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Source: *The Journal of Politics*, Vol. 68, No. 2 (May., 2006), pp. 308-321

Published by: The University of Chicago Press on behalf of the Southern Political Science Association

Stable URL: https://www.jstor.org/stable/10.1111/j.1468-2508.2006.00408.x

Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making

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One hundred and fifteen law students were given a mock brief with identical legal arguments on both sides of a standing dispute in litigation involving restrictions on political expression of public employees. The content of the expression at issue (pro-choice versus pro-life) and the jurisdiction where the case was pending (with versus without controlling authority on the standing issue) were experimentally manipulated. Participants' policy views on (1) abortion, (2) free speech, and (3) Hatch Act restrictions were measured to assess their influence on the standing decision. In line with traditional notions of legal reasoning, participants were able to separate their views on Hatch Act restrictions from the standing decision. Opinions on free speech, however, influenced judgments consistent with attitudinal hypotheses. Also, participants' opinions on abortion interacted with speech content to influence judgments—but in a manner not wholly consistent with legal or attitudinal accounts of decision making.

> While the Court gives lip service to the principle, oft repeated in recent years, that standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, in fact, the opinion which tosses out of court almost every conceivable kind of plaintiff who could be injured by activity claimed to be unconstitutional, can only be explained by an indefensible hostility to the claim on the merits.—*Warth v. Seldon* 422 U.S 490, 520 (1975) Justice Brennan, *dissenting*

Our judicial system requires that judges make a dichotomous choice between adverse litigants. This seemingly simple judgment is usually embedded in complex fact patterns where several issues are raised that could serve as the basis for deciding a case one way or the other. Cases with multiple issues are common because litigation arises from real-world situations and attorneys are trained to present all arguments favoring their client's position. Surprisingly, most social science research on legal decision making treats cases as if they were unidimensional. Scaling studies, for instance, assume that cases involve a single "dominant" issue and that outcomes can be explained or predicted by ordering the justices' preferences along that dimension (Rohde and Spaeth 1976; Schubert 1962; Segal and Spaeth 1993). Critics of scaling techniques argue that, at best, they lose information about alternative issues judges may consider; at worst, they can result in the mischaracterization of votes judges cast for other reasons (Mendelson 1963; Tanenhaus 1966).

Treating cases as if they involve a single issue also ignores the possibility that there is a *connection* between issues in litigation. How decision makers view one legal issue may influence their reasoning with respect to another. This possibility is especially intriguing in the context of cases involving "threshold" questions that accompany substantive disputes. A threshold issue is one the court must decide before it can consider a matter or invoke a particular mode of analysis. Some threshold issues, including jurisdiction and the family of issues relating to justiciability, concern the appropriateness of using judicial authority to resolve disputes. Other threshold issues involve preliminary matters judges sometimes need to address to determine what rules will guide the analysis of substantive claims.

An assumption in traditional characterizations of legal decision making is that reasoning across issues is independent: how a judge views a claim on the merits *should not* affect her reasoning on threshold issues. Given the potential for decisions on threshold matters to shape outcomes, however, it is not unreasonable to think judges' preferences on threshold issues may be related to how they view other issues in litigation. Judges who look favorably on a plaintiff's substantive

The Journal of Politics, Vol. 68, No. 2, May 2006, Pp. 308–321

 ISSN 0022-3816

claim may be more likely to conclude the plaintiff meets the requirements necessary to litigate the matter; conversely, decision makers who sympathize with the defendant may be more likely to dismiss the matter on preliminary threshold grounds.[1]

The potential for such behavior in the context of nested decision making is problematic. Threshold matters are usually classified as procedural or technical issues; they do not attract a great deal of attention relative to substantive claims. It has been suggested by political scientists who study judicial behavior from attitudinal and rational choice perspectives that the ability of judges to dispose of controversial claims on such grounds may be a tempting way for judges to make decisions consistent with their preferences while flying "under the radar." Segal and Spaeth (1993, 19–31) assert Supreme Court judges use threshold issues to allow them to reach the merits in cases they want to address and avoid doing so in cases they do not. In their analysis of the strategic behavior of justices on the Supreme Court, Epstein and Knight explicitly state, "interjection of an additional dimension to a case can be a rational course of action for a policy minded justice" (1998, 89). Despite such charges, accusations that judges actively use alternate lines of authority to justify policy-directed outcomes have not been subject to empirical investigation.

This study had two aims. The first is to test a potential mechanism of attitudinal influence that has long been of interest to judges and academics concerned with the ability of judges to comply with decisional norms that go to the heart of their legitimacy. Specifically, I test whether legal decision makers can separate their attitudes about substantive claims from their reasoning on threshold matters in litigation. A second, equally important, goal is to demonstrate the potential of experimental methods for studying important aspects of legal reasoning. Judicial scholars have recently noted a "sea change" in studies of judicial behavior with rational choice becoming the dominant method of inquiry (Bonneau and Hammond 2005; Epstein and Knight 2000, 625). Here I argue that rather than forgo the psychological tradition that has informed our knowledge of the factors influencing judicial decision making thus far, we should embrace it more explicitly—including cognitive theory and experimental methods.

To illustrate the utility of the approach I describe an experiment with 115 legally trained decision makers testing separability of preferences. The study is unique because it involves giving law student participants a realistic brief where case facts and legal arguments are controlled. By premeasuring participants' attitudes about a number of issues raised by a complex fact pattern I am able to determine not only *whether* preferences make a difference in the seemingly neutral threshold judgment they are asked to make, but *which preferences matter* from a number of possible alternatives and *under what theoretically relevant circumstances*. The result is a much richer understanding of attitudinal influence than studies that correlate blunt measures of preference with judicial case votes have yet been able to provide.

