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Supreme Court Evaluation of Federal Agency Actions

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I am submitting herewith a dissertation written by Jonathan G. Rose entitled "Supreme Court Evaluation of Federal Agency Actions." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

Richard L. Pacelle, Major Professor

We have read this dissertation and recommend its acceptance:

Michael T. Martinez, Anthony J. Nownes, John M. Scheb

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Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)
Supreme Court Evaluation of Federal Agency Actions

A Dissertation Presented for the

Doctor of Philosophy

Degree

The University of Tennessee, Knoxville

Jonathan G. Rose

December 2018
Dedication

To my mother, for teaching me
that I can (almost) always work at least a little harder.

To my father, for teaching me
how to ask questions, and why they matter.
Acknowledgements

Several people have been extraordinarily helpful in the completion of this project. I will thank Dr. Richard Pacelle, my primary advisor in the completion of this work, first. His insight and expertise have shaped every aspect of what I have done here. The theoretical arguments presented and models evaluated in this dissertation are far stronger than would have been the case absent his assistance. Without his willingness to share data he previously collected and coded, the analytical chapters would have been virtually impossible to complete, particularly in anything resembling a reasonable amount of time. Perhaps most importantly to me, his helpful, direct feedback and quick responses ensured that the process of completing my dissertation bore no resemblance to the numerous horror stories from graduate students across around the country that I read as I contemplated pursuing an advanced degree in the first place.

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as I can remember (I will admit that this second point took me a little longer to come around on). I most assuredly would not be preparing to receive a doctorate were it not for them.

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Abstract
Interactions between the federal courts and agencies are an important but often overlooked part of the policy process. This study is an attempt to explore this area of the law by examining how the U.S. Supreme Court evaluates the actions taken by federal agencies. From a practical standpoint, such evaluation has a real impact on the means available to agencies and the outcomes they bring about. Normatively, how the Court does (or does not) go about holding agencies accountable to rules and procedures created by elected officials and the agencies themselves has serious implications for notions of democratic control of government in an increasingly administration-driven age. After reviewing the relevant scholarly literature and case law, the author identifies and describes a novel body of cases unified by their administrative nature. Examining these cases using the integrated model of Supreme Court decision making developed by Pacelle, Curry, and Marshal, the author finds support for the idea that the identified body of cases is both coherent and distinct from the full set of Supreme Court cases. Using a novel analytical model, support is found for the importance of agency rulemaking in agencies receiving deference from the Court. Additionally, legal factors are found to strongly influence outcomes in the identified set of cases.
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Chapter 1

Introduction and Research Design

When thinking about the federal government, our focus often turns to Congress and the president. This is a reasonable pattern, as these elected officials are responsible for initiating the formal aspects of policy change and expend considerable resources to gain and keep our collective attention. However, there are a great many actors in the federal policy process whose names never appear on a ballot. Employees and leaders of federal agencies are responsible for implementing the policies that elected officials initiate. Federal judges exercise the power of review over actions taken by Congress, the president, and agencies.

At first glance, it may appear that unelected actors are simply following the lead of their elected cousins, mechanically and predictably working through the tasks set before them. While this view is not entirely fictitious, it is woefully simplistic and incomplete. Judges and administrators are important and powerful actors in the policy process. While elected officials may sketch the outlines of policy, it is quite often these unelected actors that fill in the details. Understanding how judges and administrators contribute to the policy process is essential to the formation of an accurate and complete view of what government in the U.S. does and is likely to do. Furthermore, understanding how the judiciary and the bureaucracy interact with one another is an important but often overlooked aspect of the practical functioning of these vital actors. This brings me to my central question: how does the Supreme Court evaluate the actions of federal agencies?

Three Example Cases

In 1967, the Tennessee Valley Authority (TVA) began construction of a dam on the Little Tennessee River (TVA v. Hill 1978). The building of the Tellico Dam, as it was called, was
funded through Congressional appropriations made in that same year. As was the case with many similar TVA projects, the building of the dam was intended to generate electricity, provide recreatonal water space, and help enhance the economic development of the area in which it was being built. In 1973, before the Tellico Dam was made operational, Congress passed the Endangered Species Act. Among other things, the Act empowered the Secretary of the Interior to identify certain species of animals as endangered. The Secretary was also given the charge to ensure the safety of the habitat of animals so identified and other federal agencies were required to work with the Department of the Interior to ensure that their activities did not harm the habitats of endangered species.

Four months prior to the passage of the Endangered Species Act, a researcher from the University of Tennessee discovered a new species of perch in a section of the Little Tennessee River. The fish, now commonly known as the snail darter, would have been supremely ill-suited to the changes to the waters it inhabited were the Tellico Dam to be finished. At the time of this discovery the Little Tennessee was the fish’s only known habitat, and early in 1975 opponents of the dam’s construction and others petitioned for the Secretary of the Interior to declare the species endangered. In October of that year, the Secretary did just that. In addition to declaring the snail darter endangered, the Secretary of the Interior determined that the Little Tennessee was the species’ critical habitat, thus shielding the river and interfering with TVA’s plans to complete the dam.

TVA argued for an attempt at relocating the species and proceeding with construction of the dam. The Department of the Interior held that the Authority’s study of the snail darter’s environment was insufficient and the dam should not be completed. Congress continued to appropriate funds for the completion of the dam as it had since 1967.
A suit was brought against TVA in a federal district court in 1976 arguing that the
completion of the Tellico Dam would constitute a violation of the Endangered Species Act and
seeking an injunction preventing this. TVA’s position was that continuing Congressional
appropriations for the project, construction of the dam itself predating the Endangered Species
Act, and substantial progress towards the completion of the dam before the snail darter was listed
as endangered all came together to indicate that completion of the project was not barred by the
Act. The district court agreed with TVA and declined to grant the injunction. However, the U. S.
Court of Appeals rejected the district court’s decision, holding that the intent of the Endangered
Species Act was clear and that work that had already occurred on the Tellico Dam had no
bearing on the matter.¹

In 1973, Congress also passed the Rehabilitation Act (Bowen v. American Hospital
Association 1986). A portion of this Act required that no disabled individual should be denied
the benefits of or participation in any program that received federal moneys solely on the basis of
that disability, provided that individual was otherwise qualified to benefit or participate. Almost
a decade later, the parents of an infant with a variety of disabilities refused to give consent for
“surgery to remove an esophageal obstruction that prevented oral feeding” (Id at p.617). The
hospital where the infant was born brought suit in an attempt to undertake the life-saving
procedure, but the court denied relief and the infant died. In response to this and citing the
Rehabilitation Act, the Department of Health and Human Services published a Final Rule that,
among other things, required

(1) health care providers receiving federal funds to post notices that,
because of § 504’s prohibition against discrimination on the basis of
handicap, health care should not be withheld from infants on the

¹ All discussion of the events of TVA v. Hill (1978) is based on information contained in the syllabus and majority
opinion of that case.
basis of their mental or physical impairments; (2) state child protective services agencies to establish procedures to prevent unlawful medical neglect of handicapped infants, and when considered necessary, in the judgment of the responsible official of the Department of Health and Human Services, to protect a handicapped infant's life or health; (3) immediate access to patient records; and (4) expedited compliance actions (Id. at p.610).

The American Hospital Association challenged these four provisions of the rule on the basis that they exceeded the bounds of the Rehabilitation Act. The Association sought an injunction preventing the enforcement of the rule in a federal district court. The district court agreed with the Association and prevented the rule from being enforced. This decision was affirmed on appeal.

Harold and Enid Davis were members of the Church of Jesus Christ of Latter-day Saints (Davis v. United States 1990). As part of its operations, the Church maintains a global network of twenty-five thousand missionaries. This network is made up largely of young men from the Church that receive direct financial support from their parents, members of local Church congregations, or from funds maintained by the Church specifically for this purpose. The Davis’ sons Benjamin and Cecil were called by the Church into missionary service in 1979 and 1980 respectively. At the instruction of the Church, the Davises transferred amounts of money specified by the Church into their sons’ checking accounts to financially support their work in the mission field. Benjamin and Cecil, like all Church missionaries, were instructed to use the funds only for necessary expenses and to keep careful records of all uses of the designated funds. These records were then submitted to Church representatives at regular intervals.

Tax law in the United States allows contributions to qualifying charitable organizations to

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2 Patient record access was included in the rule to facilitate the actions required by the rule of state child protective services agencies.
3 Expedited compliance in this instance refers to compliance with the requirements of points 1, 2, and 3.
4 All discussion of the events of Bowen v. American Hospital Association (1986) is based on information contained in the syllabus and majority opinion of that case.
5 And presumably still are.
be deducted from an individual’s or household’s annual income for purposes of calculating the total amount of income tax owed. On their 1980 and 1981 tax returns, the Davises claimed Benjamin and Cecil as dependents but indicated no charitable contributions. However, on an amended return filed in 1984 that included changes to the returns filed for 1980 and 1981, Harold and Enid listed the money transferred to their sons’ checking accounts as charitable contributions, thus reducing their overall tax burden.

In reviewing the amended returns, the Internal Revenue Service (IRS) disallowed the refunds that would have resulted from these amendments. The Davises filed a suit for a refund of taxes paid in 1985 and submitted another amended return in 1986, modifying the number of dependents claimed and reducing the listed charitable deductions to amounts confirmed by the Church as used in pursuit of mission activities. The Davises contended that the funds given to their sons were “unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible,” (Davis v. United States 1990, p.477) thus qualifying as a deduction to taxable income under 26 CFR §1.170A-1(g)(1989). The district court ruled that the Church’s lack of direct control over the funds meant that the IRS was correct in disallowing the deduction. The Court of Appeals affirmed.6

These three cases are very different in a number of ways. The subject matter of each is quite dissimilar. In TVA, the application of environmental protection regulations to a federal agency that would rather not follow them is on display. In Bowen, regulations regarding the health and welfare of disabled infants are being challenged for overstepping statutory boundaries. In Davis, the application of the tax code in a manner that might seem overly restrictive to the taxpayers involved is at question. What is most directly at stake in each case

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6 All discussion of the events of Davis v. United States (1990) is based on information contained in the syllabus and majority opinion of that case.
also varies greatly. *Davis* involves a matter of the applicable taxes on a few thousand dollars of income.\(^7\) In *TVA*, the fate of a multimillion-dollar federal project is on the line. In *Bowen*, the matters addressed are quite literally life and death.

There are, however, commonalities among these cases as well. After working their respective ways through the federal judiciary, each of these three cases found itself in the highly unlikely position of being reviewed by the Supreme Court. Each case also involved questions of whether or not federal agencies were acting in accordance with the law. The answers to these questions are mixed. The Court rendered decisions that went against the wishes of the Tennessee Valley Authority and the Department of Health and Human Services but upheld the decision of the Internal Revenue Service to disallow the Davises’ deduction of the money sent to their sons to serve as missionaries for the Church of Jesus Christ of Latter-day Saints.

This brings me back to the central question of this work: how, exactly, does the Supreme Court evaluate the actions of federal agencies? The answer to this question remains elusive. A great deal is known about how both sets of actors behave independently, and this gives us some insight into how the interactions between them might play out. Still, little large scale empirical work has been dedicated to understanding the ways that courts and agencies work with or against one another.

This is unfortunate for three primary reasons. From a purely practical standpoint, both courts and agencies play a substantial role in the public policy process. As I will discuss at greater length in a moment, modern administrative agencies are powerful and important actors in determining what government does and does not do. They are, of course, responsible for carrying out the will of Congress as manifested through statutory law. As has ever been the case, the

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\(^7\) As with any case, a complete conception of the stakes must include the downstream effects from any resulting precedent.
responsibility for execution of even the most well defined duties brings with it the opportunity to influence their shape and outcome. However, the bureaucrats who staff federal agencies⁸ are much more than mere functionaries carrying out a set of mechanically simplistic and closely constrained tasks set forth by their elected superiors. For a variety of reasons of both design and circumstance, agencies typically wield a great deal of discretion in the way they carry out their duties. For a variety of reasons both practical and political, Congress has made a habit of giving agencies broad authority to set their own goals and select the strategies to pursue them inside of often hazy statutory bounds. The legislature may set the targets in the most general sense, but it is the bureaucrats that make many, and perhaps even most, of the substantive policy decisions within a given issue area. As for the policy influence of the courts, and the Supreme Court in particular, one need look no further than decisions such as Brown v. Board or Obergefell v. Hodges or briefly consider the impact of an alternative outcome in National Federation of Independent Business v. Sebelius to understand the impact the least dangerous branch can have.

From a philosophical standpoint, it is potentially troubling that judicial and bureaucratic actors with so little direct accountability to the public would hold so much power over what government will or will not, can or cannot do. Such an arrangement does not necessarily pose a problem for democratic government, as the simple reality of being unelected does not prevent actors from acting in accordance with public opinion or, perhaps, in the public interest.¹⁰ Still, to

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⁸ And my focus in this work is restricted to actors at the national rather than the state level of government.

⁹ In Brown, the Court found the racial segregation of public schools to be unconstitutional. In Obergefell, the Court found that the 14th Amendment required states to both issue marriage licenses to same-sex couples and to recognize such marriages that were legally performed in other states. Federation of Independent Business was the first major challenge to the legality of the Affordable Care Act to make its way to the Court.

¹⁰ It should be remembered that while democratic principles are foundational to the U.S. system of government, especially as it exists in the modern era, they are not the only principles of importance. The Constitutional order and the American public can generally be seen to also find some value in both producing technically sound solutions to policy problems and protecting fundamental rights. While neither of these goals is inherently at odds with popular sovereignty, both can find themselves in such opposition from time to time. In Federalist 78, Hamilton even goes so
say that a problem might not exist is quite different from saying that one does not exist. If, as some commentators have claimed, Congress is in the habit of giving significant amounts of power to agencies with little in the way of meaningful guidance or significant restraint (Lowi 1986), there might very well exist reasons to be concerned about the state of democracy in our nation. If these claims ring false, the question remains of how, precisely, the courts monitor the limits set by the elected branches. If claims of Congressional dereliction have merit, the courts would, due to the role in the larger government structure, play an even more important part in the policy process than would otherwise be the case. Either way, understanding the manner that the judicial branch as a whole and the Supreme Court specifically decide administrative cases is necessary to gain a better understanding of the U. S. policy process. As matters currently stand, there is precious little evidence that allows us to speak to the matter in an informed way.

From a structural standpoint, it might be said that the elected branches deal more with the formulation of policy than the other components of the federal government. They choose, to an extent, the goals and the means that agencies will pursue and employ. While both Congress and the president have important roles to play in the supervision of agencies in carrying out these goals, the capacity of those in the Capital and the White House are limited in some important ways that I will discuss later at greater length. The agencies themselves will carry the policy out after putting their own often substantial stamp on its formulation. As a part of this process, agencies will engage in a great deal of interpretation of their enabling statutes and the rules and regulations they have made themselves. If an agency oversteps its bounds or misinterprets a legal provision in a major and broadly unpopular way, it might be expected that elected actors would sometimes respond. However, what if the overstep is minor in nature? What if it is far as to cite the potential for the judiciary to stand as an obstacle to majority rule quashing minority rights as a major justifications for their non-elected status.
particularized in its impact? What if it is unclear whether or not the action represents an overstep at all? These sorts of potential issue might be less likely to grab the attention of elected officials.\textsuperscript{11} Who, then, is the adversely affected individual to turn? This is a role traditionally filled by the courts, and it is essential to ensuring that government is serving its people. While the tools the judiciary has at its disposal to oversee agency actions are as deeply imperfect as those of its elected counterparts, the nature of its functioning and its assigned role within the larger structure of government means that it is at least well positioned and equipped to provide a different form of oversight than Congress or the president may be able or willing to. Understanding the mechanisms and limits of this oversight is vital to providing answers to larger questions of agency accountability.

Before I begin, I should take a moment to define more clearly my goals here. The question of court-agency interaction could be handled in two basic ways. The first is to examine how the courts evaluate agency activity, while the second is to examine how agencies present their positions to and react to the decisions of the courts. While both would, I believe, provide interesting and important insight into this set of interactions, I will employ the first approach here. Additionally, the federal judiciary is itself made up of a variety of individual courts across three distinct levels.\textsuperscript{12} Each level and even each specific court can have a different and important impact on the cases that come before it. District courts are the proverbial front lines of the judiciary. The Circuits are the first, and often last, appellate courts that will hear a federal case and each may produce decisions independent of the others. The Supreme Court reviews a tiny fraction of the total cases dealt with by the Circuits as well as some cases from state Supreme Courts and a handful of cases of original jurisdiction each term. It also has the final say in any

\textsuperscript{11} The capacity of and incentives for elected actors to intervene in these matters can also be limited in some important ways that I will also discuss at greater length later.

\textsuperscript{12} Assuming, of course, that the discussion is confined to Article III courts.
legal matter over which it can exercise jurisdiction and its decisions are binding on all lower federal courts and, in some matters, on state courts. My focus here will be on the Supreme Court. Finally, as noted in a previous footnote, I will restrict my discussion of bureaucratic agencies to federal agencies.

**Oversight of Administrative Agencies**

The administrative institutions that are so central to this endeavor are an integral part of modern governance and, arguably, modern life. Arguing for a deeper study in the U. S. of the methods of professional administration, Woodrow Wilson (1887, p.200-201) observed that:

> There is scarcely a single duty of government which was once simple which is not now complex; government once had but a few masters; it now has scores of masters. Majorities formerly only underwent government; they now conduct government. Where government once might follow the whims of a court, it must now follow the views of a nation.

> And those views are steadily widening to new conceptions of state duty; so that, at the same time that the functions of government are every day becoming more complex and difficult, they are also vastly multiplying in number. Administration is everywhere putting its hands to new undertakings.

Though written in the closing years of the nineteenth century, Wilson’s words do not seem out of place in the opening years of the twenty-first. The world is more technologically complex and interconnected than it has ever been. This creates a wide variety of new opportunities but also gives rise to many new challenges while sometimes amplifying old ones. To adapt to these challenges and make the most of these opportunities, a veritable army of technical experts from a wide range of disciplines with the capability to adapt policy in intelligent and productive ways is needed. In short, the bureaucracy is essential. This being said, it is important to remember that no tool is free of limitations, nor any solution free from its own set of problems and limitations.
The U. S. Constitution is built on, among other things, the idea of separated powers popularized by Charles-Louis de Secondat, Baron de Montesquieu. Montesquieu identifies three primary forms of governmental power: legislative (the power to make and change laws), executive (the enacting of the business of the state, such engaging in diplomacy), and judicial (the interpretation and application of the law as it relates to civil and criminal matters) (Montesquieu 2002). He argues that the separation of these powers is essential for the presence of liberty, as the combination of any two create either a ruler or a body of rulers upon which it is impossible to place meaningful restrictions.

Yet regulatory agencies are organs of government that possess all three types of power. This is hardly an original observation. Theodore Lowi (1986, p.295) holds that “the delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.” Ronald Pestrito (2007, p.16) has noted that “The administrative state in America today—both its legal framework and the manner in which it makes policy—coexists uneasily and often incoherently with the principles of constitutional government upon which the nation was founded and under which, at least in form, it continues to operate.” Gary Lawson (1994, p.1231) has stated that “The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” Looking back to the early days of the administrative state, Cass Sunstein (1987, p.447) has observed that “what the New Deal administrators celebrated as a virtue – the combination of functions – is now often regarded as a vice, precisely because of the problems that gave rise to the original distribution of

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13 Montesquieu states that “Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would no longer be possessed of liberty, because all his fellow-citizens would have the same power” (2002, p.150). In this view, liberty is equated to the rule of law.
national powers.”

Even though they represent a fusion of governmental powers, agencies are limited in a number of ways. The scope of actions each is empowered to take is relatively limited. Additionally, Congress, the president, and the courts each have tools at their disposal to set and alter the bounds inside and the manner in which agencies exercise authority. Congress has arguably the greatest measure of power in controlling agencies. The statutes that lay out an agency’s powers and boundaries are creations of Congress, and the money that allows an agency to pursue its objectives is allocated by Congress. Congress holds the purse strings and has the power to make, unmake, or remake agencies as it sees fit, and as such it might be expected that the preferences of Congress would never go ignored by agencies.

Despite the potential that Congress has to exert control over agencies, it is important to keep a few things in mind about the relationship between the legislature and the bureaucracy. While Congress may carefully direct and restrict the actions of agencies, setting clear goals and laying out a specific set of mechanisms to pursue these, it often does not (Lowi 1986). Even if the legislative branch were to put in place a carefully designed and thoroughly explained set of goals, means, and limits through legislation, its actual capacity to see that such a plan is faithfully executed is limited at best. To say that the modern bureaucracy is vast in scope, scale, and function is uncontroversial. In order to monitor the various agencies, offices, and programs it authorizes, Congress has at its disposal, as McCubbins and Schwartz (1984) famously argued, two basic strategies. The first is police patrol oversight, which amounts to examining “a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations” (McCubbins and Schwartz 1984, p.166). This method is resource intensive, requiring Congress to spend time

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14 Assuming, of course, that members perceive such activity to be worthwhile in the first place.
actively examining the actions of a variety of actors engaged in a diverse array of highly technical endeavors, all of which share an information advantage over members of Congress.

The second option McCubbins and Schwartz (1984, p.166) identify is fire alarm oversight, which they describe as establishing “a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge administrative agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself.” Rather than focusing on seeking out problems, the fire alarm approach to oversight allows other actors to notify government about problems as it sees them. While hardly a comprehensive approach, it is certainly the more resource efficient of the two and has the potential to allow Congress to step in when an especially egregious abuse of power or neglect of duty takes place.

Unsurprisingly, McCubbins and Schwartz (1984) hold that Congress is likely to prefer fire alarms to police patrols. While there is some empirical evidence that Congress engages in quite a bit of police patrol oversight (Balla and Deering 2013), it seems prudent to question the effectiveness of such measures in uncovering less-than-faithful execution of authority delegated by Congress, especially since that authority is often not delegated in wholly unambiguous ways. Fire alarm mechanisms, such as recourse to the federal courts, the opportunity to respond to agency intent provided by notice-and-comment rulemaking, and Congressional oversight hearings triggered by events are all certainly present in the administrative system.

