On March 24, 1998, a divided Supreme Court upheld Hugo Almendarez-Torres’s 85-month sentence for reentering the United States. The sentence was more than three times longer than the maximum statutory penalty for reentering the United States after a previous deportation without a prior criminal conviction. Almendarez-Torres’s problem was that he had a burglary conviction prior to his first deportation and the Court held that this much stiffer sentence could be imposed on Almendarez-Torres even though the indictment did not mention and the jury did not establish that a prior conviction had taken place.

The central question in the case was whether the prior conviction was part of the second criminal act (re-entering the United States) or whether it was part of the sentencing phase and thus not subject to the protections afforded by the Sixth Amendment’s right to a jury. Justice Stephen Breyer’s majority opinion for the Court concluded that the prior conviction
“is a penalty provision, which simply authorizes a court to increase the sentence. . . . It does not define a separate crime.” In the dissent, Justice Antonin Scalia argued that the prior conviction was an element of the crime and thus should be determined by a jury.

The case was the opening gambit in what has become one of the most confusing areas of the law—criminal sentencing requirements. It is also one of many cases where the opinions and the positions of the justices seem to contradict the attitudinal model. A liberal justice (Breyer) wrote the pro-punishment majority opinion and two moderates (Kennedy and O’Connor) and two conservatives (Thomas and Rehnquist) joined him. Against them, a conservative (Scalia) wrote a pro-defendant dissent and three liberals (Stevens, Souter, and Ginsburg) joined him.

Two years later, the Supreme Court went in a different direction in Apprendi v. New Jersey. In this case, the Court used the Sixth Amendment to overturn a sentence that went beyond a statutory maximum based upon facts that were not established by a jury. One of the justices who changed course was Justice Clarence Thomas who argued that he “succumbed” to error in Almendarez-Torres and that the court should simply reverse itself. In contrast, Justice Stevens, who had been on the losing side in Almendarez-Torres, made it clear that “even though it is arguable that Almendarez-Torres was incorrectly decided . . . we need not revisit it for purposes of our decision today” (Stevens 2000).

There is evidence that Stevens’ respect for precedent was not merely window dressing. In 2006, Rangel-Reyes v. United States presented a case quite similar to Almendarez-Torres,
thereby offering Stevens a chance to overturn the conservative precedent. However, Stevens wrote “While I continue to believe that Almendarez-Torres v. United States was wrongly decided, that is not a sufficient reason for revisiting the issue...The doctrine of stare decisis provides a sufficient basis for the denial of cert” (Stevens 2006). Characteristically, Thomas continued to want to overturn precedent – one that he originally supported – writing that the “Court should address the ongoing validity of the Almendarez-Torres exception...” (Thomas 2006).

The sentencing guideline cases do not fit the attitudinal model’s claim that justices’ decisions reflect their unconstrained policy preferences. It appears that Justices Stevens and Scalia, in particular, were influenced by legal values and that these beliefs led them to support outcomes that did not necessarily correspond to their more general policy preferences. Without legal influences, one would expect Stevens to have embraced a pro-defendant stance across the board; for Scalia, a policy-only perspective would lead one to expect him to consistently support a tough-on-criminals approach.

As suggestive as these stories are, they are, of course, insufficient to lead us to reject the attitudinal model. After all, we can just as easily produce stories of justices voting against legal doctrines in favor of their presumed policy preferences. Indeed, Stevens is hardly immune from overturning precedent and although Scalia steadfastly claims that the textual interpretation drives his statutory interpretation (see Scalia 1998), evidence suggests that he is not beyond abandoning a textual interpretation of statutes (see McGowan 2008).
Hence, while these anecdotes can raise doubts about both attitudinal and legal perspectives, we need more general social scientific tests to support one or another view.

Effective empirical tests, however, have proven elusive. This stems in large part from the difficulty of disentangling the justices’ legal and policy motivations. Qualitatively, one can explain almost any Court decision in terms of either legal motivations or the narrow pursuit of policy objectives. Statistically, this muddle of policy preferences and law creates an identification problem; as we show below, the dividing line between liberals and conservatives on any given case can be explained in policy or legal terms.

To get around this problem, we will use a spatial model to devise a novel test for measuring the extent to which prominent legal doctrines (stare decisis, judicial restraint, and protection of speech) constrain the justices’ decisions. Key to the approach is the use of the bridge observations discussed in the previous chapter. Because elected officials are less likely to be influenced by legal doctrines than justices, their revealed behavior helps us to pin down the policy implications of each case. This, in turn, enables us to isolate and statistically identify the effects on justices of legal doctrines such as precedent, the notion of deference to Congress and a strict interpretation of the constitution when the justices render their decisions.

This approach allows us to make two contributions. First, we show that even if the justices place great weight on legal doctrines, it is possible for the Court to divide consistently along policy lines, creating a misleading impression of a completely politicized court. While the
possible influence of law is hard to ignore on cases such as *Almendarez-Torres* where voting appears ideologically jumbled, we show that the influence of law can also be considerable on cases that exhibit conventional ideological voting divisions. Second, we implement our new approach to identification and find evidence that non-policy factors influence Supreme Court justices and that the extent of such influence varies across individual justices in interesting ways. These factors do not completely supplant policy preferences, but they do lead us to challenge the stark view that the Court is a small legislature of nine unelected politicians.

### 3.1 Disentangling the Law and Policy Preferences

Scholars trying to determine the relative influence of attitudes and legal forces can usually explain justices’ choices in either policy or legal terms. Consider Justice Thomas’s concurrence with Scalia’s dissenting opinion in *Lawrence v. Texas*. In this case, the Court struck down Texas’s anti-sodomy law and overturned the Court’s ruling in *Bowers v. Hardwick*. Thomas argued that even though on policy grounds he found Texas’s law “uncommonly silly,” the choice to overturn it should be made by the Texas state legislature. Others, however, saw policy motivations behind Thomas’s position, as he has been a regular opponent of the gay rights advocates who were fighting to overturn the Texas law (Pinello 2003, 100).

Spatial theory helps us clarify the problem. We begin with Figure 3.1 which presents the basic spatial model in which each justice has an ideal point at $\theta_i$, represented by his or
her location on the x-axis. The utility of justice i of voting for the petitioner is a quadratic loss function: \( U_{i}^{P} = -(\theta_{i} - \gamma_{P})^2 \) where \( \gamma_{P} \) is the spatial location of the outcome associated with voting for the petitioner. The utility of voting for the respondent is analogous: \( U_{i}^{R} = -(\theta_{i} - \gamma_{R})^2 \) where \( \gamma_{R} \) is the spatial location of the outcome associated with voting for the respondent. In the figure, the outcome preferred by the plaintiff has policy implications located between the preferred points of \( \theta_{2} \) and \( \theta_{3} \); the outcome preferred by the respondent has policy implications located between the preferred points of \( \theta_{7} \) and \( \theta_{8} \). Following standard spatial theory, a justice will vote for the petitioner if his or her ideal point is on the same side of the midway point between the outcomes associated with voting for the petitioner and respondent (which we will refer to as a cut-line).

In Figure 3.1, justices with ideal points \( \theta_{1}, \theta_{2}, \theta_{3}, \theta_{4}, \) and \( \theta_{5} \) support the petitioner and justices with ideal points \( \theta_{6} \) through \( \theta_{9} \) support the respondent. This pattern suggests a 5 to 4 liberal vote, with a cut-line between \( \theta_{5} \) and \( \theta_{6} \). Behavior here is completely consistent with the attitudinalist approach in which “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (Segal and Spaeth 1993, 65).