Separable Preferences in Legal Decision Making

The idea that the preferences of citizens and public officials may be related across choices is not new. The concept of separable preferences has been used by political scientists to explain the behavior of voters (Hinch and Munger 1997), citizens responding to political surveys (Lacy 2001), and members of Congress (Schwartz 1977). It has also been invoked in the judicial literature to explore how judges' preferences for outcomes may be related to the degree of authority they think cases should yield (Schwartz 1992).

According to Schwartz, preferences are separable if "a decision-maker's preferences along any particular issue dimension does not depend on her preference along any other dimension" (Schwartz 1992, 220). This characterization of the relationship between preferences comports with traditional accounts of legal reasoning in cases involving multiple issues: distinct issues are to be considered independently in terms of relevant facts and authority judges bring to bear on their decisions. Moreover, accepted norms dictate that judges should separate their feelings about particular claims and/or litigants from their reasoned consideration of adversarial disputes. In practice, decision makers may fall short of this ideal. As the quote from Justice Brennan illustrates, even judges acknowledge the potential for issues to "bleed" into one another in the process of legal decision making. One does not have to look too hard, or too long, to find

[1]These examples set forth a "sincere" use of the threshold doctrine where judges' decision on the threshold issue allows them to hear claims they believe have merit and dismiss claims that do not. It has also been suggested that judges may use threshold issues more strategically to hear cases when they are opposed to the plaintiff's claim because they think the case is "weak" on the merits. Although this strategic use of the doctrine is entirely plausible, it is beyond the scope of the current study.

similar accusations suggesting improper motives drive threshold decisions that deprive particular parties of their day in court.

Given rules of decision making that dictate threshold matters must be considered first in litigation and the potential for threshold issues to shape outcomes, there is no question that judges *could* act to avoid substantive questions in this manner. Whether they do so intentionally is another matter. Indeed, when acting in ways that may be classified as strategic with regard to threshold issues, judges do not demonstrate any awareness that they are acting improperly. Judges never *say* they are dismissing claims because of how they feel about particular litigants or alternative issues raised in complex cases; they do so through the seemingly neutral analysis of doctrine relating to the threshold question. Moreover, they become defensive when people accuse them of making threshold decisions on improper attitudinal grounds (Edwards 1998; Rowland and Carp 1996, 190). This sort of response belies the idea that judicial decision makers intentionally act strategically with regard to threshold issues; instead, it suggests they, themselves, *believe* they are making threshold determinations based on their objective analysis of legal authority bearing on the threshold question.

That judges believe they are using appropriate sources of legal reasoning, however, does not end the inquiry into whether such decisions are entirely objective. Borrowing from cognitive psychology, Segal and Spaeth suggest that judges may engage in "motivated reasoning" (1996, 2002), a biased decision process where decision makers are predisposed to find authority consistent with their attitudes more convincing than cited authority that goes against desired outcomes.

The concept of motivated reasoning has great potential to resolve the disconnect between judges' claims that they are following the law and the observed role of preferences in determining outcome choices. Here, I propose a mechanism of attitudinal influence involving the relationship between issues in complex cases. This conception of influence falls squarely on the "sincere" side of the debate about whether decision makers are sincere or strategic pursuers of policy outcomes. I assume they are sincere in two respects. First, I posit that because legal decision makers have been subject to strong socialization emphasizing the importance of following stylized rules of decision making, they sincerely try to achieve "legal accuracy" when making judgments (Baum 1999). Second, I allow for the influence of sincere preferences, positing that "directional" policy goals—which decision makers, themselves, may be unaware of—can come into play in legal reasoning (Kunda 1990).

Consistent with evidence from psychology demonstrating limits on motivated decision processes, I propose the law can act to inhibit attitudinal behavior where it prevents decision makers from constructing "reasonable justifications" for their outcome choices (Segal and Spaeth 1996, 1075; quoting Kunda 1990). In doing so, I take seriously evidence of attitudinal influence without dismissing the socialization legal decision makers experience as wholly irrelevant or inconsequential; I avoid the unsustainable argument that legal rules always determine outcomes, in favor of the much more tenable proposition that accepted norms of decision making may put real limits on decision makers' ability to make judgments consistent with their policy preferences.

The Experimental Approach

Although the virtues of experiments have been well documented in political science (Green and Gerber 2002; Iyengar and Kinder 1987; Kinder and Palfrey 1993) they have not been not commonly used by judicial scholars to study legal reasoning processes.[2] This is ironic because judicial decision making is, after all, decision making; it seems fool-hearted to ignore the primary method psychologists use to study reasoning processes; moreover, thinking of decision making in terms of testable cognitive processes would allow judicial scholars to move beyond the simplistic stimulus-response paradigm toward a more sophisticated understanding of the *causal mechanisms* underlying patterns of observed behavior (Rowland and Carp 1996, 144).

Using experiments in the judicial context makes sense for several reasons. First, experiments provide a degree of *control* that has not been achieved in previous decision-making research. Most behavioral studies compare how judges vote across a large number of cases, each involving their own facts and legal authority. Experiments enable researchers to analyze judgments *holding facts and authority constant*. Comparing the decisions of participants with different policy views in this relatively closed system allows for greater confidence in our causal inferences

[2]Experimental and quasi-experimental methods have been used to study the influence of judicial decisions on public opinion however (see Baas and Thomas 1984; Hoekstra and Segal 1996; Mondak 1994).

about the role of attitudes in such judgments (Iyengar and Kinder 1987, 6).

Second, experiments enable us to *manipulate* aspects of the decision domain. This allows for the effective isolation of causal variables under different theoretically relevant circumstances. In this study, for instance, we observe how decision makers make an identical threshold judgment where there is direct legal authority on the issue, and *where there is not.* Clearly this would be impossible in the real world. Observing how participants make the same legal judgments under these counterfactual conditions provides a compelling test of the extent to which policy views affect decision makers acting under different levels of constraint.

