CHAPTER 2

Legal Policy and Other Goals

According to James March (1956, 534), "it is probably true to say that judges correspond with, more than they differ from, people."[1] If so, most judges want a great many things, from high income to popularity to short working hours. But people give higher priorities to some goals than to others, and they differ in their priorities. Further, the relevance of people's goals to their choices depends on the situations in which they act, and situations vary a good deal. Thus the goals on which judges act depend on both their inherent goal orientations and the situations that translate them into operative goal orientations—those configurations of goals that actually affect judicial behavior.

This chapter considers the breadth of judges' operative goal orientations. Its central issue is the balance between two types of goals: those related to the content of legal policy—legal and policy goals—and the diverse array of goals that fall into other categories.

Students of judicial behavior seldom compare the goal orientations of judges who sit on different courts. But their separate depictions of various courts suggest the metaphor of a pyramid: at increasingly higher levels of the judiciary, the range of operative goals narrows and variation among judges diminishes. At the lowest levels, in this metaphor, interest in the content of legal policy is one of many motivations for judges' behavior, motivations whose importance differs from judge to judge. At the highest level, in the Supreme Court, only an interest in the content of legal policy influences the behavior of any justice.

In the first section of the chapter, I describe the pyramid metaphor as it emerges from scholarly work on judicial behavior. The second section considers differences among courts in theoretical terms. The final section focuses on the Supreme Court, surveying empirical evidence to assess the conception that only legal and policy goals motivate the justices.

1. This observation was quoted in Schubert 1965, 37. Thomas Jefferson expressed

The Pyramid Metaphor

Some research on state trial courts focuses on judicial decision making, generally in sentencing (e.g., Uhlman 1978; Gibson 1978b, 1980; Kuklinski and Stanga 1979; Pruet and Glick 1986; Welch, Combs, and Gruhl 1988; M. Myers 1988; Tillman and Pontell 1992; J. Ulmer and Kramer 1996). But most of the trial court research has a broader scope (see Jacob 1991; Mather 1995). Largely for this reason, studies of these courts provide only limited evidence on judges' goals (see M. Myers and Talarico 1987, 1–15). Moreover, the evidence they do provide is not entirely consistent. Still, two images emerge from this research, each involving a form of complexity.

The first image is one of diversity: judges differ in their hierarchies of operative goals. A number of studies depict state trial judges as a heterogeneous group, with wide variation in what they seek to achieve (Dolbeare 1967, 65–66; Galanter, Palen, and Thomas 1979; Wice 1985, 99–103; Conley and O'Barr 1990, 85–106; see Gibson 1978b, 1980). Some research points directly to variation in goal orientations. Caldeira's (1977) study of New Jersey judges and Sarat's (1977) study of Wisconsin judges both found that judges ranged widely in their primary incentives. In a study of a single urban trial court, Smith and Blumberg (A. Smith and Blumberg 1967; Blumberg 1967, 137–42) placed judges in such categories as "intellectual-scholar" and "judicial pensioner," categories that reflect different goals.

The second image is one of multiple motivations: individual judges act on the basis of many goals (Mileski 1971; Buckle and Buckle 1977; Cook 1979; Flemming 1982; Flemming, Nardulli, and Eisenstein 1992; McCoy 1993; J. Ulmer and Kramer 1996). For instance, Eisenstein and Jacob (1977, 24–28) cited four kinds of goals pursued by judges and other members of courtroom workgroups: doing justice, maintaining cohesion, disposing of caseload, and reducing uncertainty. One recurrent theme in the trial court research is that judges' support for plea bargaining reflects multiple goals. Heumann (1978, 144–48) described three benefits to plea bargaining: it saves time and effort and makes the judge's job easier, it reduces the chances of reversal on appeal, and it helps to satisfy administrative demands for disposition of cases (see also Neubauer 1974, 93–96; Alschuler 1976; Langbein 1979; Ryan and Alfini 1979; McCoy 1993).

describing different types of judges who each have a single dominant goal (e.g., Caldeira 1977, 5–6). Taken as a whole, however, research on state trial courts presents a picture that combines the two images: judges' behavior reflects a multiplicity of goals, and judges differ in their priorities among those goals.[2] In deciding whether to accept a plea bargain, in imposing a criminal sentence, in instructing the jury in a personal injury case, a trial judge acts on several motivations. And another judge down the hall who faces the same choices may act on a different set of motivations, or at least give different weights to the same ones.

That picture is not very startling. Rather, it comports with the way that most people think about human behavior. But the dominant picture of the Supreme Court in political science research is quite different.

As depicted in most of that research, Supreme Court justices are motivated by goals of a single type, those connected with the content of legal policy. In the terms introduced in chapter 1, their behavior as justices reflects only their interest in good policy, legal accuracy, and legal clarity. Of the whole range of motives that human beings hold, then, the great majority are inoperative. And because only one type of goal motivates justices, there is little room for variation among them. Felix Frankfurter and William O. Douglas, Warren Burger and Thurgood Marshall: in this important sense, they are all the same.

The image of justices as single-minded comes through clearly in research based on the attitudinal model of decision making, a model that interprets decisional behavior on the Supreme Court as a reflection of the justices' policy preferences (Schubert 1965, 1974; Rohde and Spaeth 1976; Segal and Spaeth 1993). The attitudinal model in its various versions has been the most influential conception of judicial behavior in political science. Proponents of the model in its purest form take strong positions on each of the three issues discussed in chapters 2 through 4: justices act only on their interest in the content of legal policy, they seek to achieve good policy rather than good law, and their votes on case outcomes are direct expressions of their preferences rather than deviating from those preferences for strategic reasons.[3]

A similar image can be found in other bodies of research on

2. The same picture emerges from journalistic accounts of trial judges (e.g., Donald Dale Jackson 1977).

3. The role of strategy in the attitudinal model is discussed more extensively in

Supreme Court decision making. Most studies of the impact of justices' personal attributes or social background characteristics rest on the premise that these characteristics shape policy preferences, which in turn determine justices' positions in cases (Schmidhauser 1961; S. Ulmer 1973b, 1986; Tate 1981; Tate and Handberg 1991).[4] Most studies that posit strategic behavior by justices assume that this behavior is aimed at advancing policy goals (Murphy 1964; Rohde 1972b, 1972c; E. Schwartz, Spiller, and Urbiztondo 1994; L. Epstein and Walker 1995).

These bodies of work accord primacy or even exclusivity to justices' policy goals. In contrast, some scholars argue that justices seek legal accuracy or clarity as well as good policy (e.g., Brigham 1978; Perry 1991; Gillman 1993; Kahn 1994; Brenner and Stier 1995). But the long-standing and sometimes heated debate between these two camps obscures their agreement on one fundamental matter: justices care overwhelmingly, or even solely, about the content of legal policy.[5]

The image of Supreme Court justices as like-minded also comes through clearly in political science scholarship. While empirical research emphasizes differences among justices, the differences are in their policy positions. In contrast with state trial courts, typologies of Supreme Court justices are based on variation in their conceptions of good policy rather than in their hierarchies of goals (e.g., Spaeth 1979, 135). Some scholars argue that justices differ in the relative importance that they accord to legal and policy considerations (e.g., Mendelson 1991). But even this variation is within a quite narrow range, compared with the variation that has been ascribed to state trial judges.[6]

Some significant bodies of writing on Supreme Court behavior depart from these images. Historical and biographical studies often suggest a range of motivations that extend beyond the content of legal policy, such as obtaining respect in the legal community and minimizing work loads (e.g., B. Schwartz 1990; Lamb and

4. However, a few studies analyze the relationship between background characteristics and the propensity to dissent (S. Ulmer 1970; Aliotta 1988) or to overrule precedents (Schmidhauser 1962).

5. Research on the relationship between the Court and external forces such as public opinion and interest groups suggests the possibility that goals other than legal policy motivate the justices. But explicitly or implicitly, much of the research on links between the Court and its environment treats the influence of external forces as a consequence of the justices' policy goals. This subject is discussed in the final section of the chapter.

6. The same is true of posited variation in "activism" and "restraint" among jus-

Halpern 1991). The same is true of journalistic accounts of the Court (e.g., Woodward and Armstrong 1979; Savage 1992). Scholars with a rational choice perspective have pointed to a wide array of other goals that might influence Supreme Court justices (Eskridge 1988; R. Epstein 1990; Spiller and Spitzer 1992; Macey 1994). But on the whole, these bodies of writing emphasize justices' concern with legal policy. And in the most influential bodies of research in political science, that emphasis is overwhelming.

