasis of interviewers' questions. Because of the breadth of the issues I discussed with judges, I frequently had to focus on specific factors. For instance, I might ask: "Do you care who wrote an opinion or
what circuit it came from?" The judge might respond affirmatively even though this factor mattered much less than many others. Even worse, a judge might answer "yes," not because a particular factor ever has influenced that judge, but because it seems reasonable that it might. Fortunately, if the analyst stays aware of this potential problem it is not hard to control. Answers such as "Yes, definitely" or "Sure. I remember one case..." are quite different from "Sure, I suppose so" or "Yeah, that could happen." In discussing judges' comments I will be sure to distinguish the more certain answers from others.

Another limitation of the interviews is the sample. It is not random, and so statistical tests based on normal distributions are inappropriate. Therefore, statistical findings from the sample cannot properly be generalized to the universe of Court of Appeals judges (or, obviously, the larger universe of all judges).

Finally, no two interviews were the same. Questions asked of some judges were not necessarily asked of all. The same question might be worded a bit differently or change position from one interview to another. The judges were not presented with fixed alternatives, and so their answers were not always directly comparable. Nor is it likely that they all understood the same questions in the same way.

All of these considerations suggest the following prescription: in analyzing the judges' responses we should not focus too closely on numbers. It is of little moment whether 28% or 42% of judges mention a particular factor if the percentage is derived through a series of judgment calls and approximations and cannot be generalized to a larger population.

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47This point is a narrow one applying only to generalization from specific statistics. That the sample is not random does not mean that no members of it are similar to other judges. If I find that six judges consider a particular goal important, I can be almost absolutely sure that some other courts of appeals judges feel the same way. What I should not suppose is that 25% of them do.
anyway. Happily, the hypotheses being tested say nothing about specific percentages; they simply state that certain factors influence the treatment of precedent.

Of course, even if they are all at least minimally correct, not all hypotheses are equally good. Some factors have more powerful influences than others, as the probit results in Chapter Four showed. Like the case analysis, the interviews can expose this kind of disparity. But they can do more than this. They go beyond the statistical analysis by revealing differences not just in strength of influence but in prevalence—that is, differences across judges. In this way, they can be thought of as allowing more rigorous—or, perhaps, more precise tests than the case studies.

The interviews possess several other advantages as well, primarily because they give an insider's view of the process. Judges may not be able to explain their own behavior perfectly, but they know more about it than anyone else and thus are excellent sources for insights that have escaped the researcher. Their comments should reveal some of the nuance and complexity inherent in actual behavior but not captured by the hypotheses or statistics. And they should identify other factors influencing judges' treatment of precedential rules.

This discussion of interview strengths points the same way as the discussion of weaknesses. The best way to mine information from the interviews is not to examine numbers summarizing their content, but to examine the content itself. The judges' words are the most important kind of data available from the interviews. Accordingly, I see my role in this chapter as akin to that of someone editing an anthology. I will quote extensively from the interviews, selecting especially those passages that are most descriptive, revealing, or otherwise worthy of particular attention. In editorial comments, I will attempt to provide context for considering the quotations, indicating where they reflect consensus, majority, or
minority views, and discussing how they fit (or do not fit) with other judges' words and the analyses in Chapter Four. In doing this, I will occasionally present summary numbers.

For ease of comparison, this chapter will generally parallel Chapter Four, with hypotheses being considered in the same order. It begins, though, with the basic assumptions of the project, since, unlike the case analysis, the surveys can speak directly to the validity of the assumptions.

JUDGES ON GOALS

As the reader may remember, I assumed that judges care about doing one or more of the following:

- Making law consistent with their policy preferences;
- Making legally correct decisions;
- Keeping bodies of law uniform and coherent;
- Deciding cases promptly.

To check the validity of the assumptions I asked the judges how important each of these considerations was to them as they went about making decisions.

For the last three goals I used language quite similar to that shown above. Getting at the first goal required a bit more subtlety. Decades of skepticism from legal realists, political scientists, and the media have made the legitimacy of their decision-making a point of great sensitivity for many judges. Asking about the pursuit of policy preferences would likely generate suspicions about the interviewer and put even the most open and candid judge on the defensive. My approach was to begin with innocuous questions about promptness and coherence/consistency and then move to policy preferences. For that goal, I asked how important it was that the outcome of a case be just or good. Most of the judges interpreted the question the way I meant it. Some did not—an inevitable and reasonable price to pay for diplomatic ambiguity.
I classified each response to goal questions along a five-point scale ranging from very important to not at all important. To reiterate, these classifications are approximate, generated by comparing judges' responses to others from themselves and their colleagues. There were a few responses I was not confident enough to classify. The distribution of responses is shown in table 5.1.

<table>
<thead>
<tr>
<th>Goal</th>
<th>VI</th>
<th>I</th>
<th>MI</th>
<th>NVI</th>
<th>NI</th>
<th>NA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coherent, Uniform Law</td>
<td>5</td>
<td>7</td>
<td>7</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Prompt Decisions</td>
<td>10</td>
<td>6</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Good/Just Outcomes</td>
<td>6</td>
<td>8</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Legally Correct Decisions</td>
<td>15</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

Note: The cells contain the number of judges ranking a particular goal in that category. For each goal, N = 24. VI = Very important; I = Important; MI = Moderately important; NVI = Not very important; NI = Not at all important; NA = No codable response.

Table 5.1: Judges' rankings of goal importance

By my estimation, five of the twenty-four judges interviewed ranked the goal of keeping law coherent and consistent as very important. Here are examples of remarks falling under this classification:

That's just a crucial thing. The only time you're not thinking about that is when your circuit hasn't spoken and you disagree with the other circuit and want to call the issue to the Supreme Court's attention.

I think that's the principal one. Next to resolving the dispute before us, it's the most important thing we have to do.

Seven judges ranked this goal as important with another seven viewing it as moderately important. Here are two examples from the latter category:
Well, it's important, but not a priority item. The priority item is: What is the justice of a particular case? Stated more simply, did the district judge make a mistake? That's our only purpose for being here.

Well, it is important. I look to see what principles undergird the position of one party or the other, what is being advanced, if they have seeds of what I consider to be positive social and redeeming aspects, not detrimental. To promote precedent simply because it is precedent is not sufficient. We need to reexamine the precedent. I come out of a tradition where precedent for so many years was used to perpetuate injustice. I see precedent as important, but we shouldn't use it when it perpetuates injustice.

Finally, three judges thought this goal not very or not at all important. Here are the comments of two of them:

Well, I'm not interested in a certain area of law; I'm interested primarily in what the law is in the circuit. Sometimes that law is not coherent and consistent, sometimes it's not what I think it should be. I can't do much about it as a senior judge. I'm not a judge like Friendly who I hear is able to bring an unravelled mess into a coherent ball.

Since this is absolutely impossible (logically and axiomatically) I don't worry overmuch about it. It's Arrow's theorem--judges are as much subject to it as are legislators. Something has to give, and it's coherence.

It seems clear that this goal belongs among the assumptions of the model. It is just as clear that it varies widely in importance from one judge to another. Some see it as critical, others as one among several goals, and others as merely secondary.

The judges disagreed less about the importance of speed. Ten of the twenty-four seemed to think it very important to decide cases quickly. One judge saw it as "terribly important to the parties." According to another, "It is probably the reason I became a judge."