Third, experiments allow researchers to take legal norms and decision making environments into account when developing hypotheses. Thus, judicial scholars can move beyond the false choice between legal and attitudinal determinants of behavior toward a more sophisticated understanding of the "conditions under which" attitudes are likely to impact legal decision making. Finally, because experiments allow for more precise measurement of policy preferences than blunt observational indicia used in correlational studies, such methods have the potential to alleviate long standing concerns about the adequacy of variables used to approximate attitudes in studies of judicial behavior (see Segal and Cover 1989 for discussion).

Of course, experiments have their shortcomings. Researchers must be careful to address concerns about the extent to which participants differ from decision makers political scientists are interested in understanding. We must be mindful of how differences between experimental settings and real-world decision contexts can limit the applicability of experimental findings. This is true for all experimental work, but especially important in a domain as complex as legal decision making.

As long as we speak to these concerns, however, there is much to gain by including experiments in a pluralistic approach to understanding legal behavior. Of course, there are obstacles to studying judicial actors in this manner.[3] Therefore, researchers who use experiments will often need to rely on proxies who are familiar with stylized norms of decision making. But even where experimental researchers do not have access to judges, they can investigate important aspects of decision making that go to the heart of specialized techniques used by judicial actors; such studies may shed significant light on the mechanisms driving observed patterns of behavior and lead to the development of new testable hypotheses (Kinder and Palfrey 1993, 19).

Laboratory experiments have been criticized for distilling real-world phenomena into artificial conditions that bear little resemble to the political concepts researchers are interested in understanding. I would argue that this is not *necessarily* the case. There are numerous examples of experiments that strike an appropriate balance between the isolation of causal variables and the realistic simulation of information environments decision makers encounter in the real world (Iyengar and Kinder 1987; Nelson, Clawson, and Oxley 1997). I attempt to follow that tradition here by giving experimental participants a hypothetical case brief with real legal authority presented in an adversarial format. Because law students are specifically trained in the tools of doctrinal analysis, I am able to use arguments that are not "watered down" in any respect; indeed, they are quite like what a judge would encounter in a case implicating her ability to separate views on alternative issues in litigation.

Of course, it is important to remember that law students are not judges. Indeed, there are competing reasons to think they may be more *and* less attitudinal than judicial actors.[4] This should not give us much pause, however. The primary goal of this study is to test a potential mechanism of attitudinal influence in legal reasoning. Because law students are trained in doctrinal techniques they are an appropriate sample to test experimental hypotheses. If findings demonstrate that attitudes do influence participants' threshold judgments, additional studies can be done to see if findings replicate in more sophisticated legal samples (see, for example, Becker 1964, 1966). At any rate, we will have hard evidence regarding this highly plausible mechanism of influence which has, so far, resisted empirical investigation.

[3]Judges, as elite decision makers, pose a knotty problem of access. Moreover, strong norms discourage judges from divulging policy views and rendering decisions in hypothetical cases making it highly unlikely they would be willing experimental participants.

[4]Because law students are relatively inexperienced in using tools of legal reasoning one might expect attitudes to be more influential in their decisions. Moreover, they are not subject to the same accountability concerns as judicial actors faced with the threat of review. There are also reasons to think law student participants may be *less* attitudinal than judges in this context; their policy attitudes are presumably weaker than judges with experience who have been vetted through the political process.

Design Specifics

To test the relationship between issues in complex litigation law student participants were presented with different versions of a brief involving a "standing" issue that has been the subject of conflicting rulings by federal circuit courts.[5] The brief was a 10-page document setting forth the facts and legal arguments submitted by each side in a hypothetical dispute with respect to defendants' Motion to Dismiss.

Specifically, the case involved a city ordinance with provisions akin to the Hatch Act restricting the political activity of public employees. Plaintiff was the wife of a city firefighter; her husband was threatened with disciplinary action after she posted a campaign sign on their property in the midst of a "hotly contested" city council election centering on the "controversial issue of abortion." After discussing the matter with her husband, the couple removed the sign, but the plaintiff-spouse brought action challenging the ordinance as an improper restriction on her right to free expression. Her claim was that the ordinance improperly restricted her political conduct because she was fearful her husband could lose his job on account of her activities. The defendant city employer raised the issue of standing, arguing that because the provision did not threaten the plaintiff-spouse directly, but only *indirectly* through the loss of her husband's employment she did not have sufficient legal interest to challenge the ordinance.

The experiment involved a 2×2 factorial design. The content of the political expression was manipulated. Half the participants read a brief where the plaintiff expressed support for the pro-life candidate; the other half, a brief where she expressed support for the pro-choice candidate. The jurisdiction where the case was pending was also manipulated. Half the participants read a brief stating that the matter was pending in a district court in the Eighth Circuit where there is direct legal authority suggesting the plaintiff should have standing [*International Assn. of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002)]. The other half were told the case was pending in a district court in the Third Circuit where there is no federal case law directly on point, but the weight of authority goes in the opposite direction [cases from three other federal courts that have decided the spousal-standing issue including two circuit decisions *Biggs v. Best, Best and Kreiger*, 189 F.3d 989 (9th Cir. 1997) and *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1980)].

The critical question is whether participants are more likely to conclude the plaintiff has standing when her expressed views are consistent with their own views on abortion. Traditional notions of legal decision making suggest that decisions on multiple issues should be independent, so there should be no difference in participants' standing judgments under the different content conditions. There are studies that indicate, however, that judges disproportunately decide cases in favor of parties with whom they are ideologically aligned (Sheehan, Mishler, and Songer 1992). Systematic differences across conditions would suggest evidence of motivated reasoning, demonstrating that participants' views on other issues raised in the hypothetical fact pattern shaded their reasoning on the standing issue.