While the dominant picture of state trial judges is not very startling, the standard picture of Supreme Court justices *is* startling—or it would be if scholars were not so accustomed to it. If all the people who serve in a particular institution are motivated by the same narrow set of goals, this is a very unusual organization (see Rowland 1991, 78).[7] And it is remarkable that in this picture of the Court, its members seek only to maximize the collective goods of good policy or good law; they are unaffected by anything that looks like self-interest.[8] Political scientists who study the Supreme Court might be reluctant to accept Justice Harold Burton's description of the Court as akin to "a monastery" (Berry

7. It is true that some scholars posit re-election as a single dominant goal for members of Congress (Mayhew 1974; Arnold 1990; see Peltzman 1984). But if re-election is dominant, its dominance rests in part on its serving as a necessary means to other important goals (Mayhew 1974, 16; Fiorina 1989, 37). Further, even those who treat re-election as dominant recognize the impact of other goals (Mayhew 1974, 15–16), and most legislative scholars explain congressional behavior on the basis of multiple goals (Fenno 1973; Dodd 1977; Smith and Deering 1983; M. Thomas 1985; Sinclair 1989; Parker 1992; Loomis 1994; J. Clark 1996).

Niskanen (1971, 1994) has posited budget maximization as the dominant "maximand" for bureaucrats (see Blais and Dion 1991). But the possible dominance of the budget is based on its serving a variety of operative goals such as salary, power, and public reputation. Although justices' concern with the content of legal policy also could stem from several different goals, it typically is treated as flowing from a narrow concern with legal policy in itself.

On problems with a single-goal model of presidential behavior, see Sinclair 1993, 223.

8. Spiller and Gely (1992, 464) and E. Schwartz, Spiller, and Urbiztondo (1994, 57) model the Court as "a self-interested, ideologically motivated institution," but ideological motivation is not self-interested in any conventional sense. Public policy *is* a collective good. Even if a justice could have a decisive impact on some aspect of public policy, the subjects of the Court's decisions are seldom matters that affect the justices much in a direct way.

It is true that even economic analyses of behavior need not assume that people are completely self-interested (G. Becker 1993; Wildavsky 1994), but a depiction of policymakers as people whose actions do not reflect self-interest at all is nonetheless striking. In this respect most students of the Supreme Court implicitly go much further than those who argue that policymakers and other people sometimes transcend self-interest

1978, 27), but the Court that most of them depict has some of the qualities that we associate with monasteries.

Between the Supreme Court and state trial courts are courts that collectively can be labeled "mid-level."[9] Social scientists have written relatively little about state intermediate appellate courts (but see Davies 1982; Scheb, Ungs, and Hayes 1989; Stow and Spaeth 1992). The scholarship on state supreme courts and lower federal courts is more substantial, but that work is diverse in approach and theme (Glick 1991; Rowland 1991; Songer 1991).

Much of the research on these courts is similar to Supreme Court scholarship in its emphasis on legal and policy goals, especially the latter. Like analogous research on the Supreme Court, studies of the relationship between judges' personal attributes or background characteristics and their decisional behavior in mid-level courts typically treat policy preferences as central to judges' behavior (S. Nagel 1961; Goldman 1966, 1975; Walker and Barrow 1985; Gryski and Main 1986; Stidham and Carp 1987; Songer, Davis, and Haire 1994; see Lloyd 1995). Some other research on decisional behavior in these courts also assumes the primacy of judges' policy goals (Jaros and Canon 1971; Atkins 1972; Rowland and Carp 1983). A number of scholars emphasize legal policy but treat both legal and policy considerations as important (Howard 1977, 1981; Kritzer 1978; Johnson 1987; Swinford 1991; Scheb, Bowen, and Anderson 1991; Emmert and Traut 1994).

In contrast with Supreme Court research, however, much of the research on mid-level courts explicitly or implicitly depicts judges as acting on a multiplicity of goals (Schick 1970; Atkins 1973; Beiser 1974; Tarr and Porter 1988; Lawler and Parle 1989; Hall and Brace 1996). In particular, work on state supreme courts and federal district courts often emphasizes judges' interest in their standing with audiences outside their courts. Several studies of elected state judges focus on tension between judges' concern with the content of legal policy and their desire to continue in office, as that tension plays out on controversial issues such as race relations (Vines 1965) and the death penalty (Hall 1987, 1992, 1995).[10] A few studies of state supreme courts suggest the importance to judges of

9. Because federal and state court systems are separate, it is impossible to order courts precisely from lowest to highest. If the higher prestige of federal courts is taken into account, it is clear that state trial courts are the lowest level and the Supreme Court the highest level. The relative positions of courts in between—state supreme courts and federal courts of appeals, for instance—are less clear.

10. However, some scholars suggest that on most issues, electoral pressures are

political elite groups that influence their electoral prospects (Schubert 1959, 129–42; Adamany 1969). Some research on federal district judges indicates that judges may be responsive to their districts because of a desire for public support and approval (Cook 1977). This is particularly true of studies of racial issues in the South during the 1950s and 1960s (Peltason 1961; Vines 1964; Giles and Walker 1975).

Still other studies point explicitly or implicitly to goals connected with the quality of life within courts. One such goal is limiting work loads (Sickels 1965; Atkins 1974). Concern with work loads comes through most clearly in accounts of structural and procedural changes in intermediate courts of appeals, which demonstrate that judges are willing to change the decisional process substantially—transferring considerable power to central court staffs—to reduce their own burdens (Baker 1994). Another quality-of-life issue is the maintenance of intracourt harmony, which is sometimes treated as a high priority for judges (Beiser 1973; Howard 1981; Brace and Hall 1993, 1995).

Thus the empirical research on mid-level courts does not fit into a single mold. When the various depictions of these courts are averaged out, however, this scholarship as a whole suggests that judges on these courts stand between the two extremes of the highest and lowest courts: their operative goals are broader than those of Supreme Court justices but narrower than those of state trial judges. Scholarship on these courts also points to variation among judges in goal orientations, though seemingly within a narrower range than in state trial courts (Glick and Vines 1969; Howard 1981; D. Klein 1996a). To that degree, then, the picture of mid-level courts that emerges from the research on them is consistent with the pyramid metaphor.

Of course, that metaphor greatly oversimplifies the research on judicial behavior, which is far from homogeneous in its depiction of courts at any level.[11] Still, the metaphor highlights an important pattern in scholarship on judges. Scholars think quite differently about courts at different levels, and they tend to ascribe

11. It is also true that the difference in the typical depictions of courts at the highest and lowest levels of the system reflects differences in research focus and methods to some degree. At both levels, analyses of decisional outputs tend to emphasize attitudes toward legal policy, while analyses of decision processes tend to produce more complex pictures of the considerations that influence decisions. Most Supreme Court scholarship is devoted to analysis of outputs, while a great deal of trial court scholarship involves

increasingly narrow and homogeneous sets of operative goals to judges at higher levels.

This metaphor leads to two issues, the subjects of the sections that follow. The more general issue is why courts might differ substantially in the operative goal orientations of their judges. What mechanisms could account for intercourt differences in judges' goals, whether or not they follow the lines of the pyramid metaphor?

The second issue concerns the Supreme Court specifically. We have a large and impressive body of empirical evidence on Supreme Court behavior. The standard depiction of Supreme Court justices holds that their behavior reflects only their concern with the content of legal policy; how well does the empirical evidence support that depiction?

Sources of Intercourt Differences in Goal Orientations

In the model presented in figure 1.1, the mix of operative goal orientations on a particular court is a product of the recruitment processes that staff the court and the situations in which its judges work. Each, of course, can create differences in orientations from one court to another.

Recruitment

The potential impact of recruitment is straightforward. People differ a great deal in what they seek to accomplish, in their inherent motives or goals (Winter 1973; Boyatzis 1973; Payne et al. 1984). Recruitment processes might bring to different courts people with different inherent goal orientations.

Arguably, such differences are limited by a degree of homogeneity among judges as a whole. With the exception of some state trial judges, they have all sought out membership in the legal profession and have experienced training as lawyers. Further, those lawyers who seek or accept judgeships may tend to share certain priorities such as an interest in respect from the general public (see Greenberg and Haley 1986). Yet these similarities are not so great that they preclude substantial variation in goal orientations. In turn, that variation allows for the possibility of systematic variation among courts.