Two judges summed up the case for promptness rather well:

It is very important for a number of reasons. First, litigants are entitled to prompt decisions, although still well-thought out and so on. Also, there's a personal reason. If a case is old, I have to go back and refresh myself.

Now that I don't carry a full load, I'm a nut about that. I think that's very important, not just for the litigants, but for the other judges. If I sit on an opinion for eight months before I get it to the other judges on the panel, they may have forgotten the case, and the clerks who worked on it may have left. I think cases opinions should go out in 4 or 5 months at most.
No judge rated promptness as less than moderately important. Those least concerned about it said things like: "I don’t think this can be a primary driving force...we just make an effort to be timely"; or "It’s an important consideration but we can’t always accomplish it."

A few judges pointed out that speed is more important in some kinds of cases than in others. Interestingly, several judges spontaneously addressed the tradeoff between speed and quality. As one said, "I’d generally rather produce a B+ opinion early than an A opinion late." Another took a similar view, opining that "[p]erfect justice takes far too much time."

A judge who had come to the federal bench recently from a state supreme court said:

There’s an avalanche of stuff here, high volume. At some point, about all you can think about is not “Is it just or fair?” but “Have I made any bad mistakes?” Later maybe I’ll be able to look at other things more, but being new now, I worry.

Not all judges believed this tradeoff necessary. "Given the choice between producing a much better opinion and finishing it promptly, I would generally choose the better opinion, especially if it’s to be published." In the words of another: "Obviously, justice delayed is justice denied...Still, I think we have to take the time it takes to truly decide a case."

Still, the fact that so many of the judges care about deciding cases promptly, and the stated willingness of a few to sacrifice a bit of quality to speed, lend firm support to the supposition that judges keep their eyes open for cognitive shortcuts. This is not to suggest that their decision-making is often sloppy. It just means that they do not ponder cases as deeply and thoroughly as they could if they heard only ten or twelve cases a year or were willing to spend five years on a single case.

The other two goals—promoting desired outcomes and making legally correct decisions—are best discussed together, since they are often seen as conflicting. Political scientists, especially, seem to regard them as mutually exclusive; legal models of decision-making compete with the attitudinal model. Not surprisingly, a few judges took the same
line. Here are three judges' reactions to the question asking about the goal of good/just outcomes:

Terribly unimportant, completely off the scale. This is just an invitation to not do what the statutes say. There are many cases where I wouldn't have voted to pass the statute, but my job in a democratic society is to make sure the majority wins, not that my view of justice does.

I just happen to think that's a wrong objective. Lots of times I write and just hate the opinion, but if it's what the statute, regulation, Supreme Court, or 6th Circuit requires, I can't do anything about it. It seems to be almost by definition that if that's an important objective you're close to ends justifying means decision-making. Ends never justify the means.

In a recent case I was on two of us really hated the result but thought the statute clearly dictated it. We got a letter from another judge (not on the panel; we had circulated the opinion) who said "I agree that's what the statute says, but I think that's a bad result. Can't you come up with a way to get around it?" My belief is a flat no. If you don't like the statute, see your congressmen.

Well, I think you have to be clinical. Hard facts make bad law. You have to intellectually discipline yourself to understand that we'll sometimes get results we don't like at the gut level, but the law goes that way and there's no intellectually honest way to go the other way without hurting consistency.

These judges obviously regard legal correctness as very important. Naturally, they are not alone in this belief. It is the most consensual goal for the judges in this sample. Of the twenty-two whose responses I can classify, fifteen seem to view it as very important while the rest consider it important.

What is more surprising is that in rejecting good/just outcomes as a goal, these judges constitute a distinct minority. It appears from their answers that 14 of the judges see the goal as at least important, six of them considering it very important. Only six adjudge it not very or not at all important.

It seems, then, that judges can be arrayed along a continuum according to the relative weight they accord to considerations of outcome and legal correctness. Some judges, such as the ones quoted above, deny any legitimacy to the former, and so can be placed at one extreme. There may be judges at the other extreme—discounting legal correctness entirely—
but they did not appear among the judges I interviewed. Most of these fell toward the middle of the continuum. To illustrate, I will quote at length from several interviews, arranging them in roughly ascending order of weight given to considerations of outcome. In cases where I include a single judge's reactions to both goals, the comments are together.

I'd say [a good or just outcome is] a secondary consideration, because I don't view my role as simply doing what I view as good and just in a particular case. I see a specific role with specific limits on my authority. It doesn't leave much room for just and right. But there are instances when that can come into play.

Of course, if within applicable precedent you can choose one or the other, you will take the one that leads to the good outcome—if precedent allows.... In appeals, you just deal with them as individual cases, try to apply good legal principles to particular cases. Some judges have a pretty definite ideological turn of mind; they may overcome it if they're conscious of it. If you've been here as long as I have, and as you get older, I think you tend to get more skeptical—about parties too. There are no particular litigants I'm trying to help. I'm trying to follow the law, even if it's not the law I would write. I think a high percentage of judges will reach a result they don't want to if the law goes that way.

[A good outcome] is great when it can happen and agonizing when it can't. There are many cases (a small percentage, though) where you can make good happen. I would say that more often than I like to think, you can't do anything. We have a case now where the judge below did a great job in a hideous trial and I would love to affirm, but I think we'll have to reverse. I don't think justice is being done, but hopefully it will be more proper now.... A legally correct decision is a form of justice, a systemic kind of justice. It doesn't give the unfortunate individual solace but it's better than judges ruling by what they ate in the morning.

There are judges who would answer [the question about outcomes] by saying that's a primary premise. But I couldn't say that entirely accurately... Sure substantive justice is important, and if I were God and not constrained by law I would be more comfortable. Our court is just a piece of the action; our authority is pretty strongly circumscribed.

As an intermediate court, we're very constricted. Often our personal inclinations are at odds with the result that must flow from the cases. Then you have to decide if the result is one you can live with or if your disagreement is so fundamental that you can't. An example is the death penalty. I haven't had to decide yet, but I don't know what I'll do when I'm faced squarely with the question of whether it's cruel and unusual. I just don't know. I'm fundamentally opposed to organized killing—doing it systematically with the blessing of society. Yet the Supreme Court has written a lot on it. When I'm faced with a concrete case, I don't know how I will come down.
[A good outcome is] very important...There are three cases in my career I've really enjoyed. [The judge then related a story about a disability claimant denied benefits for eight years.] The SSA was right on the technicalities, but we were able to find one regulation they overlooked. Just the one we needed to rule for the claimant. [I did not catch the details of the second story, but the judge was "outraged." The third story concerned a poor black woman whose mortgage was foreclosed by the Federal Housing Administration.] I said to the U.S. attorney "I assume you spent a good deal of money on this case." The US attorney said, "Yes, Judge, we prepared very thoroughly" and so on. And I said, "You did all that because this woman wanted to talk to a bureaucrat for 15 minutes?" All three cases went for the individual. Things like that make you feel good at the end of the day. It beats all antitrust, international law. It's good when you know people have the right to complain about their government and have something done about it.... There's a wide misconception in the public about the freedom a judge has. We're hemmed in. Within certain bounds, we can move around a bit. But there are some cases where we're very hemmed in. Even the ones where I took a personal interest [the earlier stories], I researched the cases thoroughly and had to find law to support my position.

I do approach my work from the old adage Earl Warren had on his desk: "Is this fair?" I always approach my work this way, although sometimes I don't have a choice so I can't.... The two most important parts of what we do is see if there's an error so unjust that it warrants a new trial and see that nothing very stupid happened.