Although the manipulations relate most directly to opinions on abortion, the case raises two other issues that could influence participants' judgments. Participants who support the type of government action at issue—the ordinance restricting the speech of public employees—may be less likely to conclude that the plaintiff-spouse has suffered an injury sufficient to challenge the ordinance. Conversely, those who support free speech in general may be more likely to conclude she has standing regardless of whether or not they agree with the specific content of the political views she is expressing.

Finally, legal conceptions of decision making suggest the law should inhibit the ability of decision makers to make decisions consistent with their preferences. Yet, judges often operate under different levels of constraint. The fact that the standing issue has been the subject of conflicting rulings by the federal circuits creates an excellent opportunity to test how preferences influence legal reasoning under different levels of constraint. By manipulating the jurisdiction where the case is pending, we can observe how preferences operate in constrained versus relatively unconstrained conditions. Indeed, this is an additional benefit of the design; it tests constraint *where it occurs* by looking at a scenario involving the decision making of lower (district) court judges bound by the rulings of higher courts. Many extant studies on the influence of precedent look the influence of precedent on the Supreme Court where justices are not subject to the same restrictions (see for example, Spaeth and Segal 1999).

[5]Standing is a threshold issue that involves whether the person who files a complaint is an appropriate party to litigate the matter. Standing is especially useful for an experiment like this because it can arise in a variety of contexts. Whenever it is raised the question of standing is always embedded in a larger substantive dispute. Moreover, from a legal standpoint, how a judge views the substantive issues raised in litigation should not affect the determination of the standing issue.

As set forth more fully below, three alternative patterns of behavior were hypothesized based on competing theories of how the law acts to constrain legal decision-making processes.

Attitudinal Hypotheses

Stated more explicitly, attitudinal accounts suggest several potential influences on participants' threshold judgments:

(1) participants should be more likely to find the plaintiff has standing when the content of plaintiff's speech is consistent with their views on abortion;
(2) participants who oppose restrictions on the political activities of public employees should be more likely to find standing regardless of content; and
(3) participants who support free speech should be more likely to find standing to challenge the ordinance regardless of content.

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

Hypotheses Regarding the Law as a Constraint on Motivated Decision Making

There are three alternative patterns of behavior that could be observed based on a legal model, an attitudinal model, or a "constrained attitudinal" model of decision making (See Figure A.1 in online appendix on JOP website for graphic illustration of hypotheses).

Legal Model Predictions. According to legal models, decision makers should be less likely to make preference-based decisions where there is direct controlling authority limiting their ability to do so. Under the Eighth Circuit conditions there is direct authority favoring the plaintiff. As a matter of law subjects should decide in her favor. It is also important to keep in mind that the authority in the brief is "stacked" in favor of the defendants. Most of the legal authority is on one side—three federal court cases to one holding that spousal-plaintiffs do not have standing to challenge ordinances restricting the political speech of public employees. Thus, in the Third Circuit conditions, where there is no direct authority, legal models of decision making would predict a decision in defendants' direction.

Attitudinal Model Predictions. Alternatively, according to attitudinal models of decision making, the law should not inhibit preference-based judgments. We should observe behavior in line with the attitudinal hypotheses set forth above in both the constrained and unconstrained conditions.

Constrained Attitudinal Model Predictions. There is a third possibility, a "constrained attitudinal" conception of legal decision making. According to this model decision makers should follow their attitudes where they are relatively free to do so and resist the temptation to make preference-based decisions when they are not. This conception predicts decision making consistent with legal hypotheses in the constrained condition and patterns of behavior consistent with the attitudinal model in the unconstrained condition.

Procedure

Experiments were conducted in June and September of 2003. All students who successfully completed their first year of training at (law school omitted) were contacted via an email solicitation and a table in the lobby of the law school (a summary of sample characteristics appears in Table A.1 of the electronic appendix). Participants were paid $20 to participate in what they believed were two distinct studies. They were told that "Study A" was a survey that was being conducted to compare the political views of graduate and professional students on campus.[6] The survey included eight policy questions and measures of background characteristics. The three questions that were used as the relevant policy measures were embedded in the survey. Participants indicated the degree to which they supported statements concerning abortion, restrictions on the political activity of public employees, and criminal sanctions for flag-burning (which was used as the general measure of support for free speech). Exact

[6]The experiment involved this "cover story" because we did not want to sensitize participants to the fact that we were looking at the role of attitudes in decision making. As it involves deception, the experimental design was, of course, vetted through the proper institutional Internal Review Board. Moreover, participants were fully debriefed following their participation.

wording of the relevant policy measures, instructions, and instrument, and mock brief are available in the electronic appendix.

After completing the survey, participants moved on to "Study B." A cover story was embedded in the instructions stating that the purpose of the study was to get feedback on a new "Summary Brief" format some jurisdictions were considering to expedite motion practice. Participants were informed that the brief was an actual legal document submitted to a federal district court in either Missouri (situated in the Eighth Circuit) or Pennsylvania (situated in the Third Circuit). To put participants in a decision-making mode, they were asked to read the brief "as if they were the judge responsible for rendering a decision on the motion." Moreover, they were instructed, "[a]t the end of the brief you will be asked how you would decide the motion and what information from the Summary Brief led you to your decision." Thus, participants knew they would be asked to justify their decisions as judges do when choosing between parties.[7] They then read the brief containing the experimental manipulations. At the end of the brief participants were asked a series of closed and open-ended questions including how they would decide the standing issue, how confident they felt in that judgment, and what facts and legal arguments in the document led them to their decision.[8]

Testing Hypotheses

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

Table 1 Distribution of Participants with Pro-life and Pro-choice Views across Treatment Conditions

	Pro-choice Views	Pro-life Views	Total
8th Circuit/Pro-life Content	18	11	29
8th Circuit/Pro-choice Content	26	3	29
3rd Circuit/Pro-life Content	17	12	29
3rd Circuit/Pro-choice Content	21	7	28
Total	82	33	115

The distribution on the abortion variable is especially important for understanding the pattern of results in this study. Most of the participants in the sample (82 out of 115) expressed pro-choice views. Table 1 shows how pro-lifers and pro-choicers were distributed across the four treatments. Not only were there fewer participants who expressed pro-life views (33 out of 115), unfortunately they did not distribute as evenly as they might have across conditions. Although subjects were randomly assigned to conditions, the significant skew in this variable resulted in smaller n's for pro-lifers—especially where the plaintiff was expressing pro-choice views.