Such variation could arise on the "supply side," in that different courts are attractive to different kinds of people. Of course, there is a general preference for courts that stand higher in the hierarchy. Large numbers of federal district judges accept appointments to the courts of appeals, but it appears that no judge has moved in the opposite direction (Goldman 1995b). Still, lawyers undoubtedly vary in their preferences among different kinds of courts (see Wyzanski 1979; Wald 1992, 174–75). Those preferences inevitably affect the composition of different courts. Watson and Downing (1969, 72–73) found little overlap between the set of applicants for trial judgeships and the set for appellate judgeships in Missouri, so that lawyers in effect sorted themselves out among courts. Such sorting out, like similar processes in other spheres of life, has a purposive element: people seek out situations that are consistent with their goals (see Buss 1987; Waller, Benet, and Farney 1994).

The "demand side" involves choices by people who recruit judges. The identities of the recruiters themselves vary. The sharpest difference is between states in which voters often make the final choices of judges and systems (federal and some states) in which public officials fully control the selection process. Further, any particular set of selectors may apply different criteria to different courts. Justice Department officials look for somewhat different qualities in district judges and Supreme Court justices.

There is a substantial body of research on judicial recruitment (Sheldon and Lovrich 1991; Goldman 1991). Most studies examine recruitment processes and outcomes in single courts or court levels, but their findings provide raw materials for intercourt comparisons. Some studies make direct comparisons, either among formal selection systems (Canon 1972; Dubois 1980, 1983; Slotnick 1984; Glick and Emmert 1987) or between levels of courts within the same formal system (Slotnick 1983; Goldman 1995a).

But the research on judicial recruitment is not aimed at identifying variation in goal orientations. Indeed, this research generally incorporates the same kind of assumption that underlies studies of judges' background characteristics: recruitment processes are important because they influence the mix of policy preferences on particular courts and sets of courts. This assumption is exemplified by Levin's (1977) insightful comparison of trial courts in Pittsburgh and Minneapolis, which showed how recruitment processes

in the two cities brought to the bench people with different attitudes toward criminal sentencing.

Still, the research on judicial recruitment provides a basis for speculation about its effects on goal orientations in different courts. To take one important example, there are reasons to posit that the lawyers who populate the highest courts care more about the content of legal policy than do those who sit on the lowest courts. That hypothesis merits discussion because of its importance, and it also illustrates the ways that recruitment might bring about differences among courts.

One basis for this hypothesis is intercourt differences in lawyers' status: both supply and demand favor the recruitment to higher courts of lawyers who have enjoyed more success in law and public life. On the demand side, the degree of success typically required of candidates for judgeships is greater for higher courts. On the supply side, judgeships become increasingly attractive to successful lawyers at higher court levels. Few leading partners in prosperous firms would be willing to consider a judgeship below the top level of a state court system, but many such lawyers would happily join a federal appellate court. The same is true of people in government. Senator George Mitchell turned down President Clinton's offer of a Supreme Court appointment, but he seemed to reach that decision with some difficulty. Presumably, he would have had no difficulty in turning down an offer to join the Superior Court of Maine. In conventional terms, then, the résumés of judges on the federal courts of appeals are considerably more impressive than those of judges on state intermediate courts.

This difference might have no impact on judges' goal orientations. But it may be that the people who reach high levels in law and politics differ from their less successful colleagues in relevant ways. One possibility is that both lawyers who practice at high levels of the profession and people who work at high levels of government tend to develop strong views about public policy issues. As a result, they might give a higher priority to policy goals on average than do other lawyers.

Probably more important than lawyers' status as a basis for intercourt differences are the images of higher and lower courts. As most people see it, the opportunity to shape law and public policy grows at increasingly higher levels of courts. On the supply side, perceptions of this difference might affect the kinds of people attracted to various courts. The highest courts may draw people

for whom legal policy is very important (Watson and Downing 1969, 73). In contrast, lawyers may seek to join lower courts for a variety of reasons, with the opportunity to shape policy ranking relatively low.

On the demand side, the people who select judges typically are quite interested in the policy views of candidates for the highest courts. As a result, they might tend to favor candidates who have expressed their policy positions often and clearly, people who are likely to care a great deal about the content of public policy (see Schmidhauser 1979, 98).[12] On the whole, policy views are less important to those who choose judges for lower courts, where partisan and personal ties between selectors and recruits often are of much greater relevance (Goulden 1974, 21–74; New York State Commission on Government Integrity 1988). That reality is captured in a judge's widely cited observation that a "judge is a member of the Bar who once knew a Governor" (Bok 1941, 3).

The hypothesis on which I have focused is of special interest because it is consistent with the pyramid metaphor: if judges on higher courts focus more on the content of legal policy than do their counterparts on lower courts, recruitment could help to explain that difference. Students of judicial behavior might posit other types of differences between higher and lower courts as well as variation along other lines, such as differences between trial and appellate judges or between courts with broad and narrow jurisdiction. But all this is highly speculative, since there has been very little research on the relationship between recruitment and judges' goal orientations.

Court Situations

Some psychologists have argued that the situations in which individuals act have a more critical impact on behavior, and intrinsic traits of individuals less, than most people realize (Patry 1989; L. Ross and Nisbett 1991). Indeed, the tendency to give undue weight to intrinsic traits has been labeled the "fundamental attribution

12. One prominent exception to this generalization was David Souter's appointment to the Supreme Court. President George Bush nominated Souter in part because he lacked an extensive record of positions on legal policy issues, thus providing fewer points of attack for potential opponents. But Souter's surprising degree of liberalism on the Court underlines the costs of this strategy.

error" (L. Ross 1977, 184–85).[13] On the whole, this argument seems convincing. More specifically, recruitment is probably less powerful as a source of intercourt differences in judicial behavior than are judges' situations.

There is no doubt that judges' situations differ enormously among courts. For instance, there are very substantial differences between trial and appellate courts in the form and setting of decisions. Courts vary in such other respects as the composition and volume of their caseloads, the resources available to judges, the proportions of their decisions that undergo appellate review, and the kinds of interactions that occur between judges and other court participants. Because of such differences, it can be argued that the Supreme Court resembles Congress and a municipal court resembles other "street-level bureaucracies" (Lipsky 1980) far more than the two courts resemble each other.

Because court situations determine how inherent goal orientations translate into operative goal orientations, differences in these situations can create intercourt variation in the mixes of goals that judges actually pursue in their judicial work. The most obvious effect of this sort, and perhaps the most important, concerns judges' career goals. Most students of Congress give a prominent place to re-election as a goal driving legislative behavior (e.g., Mayhew 1974; Fiorina 1989). That treatment of re-election is quite reasonable: members of Congress hold an attractive office (though perhaps less attractive than it once was) and face its potential loss at frequent intervals.

Of course, courts vary in both respects. I have already noted differences in the attractiveness of courts, differences that affect judges' interest in retaining their positions. Differences in job security are even greater. Most federal judges and those in a few states hold office for life or until retirement age. Other judges hold office for fixed terms, but there is considerable variation in the difficulty of winning new terms. A member of the Texas Supreme Court can anticipate a heated and expensive battle for re-election (see Donald W. Jackson and Riddlesperger 1991). A Minnesota trial judge is unlikely even to face an opponent (Benson 1993, 765 n. 2).

The importance of prospects for promotion also varies. Some promotions are more attractive than others; in a state without intermediate appellate courts, promotion from a trial court to the

13. If people tend to put themselves in situations congruent with their own goals and needs, however, the distinction between personal and situational characteristics is

supreme court is a very big jump in prestige. Further, the chances for promotion differ with the numbers of judgeships at different levels and the extent to which particular courts are staffed through judicial promotion. To take one example, federal district judges have a better chance of promotion to the next level than do members of the courts of appeals (see Posner 1985, 17).

While variation in career goals is especially easy to discern, the importance of other types of goals is also likely to differ among courts. Various characteristics of court situations help to determine what goals are relevant to judges in their judicial work and how much weight is given to particular goals.

If the operative goal orientations of state trial judges and Supreme Court justices differ fundamentally, characteristics of their situations probably are the primary reason. The judge who serves in an urban trial court typically must think about a good many things. In some courts re-election is problematic. An appellate judgeship or a well-paying nonjudicial position is worth striving for. The work load is probably heavy, resources to cope with it limited. Trial lawyers have considerable control over cases and court proceedings, especially on the criminal side. A chief judge may hold power over a judge's working conditions, even over where the judge works. Decisions can be overturned on appeal. Because of these conditions, a great many of the goals that judges bring with them to the bench remain relevant to the choices they make as judges (see A. Smith and Blumberg 1967, 99).