Our goal is to introduce law into this model. We begin with a starkly legal model in Figure 3.2 where the justices’ decisions depend exclusively upon their commitment to legal doctrines. We add a second dimension which, for simplicity, we refer to simply as the “Law.” The ideal points now refer to preferred outcomes for justices in both policy and legal space.
Justice 1 prefers liberal outcomes and values the law highly; Justice 2 is nearly as liberal, but does not value the law. For this figure, we assume that justices place no weight on their policy values and instead place all weight on their legal values. In this particular scenario, this produces a horizontal legal cut-line that distinguishes the odd numbered justices from the even numbered justices. The odd numbered justices vote for the politically conservative outcome preferred by the respondent because such an outcome is more consistent with what is mandated by their view of what legal doctrine requires.

Few scholars would claim that such a stark legal model captures the way Supreme Court judges decide. Therefore, Figure 3.3 presents a situation where both law and policy matter; law here “generates some gravitational force” on the justices (Gillman 2001, 481). The justices base their decisions on both the policy implications of a case and the legal merits of the parties’ positions. The dividing line between those who support the petitioner’s conservative and legally advantaged position and those who support the respondent’s liberal
Figure 3.2: Basic Legal Model
and legally disadvantaged position is represented by the diagonal cut-line in the figure.\(^1\) It suggests that Justices 1, 2, 4 and 6 will support the petitioner and the other five justices will support the politically conservative respondent position. The petitioner and respondent outcomes have the same policy implications but the outcome is markedly different outcome than in Figure 3.1. Relative to the policy-only world, the votes of justices 3 and 5 have switched from liberal to conservative as the vote of justice 6 has switched from conservative to liberal. In other words, precedent has led the court to go against its ideological inclinations (seen in Figure 3.1 to support the respondent’s conservative position. Figure 3.4 shows a related case. In it, the justices have the same policy preferences as before, but law is a valence dimension that all justices value. Following standard spatial theory, the vote will be 7 to 2 in favor of the respondent, a politically conservative and legally advantaged outcome.

The problem is that we have an “identification” problem in the illustrated cases. An identification problem occurs when there are two or more two equally valid solutions to a problem. A classic identification is from early algebra. The parameter X is identified in the equation \(X + 4 = 10\) but is not identified in the equation \(X + Y = 10\). X is six in the first equation, but in the second any value of X can be offset by a particular value of Y. This is essentially the problem we have as well. It is easiest to see in Figure 3.4 where we plot two different explanations of the data. One has the policy implications of the petitioner and respondent outcomes exactly as plotted in the figure such that a diagonal cut-

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\(^1\) Assuming all justices weight both dimensions equally, the cut-line is found by locating the line that bisects and is perpendicular to the line connecting the two outcomes (the petitioner and respondent outcomes).
Figure 3.3: LAW AND POLICY MODEL
line explains the voting. There is another, equally valid way to explain this vote, however. We could simply shift the petitioner and respondent outcomes to the left (these are, after all, inherently unobservable quantities) such that there is a vertical cut-line between justices 2 and 3. This cutline would produce the same 7 to 2 outcome. In words, we have two equally compelling interpretations. In the first one, justices 3, 4 and 5 were compelled to vote against their policy preferences by the superior legal merit of the respondent’s case; in the second interpretation, it was all policy, as the case’s ideological cutline between justices 2 and 3 was sufficient to completely explain voting. Hence, simply observing this – or any other – ideologically contiguous coalition cannot tell us whether the attitudinalists or legalists are correct.

We can also use equations to show that this problem persists even for a case like Figure 3.3. in which justices place different values on law. Building on standard measurement theory, we can write the probability of a conservative vote as a function of ideology and law\(^2\):

\[
Pr(y_{iv} = 1) = \Phi(\theta_i - \kappa_v + \delta_i Law_v)
\]

where \(\theta_i\) is the ideal point of justice \(i\), \(\kappa_v\) is the cutpoint on vote \(v\), \(\delta_i\) is the weight justice \(i\) places on law and \(Law\) is the legal merit of the conservative position (for now we treat this very abstractly; later we will discuss in detail how we code this variable in the statistical

\(^2\)For simplicity, we assume the “discrimination parameter” from Equation 3 in Chapter 2 is one; it is easy enough to relax this assumption (see appendix of Bailey and Maltzman 2008).
Figure 3.4: Law and Policy Model with Contiguous Ideological Coalitions
Add and subtract $\delta_{Lawv}$ and re-group:

$$Pr(y_{iv} = 1) = \Phi(\theta_{i} - \kappa_{v} + \delta_{i}Law_{v} + \bar{\delta}Law_{v} - \bar{\delta}Law_{v})$$

$$= \Phi(\theta_{i} - \kappa_{v} + (\delta_{i} - \bar{\delta})Law_{v} + \bar{\delta}Law_{v})$$

Let $\tilde{\kappa}_{v} = \kappa_{v} + \bar{\delta}Law_{v}$ and $\tilde{\delta}_{i} = (\delta_{i} - \bar{\delta})$, then

$$Pr(y_{iv} = 1) = \Phi(\theta_{i} - \tilde{\kappa}_{v} + \tilde{\delta}_{i}Law_{v})$$

Because we can get the same likelihood with these two different formulations, the model is unidentified. In the first, the cutpoint ($\kappa$) contains no legal elements and the estimated $\delta$ is the weight on the law variable; in the second formulation, the cutpoint ($\tilde{\kappa}$) contains the average weight on the law and the estimated ($\tilde{\delta}$) is deviated from the mean weight on law. Note that in the second formulation, the average effect of law is effectively buried in the cutpoint; this means that looking at Supreme Court cases only would not allow us to determine the gross effect of law on justices ($\delta$) which is the question at the heart of the law versus ideology debate.

### 3.2 Identifying the Effect of Jurisprudence

In order to address this identification problem, we seek to pin down for each case a policy-based cut-line that will enable us to isolate the extent to which law influences the decisions...
of each justice. We use two approaches to do this. First, we use members of Congress and presidents to identify the policy cut-points on Supreme Court cases. We assume that these elected actors are not affected by the three legal doctrines we assess; this is not unreasonable in light of direct evidence: “members of Congress and other lawmakers frequently consider constitutional arguments in an instrumental and strategic manner, the main objective being to pass or sustain popular public policies” (Pickerill 2004, 8).\(^3\) This is also consistent with the more general literature on Congress that finds that members of Congress are primarily motivated by ideology (Poole and Rosenthal 1997), party needs (Cox and McCubbins 1993), and constituencies (Arnold 1990).

To the extent that legal influences do in fact shape congressional and presidential positions (see, e.g. Peabody 2005), our estimated policy cut-line will not be completely purged of legal effects. If this is true, we are estimating the differential effect that the legal doctrines have on justices relative to members of Congress and the president. Nonetheless, it seems a reasonable characterization of the legal model that justices on the Supreme Court should care more about the law than do elected officials.

In terms of Figure 3.4 from above, the control actors allow us to pin down the location of the policy cut-point, which in turn lets us isolate the effect of law. If justices exhibit the same behavior conditional on policy preferences as do elected officials on cases in which legal concepts are clearly implicated, we can infer that these legal concepts do not explain

\(^3\) Justice Frankfurter anticipated our approach when he criticized Chief Justice Hughes by saying that “My kick against the Chief Justice in a single word is that he has been just as political as the President” (Dunne 1997, 187).
behavior once the preferences of each justice are accounted for. On the other hand, if conditional on policy preferences justices differ from elected officials in a manner consistent with legal doctrine, we can infer that law matters.

Figures 3.5(a) and 3.5(b) illustrate our identification strategy via an example in which the conservative respondent’s side is legally advantaged. Actors are located at their ideal points. Triangles indicate that an actor with an ideal point at that location voted liberally; squares indicate that an actor with an ideal point at that location voted conservatively. The justices are on top as they value law and policy. The non-court actors are arrayed at the bottom because they have no interest in law.