This is addressed in the ANOVA analysis by collapsing participants' predisposition with speech content in a manner wholly consistent with testing experimental hypotheses. In the logit analysis, were I to attempt to make finer distinctions about how people with alternative views respond to content, the small n's result in large standard errors for predictions involving pro-lifers. I elaborate in more detail below as I describe the specific analyses used to test experimental hypotheses.

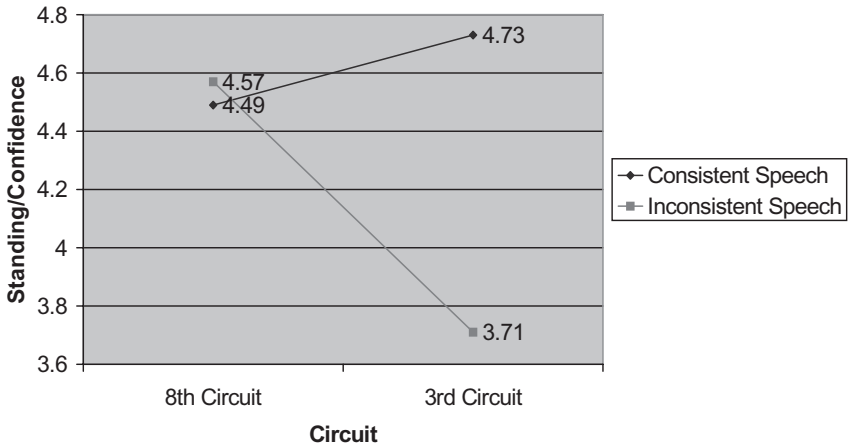
ANOVA Analysis

The dependent variable for the ANOVA was a scaled version of the standing decision created by combining participants' responses to the standing question with

[7]Clearly these conditions differ from what judges do when rendering decisions. Typically, judges take weeks to render motion decisions. Looking at decision makers' initial impressions is quite useful, however, as they can "frame" subsequent decision processes. Indeed, initial judgments are important in the legal world where judges delegate work to legal assistants so aides can proceed in a manner consistent with a judge's impression of what the law requires. Moreover, this information is important from a strategic perspective; once a decision maker makes an initial judgment based on a preliminary reading of the papers it may be significantly harder to move him or her from that decision.

[8]Here I analyze answers to the closed-ended questions. Answers to the open-ended questions have been analyzed elsewhere to determine what part of the brief participants who came to alternative conclusions cited in support of their outcome choices (see Braman 2005).

FIGURE 1 Conditional Means for Standing/Confidence Judgments Where Plaintiff's Speech is Consistent and Inconsistent with Participants' Views on Abortion



reports of how confident they were in that judgment. This scale ranged from one to six, with the lowest values for subjects who were extremely confident in their decision that the plaintiff did not have standing to challenge the ordinance and high scores for those who were extremely confident in their decision that she did have standing.[9]

Two independent variables were used in the analysis. The first captured whether participants were in a condition where the content of the political message on the campaign sign was consistent or inconsistent with their expressed views on abortion; the second reflected the jurisdictional condition where the judgment was made.

Results indicate there was an interaction between speech consistency and circuit [$F(1,114) = 3.37$]. Figure 1 illustrates the observed interaction. In the Eighth Circuit conditions participants decided the standing issue similarly when the plaintiff expressed views that were consistent with their opinions on abortion *and when she expressed views that were inconsistent* with those views. In the Third Circuit conditions more of a difference is evident. Participants were more likely to decide that the plaintiff had standing when the view she expressed was consistent with their own ($t = -2.6$, df 55, $p < .01$). Results also demonstrate that participants in the Eighth Circuit were more likely to find the plaintiff had standing when her expressed views were inconsistent with their abortion attitudes in line with controlling authority in that circuit ($t = 1.8$, df 43, $p < .05$). This pattern of results comes closest to that which would be predicted by a "constrained attitudinal" model of legal decision making.

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

Logit Model Specification

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

The speech content and jurisdiction manipulations were included as independent variables in the analysis. Speech content takes on a value of 0 where plaintiff was expressing support for the pro-life can-

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

didate and 1 where she was expressing support for the pro-choice candidate. Circuit takes on a value of 0 where participants were told they were deciding a case that was pending in a district court in the Eighth Circuit and 1 if it was pending in a court within the jurisdiction of the Third Circuit.

Each of the measures of policy preference was also included in the model. The abortion measure is dichotomous. It takes on a value of 0 for participants expressing pro-choice views and 1 for participants expressing pro-life views. The free speech variable was measured on a 6-point scale with higher numbers indicating support for criminal sanctions for flag-burning. The pro-Hatch measure is also on a 6-point scale with higher numbers indicating support for regulations that restrict the political activity of public employees.