Typically the situation of Supreme Court justices is viewed as very different. Most students of the Court take the implicit position that the justices' situation makes most of their inherent goals largely or entirely irrelevant, leaving only their interest in the content of legal policy—whether they are interested in it as law or as policy. Rohde and Spaeth (1976, 72–74) and Segal and Spaeth (1993, 69–72) made this conception of the Court explicit. Both books cited a lack of electoral accountability and a lack of ambition for higher office as conditions that free justices to focus on the content of legal policy. In effect, they argued that these characteristics render justices' self-interest irrelevant to their judging. Since all justices work under these conditions, it follows that they share the same narrow set of operative goals. The two books also cited characteristics of the justices' situation that arguably reduce the relevance of legal considerations and the need for strategic behavior, issues to be considered in chapters 3 and 4. Table 2.1 summa-

and Segal and Spaeth 1993, describing them in terms of the justices' goals.

For now, the only issue is the relevance of goals other than the content of legal policy. As some of the entries in table 2.1 indicate, there is a very plausible rationale for placing the Court at the top in the pyramid metaphor: Supreme Court justices have a considerable degree of insulation from career concerns that are quite relevant to most people, including most judges. In itself, then, the possession of a highly prestigious position for life makes an enormous difference.

Yet it is not self-evident that justices act only on their interest in legal policy. For one thing, justices might not be entirely free from concern about their careers. Despite the Court's prestige, for instance, it might be common for justices to aspire to other positions. More important, the Court's institutional characteristics do not render irrelevant such goals as personal popularity or limited work loads. Such goals might be inherently important to justices, and they might affect the behavior of justices on the Court.

Thus the abundance of empirical evidence on the Supreme Court is welcome. For no other court do we know so much about patterns of judicial behavior. That evidence can be combed for what it tells us about the operative goal orientations of the justices, specifically about the relative importance of goals connected with

TABLE 2.1. Characteristics of the Supreme Court's Situation That May Reduce the Operational Relevance of Certain Goals

Situational Characteristic	Goals That Are or May Be Rendered Less Relevant
Lifetime term and very limited prospect of impeachment	Continued tenure in position
High prestige	Securing nonjudicial positions
Discretionary jurisdiction	Legal accuracy
Absence of higher courts	Judicial promotion
	Legal accuracy (due to lack of review of decisions)
Infrequent review and limited control by other branches[a]	Court resources
	Strategic behavior in relation to the other branches[b]

Source: Based in part on Rohde and Spaeth (1976, 72–74) and on Segal and Spaeth (1993, 69–72).

[a]Rohde and Spaeth and Segal and Spaeth posit this condition, which is disputed by other scholars.

[b]This is, of course, not a goal but the way in which justices act on their interest in the content of legal policy (especially the goal of achieving good policy). Like its antecedent condition (see previous note), this result is disputed.

the content of legal policy and of other types of goals. That is the subject of the next section.

The Goals of Supreme Court Justices: Empirical Evidence

The Content of Legal Policy

Scholars who believe that legal policy is the dominant concern of Supreme Court justices find empirical support primarily in two related bodies of research: dimensional analyses of individual votes on the outcomes of cases that are decided on the merits and causal analyses of relationships between those votes and justices' policy preferences. The evidence from these bodies of research merits close examination.[14]

The classic mode of analysis in political science research on the Supreme Court is dimensional. Pritchett (1941, 1948, 1954) was the major pioneer with his analyses of interagreement patterns among justices and scales of their policy positions in votes on the merits. Using techniques such as bloc analysis and Guttman scaling, students of the Court have continued to probe voting behavior in dimensional terms. In the years after Pritchett's work, there was a movement toward increasingly complex modes of dimensional analysis (Thurstone and Degan 1951; Schubert 1962a, 1965, 1974; Rohde and Spaeth 1976).

Schubert provided an explicit theoretical framework for the findings from dimensional analysis, most extensively in *The Judicial Mind* (1965). Drawing from attitude theory in psychology and from Coombs's (1964) theory of data, Schubert (1962a, 90–91; 1965, 26–28) portrayed each case as a stimulus or *j*-point in a space that is based on the issue dimensions in the case. Each justice has an ideal or *i*-point in the same space. If we simplify to a single dimension and treat that dimension as ideological, the justice can be expected to cast a liberal vote if the justice's *i*-point is to the left of the *j*-point for the case. In a modified version of this formulation, depicted in figure 2.1, each of two alternative outcomes in a case has its own *j*-point, and the relationship between the justice's *i*-point and the midpoint between these *j*-points determines the

14. The same evidence is widely interpreted to demonstrate the dominance of policy goals over legal goals, and it also relates to the extent of strategic behavior among justices. Its implications for these two issues are discussed in chapters 3 and 4.

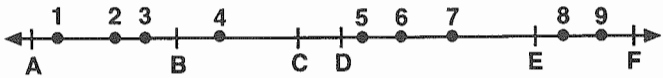

Fig. 2.1. Representation of ideal or *i*-points for justices and midpoints between *j*-points for cases on a single policy dimension. (Numbers represent *i*-points on the dimension for each justice, letters represent the midpoints between the *j*-points (not shown) for the two alternative outcomes in each case. If this is a liberal-conservative policy dimension, each justice casts a liberal vote in each case in which the midpoint between *j*-points is to the right of the justice's *i*-point. From Baum 1988, 906. Reprinted by permission.)

justice's vote (see Coombs 1964, 376–77). This spatial representation of responses to cases has powerfully influenced scholars' thinking about judicial decision making since that time.

Findings of dimensional analyses differ somewhat from study to study, but scholars consistently find that votes take a relatively simple structure (see Spaeth 1979, 109–39).[15] The justices' votes in specific categories of cases, such as double jeopardy and business mergers, generally have structures that seem to approximate a unidimensional form. Most of these categories can be combined into two or three larger dimensions, based on intercorrelations among the voting patterns for different categories. These dimensions are readily interpreted in terms of their subject matter. One contains primarily cases with economic issues. The other one or two contain primarily civil liberties issues. If there are two civil liberties dimensions, issues of equality generally fall into one set and those involving various individual freedoms into the other.

Findings from dimensional analysis in themselves are only descriptive: they depict patterns in votes rather than causal relations between votes and their determinants (see Schubert 1974, xi–xii). But descriptive patterns may lend themselves to interpretation as explanations. The standard interpretation of the dimensional findings on the Supreme Court is that the patterns of votes reflect patterns of policy preferences (or, as they are usually called, attitudes or values).[16] To the extent that cases fall within the major policy dimensions, votes in those cases are thought to be explained

15. In recent years the structure of votes in economic cases appears to be relatively complex; that development is discussed later in this section.

16. Gibson 1983, Goldman and Jahnige 1985, and Segal and Spaeth 1993 referred to attitudes, Rohde and Spaeth 1976 to relatively specific attitudes and more general values as well as policy preferences.

by the dimensions. For instance, Rohde and Spaeth (1976, 137–38) concluded that cluster analysis, metric multidimensional scaling, and factor analysis "revealed that three major values explain more than 85 percent of the Court's decisions during both the Warren and Burger Court periods" (see also Pritchett 1941, 895).[17]

This interpretation of the findings from dimensional analyses has been challenged on the ground that the scaling techniques employed and the criteria used to identify acceptable scales oversimplify the dimensionality of justices' votes (Tanenhaus 1966; see Spaeth and Peterson 1971; Stouffer et al. 1950, 77–87; Schooler 1968). There certainly is some validity to this challenge, but there can be no definitive judgment on this matter. The debate over the dimensionality of congressional votes (Poole and Daniels 1985; Koford 1989; J. Snyder 1992a) is a reminder that the findings of dimensional analysis are subject to multiple interpretations even at the descriptive level. The congressional research also points to the possibility that agenda-setting processes create "artificially unidimensional" patterns of votes (J. Snyder 1992a, 1992b; but see H. Rosenthal 1992). For several reasons, such as simplification of decision making (Poole and Rosenthal 1987, 35), justices might be inclined to reject cases and issues that do not fall into familiar attitudinal dimensions.

The simplicity or complexity of dimensions in Supreme Court votes is significant, but it is not as critical a question as it might seem. A complex pattern of votes does not mean that justices vote on some basis other than their policy preferences; the structure of preferences itself might be complex. For example, some studies indicate that voting in economic cases has moved away from a basically unidimensional pattern (Ducat and Dudley 1987; Hagle and Spaeth 1992a, 1993). Almost surely, the primary reason for this change is that political leaders—including Supreme Court justices—have become less inclined to view the range of economic issues in terms of a single attitudinal dimension. Justices' votes in economic cases may express their preferences as directly as they ever did, even though the resulting patterns are not as neat as they once were.