Policy preferences
The vote on the court was 7 to 2 for the conservative respondent’s position. As discussed above, based on the vote alone, we cannot tell if ideology alone determined the vote or if legal considerations moved some votes. If we have non-legal actors, however, we can make these distinctions. Suppose that we observe 14 non-court actors (such as members of Congress who we assume are not affected by the law) take positions on the case; their positions are based only on ideology. They are located low on the “Law” dimension at the bottom of each figure. One possibility is that we observe something like panel (a) in which the non-legal actors break at the same point as the Supreme Court justices. In this case, the dividing line ($\kappa$) is at the same ideological location for both institutions, implying that there is nothing distinctive about the court.

Another possibility is that we observe something like panel (b) in which the non-court actors divide at a different point than do the justices. In this case, the non-court actors divide roughly in the middle of the ideological space, quite differently than the justices’ 7 to 2 division. The three justices to the left of the dashed double line in panel (b) would have been expected to vote liberally if they voted in accord with their co-ideologues in the policy-only world. However, they voted in favor of the legally-favored conservative respondent’s position, implying a diagonal cutline such as we have seen in the law and ideology models developed above. Without the non-court actors we would not be able to pin down the ideological implications of a case (the double line in the figures and $\kappa$ in the equations), meaning that we would not be able to distinguish between these very different interpretations of the 7 to
2 observed vote.

The second tool we use to identify the law follows the same basic logic, but makes use of justices taking positions on non-contemporaneous Supreme Court cases. This approach allows us to identify the effect of *stare decisis* on decision-making. (We will discuss our approach to *stare decisis* and other legal concepts in greater detail below). We use two kinds of observations: votes by justices on the original case and post-hoc position-taking by justices on the case. On the original precedent case, justices are addressing a specific legal issue for the first time. For our illustration, we assume precedent or other measurable legal influences are not in play on the original case, so justices are acting based only on policy preferences. Once a case is decided, however, precedent and therefore the decision of the original case can affect the post-hoc positions taken later by non-contemporaneous justices. Examples of post-hoc position taking include Justice Thomas and Scalia opposing *Roe v. Wade* and Justices Souter, O’Connor and Kennedy upholding its core in the 1992 *Planned Parenthood v. Casey* decision.

Figure 3.6 shows how these observations provide additional leverage for identifying the effect, if any, of precedent. We place justices on similar ideological and legal scales as before but we are more specific about law (labeling it as *stare decisis*) and as a heuristic device we treat the justices deciding the original case as not valuing precedent (for even if they do value precedent, it does not matter in this as there is no precedent on the original case). They are therefore at the bottom of the figure (analogous to the non-court actors in the
Figure 3.6: Using post hoc comments to identify the effect of precedent
previous figures). Their behavior allows us to identify the ideological cutline which, in turn, allows us to assess whether precedent influences position-taking. Justices on the original court and the post-hoc justices are different. To make it clear that the post-hoc positions are not necessarily votes on cases, we depict seven rather than nine justices in the post-hoc commenters line of justices.

We can look at possible outcomes to see how our identification approach works. In panel (a) of Figure 3.6, there is no evidence that precedent mattered. The ideological cutline is the same on both cases. The distribution of votes is different only because the personnel of the court changed, but there is no indication that the post-hoc commentators are doing anything but following their policy preferences. In panel (b) of Figure 3.6, on the other hand, there is evidence that precedent mattered as three justices to the right of the cutline in the original case are now taking liberal positions even though their co-ideologues on the original case voted conservatively. The general idea in both of our identification strategies is to use situations in which we observe position taking among some set of actors for which law does not matter and then see if, controlling for ideology, behavior changes when law does matter.

### 3.3 Three Legal Doctrines

Our goal in this chapter is to assess whether “law” affects judicial decisions independently of policy preferences. There are, to be sure, numerous legal doctrines that may shape judicial
decision-making. We cannot cover them all, not only because of their volume, but because many cannot be measured and others are unlikely to consistently influence many justices. Therefore we concentrate on legal doctrines that are both prominent and that can be coded in a reasonably straightforward way. Three doctrines fit our criteria: *stare decisis*, judicial restraint and strict interpretation of the First Amendment.

*Stare decisis*  The most widely celebrated legal influence is *stare decisis*, the notion that prior court decisions serve as precedents that guide judges’ decisions. Public law scholars and Supreme Court justices routinely argue that precedent shapes the decisions of the Court (Levi 1949; Dworkin 1978; Kahn 1999; Gilman 1999; Clayton 1999; Hansford and Spriggs 2006). There are many examples in which justices seem to truly be influenced by precedent. For example, in *Baze v. Rees* Justice Stevens announced that he opposes the death penalty in all cases, but that he would respect the precedents of the court and join the majority in upholding lethal injections (Toobin 2007, 400).

Quantitative evidence in support of *stare decisis* has been mixed. Richards and Kritzer (2002) find evidence that doctrinal changes in First Amendment case law led to measurable changes in the determinants of case outcomes. George and Epstein (1992) conclude that both law and ideology affected death penalty cases. Likewise, Hansford and Spriggs (2006) found precedents to be an important constraint if the precedents have achieved a favored status by being employed repeatedly over a lengthy period of time.
In contrast, Segal and Spaeth (1996a) and Spaeth and Segal (1999) argue that precedent does not matter. They focused on whether individual justices who dissented on landmark cases subsequently supported the precedent in future progeny cases. For example, if an original case had a liberal majority, they interpret the legal model to mean that the conservatives on the original case should vote with the liberals on progeny cases. They found that justices’ votes rarely change on progeny cases, from which they infer that policy preferences exert a strong effect and that precedent exerts little or no effect.

Segal and Spaeth’s evidence is not definitive and, given its central role in the literature, we think it is worthwhile to go into some detail relating their approach to the models we have developed. Segal and Spaeth’s standard is, in fact, a test of a very strong version of the legal model, one in which ideology plays no role. To see this, consider two cases: an initial case with a liberal majority and a subsequent case. For the second case, the political implications ($\kappa$ in our equations) can either be more liberal or more conservative. First, consider a more liberal progeny case - a case where the political cutline is to the left of the original case. In Segal and Spaeth’s interpretation of the legal model, the world looks like Figure 3.2 from earlier in this chapter; the liberal side of the case is now advantaged legally and all justices who value the law should vote for it.

Segal and Spaeth’s standard implies an extremely strong version of the legal model. Their version assumes that precedent always extends to the new case is questionable. The legal precedent of a constitutional right to an abortion in the first two trimesters does not establish
a legal precedent of constitutional right to an abortion in an unlicensed facility. As Friedman (2006) argues, adherence to precedent does not require an individual justice in the minority to bow to the will of the majority. Narrowing a precedent is not necessarily being unfaithful to *stare decisis*. Hence, the 1980 decision in *Rhode Island v. Innis* that defined the scope of questions that required a *Miranda* warning was not inconsistent with the Court’s 1966 *Miranda* ruling because this question was not raised when *Miranda* was decided.\(^4\)

A more relevant version of the legal model might be one in which policy preferences and legal values matter. Using the model from Figure 3.3, Figure 3.7 uses an example to illustrate the predictions of that model for progeny cases. In the original precedent case, P1 is the spatial location of the petitioner and R1 is the spatial location of the respondent. By assumption, neither case is legally advantaged given the liberal precedent on the earlier case. The justices split according to the vertical line leading to a 5 to 4 liberal victory. On the subsequent case, the petitioner and respondent’s outcomes have moved to the left and for the sake of argument, we grant that the petitioner’s outcome is now legally advantaged. This will induce a diagonal cutline as indicated in the figure.\(^5\) Precedent matters but only on the margins. The vote is 5 to 4 for the conservative outcomes not because precedent is irrelevant but because the case cutpoint on the progeny case is to the left of the original case cutpoint.

If precedent did not influence the justices, the vote would be determined by a vertical cutline.

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\(^4\) As will become clear later, our coding of precedent relies on a party to a case or a justice making a specific argument that the precedent applies; a case being on the same issue is not sufficient for inferring that precedent applies.

