

## Decision Making on the US Courts of Appeals

Segal, Songer and Cameron, 1995.

Excerpt:

. . . Since their creation in the 1890s, [the US. courts of appeals] have been responsible for ensuring the uniformity of national law in a diverse republic in which sectional pressures constantly seek to undermine that uniformity. More recently, they have become the principal means of supervising the myriad federal regulatory agencies. In both these roles, they are important policy makers: the final authoritative interpreters of federal law and the Constitution in the overwhelming majority of all civil and criminal cases filed in the federal courts. We consider decision making on the US courts of appeals by examining three different models of behavior—the legal model, the attitudinal model, and the hierarchical model. Briefly, the legal model, as its name suggests, holds that judges make decisions based on legal factors such as the intent of the framers of the Constitution and precedent. Alternatively, the attitudinal model holds that judges make decisions based on their own attitudes and values. Finally, the hierarchical model holds that judges on the courts of appeals have attitudes and values but, as intermediate-level players in a complex judicial hierarchy, are limited in their ability to pursue their values. Hence, the hierarchical model combines elements of the other two and encompasses them as extreme cases. We examine these models using a sample of search and seizure cases decided by the US. courts of appeals between 1961 and 1990.

### The Hierarchical Model

Arguably, the pure attitudinal model has particular relevance for decision taking on the Supreme Court. The Supreme Court is a court of last resort whose decisions cannot be overturned by other courts. Supreme Court justices lack electoral or (for the most part) political accountability and have no ambition for higher office. In general, then, they need please no one but themselves. Finally, the Court controls its own jurisdiction and thus can weed out frivolous suits in which text or intent or precedent might be perfectly clear.

These arguments have limited applicability to the judges who sit on the US. courts of appeals. First, ambition might be a constraint on the decisions of circuit court judges. Whereas Supreme Court justices have little room to improve their job stature, the same is not true of circuit court judges. We have no accurate count, but it strikes us as reasonable to assume that many of these judges dream of being promoted to the Supreme Court. Thus, the politically acceptable might impinge on the personally preferable. Second, decisions made in circuit courts can be appealed to the Supreme Court. Lower court judges must then at least consider the preferences of courts above them, although as we shall see, the extent to which they must do so is not always clear. Finally, lack of docket control means that circuit court judges get some cases to decide in which legal discretion is at a minimum, perhaps because of the clarity of a statute or the settling of the issue by the Supreme Court. Although it is impossible to know how often appeals court judges feel that the law or precedents are so clear that any judge would feel constrained to reach the same conclusion, one study estimated that such constraint may exist in as many as 62 percent of their cases (that is, judges may have substantial discretion in only a little over a third of their cases).

How might one construct a model of judicial decision making by judges who are constrained by their location in the judicial hierarchy? A detailed answer is far beyond the scope of this chapter; nevertheless, one way to proceed is to use insights from what social scientists refer to as “principal-agent” theory, a theory of strategic decision making within hierarchical settings. Principal agent theory focuses on situations in which subordinates have different preferences from their hierarchical superiors and the ability to take hidden actions or exploit hidden information relevant to the decisions. According to the theory, monitoring, auditing, and sanctioning become critical in such situations; the theory provides tools for analyzing these and other features of hierarchies.

Application of principal-agent theory to the federal judiciary suggests a “hierarchical model” of circuit courts. At the level considered here, the hierarchical model is mainly conceptual; exact predictions depend

on the detailed procedures followed in the hierarchy. For example, tightening or loosening the certiorari process used by the Supreme Court might well alter the decisions muting from the circuit courts. One very general prediction, however, is common across a wide variety of hierarchical models: superiors rarely find it in their interest to control the behavior of subordinates completely, [as the costs of perfect compliance will outweigh the benefits). . . . Accordingly, a general prediction of many hierarchical models is that decision making in the circuit courts depends both on the preferences of the nominal superiors, the Supreme Court, and those of the nominal subordinates, the circuit court judges. . . .

### Hypotheses about Circuit Court Decision Making

The legal, attitudinal, and hierarchical models make different predictions about the factors influencing the decisions of circuit court judges. These differences create the opportunity to test the models. In Table 1 we summarize the different predictions.