In any event, it is noteworthy that disagreements in voting largely follow lines that can be interpreted in terms of policy

17. Schubert (1962a, 104) took a somewhat different approach, concluding from the correlation between justices' positions on content-based and non–content-based dimensions that attitudes toward policy are the bases for voting choices.

dimensions. As Goldman and Jahnige (1985, 137; emphasis in original) argue,

> we cannot say that attitudes *cause* votes when we have defined those attitudes in terms of the same votes. Nevertheless, it is clear that if the attitudinal hypothesis were invalid, neither repeated findings of bloc voting, scale patterns, nor consistent issue-oriented voting would be found. It is therefore reasonable to suggest that judges tend to behave *as if* their attitudes and values governed their voting choices.

Put another way, the patterns of votes disclosed by dimensional studies seem more consistent with attitudes about public policy than with other possible explanations. In this important respect, these studies support the conclusion that policy goals are important bases for Supreme Court behavior. However, several caveats are needed.

First, if justices' policy preferences are the primary source of these patterns of votes, they might be augmented by other sources. For instance, some justices may give a high priority to pleasing audiences that have strong collective preferences themselves, and they could best do so by taking ideologically consistent positions on the Court. To take an unlikely possibility, if Antonin Scalia's only goal were to win the favor of conservative legal scholars, his voting probably would fit into dimensional scales as well as it actually does. To take a more likely possibility, Scalia's own conservative views may be reinforced by the importance to him of audiences whose views also are conservative. As in Congress, it is difficult to separate out the effects of personal attitudes and constituencies as sources of ideologically consistent voting (see Peltzman 1984).

Second, the dimensionality of votes tells us about forces that operate differently on different judges, but it tells us nothing about forces that affect all the justices similarly. To the extent that certain goals have uniform effects on the justices, those effects cannot be discerned from patterns of disagreement. For instance, trends in societal or congressional opinion could move justices in the same direction and to about the same degree, thus creating no serious disturbance in dimensional patterns.

Third, although scaling techniques tend to minimize the numbers of apparent deviations from consistent voting, deviations from unidimensionality do appear. Those deviations could reflect

the systematic effects of other influences and goals. Thus these "residuals" from dimensional analysis are theoretically significant and merit closer attention (see Schubert 1963a).

Finally, votes on the outcomes of cases represent only one part of Supreme Court decision making. A focus on votes excludes the content of legal rules that justices support, the more consequential component of the Court's decisions on the merits. It also excludes decisions to accept or reject petitions for certiorari, whose significance for the Court's role as a policymaker is self-evident. It is not at all certain that the relative weights of different goals are uniform across all the aspects and stages of decision (Baum 1993).

Despite the inherent limitations of dimensional analysis in explanation, dimensional analyses of votes do provide strong evidence that justices' policy preferences influence their behavior substantially. But the findings from these analyses do not establish that the content of legal policy is the only consideration that motivates Supreme Court justices to a significant degree. The evidence is too ambiguous and too limited to support that conclusion.

If scholars often infer more from dimensional studies than is strictly justified, one unstated reason is that they read the dimensions of voting in terms of an implicit causal analysis. Justices' behavior away from the Court and prior to joining the Court provides more direct evidence of their policy preferences, and in turn those apparent preferences typically are consistent with the positions that justices take as members of the Court (Kritzer 1996, 17). We see William Rehnquist as acting on conservative values, for instance, because those values were evident during his pre-Court career. There was no doubt about the personal liberalism of William O. Douglas when he expressed that liberalism consistently in his extrajudicial writing. While dimensional analysis often is used for exploratory purposes, in effect students of the Supreme Court have used it to confirm their own impressions from observation of the justices.

Systematic causal[18] research on the relationship between justices' policy preferences and behavior has been limited by the difficulty of measuring preferences directly. A few scholars, however, have undertaken such research. An important early study was David Danelski's (1966) analysis of Pierce Butler and Louis Brandeis, which identified for each justice a similarity of themes

18. I should note that by "causal" I mean only that possible associations between independent and dependent variables are analyzed, not that such associations necessar-

between the speeches they gave as lawyers and their work as justices.

Jeffrey Segal and Albert Cover (1989) took a more comprehensive approach, analyzing the relationship between policy preferences and voting behavior for justices who joined the Court between 1953 and 1988. Their measure of preferences was based on content analysis of newspaper editorials after a justice was nominated. Segal and Cover found a strong statistical relationship between preferences and voting behavior. A follow-up study (Segal, Epstein, Cameron, and Spaeth 1995) extended analysis to earlier and later appointees. It also identified some complexities in the relationship between measures of preferences and voting behavior while confirming the basic thrust of the original study (see L. Epstein and Mershon 1996).[19]

These studies are important because they provide hard evidence of the connection between justices' views about policy and their behavior that scholars have long inferred from their own observations. If confirmation was needed, they confirm that preferences have a great deal of impact on behavior. But each caveat discussed in connection with the findings of dimensional research applies to the causal studies as well. Thus these studies support the conclusion that justices are strongly motivated by their policy goals, but they leave open the question of whether other goals have a significant impact on the justices' behavior.

Career and Standard of Living

Without question, Supreme Court justices care about a good many things other than legal policy. As scholars have argued, however, their situations as justices render some of those goals largely irrelevant to their behavior on the Court. This seems to be true of goals connected with careers and standard of living.

As discussed earlier, career goals generally are viewed as inoperative for contemporary justices, because justices hold their positions for life and because the Court's prestige and power leave them uninterested in other positions. Lifetime tenure could be overcome by impeachment and conviction in Congress, but it is

19. Another type of causal analysis focuses on consistency over time in the justices' relative positions on an issue or set of issues (Hagle and Spaeth 1992b; see Segal and Spaeth 1993, 255–60). Such analyses demonstrate high consistency, from which one infers that the sources of voting differences among the justices are basically stable

doubtful that the desire to avoid removal through impeachment affects justices' positions in cases except in rare instances. Congressional interest in impeachment of William O. Douglas over the years and the potential impeachment of Abe Fortas in 1969 stemmed in part from their liberal positions on the Court. Yet removal through impeachment is not only quite unlikely but easily averted through careful behavior outside the context of decision making (see Eisler 1993, 212).

Ambition for other positions might be more consequential, because some justices undoubtedly have that ambition. For one thing, an associate justice can be promoted to chief justice, and at any given time there probably are a few justices who keep that goal in mind. Robert Jackson's desire for promotion and his unhappiness at failing to win it in 1946 became a matter of public interest after he disclosed his feud with Hugo Black (Gerhart 1958, 235–88; John Frank 1949, 123–31). Further, at least a few justices have contemplated candidacies for president or vice president. Douglas seemed to have considerable interest in both offices (J. Simon 1990, 257–75), and Black had wanted the vice presidential nomination that went to Harry Truman (H. Black and E. Black 1986, 216). More recently, some observers perceived that Sandra Day O'Connor was interested in the vice presidency (R. Davis 1994, 128).

Occasionally, justices do leave the Court for other positions. Charles Evans Hughes resigned in 1916 to run for president. And once in a while, a justice finds the Court an unfulfilling setting and takes a federal administrative position, as James Byrnes did in 1942 (Robertson 1994, 311–19). A more ambiguous case is that of Arthur Goldberg, who left the Court in 1964 to become U.S. Ambassador to the United Nations; Goldberg may have been unaware of his unhappiness on the Court until President Lyndon Johnson informed him of it (B. Murphy 1988, 163–71).[20]

To the extent that justices care about other positions, that concern might affect their behavior on the Court. Since presidents appoint chief justices and high executive-branch officials, justices may cast votes and write opinions that are intended to please current or prospective presidents. Federal judges who seek judicial promotions are sometimes suspected of that behavior (Safire 1985; Kaplan 1990). Justices who seek promotion to chief justice might

20. There is some reason to posit that the Court has become more attractive and thus that justices have become less inclined to leave for other positions. But there has not been a clear decline over time in the rate of departures for other positions—though

also try to avoid displeasing senators; the Senate failed to confirm Fortas's promotion in 1968 and allowed William Rehnquist's promotion in 1986 only after a heated battle. Similarly, justices who have ambitions for high elective office may take positions designed to appeal to public opinion, just as elected judges may do in order to secure re-election (Reidinger 1987; Hall 1992).