\(^5\) Recall that one identifies this cutline by drawing a line connecting P2 and R2, finding the midpoint of that line and then drawing a line perpendicular line through that point. This line divides the space into points that are closer to P2 and points that are closer to R2.
between the petitioner and respondent outcomes; in this example, conservatives would have won 7 to 2 as only $\theta_1$ and $\theta_2$ are to the left of the vertical cutline between P2 and R2.

Another possibility is that the spatial locations of the progeny case move to the right. That is, in the first case liberals win and then in the subsequent case an even more conservative case comes to the court. For example, the court might strike a law banning abortion and then a law banning morning after pills may come to the court. We could draw the lines
(shifting P2 and R2 to the right) and would get an expanded area in which justices would be voting liberally on the progeny case. But there are two important points here. First, the marginal effect of law and preferences on behavior might not have changed between the two cases. Instead, what might have happened is that the shift in the policy cutpoint to the right just makes it more likely to observe behavior consistent with the legal model even as the legal model plays no greater role in causing such behavior.

In addition, even as we do not place much inferential weight on the increase in liberal voting in this situation (in contrast to Segal and Spaeth who would interpret the increased liberal votes as precedential behavior), we believe it is unlikely that $\kappa$ on the progeny will shift to the right after a liberal precedent (or, by the same logic, that $\kappa$ on the progeny will shift to the left after a conservative precedent). If the original precedent case is decided liberally, it seems unlikely that litigants and overturn-averse lower courts would want to send a case to the Supreme Court that is even less likely to pass on policy grounds (Kastellec and Lax 2006). That is, if the Supreme Court rules there is a right to abortion in the first two trimesters, lower court judges in general would not want to be associated with allowing a ban on morning after pills (arguably a ban on abortion in the first day). On the other hand, it makes more sense for litigants and lower court judges to be willing to contradict the Court on cases where the policy implications would move policy further in the direction of the initial case. A lower court judge could accept a right to abortion in the first two trimesters, but also hold that a waiting period or medical licensing requirement is unacceptable - cases
in which the outcomes would move to the left.\footnote{For more discussion of the Segal and Spaeth approach see Songer and Lindquist (1996), Brenner and Stier (1996) and Segal and Spaeth’s (1996b) response.}

**Judicial deference** Another non-attitudinal doctrine that may shape judicial decision-making is judicial deference to legislatures. This factor comes into play when justices argue, as in Thomas’s “uncommonly silly” comment above on *Lawrence*, that although they do not agree with a given case outcome, it is the task of duly elected legislators, not unelected judges, to change policy. Justices can be among the most forceful advocates for judicial restraint. Justice John Marshall Harlan II wrote: “This Court, limited in function, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process” (1964, 624-625). More recently, Chief Justice Roberts has elaborated on his belief in judicial restraint:

> Members of Congress have been chosen by hundreds of thousands of people, millions of people. Not a single person has voted for me. And that is, to me, an important constraint. It means that I’m not there to make a judgment based on my personal policy preferences or my political preferences (Barnes 2006).

Justice Frankfurter personified judicial deference – much to the chagrin of liberals who supported his appointment to the bench. In 1950, Frankfurter testified before the Royal Commission on Capital Punishment in London and opposed the death penalty because of the deleterious effects on the trial system caused by sensationalism. He did not, however,
systematically rule against the death penalty as a justice (Urofsky 1991, 215). Frankfurter also disagreed with the anti-subversive Smith Act of 1940, but did not rule against it (Urofsky 1991, 115).\footnote{Others have argued that Frankfurter was selective in how he exercised restraint; see discussion in Cross (1997, 276).}

Other behavioral patterns of the court suggest the court is inclined to defer to Congress. The court invalidates a tiny proportion of legislative statutes – 0.0075\% according to Zeppos (1993) – and it is hard to believe that the court is in such high agreement on policy grounds with the other branches. In addition, justices often use court opinions to invite Congress to fix things as opposed to doing it themselves, as one might expect unconstrained policymakers to do (Hausegger and Baum 1999).

**Strict interpretation of First Amendment** A third legal value that could lead justices to vote against their policy preferences is a strict interpretation of the Constitution. The concept of strictly interpreting the Constitution has a storied history in American jurisprudence and is particularly employed when interpreting the First Amendment. Justices Holmes and Brandeis played a major role. In 1919, Justice Holmes used a “clear and present” danger standard to justify jailing socialists under Espionage Act for urging opposition to the draft and wrote a majority opinion upholding the jailing of socialist leader Eugene Debs even as was writing personal letters saying he thinks Debs should be freed from jail (Lewis 2009). After a barrage of criticism from, Holmes dissented in case in which the Court upheld the conviction of radicals who had been convicted under Espionage Act. This was “first Supreme Court
opinion, ever, that treated freedom of speech as a fundamental value under the Constitution. The Court had never found that any suppression of speech violated the First Amendment’s guarantee of free expression. For the next twelve years Holmes and Brandeis continued to dissent in free speech cases until finally, in 1931, a majority of the Court for the first time enforced the amendment, with Holmes still sitting at ninety” (Lewis 2009, 46).

Other Justices, particularly those with strict interpretativist orientations, vigorously defend the First Amendment’s “Congress shall make no law” prohibition on restricting speech. For example, Justice Hugo Black – stating that “no law means no law” – would vote to strike laws that he may well have agreed with but for his interpretation of the Constitution (Black 1969). The contemporary justice who is most frequently associated with the view that the Constitution should be interpreted literally is Scalia (Tushnet 2005). This view has led Scalia to cast a number of votes that have resulted in alliances that span the ideological spectrum. Perhaps the most prominent examples are Scalia’s decision to join Justice William Brennan in striking down state (Texas v. Johnson) and federal (United States v. Eichman) laws prohibiting flag burning. While delivering a speech at the University of Mississippi School of Law, Scalia explained that he cast the deciding vote for Gregory Lee Johnson in the Texas v. Johnson case even though “I would have been delighted to throw Mr. Johnson in jail. Unfortunately, as I understand the First Amendment, I couldn’t do it” (UM Lawyer 2003, 1).

While in an ideal world we would be able to code and model some of the other legal
doctrines such as originalism and federalism, we should note that the absence of these legal variables in our model is not particularly troubling with regard to our broader project of trying to assess whether legal factors matter. Omitted variables cause bias if two conditions are met: the variable affects the dependent variable and it is correlated with other included variables. If the excluded legal concepts do not actually affect voting on the Supreme Court, then excluding them causes no bias. If, on the other hand, the excluded legal variables do affect Supreme Court voting, then law matters, contradicting the attitudinal model. The danger would be that we would be mis-labeling the exact nature of the non-ideological influences on the court.

3.4 Modeling and Estimating the Role of Law

Our model brings together our identification strategy and our interest in precedent, deference and First Amendment speech values. We model the positions taken by justices, presidents, and members of Congress on Supreme Court cases and congressional roll calls as a function of ideology (for all actors) and legal factors (justices only). The model is derived in the appendix from Equation 3.1 using the standard techniques of random utility models and ideal point preference estimation. The dependent variable indicates whether or not an individual voted conservatively. The model estimated is

\[
Pr(y_{itv} = 1) = \Phi(\alpha_v(\theta_{it} - \kappa_v) + \pi_i PREC_v + \delta_i DEF_v + \sigma_i SPEECH_v) \tag{3.1}
\]
where $y_{itv}$ is 1 if individual $i$ takes a conservative position at time $t$ on vote $v$, $\alpha_v$ is the vote discrimination parameter, $\theta_{it}$ is the policy preference of individual $i$ at time $t$ (the higher the value, the more conservative), $\kappa_v$ is the vote “cut-point,” $\pi_i, \delta_i$ and $\sigma_i$ are the weights justice $i$ places on precedent, legislative deference, and protection of speech, respectively, and $PREC_v, DEF_v$ and $SPEECH_v$ are the precedent, deference, and speech variables, coded as described below. Policy preferences are permitted to vary over the course of an individual’s career (see appendix).