[Insuring a good/just outcome is] very important. I'd put that way up top. We're here to do justice, primarily.... I guess the art of judging consists in trying to produce just results within the constraints of legality.

I believe two points emerge clearly from this long set of quotations. The first is that most of these judges take very seriously the notion of deciding cases in accordance with some notion of legal rightness. Even those who admit caring deeply about outcomes feel constrained by the force of law. And, although the judges frequently refer to the constraint of precedent, they obviously see the force of law as broader than that.

In most of the interviews I asked the judges if they could explain what a legally correct decision was. Understandably, they could not do so very intelligibly⁴⁸. A few were

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⁴⁸A typical interchange went as follows:

[DK: How do you know what's a good rule?]
Judge: How do I know? My conscience says it's so. I've been a judge since 1966. It's instinctive. I might think it's good, my clerk might differ, I might change my mind.
not even willing to try. Nevertheless, what they were able to communicate went well beyond
respect for precedent. A legally correct decision might: "follow a good text on the subject";
"follow decisions that are binding and the conventions we should follow in interpreting
statutes and cases"; involve "logic and reasoning, sometimes just plain common sense"; rely
on "honest fact reporting," and so on. If we can take the judges’ statements at full value,
they provide considerable evidence that the judges care a good deal about producing decisions
that meet the complex criteria of legal correctness.

The second point is that many of the judges also care about the outcomes of the cases
they decide49. Holding these two goals generates ambivalence, as is evident in several of the
excerpts given above. It is not always possible for judges to reach desired outcomes through
decisions they feel are legally sound. When it is impossible, one of the goals must yield. It
seems clear from the comments that which goal yields depends much on what judge is
deciding the case and, perhaps, what the case involves.

JUDGES ON FACTORS

The evidence discussed so far suggests that each of the four goals matters to judges.
At the same time, it helps us see how doubtful it is that any two judges hold precisely the
same mix of goals. If goals vary across judges, then it is likely that the factors influencing
their behavior do so as well. We can decide whether this is true as we turn to their
discussions of precedents and decision-making, taking the hypotheses in order.

I did not ask the judges any question directly parallel to hypothesis 1 (the impact of
ideological distance). I am not sure how the question could be framed without offending

49Incidentally, their candor in discussing this gives us added reason for taking their other
statements at face value. Rarely did a judge give any indication of dissembling or otherwise
trying to hide ugly truths from an outsider.
some judges. More importantly, it would be superfluous. Of the hypotheses, this one is the most directly and obviously tied to a specific goal. It is difficult to see what an additional question could add to what we learned from their answers about the outcome goal.

Therefore, I will begin with what judges have to say about the characteristics of other judges. Typically I asked the judges if, in deciding whether to follow a certain precedent, they cared who wrote the opinion. Sometimes I used different wording, asking whether they weighted opinions from different judges differently. Because of the dynamics of the interviews, I was rarely able to get a judge to differentiate clearly between expertise and general prestige. Also, the judges sometimes mentioned other traits. For these reasons, most of the discussion below will concern characteristics generally, rather than specifically. As a final point, I should note that not all of the comments below were specifically prompted. In some cases judges spontaneously raised the issues.

Some judges felt that the reputation of an opinion writer had no influence on their own decisions whether to go along with the opinion. Here are examples of their replies:

I don't owe any allegiance to Scalia or Judge Arnold or Herman [this last name might have been heard wrong]. I don't say I think he's smarter than I am. Hell, he could be having a goddamn bad day.

Not really. I know some judges have a national reputation, but usually with that comes bias—ideological and intellectual. There's nothing wrong with that, but you become aware of it—like Posner. I've read some opinions from judges I hadn't heard of that were very good.

These judges were in the minority. Of those who discussed the issue, most felt that the name on the opinion did affect them at times. Where they differed from each other was in their estimates of the effect. As before, I will present a string of quotations arranged in a rough order. Here I start with judges who feel the effect is small or infrequent.

Once in a great while I feel an initial kick because it's from a great judge—say Friendly or Wisdom. But usually it's the opinion itself, if it's a thoughtful opinion.
I guess it might matter. I wouldn't distinguish by circuit. There are certain judges I know and have a lot of respect for. If I find they said something, I might give it a little more weight. Maybe "weight" is not the right word. I think through the case myself, but if a judge I respect agreed exactly with my position, I'd feel more satisfied, while if that judge were diametrically opposed I would pause.

Sure, the better the judge, the more seriously you take them. Some people you know personally, others just through opinions, but you form a sense of how good they are through their work.

And some judges certainly have reputations as being careful, including some on our own court. You can figure they looked at all parts of the problem, didn't just decide off the top of the head. I pay lots of attention to those opinions.

When I see a decision, I want to know who wrote it. There are some people whose judgment I respect and others who I don't. And you know how philosophically attuned you are to that other person. On the negative side too—if someone is knee-jerk in the other direction, I don't trust them as much.

Oh, yeah. There are some I think I'm more sympatico with. Also, I certainly take note of ones from Posner. I'm impressed by [?] and Kearse, Oakes and some others on the 2nd. This is factored in almost unconsciously. Judge Winter is just too conservative. He's supposed to be a fine judge, but I'm not very impressed.

Even if there isn't a definitive body of law in other circuits but there's an opinion by a judge, even a dissent—I respect some judges more than others...For example, Noonan on ethics, Posner on economics. I would want to pick his brain. On the 14th Amendment, Bork.

Yes. It matters very much. I have ratings for judges just like you rate baseball or football players. One of first things I look at is who wrote the opinion... When I see an opinion written by [Judge A, Judge B, or Judge C, all from the judge's own circuit] I give it a good deal of thought before I disagree. The same with judges from other circuits: Campbell, Breyer; I could go down the list. It's a very big factor. Say there was a panel of [A, B, and C] not directly binding on me. It would be very difficult for me—knowing they're consistently fair, learned, researched—I'd be very loath to walk too far away. With other judges, I look and sort of sniff: "This guy's sort of a clown." I don't like to cite them, even if they come out the way I want to go.

These quotations contain strong evidence—stronger than was found in the case analysis—that judges' characteristics affect the success of their precedents. This finding once more raises the question of why the prestige and expertise variables did not perform better in the statistical analysis.
One answer suggested by these excerpts is that not all judges pay attention to the names on opinions; a fair number do, but not all. Another is that for those judges who do pay attention, the effects are likely to be infrequent. Even the last judge quoted does not indicate that he is invariably influenced. Rather, his decision is affected by judges he particularly respects or disdains. It is probable that most judges fall somewhere in between for him. In short, even if, as some of the comments imply, the effects are sometimes powerful, they are infrequent. Consequently, they cannot appear large in a statistical analysis which averages them across cases.

Another point which comes out in the quotations and may also help account for the weak performance in the case analysis is that judges' evaluations of each other are subjective and idiosyncratic. There are probably a few judges who command universal respect (or scorn), but most judges are evaluated differently by different peers. A closely related point is that multiple criteria go into the evaluations. Judging from the above remarks, jurists may earn respect by displaying expertise, fairness, thoroughness, thoughtfulness, or, perhaps, other unnamed traits. Thus, to capture the impact of judges' characteristics more adequately in the statistical analysis, more complex, refined, and individuated measures would be required.