However, even when Congress is made aware of potential problems with or misuse of delegated power, there is no certainty that it will act. The preferences of Congress are a vast and perhaps nebulous thing. As a few minutes of the nightly news is likely to inform anyone, Congress is not always (and perhaps not often, for that matter) in one accord. As a robust agenda
setting literature will attest (e.g., Downs 1972, Cobb, et al. 1976; Walker 1977; Nelson 1986), public attention is fleeting, there are few guarantees about which items are likely to make it to the Congressional agenda, and there is a great deal of competition for the limited space to consider, discuss, debate, and perhaps even act on the near infinite number of potential public issues that exist. Earning the ire of a few members of Congress is unlikely to be sufficient to rouse the collective will required to censure an agency actively, particularly if other members are happy with, indifferent to, or simply unaware of the agency's actions.

If there is some degree of validity to Mayhew's (2004) assumption that members of Congress are primarily interested in reelection, this should come as little surprise. Such a focus seems likely to lead individual members\(^\text{15}\) to spend their time primarily on those activities that have the greatest chance of garnering positive attention from their constituents. Actively monitoring and managing agencies might fall into this category in instances when a program is remarkably well received or, perhaps more likely to have the desired result, when there is a truly momentous and highly visible administrative blunder. While these opportunities and assorted others will present themselves from time to time, they will probably not be the norm. Congress as a whole is probably not presented with much of an incentive to actively watch what agencies do. While individual members or small groups might take an interest in such activities, either as a result of their constituents’ particular interests or as the result of personal initiative, it seems unlikely that the critical mass required to take action could be assembled with any regularity. As James Wilson (2000, p.237) observed,

> No agency is free to ignore the views of Congress. An agency may, however, defer to the views of one part of Congress (say, one committee) instead of another, or balance the competing demands

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\(^{15}\) And it is important to remember that Congress is simultaneously 1 branch of government, 2 distinct chambers, and 535 individuals with their own constituencies and personal preferences.
of the White House with those of some parts of Congress in ways that other parts may not like. The bureaucracy cannot evade political control… But it can maneuver among its many political masters in ways that displease some of them and can define its tasks for internal reasons and not simply in response to external demands.

Organizationally, federal agencies are a part of the executive branch. The president has the authority to appoint leaders who serve solely at his pleasure to many agencies,\(^\text{16}\) to make executive orders, to make organizational changes to the broader executive branch, and to review proposed regulations using the Office of Management and Budget. Each of these methods has its merits. The appointment of agency leaders has been found to have a significant impact on agency policy outputs (Wood and Waterman 1991). Executive orders allow the president to make limited but unilateral policy changes through issuing instructions to executive agencies, and their impact can be seen in historical examples ranging from the racial integration of the armed forces and requirements that agencies engage in cost-benefit analysis when proposing new rules (Mayer 1999) to more recent ones such as the travel restrictions put in place by President Trump.\(^\text{17}\)

Organizational changes may help reframe and redirect agencies, though in the modern era major changes to organizational structure require cooperation from Congress to enact (Pika, et al. 2017, Ch.6). Review of proposed rules through OMB gives the president significant input on the content of final rules, changing, slowing, and even stopping rules that are viewed unfavorably (Croley 2003).

Each method also bears some important limitations. While political appointees can have significant impact on agencies, the expected or intended impact may not always emerge. James Wilson (2000, p.261-261) notes that

\(^{16}\) Though it should be noted that many agencies that exist primarily for purposes of promulgating and enforcing regulatory law are constructed with leadership structures that are more insulated from direct presidential influence.

\(^{17}\) The judicial system has also demonstrated its role in the policy process in this example.
A remarkable transformation occurs at the very moment a president administers the oath of office to cabinet secretaries or bureau chiefs. Just before the appointees place their hands on the Bible they are committed followers of the president’s principles and policies. The oaths uttered, the hands are lifted from the Bible; almost immediately, the oath takers begin to experience a soul-changing conversion. Suddenly they see the world through the eyes of their agencies- their unmet needs, their unfulfilled agendas, their loyal and hardworking employees.

Executive orders still have to conform in some manner to the authority vested in the president or the agency or agencies to which it is directed. The substantive impacts of reorganization can often be modest at best (Pika, et al. 2017, Ch.6). While OMB is a powerful tool for influencing rulemaking activity, the number of rules that can be reviewed in a meaningful way is, and one would imagine must be, severely limited (Croley 2003). To return to an idea discussed earlier, it might also be expected that the nature of presidential oversight would, by virtue of necessity, fall primarily into the fire alarm category. There is simply too great a volume of administrative activity for the White House to be able to actively monitor all, or even a majority, of it. While police patrols are possible and, I suspect, do occur with some regularity, the same questions of substantive impact that apply to Congress’s patrols should hold for the president as well.

The courts play a limited but important role in monitoring the bureaucracy. The judicial system, taken as a whole, can be described as a relatively passive actor. Judges must wait for problems to come to them before they can take any action. Undertaking the process of bringing a problem to the courts will almost assuredly be a long and expensive ordeal, limiting the number of individuals or groups that choose to use the legal system or, for that matter, have the means to make use of it in the first place (Pacelle 2015, Ch.6). Judges are at an information disadvantage relative to agencies and generally lack direct lines of communication with agencies. All in all, the courts are probably ill-suited to oversee agencies. This being said, “due to electoral motivations, a diminished capacity to make coherent public policy, or simply a lack of political
will, Congress and the president have been less than vigilant. As in numerous areas of law, the courts have been thrown into the breach” (Id. at.108). The question before us, then, is how do the courts, and the Supreme Court more specifically, go about filling the role into which they have been cast?

In order to answer this question, information from a variety of studies within the realm of public law is needed. Naturally, the law itself must feature prominently in this discussion. Each federal agency exists inside of an interconnected web of law created by multiple actors that simultaneously empowers and restrains it. While the ultimate power of legal interpretation rests with the Court, agencies actively engage in legal interpretation as they seek to carry out the duties given to them by the elected branches. Congress says through a statute that an agency must do this thing and that thing, but not some other, similar thing. The president says through an executive order that the same agency should do this thing first and most, and make sure to do that other thing in a particular way. The Constitution, largely in the voice of the Supreme Court, says that these particular things cannot be done. The agency has itself said through rules and rulings that certain procedures must be followed for certain kinds of action, and that particular terms are defined in specific ways. The courts more directly append, annotate, and expound on each of these kinds of law as they hear cases. As agencies navigate this legal web, they must reconcile this set of directives, licenses, and prohibitions and act in a manner that faithfully incorporates each in a way that can be applied to the circumstances of an often messy reality. What the law says about any specific action an agency may take or decline to take is likely to be highly particularized. As such, it is somewhat difficult to speak comprehensively about the relevant law when dealing with, for example, the Internal Revenue Service, the Department of Health and Human Services, and the National Security Administration simultaneously.
For good or ill, the courts will be called on to resolve the issue when people or organizations disagree with agencies about the proper application of the law. Both the courts (and the Supreme Court in particular) and federal agencies can be viewed as experts in their very different fields (Pacelle 2015). The courts are, of course, experts in the law and its interpretation. Agencies and the bureaucrats that staff them can, by working day in and day out inside of specifically defined areas of public policy, be viewed as technical experts within their respective domains. While it is probably safe to assume that the courts possess a greater mastery of the law, or at the very least have the final say in the matter, than their bureaucratic cousins, their mastery of the technical complexities and practical realities of constantly evolving bodies of policy can likely be seen as somewhat lacking in comparison to those filling the ranks of the civil service. What, then, happens when the policy generalist Court is called upon to assess the actions and rules of policy specialist agencies? Should the justices insert their legally-based reasoning into often hyper-technical problems and accompanying solutions that they are likely less than optimally equipped to navigate, or should they simply leave matters to the technical experts? This question is further complicated by the fact that, despite whatever technical knowledge advantages agencies might have relative to the courts, the goals they are given and the means they are empowered to pursue those goals through are rooted in statutory interpretation that exists firmly in the judiciary’s domain.

Whatever answer to this dilemma might seem most normatively appealing, a study of currently controlling precedent in the form of United States v. Mead Corp. (2001)\textsuperscript{18} tells us that, in the current era, there are certain conditions under which the Court is more likely to defer to an

\textsuperscript{18} Mead is the most relevant decision to examine for those interested in deference at the time of writing. However, the legal standard can and does change. Mead itself represents the latest development in a line of jurisprudence that stretches back to the New Deal era. It should also be noted that some cases that might be candidates for evaluation under Mead are sometimes evaluated under other standards. I discuss this in greater detail in Chapter 2.
agencies actions and other sets of conditions where it is likely to employ greater scrutiny to those actions. I leave the full discussion of deference for the second chapter, but I am fortunate for its existence given my goals for this study. The concept of deference provides us with an avenue that can be used to put some order to the wide variety of statutes, regulations, and case law at play in administrative jurisprudence.

Understanding the law, though, is not enough to understand how the Court goes about its business. While there is reason to believe that the law does matter to the justices and to the Court, the law is seldom a simple equation to be mechanically solved. Each individual justice has his or her own views on what the law is and what the law should be. These views can and, it seems, are often likely to influence the way that each justice reaches her or his own conclusion in a given case. That being said, the Court is still ultimately a majoritarian institution. Regardless of how a particular justice may think a particular case should be decided, she or he must convince four other justices that a given answer is the best one, whatever the evaluative criteria may be, in order to reach a decision. The dynamics of small group voting do seem to play a part in the content of the decisions that the justices ultimately reach, and these dynamics often involve bargains and accommodations (Epstein and Knight 1998). Finally, the Court is no island. It is one part of a system of government designed to foster interdependence between multiple actors, and it can and should be expected that the other actors will, to some extent, influence the Court’s decisions. The degree to which these factors come together to shape majority opinions can and does vary, but understanding how these forces interact to shape outcomes is critical to answering the question I set forth here.

Before the justices render a decision or hear arguments, they must decide which cases

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19 The votes of five justices would typically be required to form a majority coalition, though the number may be smaller if two or more justices have recused themselves from a particular case.
they will actually accept for review. The Supreme Court’s docket is chosen at the discretion of the justices, and the number of *writs of certiorari* granted is a scant fraction of the number of petitions received. To choose the 80 or so\(^{20}\) cases that will be accepted in a term from the thousands of requests for review that are submitted, the Court applies a varied and shifting set of criteria. This agenda setting process is an integral part of the Court’s role in the judicial system and in the greater policy process.

To discuss interactions between the Court and federal agencies in an informed manner, the part played by the Office of the Solicitor General must also be considered. The Solicitor General, often referred to as the SG, represents the government’s interests and position before the Supreme Court.\(^{21}\) The Office of the Solicitor General is organized as a part of the Department of Justice, and the SG is chosen by and serves at the pleasure of the president. The SG plays an important role in shaping the Supreme Court’s agenda, particularly where agencies are concerned. Whether or not an agency loss at the circuit level is appealed to the Supreme Court is a decision that rests with the Solicitor General. The office is also one of the, if not the single, most successful litigants to appear before the Court, winning far more cases than it loses. The reasons for this success are complex, and I will examine them in the following chapter. For now, I will simply say that the Solicitor General is a pivotal player in the ongoing development of administrative law.

This work will proceed in five additional sections. In Chapter Two, I will review the extant literature relevant to my topic. The existing political science research that directly examines the subject of my question is somewhat more limited than the literature that addresses other aspects of public law, but there are many areas of scholarship that can provide information

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\(^{20}\) In the current era. The Court heard a larger number of cases in the average term in the past.  
\(^{21}\) The SG is responsible for the vast majority of the actual litigation that federal agencies engage in before the Supreme Court, but not every single case that an agency is party to. More on this later.
relevant to that question. In Chapter Three, I will discuss the process I used to identify the cases that form the basis of this study. I will also provide a variety of descriptive information about my cases. This information should place the analytical chapters in proper context and provide insight into a body of cases that has received little direct attention from political scientists. In Chapter Four, I will attempt to find support for the idea that the set of cases I discuss in Chapter Three represents a coherent area of Court decision making that is distinct from other jurisprudential domains that have received greater scholarly attention. In Chapter Five, I will test my own set of hypotheses about the nature of Supreme Court evaluation of administrative agency action using the set of cases described in Chapter Three and analyzed in Chapter Four. In Chapter Six, I will summarize my findings and offer suggestions for future work in this area of public law research.
Chapter 2

Literature Review

I would like briefly to return to the three cases discussed at the opening of Chapter 1. The government lost its case in both *TVA v. Hill* and *Bowen v. American Hospital Association* while finding success in *Davis v. United States*. Why is this? Did the Tennessee Valley Authority and Department of Health and Human Services flagrantly exceed the boundaries of their authority while the Internal Revenue Service behaved in a more scrupulous manner? A closer examination shows that the *TVA* and *Bowen* decisions were fairly contentious, both finding 3 justices in dissent, while *Davis* was unanimous. While it might be somewhat safe to assume from this information that the IRS was pretty clearly operating within the limits of its mandate, it is probably not so easy to say that the TVA and DHHS definitively were not. The litigators for both agencies were, after all, able to convince three judges on the highest court in the nation that their actions were justifiable at some level.

Unsurprisingly, the “clear legal boundaries” hypothesis put forth a moment ago is almost certainly too simplistic to offer any real insight into what is driving the outcomes in all 3 of these cases. The question of why these cases were decided in the manner they were remains. Unfortunately, little of the existing political science literature directly addresses the specific way in which the Supreme Court evaluates the actions of federal agencies. However, there is extant research that casts a great deal of light on how the courts and agencies interact with one another. The Supreme Court has near complete control over the set of cases it hears, and scholarly work on how the Court exercises this control can provide important information about the context in which these cases are taken up. The legal underpinnings of judicial deference to agencies are relatively clear and represent an important piece of the larger puzzle. However, these legal factors must themselves be considered within the larger discussion of the Court’s decision.
making processes. Work addressing both of these subjects has important bearing on the question I wish to answer. A good deal is known about the role and function of the Office of the Solicitor General whose attorneys serve as a bridge between the executive and judicial branches. While none of these areas of study will tell us everything that is needed, each can tell us something important.

There is also a body of existing scholarship that, while not speaking to the exact question framed in Chapter One, examines the relationship between federal agencies and the federal judiciary. Epstein and O’Halloran (1998) suggest that the courts have traditionally served and can continue to serve three primary functions in providing oversight of agencies: (1) making sure that Congressional delegations of authority are issued in conjunction with some manner of policy goal that specific delegation is intended to serve; (2) ensuring that agencies follow the procedures and guidelines set out by Congress and holding agencies to task when they fail to do so; and (3) “continuing to enfranchise any and all affected interests into the policymaking process, so that bureaucratic malfeasance will be less likely to go unnoticed” (Id. at 987). Furthermore, there is evidence that agencies are responsive to the behavior of the judiciary. Separate studies involving the Internal Revenue Service and the Army Corps of Engineers have shown that both agencies tend to shift the way that they carry out their duties within a given geographic area in response to the preferences of the court of appeals for that area (Howard and Nixon 2002; Canes-Wrone 2003).

Of course, the cases heard by the circuits are, as a population, different in some important ways from those that are heard by the Supreme Court. The Office of the Solicitor General, whose role I will discuss in greater detail momentarily, is not involved at the intermediate appellate level. Due to the justices’ ability to set their own docket and their collective perception of their
role in the judicial system, the cases that the Supreme Court hears are likely to be legally difficult and substantively important to not only the individuals and/or groups involved, but to the functioning of the government as a whole (Perry 1991). Aside from the nature of the cases, the context in which the circuits and the Supreme Court function is quite different. Review by a panel from the appropriate circuit court is highly likely for all cases that originate in the federal judiciary. Supreme Court review is rare and entirely at the discretion of the justices. While the Supreme Court hears a relative handful of cases each term, circuit court judges still must consider the possibility of the review of their decisions either by the Court or by an *en banc* panel of their peers on that circuit. The Supreme Court is the proverbial last stop for any case in the U. S. legal system. The precedential impact of circuit court decisions is limited to the circuit in which a case is decided. A Supreme Court decision can, depending on the broadness or narrowness in which the majority opinion is written, influence the law across the entirety of the country.

While important distinctions do exist between the circuit courts and the Supreme Court, there is evidence that agencies respond to the decisions of the Court as well as the circuits. Examining 229 cases involving Court review of agency actions between 1953 and 1990, Spriggs (1997) determined that there were no instances of an agency, in various recorded responses to Court decisions, openly defying the will of the Court. In fact, he found that agencies only narrowly complied, tailoring their responses in a manner that would limit the overall impact of the Court’s decision, in less than seven percent of observed cases.\(^{22}\)

As an explanation of this broad trend of compliance, Spriggs (1997) offers up two main contributing factors. First, those individuals or groups who prevailed against federal agencies

\(^{22}\) Because of the differences between the cases heard in and the context surrounding the circuit courts and the Supreme Court, the way that agencies react to these two levels of the judiciary could very well be different.
would almost certainly bring suit again if the agency failed to act as directed by the Court. Second, the repeat-player nature of federal agencies means that agencies will rightly be concerned that failure to comply now may result in further, possibly more severe censure in future interactions with the Court. I find these arguments to be convincing, but I would add something further. While I believe that censure by the Court (or the courts, for that matter) is something that agencies want to avoid, it must be kept in mind that the judiciary lacks both Congress’s purse and the president’s sword. Without actions taken by the other branches, a Court opinion is only, in practical terms, so many words on paper. However, judicial censure or evidence of open defiance of the Court’s decisions may very well serve as a fire alarm in and of itself to the elected branches, spurring them to action. At the very least, such information may be enough to draw more police patrol-style oversight to a particular agency or division thereof. In these ways, defiance or evasion of the will of the Court might be tied to an increased likelihood of direct, concrete consequences for the offending agencies.

**Case Selection**

There is, however, more to understanding the role and influence of the Supreme Court than understanding how it reaches the decisions it makes. Before writing opinions, meeting in conference to discuss or vote, or hearing arguments, the Court must first decide which cases it will address in a given term. In the modern era, the Court is largely free to take only the cases it wishes to. Taking a particular case presents the opportunity to change, enshrine, or unify lower court precedent. Passing over a potential case allows the status quo, as decided by the lower court, to stand. Either decision has a real impact on policy.

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23 See McCubbins and Schwartz (1984) or the brief discussion thereof in Chapter 1.
24 This does not give the Circuit decision standing as Supreme Court precedent, nor does it signify that the Court supports the Circuit decision.
While a discussion of the Court’s agenda setting process is not central to addressing my core question, I include such a discussion here for two reasons. First, because the environment that the Supreme Court operates within is a very particular one. It is important to remember that, because of the near-total discretionary control that the justices have over their own caseload, the cases that reach the Court do not do so by accident. Instead, those cases are chosen by the justices based on a combination of institutional norms, interpersonal dynamics, and personal views. Failure to acknowledge the nature of the Court’s agenda is a failure to place the decisions they reach into proper context. Second, because understanding case selection is important to fully appreciating the significance of a central player in this area of the law, the Office of the Solicitor General.

*Deciding to Decide: Agenda Setting in the United States Supreme Court* (Perry 1991) is one of the most in-depth examinations of the process underlying grants of *certiorari* that has been performed to date. Focusing on the 1976-1980 terms of the Court, Perry makes extensive (though not exclusive) use of interviews with justices and their former law clerks. In broad strokes, Perry identifies two primary modes of behavior when deciding whether or not to grant cert. What he calls “Jurisprudential Mode” involves consideration of the traditional legal factors involved in setting the Court’s agenda: inter-circuit conflict, the importance of the question presented in terms of substantive policy, and sufficient percolation in the lower courts along with a few others. Perry holds that this mode of evaluation will apply when the Justice in question is not especially concerned with the particular direction of the potential decision, as he believes will be the case for most cert applications. The second is “Outcome Mode,” which applies when a Justice is more directly concerned about the decision in a potential case. When operating in Outcome Mode, the justice will behave in a more strategic manner. The first question asked here
is whether or not the justice’s preferred position is likely to prevail (though a case that would be “institutionally irresponsible not to take” (Id. at 278) might be granted cert despite this), followed by the likelihood of the particulars of the case shaping the decision in an undesirable way. When a justice votes to grant cert on a case that he or she intends to use to move the law in a direction more in line with his or her preferences and believes is likely to be decided in accord with those preferences, that justice is said to be making an aggressive grant. A justice who would like to grant cert to move the direction of the law but thinks the case is unlikely to be decided in a manner consistent with his or her preferences and, as such, does not vote to grant is said to engage in a defensive denial. The process Perry describes is one “of decisional steps or gates through which a case must successfully pass before it will be accepted. Failure to ‘pass a gate’ will usually mean a case will be denied…It is justice-specific, not issue specific. The decision process by one justice to take a case may look very different from that of another justice for the same case; and, the process used by a justice in evaluating one case will be very different from that used to evaluate a different case” (Id. at 16).

Of course, these considerations only come into play after a great winnowing of the potential cases. As one former Court clerk put it, “There is a great presumption on the Court that on its face, a case just won’t be heard…There is really almost a siege mentality…You have to screen down to [so few] argument days, so there is a strong presumption for not hearing cases” (Perry 1991, p.219). Given the ratio of cases heard to petitions submitted, close scrutiny at the cert stage seems inevitable. Perry identifies a number of factors that seem likely to result in a case being dealt with as chaff. The first is that a case that is plainly frivolous, such as one that appears to be filed simply as a delaying tactic or is submitted by “that certain proportion of just nut-cases” (Id. at 222). A perhaps less obvious sort of case that is placed in this category is one
that is fact-specific, a case where the question at issue boils down to how specific events unfolded rather than any larger, broadly applicable question of law. “Clear denies” are another category of cases unlikely to survive the process. These are cases involving issue areas in which several or potentially all of the justices simply have no interest in acting, though what these issue areas are may change as time passes or personnel change. The other such categories identified by Perry are cases that have not sufficiently percolated, those with “bad facts” (a case where the relevant particulars would make it difficult to deal coherently with a deeper legal issue), and cases that are seen as “intractable” by the justices (where, for lack of a better description, they simply do not know what to do with the case).

Empirically, quite a bit is known about how the Court goes about making its *certiorari* decisions. Cases where the United States Government is the petitioner, where lower court conflict exists (be that disagreement between federal circuits, various state courts, federal and state courts, or a lower court and Supreme Court precedent), or where at least two *amicus curiae* briefs have been filed in favor of review are all far more likely than cases where none of these factors are at play to be brought before the Court, and exhibiting more than one of these qualities further amplifies this effect (Caldeira and Wright 1988). In fact, the presence of *amicus* briefs opposed to a grant actually appear to increase the chances of a case being taken up, though this effect is not nearly as strong as the others mentioned. A more recent study also found that an increasing number of *amicus* briefs arguing in favor of granting cert did increase the chances of a case being taken by the Court, though the effect of these petitions was greatest when the petitioner was at a resource disadvantage when compared to the respondent (Black and Boyd 2010).