We estimate the parameters of the model for all justices, presidents, and members of Congress in the dataset. The identification assumption is $\pi_i = \delta_i = \sigma_i = 0$ for all non-justices, which means that we are identifying the effect of these factors on justices relative to any effect they may have on non-justices. Finding $\pi_i > 0$ or $\delta_i > 0$ or $\sigma_i > 0$ for at least some justices would be consistent with the idea that legal factors exert a real effect independent of judicial policy preferences.

The model is estimated via a Bayesian Markov Chain Monte Carlo (MCMC) algorithm that simultaneously estimates the parameters in Equation 3.1. This approach is flexible enough to incorporate constraints on cut-points, and it readily produces standard errors of all estimated quantities (see, e.g., Clinton, Jackman and Rivers 2004; Clinton and Meirowitz 2001).

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8This is a standard part of ideal point estimation and item response theory. The higher the discrimination parameter, the better the vote is at distinguishing between liberals and conservatives.
3.5 Data

The dependent variable is the position—conservative or not—taken by justices, members of Congress, and presidents on 3,239 Supreme Court cases and 1,538 congressional votes that occurred between 1950 and 2008.\(^9\) No observation exists for those who did not take a position on a given case or roll call vote.

**Identifying Policy Implications of Supreme Court Cases** The approach relies on the inter-institutional bridge observations discussed in the previous chapter to identify legal versus attitudinal behavior. These observations consist of members of Congress and Presidents taking positions on Supreme Court cases. We also employ post-hoc Supreme Court observations as discussed above to help us isolate the effects of *stare decisis*. These are comments by justices that express support or opposition to a prior ruling of the court. Typically they were made by a justice about cases that were decided before the justice served on the bench. For example, Justices Stephen Breyer and Ruth Bader Ginsburg noted in *Lawrence* (2003) that they would have voted with the minority in *Bowers* (1986). Another example is Stevens’ assertion “I would have joined Rehnquist’s dissent in *Weber* [*United Steel Workers v. Weber*] had I not been disqualified” (2005, 14). Thus, we created a Bowers observation for Breyer

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\(^9\)We limit Supreme Court cases to those that involved criminal procedure, civil rights, First Amendment, due process and privacy. These cases were isolated by using Spaeth’s broad issue categories (2006). In particular, the Spaeth *value* variable had to be less than six. The cases selected include high-profile social issues such as abortion rights, the death penalty, and affirmative action and lead us to focus on the most salient areas of the Supreme Court agenda. We limit congressional and presidential roll calls to those focused on similar issues. The House and Senate roll-call votes are taken from Poole and Rosenthal’s Voteview website (2007). Details are available in the appendix. We have also estimated models including federalism cases and find generally similar results.
and Ginsburg and a Weber observation for Stevens. All these observations were made by justices who were on the Court at the time of the comment. When these observations refer to a case for which a precedent had not previously existed, they are useful for assessing the impact of precedent, as discussed above.

While our interest centers on the behavior of Supreme Court justices, we include congressional votes in order to estimate preferences of members of Congress relative to one another. This, in turn, helps us to pin down the policy implications of votes and enables us to use elected officials’ positions to isolate the effect of the law on Supreme Court justices.

**Coding Cases** Our key independent variables are the three legal concepts discussed so far: precedent, deference to Congress, and the sanctity of the First Amendment’s free speech clause. We code cases in which we believe that it is possible to objectively identify each of the three legal doctrines. Of course, a justice can use numerous legal principles to guide his or her decision in a particular case. Nevertheless, we believe that in any particular case certain legal principles are more pronounced. For example, although every case could theoretically be used to overturn a precedent, stare decisis is a prominent issue in only a subset of cases. An important question in Webster, for instance, was whether the Roe precedent should be upheld. The petitioner’s brief, in fact, asked the Court to use the case as a vehicle for overturning Roe (Segal and Howard 2001, 435). In contrast, in Texas v.

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10 It was this phenomenon that led Friedman to note that “Law may seem frustrating to political scientists in that, because of the way it works, the actions of legal actors are not so easily coded as they may like” (2006, 267).
Johnson (1989) there was no serious question of overturning the precedent that established that the Constitution protected symbolic speech; in this case, none of the parties or justices involved in the case argued that a precedent needed to be reversed.

To denote cases in which precedent was particularly salient, we relied upon the actions of the justices and the litigants. Precedent was coded as present if (a) any of the parties or justices expressly supported overturning a specific precedent and (b) the votes divided justices into pro-precedent and anti-precedent camps; that is, we would not code precedent as being in play if some, but not all, of the majority expressed an interest in overturning precedent. The value of the precedent variable depends upon whether supporting the precedent in question implied a liberal or conservative vote. If a liberal decision overturned precedent, that would mean that conservatives were voting deferentially (to uphold the precedent), and the precedent variable would be coded as 1. If a conservative decision struck down precedent, the liberals were voting in favor of precedent and the precedent variable would be coded as -1. A good way to understand the logic is to refer to Equation 2: a positive value of $\pi_i$ (the justice-specific coefficient on precedent) coupled with a positive value of the precedent variable would increase the probability of a conservative vote; a positive $\pi_i$ coupled with a negative value of the precedent variable would decrease the probability of a conservative vote.  

\[ \text{11 For 1984 to 1995, the coding of petitioner and respondent briefs is from Segal and Howard (2001). For the 1978 to 1983 and 1995 to 2008 period, we coded the petitioner and respondent briefs. Justices positions on precedent are primarily from the alter_du variable in Benesh and Spaeth (2003). For the few years not included in Benesh and Spaeth (2003), we relied upon both Spaeth's (2006) alt_prev variable and our own reading of the opinions.}\]

\[ \text{12 The coding of this variable has a built-in bias against finding an effect for precedent. All cases in which precedent was} \]
Our *deference* variable indicates cases that involved the court upholding or overturning the constitutionality of a law passed by Congress.\textsuperscript{13} For example, a case involving a federal statute banning flag burning implicates legislative deference, while a case involving the constitutionality of a shopping center that bans leafleting does not. Likewise, a case involving a National Park Service ban against oversized placards on a national monument would implicate deference to a legislative body only if the question before the Court clearly involved a law adopted by Congress, rather than an administrative decision of the Park Service.

The value of the *deference* variable depends on whether deference implied a liberal or conservative vote. For example, if an act of Congress authorized the attorney general to expel foreigners without a hearing and was challenged, a vote for deference (accepting the act’s constitutionality) would imply a conservative outcome; the “deference” variable in this case would be coded as 1. Likewise, if an act of Congress mandated minority set asides in contracting, a vote for deference (accepting the act’s constitutionality) would imply a liberal outcome; the “deference” variable in this case would be coded as -1.

Our coding with regard to *freedom of speech* proceeded in a similar fashion. To ascertain whether each justice allowed a strict interpretation of the First Amendment’s free speech protections to drive their decision-making, we relied upon Spaeth (2006) to identify constitu-

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\textsuperscript{13} We relied upon Spaeth’s (2006) *authdec* variable. We also read each case identified in this manner to ensure that they involved the constitutionality of a law enacted by Congress and the President.
tional cases in which freedom of speech questions were particularly prominent.\footnote{Cases are coded as implicating First Amendment speech rights if the Spaeth \textit{authdec} variable either of the constitutional codes and the Spaeth issue code is in the 400s, excluding the codes for religious freedom (codes 455-462).} The value of the \textit{speech} variable depends on whether protection of free speech implied a liberal or conservative vote. For example, in the Texas flag burning case, a vote to protect speech would imply a liberal outcome; the “speech” variable in this case would be coded as -1. Likewise, if a “free speech vote” implied a conservative outcome, the “speech” variable would be coded as 1. For example, in \textit{Airport Commissioners v. Jews for Jesus}, the Supreme Court ruled against the Los Angeles Airport Commission to prohibit it from banning the distribution of religious pamphlets. A vote for Jews for Jesus would be coded as 1.