Thus there is a possibility that career goals significantly affect the choices made by some justices. But that effect probably is limited even for those justices with an interest in other positions (see Rohde and Spaeth 1976, 96 n. 8). And it appears that most justices care too little about other offices for career goals to have any meaningful effect on their behavior.

A second goal with little apparent impact is maximizing income and its equivalents. Supreme Court justices would be unusual people indeed if they did not care about material matters—and clearly they do. In an earlier era, many justices resisted retirement in order to maintain their income; the provision of attractive pension benefits has increased the retirement rate substantially (D. Atkinson 1976; see Squire 1988). Busy as justices are, most of them find time to participate in remunerative activities such as law school lectures. Abe Fortas, eager for additional income, engaged in activities that raised ethical questions and that ultimately brought about his resignation from the Court (B. Murphy 1988, 545–77; Kalman 1990, 359–78). William O. Douglas also made himself vulnerable to calls for impeachment with his moneymaking activities (J. Simon 1980, 391–411).

Perhaps concern with income occasionally affects justices' choices. In 1995 questions were raised about denials of certiorari favoring the West Publishing Company. The company had provided travel and other benefits to several justices who helped to select recipients for a West-sponsored annual award to a federal judge (*Washington Post* 1995). And it might be that the desire to retain opportunities for lucrative law school visits or speeches to bar associations affects responses to cases involving law schools or lawyers' groups (see Mauro 1992a). But such possibilities involve too narrow a range of cases to be significant in Supreme Court behavior as a whole.

Limiting Work Load

Some other goals are not so easily dismissed. Of all the considera-

fellow justices, and their standing with audiences outside the Court. Relations with colleagues and standing with Congress, one important audience, both are considered in connection with strategic behavior in chapter 4. In this section I discuss relations with other external audiences and work load.

Judicial concern with work load is a strong theme in trial court research (e.g., Feeley 1979, 196; Lynch 1994, 120). While Supreme Court justices might care less about their work load, in part because it exerts less pressure on them, it seems reasonable to assume that nearly every justice prefers less judicial work to more (see Posner 1995, 123–26). Indeed, there is considerable evidence for this assumption. Justices sometimes complain about the burdens created by their work loads (Powell 1982; Stevens 1982; Burger 1985). An interest in minimizing work loads is reflected in the limited hours that some justices devote to their Court work, in delegation of significant responsibilities to law clerks, and in the development and exercise of discretionary jurisdiction. The question in each of these instances is the extent to which the goal of limiting work loads has an independent effect on the justices' behavior as decision makers—particularly an effect that conflicts with their pursuit of legal and policy goals.

While some members of the Court are willing to work very long hours, others are not. In the latter group, the most visible are those who spent much of their time on other activities—for instance, Douglas on his writing and travel (J. Simon 1980), Fortas on his consultations with President Johnson (Kalman 1990, 293–318). Those justices who devote less than full time to the Court are making something of a trade-off. If they devoted more time to study of cases, they might better identify the positions that are most consistent with their legal or policy goals. If they gave more time to persuasion of their colleagues, they might enhance collective support for their positions. It may be that the trade-off is slight, that the effective justice would gain little by working additional hours, but this is not necessarily true.

Concern with work loads has led to increased delegation of major responsibilities to law clerks—a development decried by some legal commentators (e.g., Kester 1983; Starr 1993). A good case can be made that justices lose little control over the Court's work through this delegation (Tushnet 1992). But they lose *some* control, particularly in the case selection process. This is probably a very sensible trade-off, yet its existence calls into question the justices' complete devotion to law and policy.

marily mandatory to one that is almost entirely discretionary resulted largely from lobbying by the justices themselves (O'Brien 1993, 135). The successive reductions of mandatory jurisdiction appear to be quite consistent with justices' concern for the content of legal policy, because discretionary jurisdiction enables them to concentrate their time on cases that have the greatest potential impact on law and policy (Gressman 1964).

More ambiguous in its impact is the recent decline in the number of cases that the Court accepts for full decisions on the merits (Biskupic 1994a). The mean number of cases accepted per term was 180 in the 1984–87 terms and 99 in 1992–95. That reduction occurred even as the number of petitions for hearings grew, so that the proportion of petitions accepted by the Court declined from 4.2 percent in 1984–87 to 1.5 percent in 1992–95. The great majority of cases accepted by the Court derive from paid petitions, and the number of those petitions has remained stable since the mid-1980s. Even so, the proportion of paid petitions accepted by the Court fell from 7.8 percent in 1984–87 to 4.1 percent in 1992–95.[21]

Such a massive change must reflect a conscious decision by several justices. Perhaps they are motivated by a concern with legal policy. For instance, justices who prefer the legal status quo to most of the doctrinal changes that result when the current Court decides cases might be the strongest proponents of a smaller docket on the merits; in other words, "defensive denials" of certiorari (see Perry 1991, 198–207) may be standard practice for some members of the Court. Some justices may have concluded that the best way to advance a systematic policy agenda is to limit their work loads so they can analyze each case carefully for its implications. Or they might want to focus their efforts on a limited number of policy issues that they care the most about.

But these explanations seem less plausible than the straightforward goal of reducing work loads. And the decline in the Court's collective willingness to hear cases seems to indicate that at least some justices sacrifice opportunities to advance their legal or policy goals in order to reduce their work loads. After all, the volume of petitions aside, the number of cases that raise important issues can hardly be declining and almost surely has increased considerably. Moreover, the Court's capacity to oversee lower courts

21. These figures are calculated from data collected by the Court and published annually by *United States Law Week*. They exclude original jurisdiction cases and those summarily decided by the Court. The numbers of summary decisions are fairly unstable from term to term but show no clear trend over this period.

is increasingly limited as it reviews a smaller proportion of their decisions (see Strauss 1987).

The possible effects of work load concerns that have been discussed thus far might be considered peripheral, in that they would not systematically affect justices' positions on the merits of cases. But there are a few ways in which work load concerns could have such an impact. One is that justices might be more willing to join the opinions of colleagues in order to save the time involved in writing separate opinions (Posner 1995, 123–26). It is likely, however, that the availability of law clerks reduces any effect of this sort. Indeed, work load concerns might actually encourage the writing of separate opinions and move the Court further from unanimity, because it is time-consuming to seek consensus (see Bator 1990, 687).

Another possibility is that the justices sometimes choose doctrinal positions with the aim of limiting the need to decide future cases and thus reducing their work loads. At least a few opinions have described this aim explicitly. In *Paris Adult Theatre v. Slaton* (1973, 93), for instance, Justice William Brennan cited "the burden of deciding scores of obscenity cases" as a reason for his own change of position in the field. Even if these opinions depict the justices' motive accurately, however, it is unclear how often they act on this motive.[22] Like other possible effects of the justices' interest in their work loads, this practice merits more study.

The Court's Audiences

There is no doubt that Supreme Court justices care about their standing with audiences outside the Court. They frequently speak to legal groups and sometimes speak to other interest groups. They often work to obtain positive reactions from such groups; Benjamin Cardozo, for instance, "cultivated the good opinion of academics" (Posner 1990, 132). Many justices pay attention to their depiction in the mass media (R. Davis 1994, 38–40), some grant interviews to journalists (R. Davis 1994, 105–107, 119–22; Glendon 1994, 113–14), and some respond to criticism in the press (Jeffries 1994, 278–80; R. Davis 1994, 112–13). Harry Blackmun read his mail from the public (Koh 1994, 20), and William Brennan cared about his portrayal in biographies (Mauro 1995). Several

22. It should be noted that a justice who pursues legal clarity as a goal also would favor doctrinal positions that minimize the need to decide future cases.

justices have maintained personal relationships with presidents, even at the risk of creating conflicts of interest (John Frank 1970).

This interest in the approbation of certain audiences gives those audiences potential influence over the justices' decisional behavior. Indeed, scholars who study interactions between the Supreme Court and external groups have posited various ways that these groups influence the Court's decisions. The extent and forms of that influence can tell us something about the justices' motivations.

At the outset, a distinction should be made between congruence or covariation on the one hand and influence on the other. Congruence refers to similarity between what an external group wants and what the Court does, covariation to similar trends in the position of an external group and in Court decisions. Neither, of course, necessarily connotes influence. It is influence that helps to illuminate the justices' goals, because the influence of an external group must have a motivational basis.