These findings seem to harmonize with Perry’s ideas. Conflict in the lower courts is, of
course, the first step of Jurisprudential Mode evaluation. Substantively, such conflict matters because it means that the law is being applied in different ways in different places (though a desire for well-percolated cases means that such conflict may be tolerated for a time). The U. S. as petitioner and the presence of *amicus* briefs in favor of cert each speak to the importance of the case. Naturally, a request by the federal government that a decision be reviewed indicates that such a case is important to the grand organization of which the Court is a part. The presence of *amicus* briefs can be seen as an indication that a case matters to organized interests, and thus might be more likely to pass through the gate of importance. Furthermore, an admittedly limited analysis of portions of the personal papers of Justice Blackmun appear to “suggest that while the justices detest tax cases, they are willing to put them on their discretionary docket in an effort to protect the federal budget” (Staudt 2004, p.920). This seems to provide further support for the idea that the justices are willing to take cases that are important to the government even if they have little personal interest in them.

At the same time, there is support for Perry’s postulated Outcome Mode. In a study of search and seizure cases spanning from 1972-1986, a conservative Court was found to be more likely to review liberal lower court decisions than conservative ones, all else being equal (Cameron, et al. 2000). This could be interpreted as simply another signal for Jurisprudential Mode importance, as a decision viewed by a justice as an improper application of the law may certainly be substantively important. However, viewed through an attitudinalist lens, such ideological incongruence seems likely to make the outcome in a given case more salient to a justice. Empirical evidence exists that justices engage in behavior consistent with Perry’s conception of aggressive grants (Boucher Jr and Segal 1995) and defensive denials (Caldeira, et

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25 Although, as Salokar (1992, p.109) points out, the Court chooses not to review many cases that it likely views as decided incorrectly.
al. 1999), acting strategically to shape the Court’s docket in a manner conducive to seeing their individual policy preferences expressed in the decisions likely to be rendered. In a more recent study, Black and Owens (2009) find that justices’ decisions about whether or not to grant cert are indeed influenced by their preferred outcome, but that the presence of various legal variables, most notably lower court conflict, tends to reduce the impact of those preferences on the eventual decision of whether or not to place a case on the Court’s docket. In the presence of such legal factors, justices are more likely to grant *certiorari* than purely preference-based analysis might indicate. This seems to map well to the “institutionally irresponsible to not take case?” step of Outcome Mode reasoning.

On balance, the various components of Perry’s model of *certiorari* decision making seem to match well with empirical findings. Theoretically, the model makes a great deal of sense. It seems naive (particularly in light of vast evidence of the impact of individual attitudes on judicial activity) to imagine that a justice’s preferred policy outcomes would have no impact on Court agenda setting. It seems unlikely that, as a branch of the federal government, the Court would ignore the demands of the other branches. It also seems improbable (as well as highly troubling) that the law, even broadly defined, would play no part in shaping the decisions of those who have been deeply socialized to respect, and derive their authority from, the law. Perry’s approach makes room for each of these factors to play a role in final outcomes that is both plausible and pragmatic.

Whatever rationale underlies the Court’s case selection process, it is important to remember that case selection is not a function carried out only by the justices. As Perry (1991, Ch.3) records, the modern Court uses a “cert. pool” to assist in sifting through the large number of potential cases it might take in a given term. The petitions for the term are randomly
distributed among those justices that opt into the pool. Each participating justice then randomly assigns those petitions given to his or her law clerks to review. The clerks review their assigned cases, writing a memo that “summarizes the issues, the facts, and the opinion(s)...followed by a cursory analysis and a recommendation to grant or deny” (Perry 1991, p.42). These memos are compiled and sent to the other justices that are members of the pool, each of whom has one of his or her own clerks review the memo, compare it with the case records, and write his or her own assessment of the initial memo.

The exact extent to which the justices rely on these memos in making their final decisions about granting certiorari is not especially well known, although it seems unlikely that such a system would be put in place and its product not put to some level of use. Most likely, the particular level of reliance on the views of clerks will vary by justice and term, if not also issue area and other factors. One analysis of limited scope found that the justices often disagreed with the recommendations to grant or deny made in pool memos (Palmer 2001). However, while the justices do not blindly accept the memo recommendations, there is evidence to suggest that the cert pool does have an impact on the Court’s agenda. Another, broader study has found that the information contained in the cert pool memos do appear to influence the decisions that the justices make (Wallander and Benesh 2014). Yet another finds that, while the justices weigh memo recommendations against their own outlook on the case and appear to take into consideration the ideology of the author’s supervising justice, roughly seventy-five percent of the cert votes included in the study followed the recommendation made in the memo (Black, et al. 2014). Others have argued that the mechanism of the pool itself may explain, at least in part, the reduced number of cases the Court chooses to hear each term (Adler 2008; Chemerinsky 2008). That the justices do not personally examine each of the thousands of petitions the Court receives
each term should come as no surprise given the ubiquitous limitations on time that all people face. However, every pair of hands a decision passes through represent a chance to alter the eventual decision reached. Given the existence of the cert pool, “one cannot talk about the agenda setting process without talking about the law clerks” (Perry 1991, p.69).

The Legal Framework of Deference

The justices that make up the Supreme Court can be viewed, I think correctly, as experts on the law. However, they may take up cases involving questions that touch on issues such as the regulation of speech, criminal procedure, tax law, air and water quality, and the distribution of disability benefits over the course of a term. While there are likely few individuals that can match the justices’ knowledge of common law jurisprudence in the U.S. context, it seems unlikely and perhaps even unreasonable to expect them to hold a comparable level of knowledge about the ins and outs of every possible area of life in which the modern administrative state is involved. So far as specific areas of policy are concerned, the justices are probably better viewed as generalists. While the courts will inevitably be called upon to examine the actions taken and rules made by agencies, it can safely be assumed that the agencies themselves are the experts in their respective fields.

In addition to this informational disadvantage, the federal judiciary also faces a wide variety of legal questions when exercising oversight of agencies. Often, they are called upon to determine whether or not an agency is working within the boundaries, through the means, and towards the ends given them through statutes. At other times, questions of the compatibility of agency actions or rules with Constitutional law are raised. At still others, the courts will be called on to see whether or not an agency is operating in compliance with its own stated policies and procedures. All of these questions will, of course, be influenced by a body of case law dealing
with agencies both as a broad class of actor and in very particularized ways such as the interpretation of specific statutory requirements. Considering all of this, it can safely be assumed that the specific factors that will be relevant in a given case are bound to vary a great deal. Seen in this light, administrative law takes on a quite fractured appearance.

As briefly discussed in the previous chapter, however, there is an alternative to viewing the review of agency activity through a variety of highly specific lenses. I turn, instead, to the concept of deference. Deference, in short, is the Court choosing to allow an agency’s own interpretation of relevant statutory or regulatory provisions to stand rather than imposing its own understanding of the legal text in question to the situation at hand.

Deferring to an agency’s reading of the law can be a way to overcome the practical limitations the Court faces as a participant in the policy process. The justices could simply leave it to the technical experts to decide how things should be. Sometimes, they do just that. Applied in an overbroad manner, though, deference leaves open the possibility that agencies lack an effective post-facto check on their activities.26 This possibility is particularly troubling given the fused-power nature of many agencies.

To begin to understand how the courts approach issues of deference to agencies, it is necessary to examine a series of Supreme Court cases. The first is Skidmore v. Swift & Co (1944). The case reversed and remanded a decision by the 5th Circuit that upheld a lower court ruling that seven overnight, on-call firefighters were not entitled to overtime pay for time spent waiting in the Swift and Company fire hall in addition to their regular daytime employment. However, the most important aspect of the case was the rationale for this decision. In Skidmore, the Court held that:

26 Especially given the structural and practical limits that Congress and the president face in monitoring and managing the bureaucracy as discussed in the previous chapter.
the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control (Skidmore V. Swift & Co. 1944, p.140).

This reasoning lays out a take-them-as-they-come approach to reviewing agency actions in which agencies can expect to be required to defend the choices they make in exercising their authority (Graham 2007), but which is also not openly hostile to those choices. While the decision represents a seemingly reasonable attempt at sorting out how to deal with agency action during the early days of the modern administrative state, “Skidmore marked the beginning of a morass of judicial power in deferring to agencies that cried out for clarity” (Womack 2002, p.295).

Skidmore remained the standard for assessing agency action for several decades. However, National Muffler Dealers Association v. United States (1977) marked an important move away from the New Deal-era evaluation method. The Dealers Association in question sought a refund of income taxes already paid, claiming exemption under the “business league” provision of §501(c)(6) of the Internal Revenue Code of 1954. The Internal Revenue Service held that the Association did not qualify for the exemption, as business league status was contingent upon working in the interest of an entire industry rather than that of a specific product or manufacturer and the Association was composed only of licensed dealers of Midas brand mufflers. The majority noted that the IRS had previously held “businesses that market a single brand of automobile, or have licenses to a single patented product, or bottle one type of soft drink” (Id. at 483) failed to qualify for the exemption as well. The Association argued that this
construction of what constitutes a business league, adopted through a Treasury Regulation rather than being defined by statute, was too narrow and ran counter to Congressional intent. Finding little meaningful guidance in the statute as to what exactly a business league is, the Court sided with the IRS, holding that “while the Commissioner's reading of § 501(c)(6) perhaps is not the only possible one, it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated” (Id. at 484) and that “The choice among reasonable interpretations is for the Commissioner, not the courts” (Id. at 488). Also of importance to the Court’s decision were the consistency of the denial with the Service’s larger pattern of enforcement and the policy’s grounding in the “established principle” (Id. at 488) of not favoring one organization within a given industry over another with a tax exemption. However, the core question of the case is “whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose” (Id. at 477).

While perhaps standing as something less than a perfectly clear standard for how the judicial system should evaluate agency activity, National Muffler did formalize the notion that, under some circumstances, agencies could be viewed as the primary interpreters of statutory language. It “established a standard of moderate deference to agencies,” (Pacelle 2015, p.112) leaving the Court with a variety of options should it wish to intervene, but stepping back from the level of scrutiny that could potentially be brought to bear under Skidmore. Chevron USA Inc. v. Natural Resources Defense Council, Inc. (1984) takes things further still, giving a great deal of deference to agency actions. Chevron was a case about EPA interpretation and implementation of a provision of the Clean Air Act, but more relevant to our purposes here, it applies a new standard to the evaluation of agency activities. This standard involves a two part test. The first step is asking whether or not Congress has, in the relevant enabling statute, spoken specifically
to the power in question. If it has, either negatively or affirmatively, the Court takes that as the answer. If there is no clear answer, though, the Court determines whether or not the agency action is valid within a “permissible construction of the statute” (Id. at 866). If so, the action is found to be allowable. This is a seemingly far more deferential standard than existed under Skidmore, as the Court moved its official position from making no assumption that agencies are acting within their authority to instead accepting any agency action that is not clearly taking place outside of statutory bounds. This created a legal environment where “judges are required to decide cases against the backdrop of a Court that appears to favor agency decision making in particular contexts” (Womack 2002, p.301).

There were, however, limits to how far the Court was willing to go in applying Chevron’s highly deferential standard. Those boundaries began to coalesce in Christensen v. Harris County (2000). Amendments made in 1966 and 1974 to the Fair Labor Standards Act of 1938 allow state and local governments to offer compensatory (hereafter “comp”) time rather than monetary reimbursement for overtime hours worked to employees, though employees must be paid for any time accrued but not used upon leaving employment with that government entity and/or overtime beyond a cap set by statute. Harris County, Texas made arrangements to do just this with the employees of its Sherriff’s Department but became increasingly concerned with the potential financial burden of paying for large stores of unused comp time. As a result, the county put a policy in place that allowed supervisors to set threshold levels of time that could be accumulated. As employees approached these thresholds, the supervisor would inform the employee and request that hours be used to reduce the number banked. If the employee failed to do so, the supervisor would schedule the time to use the hours. In response, the employees brought suit, holding that the policy violated the FLSA. The federal government filed an amicus brief siding
with the employees, citing an opinion letter issued by Department of Labor’s Wage and Hour
Division that interpreted the FLSA as allowing such a policy only on condition that an existing
labor agreement provided for it. The Court’s majority upheld Harris County’s policy, specifically
stating that Chevron deference was not appropriate. Two factors are critical to the majority’s
rationale here. First, the Division’s position was based on “an interpretation contained in an
opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment
rulemaking. Interpretations such as those in opinion letters-like interpretations contained in
policy statements, agency manuals, and enforcement guidelines, all of which lack the force of
law do not warrant Chevron-style deference” (Id. at 587). Second, this particular interpretation
seemed to run directly contrary to the agency’s existing, relevant regulations. Justice Thomas
wrote that “To defer to the agency's position would be to permit the agency, under the guise of
interpreting a regulation, to create de facto a new regulation” (Id. at 588).

United States v. Mead Corp, a case that dealt with a tariff decision issued by the Customs
Service via a ruling letter, is the final deference case that must be examined. Mead had been
importing day planners, “three-ring binders with pages for daily schedules, phone numbers and
addresses, a calendar, and suchlike,” (United States V. Mead Corp  2001, p.224) for several
years, and from 1989 to 1992 the Customs Service classified these planners in such a way that
they were not subject to tariffs. However, in 1993, the Service reclassified the planners as bound
diaries, a category subject to tariffs, by way of ruling letter. Ruling letters prepared by the
Customs Service represent the agency’s position on various issues, serve as a source of authority
for action for representatives of the Service, and at the time of this case “could be modified
without notice and comment under most circumstances” (Id. at 223). Mead protested the agency
ruling through administrative means, but brought suit when that proved unsuccessful. The
Federal Circuit held that the ruling letter was not due *Chevron* deference, or any deference at all, and reversed the Court of International Trade’s original decision for the government. In remanding the case, the Supreme Court instructed that the Service’s ruling letter was indeed due no deference under *Chevron*, but that *Skidmore* should instead be applied to decide whether the action could stand. However, rather than eliminating *Chevron* in favor of reestablishing *Skidmore*, the Court had actually applied separate standards based on Congressional intent. Writing for the eight-member majority, Justice Souter stated that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority” (Id. at 226-227). As for how exactly to make this determination, the opinion says that

> We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication (Id. at 229-230).

However, the lack of notice and comment proceedings is not enough in and of itself to preclude *Chevron* deference, as “we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded” (Id. at 231).

As with almost any decision the Court renders, opinions differ on both the legal reasoning behind and the substantive impact of *Mead*. One of the most outspoken critics of the
decision was the late Justice Scalia, who opined in his lone dissent that *Mead* “has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' "totality of the circumstances" test. The Court's new doctrine is neither sound in principle nor sustainable in practice” (*United States V. Mead Corp* 2001, p.241). Some have pointed out that, while *Mead* states that a decision being reached through formalized procedures is a sign that they are due *Chevron* deference, it also states that other kinds of decisions may also be granted *Chevron* rather than *Skidmore* deference without articulating a clear test for determining which to apply (Jordan 2002; Beerman 2014). Others have chosen to focus their critiques on the difficulty of operationalizing *Mead*'s search for Congressional intent to act with the “force of law,” as such intent might be indiscernible or simply absent (Weaver 2002).

There are those who speak much more favorably of the new standard, though. *Mead* makes it quite clear that *Chevron* deference goes above and beyond what should be granted under other possible standards of deference, and should be granted only when Congress has delegated legal authority to an agency (although it is not always clear what this will look like in practice) (Merrill 2002). Hickman observes that “Although admittedly based only on informal impressions rather than empirical analysis, contrary to *Mead*’s critics, I would assert that *Mead* overall has had a stabilizing effect on the lower courts' *Chevron* jurisprudence” (Hickman 2014, p.549). The opinion’s dual standard can also be seen as serving an important normative function, providing more deference to rules made in a more publicly accountable way and more scrutiny applied to those made through less open means (Hickman and Krueger 2007).

Whatever one might think about the standard of review created by *Mead*, it is important to consider how it is employed by the Court in practice. Unfortunately, as is so often the case in
the discipline, the shortest version of the answer is “it’s complicated.” The Court can and does bypass the *Mead* factors in possibly qualifying cases by finding that the statute in question is unambiguous (Eskridge Jr and Baer 2007; Hickman 2014). Sometimes, it simply does not apply *Mead* when it appears that it could, opting instead for other or *ad hoc* forms of review (Eskridge Jr and Baer 2007). That being said, it does seem that *Chevron* would likely be applied where more structured forms of rulemaking, such as notice-and-comment or formal adjudication, were used, whereas the less deferential *Skidmore* standard would be used when the action stemmed from less formalized means, such as the letter issued in *Mead* itself (Martin and Super 2006).

There are also a few issue areas that are currently considered outside of the *Mead* framework altogether. First, there are times when an agency is given explicit and total discretionary power through an enabling statute (Martin and Super 2006). There are very few issue areas where this holds true, but there are some, including CIA security clearance decisions for employees. Where such grants of authority exist, though, the Court lacks jurisdiction to rule.

There are three more broad classes of agency activity that are decided on a more *ad hoc* but non-deferential basis that deal with domestic policy: (1) those where agencies fail to promulgate rules altogether (either in dereliction of their delegated responsibilities or when insufficient guidance is provided as to what activities are subject to sanction); (2) those where rules are made in a manner that violates the Administrative Procedure Act; and (3) arbitrary, capricious, or abusive

27 The majority choosing to apply one standard of review over another, or laying out a unique standard rather than applying a preexisting one, can be interpreted in a number of ways. It could represent an attempt to bring the decision into alignment with the majority’s ideological preferences when another standard might not reasonably allow for such alignment. Given the remarkable level of success enjoyed by the government as a litigant, it could be the result of the Court finding creative ways to justify the acceptance of administrative activity. It could also be due to the legal complexity of the questions presented making it unclear whether or not *Mead* is the appropriate or best framework to apply. These possibilities tie into the forthcoming discussion of various scholarly models of judicial decision making. It is worth noting that Eskridge and Baer (2007) include a much wider variety of cases in their study than I do in the later chapters of this work. While their approach certainly has advantages, I also think that casting the proverbial net as widely as they do increases the likelihood of contradictory legal principles coming into play. As I have mentioned previously and will continue to discuss throughout this work, administrative cases are often multifaceted and can incorporate a variety of legal considerations.
actions.

Taken together, these 5 cases, especially *Skidmore*, *Chevron*, and *Mead*, begin to give us an idea of how the courts, in general, and the Supreme Court, specifically, are likely to deal with the administrative questions that are brought before them. The methods employed in an agency’s decision making process will likely factor heavily in judicial consideration of those decisions. The intent of Congress, as expressed through statutory language, will as well. However, as is often the case, such intent is not always clear. To a certain extent, such ambiguity can be placed at the feet of the imprecision inherent in language. However, it should also be remembered that the nature and rules of the legislative process itself can lead to the passage of ambiguous statutes as the alternative may often be that no bill is passed at all.\(^\text{28}\)

Legislators, even within the same political party, will often disagree as to what policy objectives should be sought through legislation and what means should be employed to reach those objectives. Moreover, legislators are influenced by the myriad interest groups (and their lobbyists) that have a stake in a particular policy issue. Any bill that can muster a majority in both houses of the legislature will usually undergo significant changes along the way. Even if the original language of a bill was crystal clear, the need to build majority support for the bill within the legislature, or the need to engender the support of the president…will often require the substitution of more ambiguous language (Scheb and Scheb 2005, p.118).

As the president and courts have been able to turn vague Constitutional language into sources of substantial authority, agencies are similarly empowered by vague statutory provisions. The process of turning legislative language into operative policy requires specificity in terms of goals, means, and procedure, and gaps left by Congress for agencies to fill in present opportunities to interpret and define delegated authority.

Whether or not the justices currently apply *Mead* as discussed or applied the other

\(^{28}\) As a practical matter, the justices are also free to disregard any legislative intent that may exist. The extent to which this occurs is a question that, appropriately enough, is open to interpretation.
standards during their respective eras is not entirely clear. As I will discuss momentarily, there are camps of scholars working in the subfield of public law that both accept and reject the notion that the law serves as a meaningful constraint on the Court at all. Chapter 5 of this study will attempt to empirically address, to a degree, the question of precedent’s impact in administrative cases. For a number of reasons, I suspect that precedent does matter. First, it seems as though a degree of predictability in the Court’s decision making would be required for agencies to carry out their appointed tasks without having their actions and or struck down with seemingly no rhyme or reason. Second, while the elected branches might have limited incentive and capacity to fully monitor the vast array of activities undertaken by the many subunits of the federal bureaucracy, both Congress and the president have tools at their disposal to check the Court. Should the justices consistently behave in a seemingly capricious manner to the detriment of policy implementation, it seems likely that the other branches could eventually be stirred to action. Finally, the process of developing new precedent merely to use it as justification for the justices to do whatever they want seems like a great deal of work for little practical payoff. This seems especially important to remember given the extraordinary breadth of factors that Skidmore could provide such cover for employing and the Court’s move to standards that provide less space for justification in this vein.

**Supreme Court Decision Making**

The chain of precedent discussed above seems likely to have a bearing on the outcomes of administrative cases. However, the broader body of scholarship on Court decision making

29 Particularly if the circuits do, in turn, follow the Supreme Court’s lead. This stands as a separate question from the one being addressed here.
30 Perhaps serving as a rubber stamp for agency action that exceeded politically-set boundaries or shirked assigned duties would have a similar effect.
31 Though less space should not be read to mean no space.
identifies a variety of factors that may shape the outcomes of cases heard by the justices. Legal considerations are one such set of factors, but different factors have been proposed as well. Sometimes, these varying explanations of how the Court reaches its decisions stand in tension with one another. In this section, I will explore the major fields of thought surrounding Supreme Court decision making in an attempt to both situate the case law already discussed within the proper context and to inform my study of this specific portion of the Court’s jurisprudence.