A final point before moving on: in two of the comments quoted reference is made to judges' ideologies. It is likely that this tendency to look to judges with similar views is shared by other judges.\(^5^0\) It is not clear how this tendency should be interpreted. At the

\(^{50}\)We know from Kingdon's (1981) research that it is shared by legislators as well. Interestingly, one judge gave a very different example of the importance of ideology, noting that he would give extra weight to a liberal opinion written by a conservative judge or a conservative one written by a liberal. In his view, such opinions were evidence that a judge had thought hard about a problem.
simplest level, one might suppose it means that judges simply wish to avoid making decisions leading to policy outcomes they dislike. This explanation is less than satisfactory. Very seldom will a judge need the help of another to determine the beneficiary of a particular ruling. One important exception might be when the long-term strategic implications of a decision are unclear. But this exception is probably rare.

Another possibility relates back to the notion that the goals of good outcomes and legal correctness can be intertwined. Anyone who has ever greeted a controversial court decision with joy or disgust knows how difficult it is to separate gut reactions to policy implications from appraisals of legal reasoning. The same psychological dynamics probably extend to our perceptions of other decision-makers as well. Thus, judges may be more suspicious of the decision-making methods of those with whom they disagree ideologically, seeing them as more willing to sacrifice legal correctness to desired outcomes. On the other hand, they may see ideological agreement as resulting in part from agreement on methods of decision-making. If so, the tendency to look to ideological soulmates can grow out of the goal of making good law.

The next hypothesis involving the goal of good law, H2c, holds that adoption rates should be lower for rules announced over a dissent than for other rules. Unfortunately, I had not yet included this hypothesis when I began the interviews. So, aside from the one judge quoted in Chapter One who paid extra attention when he saw a dissent, I have no information from the judges on this point.

I have a good deal of information concerning the importance of other circuits' actions (Hypothesis 4). This segment of the interviews seems to me perhaps the most intriguing, as it reveals a remarkably wide variety of opinions on a question so close to the heart of this
Some judges care little how a rule has been treated in other circuits. Here is a
sample of their remarks:

If it's factually related and there are 3 courts on one side and none on the other, I
may follow if it makes sense. If it doesn't, I don't give a damn if there are six cases
out there if they don't make sense. If I can make a plausible argument on the other
side, I'll do it, although I have to convince the other judges on the panel.

I try not to be influenced by the number of courts. I don't look to the scales, see how
it is tipping. I look instead at the reasoning, whether it's compatible with my own
approach to the law.

There are no rules; I pick what I like.

Some other judges feel no compulsion to avoid circuit conflicts, but take notice when
they see a consensus developing. For instance:

I don't care what any other circuit decides if...[the judge did not finish]. There are
several ways to regard law from another circuit. For example, "That's a very
prestigious circuit so we should follow it." I've never subscribed to that view. When
I start to care is about when three or four circuits have all agreed it means X and
none have said it means Y. If they're on both sides, numbers do weigh some, but
generally very little.

If the 6th Circuit hasn't spoken and I see seven circuits have taken a position with a
pretty logical argument, I'd probably go along. If there's only one other circuit, and
I think its opinion doesn't make sense, then I will look a lot farther, at other cases not
directly on point but having similar or analogous issues.

I think if there's a generally accepted doctrine I would certainly follow it—if it makes
sense. If it doesn't make sense and I see a text that does, I'll follow the text.

[DK: Would it make a difference whether the circuits were 3-0 or 2-1?]
It would make some difference. I would be a little inclined to go with the two, but if
the one made more sense [the judge might follow the one]. If they were 3-0, I would
have to be damn sure that I was right before I didn't follow them.

[DK: Does it matter how the circuits divide?]  
Judge: Yes, it certainly does matter. If they're evenly split, I have to make two
choices: adopt one or the other or fashion a new one. If they're unanimous—say six
all came to the same conclusion—certainly that's pretty convincing evidence that the
rule is right.

Other circuits and state courts are very influential. Most influential is the reasoning
behind decisions. I had a recent case where only two other circuits had addressed the
issue: the 1st and the DC. They came out diametrically opposed. I followed the 1st
because I thought its reasoning was better. I will confess that if five, six, or seven circuits have gone one way I find it very difficult—although not impossible—to say we should go the other way.

Finally, other judges express a reluctance (on their own part or that of other judges) to cause a circuit conflict. They vary some in the intensity of their feelings. The following remark shows a moderately strong sentiment:

If in doubt, I tend to go with [other circuits]. I'm reluctant to create a circuit split, but I will do that if I think the other circuit is wrong. [DK, later: Does the number of circuits matter?] Three or four on the same side would certainly have more weight than one, but I would pay close attention to the one if that's the only decision on the issue. I think most judges would. There's some value to uniformity.

The next three reflect stronger views:

Sometimes you know a case will go to the Supreme Court. There was this one we knew would, because our decision created a circuit split. A number of judges on the court were horrified by this and wanted to en banc. They thought we should go with the 5th [the other circuit].

If there's nothing from the Supreme Court or the [judge's own circuit], what other circuits have done is of extreme importance, I think, in that it influences us. Unless I think what the other panel has done is off the wall I give great weight to it. As [another judge] says, someone has already looked at it and made a rule. Why create a dispute except for a very good reason? So I don't unless, as I say, it's off the wall.

I disagree with the idea that Courts of Appeals should be fully autonomous actors, all going their own way. The idea of disagreeing with others is defended with the percolation idea. I think that's absolutely wrong. Federal law is supposed to mean one thing, not something different in New York, Minnesota, or whatever.... My personal inclination is to join the majority because of my underlying philosophy. If the circuits are split, then I'm on my own, but if they've only gone in one direction, I'll generally go along. It would have to be an off-the-wall position for me to disagree.51

The picture that emerges from these quotations is, by now, familiar. The strength and unanimity of circuit support are important influences for judges, but for some judges much more than for others.

51This judge is the same one referred to in the previous comment.
The comments also help explain why they are influential. I suggested in earlier chapters that the influence can arise from two distinct motivations. The interviews confirm this. In the last quotations, there is explicit reference to the goal of legal uniformity. Some of the other remarks implicate—one quite directly—the goal of making good law. The more circuits there are supporting a rule, the more difficult a judge finds it to believe the rule is legally wrong.

Judges' concern with producing decisions that are legally sound also comes across in references to the actual content of opinions. There is some of this in the above quotations. The following excerpt also provides a good example:

Circuits are not bound to follow the precedents of others, but if the other circuit hands down a decision on a novel area, we'll analyze it, and if the reasoning commands respect and it seems well-analyzed, we are disposed to adopt that reasoning—but not commanded to, and many times don't. We come to the conclusion based purely on our own reasoning. But we do respect other jurisdictions—courts of appeals and also state high courts of reputation and expertise—and we defer very often to their reasoning and apply it.

As I have mentioned already, I was unable in the case analysis to examine the characteristics of particular opinions. Yet as the interviews progressed I encountered a number of comments like the one above and decided to delve further into the issue with the judges. They had no easy time distinguishing good from bad opinions, but their efforts were interesting and, at times, illuminating. I will digress briefly to discuss these efforts, taking up the remaining hypotheses afterward. Here are several examples of judges' statements:

If the opinion is clear, follows a rather defined process of logic from premise to conclusion, citing facts to reach a reasoned conclusion; if so, I'd be attracted to it. Logic, presentation, clarity, style. I despise opinions with a bunch of opinions cited saying it's the only decision that could be reached but it doesn't match with the facts.