		<b>PREDICTION</b>		
<b>Model</b>		<i>Case Facts Matter</i>	<i>Doctrine Matters</i>	<i>Preferences Matter</i>
Legal		Yes	Yes	No
Attitudinal		Yes	No	Yes
Hierarchical		Yes	Yes	Yes

The first thing to glean from Table 1 is that case facts are crucial to all three models. The legal model holds that judges consider the facts of the case in light of text, intent, and precedent. The attitudinal model holds that judges consider the facts of the case in light of their own personal policy preferences. The hierarchical model combines both perspectives: judges consider the facts of the case in light of their own personal policy preferences but are likely to be somewhat constrained by text, intent, and precedent, depending on the tools available to higher courts to control lower ones. Because all three models agree about the importance of case facts, fact variables cannot be used to test the models. Instead, fact variables must serve as control variables. That is, the inclusion of facts in our model will allow us to make sure that any results we achieve with regard to legal and attitudinal variables are the result of those factors and not changes in the types of cases heard by the courts of appeals.

The situation differs concerning the influence of Supreme Court doctrine. The legal model and the hierarchical model suggest that the decisions of circuit court judges are affected by Supreme Court doctrine. In contrast, the attitudinal model suggests that Supreme Court doctrine plays little role in the decision making of the circuit court judges. So the importance of Supreme Court doctrine can be used to test the legal and hierarchical model versus the attitudinal model, but not against each other. In other words, if Supreme Court doctrine proves to be important in circuit court decision making, the data reject the attitudinal model as a complete explanation of circuit court decision making.

The attitudinal model and the hierarchical model suggest that circuit court decision making will be affected by the attitudes of the judges on the case, independent of the policy or doctrinal trends on the Supreme Court. The legal model, however, suggests that attitudinal variables play little role in judicial decision making. Therefore, attitudinal variables can distinguish the attitudinal and hierarchical model from the legal model. In other words, if attitudinal variables prove important, the data reject the legal model as a complete explanation of circuit court decision making.

Combining these tests implies the following: if either the attitudinal or the doctrinal variables prove unimportant, the data reject the hierarchical model. If both prove important, both the attitudinal and legal models are dominated by the hierarchical model as an explanation of circuit court decision making.

### Results

We test the three models on a random sample of votes by circuit court judges in search and seizure cases between 1961 and 1990. Critical variables are the facts of the case, contemporary Supreme Court doctrine, and the attitudinal predisposition of the particular judge. . . .

[We combine our legal and attitudinal variables into a single model to create the hierarchical model. Thus, we can statistically determine whether attitudinal and legal factors exert independent influence on circuit court decisions after each is controlled for the other. Note the following: Between 1969 and 1990, the Supreme Court became increasingly conservative because of the appointments by Richard Nixon, Gerald Ford, Ronald Reagan, and George Bush. So too did the circuit courts become more conservative, for essentially the same reasons. The hierarchical model allows us to determine whether the conservatism of the circuit court judges was due to their own conservatism, the Supreme Court's conservatism, or both.

The results indicate that our legal variable, Supreme Court Change, and our attitudinal variables, measuring region and party, continue to exert a strong influence on the decisions of circuit court judges. . . . [All] have the ability to shift dramatically the likelihood that a search will be upheld.

## Conclusions

We can now draw some conclusions about the three models. The data reject the legal model as a complete explanation of circuit court decisions because the attitudes of circuit court judges clearly have an effect on their decisions, even when there is a control for the facts in the cases. The data also reject the pure attitudinal model as a complete explanation of their decisions because changes in Supreme Court doctrine affect the decisions of circuit court judges, even when there are controls for facts and attitudes. Instead, the data demonstrate that the hierarchical model, as applied to circuit court decisions, dominates both alternatives: as predicted by that model, both attitudes and Supreme Court doctrine matter. Of course, this does not mean the hierarchical model is "true" in some transcendental sense. But the hierarchical model does provide a simple and useful starting place for understanding the decision making of lower-court judges. ...