If justices are influenced by their audiences, that influence could have any of several bases. One possibility is that justices take positions preferred by their audiences as a means to advance their interest in the content of legal policy. Thus they might favor the executive branch in litigation in order to maintain support from policymakers who implement many Court decisions. Similarly, their opinions might follow trends in public opinion as a means to build public approval of the Court as an institution and thus to deter attacks on its decisions by elected officials.

Alternatively, justices could seek the approval of particular audiences as a way to advance goals other than shaping legal policy. For instance, they might try to build support for the Court in Congress in order to maximize the Court's budget, because a higher budget makes their life more comfortable. And justices may respond to audiences because they like approval from those audiences for its own sake. A justice may enjoy the privilege of interacting with the president or accolades from legal academics or positive coverage in the mass media.

It seems highly unlikely that justices care about approval from their audiences only as a means to other ends. Harsanyi (1969, 524) argued plausibly that "[p]eople's behavior can be largely explained in terms of two dominant interests: economic gain and social acceptance." As discussed earlier, economic gain may have little relevance to Supreme Court justices. Social acceptance *is* relevant,

and justices would be a singular group of people if none of them were concerned with respect and popularity outside the Court.

Still, the mix of motivations responsible for any influence of external groups on the Court is an open question to be determined empirically. Leaving Congress aside until chapter 4, there are substantial bodies of empirical findings on three other sets of external groups: the general public, interest groups, and the federal government as participant in litigation. That research can be analyzed for what it tells about the extent of influence and about its motivational sources.

The great difficulty of ascertaining influence and its sources should be emphasized. It is not necessarily easy even to ascertain congruence or covariation between a justice's positions and those of an external group. Further, it can be quite difficult to determine whether congruence or covariation actually reflects group influence. Finally, the task of identifying the sources of any influence is even more perplexing: patterns of influence that result from justices' interest in legal policy often would look quite similar to patterns resulting from their interest in personal respect and popularity. If influence reflects a combination of motives, as it probably does in most instances, determination of their relative strength may be particularly difficult. Thus it should not be surprising if our understanding of external influence on the Court is quite incomplete.

On the *general public* as one audience, there are now several studies of the relationship between public opinion and Supreme Court decisions. Some studies examine congruence between the Court's positions on specific issues and public opinion on these issues (Barnum 1985; Marshall and Ignagni 1995; Weissberg 1976, 110–26, 135–36), and a book-length study analyzed congruence in considerable depth (Marshall 1989). The results are mixed, but overall these studies show more agreement than disagreement between the Court and the mass public. Other studies have analyzed covariation over time between broad patterns of public opinion and of Court policy (Mishler and Sheehan 1993; Link 1995; Stimson, MacKuen, and Erikson 1995; Flemming and Wood 1997), each concluding that there is substantial covariation between opinion and policy.

To the extent that policy and opinion are related, some of the possible sources of that relationship involve no direct influence for public opinion (Dahl 1957; Marshall 1989). For example, justices

may respond to the same societal events and trends that affect public opinion. Alternatively, they may respond to other policymakers who themselves are influenced by the general public. Presidential elections are an expression of public opinion, so the effects of new appointments on the Court may track changes in opinion (Norpoth and Segal 1994).

The various possible linkages between opinion and decisions are difficult to disentangle. The studies of congruence and covariation provide evidence suggesting that public opinion has an impact on the Court, but it remains uncertain whether opinion has a substantial effect that is independent of other forces on the Court (see Caldeira 1991, 313–16; Norpoth and Segal 1994). In any case, to the extent that the general public does influence the Court, we know little about the motivational sources of that influence (Flemming and Wood 1997, 471).

Scholars have given considerable attention to *interest group* activity in the Supreme Court (see L. Epstein 1993).[23] Much of this research focuses on particular sets of groups or policy areas (e.g., Sorauf 1976; O'Connor 1980; Olson 1984; Wasby 1995). Other research considers group activities and interactions with the Court more broadly (e.g., Barker 1967; Vose 1972; L. Epstein 1993). On the success of groups in the Court, a form of congruence, many studies suggest a positive picture—at least for certain groups—based on major victories such as *Brown v. Board of Education* (1954) for the NAACP Legal Defense Fund (Kluger 1976) or on high winning percentages over time (Lawrence 1990, 98–122). That success underlines the possibility that individual groups, or interest groups as a whole, actually influence the Court's behavior.[24]

Some scholars who analyze interactions between interest groups and the Court in particular fields have concluded that groups do exert substantial influence. In their study of abortion and capital punishment, Epstein and Kobylka (1992) argued that group arguments help to frame issues for the Court. And several

23. Interest groups can be defined in a variety of ways. For this discussion I include all organized entities that participate in litigation before the Court. Among the categories of entities submitting amicus curiae briefs that Caldeira and Wright (1990b, 791) described, I exclude only individuals and corporations—though the United States and the Solicitor General as its representative will be discussed separately.

24. One way that interest groups affect the Court is outside the scope of this inquiry: groups can bring to the Court cases and issues that otherwise would not have reached it. Without question, group sponsorship provides an important base for the Supreme Court's work in fields such as civil liberties by assisting litigants in reaching the

scholars have deduced that group participation affects outcomes and doctrinal positions (e.g., Kobylka 1995). In his study of church–state litigation, Sorauf (1976, 352) concluded that group activity has a powerful effect on courts.

> Courts cannot ignore the demands placed upon them. As sophisticated groups and individuals bring litigation whose primary purpose is to overturn some public policy, they create enormous pressures on the courts to take precisely that activist step.

Such judgments should be given considerable weight because of the rich evidentiary base on which they rest, but there is room for differing judgments about the extent of group influence (see L. Epstein and Rowland 1991).

Some studies have assessed the impact of interest groups by measuring the effect of amicus curiae briefs on case selection or outcomes on the merits when other relevant variables are held constant. McGuire (1990) found that the relative support of amici for the two sides had a statistically significant effect on outcomes in obscenity cases. In a series of studies, Caldeira and Wright (1988, 1990a, 1994) found that amicus support for petitioners substantially increased the likelihood of a certiorari grant during two Court terms (see also McGuire and Caldeira 1993). To some degree, amicus briefs might be indicators of other case characteristics that actually influence justices. Nonetheless, these findings provide strong evidence that interest groups make a difference.

Influence on the Court by interest groups could flow from justices' interest in the content of legal policy. Caldeira and Wright (1988, 1112) viewed justices as acting to achieve policy goals; groups affect their selection of cases by giving them cues about which cases would be most useful to advance their conceptions of good policy. Similarly, the positions that interest groups take on the merits of cases might provide cues to justices about how particular cases relate to their policy preferences. Taking a different perspective, Sorauf (1976, 352) argued that courts that fail to respond to group demands for activism "risk losing support in that part of the public that expects an activist judiciary." In turn, loss of that support might diminish courts' effectiveness in shaping public policy.

Yet just as justices may court popularity in the general public for its own sake, they might seek the approval of interest groups for the same reason. They may be particularly interested in their

standing with prestigious legal groups such as the American Bar Association. On the whole, however, it seems more likely that the influence of interest groups rests on justices' interest in the content of legal policy.

The motivational sources of group impact have not been probed empirically. It is probably easier to distinguish among sources of influence for interest groups than it is for public opinion, because different sources may lead to different patterns of behavior: the justice who courts a group for personal reasons is likely to give more distinctive support to the group itself than is the justice who acts on the basis of a policy goal. But here too, research has concentrated thus far on the prior question of ascertaining the existence and extent of influence.

Among all the litigating groups that might influence Supreme Court policy, scholars have treated the *federal government* as unique. That treatment is appropriate, because the federal government stands out for its frequent involvement in Supreme Court litigation and for its close relationship with the Court. The government's role as a participant in litigation and the role of the solicitor general as its legal representative in the Court are familiar to students of judicial politics (see Scigliano 1971, 161–96; Salokar 1992). Equally familiar is the federal government's extraordinary success in the Court, both as party and as amicus. That success is reflected in decisions on the merits and, more dramatically, in the Court's selection of cases to hear (Salokar 1992, 106–50).

Scholars have offered several explanations for the solicitor general's success, and they disagree a good deal about the importance of particular explanations (see Tanenhaus, Schick, Muraskin, and Rosen 1963, 122; Segal 1991, 376–82; McGuire 1996). One explanation not involving direct influence is that by screening cases carefully the solicitor general brings an unusually strong set of petitions to the Court (O'Connor 1983, 259–60). Another, involving influence of a sort, is that presidential appointments produce similar perspectives in the solicitor general's office and the Court (Scigliano 1971, 182; but see Segal 1990).