How persuasive is it? It grappled with issues and came to some conclusions. If there are good reasons for the conclusions, then I will probably tag along. If they're not very good, I'm not going to follow.
If I think an opinion is too preachy, trying to make broad law, I get a bit leery. I like the case by case approach. With the broad approach, the rule can fail when you encounter something unforeseen.

[The following interview took place with a clerk (C) present along with the judge (J).]

C: When I read different opinions, I'm influenced by which I think is better written and more logical.
J: I think that's right.
C: One might just throw in a sentence. Another explains it and you see the point. It seems sometimes the bad rules are not well explained.
J: I think that's exactly right.

Sometimes the facts of the specific case and how the court reasoned can be very persuasive. If the opinion is well done and covers all bases, I think more of it. If the opinion is cursory—doesn't get into the problems it's generating—I pay less attention to it.

Evidently, judges are considerably more inclined to adopt rules that are carefully and logically explained and defended than ones that are simply announced. Of course, this is not to say that lengthy, nuanced opinions are invariably influential. Indeed, they may arouse other judges' suspicions. As one judge said:

"There are some opinions that are so opaque and convoluted, at a certain point I get the feeling they're straining over a gnat. It has to be simpler than what I'm reading, so I distrust what I'm reading."

Still, we can conclude that in analyzing a rule, judges look at more than just what the rule does or how it affects policy. They look as well to the quality of reasoning behind the rule.

Even a well-reasoned opinion may not win the approval of some judges. In discussing the weak performance of antitrust precedents in Chapter Three, I suggested that particularly novel or broad legal rules might be regarded with some distrust. Two of the comments just quoted (the third and fifth in the set) lend credence to the point. Undoubtedly, many judges see law-making as an essentially incremental process and are disinclined to follow rules that deviate from this norm. There need be no ideological component to this stance; both liberal and conservative rules can be constructed either in pieces or out of whole cloth. It may, rather, be pragmatic in nature, arising from the view that a rule which appears
sound in theory may work poorly in practice or may work in one situation yet fail miserably in another.

This view appeared to play a role in events described to me by two judges. Both were responding to the final interview question, in which I asked for their thoughts as to why some rules spread easily while others are resisted. This is what they said:

Well, I'll tell a story I probably shouldn't tell. My wife is an actuary who deals with [a statute]. An old law school classmate of mine on another circuit wrote an opinion in a [case dealing with that statute]. My wife said not only was it all-out wrong, but it would create havoc in the _____ world if it was followed. She wrote an article on it. A few years have passed, and it turned out that nobody followed it. It was unworkable.

I once, with [another judge in the circuit] created [a new rule], that youth are a mandatory component of a jury pool. It's a circuit court decision that was never followed that I know of and was crudely commented on. Finally, after 10 years I had to eat my words. Probably it was far more complicated and difficult to live with [than the judge thought at time]. Other courts probably said: "Where will it stop?" looking at other facts, and so on.

Taken together with the other remarks, these provide rather compelling evidence that judges are affected by the perceived breadth and novelty of precedential rules, as well as the quality of the opinions in which they are laid down. These influences were not uncovered in the case analysis of Chapter Four.

Returning to the hypotheses tested in that chapter, we come to H5, which holds that the previous actions of a judge's circuit should influence that judge's treatment of precedential rules. Unlike what was found for the other hypotheses, here there is almost no interesting variation to report. One judge claimed that his circuit was unlike others in that it allowed panels to overrule each other. When I asked his circuit colleagues about this point, they disagreed with his interpretation of the circuit rule. No other judge said anything like this. Typically they referred to the importance of circuit precedents in an offhand way. Answers to my questions about the influence of precedents generally began
with something like: "As long as there is no controlling precedent from the Supreme Court or the [judge's] circuit" or "Of course, if there is a precedent on point from the Supreme Court or the [judge's] circuit, we're bound." The impression I got was that they viewed the necessity of following circuit precedent as self-evident and believed I knew (or should have known) this.

These kinds of responses are helpful in that they strongly confirm the hypothesis. In a way, though, they are disappointing. It is no secret that judges do sometimes (explicitly or implicitly) disregard circuit precedents (Wald 1986). I would have liked to get from the judges some idea of why this occurs, but their perfunctory replies cut off this avenue of inquiry.

The last hypotheses to discuss are those positing variations in impact across fields and judges. Because I did not ask judges directly about the influence of ideological distance, I was unable to find out if they thought its impact greater in certain fields than in others. This is no great loss, as the hypothesis is one of the least problematic of the project. If ideological distance matters, it would seem almost a truism that it would matter more in more ideologically salient cases.

The other hypotheses are more debatable, yet they too are supported by judges' statements. Concerned as I was with maintaining a natural flow to the interviews, I could not probe these issues with any great precision. Rather, in the course of discussing the factors influencing treatment of precedents, I asked in a general way whether the influences were different in different types of cases. As a result, it is not always easy to relate individual statements to specific hypotheses. Still, as a group they reflect well on the hypotheses.
Notwithstanding my effort to avoid putting words in judges' mouths, some of the affirmative responses are lukewarm and probably should not be weighted too heavily. For example:

First, we get far fewer antitrust cases than search and seizure. Yeah, I'd probably pay more attention to an antitrust case from Posner or Easterbrook than a search and seizure case from the 7th.

Fortunately, some other prompted responses carried greater conviction, and some judges even raised the point on their own. Of the next group of quotations, the first three come from responses to unrelated questions (the third, very early in the interview).

There's some tendency to follow other circuits because that's the easy course. Also, sometimes it's the best course. It depends on the importance of the question: if it's minor, its easier to follow; if it's monumental, you think, more than just follow.

Well, I think one big consideration is the degree to which judges have strong views on the subject involved. In a highly technical area, where judges are not likely to have strong feelings, I think there's a much greater tendency for a snowball effect. Once one case has been decided, its easier for the others to go along than to take another position. I see this a lot. This sometimes makes a big body of bad law. That's where I've said I'll go against a number of other circuits.

I think all judges are products of their backgrounds, experiences, so there may be areas from which they come—comfort, familiarity—that finds a judge more willing to be firm in his position or take the lead in attempting to persuade others. In areas where a judge is not comfortable, I think there might be a tendency to let yourself be persuaded, listen to arguments, even be deferential (that may be too strong a word) to those who know more about the subject.

Yeah, I think in an area where I don't have much experience I would give a great deal of deference to a judge with much more experience than I have. Oh, yes.

Sure, I think that's true. As a practitioner and in other capacities, I learned a lot about utility regulation, so I figure I know more than the run of judges, so I give less weight to others than to me.

Certainly where you're more confident in your own knowledge you're less likely to defer. But even in a case where you are confident, you still hesitate to start overruling others.
As I mentioned, the hypotheses are somewhat jumbled in a few of these quotations. Nevertheless, together they touch on every aspect of the hypotheses, providing evidence that judges’ deference to expert judges and circuit consensus are less in salient fields or where the judges are themselves expert.

CONCLUSION

The data from the interviews are not easy to interpret. Some readers might wish to see more numbers. They might be more willing to grant the validity of the hypotheses if it were shown that more than half the judges interviewed agreed with them. But to proceed this way would be to introduce a false sense of precision. Not all of the judges were asked the same questions; not all responses were intelligible. In an important way, the data from the interviews are simply messier than those from the case analysis.