Putting the above sources of data together, we have a data structure in which there is a dependent variable (whether or not a given actor took a conservative or liberal position on a given case or roll call) and a series of parameters that allow us to estimate ideal points ($\theta$), vote parameters ($\alpha$ and $\kappa$), and the law variables ($\pi, \delta$ and $\sigma$) identified in Equation 3.1.

### 3.6 Results

Table 3.1 reports the estimated precedent ($\pi$), congressional deference ($\delta$), and speech ($\sigma$) parameters for the justices in the sample, as well as the Bayesian analog to a significance level for each parameter. The column headed $\pi = \delta = \sigma = 0$ has the Bayesian analog to a $p$-value for the null hypothesis that the coefficients on all legal parameters are equal to zero versus the alternative hypothesis that at least coefficient is greater than zero. For 24 of 32
justices, we can reject the null that all legal parameters are zero or less at the one percent level; the number goes up to 28 and 30 for the five and ten percent levels respectively.\textsuperscript{15} This indicates that there is solid support that some kind of legal values affect most justices. Two of the three justices for whom there is least evidence of legal effects have relatively few observations (Jackson and Vinson), meaning that we are face a shortage of statistical power in those cases.\textsuperscript{16}

Breaking the results down by legal dimension, the precedent parameter for seven justices was significantly greater than zero at the one percent level and was significantly greater than zero at the five and ten percent levels for 11 and 14 justices, respectively. The deference parameter for five justices was significantly greater than zero at the one percent level and was significantly greater than zero at the five and ten percent levels for eight and 12 justices, respectively. The free speech parameter for 15 justices was significantly greater than zero at the one percent level and was significantly greater than zero at the five and ten percent levels for 16 and 17 justices, respectively.\textsuperscript{17}

Of course, we wish to get a sense of how much these factors mattered. The non-linear probit-like structure of the model renders direct interpretation of the parameters impossible. Therefore, we used the estimated parameters to simulate justices’ probabilities of voting conservatively. Figure 3.8 shows one typical set of simulation results for the precedent parameter.

\textsuperscript{15}In the Bayesian context, a variable is significantly greater than 0 at the 1\% level if at least 99 percent of the values in the posterior samples were above 0.

\textsuperscript{16}These results differ from those that appeared in Bailey and Maltzman (2008). The differences stem from adjustments to the coding protocol (see chapter 2) and correction of a coding error; see http://www9.georgetown.edu/faculty/baileyma/.

\textsuperscript{17}We also estimated the model based on a data set that included federalism cases. The results are very similar.
### Table 3.1: Legal Parameter Estimates

<table>
<thead>
<tr>
<th>Justice</th>
<th>Precedent (π)</th>
<th>Congress (δ)</th>
<th>Speech (σ)</th>
<th>Precedent (π)</th>
<th>Congress (δ)</th>
<th>Speech (σ)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>-0.32</td>
<td>-0.87</td>
<td>1.02</td>
<td>Fortas</td>
<td>-0.67</td>
<td>-0.13</td>
</tr>
<tr>
<td>p = 0.94</td>
<td>p = 1.00</td>
<td>p = 0.001</td>
<td>p = 0.001</td>
<td>p = 0.94</td>
<td>p = 0.57</td>
<td>p = 0.66</td>
</tr>
<tr>
<td>Reed</td>
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<td>2.49</td>
<td>0.38</td>
<td>Marshall</td>
<td>-0.04</td>
<td>0.14</td>
</tr>
<tr>
<td>p = 0.6</td>
<td>p = 0.003</td>
<td>p = 0.22</td>
<td>p = 0.001</td>
<td>p = 0.56</td>
<td>p = 0.23</td>
<td>p = 0.003</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>-0.02</td>
<td>0.49</td>
<td>-0.33</td>
<td>Burger</td>
<td>0.31</td>
<td>0.41</td>
</tr>
<tr>
<td>p = 0.51</td>
<td>p = 0.09</td>
<td>p = 0.87</td>
<td>p = 0.025</td>
<td>Blackmun</td>
<td>0.09</td>
<td>0.41</td>
</tr>
<tr>
<td>Douglas</td>
<td>-0.20</td>
<td>-0.86</td>
<td>0.95</td>
<td>Powell</td>
<td>0.36</td>
<td>0.56</td>
</tr>
<tr>
<td>p = 0.74</td>
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<td>p = 0.001</td>
<td>p = 0.001</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jackson</td>
<td>0.79</td>
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<td>0.19</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>p = 0.2</td>
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<td>p = 0.34</td>
<td>p = 0.066</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burton</td>
<td>-0.25</td>
<td>1.11</td>
<td>0.00</td>
<td>Rehnquist</td>
<td>0.23</td>
<td>0.11</td>
</tr>
<tr>
<td>p = 0.68</td>
<td>p = 0.01</td>
<td>p = 0.49</td>
<td>p = 0.005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vinson</td>
<td>-1.47</td>
<td>1.33</td>
<td>-0.31</td>
<td>Stevens</td>
<td>0.37</td>
<td>0.29</td>
</tr>
<tr>
<td>p = 0.83</td>
<td>p = 0.20</td>
<td>p = 0.70</td>
<td>p = 0.110</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clark</td>
<td>0.44</td>
<td>0.32</td>
<td>-0.28</td>
<td>O'Connor</td>
<td>0.58</td>
<td>-0.24</td>
</tr>
<tr>
<td>p = 0.03</td>
<td>p = 0.14</td>
<td>p = 0.91</td>
<td>p = 0.003</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Minton</td>
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<td>1.25</td>
<td>0.23</td>
<td>Scalia</td>
<td>-0.18</td>
<td>-0.59</td>
</tr>
<tr>
<td>p = 0.72</td>
<td>p = 0.03</td>
<td>p = 0.32</td>
<td>p = 0.008</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Warren</td>
<td>-0.36</td>
<td>0.24</td>
<td>0.31</td>
<td>Kennedy</td>
<td>0.27</td>
<td>-0.53</td>
</tr>
<tr>
<td>p = 0.91</td>
<td>p = 0.21</td>
<td>p = 0.09</td>
<td>p = 0.025</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harlan</td>
<td>-0.02</td>
<td>0.00</td>
<td>-0.08</td>
<td>Souter</td>
<td>0.77</td>
<td>0.06</td>
</tr>
<tr>
<td>p = 0.54</td>
<td>p = 0.49</td>
<td>p = 0.67</td>
<td>p = 0.181</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brennan</td>
<td>-0.19</td>
<td>0.23</td>
<td>0.69</td>
<td>Thomas</td>
<td>-0.50</td>
<td>-0.91</td>
</tr>
<tr>
<td>p = 0.87</td>
<td>p = 0.08</td>
<td>p = 0.001</td>
<td>p = 0.001</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Whittaker</td>
<td>-0.13</td>
<td>0.71</td>
<td>-0.13</td>
<td>Ginsburg</td>
<td>0.67</td>
<td>-0.35</td>
</tr>
<tr>
<td>p = 0.63</td>
<td>p = 0.07</td>
<td>p = 0.63</td>
<td>p = 0.031</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stewart</td>
<td>0.20</td>
<td>0.21</td>
<td>0.80</td>
<td>Breyer</td>
<td>0.64</td>
<td>-0.11</td>
</tr>
<tr>
<td>p = 0.11</td>
<td>p = 0.09</td>
<td>p = 0.001</td>
<td>p = 0.001</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>0.24</td>
<td>0.40</td>
<td>0.06</td>
<td>Roberts</td>
<td>1.24</td>
<td>0.00</td>
</tr>
<tr>
<td>p = 0.05</td>
<td>p = 0.00</td>
<td>p = 0.29</td>
<td>p = 0.001</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Goldberg</td>
<td>-0.67</td>
<td>-0.10</td>
<td>1.46</td>
<td>Alito</td>
<td>1.39</td>
<td>0.17</td>
</tr>
<tr>
<td>p = 0.82</td>
<td>p = 0.54</td>
<td>p = 0.04</td>
<td>p = 0.021</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note: p is Bayesian analog to p-value.*
(in order to keep it our table simple, it is limited to justices appointed after 1960). We assume that the cutpoint, $\kappa$, is zero. For each justice we calculated his or her average policy preference over the time period in the sample and then calculated the probability of voting conservatively given that the precedent either was implicated and implied a liberal vote (the shaded bar in the figure) or was implicated and implied a conservative vote (the clear bar). If after controlling for policy preferences a justice’s votes were swayed by precedent, his or her clear bar will be higher than his or her shaded bar. For example, when precedent suggests a liberal outcome, O’Connor is simulated to vote in a conservative direction with 45% probability; but when precedent suggests a conservative outcome, O’Connor is simulated to have an 85% probability of voting conservatively. On cases where respect for *stare decisis* was central, precedent dictated whether O’Connor voted in a liberal or conservative direction. In contrast, Scalia’s clear and shaded bars are relatively similar (and, if anything, suggest Scalia tends to vote against precedent), suggesting that *stare decisis* plays a relatively small role in his jurisprudence; in other words, our results indicate that regardless of the direction of the precedent Scalia embraces conservative positions.