The Legal Model

While there are many ways of understanding Supreme Court decision making, it can be said that, generally, these various approaches fall into one of three broad categories. The first, and oldest, of these is the legal model. The legal model holds that the Court is, at some level, constrained in its action by the law. The law here can broadly be characterized as the plain meaning of Constitutional or statutory language, the intent of the framers of the Constitution or legislative intent, and legal precedent created by prior Court decisions (Segal and Spaeth 2002 Ch.2; Pacelle, et al. 2011 Ch.2). 32

This model has important normative bearing on the Court. Specific interpretations of particular Constitutional or statutory provisions have obvious implications for what government and private actors may be allowed to, compelled to, or prohibited from doing. While individual decisions are thus important, arguably the most important functional aspect of legal considerations is the legal stability that comes through the application of precedent. As Spriggs

32 In the modern literature on Supreme Court decision making, legal considerations are not generally viewed as the force primarily responsible for shaping Court opinions much of the time. However, legal factors, particularly precedent, have been found to exert significant influence on case outcomes. I will reference some of the available evidence of this momentarily. I discuss the legal model for two primary reasons. First, regardless of its current standing within the literature, it is one of the three major models of understanding how the Court decides cases. Second, I suspect that the legal model will be quite important for explaining the outcomes of administrative cases. More on this later.
and Hansford (2001, p.1092) observe, consistent application of the law has societal value, as “Supreme Court opinions set up referents for behavior by providing actors with information necessary to anticipate the consequences of their actions. Adherence to precedent, moreover, facilitates this process by reducing uncertainty and thus allowing individuals to shape their behavior according to stable legal rules.” It is important to remember that the individuals potentially impacted by inconsistent application of the law can be private citizens or members of government. While it would certainly be deeply undesirable if private citizens were, because of a mercurial judiciary, unable to know what they must do to obey the law, frequent shifts in Constitutional or statutory interpretation would also render Congress unable to legislate effectively, the President unable to effectively execute, and agencies unable to effectively administer.

Beyond broader societal concerns, precedent has the potential to matter to justices for their own purposes. If it is assumed, as it is by the vast majority of modern scholars writing about the Court, that the justices have their own particular policy preferences and a desire to see those preferences enacted to some degree, they have two choices each time they are faced with precedent that runs counter to their preferences. On the one hand, the justices can respect the decisions of their predecessors and decide the case in a manner that goes against their own values to a greater or lesser extent. While this will, by necessity, limit the potential for a justice to leave his or her mark upon the law, it also reinforces the idea that precedent matters in the first place. On the other hand, the justices could decide to ignore precedent altogether and to simply do what they felt was best given the question before them. This would certainly give every justice great power to influence the law in the short term. However, if today’s justices do not respect precedent, why should tomorrow’s? In this sort of arrangement, any victories that a justice may
win for their preferred policy will very likely be fleeting.\textsuperscript{33} As such, the justices, with both a desire for consistency and a view towards long-term influence over short-term gains, will restrain themselves and respect the decisions of those who have gone before.

This model has found some empirical support. Litigants and the justices themselves cite precedent with great regularity, which seems to me an odd piece of theatre to perform so consistently if it has no meaning.\textsuperscript{34} Perhaps the most important set of findings of support for the legal model have been that precedent does seem to influence the outcomes of the Court’s cases, even when controlling for the ideological preferences of the justices (Songer and Lindquist 1996; Bailey and Maltzman 2008; Pacelle, et al. 2011; Johnson, et al. 2012).\textsuperscript{35} A properly specified legal approach has been found to predict the outcomes of search and seizure cases, a type of case often thought to be decided in a seemingly random fashion (Segal 1984). Legal reasoning, in the form of arguments made before the Court, has been found to impact the outcomes of cases (Johnson, et al. 2006). There is also evidence that, between the 1953 and 2000 terms, the Court overruled its own precedent, on average, 2.7 times per term (Segal and Spaeth 2002 Ch.2). If 85 is taken as the average number of cases heard by the Court each term (which is accurate for more recent terms, but would be an under-estimate as examination proceeds farther back into the Court’s history) (Baum 2013 Ch.3), then the Court overrules its precedents roughly 3.2 percent of the time during the referenced period. While this certainly places the following of precedent outside the realms of inviolable principle, I feel comfortable saying that something that happens less than 4 percent of the time that it can possibly happen qualifies as a relatively rare event. As Spiller and Spitzer (1992, p.41) observe, “Courts are not free to do ‘whatever they want,’ but

\textsuperscript{33} This principle is often referred to as “The Golden Rule of Precedent.”
\textsuperscript{34} Though a staunch attitudinalist might argue that theatre, or at best justification, is precisely what such citations from the justices amount to.
\textsuperscript{35} More on the importance of those preferences in a moment.
must operate with tools and within spaces that are defined for them by various sources of
authority.”

To add a bit of anecdotal information to this body of scholarly work, I also offer two
examples. In *Texas v. Johnson* (*Texas V. Johnson* 1989), the Court ruled that a Texas statute
making it illegal to desecrate an American flag ran afoul of the First Amendment. Justice
Antonin Scalia, perhaps to the surprise of many, was a part of the majority that joined Justice
Brennan’s opinion. Speaking about the decision in 2016, Scalia noted that “If it were up to me, I
would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American
flag…but I am not king” (Bump 2016). In *Brown v. Entertainment Merchant’s Association*
(2011), the Court found that video games were protected by the First Amendment and
subsequently struck down a California law that created fines for renting or selling violent video
games to those under eighteen years of age. Discussing her vote for the majority position in the
case, Justice Elena Kagan said that so far as her personal preferences went, “it should be that this
law was OK…but I could not figure how to make the First Amendment law work to make it
OK…it’s clearly a content-based distinction [and] that’s usually subject to the strictest scrutiny.
There was no very good evidence, not of the kind one would normally need, that the viewing or
playing of violent video games was harmful [to minors]. And so I just couldn’t make it work
under the First Amendment doctrine that we have and have had for a long time” (Orland 2015).
While I acknowledge that the plural of anecdote is not data, I think that both justices’ statements
illustrate the fact that, at least sometimes, a justice might see the law as a real impediment to
making the decision that he or she would most prefer despite having a seemingly strong opinion
about the outcome.

At the same time, it is worth taking a moment to acknowledge the weaknesses of the
legal model. First, plain meaning is not always so plain. Discussing Constitutional interpretation, Justice Souter (2013, p.262) has said:

> The Constitution has a good share of deliberately open-ended guarantees, like rights to due process of law, equal protection of the law, and freedom from unreasonable searches. These provisions cannot be applied like the requirement for 30-year-old senators; they call for more elaborate reasoning to show why very general language applies in some specific cases and not in others, and over time the various examples turn into rules that the Constitution does not mention.

As an example, one plain meaning interpretation of the Eighth Amendment might protect any form of punishment that was either cruel or unusual, so long as it did not fit both categories (whatever, in turn, those terms might mean). Even if the language might be thought of as relatively clear, “the Court might behave arrogatingly,\textsuperscript{36} reading into the document rights that are not explicitly there, and reading out of the Constitution rights that it explicitly contains” (Segal and Spaeth 2002 p.110). Turning to the intent of the drafters of law can be a similarly fraught process. Whether Constitutional or statutory (or, for that matter, administrative or precedential), law in the U. S. is a product of group decision making, and different members of a group can mean different things even if they can agree to support a given broad principle. To drive this point home, a textual analysis of the opinions of Justices Rehnquist and Brennan covering a ten year period revealed that both would cite the intentions of the framers to support very different outcomes in particular cases (Gates and Phelps 1996). While the Court may overturn precedent at a relatively low rate, there is evidence to suggest that the individual justices do not always see themselves as constrained by it in a meaningful way (Segal and Spaeth 2002 Ch.7). Furthermore, as many of the cases that come before the Court present difficult legal questions or are unusual in

\textsuperscript{36} This is the term used by the quoted authors.
some way (Perry 1991), how to apply precedent and perhaps whether or not there is precedent that is directly applicable is likely to be an open question.

The Attitudinal Model

The second major approach to understanding Court decision making is the attitudinal model. The attitudinal model is based on the idea that the justices have sincere policy preferences and that the decisions they make from the bench are attempts to align policy with those preferences more closely. In other words,

This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal (Segal and Spaeth 2002, p.86).

It is an individual level model, focusing on each justice as an independent actor working to bring about their preferred outcomes. In light of the policy-making power belonging to the Court, viewing it through the lens provided by this model might leave us with the impression that it is a body very much like Congress, albeit without electoral concerns. Cases could be viewed as roughly analogous to proposed bills, each justice arguing for and ultimately voting for the answer they feel is most appropriate. Without any direct recourse available to the other branches of government or the populace, a belief might begin to develop that the justices are free to decide cases entirely as they wish. This approach to understanding judicial behavior seems eminently reasonable. After all, the justices, along with the rest of humanity, are faced with constraints of time and information-processing capacity and, as such, have to fall back on certain heuristics to understand the various problems that they are faced with (Segal 1986). What tool could be more useful to navigating a seemingly endless array of value and outcome possibilities than one’s
personal sense of right and wrong? This may seem especially likely as each justice has a lifetime appointment, has reached the headiest heights of the American legal profession and cannot thus be enticed through the potential of promotion, and is not required (in any sort of directly enforceable way, at least) to make decisions on any particular basis. The fact that justices with the power to assign the writing of decisions tend to either keep the decision or give it to the justice most closely aligned with them on the issue in question supports this view (Rohde 1972). An examination of conference notes from the personal papers of Justices Brennan and Powell indicated that, at least during their time on the Court, policy outcomes were a much more frequent matter of discussion than a variety of legal factors (Epstein and Knight 1998). In fact, evidence to support this outlook has even been found by scholars seeking evidence to support other models of understanding the Court (Sala and Spriggs 2004).

Nonetheless, there are some serious problems with the attitudinal model. Its core idea, that judges’ rulings are based on their sincere preferences, is remarkably difficult to test given that there is no direct way of actually observing what a person’s sincere preferences are. Using one-dimensional ideological scales (a method still in use today), early attitudinalists used justices’ votes on cases to determine their ideological preferences to show evidence of the influence of attitudes (Segal and Spaeth 1993 Ch.6). Perhaps unsurprisingly, past votes turned out to be a pretty good predictor of future votes. As many others have pointed out, using observed behavior as an indicator of sincere attitudes which in turn drive behavior is a

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37 The concept of attitudes is, of course, broader and more complicated than simply one’s sense of right and wrong. It involves one’s preferences about specific policy outcomes, one’s conception of the proper or best way of pursuing those outcomes, and one’s political ideology.

38 This difficulty does not pose a problem for the theoretical underpinnings of the model itself, but it does make it difficult to collect meaningful evidence of the model’s veracity. The proverbial mountains of evidence that support the basic premise of the attitudinal model do much to overcome this difficulty. However, to gain an accurate understanding of the impact of attitudes, the available evidence needs to be viewed in the light of its inherent limitations and methodological peculiarities. The failure to do this runs the risk of scholars declaring the complete explanatory power of an undoubtedly important but still limited approach.
tautological approach to explaining the impact of attitudes on judicial action (Segal and Spaeth 1993 Ch.6; Epstein and Knight 1998 Ch.1). This method also excludes cases where the Court reaches a unanimous decision as differences between justices are needed to place them on the ideological spectrum. Unfortunately, this means that the nearly forty percent\(^ {39} \) of total Court cases that are decided unanimously are omitted from such analysis (Spaeth 2016). Other methods of determining justice’s sincere preferences have been constructed, such as using pre-confirmation journalistic descriptions of nominees to the Court as liberal or conservative (Segal and Spaeth 2002 Ch.8), but I would argue that the core issue of determining what a person really, truly wants absent all contextual considerations remains intact. However, it is worth noting that, as I mentioned earlier, there appears to be a consensus within modern accounts of judicial activity accepting the idea that the policy preferences of judges are an important factor in understanding their decisions to some degree. It is also important to remember that, as I will discuss in a moment, individual preferences are not the only factor that influences group decision making.\(^ {40} \)

*The Strategic Model*

Whatever specific effect the law and attitudes exert on Court decisions, no such decision is made in pure isolation. Regardless of the views of any given justice, the Court is still a majoritarian institution operating within a system of separated powers and checks and balances. The influence of these contextual factors is the primary focus of the third model of Court decision making: the strategic model. An application of rational choice to understanding the Court, the strategic model makes three key assumptions consistent with that approach: that actors

\(^{39}\) Looking at the 1946-2015 terms of the Court recorded in the Supreme Court Database, 3454 cases of 8737 recorded have a minVotes (number of votes for the minority position) value of zero. This is 39.53 percent of total cases recorded during this time frame.

\(^{40}\) Particularly when that group is itself operating within a system of separated powers and checks and balances.
have goals, that strategic interactions take place between actors, and that institutional structures influence these interactions (Epstein and Knight 1998). The strategic model addresses behavior at both the individual justice level and also at the institutional level. The individual level aspects include how the decision is made to hear a case to begin with and how the justices maneuver to bring the final opinion closer to their preferences. The institutional level aspects focus instead on how the Court, as a single governmental entity rather than as a collection of individuals, acts to maintain its power and independence. Both aspects of the model provide important insight into how the Court functions. It is worth noting that the vast majority of strategic models of Court behavior accept in part the attitudinalist argument that at least one of the sources of utility justices seek are policy outcomes based on their personal preferences, though this does not necessarily have to be the case (Epstein and Knight 2000).

On the matter of intra-Court strategy, there are two broad categories of activity: choosing whether or not to grant *certiorari*, and the rendering of decisions in the cases that have been granted cert (Epstein and Knight 1998 Ch.3). The basic considerations of Court strategy during the *cert* stage have already been discussed in this chapter. As for strategic action at the decision stage, no single justice can, in isolation, impose his or her preferences on the other eight. If initial discussion of a case does not reveal at least a five justice coalition that shares effectively the same view of that case, some form of compromise must occur between actors to settle the matter. If the decisions that faced the Court were as simple as deciding which party before them triumphed, such compromise might be largely unnecessary. However, the justices are called on not only to choose winners and losers\(^\text{41}\) in the present, but to enshrine their rationale in an opinion that, depending on how narrowly or broadly it is written, goes on to influence other cases. What parts of the law are most relevant? Which facts of the case are worthy of the

\(^{41}\) As well as declaring the occasional judicial do-over through remand orders.
greatest attention? How is this case different, or not, from similar cases? Reaching consensus around details such as these makes naturally occurring, negotiation-free majorities far more difficult to reach. The act of assigning the opinion to a particular justice to write can also be a matter of strategic choice (Rohde 1972, Slotnick 1979).

The most notable of the institutional considerations would be the standing and power of the Court as one of the three branches of the United States government. Where Congress has the power of both taxation and spending and the President sits as the Commander-in-Chief of the military and the chief administrator of the nation’s bureaucratic apparatus, the Court has no such tool available to it to facilitate the enforcement of the decisions it makes. As the Court relies on other actors to enforce its will and thus maintain its power, it must, as an institution, concern itself with how it is viewed by the other branches of government as well as adhering to the broader norms that exist between all three branches (Epstein and Knight 1998 Ch.5). In other words, “ justices rely on other institutions and actors to execute the Court’s decisions. These actors are likely only to execute decisions that satisfy notions of normatively appropriate behavior—decisions that trespass such boundaries are likely to be met with noncompliance” (Black and Owens 2009).

This may seem a particularly difficult task when it is remembered that one of the primary intended purposes of the Court is to serve as a check upon the power of both the President and Congress, both of which are in turn supposed to serve as checks upon the Court’s power, and both of which possess the previously discussed substantive tools for doing just this that the Court has no direct analogue for. What the Court does have, however, is a place in the minds of the American people as a legitimate actor and authoritative voice in questions of law (Caldeira and Gibson 1992). It can perhaps be inferred that this legitimacy means that open defiance of the
Court has the potential to result in electoral backlash or other substantive consequences, as various government actors do comply with rulings that they almost certainly would have preferred not to (Baum 2013 Ch.6). Maintaining this legitimacy, though, means that the Court faces pressure to maintain to some extent a public image of being above the political wrangling of the day, of being beyond questions of what each member wants, and to speak, instead, to what is right and proper in the eyes of the law (Caldeira and Gibson 1992). Sometimes (such as when the law and its traditional application view a particular question as the domain of Congress or the President), maintaining this image means that the Court might be more likely to defer to the decisions of the other branches despite the specific preferences of the justices. National Federation of Independent Business v. Sebelius (2012), where Chief Justice Roberts declared the Affordable Care Act to be the sort of policy decision that is rightfully the business of the elected branches rather than the Court to decide on, could be viewed as an example of such behavior.

There is evidence, albeit mixed, to support the strategic model at both the individual and institutional levels. At the individual level, the personal papers of various justices show clear evidence of bargaining behavior occurring when rendering decisions (Epstein and Knight 1998, Ch.1). The Court tends to reverse the decisions of lower courts more than it upholds them, (Epstein and Knight 1998, Ch.2), strategically managing limited docket space with likely majorities mostly allowing the cases with outcomes they view favorably to stand on the authority of the circuit courts. In the meantime, they tend to spend their cert grants to overturn those decisions they oppose.

There are signs that the Court might engage in strategic consideration of the preferences of the other branches as well. There is empirical evidence showing that the Court is deferential to Congress in the decisions it reaches under certain kinds of conditions (Hansford and Damore
2000), and particularly when Congress as a whole is hostile towards the Court (Clark 2009). There is evidence to suggest that the Court is influenced in deciding Constitutional questions, often thought to be the sole domain of the Court, by the preferences of Congress (Harvey and Friedman 2006). The office of the Solicitor General, which has close ties to the President and acts on behalf of the U. S. government in all cases where it is a party that come before the Court, wins its cases far more often than it loses (Baum 2013). Viewed through a particular lens, this might be viewed as a sign of strategic deference on the Court’s part, though there is also evidence that points towards alternative explanations. There is even evidence to suggest that Court decisions are influenced by public opinion (Mishler and Sheehan 1996; McGuire and Stimson 2004; Casillas, et al. 2011), though the exact reasons for this, as well as the degree of substantive impact it has, are unclear.

One criticism of the strategic model is that it overstates the ease with which Congress can interfere with the Court (Segal and Spaeth 2002, Ch.3), an idea that can probably also be applied to the President’s strategic role. Also, while the study of strategic considerations does not have to take place within the context of a formal model (Epstein and Knight 2000), it is worth noting that the utility of such models is entirely dependent on the quality with which they are specified by their authors. While statistical approaches are not immune to such potential problems, the danger of “discovering” something that has very little to do with the way things operate in the real world seems very real when one’s method of inquiry is a wholly mathematical abstraction unbound by observational data. However, Clark (2009) does offer compelling, empirical evidence that the Court becomes increasingly deferential to Congress as its public support and, thus, legitimacy, decreases.

42 More on this in a moment.
The Three Models Considered

All three of these models have their strengths and weaknesses as well as their respective adherents and detractors. For my part, I expect that each has some important things to teach us about the function of the courts generally and of the Supreme Court specifically. It seems reasonable to expect that there are some areas of the law that the justices feel especially strongly about and where the other branches have little capacity to act. As a result, attitudes might dominate in such areas. In another area, the elected branches might have great capacity to act and the public may have a sizeable and fairly consistent interest in actions taken in that area. In such an area, institutional strategic imperatives might lead to the Court largely deferring to the elected branches. In yet another area, predictability and stability in the law might be held as the greatest goal to be pursued, and as such legal factors might come to the fore while the policy preferences of Congress, the president, and even the Court might tend to fade into the background.

We do, in fact, have evidence of something very much like this set of differing influences occurring in practice. The law, in the form of precedent, does appear to exert influence on the outcomes of cases, though this effect is more pronounced in statutory and/or economic cases than in Constitutional or rights and liberties cases (Pacelle, et al. 2011). The impact of attitudinal influence is witnessed across a wide variety of case types, though such influence may have the greatest effect in high salience cases such as those involving civil rights and liberties and cases involving Constitutional questions (Unah and Hancock 2006; Pacelle, et al. 2011). The Court also appears to behave in a somewhat deferential manner to the elected branches, though the president appears to have greater influence in civil rights and liberties matters while Congress seems more influential in cases involving economic questions (Pacelle, et al. 2011).43 I will

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43 Though the president does appear to be more influential in Constitutional economic cases than Congress.
discuss these relationships in greater detail in Chapter Four. For now, I will simply say that each of the models does appear to have a bearing on the way the Court decides cases, but that each factor appears to have a differing level of influence depending on the specific area of the law being examined. It may be the case that the legal factors discussed earlier exert important influence in the area of administrative law. It may, instead, be that the preferences of the justices or of the elected branches hold primary sway. It may be that all matter in equal measure, or that there is simply no discernible pattern in this particular area of the law. Whatever the outcome, it is important to remember that the process by which the justices arrive at their conclusions, and by which the Court makes its decisions, has a tangible impact on what the law is in practice.

Having reviewed the literature, I expect that legal factors will predominately determine the outcome of administrative cases I will examine in subsequent chapters. It seems likely that many administrative cases will involve subject matter about which the justices may not have especially strong preferences. In the absence of strong attitudinal cues, it seems reasonable to expect legal factors to guide the justices. As I have argued previously, it also seems likely that stability in the standard of review will be of critical importance if agencies are to carry out their duties in the face of virtually inevitable challenges to their activities. However, I do not think that administrative law must be the exclusive domain of the legal model. A scenario where a case dealing with an administrative question that was particularly salient to elected actors was handled primarily through the evaluation of inter-branch strategic considerations is not difficult to imagine. Neither, for that matter, is an administrative case that the justices are particularly

44 There is also a discussion to be had about the curbing of Article III courts’ ability to review certain cases, but I leave that for another time. My focus is on what the Court does with those administrative cases it does hear.
invested in being decided on the basis of their respective policy preferences. There is room for each model to play a part, though I expect that the legal model will prove the most influential.\textsuperscript{45}

\textbf{The Solicitor General}

As I have discussed throughout this chapter, the Supreme Court does not operate in isolation. The justices exist within a vast, interconnected web of government actors who all, through intent, structural relationships, or occasionally even happenstance, influence the environment of, problems faced by, and potential solutions available to the others. The president, Congress, employees and leaders of federal agencies, the public, and the Court’s own clerks have all received some degree of attention. However, there is one other set of actors that must be mentioned in order to have a relatively complete picture of the dynamics of administrative law: the Office of the Solicitor General.

In the wake of the Civil War, the federal government was engaged in, for that point in time, an unprecedented level of litigation (Salokar 1992). Lacking the personnel to handle the volume of cases in-house, the government was forced to hire private attorneys to meet the new demand. As might be expected, this was quite expensive and not especially well coordinated. In response, and as part of the larger Judiciary Act of 1870, Congress created a new position to assist the Attorney General and represent the government in legal arguments. Thus, the Solicitor General, a position so influential that the officeholder is sometimes referred to as “the tenth justice,” had its beginnings as a cost saving measure.