Does that mean the interviews should be discounted, treated as mere illustrations accompanying the main text? I think not. As I argued at the beginning of the chapter, the hypotheses hold, not that all, or even most, judges react to certain influences, but that some do. Therefore, as long as we can make the reasonable assumption that the judges in the sample are similar to their colleagues, any definite affirmative response should count as evidence for a hypothesis. In my view, most of the statements quoted above fit this criterion. The specific language the judges use reflects serious commitment to their answers, as does their use of examples. This is typically even more evident when the interviews are seen in their entirety. Obviously, the interviews could not be presented whole, but it was for this reason that I quoted from them so extensively. Finally, I should note that in most cases, the
responses quoted represent only a sample of those that could have been chosen. Other similar answers were excluded for considerations of space and readability.

For those willing to read the evidence in the way I suggest, what do the interviews tell us? For one thing, they clearly indicate that each of the goals assumed at the outset of the project is indeed a significant one for many judges. For another, they support those hypotheses that could be tested through the interviews. Not all of the hypotheses are supported equally forcefully or precisely, but ultimately the interviews reinforce or strengthen the findings of case analysis, finding the following factors to be influential: other judges’ expertise and prestige; the weight of circuit support; intra-circuit precedent; and, as moderating influences, the salience and difficulty of cases and the expertise of the judges themselves.

The interviews also reveal things left hidden by the case analysis. They give us some insight into how judges gain the respect of their colleagues, what traits generate prestige. They indicate that judges may give more weight to the opinions of ideological fellows even when their goal is to make good law. They show that judges care about how an opinion is written and help us understand why some opinions are preferred to others. And they suggest that some kinds of rules—narrower, more cautious ones—are more likely than others to be well received.

Finally, and I think just as importantly, the interviews reveal considerable variation across individual judges. They do not all possess the same mix of goals. Naturally, then, they are not all influenced equally by the same factors. The differences are not always small, either. For instance, recall the judges’ remarks about the importance of what other circuits have done. They range from very concerned to not at all. The interviews serve as useful
reminders that even as we attempt to formulate generalizations about judges' behavior, we should be careful not to overlook consequential differences.
CHAPTER 6

I begin this chapter by summarizing the results of the preceding analyses and considering some implications of the findings. After this, I will offer thoughts about possible directions for further research and this project’s place in judicial scholarship.

FINDINGS

Neither the case analyses nor the interviews provide wholly satisfactory tests of the hypotheses. Both methods have inherent limitations of scope and precision. Neither is able to cover all the factors identified as significant by the other. Nor can either alone yield definitive answers to specific questions.

On the positive side, though, they are highly complementary, each compensating somewhat for the most important weakness of the other. This is easy to see moving from interviews to case analyses. The chief drawback of the former is the inescapable subjectivity of the data sources. No matter how many judges state a particular position, there is always some chance that their words reflect what they think should be, rather than what is, or that they simply misunderstand their own actions. The case data, on the other hand, are collected and interpreted by a relatively disinterested outsider.

The main weakness of the case analysis arises from the narrow operationalization of concepts that are themselves broad and fuzzy. Rarely can a constructed measure capture completely the phenomenon it is meant to represent. At the same time, it may reflect
something of other factors or influences as well, leaving itself open to competing interpretations. One of the great advantages of the interviews is that they allow us to get at questions more directly. Thus, for example, instead of asking whether adoption rates increase with circuit support for a rule, I was able to ask judges explicitly whether circuit support influences them.

When evidence from the two methods is combined, three of the hypotheses do very well. The data leave little doubt that the ideological implications of rules, circuit support, and intra-circuit precedent all affect judges’ decisions whether to adopt precedential rules. The remaining hypotheses are all supported, but to varying degrees.

Judging from the case analysis, a dissent from an initial decision seems to undercut a precedent’s success. However, due to my oversight, there is very little evidence on this from the interviews. Furthermore, dissent is one of those variables that can be interpreted in different ways. Dissents may matter in themselves, as one judge suggested, signalling later judges to treat a rule with caution. On the other hand, the variable may simply serve as a surrogate for legal complexity or difficulty. That is, rejections may follow a dissent, not because of the dissent itself, but because the rule is problematic. Taking this into account along with the fact that the variable performed moderately well both here and in Johnson’s (1987) compliance study, I offer the following assessment: we do not have firm evidence that dissenting opinions are influential, but we have enough to justify continued attention to the variable.

Unlike dissents, the factors of expertise and prestige appear more important in the interviews than in the case analysis. It will be recalled that the variable PRESTIGE did not perform well in Chapter Four. And while it is true that in the final equation of Chapter Four the coefficients for expertise were quite large, the estimates are based on very few cases and
should not be accepted at face value. Nevertheless, some of the judges interviewed stated
with conviction that the characteristics of other judges can affect their own decisions.

This is one area where I think the results from the interviews should be emphasized
over those of the case analysis. On the one hand, as I have noted, the concepts are not easy
to operationalize, their effects may be overshadowed in the case analysis by other variables,
and the type of impact they are likely to have—infrequent yet important—is difficult to pick up
in a statistical analysis. On the other, the interview statements attributing importance to other
judges' traits are forceful and unambiguous. Ultimately, while the results are far from
conclusive, I believe a good case has been made that these factors matter.

The same could be said about the interaction hypotheses, those positing variation
across fields and judges. Case analysis results indicate that ideology matters more and circuit
support less in the more salient, less technical field (search and seizure) than in the other two.
Especially since they are backed up by statements from the interviews, I am inclined to think
these results are real. They must still be approached with caution, though. After all, only
three fields are covered, and they might have broken down this way by chance. There is less
evidence for the remaining interaction hypotheses in the case analysis, but they too are
supported in the interviews.

In short, I believe the same conclusion applies to each of the factors other than the
first three discussed. Only with a low standard of proof could one claim that they have been
shown with any certainty to be influential. Yet each has made a respectable showing—strong
enough, I think, to encourage scholars to keep them in mind when thinking about the spread
of precedents and to include them in analyses when conducting research.
IMPLICATIONS

As I mentioned in Chapter One, because the hypotheses are derived from assumptions about judges' goals, their success or failure reflects back on those assumptions, telling us something about what goals matter to judges. They do not reflect perfectly, though. Not all of the hypotheses follow uniquely from particular goals; that is, some might be explained in terms of other, unspecified goals. I do not find these alternative explanations as plausible as the primary ones, but they should not be ignored. I will now briefly consider some of them.

At first glance, the connection between the goal of promoting desired policy and the hypothesis that judges adopt rules ideologically close to them appears unquestionable. In much decision-making literature, the connection is taken for granted; ideological voting patterns are taken as evidence of the goal.

Yet, there is another way to understand ideological voting. It is possible that judges desiring more than anything to produce legally correct decisions could differ from each other and break down along ideological lines. The concept of motivated reasoning may help to explain this. According to some psychological studies, even when people attempt to make accurate decisions, if they have incentives to reach particular conclusions, they are likely to be more selective in their perceptions and may adopt different decisional heuristics than they would otherwise (Kunda 1987, 1990). Of course, motivated reasoning could not induce ideological voting unless judges held the goal of promoting policy preferences, but the goal need not be explicit or even conscious, nor must it be primary.