Figures 3.9, 3.10 and 3.11 present averages of such simulations across multiple values of $\kappa$. For each justice, the bar indicates the average of the simulated change in probability of a justice casting a conservative vote when the precedent is implicated (Figure 3.9), when deference to Congress is implicated (Figure 3.10) or when a strict interpretation of the first
Probability of Conservative vote for cutpoint (K) = 0.0

Figure 3.8: Simulated Effect of Precedent
amendment suggests a particular outcome (Figure 3.11). We also use a thin line to connect the 10th and 90th percentiles of the posterior distribution in order to give a sense of the precision of the parameter estimates. The precision of the estimates varies in part because some justices voted on only a few cases with legal concepts implicated.

Every justice who joined the bench after Burger has a significant *stare decisis* parameter except Thomas, Scalia and Blackmun. Thomas has a reputation for not valuing precedent; Goldstein (2007) wrote that Thomas “believes that precedent qua precedent concerning constitutional law has no value at all; he does not give *stare decisis* any weight. Justice Thomas’ view is, at bottom, a doctrine of *stare indecisis*” (see also Toobin 2007, 119; Sunstein 2005, 34). That Justice Scalia is unconstrained by *stare decisis* is also not particularly surprising; as he himself has noted, “I do not myself believe in rigid adherence to *stare decisis* in constitutional cases” (Scalia 2003). The pro-precedent justices are not surprising either. For example, Toobin (2007, 63) attributes to Kennedy the thought that “saving Roe would show the world that judges were something more than mere pols” at the time Kennedy joined Souter and O’Connor to reaffirm the basic core of *Roe* in the *Casey* decision. Of justices appointed before Burger, only White and Clark exhibited pro-precedential behavior.

For the deference to Congress parameter, the results in Figure 3.10 indicate that Justices

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18The number for each justice and each legal concept is calculated via simulations based on parameter estimates in Table 3.1. For each simulation, we calculated the average difference in the probability of a conservative vote when the legal concept (e.g. precedent) implies a conservative and a liberal vote. For each concept, we conducted simulations based on cut-point values of $\kappa = -0.5; \kappa = 0.0; \text{and} \kappa = 0.5$. For example, for Justice O’Connor the difference that occurs when $\kappa = 0$ for the *Stare Decisis* can be seen in Figure 3.4 by subtracting the liberal O’Connor precedent bar from the conservative O’Connor precedent bar. For this cut-point, Figure 3.8 suggests a difference of 49%.
Bar indicates average change in probability of conservative vote when moving from Precedent = -1 to Precedent = 1.
Line indicates simulated 95% Bayesian confidence interval.

Figure 3.9: Effect of Precedent
Bar indicates average change in probability of conservative vote when moving from Deference = -1 to Deference = 1.
Line indicates simulated 95% Bayesian confidence interval.

Figure 3.10: Effect of Deference to Congress
Bar indicates average change in probability of conservative vote when moving from Speech = -1 to Speech = 1.
Line indicates simulated 95% Bayesian confidence interval.

Figure 3.11: Effect of Judicial Free Speech Values
John Paul Stevens, Lewis Powell, Harry Blackmun, Warren Burger, Byron White, Potter Stewart, Charles Whittaker, William Brennan, Sherman Minton, Harold Burton, Felix Frankfurter and Stanley Reed were significantly more likely to practice judicial restraint and defer to Congress. In contrast, Justices Clarence Thomas, Anthony Kennedy, Antonin Scalia, Sandra Day O’Connor, William Douglas and Hugo Black have coefficients that are both negative and significant—suggesting the complete absence of any constraint based upon a notion of congressional deference. The face validity of these results is reinforced by a New York Times op-ed by Yale constitutional law professor Paul Gerwirtz and former Justice Stevens clerk Chad Golder (2005); they characterized Thomas (followed by Kennedy and Scalia) as the justices least likely to practice judicial restraint.19 Our findings are also compatible with Howard and Segal’s (2004) finding that White and Powell are the two justices who most clearly showed a preference for deference when both liberals and conservatives sought to overturn a congressional act.20

Figure 3.11 indicates all justices appointed after Whittaker except Breyer, Rehnquist, Burger and White were significantly influenced by pro-speech sentiments. That is, after controlling for the ideological predispositions of these justices – many of whom would be ideologically predisposed to favor speech claims – most justices were more favorable toward speech claims. The inclusion of members of Congress in the model allows us to identify these

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19 While Gerwirtz and Golder characterized Stephen Breyer as the justice most likely to practice judicial restraint and to uphold the constitutionality of congressional statutes. They did not control for ideology in their analysis.

20 We do not include Roberts and Alito in this figure or the next one because we have very few observations on which deference or speech law were implicated (at least in the manner we code these variables); their results are available in Table 3.1.
effects by pinning down the ideological “cutpoint” of cases where speech was a central issue. Among the justices with the largest estimated parameters are justices Black and Stewart, consistent with Black’s famous devotion to the First Amendment (see, e.g., Dunne (1977, 289) and Cross (1997, 291)) and Stewart’s belief that “censorship reflects a society’s lack of confidence in itself. It is a hallmark of an authoritarian regime” (Stewart 1966, 498).

3.7 Explaining Cross Justice Differences

The most striking finding is the generality with which law affects the justices: almost all justices are affected by at least one of our three legal concepts. The next most striking finding, though, is the heterogeneity across justices: justices place different weights on salient legal doctrines. How can we explain these differences?

Chief Justice Roberts offered one explanation in a February 4, 2009 speech at the University of Arizona in which he argued that former judges are more likely to take into account legal factors such as stare decisis than the politicians, law-professors and practicing attorneys who were routinely appointed in earlier eras. Roberts claimed that when the bench was dominated by individuals without judicial experience “the practice of constitutional law – how constitutional law was made – was more fluid and wide ranging than it is today, more in the realm of political science” (cited in Liptak 2009).

Although we obviously take great offense at the implicit slap at political science, Roberts’
point is an interesting empirical question – are former judges more likely to take into account legal factors than justices without such experience? Political scientists and empirically oriented law professors have asked similar questions. In a recent study, Epstein, Martin, Quinn, and Segal (2009, 833) argue that “former appellate court judges are no more likely to follow precedent or to put aside their policy preferences than are justices lacking judicial experience.”