The Solicitor General serves as a part of the Department of Justice and serves at the pleasure of the president (Salokar 1992). While formally nominated by the president and

\textsuperscript{45} Of course, the distinctions between these approaches are not entirely clear cut. As many others have pointed out, legal reasoning can serve as window dressing for the pursuit of preferred outcomes. The existence of stability in review might itself be seen as a strategic concern for the Court as an institution in a separation of powers system. Legal reasoning and argument could play a role in shaping one’s policy preferences.
confirmed by the Senate, the Solicitor General is typically chosen by the Attorney General for a combination of legal acumen and ideological compatibility with the administration. Working under the Solicitor General are the principal deputy, who is also a political appointee, three (or sometimes four) deputy solicitors general who are a part of the federal civil service, and seventeen to twenty staff attorneys (Pacelle 2003). The office is responsible for presenting briefs and oral arguments before the Supreme Court on behalf of the government, authorizing others to argue on behalf of the government before the Court, and preparing *amicus curiae* briefs to represent the government’s interests in a case when it is not a party at both the *cert* and merits stages.

In addition to the duties listed above, and of great importance to my broader topic, the Solicitor General decides which cases the government may appeal to the Supreme Court or *en banc* review. When the government faces an unfavorable decision from a three-person appellate court, the affected actor (either a federal agency or a prosecutor) has four options (Zorn 2002): (1) the case may simply be dropped and the decision allowed to stand, (2) an application to have the case reheard by the same three-judge panel that heard the initial appeal might be made, (3) an *en banc* review involving all or most of the judges for the circuit in question can be requested, or (4) a writ of *certiorari* might be sought. No clearance outside of the agency involved in the case is required to take the first two options, but the Solicitor General must agree for any further review to be pursued. However, before a potential case reaches the SG, the Department of Justice’s appellate section will review the details and make its own recommendation about whether or not to proceed. Examining cases that underwent this process in 1994 and 1995, Zorn found that the Department of Justice’s recommendation appeared to carry a great deal of weight.

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46 These may be filed voluntarily, but at times the Court will invite the office to file as *amicus*.

47 According to Zorn, this is quite rare.
with the Solicitor General, as the recommendation not to pursue further action was accepted by the SG in all but nine of 1338 cases. He went on to find that factors representing cost to the government, reviewability, and prospects for success also influenced the Solicitor General’s decision to pursue review of a case. Cost is conceived of broadly here as adverse impact on the government’s ability to bring about the policy preferences of various leaders, and the invalidation of a law or order was found to significantly increase the chances of a case being granted further review. Reviewability, or the likelihood that the case will be seen worthy of an additional hearing, finds support in both the presence of intercircuit conflict in decisions (as previously discussed, an important legal indicator) and the filing of amicus briefs (also already discussed as a marker of importance and relatively rare at the circuit level) increasing the likelihood of further review being sought. Winnability, which is what it sounds like, also appears to matter, as the unfavorable circuit decision overturning a trial decision in the government’s favor (indicating a fact pattern or reading of the law that at least could be conducive to a pro-government decision) also increases the chances of a case advancing.

Any meaningful discussion of the Solicitor General must include a discussion of just how successful the office is before the Court. At the certiorari stage, a case is significantly more likely to be reviewed by the Court if the Solicitor General is the petitioner (Caldeira and Wright 1988; Perry 1991). At the merits stage, the SG wins more than it loses as both petitioner and respondent (Salokar 1992; Bailey, et al. 2005). When participating as amicus at the merits stage, the SG’s support significantly increases the supported party’s chance of winning (Salokar 1992; Collins 2004). In some cases, final opinions may even borrow directly from the language used in briefs filed by the Solicitor General (Corley 2008). In short, “the United States federal government is the most frequent, the most important, and the most successful litigant in the

Black and Owens (2012) identify six overarching theoretical themes in the broader literature to explain this level of success. The repeat player theory holds that the SG’s victories are based in a combination of informational advantage gained through repeated litigation before the Court, a higher level of resources relative to opposing litigators that can be leveraged to perform more thorough research and thus formulate better arguments, and additional trust gained from the Court through long-run incentives to present information and arguments in an open and honest manner that firms arguing before the Court far less frequently lack. One line of thought focuses on the quality of the lawyers employed by the office, positing that, as a prestigious institution that hires in a very selective manner, the attorneys that serve the Solicitor General are more often than not of a higher caliber than their opponents. The ideological approach suggests that the success of the Solicitor General is dependent on how closely the office’s preferences for policy outcomes (or, perhaps, the specific policy outcomes argued for) match those of the Court. The separation of powers theory is based on the idea that the various capabilities of Congress and the president to check the Court (e.g., restriction of jurisdiction, impeachment, marshalling of public opinion) give the justices an incentive to consider the preferences of the political branches and render decisions that reflect these preferences when the question is salient to those branches. The selection strategy approach holds that the SG carefully chooses the cases it will bring to the Court and selects those that it believes are most likely to be decided in the government’s favor. Finally, there is the idea of professionalism. This is, in this instance, the premise that the Court accords the office consideration due to the valuable and well-executed screening function it performs in allowing government cases to apply for cert and because, while the office does and can represent the president’s interests, it also provides the court with high-quality legal research.
and arguments.

Each of these factors is likely to play a part in the frequent success enjoyed by the Solicitor General. Given the overwhelming evidence that the justices’ policy preferences influence their decisions, it seems wrong to assume that this plays no part in SG success. There is, in fact, evidence that indicates that the office is most effective in convincing individual justices when the preferences of the SG and justice align or the SG is taking a position understood to run counter to the administration’s preferences (Bailey, et al. 2005). The office has been described as attracting top-flight talent (Salokar 1992), and as strong legal arguments have been found to impact the Courts’ decisions (Black and Owens 2011), it seems difficult to dismiss the idea that employing quality litigators matters. Given the importance of attitudes and legal reasoning, along with the resources available to the SG and the wider Department of Justice, it follows that the office’s ability to continually place well trained, well researched, and very experienced attorneys before the Court is almost certainly beneficial. There is at least some evidence of the Court acting in ways that, all things considered, its members would probably prefer not to when issues with substantial impact on the federal government are at play (Staudt 2004). Given the Court’s limited docket, well-known factors influencing the granting or denial of cert, the once again noted influence of attitudes, and the potential for adverse decisions, it seems foolish to expect that the Solicitor General would not engage in strategic consideration of cases to bring to the Court. There is evidence that this sort of consideration occurs (Zorn 2002).

But what about professionalism? As it turns out, professionalism might be the most important factor of all. To begin with, there is evidence that the more overtly political the behavior of the Solicitor General becomes (effectively, the more that the office focuses on

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48 The paper cited here involves decisions regarding cert, though it seems unlikely that legal considerations would matter at one stage of Court activity and be wholly irrelevant at another.
pushing the president’s agenda rather than providing well-grounded legal arguments) the more the office’s influence diminishes (Wohlfarth 2009). Black and Owens (2012) have searched for evidence of influence wielded by Solicitor General. Influence in this case is distinct from mere success, as success might be achieved through strategic action, ideological alignment, or even pure dumb luck (albeit probably not with the consistency that SG has found it). Influence, instead, would be evidenced by the Court taking actions that it would not absent the participation and position of the Solicitor General. Through a series of tests on data at the agenda and merits stages, Black and Owens claim to find evidence of exactly this sort of power. Of the various approaches to understanding the SG’s success, they argue that only professionalism can explain the influence wielded by the office.

The Solicitor General is, first and foremost, a strategic actor. The office, and its chief occupant, are beholden to the president and expected, to some degree, to work in a manner that advances the values and preferences of the administration (Pacelle 2003). However, doing this requires maintaining influence (or at the very least a good working relationship) with the Supreme Court despite arguing positions that will not line up with those of the all of the justices all of the time. If the Solicitor General fails to serve the president well, he or she may very well be replaced. If the Solicitor General fails to serve the Court well, then he or she becomes unable to serve the president well. In order to serve both institutions, the Office of the Solicitor General must be a policy advocate, but an advocate who builds its arguments within the framework of a longstanding-legal tradition.

**Conclusion**

The Supreme Court specifically plays an important if limited role in providing oversight for federal agencies. The Court can be the final arbiter of whether or not agencies are faithfully
carrying out the duties they have been given by the elected branches. While space on the Court’s agenda is limited, it has the capacity to grapple with issues that elected officials might choose to overlook. There is evidence that agencies are responsive to the decisions of the courts generally and to the Supreme Court specifically.

Case selection will not play a major role in this study, though understanding it is an important part of a functional knowledge of the Court. Generally speaking, the Court is more likely to take cases to which the federal government is a party than other kinds of cases. There is evidence to suggest that the justices do consider their policy preferences when deciding which cases to take and are more likely to take those cases that they expect can be used to move policy in a direction more to their liking. However, other factors such as circuit decisions that are at odds with one another or cases involving questions that have substantive impact on how the federal government carries out its business are also likely to be taken by the Court.

The Court’s treatment of deference has evolved a great deal since the early days of the modern administrative state. Skidmore (1944) opened the discussion with the Court taking a fairly moderate position: there is no assumption that an agency’s interpretation is the proper interpretation, but neither is there an assumption that the agency is wrong. Administrative interpretations of the law could be found persuasive or not based on a wide variety of factors. Skidmore stood as the primary piece of precedent in the realm of deference until National Muffler Dealers Association (1977) was decided some three decades later, marking the Court’s move towards a stance of greater deference towards agency interpretations of the law.

National Muffler was not as long-lived as its predecessor, though, as Chevron USA Inc. v. Natural Resources Defense Council, Inc. (1984), the next milestone case in our evolutionary

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49 I had originally hoped to incorporate the case selection process into my study, but a lack of readily available data and time constraints led me to pursue other options. I think that the question of which agency cases the Court decides to hear and which it passes over is an important one, and I hope to revisit it in a future study.
record, was decided seven years later. *Chevron* stands as the high-water mark for the Court’s presumption of deference, placing much greater value on agency expertise than those decisions that came before or after it. *Chevron* did not represent a proverbial blank check for agencies to act as they pleased, as clear Congressional intent as embodied in statutory language was still given priority over conflicting agency interpretation. However, absent clear Congressional intent, agencies were given the benefit of the doubt so long as the justices did not see their interpretations as clearly falling outside of corresponding grants of authority.

At the turn of the century, the Court began to step back from *Chevron*’s high level of deference. The opinion in *Christensen v. Harris County* (2000) marks a departure from *Chevron* by stating that certain kinds of agency action might not be due *Chevron* deference while others might still be. In *Christensen*, both the fact that the relevant agency decision was reached through an interpretive letter rather than through some more formalized means and the fact that the interpretation in question departed from a longstanding interpretation were cited as important for the Court’s refusal to apply *Chevron* deference. Following hot on the heels of *Christensen*, *United States v. Mead Corp* (2001) refined and solidified this line of jurisprudential thought. *Mead* explicitly sets forth a double standard for evaluating agency interpretations of the law. If Congress has empowered the agency to act with the force of law, agency activities ensuing from this grant of power should be evaluated using the *Chevron* standard. However, agency action that is not intended by Congress to carry the force of law should be evaluated under the far less deferential *Skidmore* standard.

This jurisprudential evolution has some important implications for the question this work attempts to answer. If the Court is taken at its word as embodied in these five decisions, then it should be expected that the way the justices have evaluated agency actions has changed over
time. To simplify the incorporation of this concept into something operationalizable,\textsuperscript{50} it seems appropriate to look to the way that the \textit{Mead} decision focuses on \textit{Skidmore} and \textit{Chevron}. These cases, along with \textit{Mead} itself, should be carefully considered in any evaluation of the Court’s decisions in administrative cases. \textit{National Muffler} and \textit{Christensen} are probably best viewed as significant but limited transitional cases between these three touchstones.

Of course, discussing the importance of these cases presupposes that the law actually factors into the justice’s decisional process. Part of the literature on Supreme Court decision making acknowledges that legal matters do influence case outcomes, but there are other perspectives as well. The attitudinal model views the policy preferences of the justices as the primary driver of what the Court does. In the attitudinal view, legal language might be used to drape judicial policymaking in a veneer of respectability, but any appeal to legal reasoning is a \textit{post facto} exercise. The strategic model accepts the attitudinal model’s proposition that the justices have and are influenced by preferences for particular policy outcomes, but acknowledges a variety of constraints on individual justices’ ability to see these preferences put into place. These constraints take two main forms: (1) the majoritarian nature of the Court and (2) the Court’s place in a larger system of separated powers. On the first point, the strategic model focuses on the idea that majority opinions, existing ultimately as a product of small group voting, are unlikely to result in every or possibly any justice receiving a policy outcome that matches his or her preferences in their entirety. On the second point, the strategic model emphasizes the Court’s lack of substantive tools to enact its own decisions and the potential for the ensuing reliance on elected actors to carry out to influence the way that the Court makes decisions. The law can matter inside of the strategic model, but would function primarily as either a common

\textsuperscript{50} Jumping ahead a bit, the number of cases to examine is somewhat limited. Because of this, it seems important to limit the degree to which the available observations are subdivided.
point of reference for crafting intra-Court consensus or an expression of the policy preferences of other governmental actors to be considered\textsuperscript{51} depending on which variety of constraint the discussion emphasizes.

Each of these models has its detractors and supporters. The attitudinal model can probably be described as the one generally accepted by the academic community as providing the greatest degree of explanatory power, though this apparent power must be understood to carry some important caveats. Taken in isolation, the legal model can probably be described as the one generally accepted by the academic community as being the most limited, though there is evidence to support the impact of the law in some contexts. Empirical study of the strategic model has met with mixed results, though its core premises seem facially valid. While there has been much discussion of which of the models offers the most powerful set of explanatory tools, there is also work that considers the models together. This seems appropriate, as the factors of judicial decision making that each model focuses on seems likely to exert at least some influence on the outcomes of cases. My goal is to incorporate aspects of each of these three models into my attempt to address the question of how the Court evaluates agency actions.

Finally, the Office of the Solicitor General is an influential actor in both the case selection and decision stages of this process. While the Solicitor General does not have direct control over which cases the justices choose to take, a request to hear a case from the Office is likely to be met with a writ of certiorari. Furthermore, the SG is hugely influential in shaping the body of cases involving the federal government that are submitted to the Court for review. At the decision stage, the SG wins far more than it loses as both petitioner and respondent. While the government does not win every case it appeals to the Court, it does win the vast majority of

\textsuperscript{51} Excluding precedent, at least. So far as inter-branch strategic considerations go, precedent is likely to represent either a constraint on or an opportunity for the justices pursuing their preferred policy outcomes in the face of opposition from elected actors.
them. A large part of the credit for this impressive record can be placed squarely at the feet of the lawyers of the Office of the Solicitor General. In evaluating how the Court reaches its decisions about agency actions, the part played by the Solicitor General must be considered and included.

This chapter marks the last time that I will focus primarily on the work others have done. Chapter 3 will focus on describing the cases I will examine in Chapters 4 and 5 and the process I used to identify those cases. However, the literature discussed here informs the selection process and the subsequent analysis. The remainder of the study will stand on the foundation set down here.

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52 To briefly jump ahead one chapter, the government won almost 71 percent of the cases included in this study.
53 There are a small number of cases where a specific agency litigator represents the government’s interests before the Court. Even in these cases, the SG can act through *amicus* briefs.
Chapter 3

Selection and Description of Cases

My ultimate goal in this work is to address the question implied on the title page: how does the Supreme Court evaluate the actions of federal agencies? To do this, it is necessary to identify and isolate relevant cases for study. In this chapter, I will discuss the process I used to do just this. In the early stages of this project, I had hoped that I might find a pre-existing template that I could use to rule in and rule out cases as presenting primarily administrative questions. This would have had the advantage of allowing my research to be more easily and directly compared to existing studies. It also, quite frankly, would have resulted in far less work for me to do.

For good or ill, I found no such template and instead proceeded to construct my own set of criteria for inclusion in this study.\(^{54}\) This chapter begins with a discussion of what those criteria are, how I arrived at them, and how I applied them. While the criteria themselves and the related discussion have been through a number of revisions, the work presented here might still be best viewed as a first draft of a plan for attempting to isolate these cases from the larger body of the Court’s caseload. I have full confidence that my approach is fit for purpose, though I do not doubt that future studies will include refinements to it. Every conversation does need a beginning, though, and I think that I provide a decent one here to a conversation that I hope can continue in an increasingly large number of voices.

After discussing my selection criteria, I will go on to describe the chosen cases at some length. Given the novelty of my approach and the relatively scant attention paid to the specific set of cases I have identified, this seems a useful exercise. Chapters 4 and 5 involve statistical

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\(^{54}\) I did find a number of articles that examined cases that explicitly cited major administrative law cases such as *Chevron* or *Mead*. While this approach certainly has merit depending on the ends pursued, my goal is a more holistic examination of cases directly involving federal agencies.
examination of the outcomes of these cases, but such examination means little without a fuller understanding of the context in which they exist.

The cases that I am interested in are those that involve judicial evaluation of agency action. To this point in time, political scientists have given little specific attention to how the Court treats these questions. This is somewhat understandable, as the finer points of, for instance, applying specific portions of the tax code likely do little to stir the imagination of the public, the student, or the researcher, particularly when compared with their oft-studied cousins such as the freedom of speech or religion. That being said, tending toward the arcane and, to some, perhaps uninspiring end of the spectrum of American politics does not make this facet of administrative law any less substantively important.55

Criteria for Inclusion

I began the process of isolating these specific cases by limiting my search to those cases that involved the government as either petitioner or respondent to ensure that agency action was at the center of each case. I continued by determining the time period I wished to examine. It seemed important to include cases from the Skidmore, Chevron, and Mead eras, as I wanted to test whether or not these regime changes significantly impacted the way these cases were decided. Given the role of the Solicitor General in selecting the government cases that are made available to the Court for consideration, I wanted to include multiple presidents of both major parties as I suspect that both personal and partisan differences between administrations could have the potential to shape the Court’s agenda and its decision making in this area. Finally, I wanted to draw on a body of cases large enough to enable me to perform meaningful statistical

55 It should not be forgotten that, while cases with narrow societal impact involving highly technical questions are certainly a part of this area of the law, administrative cases can also have implications for essential rights and liberties.
analysis but constrained enough to be manageable in scope.

With these criteria in mind, I settled on the 1977-2007 terms of the Court. This includes the waning years of the *Skidmore* era (the 1977-1982 terms), the entirety of the *Chevron* era (the 1983-1999 terms) and the beginning of the *Mead* era (2000-2007 terms). It also covers the entirety of the Carter, Reagan, H. W. Bush, and Clinton administrations, along with all but the final stretch of W. Bush’s last year in office. Using the 2007 term as the cutoff for inclusion is the result of trying to limit the scope of the project, the supplemental data available to me ending in the 2007 term, and the data for the Obama administration terms being unavailable at the time that the project began. In terms of the Court itself, the studied span includes the last few years of the Burger Court, all years of the Rehnquist Court, and the opening years of the Roberts Court. Ideologically speaking, this period has a decidedly conservative bent.57

After deciding which terms to focus on, I next worked to establish which cases within those terms I would include in my analysis. I turned to the Supreme Court Database (Spaeth 2016) as a starting point. Examining the codebook for the database, the adminAction variable seemed to provide a likely place to start. This variable is used when administrative agency action precedes a case and includes which agency took that action. In cases where multiple agencies are involved, the value of adminAction is based on which agency’s action is more relevant to the case or, alternatively, the agency that took action more recently. Included in such actions are those taken by agency officials and official denials of requests for the agency to take specific actions. In the Database, the following are not coded as agency actions:

---

56 Very generously provided to me by Dr. Richard Pacelle.
57 19 out of a total 31 terms with a Republican president seem sufficient to characterize the presidential politics of the period as more conservative than liberal. As for the Court, the Common Space scores for the median justice are positive for 19 of the 30 terms for which I have data. This denotes a Court that has, at the least, conservative leanings. No cases meeting my selection criteria were heard by the Court in the 2005 term, so I omit it from this description. 10 of these conservative median justice terms coincide with a Republican president holding the White House at the beginning of the term.
- A "challenge" to an unapplied agency rule, regulation, etc. A request for an injunction or a declaratory judgment against agency action which, though anticipated, has not yet occurred.
- A mere request for an agency to take action when there is no evidence that the agency did so.
- Agency or official action to enforce criminal law. The hiring and firing of political appointees or the procedures whereby public officials are appointed to office.
- Attorney general preclearance actions pertaining to voting. Filing fees or nominating petitions required for access to the ballot.
- Actions of courts martial.
- Land condemnation suits and quiet title actions instituted in a court.
- Federally funded private nonprofit organizations. (Spaeth 2016, p.26-27)

Equipped with this information, I proceeded to eliminate all cases that were assigned no value for adminAction. However, this still left a number of cases where the federal government was not a party. I made this determination by going through the “petitioner” and “respondent” variables in the database and finding several cases where both parties to the case were private or state actors. I dropped these cases, giving me a pool of 526 potentials. Then I began to read.

Mirroring the process used by Spaeth et al. in coding the adminAction variable (albeit with different ends), I read through the syllabi and occasionally parts of the majority opinion for each of the remaining cases. As I read, I took notes about the legal questions presented by each case left in my list. After my initial survey, I reviewed my notes and constructed a list of the

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58 Examination of Dr. Pacelle’s solicitor-general focused data yielded six cases that met all of the criteria applied except for having a value assigned for adminAction, and were subsequently included in my final dataset. While this does raise the possibility of other relevant cases in the original database that might also be missing an adminAction value, I am convinced that the likelihood of this is low. My initial study of Pacelle’s data yielded fifty-four additional cases where the federal government was a party, and, as previously stated, only six of those met the additional criteria for inclusion.

59 It’s worth noting that the classifications I applied to these cases were based primarily on the way that the Court addressed them. If the majority held that the question was really one of whether or not an agency overstepped their authority in promulgating a regulation rather than whether or not they applied that regulation correctly, or vice versa, I took them at their word.
sorts of questions that I would keep and that I would drop. Those that would be kept were those that involved questions of whether or not an agency regulation was made within the confines of that agency’s statutory authority, whether or not an agency action violated that agency’s own rules and regulations, and whether or not enforcement or other policymaking actions taken by an agency under color of direct statutory authority were within the scope of that authority.

I think it is probably useful to take a moment to discuss those sorts of questions that did not make the list. One that arose quite often was whether or not a given statute was in conflict with either the Constitution or another statute or statutes. Cases involving the civil liability of the U. S. government or government officials were also excluded, as were those focused primarily on the jurisdiction of a given court to hear a case. I wrestled with whether or not to include cases involving agency responses to Freedom of Information Act requests, coming down on the side of excluding them as the act of releasing (or not) documents to public request seems fundamentally different than creating or enforcing the law. I wrestled even more with civil suits brought by agencies in order to enforce statutory provisions or regulations. On the one hand, this is an important class of enforcement behavior. On the other, an agency bringing a civil suit against an individual or entity seems like an inherently different kind of action than the unilateral rulemaking and enforcement activities in which I am primarily interested. As such, I leave those cases for another study.