Circuit support for a rule is another theoretically ambiguous factor. I have already pointed out that its impact could arise from either the goal of coherent and consistent law or that of legally correct decisions. In addition, it might sometimes come from a desire simply to dispose of a case: the panel just counts up the sides and goes with the majority. More
plausibly, it might reflect a goal of maintaining professional respect, here accomplished by avoiding reversal by the Supreme Court. Another possible alternative is that judges seek to retain the good will of their colleagues by treating their opinions with deference. Finally, judges may follow precedents as a means of preserving judicial power, fearing that the creation of conflict could undercut courts' legitimacy.

These last three goals might also help account for adherence to intra-circuit precedents, as might the goal of maintaining harmony in the circuit. Furthermore, the high regard of colleagues may be instrumental in the achievement of another goal—namely, power and influence within the court.

The remaining factors—judicial prestige and expertise—appear to me more obviously linked to their goals. Perhaps judges feel they are less likely to be reversed if they follow the leads of respected judges, but it seems far more plausible that they follow them in order to produce legally sound decisions.

Ultimately, however, even considering the evidence from the interviews, this study does not allow us to reach definitive conclusions about the goals motivating judges. This is a limitation of the study, but it does not, I think, grow from any particular flaw in the research. Goals, after all, are abstract and intangible. No behavioral study can allow us to identify them with complete confidence. Nor—unless we become willing to accept people's self-perceptions uncritically—can interviews. Assessed by a reasonable standard, then, I believe this research contributes to a broader understanding of judges' behavior, providing firm, though not irrefutable, evidence of the impact of several distinct goals.
FUTURE RESEARCH

There are several ways in which this project can be improved on in future studies of judges’ reactions to new legal doctrines. One task, if the factors examined in this study are included in future research, will be to improve upon the empirical indicators used here. The measures of ideology, prestige, and expertise are each flawed in two significant ways. For ideology, one flaw is its restriction to a single dimension. As I have already noted, the ideological directions of rules and ideological predilections of judges can fall along any of several dimensions. If researchers can find non-circular techniques for identifying where judges and rules belong on these dimensions, they should be able to measure the impact of ideological distance more accurately. They could do even better by refining the measure of rule ideology, adding intermediate categories so that we could say, not just whether a rule is liberal or conservative in its implications, but how liberal or conservative it is.

Measures of prestige and expertise would be better if somehow scored from the perspectives of other judges. Judges’ assessments of their colleagues are idiosyncratic, and attempts by researchers to assign a single rating on behalf of all later judges result in imperfect substitutes. Perhaps more realistically, rating measures could be expanded to cover more specific traits, such as thoroughness, learning, and writing ability.

Like prestige and expertise, judgments as to the difficulty and salience of cases are subjective and varied. Creating variables to reflect this fact may not be feasible, but we could improve on the effort in this project by drawing cases from more fields of law. With more fields, if we found the expected pattern of differences in impact across fields of unequal difficulty and salience, we could be more confident that the differences are in fact attributable to those characteristics rather than chance.
None of these improvements would be easy to implement, and ultimately, I am not optimistic that the measures can be strengthened much. However, the possibilities for ideology and field characteristics appear better than those for judicial traits. Moreover, there are several additional research paths that are probably more manageable and at least as likely to be fruitful.

In particular, I believe we can develop fuller models of the treatment of precedents. This could be done even without adding to the basic assumptions of this project. For instance, in addition to examining the more specific judicial traits just mentioned, we could follow the lead of compliance studies (e.g., Tarr 1977; Johnson 1987) and try to code opinion characteristics. Clarity and simplicity might be worth another look, although the evidence from this project does not ease my suspicion that their effects are not large enough to be discernible. The evidence points more strongly to the importance of care, thoroughness, and logical rigor in opinions. The question for these variables is whether they can be assessed with a reasonable degree of objectivity.

Just as differences between judges and between opinions can matter to other judges, so can differences between legal rules. We have found this to be true of rules' ideological implications. Findings in Chapters Three and Five suggest that other characteristics such as breadth and novelty may also be important. Specifically, it appears that judges may apply an especially high level of scrutiny to rules that break sharply with established doctrines or that are written in particularly broad fashion. I do not imagine that these variables would be as difficult as some others to code.

Another way to expand the model would be to look outside the court system for influences. Scholars have shown that such aspects of judges' environments as public opinion and party control of the other branches can have an impact on their decision making (e.g.,
Gibson 1980; George and Epstein 1992) and compliance with higher court decisions (Tarr 1977). Nothing in this project speaks to this point, but it is reasonable to suppose that the influence of these factors could be seen in judges’ treatments of precedents.

Finally, we could follow the lead of scholars like Merryman (1977) and Friedman, et al. (1981) in investigating such other legal influences as law reviews and legal texts. If judges look to them for help in deciding cases, then their reactions to new rules may affect the judges’ reactions in turn.

Of course, there is no reason for future studies to be restricted to the present assumptions. I have not investigated the possibility that judges act strategically in considering new rules. Now that we have found some evidence that policy and legal correctness goals play important roles, it might be useful to turn our attention to strategic behavior. After determining how strategic behavior should be manifested and when it is most likely to occur, we could search for evidence of it.

Even maintaining the assumption of sincere behavior, it would be possible to expand the theoretical base of the research. Judges can be motivated by any number of goals. Not all of these are relevant (operative, in Baum’s (1994) terminology) in all situations. And, as already noted, I believe the goals included here are the ones most likely to affect the treatment of new rules. Still, there are others that might play important roles. Among those in Baum’s list, I would note particularly: maintaining harmony with other judges; holding power within the court; gaining promotion to a higher court; and achieving popularity and respect in the legal and general communities.

Finally, the success of this project appears sufficient to warrant extending its approach to other judicial systems. In a fascinating essay, Shapiro (1970) points out that state supreme courts, which are under no obligation to respect each other’s rulings, have been known to
produce law "with a remarkably uniform core." (p. 50) There are almost certainly differences between the treatment of precedents in state courts and in federal courts, and it would be intriguing to see how well the factors influential in the latter explain behavior in the states. If the framework succeeds there, we could—with modifications—apply it to other countries and perhaps even across countries—for example, to applications by European courts of European Union law. Even if it were unsuccessful, it might teach us something interesting about differences in court systems.

CONCLUSION

I will conclude with a few thoughts about the theoretical approach of this project, for I believe the project makes something of a methodological contribution to judicial studies. It does so by demonstrating the utility of integrated research. It has drawn on work from decision-making, compliance, and diffusion studies. Certainly, it is not unique in pulling from distinct areas of judicial research. A number of scholars have previously integrated different subfields in studying an aspect of judicial behavior. Among them are Tarr (1977), Johnson and Canon (1984), Johnson (1987), Swinford (1991), Epstein and Kobylka (1992); and Songer and Haire (1992). Yet it seems fair to state that these types of studies remain exceptions in judicial politics. Most studies continue to be grounded in a single area of research.

In many cases, this is entirely appropriate. We still have much to learn about all aspects of judicial behavior, and we could not progress without a good deal of narrowly focused research. Nevertheless, since many aspects of judicial behavior are linked to each other, I believe our field would benefit from increased efforts at integration—using insights into one kind of problem to reveal something about others.
Along similar lines, I think we would be wise to devote more attention to relatively broad issues. Topics such as decision-making, compliance, and legal mobilization are highly interesting and have important implications in themselves. Yet surely one of the key reasons we study them is because we wish to understand why certain policy outputs emerge from the courts—that is, why the law is what it is.