Explanations that point to direct influence include the expertise of the solicitor general's office in litigation (Provine 1980, 86–92); its perceived expertise, which gives greater weight to its positions (Scigliano 1971, 182–91); the justices' gratitude to the government for its self-restraint in petitioning for certiorari (Scigliano 1971, 182–91); and the Court's dependence on the exec-

1981, 228–29; Salokar 1992, 177). The gratitude explanation relates most directly to work load, while the others are more closely linked with justices' interest in the content of legal policy. More broadly, a number of scholars have suggested that justices' deference to the executive branch or a general affinity between the executive and judiciary help to account for the government's success in the Court (Scigliano 1971, 182–91; Segal 1990, 147–49; Salokar 1992, 176–80); these links between Court and executive might have several motivational bases.

The most significant empirical evidence on the solicitor general's influence comes from multivariate studies of case selection (Caldeira and Wright 1988) and of decisions on the merits (Segal 1984; Segal and Reedy 1988; McGuire 1990; George and Epstein 1992). These studies indicate that, when other factors are held constant, the federal government still fares considerably better than other litigants. This finding suggests that the federal government's success reflects real influence and not just the cases it brings or the positions it takes.

But what are the sources of this influence? Little has been done to distinguish empirically among the many possible sources of the solicitor general's advantage. The most systematic research was undertaken by McGuire (1996), who analyzed decisions on the merits in the 1977–82 terms. McGuire concluded that the expertise of lawyers in the solicitor general's office based on their experience before the Court accounted for at least the preponderance of their high rate of success. This finding is important, because it suggests that the executive branch exerts no pull on the Court beyond that available to other litigants. It may be that this is true for decisions on the merits but that there are multiple sources for the much greater advantage of the federal government in getting its cases accepted by the Court.

This discussion of the Court's audiences has underlined the difficulty of ascertaining external influence on the Court and, even more, of identifying the motivations that allow any influence to occur. Two factors further complicate these tasks. First, justices may well vary in both the identities of the audiences that influence them and the extent of this influence, in part because they have different mixes of goals. Thus it is important to probe the impact of external forces on individual justices, as several studies have done (e.g., Segal 1988; Marshall 1989; Lawrence 1990; Caldeira and Wright 1994; Mishler and Sheehan 1996). These studies show differences among

and such external forces as majority opinion in the general public, though this variation may not result from differences in influence. In any event, analysis routinely should extend to the individual level.

More fundamental is a second complication: if justices *are* influenced by audiences outside the Court, those groups do not necessarily fit the categories on which scholars have focused. For instance, legal academics may be quite important to some justices (W. Murphy 1964, 63; Posner 1990, 132; see Fuld 1953, 915–16). It appears that some justices care about their place in history, so that they pay attention to an amorphous and somewhat inchoate audience (see Mauro 1995; B. Schwartz 1996b, vii–xii). Even justices who care about public opinion may aim at particular segments of the public rather than the general population. For this reason, the analyses of external influence that have been done so far may miss much of the influence that actually occurs.

Two current justices illustrate these complications. In their orientations toward the world outside the Court, President Bush's appointees seem to differ a good deal. David Souter surely cares about audiences outside the Court; after all, he helped to write an opinion that is striking in its concern with public perceptions of the Court (*Planned Parenthood v. Casey* 1992). But his outside activities appear to be quite limited (Biskupic 1994b), and he may orient himself heavily toward the Court itself. If so, external audiences might be only moderately salient to him. It also seems likely that their influence is relatively complex and nuanced.

In contrast with Souter, Clarence Thomas clearly is very interested in audiences outside the Court (M. Fisher 1995; A. Williams 1995). He has given several speeches to conservative organizations and received an award from one (Biskupic 1993). He had a meeting with African Americans, including journalists, at which he defended his positions on the Court (Biskupic 1994c). He reportedly described himself as "a very good friend" of conservative commentator Rush Limbaugh, and he officiated at Limbaugh's wedding (Mauro 1994, 51).[25] It is quite uncertain how much these audiences influence Thomas's behavior as a justice, but the potential for influence seems greater than it does for Souter. More important, the audiences about which Thomas seems to care most

25. It may also be relevant that Virginia Lamp Thomas, Clarence Thomas's wife, wrote an article for *People* magazine about the battle over his confirmation shortly afterward, one that understandably portrayed the justice in a very positive light (V. Thomas 1991; see R. Cohen 1991).

do not fit the categories on which research has focused, and their influence would be quite difficult to measure.

Summing up

I have emphasized how little we know about the motivational sources of any influence on the Supreme Court from the Court's audiences. The same can be said about other issues discussed in this section, including the broadest issue: the relative importance to the justices of goals connected with the content of legal policy and other types of goals. Students of the Court generally assume that justices act to advance their conceptions of good law or good policy, and supporting that assumption are strong theoretical arguments and considerable empirical evidence. But those arguments and evidence are not conclusive.

One reason is that justices clearly care about things other than the content of legal policy. Despite a substantial degree of insulation from their environment, many justices show serious interest in the ways that various audiences perceive them as individuals and the Court as an institution. They also show serious interest in their work loads. It would be surprising if they did *not* care about the length of their days at work or their standing with external groups.

This does not necessarily mean that personal standing or limited work loads are important operative goals for the justices, independent of their interest in the content of legal policy. It is quite possible that the goals of pleasing audiences and limiting work loads for their own sake have only a peripheral effect on justices' behavior in deciding cases, sufficiently limited that their impact can safely be ignored. But that is not self-evident from what we know about the Court. Both theoretically and empirically, the breadth of the justices' operative goals remains an open question.

Conclusions

Judges differ in their inherent goals, and court situations differ in the ways they translate inherent goals into operative goals. For both reasons, different courts may feature quite different mixes of operative goals.

The scholarship on judicial behavior suggests the metaphor of a pyramid to describe differences in judges' goals across court levels. In particular, there is a striking difference between the breadth

and heterogeneity of goals depicted collectively by students of state trial courts and the narrowness and homogeneity depicted by students of the Supreme Court.

The depiction of state trial courts suggested by the relevant scholarship should be regarded as tentative, because research on those courts has given limited attention to judicial behavior as such; we need to learn more. Still, this depiction is consistent with the situations of judges in those courts. Working in a complicated situation, state trial judges could be expected to act on a wide range of goals. Further, they would seem likely to differ considerably in their priorities among these goals.

Although scholarship on midlevel courts is far from any consensus about the forces that influence judges, taken as a whole that research is also consistent with the pyramid metaphor. However, there remains a great need for more research with a broad focus, aimed at sorting out the relative importance of different considerations in the decisions of courts such as state supreme courts and federal district courts. Because these courts differ in important respects, such as their positions within judicial systems, the picture that emerges from additional research may be of considerable intercourt variation in operative goal orientations.

Having just said a great deal about the Supreme Court, I want to make only one additional point. The strong basis for accepting the dominance of legal and policy goals in the Court has deterred scholars from considering directly the impact of other motivations on the justices. Despite all the research that has been done on Supreme Court behavior, this is one set of issues that is understudied and that merits more concerted research.

The issues on which Supreme Court scholars *have* focused follow the assumption of primacy for the content of legal policy. One central question for students of the Supreme Court, a question applied to other courts as well, is the relative importance of legal and policy considerations in shaping judges' choices. That issue is the concern of chapter 3.

CHAPTER 3

Law and Policy

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. (Chief Justice John Marshall for the Supreme Court in *Osborn v. U.S. Bank* 1824, 866)

> Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. (Supreme Court Justice Felix Frankfurter, dissenting in *Board of Education v. Barnette* 1943, 646–47)

> My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief. (Supreme Court nominee William Rehnquist, testifying before the Senate Judiciary Committee in 1971 [Mason 1979, 293])

The study of judicial behavior in political science is rooted in skepticism about the theory of judging reflected in those three statements. For several decades, political scientists have agreed on the proposition that judges do more than apply the law, that their conceptions of good policy influence their choices. But scholars have disagreed vehemently about the relative importance of judges' interests in good law and good policy.

This debate has focused most heavily on the Supreme Court. One reason is that most scholars treat the content of legal policy as the only important consideration in the justices' choices, so the distinction between law and policy is especially sharp in the Court. But the debate extends to other courts as well, and appropriately so: even if lower-court judges act on a wide array of goals, the balance between law and policy is still important to their behavior. This chapter addresses that debate by considering the impact of