There are a variety of other case types that would generally meet the stated criteria, but either still raise what I argue are fundamentally different sorts of questions or that incorporate confounding factors that would diminish or overshadow the administrative questions presented. The following case types were generally less common than those already named, but were also excluded for these reasons:
- The post-litigation award of attorney’s fees
- The authority of district courts to apply specific sanctions
- Who may represent or join a class in a class action suit
- Whether a particular kind of information is covered by attorney-client privilege
- The powers and immunity of the president
- The applicability of estoppel
- State application of federal statutes or regulations
- Cases rendered moot by circumstance
- Cases remanded because the issue was deemed not to be ripe
- Separation of powers
- Whether or not federal statutes or regulations pre-empt state law
- Questions of foreign policy and the application of treaties
- Cases where the final vote was an equally divided decision

Many cases very clearly fell into one of the included or excluded categories, but (perhaps unsurprisingly) others were more difficult to classify. For instance, in *General Motors Corporation v. United States* (1990), a civil suit for enforcement was filed by the EPA in addition to issuing a notice of violation, but the Court spoke to the question of whether or not the EPA’s failure to comply with statutorily mandated timeframes stripped the agency of all enforcement power in the matter. I decided to keep this case, as the question addressed by the Court fell strongly into the included category of agency enforcement action taken under statutory authority despite the presence of facts that would otherwise exclude it. A number of cases, both included and excluded, featured such conflicts of classification. I have made every attempt to be as consistent as possible in treating similar cases in similar ways when such conflicts arose. A full list of the cases included in my analysis can be found as an appendix to this work.

At this point, it seems worth taking some time to discuss how this body of cases looks. Figure 3.1 shows the total number of cases heard by the Court\(^60\) for each term included in this study as well as the number of cases from each term that met the above-discussed criteria. The number of cases the Court takes each term has decreased markedly from a high-water mark

\(^60\) As recorded in the Supreme Court Database.
of almost 180 in 1981 to fewer than 80 in 2007. The number of cases I have identified follows a similar albeit less dramatic decrease over time, reaching a maximum of just over 20 cases in both the 1982 and 1983 terms, with no cases at all in 2005 and only 2 in the 2007 term.

Figure 3.2 gives a clearer picture of the percentage of the Court’s docket these administrative cases occupied during the selected years. While the year-to-year change can best be described as erratic, there is a general downward trend as time progresses with a couple of notable exceptions. The administrative cases included here were roughly 13.5 percent of the total cases heard by the Court in the 1977 term, the first included, though this is followed by a sharp decline. There is a notable spike during the 1982 and 1983 terms where the Court heard 22 of these cases each term (the highest raw number of cases, though the overall number of cases heard nears the peak of 177 cases heard in the 1981 term). Erratic change with a downward trend continues to hold until the 2000 and 2001 terms, with these administrative cases just making up
just over 11 percent of cases heard in the 2000 term and just over 15 percent of the cases in the 2001 term.

While the raw number of cases here is relatively low compared to the late 1970s and early 1980s, the Court’s docket during these terms was roughly half the size it reached during the 1981 term. Interestingly, these spikes correspond with the *Chevron* decision (1983 term) and the *Mead* decision (2000 term) respectively. It seems likely that there is some connection between these cases and the increase in the proportion of administrative cases making their way to the docket. If such a connection exists, I suspect that it would take one of two forms. The first possibility is that the Court had decided to spend some additional time in those terms dealing with administrative matters and that this interest led the justices to take both more cases and

![included_cases_percentage](image-url)

**Figure 3.2 Included Cases as Percentage of Total Cases**

...
these two specific cases. The second possibility is that these were cases that grabbed the attention of the justices and consequently put them into a state of mind more open to addressing administrative cases. Given Perry’s (1991) assertion that the justices often see individual cases that deal with similar subject matter as largely interchangeable and the particulars of both cases, I would be more inclined to hold with the first possibility. This is, of course, only speculation on my part.

Case Outcomes

Table 3.1 identifies the number of cases in which the government either wins or loses as either petitioner or respondent. In the cases I have identified, the government is the petitioner almost 62 percent of the time and wins roughly 71 percent of the time. As a respondent, the government still wins more than it loses (almost twice as often, in fact), but tends to find success less frequently than it does as petitioner (where it does so nearly three times as often as it loses). This is especially striking when compared to the rate of success for petitioners and respondents in the total set of cases from the studied period. Overall, the respondent prevails in just over one-third of the cases that came before the Court during this time while the petitioner found success in just under two thirds. The government wins far more often in both roles than the average litigant.

Decision direction is an attempt to capture how liberal or conservative a given Court decision is. It is a central part of attitudinal models of judicial decision making and has been

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61 Pacelle (1991) argues that the Court may take related cases in this manner as a way of expanding the effective amount of agenda space. All else being equal, dealing with a handful of related cases requires less overall work than dealing with a handful of cases from entirely different areas of the law.

62 See Chapter 2 for a larger discussion of Chevron and Mead.

63 According to the Supreme Court Database, the respondent was victorious in 1403 of the 3744 cases heard in the 1977-2007 terms (37.4 percent).

64 Also according to the Supreme Court Database, the petitioner was victorious in 2341 of 3744 cases heard in the 1977-2007 terms (62.5 percent).
Table 3.1 Wins and Losses by Petitioner Type

<table>
<thead>
<tr>
<th>Gov. Position Prevalied</th>
<th>Yes</th>
<th>No</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>145 (65%)</td>
<td>79 (35%)</td>
<td>224</td>
</tr>
<tr>
<td>No</td>
<td>51 (54%)</td>
<td>43 (46%)</td>
<td>94</td>
</tr>
<tr>
<td>Total</td>
<td>196 (62%)</td>
<td>122 (38%)</td>
<td>318</td>
</tr>
</tbody>
</table>

found to have significant influence on how the justices decide cases, particularly in cases involving civil rights and liberties. The pro-federal government position is coded in the Supreme Court Database as liberal in most issue areas, and with the general trend of victory the government has before the Court, it might be expected that a majority of the cases would be decided in a liberal manner. However, this might be offset by two additional factors. The generally conservative tendencies of the Court during the investigated era might skew the results in a more conservative direction. Also, given the expectations that the Solicitor General serves in some capacity as an advocate for the president’s policy preferences, the government’s high win rate, and the prevalence of Republican presidents during these terms, it might reasonably be expected that such an effect would be further amplified than might otherwise be the case.

Table 3.2 presents some decidedly mixed results. There is a perfectly evenly split between conservative and liberal decisions and the decisions for these cases were, on the whole, slightly more liberal than the full set of cases for this period. Cases that the government won were slightly more likely to be coded as liberal decisions (58 percent of total) than conservative

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65 This is notably not true for criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys cases.
66 Though it is worth remembering that presidents of all parties can and do benefit from power vested in the federal government.
67 The Supreme Court Database records 3744 total cases in the 1977-2007 terms. Of these, 2041 were coded as conservative decisions, 1634 as liberal, and 69 as unspecifiable. This works out to a roughly 54 percent/44 percent conservative/liberal split.
(42 percent of total) whereas cases that the government lost were more than twice as likely to be decided in a conservative (90 percent of total) rather than liberal (30 percent of total) direction. The policy preferences of the various actors involved are likely pushing the results of these cases in a more conservative direction than might be expected otherwise, though perhaps not to the extent that a purely attitudinal outlook would predict.

For many, though not all, issue areas, a liberal decision is one that favors the government. It might not be especially surprising, then, that the government so often appears to be arguing for a liberal outcome. At the same time, a great deal of the literature that addresses the Court’s decision making is heavily influenced by the policy preferences of the justices. As there is every indication that the Court was predominately conservative during the period examined, the fact that the majority of the decisions were not, as a result of these preferences, conservative seems an important observation. I suspect that the reason for this lies largely in the influence of legal factors, precedent in particular, in this set of cases. I will test this suspicion directly in Chapters 4 and 5.

It is worth remembering that decision direction is coded using a fairly complicated set of criteria and that those criteria are dependent on the specific issue area that a case addresses. As I will discuss in greater depth momentarily, this group of cases represents something of a mixed bag of the traditionally defined issue areas, encompassing civil rights, taxation, and criminal procedure, among others. Additionally, as discussed in the previous chapter, the justices can and

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**Table 3.2 Decision Direction in Government Wins and Losses**

<table>
<thead>
<tr>
<th>Decision Direction</th>
<th>Gov. Position Prevailed</th>
<th>Conservative</th>
<th>Liberal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>94 (42%)</td>
<td>130 (58%)</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>65 (69%)</td>
<td>29 (31%)</td>
<td>94</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>159 (50%)</td>
<td>159 (50%)</td>
<td>318</td>
<td></td>
</tr>
</tbody>
</table>
do seem to approach different issue areas in different ways (Lauderdale and Clark 2012), with, for instance, a justice that consistently votes conservatively on questions of criminal procedure also voting in a consistently liberal fashion on First Amendment questions. As such, trying to infer some coherent set of ideological preferences for this set of cases from this information is likely to be unfruitful (and, as with any simple correlation when studying complex phenomena, unwise). What can be gathered from this, however, is that the simple assertion that a conservative Court leads to drastically more conservative set of decisions does not appear to hold true for this set of cases. Such findings are one of the reasons I think that these cases and questions of administrative law more broadly are so potentially interesting.

Table 3.3 presents the decision direction of the decisions for each case along with the president under which each decision was reached. I include it for two reasons. First, the various administrations provide a compact if uneven stand-in for time. Second, given the success of the Solicitor General and the expectation that the office will attempt to act in accord with the president’s preferences to some extent as allowed by good legal reasoning and argumentation, it might be expected that Republican and Democratic administrations result in significantly more conservative and liberal decisions respectively in this body of cases. The data will, once again, disabuse us of this entirely reasonable notion. While the Carter era does contain more liberal outcomes than conservative, with the opposite holding true for the H. W. Bush era, the differences in both instances are minor. Even more to the point, the Reagan, Clinton, and W.

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68 Though these particular findings might be ascribed to the potentially low salience of these cases. I will explore this possibility more in Chapter 5.
69 Based on the term of the Court. During transition terms, the president listed will be the outgoing president.
70 It does appear that the OSG reversing its position on a specific issue due to a change of administration is a relatively rare thing (Pacelle 2003, Ch.8). Such changes do occur, though, typically in high salience cases.
Table 3.3 Decision Direction by President

<table>
<thead>
<tr>
<th>President</th>
<th>Conservative</th>
<th>Liberal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carter</td>
<td>33 (49%)</td>
<td>35 (51%)</td>
<td>68</td>
</tr>
<tr>
<td>Reagan</td>
<td>61 (50%)</td>
<td>62 (50%)</td>
<td>123</td>
</tr>
<tr>
<td>H. W. Bush</td>
<td>22 (51%)</td>
<td>21 (49%)</td>
<td>43</td>
</tr>
<tr>
<td>Clinton</td>
<td>27 (55%)</td>
<td>22 (45%)</td>
<td>49</td>
</tr>
<tr>
<td>W. Bush</td>
<td>16 (46%)</td>
<td>19 (54%)</td>
<td>35</td>
</tr>
<tr>
<td>Total</td>
<td>159 (50%)</td>
<td>159 (50%)</td>
<td>318</td>
</tr>
</tbody>
</table>

Bush eras run counter to partisan-ideological expectations, though the total difference is also small for each of these.

Table 3.4 presents the cases that should be most likely to exhibit the influence of presidential preferences: those where the government was the petitioner and also won the case.

As described in the previous chapter, the Solicitor General serves as a gatekeeper for which cases the government will bring. While the SG is constrained in some significant ways in deciding which cases to seek cert for, such as the facts of the case, actions taken or rules promulgated by agencies, and the general litigation strategy followed by the Department of Justice to that point, there is still room for the office to exert its influence. While most of the particulars for any given case are pretty well defined by the time the SG makes a decision about filing a cert petition, there are many cases to choose from (Zorn 2002). From this body of cases, it is expected that the SG would seek cert for a limited number of those cases that meet some key criteria. First, that the case would serve as a vehicle to either advance or at least defend some aspect of the president’s agenda, although such advancement is likely to be more limited than it might be in, for instance, a civil rights case with broad implications. Second, that the case would possess a fact pattern

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71 The SG will likely also petition for some cases that the president has little direct interest in to be taken by the Court for such purposes as resolving conflicting decisions from different Circuit courts or simply to settle a matter of law.
Table 3.4 Decision Direction by President for Cases When Government was Petitioner and Won

<table>
<thead>
<tr>
<th>President</th>
<th>Conservative</th>
<th>Liberal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carter</td>
<td>12 (40%)</td>
<td>18 (60%)</td>
<td>30</td>
</tr>
<tr>
<td>Reagan</td>
<td>31 (49%)</td>
<td>32 (51%)</td>
<td>63</td>
</tr>
<tr>
<td>H. W. Bush</td>
<td>12 (55%)</td>
<td>10 (45%)</td>
<td>22</td>
</tr>
<tr>
<td>Clinton</td>
<td>7 (44%)</td>
<td>9 (56%)</td>
<td>16</td>
</tr>
<tr>
<td>W. Bush</td>
<td>8 (57%)</td>
<td>6 (43%)</td>
<td>14</td>
</tr>
<tr>
<td>Total</td>
<td>70 (48%)</td>
<td>75 (52%)</td>
<td>145</td>
</tr>
</tbody>
</table>

and a set of arguments made at the lower levels of the judiciary that seem likely to prevail before the Supreme Court. While these factors likely do not apply in all cases, the literature on the SG suggests that both should often hold true.

With these cases, the expected relationship between partisanship and decision direction is generally observed. The strongest relationship occurs during the Carter era, with 60 percent of the decisions reached having a liberal direction. The W. Bush, Clinton, and H. W. Bush eras also follow the expected trend, with 57 percent, 56 percent, and 52 percent of the respective decisions having the expected direction. While this is notable, it is also not the very lopsided sort of pattern that might have been expected. Additionally, the Reagan era actually sees one more liberal decision than it does conservative.

Again, care should be taken about drawing conclusions from a few simple comparisons, particularly with such a small number of cases. Nonetheless, this information does lead me to think that attitudinal factors may not play as strong a role in determining the outcomes of these cases as they seem to in other issue areas. Of course, it is also possible that they simply work in a different manner than the academic community is accustomed to seeing or that the coding

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72 It should be remembered that the OSG must also serve the Court if it wishes to maintain its standing and influence. As such, arguing from a solid legal position and imposing order on the law is likely to be as or even more important than achieving a particular, ideologically-driven end.
criteria for decision direction or the mix of issue areas represented here confuse or otherwise mask those effects. However, it has also been argued that “The Court and the OSG are partners in a process of imposing consistency on the law so that agencies and their clientele will know the appropriate boundaries” (Pacelle 2015, p.119). If such stability is the goal of both the Court and the Solicitor General, then I would expect to see precedent matter at least as much, and likely a good bit more than, the policy preferences of the moment. A measure of partisan influence tempered by a robust respect for what has come before seems a reasonable explanation for the results seen in Table 3.4. Whatever the reason for the emergence of this pattern, I intend to test this particular suspicion more rigorously in the following two chapters.

Table 3.5 lists the various agencies involved in the identified cases and how often they appear as both petitioner and respondent. Each agency involved in at least four cases receives its own line on the table, but those involved in fewer cases are lumped together and listed at the bottom of the table in order to save space. A few things from this table stand out. First, the Internal Revenue Service is far and away the most frequent litigant, appearing almost as many times as a petitioner as the next most frequent litigant has appeared before the Court at all and making up almost 23 percent of the full number of cases identified. The next most frequent litigant, the National Labor Relations Board, accounts for around 13 percent of the total cases, and the numbers begin to drop quickly after that. Only twenty-one of the fifty-eight agencies included in the data participated in a case before the Court four or more times, and twenty-two agencies participated in only a single case. Among those litigants that participated in four or more cases, the majority appeared more frequently as the petitioner than the respondent. This is

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73 I use the adminAction value assigned to each case in the Supreme Court Database (along with the six I entered) to arrive at the totals in Table 3.5. This makes for a bit of a simplification of reality in some instances, but provides what I contend is a generally accurate picture of which agencies are involved. However, one limitation is that this method does not include the other agency involved in the four cases with different government agencies serving as both petitioner and respondent.
## Table 3.5 Agency Appearances before the Court

<table>
<thead>
<tr>
<th>Agency</th>
<th>As Petitioner</th>
<th>As Respondent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Internal Revenue Service</strong></td>
<td>40 (56%)</td>
<td>32 (44%)</td>
<td>72</td>
</tr>
<tr>
<td><strong>National Labor Relations Board</strong></td>
<td>19 (45%)</td>
<td>23 (55%)</td>
<td>42</td>
</tr>
<tr>
<td><strong>Department of the Interior</strong></td>
<td>14 (78%)</td>
<td>4 (22%)</td>
<td>18</td>
</tr>
<tr>
<td><strong>Board of Immigration Appeals</strong></td>
<td>10 (67%)</td>
<td>5 (33%)</td>
<td>15</td>
</tr>
<tr>
<td><strong>Department of Health and Human Services</strong></td>
<td>9 (60%)</td>
<td>6 (40%)</td>
<td>15</td>
</tr>
<tr>
<td><strong>Federal Communications Commission</strong></td>
<td>6 (55%)</td>
<td>5 (45%)</td>
<td>11</td>
</tr>
<tr>
<td><strong>Environmental Protection Agency</strong></td>
<td>5 (50%)</td>
<td>5 (50%)</td>
<td>10</td>
</tr>
<tr>
<td><strong>Department of Labor</strong></td>
<td>5 (71%)</td>
<td>2 (29%)</td>
<td>7</td>
</tr>
<tr>
<td><strong>Immigration and Naturalization Service</strong></td>
<td>6 (86%)</td>
<td>1 (14%)</td>
<td>7</td>
</tr>
<tr>
<td><strong>Department of Justice</strong></td>
<td>3 (50%)</td>
<td>3 (50%)</td>
<td>6</td>
</tr>
<tr>
<td><strong>Federal Reserve Board of Governors</strong></td>
<td>3 (50%)</td>
<td>3 (50%)</td>
<td>6</td>
</tr>
<tr>
<td><strong>Interstate Commerce Commission</strong></td>
<td>4 (67%)</td>
<td>2 (33%)</td>
<td>6</td>
</tr>
<tr>
<td><strong>Benefits Review Board</strong></td>
<td>1 (20%)</td>
<td>4 (80%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Customs Service</strong></td>
<td>3 (60%)</td>
<td>2 (40%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Department of Education</strong></td>
<td>3 (60%)</td>
<td>2 (40%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Federal Trade Commission</strong></td>
<td>3 (60%)</td>
<td>2 (40%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Securities and Exchange Commission</strong></td>
<td>3 (60%)</td>
<td>2 (40%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Social Security Administration</strong></td>
<td>5 (100%)</td>
<td>0 (0%)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Department of Health, Education, and Welfare</strong></td>
<td>2 (50%)</td>
<td>2 (50%)</td>
<td>4</td>
</tr>
<tr>
<td><strong>Federal Energy Regulatory Commission</strong></td>
<td>2 (50%)</td>
<td>2 (50%)</td>
<td>4</td>
</tr>
<tr>
<td><strong>Federal Labor Relations Authority</strong></td>
<td>3 (75%)</td>
<td>1 (25%)</td>
<td>4</td>
</tr>
</tbody>
</table>

3 included cases: Department of the Treasury, Equal Opportunity Employment Commission, Food and Drug Administration, Merit Systems Protection Board, Patent Office, Secretary of the Army, and U. S. Sentencing Commission

2 included cases: Commodity Futures Trading Commission, Department of Commerce, Department of Energy, Department of Housing and Urban Development, Federal Bureau of Prisons, Federal Election Commission, Federal Home Loan Bank Board, Occupational Safety and Health Administration

1 included case: BATFE, Civil Aeronautics Board, Comptroller General, Comptroller of Currency, Department of Agriculture, Department of State, Department of Transportation, FBI, Farmers Home Administration, FDIC, Federal Maritime Commission, Federal Railroad Administration, OMB, NASA, National Security Agency, Occupational Safety Review Commission, Pension Benefits Guaranty Corporation, Postal Rate Commission, Provider Reimbursement Review Board, Secretary of the Navy, State Agency, U. S. Forest Service, Veterans Administration, and 1 unidentified agency.

74 This is *Andrus v. Idaho* (1980), which involved a dispute over lands that Idaho requested removed from the public domain in order for the state to develop it under provisions of the Carey Act of 1984. The Department of the Interior’s refusal to do so gave rise to this case.

75 This is *Leo Sheep Company v. United States* (1979), a case involving the government clearing a road through land held by the Leo Sheep Company to allow public access. I am fairly confident that this action was taken by the Department of the Interior or some agent thereof, but have been unable to verify this.
not particularly surprising, given that the Court takes far more of these cases with the
government serving as the petitioner than the respondent. However, the National Labor Relations
Board and the Benefits Review Board (part of the Department of Labor that deals with aspects of
the Longshore and Harbor Worker’s Compensation Act and the Federal Coal Mine Health and
Safety Act of 1969) both appear more frequently as respondents. The Environmental Protection
Agency, Department of Justice, Federal Reserve Board of Governors, Department of Health,
Education, and Welfare (since restructured into the Department of Education and Department of
Health and Human Services), and the Federal Regulatory Energy Commission have all appeared
an equal number of times in each role.