Although the Epstein, Martin, Quinn, and Segal finding contradicts Roberts’ claims, it is not the sort of analysis that should lead one to conclude that prior judicial experience does not influence how an individual justice interprets the law. We argue this for three reasons. First, it is not based upon an analysis that isolates the effect of *stare decisis*. Second, their measure of prior experience is a dummy variable to denote service on a federal appellate court. Of course, other courts and the length of tenure a justice serves may influence the degree to which a justice respects precedent. Third, they conclude that ideology appears to have “far more to do” with a justice’s decision to adhere to precedent than does prior federal appellate experience. Of course, the “far more to do” standard does not mean one should reject the importance of prior experience.

To test the Roberts hypothesis that judicial experience matters, we modeled the average effects of *stare decisis*, deference to Congress and strict interpretation of the Constitution’s free speech clause plotted in Figures 3.9 to 3.11. From each model, we excluded justices if they did not vote on at least 15 cases where the legal variable in question was coded as
non-zero. As explanatory variables, we included both the ideology of each justice and the number of years they served on a bench prior to being promoted to the Supreme Court.

These results are presented in Table 3.3. The column headed by “Federal” counts only years on the federal lower courts; the column headed by “All” counts all previous judicial experience. We find ample support for the claim that experience shapes a justice’s support for *stare decisis*, corroborating Roberts’ claim. Whether previous experience is measured in federal or total terms, justices who had more experience as a judge before coming to the court show higher levels of influence by precedent. On the other hand, the table indicates little support for the hypotheses that prior judicial experience influences the extent to which a justice supports the First Amendment or defers to Congress.
3.8 Courts, Law and Congress

Another interesting aspect of modern court dynamics is that even though Republican presidents have nominated 12 of the last 15 justices (including Sonya Sotomayor), the court’s movement to the right has been fairly moderate (Baum 1997, ix; Kahn 1999; Toobin 2007, 160). This has led conservatives to be as upset with the court as the left, if not more so (e.g., Bork 1990, 120; Levin 2005).

Why has the Court not shifted more decidedly? First, even though the Republican-appointed justices have ranged from moderately to very conservative, many have retained a respect for precedent and free speech that has slowed movement of the court to the right (Lindquist and Cross 2009, 6). Figure 3.12 plots the preferences over time of the president, House median, Senate median and Supreme Court median. We also add the effective court median when precedent is liberal which is calculated by setting the precedent variable to -1 and calculating net preferences ($\theta_i - \pi_i$ for each justice). We see that even though the Court is often ideologically situated within the pareto set, precedent can keep the law more liberal. (A Pareto set in this context refers to the set of points from which deviation will make at least one of the elected branches worse off. It is the line segment connecting the most liberal of the three elected branches to the most conservative of the three elected branches.) Across the time period, the ideology of the court median is largely in the political pareto set (or to the right of it as in the Carter and Clinton years). However, the net location of the court on
liberal precedent cases is to the left. In the Reagan era the court would be skating at the left edge of the political pareto set on liberal precedent cases; during the George W. Bush years the court was well beyond the left edge of the political pareto set on liberal precedent cases. A corresponding figure with a conservative precedent would put the court to the right of the political branches, but we suspect that after 33 years of the Warren and Burger Courts, precedents tended to be liberal rather than conservative, making the simulation of liberal precedent more relevant.\textsuperscript{21}

Figure 3.13 shows a similar dynamic on speech. We again plot the president and institutional medians across time, but this time we add the effective Supreme Court median when speech implied a liberal vote (such that each justice’s effective preference becomes $\theta_{it} - \sigma_i$). The court on non-speech cases is the same as above - riding largely in the political pareto set. But on speech cases, the court is considerably to the left of the political pareto set. In the fifties and sixties the court was substantially out of the range of the elected branches at times; after that the court settled in on the left edge of the political pareto set on speech cases until the 2000s when it again was far to the left of the congressional medians and president on cases where free speech implied a liberal vote.

\textsuperscript{21}There is a bump in the liberal precedent median in the early nineties after Thomas replaced Marshall on the court. This moved the median from O’Connor to White. While the two were very close ideologically (yielding little change in the policy median of the court), O’Connor placed greater weight on precedent. Moving from her to White moved the median on the liberal legal precedent cases to the left. When White left, the median moved back to O’Connor and the considerable gap between the median on non-precedent cases and precedent case opened up again.
Figure 3.12: Court median on liberal precedent compared to Congress and President
Figure 3.13: Court median on liberal speech case compared to Congress and President
3.9 Conclusion

For years, many empirically oriented judicial scholars have maintained that there is no systematic evidence that legal doctrines constrain justices. Some legally oriented scholars have responded that the effect of law is immune from quantitative testing. In this chapter, we tackle this puzzle by using the positions taken by members of Congress, presidents, and previous Supreme Court justices to identify distinctive effects of law and policy on Supreme Court decision-making. In contrast to the attitudinal model, we find strong evidence that legal principles are influential for the decisions made by most justices. We also find that different justices place different values on legal doctrines and that not every justice allows the legal doctrines we have measured to trump their policy preferences. Interestingly, we find suggestive evidence that the variation stems in part from the judicial experience of each justice.

Advocates of the attitudinal model will rightfully point out that our evidence should not be construed to imply that policy preferences are unimportant. Even though one could, in light of the coarseness of our legal measures, consider our findings of legal effects as a lower bound on the influence of law, our estimated policy preferences indicate that models of Supreme Court decision-making should include the policy preferences of justices. Hence our findings should not be taken to imply that the law alone accounts for the decisions of justices. When it comes to understanding the Court, there should not be absolutes.
Furthermore, policy preferences may operate at a meta-level; justices may “choose” the judicial values that most advance their broad policy goals. For example, during his service in the Nixon administration future Chief Justice Rehnquist wrote that a “judge who is a ‘strict constructionist’ in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs” (Dean 2001, 16). This kind of thinking may have made strict construction attractive to a young conservative lawyer and whatever deviations from the conservative line that may later be called for due to adherence to this approach may simply be outweighed by the advantages of having a general theory upon which to base generally conservative action. Or, to provide other examples, it is possible that Justice Souter valued precedent in part because precedents were generally liberal; he may have had to support some he did not like, but on net may have come out where his policy preferences led. Likewise, Scalia may be a committed textualist on flag burning in order to promote favored outcomes on other cases such as Roe. It is possible, as Posner (2005, 50) put it, that “Scalia and Thomas trade a minor preference for a major one.”

Following precedent may also, on the whole, achieve certain long-term policy goals even as this tool forces them to sacrifice policy goals in some instances (Bueno de Mesquita and Stephenson 2002; Hansford and Spriggs 2006). A justice’s dedication to precedent may indeed stem from a recognition that without stare decisis he or she will be unable to have a lasting effect on policy.

Adherents of a legal model may be buoyed by our findings that legal forces can matter
significantly. Still, they may believe that we find an effect for policy preferences because we limit our analysis to measurable aspects of *stare decisis*, congressional deference and protection of speech. There are many aspects of the law, ranging from the doctrine of original intent to respecting the “plain meaning” of legislative statutes, that we have not examined and that may well influence justices. Justices who act inconsistently with a legal doctrine are also not necessarily letting their policy preferences override the law (Lindquist and Solberg 2007). In some cases, it may be that adherence to one legal concept may override adherence to another. For example, a justice who values a narrow reading of the Commerce Clause may be less likely to defer to Congress when Congress inserts itself into the gray area of federalism.

These possibilities should not obscure our central finding: the attitudinal model is too restrictive. Justices are not simply life-tenured policy maximizers. They operate in an environment in which the freedom to pursue their personal values leads many justices to follow legal values about the proper role of deference to elected officials and the proper treatment of precedents. Justices operate in a world of constraints defined in large part by the doctrines that they subscribe to. Justices vary in the weights they place on the legal values measured here, and, presumably, in the weights they place on values we have not been able to measure. But the influence of law is clear.