If this is true, it is difficult to explain—or justify—the paucity of research devoted to the explanation of policy outputs, especially below the level of the Supreme Court. Scholars have committed a great deal of energy to understanding how litigants and attorneys decide what cases to bring, what arguments they choose to present, how judges select cases, how they arrive at their decisions, and how collective decisions emerge from the individual ones. They have spent much less time asking how, taken together, these various aspects of the policy process determine the content of policy.

The present study does not integrate these components nearly as fully as would be ideal. Consequently, it contributes only a little to our knowledge of what is, after all, a very big topic—the development of judicial policy. Nevertheless, I believe it demonstrates the value of a particular approach to that topic. If future research can build on and further develop this approach, our understanding of judicial policy-making is likely to grow substantially.
APPENDIX A: INTERVIEW QUESTIONS

This is a copy of the notes I used to conduct the interviews. Most interviews departed from the order and wording given here in some way, but it gives a generally accurate picture of how the interviews were conducted.

Before we begin, I'd like to remind you of the purpose of the interview. I'm writing my dissertation on the development and spread of law and thought you might be able to give insights into the role of judges in that development.

Everything we discuss is purely confidential. If you allow it, I might want to quote something, but I won't give the reader or anyone else a way to guess your identity.

I'm interested in whether judges tend to specialize, develop expertise in particular areas: Are there any particular fields of law in which you consider yourself expert [prompt: any in which you specialize?]

Does this circuit have special expertise in any areas?

I'm particularly interested in three areas of law: antitrust; search and seizure; and environmental law.

Thinking back over the last 10 or 15 yrs., are there any circuits (or individual judges?) with particular expertise in antitrust (in your own opinion or by general reputation)?
Would it be possible to rank the circuits in some way?

What about search and seizure? Environmental law?

It seems that circuits sometimes gain reputations for general excellence. [If needs cue: An example would be the 2nd Circuit in the 1940's and 50's.] Are there any circuits today which have a reputation for general excellence or which in your view merit such a reputation?

Is it possible to rank the circuits on this dimension (perhaps high, medium, and low)?

Returning for a moment to the three areas of law I mentioned—antitrust, search and seizure, and environmental law—would you say that any of these areas are generally more or less difficult than the others? I mean, do they generally vary in the amount of mental effort you have to put in to decide cases?

Of the three areas, which do you have the greatest interest in? Which the least?

Now I'd like to ask some questions about how you view different aspects of your work.

First, when you're writing an opinion, do you have any particular audience in mind?

I would imagine that when you are deciding a case, you might have certain general objectives in mind. Let me mention some possible objectives: could you tell me how important, if at all, each one is to you when you're deciding a case?

a) Making sure that the body of law in an area is coherent and consistent.

b) Deciding cases promptly/keeping up with caseload

c) Insuring that the outcome of the specific case is good (just, beneficial to society)

d) Making sure the decision is legally correct, regardless of whether you are happy with the specific outcome.
In your view, what makes a decision legally right or wrong? In other words, how can we distinguish good law from bad, apart from our feelings about outcomes?

Are there other types of objectives which come to mind when you're deciding a case?

How important would you say other judges' decisions are to you when you're deciding a case? Here I mean Supreme Court, other panels of your own circuit, or other circuits, so if you feel we should distinguish between them on this and next few questions please do.

Can you estimate the percentage of cases not covered by Supreme Court or circuit precedent?

How do you usually find out about decisions of other judges? [Prompt: briefs; clerks; own research; contact with other judges.]

How good a job do the briefs usually do of bringing relevant cases to your attention?

We'd expect judges to be more likely to adopt legal rules from other decisions in certain cases than in others. For instance, if the decision is clearly relevant, as opposed to one which is not. I'm wondering if there are other factors that affect this choice too. For example, would you be more inclined to adopt rules from certain courts or judges than others? Why? Anything else about the other courts?

Could there be something about the case itself or the issues involved that would make you more or less likely to adopt the earlier legal rule? [Prompt: field you're expert in; care about issue; difficulty]

What about the earlier decision itself? Are there any characteristics that would make it more or less likely that you'd adopt the rule.

I'd like to end with a question close to the heart of the project. It seems that sometimes a court sets down a legal rule and the rule catches on quickly—lots of courts adopt
it. Other times it becomes very controversial. Still other times, it is pretty much ignored and falls by the wayside. I want to ask if from your own experience you have ideas about why some rules get treated differently from others. Maybe why some get attention and others don’t? Of those that get attention, why sometimes it’s smooth sailing while other times it’s rocky?
APPENDIX B: CODING RULES

Below are the notes I used to code variables for the case analyses.

Cases

1. **New Rule:** Issue not addressed by other circuit or directly by the Supreme Court. Or, new approach to old issue. Once have identified a probable new rule, start reading through cases to see if any mentions of earlier incarnations of the rule. If find any, discard the rule.

2. Whether rule is relevant for current case: 1) See if rule is explicitly addressed by court (does not have to be cited). AND/OR 2) Frame rule as answer to a question. Then ask question in current case and see if answer could affect outcome of case. If could, then relevant. When precedent is distinguished, if feel distinction is good or can’t decide, leave out of analysis. Only include fairly clear false distinctions (where rule as stated by first court would affect outcome); code these as rejections.

3. Citation connection: If original rule or any case citing original rule is cited.

4. Treatment— follow/same rule: If rule announced by current court is same or essentially same as first. Does it answer the relevant question in same way as the first?

5. Treatment— inconsistent: Either announces competing rule or announces no rule but answers question in way could not if used rule.
6. Treatment—no rule/consistent. No rule announced, way question answered is way
would be answered using rule.

7. Rule ideology: Does rule, as opposed to implied or explicit alternative, favor party
thought of as liberal side or conservative side? Dichotomous.

Judges

1. Expertise: 1 if search of Index to Legal Periodicals by author’s name limited by
subject and/or title including field name yields one or more entries prior to 1995. 0
otherwise.

2. Year appointed, president’s party in Almanac of the Federal Judiciary.

3. Ideology. 1-5. Liberal, moderate liberal, moderate, moderate conservative,
conservative. From Almanac of Federal Judiciary.* Find sentences or paragraph on ideology
in lawyers’ evaluation section. Take informal average of comments, eliminating single
outliers. (e.g., if 5 say conservative and one says moderate conservative, code as
conservative.) Use Almanac’s summary statement as guide, but not conclusive. If between
two categories, choose more moderate one. (e.g., if two say moderate conservative and 3 say
conservative, choose moderate conservative.)

4. Quality/prestige. 0-7. Below average, average, average/good, good, good/very
good, very good, very good/excellent, excellent. From Almanac.* (These ratings are based
directly on lawyers statements, not rewording of them. The average rating of judges is not
"average," but "good/very good.") Look at two separate sections: paragraph on legal skills
(usually first); paragraph or lines on opinion-writing. Give equal weight. Again, take
informal average. Statements like "excellent" "top-notch", "best on the court", "extremely
good" are excellent. Ones like "very good" "very strong" "high level", etc. are very good.
Very good/excellent will have some of each. Excellent is reserved only for judges where clear consensus goes that way. Again, if doubt go for more moderate. Rank "average/good" or lower for statements like "not very inspired", "not a scholar" (unless qualified by a good compliment) "nothing special", "average", etc. Below average should be very rare—only if clear consensus of negatives. Again, note that lawyers systematically over-rank.

* In 1995 or 1994 editions if possible, then 93 or 92, then 91. Current have most detailed descriptions and most comments. Gets progressively slimmer biennially, until none before 1990.
REFERENCES