Table 3.6 includes information detailing the number of wins and losses experienced by
each agency participating in at least five cases as both petitioner and respondent. Once again
unsurprisingly, most of the included agencies tend to fair better as a petitioner, though the
National Labor Relations Board, Department of Health and Human Services, and Customs
Service have all found more success as the respondent. The Department of Justice and Federal
Reserve Board of Governors have fared equally well in each role. Table 3.7 lists the issue areas
of the cases included in my analysis, along with the number of cases in each that the government
both won and lost. Given the frequency of both the Internal Revenue Service and National Labor
Relations Board as litigants, it should not be surprising to see that Federal Taxation and Unions
account for over one-third of the included cases. Given the often economic-focused nature of
regulation and regulatory activity, it also should probably not be surprising to see that Economic
Activity shows up quite often as well. Perhaps less expected is the number of Civil Rights cases
included.
<table>
<thead>
<tr>
<th>Agency</th>
<th>Wins as Petitioner</th>
<th>Losses as Petitioner</th>
<th>Wins as Respondent</th>
<th>Losses as Respondent</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal Revenue Service</td>
<td>28 (39%)</td>
<td>12 (17%)</td>
<td>22 (31%)</td>
<td>10 (14%)</td>
<td>72</td>
</tr>
<tr>
<td>National Labor Relations Board</td>
<td>10 (24%)</td>
<td>9 (21%)</td>
<td>14 (33%)</td>
<td>9 (21%)</td>
<td>42</td>
</tr>
<tr>
<td>Department of the Interior</td>
<td>11 (61%)</td>
<td>3 (17%)</td>
<td>2 (11%)</td>
<td>2 (11%)</td>
<td>18</td>
</tr>
<tr>
<td>Board of Immigration Appeals</td>
<td>9 (60%)</td>
<td>1 (7%)</td>
<td>2 (13%)</td>
<td>3 (20%)</td>
<td>15</td>
</tr>
<tr>
<td>Department of Health and Human Services</td>
<td>6 (40%)</td>
<td>3 (20%)</td>
<td>5 (33%)</td>
<td>1 (7%)</td>
<td>15</td>
</tr>
<tr>
<td>Federal Communications Commission</td>
<td>5 (45%)</td>
<td>1 (9%)</td>
<td>4 (36%)</td>
<td>1 (9%)</td>
<td>11</td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>5 (50%)</td>
<td>0 (0%)</td>
<td>3 (30%)</td>
<td>2 (20%)</td>
<td>10</td>
</tr>
<tr>
<td>Immigration and Naturalization Service</td>
<td>3 (43%)</td>
<td>3 (43%)</td>
<td>0 (0%)</td>
<td>1 (14%)</td>
<td>7</td>
</tr>
<tr>
<td>Department of Labor</td>
<td>3 (43%)</td>
<td>2 (29%)</td>
<td>1 (14%)</td>
<td>1 (14%)</td>
<td>7</td>
</tr>
<tr>
<td>Department of Justice</td>
<td>2 (33%)</td>
<td>1 (17%)</td>
<td>2 (33%)</td>
<td>1 (17%)</td>
<td>6</td>
</tr>
<tr>
<td>Federal Reserve Board of Governors</td>
<td>2 (33%)</td>
<td>1 (17%)</td>
<td>2 (33%)</td>
<td>1 (17%)</td>
<td>6</td>
</tr>
<tr>
<td>Interstate Commerce Commission</td>
<td>4 (67%)</td>
<td>0 (0%)</td>
<td>1 (17%)</td>
<td>1 (17%)</td>
<td>6</td>
</tr>
<tr>
<td>Benefits Review Board</td>
<td>0 (0%)</td>
<td>1 (20%)</td>
<td>1 (20%)</td>
<td>3 (60%)</td>
<td>5</td>
</tr>
<tr>
<td>Customs Service</td>
<td>2 (40%)</td>
<td>1 (20%)</td>
<td>2 (40%)</td>
<td>0 (0%)</td>
<td>5</td>
</tr>
<tr>
<td>Department of Education</td>
<td>3 (60%)</td>
<td>0 (0%)</td>
<td>2 (40%)</td>
<td>0 (0%)</td>
<td>5</td>
</tr>
<tr>
<td>Federal Trade Commission</td>
<td>3 (60%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (40%)</td>
<td>5</td>
</tr>
<tr>
<td>Securities and Exchange Commission</td>
<td>2 (40%)</td>
<td>1 (20%)</td>
<td>1 (20%)</td>
<td>1 (20%)</td>
<td>5</td>
</tr>
<tr>
<td>Social Security Administration</td>
<td>4 (80%)</td>
<td>1 (20%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>5</td>
</tr>
<tr>
<td>Totals</td>
<td>102</td>
<td>40</td>
<td>64</td>
<td>39</td>
<td>245</td>
</tr>
</tbody>
</table>
Table 3.7 Government Wins and Losses by Issue Area

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>Government Won</th>
<th>Government Lost</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure</td>
<td>15 (94%)</td>
<td>1 (6%)</td>
<td>16</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>36 (72%)</td>
<td>14 (28%)</td>
<td>50</td>
</tr>
<tr>
<td>First Amendment</td>
<td>10 (100%)</td>
<td>0 (0%)</td>
<td>10</td>
</tr>
<tr>
<td>Due Process</td>
<td>8 (80%)</td>
<td>2 (20%)</td>
<td>10</td>
</tr>
<tr>
<td>Privacy</td>
<td>2 (100%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Attorneys</td>
<td>2 (100%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Unions</td>
<td>28 (58%)</td>
<td>20 (42%)</td>
<td>48</td>
</tr>
<tr>
<td>Economic Activity</td>
<td>48 (69%)</td>
<td>22 (31%)</td>
<td>70</td>
</tr>
<tr>
<td>Judicial Power</td>
<td>19 (68%)</td>
<td>9 (32%)</td>
<td>28</td>
</tr>
<tr>
<td>Federalism</td>
<td>7 (64%)</td>
<td>4 (36%)</td>
<td>11</td>
</tr>
<tr>
<td>Federal Taxation</td>
<td>49 (69%)</td>
<td>22 (31%)</td>
<td>71</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>225 (71%)</td>
<td>93 (29%)</td>
<td>318</td>
</tr>
</tbody>
</table>

The government won more cases than it lost in each individual issue area but did particularly well in Criminal Procedure, First Amendment, Due Process, Privacy, and Attorneys cases (though there were a mere two cases in each of the last two categories). It fares the most poorly in Unions, Federalism, and Economic Activity cases, but never reaches a win rate lower than around 63 percent (for Unions cases) in any issue area. Given the way that ideological factors are coded, the lopsided number of government wins in the areas of criminal procedure, First Amendment, and due process are a likely source of the conservative-titled outcomes noted above.

Table 3.8 collects the direction of the various decisions made in each issue area. As expected, Criminal Procedure and First Amendment cases appear to be decided in a generally conservative manner,\(^76\) while Due Process and Judicial Power tend to go in that direction, but not by such large margins. These outcomes should not be particularly surprising given the overall conservative tendencies of the Court during the period examined. Privacy and Attorneys cases

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\(^76\) I expect the administrative issues at play in cases that address questions of Criminal Procedure or application of the First Amendment to have a somewhat attenuated impact on the outcome of the case when compared with other, likely less salient, issue areas such as Federal Taxation.
Table 3.8 Decision Direction by Issue Area

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>Conservative</th>
<th>Liberal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure</td>
<td>14 (88%)</td>
<td>2 (13%)</td>
<td>16</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>25 (50%)</td>
<td>25 (50%)</td>
<td>50</td>
</tr>
<tr>
<td>First Amendment</td>
<td>9 (90%)</td>
<td>1 (10%)</td>
<td>10</td>
</tr>
<tr>
<td>Due Process</td>
<td>6 (60%)</td>
<td>4 (40%)</td>
<td>10</td>
</tr>
<tr>
<td>Privacy</td>
<td>2 (100%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Attorneys</td>
<td>2 (100%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Unions</td>
<td>22 (46%)</td>
<td>26 (54%)</td>
<td>48</td>
</tr>
<tr>
<td>Economic Activity</td>
<td>34 (49%)</td>
<td>36 (51%)</td>
<td>70</td>
</tr>
<tr>
<td>Judicial Power</td>
<td>18 (64%)</td>
<td>10 (36%)</td>
<td>28</td>
</tr>
<tr>
<td>Federalism</td>
<td>5 (45%)</td>
<td>6 (54%)</td>
<td>11</td>
</tr>
<tr>
<td>Federal Taxation</td>
<td>22 (31%)</td>
<td>49 (69%)</td>
<td>71</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>159 (50%)</strong></td>
<td><strong>159 (50%)</strong></td>
<td><strong>318</strong></td>
</tr>
</tbody>
</table>

see no liberal decisions at all, but there are a very small number of cases in both categories. No issue area is as overwhelmingly liberal as the Criminal Procedure and First Amendment areas are conservative, but Federal Taxation is the area most consistently decided in a liberal fashion. Unions, Economic Activity, and Federalism all lean more liberal, while Civil Rights is evenly split between liberal and conservative decisions.77

Each decision of the Supreme Court comes down, ultimately, to a vote among the justices. The majority’s position, typically requiring a minimum of five justices to join, will go on to become precedent. Those in the minority may call to future justices with the arguments written in their dissent or dissents. While a significant number of the Court’s cases are decided unanimously, the majority of them are not. Depending on one’s theoretical inclinations, the

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77 The outcomes of the Civil Rights cases need to be placed into the proper context. Looking at all cases in the Supreme Court Database that are coded as Civil Rights cases (1372 in total), more were decided in a liberal direction (771) than a conservative one (601). Examining the data in a term-by-term fashion, the Court begins deciding these cases in an overwhelmingly liberal direction in the early 1950s. This trend continues until the mid-1970s when conservative decisions begin to become more common than liberal ones. This trend matches closely, albeit not perfectly, with the election of Richard Nixon as president and the conservative swing of the Court that followed in the wake of his and later Republican presidents’ appointments. The even split observed here represents a departure from the far more liberal approach to Civil Rights cases the Court employed in the preceding decades.
degree of dissension in a case might be a signal that the law is particularly unclear on the point in question, a sign of the impact of attitudinal factors in the issue area, or some combination of these. Unanimous decisions might be understood to represent either low salience cases or cases decided primarily on the basis of fairly clear legal principles. Cases decided by the narrowest margin might be seen as the most legally difficult or attitudinally charged. Table 3.9 shows the level of disagreement on the Court in each of the issue areas represented in the cases that the government won through tracking the number of votes for the minority position in each case.78

Examining these data, a few patterns begin to emerge. First, and most strikingly, almost half of the government victories were unanimous decisions. The less contentious one- and two-vote minorities are the least common outcomes, with the more divisive three- and four-vote minorities falling somewhere in the middle. Each issue area includes at least one unanimous decision, while unanimity occurs most frequently in Economic Activity and Federal Taxation cases.79 As a proportion of the total number of cases in each issue area, Due Process and Federalism cases appear to be relatively non-contentious. On the other side of the coin, Criminal Procedure, Civil Rights, and First Amendment cases show more common and apparently deeper divides among the justices. While close decisions certainly occur with some regularity when the government position prevails in these administrative cases, this information points to a generally high level of agreement between the justices when finding for agencies.

Table 3.10 details the number of minority votes in those identified administrative

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78 The data in Tables 3.9 and 3.10 were gathered using the Supreme Court Database’s minVotes variable. It should be remembered that there are a number of instances where fewer than nine justices participated at the decision stage of the case. 276 total decisions of the full 318 involved all nine justices, 36 involved eight, 5 involved seven, and 1 case involved only six justices at the decision stage of the case. This was Board of Governors of the Federal Reserve System v. Investment Company Institute.

79 Perhaps unsurprising, given that these are themselves the areas with the greatest number of cases in this category.
### Table 3.9 Dissension in Cases the Government Won

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>0 (0%)</th>
<th>1 (7%)</th>
<th>2 (13%)</th>
<th>3 (27%)</th>
<th>4 (33%)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure</td>
<td>3 (20%)</td>
<td>1 (7%)</td>
<td>2 (13%)</td>
<td>4 (27%)</td>
<td>5 (33%)</td>
<td>15</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>14 (39%)</td>
<td>2 (6%)</td>
<td>4 (11%)</td>
<td>11 (31%)</td>
<td>5 (14%)</td>
<td>36</td>
</tr>
<tr>
<td>First Amendment</td>
<td>3 (30%)</td>
<td>0 (0%)</td>
<td>2 (20%)</td>
<td>3 (30%)</td>
<td>2 (20%)</td>
<td>10</td>
</tr>
<tr>
<td>Due Process</td>
<td>3 (38%)</td>
<td>3 (38%)</td>
<td>0 (0%)</td>
<td>1 (13%)</td>
<td>1 (13%)</td>
<td>8</td>
</tr>
<tr>
<td>Privacy</td>
<td>1 (50%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (50%)</td>
<td>2</td>
</tr>
<tr>
<td>Attorneys</td>
<td>1 (50%)</td>
<td>0 (0%)</td>
<td>1 (50%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Unions</td>
<td>13 (46%)</td>
<td>2 (7%)</td>
<td>2 (7%)</td>
<td>5 (18%)</td>
<td>6 (21%)</td>
<td>28</td>
</tr>
<tr>
<td>Economic Activity</td>
<td>30 (63%)</td>
<td>1 (2%)</td>
<td>5 (10%)</td>
<td>6 (13%)</td>
<td>6 (13%)</td>
<td>48</td>
</tr>
<tr>
<td>Judicial Power</td>
<td>10 (52%)</td>
<td>1 (5%)</td>
<td>1 (5%)</td>
<td>4 (21%)</td>
<td>3 (16%)</td>
<td>19</td>
</tr>
<tr>
<td>Federalism</td>
<td>5 (71%)</td>
<td>1 (14%)</td>
<td>1 (14%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>7</td>
</tr>
<tr>
<td>Federal Taxation</td>
<td>26 (53%)</td>
<td>8 (16%)</td>
<td>6 (12%)</td>
<td>8 (16%)</td>
<td>1 (2%)</td>
<td>49</td>
</tr>
<tr>
<td>Total</td>
<td>109 (48%)</td>
<td>19 (8%)</td>
<td>24 (11%)</td>
<td>42 (19%)</td>
<td>30 (13%)</td>
<td>224</td>
</tr>
</tbody>
</table>

### Table 3.10 Dissension in Cases the Government Lost

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>0 (0%)</th>
<th>1 (7%)</th>
<th>2 (13%)</th>
<th>3 (27%)</th>
<th>4 (33%)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (100%)</td>
<td>0 (0%)</td>
<td>1</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>2 (14%)</td>
<td>1 (0%)</td>
<td>2 (0%)</td>
<td>3 (50%)</td>
<td>6 (0%)</td>
<td>14</td>
</tr>
<tr>
<td>First Amendment</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0</td>
</tr>
<tr>
<td>Due Process</td>
<td>1 (50%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (50%)</td>
<td>0 (0%)</td>
<td>2</td>
</tr>
<tr>
<td>Privacy</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0</td>
</tr>
<tr>
<td>Attorneys</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0</td>
</tr>
<tr>
<td>Unions</td>
<td>4 (20%)</td>
<td>0 (0%)</td>
<td>1 (5%)</td>
<td>4 (20%)</td>
<td>11 (55%)</td>
<td>20</td>
</tr>
<tr>
<td>Economic Activity</td>
<td>3 (14%)</td>
<td>3 (14%)</td>
<td>2 (9%)</td>
<td>8 (36%)</td>
<td>6 (27%)</td>
<td>22</td>
</tr>
<tr>
<td>Judicial Power</td>
<td>5 (56%)</td>
<td>1 (11%)</td>
<td>2 (22%)</td>
<td>0 (0%)</td>
<td>1 (11%)</td>
<td>9</td>
</tr>
<tr>
<td>Federalism</td>
<td>1 (25%)</td>
<td>0 (0%)</td>
<td>1 (25%)</td>
<td>1 (25%)</td>
<td>1 (25%)</td>
<td>4</td>
</tr>
<tr>
<td>Federal Taxation</td>
<td>4 (18%)</td>
<td>3 (14%)</td>
<td>8 (36%)</td>
<td>4 (18%)</td>
<td>3 (14%)</td>
<td>22</td>
</tr>
<tr>
<td>Total</td>
<td>20 (21%)</td>
<td>8 (9%)</td>
<td>16 (17%)</td>
<td>22 (23%)</td>
<td>28 (30%)</td>
<td>94</td>
</tr>
</tbody>
</table>
cases that the government lost. The data for these cases paint a picture in stark contrast with those that the government won. While there are unanimous decisions that find against the government, these are only the third most common type. The most common such decision is one with four justices in the minority, with the second most common being a three-justice minority. Whatever the underlying logic or rationale, the decision to find against the government in cases involving administrative rulemaking or action appears to be much more divisive than the decision to find in its favor.

Looking at the issue areas individually, Judicial Power cases still exhibit a majority of unanimous decisions with only a single case with a 5-4 decision. However, this appears to be a bit of an oddity. While all but two of the issue areas that were represented by at least one case before the Court contain at least some unanimous decisions, dissension is clearly more common in these cases than unanimity. Furthermore, high levels of dissension seem to be the norm in Civil Rights, Unions, and Economic Activity cases. Federal Taxation is more of a mixed bag, with dissension being more common than unanimity, but with more instances of one- and two-justice minorities than three- and four-justice minorities. Federalism is more evenly split between the possible outcomes, though only four such cases are included.

Conclusion

The ultimate goal of this study is to shed some light on the manner in which the Supreme Court evaluates the actions of various federal agencies. Another way of phrasing this central question might be “why are some federal agency actions upheld by the Supreme Court while others are struck down?” Any attempt to address this, or any, question empirically requires that boundaries to the inquiry be set. This is for two primary reasons: (1) to ensure that the answers arrived at are actually connected to the question being asked and (2) to set forth a task that can
actually be completed. These goals often exist in tension with one another. The subjects of a political scientist’s questions are often vast and multifaceted while time, as so much of the discipline’s literature points out, is a valuable and highly limited resource. The result of this tension is that every study is limited in some important ways, and this study is no exception.

This being said, I have tried to draw the boundaries of this particular work in a way that is both theoretically sound and inclusive enough of relevant data to provide a reasonable answer to the question at the core of this document. The time period being examined, the 1977 through 2007 terms of the Court, is advantageous for answering this question for a variety of reasons. It includes terms from each of the three major eras of administrative deference jurisprudence. It includes stretches of time with multiple Democratic and Republican presidents,\footnote{Albeit skewing more Republican overall.} which is potentially relevant due to both the president’s role as chief administrator and because of the importance of the Office of Solicitor General in this area of the law. This period also allows for the use of pre-existing data from a variety of sources to allow for more time to be devoted to analysis than data collection.\footnote{Though a considerable amount of time has still been spent on data collection despite these advantages.} Finally, the period is expansive enough to include a large number of cases to study in the face of fairly restrictive case selection criteria.

To briefly recap these criteria, the Supreme Court Database (Spaeth 2016) serves as the starting point for my selection criteria as it is widely used and generally considered highly reliable. After choosing a time frame to examine, my next step was to filter out all cases that had no value for the adminAction variable. This variable denotes that agency action occurred during the events preceding the case as well as recording which agency took that action. Limiting the included cases in this manner began the process of focusing in on administrative cases, but still cast the net too wide. I also eliminated all cases to which the federal government was not a party.
This removed two primary sets of cases. The first were those that involved state rather than federal agencies. Due to federalism and the variability of state law, these seemed like fundamentally different sorts of cases than the ones in which I am interested. The second set was those cases that involved no government actor as a party. My reason for this was a combination of the overall level of success enjoyed by the federal government as a litigant seeming to set those cases apart from others where the government did not participate directly and the potential for cases that addressed administrative questions in an oblique manner to add further murk to already unclear legal waters. This done, I proceeded finally to eliminate those cases that centered around questions other than whether or not the action taken or rule made by the involved agency was within that agency’s authority. The most common such disqualifying question was whether or not a statute that would potentially empower an agency to take a given action was properly within Congress’s authority to enact. This process left me with 318 cases in total.

The majority of the space in this chapter was given over to describing a variety of characteristics of this body of 318 cases. The first reason for this is that neither this particular set of cases nor ones similar to it have received much focused attention from researchers. While these cases have certainly been included in past analysis, I am aware of no other studies that group and isolate them as I have here. Simply put, the discipline knows little about the contours of this specific portion of the legal landscape and the discussion contained in this chapter thus seems useful in its own right. The second reason description is important here is that those heretofore unknown contours can and should inform the understanding of these cases in the context of both this study and of the broader literature.

A number of notable trends have emerged in the data assembled here. Some of these conform to much of the common scholarly knowledge about the Court and its cases. The
government wins more than it loses, the Court could generally be described as a conservative one during the 1977-2007 terms, and cases in issue areas such as Civil Rights and First Amendment questions tended to divide the justices more than those in areas such as Federalism and Federal Taxation. These points might be considered common knowledge among scholars that study the Court, but each of them has important implications for putting the results in ensuing chapters into proper context. Government losses are comparatively uncommon, and any factors that might lead to significantly increased chances of such losses thus seem important to identify and understand. An attitudinalist would see the conservative tendencies of the Court during this time and expect a high proportion of conservative outcomes. Instead, there is an ideological tie that is less conservative than the full set of cases for the period being examined. This could point to the reduced importance of attitudinal factors in this set of cases. While I think that the cases I have identified here represent a unique and coherent area of jurisprudence, the observed division in levels of dissension suggests that factors spanning beyond purely administrative concerns are probably still relevant.

Some observed trends, such as the number of tax cases heard by the Court, which has near total control over its own docket and claims to detest hearing them, are surprising. While there is some correlation between the president’s membership in the Democratic or Republican Party and the frequency of liberal or conservative decisions in these cases, the differences are relatively minor and, in the case of the Reagan administration, run counter to expectations. If the Court were primarily looking to the chief administrator for cues about how to make its decisions in these cases, a different set of outcomes might be expected. Alternatively, it might be expected that a different set of outcomes would occur if the Solicitor General were acting in an overtly political manner in a large portion of the included cases, particularly given the government’s rate

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82 This point will be the focus of my next chapter.
of success. While a great many agencies have appeared before the Court during the thirty-one terms examined, many agencies were involved in only one or two cases during this span. On the other end of the spectrum, nearly 51% of the total cases gathered here involved only five different agencies. Given the segmented nature of the federal judiciary, some additional consideration might need to be given to the idea of agencies complying with Supreme Court decisions due to potential repeat-player status. While this very well may hold true for the Internal Revenue Service as the most frequent litigant before the Court from this set, NASA and the Forest Service might be more interested in what the relevant circuit has to say about a particular question. Finding in favor of agency action or rulemaking appears to be a generally less contentious action than finding against it, though there is a large degree of issue area and case-to-case variation. On its face, this has the look of inter-branch strategic considerations, though it very well might be something else. Criminal procedure, civil rights, and first amendment cases appear to be fairly contentious. Taxation and economic activity cases do not. This might recast the question of dissension in a primarily attitudinal light, some other information seen here to the contrary.