Opinions on abortion do not predict how participants will decide the standing issue in and of themselves. The relevant question is how participants' attitudes on abortion interact with the content of the speech in the condition to which they are assigned. Thus, the model includes a two-way interaction between abortion opinion and speech content. The three-way interaction between abortion opinion, speech content, and circuit is also theoretically relevant. As demonstrated in the ANOVA analysis, participants may act differently in response to content they disagree with under different levels of constraint. Including the three-way interaction allows us to test this possibility. All of the two-way interactions that are nested in the three-way interaction are also included in the model so it is fully specified.

There are two additional interactions in the model. The flag-burning variable, representing participants' level of support for free speech and the pro-Hatch variable were each interacted with the circuit manipulation. Again, this allows for the possibility that participants may be more inclined to act in accordance with their attitudes in the Third Circuit where they are relatively free to do so because there is no direct legal authority on the standing question. Finally, participants' ideology [7-point scale (extremely conservative-extremely liberal)], year in law school [3-point scale (2L, 3L, and recent graduate)], and gender (1 male, 2 female) were included in the model as control variables.

Logit Model Results

Coefficients for independent variables with robust standard errors are presented in Table 2. Because all of the variables, except for the control variables, are embedded in interactions, the coefficients do not tell us much about their effect across the various treatment conditions.[10] Therefore, separate hypothesis and joint hypothesis tests were conducted to test their influence in various theoretically relevant circumstances.

Table 2 Logit Estimates for Law Students' Standing Decision in Hypothetical Case

INDEPENDENT VARIBLES	Coefficient	Robust SE
Constant	3.974*	2.48
Ideology	.232+	.16
Law Year	−.343	.37
Gender	−.384	.55
Circuit	−3.106*	1.58
Speech Content	−1.229+	.94
Abortion Opinion	−.596	1.36
Flag-burning Sanctions	−.598**	.27
Pro-Hatch	.298	.47
Circuit × Flag-burning Sanctions	.185	.34
Circuit × Pro-Hatch	.298	.47
Circuit × Content	2.540*	1.28
Circuit × Abortion Opinion	2.412+	1.64
Content × Abortion Opinion	−1.603	1.41
Circuit × Content × Abortion Opinion	.389	2.11
Wald χ^2 (14)	17.16	
Log Liklihood Ratio (14)	24.26*	
Count R Squared	.84	
Adjusted Count R^2	.35	

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

None of the control variables reach standard levels of significance. Ideology is marginally significant; its direction indicates that liberal participants were more likely to find that the plaintiff had standing to challenge the ordinance than conservative participants. This makes sense and may reflect the fact that preference measures did not capture all of the ideological variance that could potentially impact the standing decision. Generally speaking, liberals are more likely to support broad conceptions of court access than conservatives.

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

Hatch Act Opinions

Table 3 sets forth the predicted probabilities of a standing decision for participants who expressed strong support and opposition to Hatch Act restrictions. In the Eighth Circuit the effect of the variable is quite small but in the predicted direction, participants who support such restrictions were less likely to decide the plaintiff had standing. In the third circuit the effect of the variable is more pronounced, but in the wrong direction. Relevant hypothesis and joint hypothesis tests demonstrate, however, that the effect of this variable was not significant in either condition [Wald = .04, *n.s.* 8th circuit; Wald = 1.37, *n.s.* 3rd Circuit]. Thus, participants were able to separate their preferences on this issue from the standing decision in line with traditional notions of decision making.

Table 3 Predicted Probabilities of Standing Decision for Decision Makers with Alternative Views on Hatch Act Restrictions, Flag-Burning Sanctions, and Abortion

Opinion/ Decision Context	Predicted Probability	Standard Error
Hatch Act Opinions		
8th Circuit		
Pro Hatch Act	.81	.23
Anti Hatch Act	.85	.10
3rd Circuit		
Pro Hatch Act	.77	.17
Anti Hatch Act	.43	.16
Free Speech Opinions (Flag Burning Sanctions)		
8th Circuit		
Anti Sanctions	.91	.09
Pro Sanctions	.49	.21
3rd Circuit		
Anti Sanctions	.68	.13
Pro Sanction	.27	.17
Abortion Opinions		
8th Circuit		
Pro-life content		
Pro-choicers	.86	.11
Pro-lifers	.80	.14
Pro-choice content		
Pro-choicers	.71	.09
Pro-lifers	.27	.21
3rd Circuit		
Pro-life content		
Pro-choicers	.57	.11
Pro-lifers	.86	.12
Pro-choice Content		
Pro-choicers	.80	.10
Pro-lifers	.47	.31

Support for Free Speech

In contrast, free speech opinions did significantly influence participants' threshold judgments. In Eighth Circuit, participants who expressed strong support for free speech (opposition to criminal sanctions for flag burning) were 42% more likely to decide the plaintiff had standing than those who strongly supported sanctions for flag burning (Wald = 5.08, $p < .01$). The same pattern obtained in Third Circuit where those who expressed support for free speech were 41% more likely to decide the plaintiff had suffered an injury sufficient to confer standing (Wald = 2.67, $p < .05$).

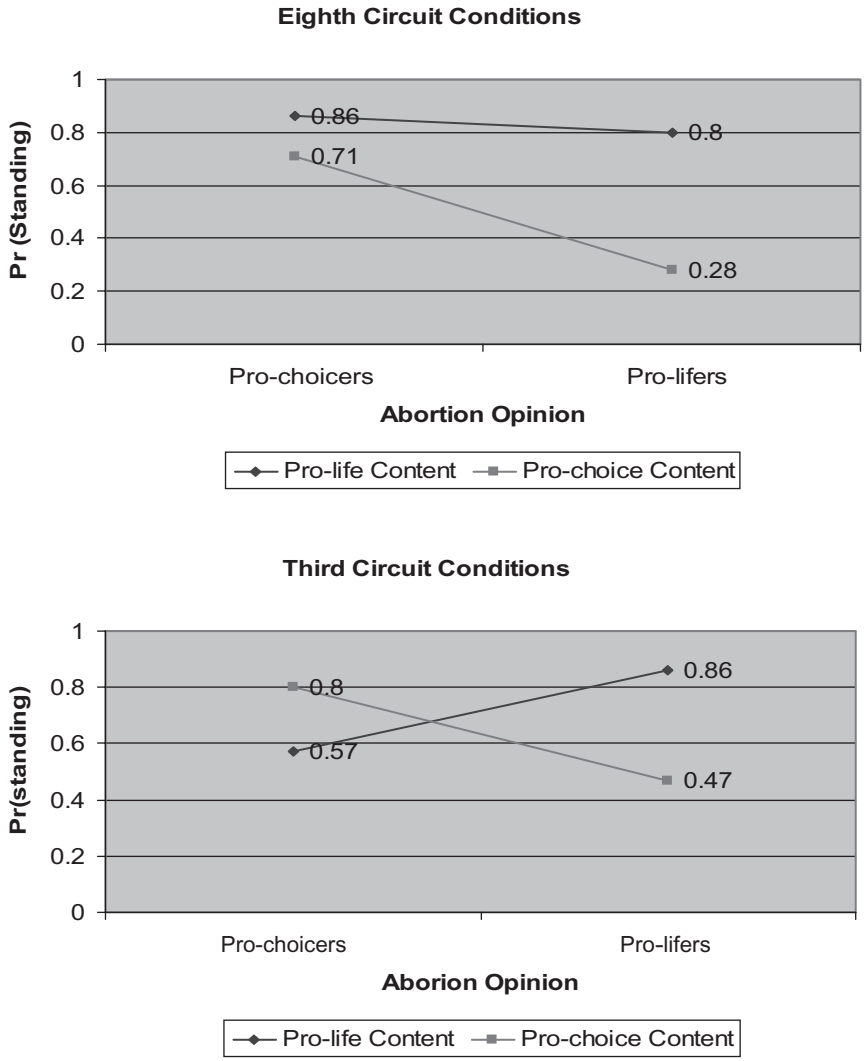
Opinions on Abortion

The predicted probabilities presented in Figure 2 tell a different story about how participants with alternative views on abortion reacted to content across the jurisdictional conditions.

Pro-Choicers. Consistent with results from the ANOVA, participants with pro-choice views seem to be following a constrained attitudinal model of decision making. In the Eighth Circuit, they made similar decisions when the plaintiff was expressing pro-choice views and when she was expressing pro-life views. In the Third Circuit, however, more of a difference is evident; participants who expressed pro-choice views were 23% more likely to decide the plaintiff had standing when she was expressing views that were consistent with their own (Wald = 2.39, $p < .06$). Moreover, pro-choicers in that condition were 29% less likely to decide the plaintiff had standing when she was expressing pro-life views than participants who themselves expressed pro-life attitudes (Wald = 2.63, $p < .05$). Finally, findings indicate that participants with pro-choice views treated pro-life content differently across conditions. In the Eighth Circuit, where there was controlling authority, they were about 30% more likely to say plaintiff had standing when she was expressing inconsistent views compared to pro-choice decision makers in the Third Circuit faced with the same factual scenario (Wald = 4.34, $p < .02$).

Pro-Lifers. Results suggest that pro-life participants were acting in accordance with their preferences in the constrained and unconstrained conditions. The predicted probability of a decision favorable to the plaintiff in the Eighth Circuit was .80 where plaintiff was expressing pro-life views compared to .28 where she was expressing pro-choice views (Wald = 3.91, $p <$

FIGURE 2 **Predicted Probabilities of Standing Decision for Decision Makers with Alternative Views on Abortion in Eighth and Third Circuit Conditions**



.02). In the Third Circuit pro-lifers were 40% more likely to decide the plaintiff had standing when she was expressing consistent policy views.[11]

Discussion: Parsing the Role of Law and Attitudes in Threshold Judgments

This study produced some interesting findings about the ability of law-student participants to separate their preferences on substantive issues from the standing decision asked of them in this experiment. Participants were clearly able to separate their views on regulations restricting the political activity of public employees from their reasoning about this threshold issue. It is equally clear, however, that participants' level of support for free speech influenced their decisions in systematic ways.

The influence of free-speech opinions lends support to attitudinal accounts of decision making. The precise nature of that influence, however, remains unclear. Specifically, we cannot tell whether free speech attitudes drove decisions from the "top down" or influenced participants' reasoning processes from the "bottom up." From a legal standpoint, it would be improper if participants' attitudes about free speech influenced their decisions in a top-down manner, that is if they decided the case the way they did because they were sympathetic (or hostile) to plaintiff's claim on the merits. The influence of the variable, however, could also have been bottom-up, shading participants'

[11]Although this seems like a substantial difference, large standard errors associated with predictions in this circuit for pro-lifers prevent us from saying it is statistically significant.

interpretation of facts and authority related to the alleged "injury"—participants who supported free speech may have been more inclined to view the plaintiff's injury as a cognizable legal harm. One may question whether this more benign "bottom-up" influence should occur in the presence of controlling authority on the issue; still, this characterization of the variable's influence is more compatible with traditional notions of legal decision making. Since results are consistent with both explanations, we cannot say which is operating with regard to the observed influence of free speech attitudes.

Results are somewhat mixed with respect to the influence of abortion attitudes. Taken together findings provide good evidence that the three-fourths of the sample that expressed pro-choice opinions were following a "constrained attitudinal" model with respect to their abortion opinions. Although it appears that the pro-lifers were acting in accordance with their preferences in the constrained and unconstrained conditions, we can have less confidence in that finding given the unequal distribution of participants with pro-life views across treatment conditions.[12]

Although they must be interpreted with caution, results regarding the behavior of participants with alternative abortion attitudes stand out for several reasons. First, the finding that pro-lifers in the Eighth Circuit were being attitudinal, and indeed may have been *more* attitudinal than pro-life participants in the Third Circuit, is at odds with hypotheses suggesting participants should have been be constrained by controlling authority. In direct contrast, it suggests pro-life participants were *reacting against* authority where it favored a plaintiff who was expressing views contrary to their own. It could be that the specific combination of factors (objectionable speech with doctrine favoring the party expressing those views) caused pro-lifers to buck prevailing authority under the conditions where they should have evidenced constraint.[13]

Because we cannot say for certain what process is driving this unexpected result, or that it would replicate in other samples, I leave it as an intriguing observation inviting further investigation. It is important to note, however, that if pro-lifers and pro-choicers are responding to controlling authority differently it would involve a more complex story than extant theories of legal decision making can currently account for, suggesting that judicial scholars should consider the potential for differential responses to constraint in modeling decisional behavior.

Conclusion

Rowland and Carp have argued, "if the study of political jurisprudence is to move beyond its current comfort zone, we must develop a theory of judicial behavior that can accommodate political and jurisprudential influences without assuming away the judicial reasoning process" (1996, 136). This study represents a start in that important direction. Looking at a very basic aspect of decision making, we saw the influence of attitudes on legal reasoning processes was real—but not without boundaries. Findings lend support to both legal and attitudinal accounts in some respects demonstrating that decisions are not determined by wholly legal or wholly attitudinal factors but a complex interaction of the two.

Case facts and legal context create decision environments where legal actors are subject to different levels of constraint. Moreover, the experimental design used in this inquiry helped us see that some attitudes may be more influential than others in shaping judgments under various circumstances. Here free speech attitudes seemed to have the most consistent effect on participants, influencing judgments in constrained and unconstrained conditions. As detailed above there is a legally justifiable reason for such influence making it the "least separable" of the preferences tested in this study. In contrast, there is no

[12]Specifically, the small n associated with the conditions where pro-lifers were given pro-choice content influences the confidence with which we can generalize this result to any group other than the law students in the sample. It is important to note that most of the law students were liberal on the abortion issue; participants in this cohort willing to express unpopular, pro-life, views may have been especially likely to go against the prevailing wisdom and challenge authority. Thus, further testing needs to be done to determine if the result would obtain where pro-lifers comprise a 'critical mass' of decision makers.

[13]If the finding *is* reflective of a more general phenomenon there are two possible explanations. It could be that pro-lifers see themselves as a "legal minority" because they are currently on the "losing side" of the abortion issue. This perceived minority status might cause pro-lifers to resist controlling authority where they believe courts have not done a good job on the issue, especially when the issue is salient (as it may have been where the plaintiff was expressing objectionable pro-choice views). The second explanation concerns the ideology of experimental participants with pro-life views. There is psychological evidence suggesting that people with conservative views may be especially prone to motivated decision processes (Jost et al. 2003). Thus, the jurisdictional manipulation that inhibited pro-choicers from making decisions consistent with their preferences may not have been effective to curb motivated decision processes among more conservative pro-lifers in the sample.

legally justifiable reason participants' abortion attitudes should have influenced the standing judgment as they did; but the influence of the variable was most evident in the unconstrained conditions where participants had more latitude to act in accordance with their preferences. Finally, although it was entirely plausible participants' attitudes about Hatch Act restrictions would influence their standing judgments, no such relationship was evident, demonstrating that participants were able to separate their views on this issue from the standing decision in line with traditional accounts of decision making.

Like most research that studies political phenomena from a new perspective, this study raises at least as many questions as it answers. In testing a sincere model of attitudinal influence results speak most directly to debates about influence of legal and attitudinal factors in decision making. Findings, however, may also have import for those who study decision making from a strategic perspective. Looking at how individuals respond to case facts and authority under different levels of constraint may reveal the relative ease with which strategic actors will convince others of their views as we move to the group context of appellate decision making. Moreover, looking at the influence of particular attitudes may point toward arguments that will hold sway in that context.

Arguably, the debate between sincere and strategic conceptions of judicial behavior has been fueled by the failure of judicial scholars to address cognitive processes. Without knowing *how* judges reach conclusions consistent with their preferences, political scientists, skeptical of doctrinal explanations judges give for their own behavior, have been quick to jump to strategic accounts of decision making. While this study does not *disprove* strategic explanations, evidence of constraint uncovered here lends support to the idea that legal accuracy goals may yet predominate in the minds of decision makers and attitudinal outcomes may be the result of very human psychological processes rather than any conscious decision to flout the law in pursuit of policy. At the very least findings that attitudes systematically influenced threshold judgments in predictable ways puts "meat on the bones" of psychological mechanisms of influence by offering concrete evidence of a specific avenue of influence in legal reasoning processes.

Acknowledgments

Special thanks to Gregory A. Caldeira, Lawrence Baum, Thomas E. Nelson, Peter M. Shane, L. Camille Hebert, James J. Brudney, Dean Lacy, Greg Gwiasda, Brandon Bartels, the editor, and anonymous reviewers at JOP for their invaluable comments and assistance at various stages of this project. Also thanks to the participants in the Research in American Politics series at Ohio State University, Friday Afternoon Research Series at Indiana Law School and Workshop in Political Theory and Policy Analysis at Indiana University. This research was enabled by the assistance of the Interdisciplinary Center for Law and Policy Studies at the Moritz College of Law and funding from the Alumni Grants for Graduate Research and Scholarship Committee at Ohio State University.

Manuscript submitted 28 January 2005
Manuscript accepted for publication 7 July 2005

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