In closing, I will repeat myself on a few points. The first is that it would be dangerous to attempt to infer too much about the nature of these cases from the descriptive data presented here. The outcome of any given case that the Court decides to hear is, as discussed in the previous chapter, the product of fact patterns, the application of relevant Constitutional, statutory, administrative, and case law, the preferences of each individual justice, strategic interactions between the justices, considerations about the preferences of the other branches and of the public, and the arguments made by attorneys to the Court, among others. The questions the Court seeks out are often not simple ones, and the answers and the manner in which the justices
arrive at them are not likely to be either. However, some patterns have made themselves apparent here. It is my hope that these observations will shed some valuable light on an understudied portion of the Court’s docket, and that this light will reveal the path to an answer to my core question.
Chapter 4

The Integrated Model of Supreme Court Decision Making

Research on the Court often incorporates the concept of issue area, the broad subject matter of a body of cases. The assumption of this inclusion is that different areas of the law will be subject to different sets of factors that bear consideration in reaching a final decision. If the Court’s decisions are driven, at some level, by legal factors, the reasonableness of this assumption is self-evident. Constitutional, statutory, and common law provisions are and must be different for handling questions of, for instance, civil liability versus religious expression. The law is structured differently in a variety of areas, and as a result cases in different areas see different kinds of questions asked and reasoning applied, different legal tests and standards of evaluation used, and different weights given to competing objectives in deciding different kinds of cases. In short, different issue areas are likely to be dealt with in very different manners.

While the law itself creates differing sets of criteria for evaluating cases with different subject matter, the law is not the only factor that influences the outcome of cases before the Supreme Court. As attitudinalists will point out, judges in the U. S. judiciary, particularly those that serve on the Supreme Court, are quite free to take a wide variety of actions and impose a multitude of interpretations on the law (Segal and Spaeth 2002). Depending on their predilections, two justices may read the same legal provision in profoundly different ways. Such differences, taken in aggregate across the Court, have the potential to lead to different outcomes in similar cases as the ideological makeup of the Court changes. As proponents of the strategic approach to judicial decision making remind us, the Court is in many ways more than the sum of the attitudes held by the justices. One justice’s view of an issue, no matter the strength of the conviction with which it is held, cannot come into legal effect without the support of at least
some other members of the Court. As such, interpersonal and inter-group bargaining and negotiation will shape the way that these attitudes coalesce and transform into a written opinion (Epstein and Knight 1998). It might be expected that attitudes and the ensuing small-group dynamics that spring from them\(^83\) will factor heavily into those decisions whose outcomes the justices have great interest in and where they are the primary influencers of the law, such as in Constitutional civil liberties cases.

In addition, the judiciary is more than just the Supreme Court. While the Court may choose to have the final say in any case that seeks certiorari, the total number of cases the justices will take up in a term represents only the tiniest fraction of the full number of cases moving through the wider federal court system (Perry 1991; Baum 2013). The justices must work through the cases they choose, but the Court also has a responsibility to provide guidance to those acting in the lower levels of the judiciary in order to facilitate a measure of consistency between courts operating across the entirety of the nation.\(^84\) Part of this responsibility requires the Court to answer difficult and important legal questions, providing clear and replicable decisional criteria in emerging or changing sectors of the law. Part of this responsibility is also to maintain a certain level of stability in the law (Pacelle 2015). While legal interpretations can and do change, frequent, radical change in the Court’s rulings within a given area would leave lower court judges unsure of how to proceed and litigants unsure of the rules by which they were playing. As a practical matter, the Court must be aware of standing precedent even as it attempts to navigate an ever-shifting statutory and regulatory landscape.

To further complicate matters, the judiciary does not operate in a vacuum. Proponents of

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\(^83\) Such dynamics might even be expected to play a larger role in cases where a large number of the justices are largely unconcerned with the particulars of the outcome and, therefore, potentially more open to persuasion.

\(^84\) While the Supreme Court can help foster this consistency, it cannot enforce it in a comprehensive manner. Conflicting interpretations of the same legal provisions across the circuits are, and likely will remain, an ongoing phenomenon.
the strategic model would once again remind us that the U. S. government is one of separated and sometimes competing powers. Congress has the power to tinker with the Court’s jurisdiction and, of course, is primarily responsible for creating the law. The president is tasked with taking the law and putting it into action. Both possess the tools to curtail the Court’s influence on policy outcomes (Epstein and Knight 1998). As a result, the Court might defer to the preferences of the elected branches in some instances. The will of Congress might, for example, mean a great deal in matters that are of great importance to the voting public and which are shaped principally through statutes, such as national economic policy.85

At the same time, while the occupants of the three institutions may not always see eye to eye with one another, they do share a common source of power and influence in the continuing, stable function of the federal government. Given these facts, it might be assumed that there will be times when the Court defers to the other branches in contradiction of the sincere preferences of the majority of its members. It might also be the case that there will be instances where the primary preference of the Court, along with one or both of the other branches, will be maintaining the function and power of the federal government of which they are all a part.86

For a variety of reasons legal, structural, and practical, different combinations of these factors appear to apply in different amounts in different issue areas (Pacelle, et al. 2011). This brings me to the first question I wish to address: do the cases I have identified represent a coherent and distinct area of Court decision making? A couple of definitions are in order here. When I ask if these are a coherent group of cases, I ask whether or not there are sufficient threads of commonality between them that they will be decided using similar criteria. As discussed in a

85 This dichotomous treatment of civil liberties and economic policy is discussed by the Court itself in the now famous Footnote Four of United States v. Carolene Products (1938) (Segal and Spaeth 2002, Chapter 4).
86 The goals of the individual justices and of the institution that is the Court are not exactly one and the same. While the justices likely have their own policy goals, those goals require the cooperation of the other branches to attain.
prior chapter, the Supreme Court Database codes the cases I have identified as existing within a variety of different issue areas. This is reasonable, as, viewed through a certain lens, they deal with a wide variety of questions.

However, it is my contention that all of these cases have a great deal in common. First, each selected case involves an exercise of authority by a federal agency. Second, the authority exercised in each case finds its source in power delegated by Congressional statute. Third, the Office of the Solicitor General will almost always be closely involved in such cases, either representing the government as respondent or bringing the case before the Court as petitioner. Finally, each case involves the ability of the United States government to carry on its chosen business. If I am correct, this coherency will mean that these cases will be decided using a similar set of criteria in a closely related and observable manner. I think that it is possible that the question shared by all of these cases, “Did the agency in question act within the authority granted to it?” might serve to set them apart as their own, distinct area of the law.

When I ask if these cases are distinct, I ask are they, taken as a whole and taken in various parts, decided in a demonstrably different manner than both the full set of cases from which they are drawn and other similar but non-administrative cases. The question I hope to answer later in this work is how specifically the Court evaluates these cases. However, if the answer to this preliminary question is “no,” either because they are not treated similarly to one another or because their treatment is due to different factors unrelated to the ones I have identified in selecting these cases, this second question becomes essentially meaningless.

87 The agencies all claim as much at least, though the Court does not always agree that an action represents a proper exercise of that power.
The Integrated Model

Fortunately, a tool that is well-suited to precisely this question has already been developed. In *Decision Making by the Modern Supreme Court* (2011), Richard Pacelle, Brett Curry, and Bryan Marshall present an integrated model of Supreme Court decision making. The model incorporates a variety of attitudinal, strategic, and legal factors to examine a large body of Court cases as well as several subsets thereof. Using their data in addition to supplemental data coded by Pacelle, I intend to use their model to analyze my data in an attempt to answer this preliminary question.

The integrated model uses the binary decision direction of the Supreme Court’s decision in a given case, coded 0 for a conservative decision and 1 for a liberal one, as the dependent variable. The ideological decision direction data in the Supreme Court Database (2016) serves as the basis for this variable, though it is recoded by Pacelle et al. (2011) for analytical reasons. It employs seven independent variables chosen to represent the mixture of attitudinal, strategic, and legal factors that seem to be relevant to Supreme Court decision making. The NOMINATE Common Space measure of median justice ideology developed by Epstein, Martin, Segal, and Westerland (2007) stands in for the attitudes of the Court. The president’s preferences are represented by a Common Space score as well. The NOMINATE scores (Poole and Rosenthal 1997), measuring the ideological preferences of the median members of the House and Senate, are included as a measure of the potential strategic impact of Congressional preferences.

The model includes three legal variables. The first of these is the ideological direction of the most relevant precedent cited in the syllabus of a case (coded -1 for a conservative decision,

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88 The SCDB numerically codes conservative decisions as 1 and liberal decisions as 2. Recoding these as 0 and 1 respectively is required for meaningful analysis through logistic regression.
89 Pacelle *et al.* reversed the sign of the NOMINATE and Common Space scores in order to achieve ideological congruence (specifically, more positive numbers equating to more liberal outcomes) across their measures. I use their data in this analysis, so the same holds true here.
1 for a liberal decision). The second is the presence or absence of on-point precedent in a case. As the model’s originators put it, “On-point precedents typically refer to cases that are virtually identical to a recent decision. In most instances, the on-point case is a companion to the full decision…In other circumstances, the on-point decisions occur in cases that follow the landmark decision by a year or two” (Pacelle, et al. 2011, p.60). In other words, a case coded as a 1 for on-point precedent will have been recently preceded by a very closely related case. If precedent is constraining on the Court’s decision making, on-point precedent would be expected to be even more so given the subject matter and temporal connections between the precedential decision and the present case. The final legal variable included is issue evolution. Issue evolution consists of four stages (Pacelle, et al. 2011). In the first, the Court is perhaps unsure of what to do with an emerging issue and attempts to couch that issue in the jurisprudence of a similar existing issue area. In the second stage, separate specific precedent is created and refined for the issue at question. In the third stage, the facts of the case become more complicated and are perhaps handled less well by the existing precedent. In the fourth stage, the issue begins to mix with other issues, leading to potentially conflicting imperatives. Generally speaking, moving from one stage to the next indicates an increase in the difficulty of the question being presented. The variable was coded by Pacelle et al. (2011) as a 1, 2, 3, or 4 corresponding to the stages described above.

Pacelle and his colleagues tested their model on the majority of the full set of cases heard by the Supreme Court from the 1953 to the 2000 term, as well as several subsets. For the full set of cases, each of the independent variables was found to have significant impact on the direction of the decision except for the preferences of the Senate. For each independent variable that reached significance except for issue evolution, the relationship with the dependent variable was a positive one. In other words, the more liberal the preferences of the median justice of the

90 Cases involving questions of federalism and of the separation of powers were excluded from their analysis.
Court, the median member of the House, and the president, and in the presence of liberal precedent and on-point precedent, the more likely the case would be decided in a liberal manner. The relationship between decision direction and issue evolution was negative, meaning that the later the stage of issue evolution a case represented, the more likely the decision would be a conservative one. With the exception of the influence of the Senate, the model’s results conformed to the authors’ expectations.

**Data and Hypotheses**

In order to determine whether or not the cases discussed in the previous chapter constitute a coherent and distinct area of jurisprudence, I will examine those cases using Pacelle, Curry, and Marshall’s (2011) integrated model of Supreme Court decision making. As in the original work, the analysis will employ logistic regression as the dependent variable. The ideological direction of the Court’s decision in a given case is dichotomous. The ideological direction of relevant precedent will be referred to as Precedent. The issue evolution stage will be referred to as Evolution. Table 4.1 provides summary statistics for these variables. All ideological variables are coded such that more positive values equate to a more liberal position and more negative values equate to a more conservative position. The common space variables are continuous in nature with upper and lower bounds of -1 and 1 (Epstein, et al. 2007). Precedent is a categorical variable with -1 indicating conservative precedent, 0 indicating an indeterminable ideological direction, and 1 indicating liberal precedent. Evolution is also categorical in nature, taking on values from 1 to 4. The coding of

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91 The ideological direction of the Court’s decision in a given case. As discussed in the previous chapter, 159 of the cases are coded as liberal decisions and 159 are coded as conservative.
Table 4.1 Summary Statistics of Independent Variables

<table>
<thead>
<tr>
<th></th>
<th>Observations</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
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<td>0.099</td>
<td>-0.245</td>
<td>0.103</td>
</tr>
<tr>
<td>President</td>
<td>318</td>
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<td>0.490</td>
<td>-0.564</td>
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<td>House</td>
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<td>0.292</td>
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<tr>
<td>Senate</td>
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<td>0.067</td>
<td>-0.155</td>
<td>0.164</td>
</tr>
<tr>
<td>Precedent</td>
<td>318</td>
<td>0.179</td>
<td>0.951</td>
<td>-1</td>
<td>1</td>
</tr>
<tr>
<td>Evolution</td>
<td>318</td>
<td>2.871</td>
<td>0.696</td>
<td>1</td>
<td>4</td>
</tr>
</tbody>
</table>

these variables is the same as used in *Decision Making by the Modern Supreme Court*, and higher values indicate generally more difficult legal questions.

I expect to see a different pattern of significance in the cases I have identified. To provide a speculative answer to my question, I suspect that these cases are different in some important ways from the complete universe of cases that the Supreme Court hears each term. To begin with, I expect that the policy preferences of the Court will not have a significant impact on the outcome of these cases. As a practical matter, Pacelle et al. (2011) find a limited impact for the Court’s attitudes in statutory economic cases,\(^\text{92}\) and judicial attitudes do not exert significant impact on the outcomes of Constitutional economic cases. There are, I believe, some important similarities between these sets of cases and the ones identified here. First, I suspect that these administrative cases are, like those economic cases, of low salience\(^\text{93}\) to the Court. While they undoubtedly represent questions of substantive importance, and some of the cases do indeed address questions of fundamental rights and liberties, many, many more are steeped in

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\(^{92}\) Pacelle et al. (2011) classify a case as a statutory economic case based on two criteria. The first is the subject matter. Qualifying subject matter includes cases where the U.S. government is defendant against a tort claim, cases involving the Internal Revenue Code, and bankruptcy law, labor relations, antitrust, and commerce cases. Most cases that do not fall into this category would be considered by Pacelle et al. to be rights and liberties cases. Referring to cases as statutory serves to distinguish those that focus on the interpretation of language found in Congressional statutes from other cases that deal primarily with the interpretation of Constitutional language. This distinction is important because Constitutional interpretation is primarily the domain of the Court, while Congress possesses the ability to alter statutory language with (hypothetically) relative ease.

\(^{93}\) Unah and Hancock (2006) provide evidence for the idea that attitudes have a stronger effect in high salience cases.
administrative arcana. The specific provisions of the tax code and their application matter in a very real way to both the nation and its people. Despite this, I have difficulty imagining that the justices become deeply, personally invested in the outcomes of such cases. The fact that, as discussed in the previous chapter, around forty-one percent of the administrative cases included here were decided unanimously may provide some support for this view. For comparison’s sake, about 35 percent of the total civil rights cases heard by the Court from 1977-2007 were decided unanimously, while only 25 percent of First Amendment cases heard during that time were free of dissension.\footnote{94 Taken from the Supreme Court Database (Spaeth 2016) using the issueArea variable.}

Second, while these administrative cases are more often than not statutory in nature, I believe they mimic Pacelle’s Constitutional economic cases in that the Court’s primary goal is “to settle the law, not to settle it in a particular direction” (Pacelle, et al. 2011, p.166). If people are to follow the law, then they must first know the law (more or less, at least). This can be relatively difficult on its own, but could be made practically impossible by frequent, drastic shifts in legal obligations and expectations. While this principle has important implications for anyone and everyone, it is perhaps of greater-than-usual importance to federal agencies. Tasked as they are with carrying out the work of government under the overlapping supervision of Congress, the president, and the judiciary, agencies have a strong set of incentives to act within legal boundaries. To do otherwise invites scrutiny, challenge, and censure.\footnote{95 This is not to imply that such things cannot be found where agencies are very clearly operating inside of legal boundaries.} In order to ensure compliance, policy and procedure must be developed and deployed, consuming time and other agency resources. Relevant law being in a constant state of flux thus presents a risk of hindering or, depending on the frequency and magnitude of the changes, even crippling agencies. While this is problematic in its own right, it might also be expected that both the president and
Congress would, regardless of their specific policy preferences, take issue with at least some of the core functions of modern government in the U. S. being disrupted in this manner. This, in combination with the likely low salience of many of these cases to the justices, should result in less attitudinal impact than is typically observed in other areas of the law.

That brings me to my next expectation: I posit that each of the legal variables will have significant impact on decision direction. Keeping with the findings of Pacelle, Curry, and Marshall (2011), precedent direction should relate positively to decision direction while issue evolution should have a negative relationship. I do make a modification to the original model here by removing on-point precedent from it. The reason I do this is because only eleven cases in the set are coded as having on-point precedent.

As for the strategic variables, I expect that the preferences of the House and the president will each rise to significance. The original model generally found that the preferences of the Senate were not significant, and I expect that the same will hold true here. The president is a more complicated matter. The president has a number of points of contact with agencies and the power granted to the various agencies within the broader executive branch serves as a substantive source of the president’s own power (e. g. Wood and Waterman 1991; Mayer 1999; Croley 2003). Additionally, the Solicitor General serves at the president’s pleasure and is responsible for deciding which cases the government will appeal as well as actually arguing all cases in which the government is a party (Salokar 1992; Pacelle 2003). Given this, I expect that the president’s preferences will have a significant and positive influence on decision direction. However, there is an important caveat to keep in mind. The extant literature on the SG indicates that, while the office is expected to pursue the president’s interests to some extent, attempting to do so through the naked support of ideology-driven outcomes is not a long-term winning strategy.
(Wohlfarth 2009). If this is accurate, and particularly if the Court and SG share the goal of imposing stability on the law in these cases, it might be expected that the policy preferences of the president will not be significant. Finally, given the aforementioned low salience of these cases to the Court, the importance of their preferences in low-salience cases, and their general connection to agencies, I expect that the preferences of the House will have a positive and significant impact on decision direction. Low salience for the Court does not necessarily translate to low salience for the House, whose members write the legislation that shapes administrative action, sit on the committees that oversee these agencies, are lobbied by interest groups that operate in agencies’ domains, and receive electoral support (or not) from constituents that take an interest in or receive benefits from administrative activity.

However, if I am incorrect and these cases are instead nothing more than the proverbial grab-bag of cases pulled from other areas of the law, I would instead expect to see a different set of outcomes. The first possibility that could indicate a lack of commonality between the cases is that no meaningful pattern is discernible when examining the full set of cases. If there is no substantive connection between the assembled cases, then it seems reasonable that none of the included variables would have any meaningful impact on the aggregate direction of the Court’s decisions. The second possibility for such an outcome is that the analysis of the full set of cases does result in some variables displaying significant impact, but that impact is merely the result of other, non-administrative connections between the cases.

It is functionally impossible to rule out this second possibility, but I think that there are some very likely markers of such a relationship that can be examined. Pacelle et al. (2011) initially test the integrated model on the full set of civil rights, civil liberties, and economic cases taken by the Court during the 1953-2000 terms, but they also go on to examine several subsets of
cases based on subject matter and whether questions of Constitutional or statutory interpretation are primarily at play. By subdividing and analyzing the administrative cases based on the same criteria, comparison between my results and Pacelle’s are possible. If the results of these area comparisons are identical in terms of the mix of variables exerting significant influence across studies, it seems fair to assume that any significance displayed in the unified analysis is the result of the relationships identified in Decision Making. If these area comparisons display a different set of significant relationships, though, then I would argue that greater confidence about the distinctiveness of the administrative cases is warranted.

**Quantitative Results**

Table 4.2 displays the results of the integrated model on the full set of administrative cases that meet my selection criteria. Several of my hypotheses find support in the data, while a few others do not. Fortunately, both sets of results are interesting in their respective ways. I will begin with those hypotheses that have found support. First, and least surprisingly, the ideological preferences of the Senate do not significantly impact the ideological direction of the Supreme Court’s decisions in these cases. This held true in the majority of the case types tested by the model’s originators and was fully expected here. Second, the direction of the most relevant precedent has a significant and positive effect on the decision direction in these cases. This is consistent with my expectation that legal stability would be a key concern here. Third, issue evolution stage is significantly and negatively influential on decision direction. As the cases become more difficult, precedent would perhaps fit less well with the facts of the cases presented and thus exert less influence on the eventual decision.

Now, on to those hypotheses that failed to find support. First, the preferences of the
Table 4.2 Integrated Model: All Identified Cases

<table>
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<th>Model</th>
<th>Change in Probability</th>
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<td>.27</td>
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<td></td>
<td>(1.31)</td>
<td></td>
</tr>
<tr>
<td>President</td>
<td>-.05</td>
<td>-.01</td>
</tr>
<tr>
<td></td>
<td>(.31)</td>
<td></td>
</tr>
<tr>
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<td>.46</td>
<td>.10</td>
</tr>
<tr>
<td></td>
<td>(1.13)</td>
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</tr>
<tr>
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<td>-.27</td>
</tr>
<tr>
<td></td>
<td>(2.74)</td>
<td></td>
</tr>
<tr>
<td>Precedent</td>
<td>.79**</td>
<td>.17</td>
</tr>
<tr>
<td></td>
<td>(.13)</td>
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</tr>
<tr>
<td>Evolution</td>
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<td>-.08</td>
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<tr>
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<td></td>
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<td></td>
</tr>
<tr>
<td>N</td>
<td>318</td>
<td></td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

House do not exert significant influence on the decision direction in these cases. This lack of significance for the House’s preferences is, on its face, theoretically difficult to explain as these cases are largely the sort of economics-focused, non-Constitutional questions that would typically be seen as likely to display the effects of Congressional preferences.

It should be noted that, while the contemporary preferences of Congress do not appear to influence the decisions of the Court in these cases significantly, Congress does play an important

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96 The Pearson $\chi^2$ value for the overall model is 129.06, with a probability of .3837, indicating that the model fits the data well. As a secondary check, evaluation of the model via Receiver Operator Characteristic curve returns a $p$ value of .7097, indicating that the model predicts observed outcomes reasonably well. Collinearity does not appear to be an issue, with the VIF values for the independent variables ranging from 1.02 for Precedent to 2.38 for Court. A correlation matrix of the independent variables indicates some cause for concern with a correlation of .6039 for House and Senate. This is still acceptable, if a bit higher than ideal, and the linked election cycles for the two chambers present a clear theoretical reason for the two variables to jointly vary. The next highest correlation is for Court and President at .2723.

97 It would be interesting to examine the impact of the preferences of a relevant Congressional committee or committees on the outcome of these cases. While the questions posed in these cases may be of limited interest to the full chambers, the preferences of such specialized subgroups might be influential. Such analysis is beyond the scope of this work, but seems worthy of future investigation.
role in this process. While agencies are structurally located within the executive branch, they are also creatures of Congress. They are created and empowered through statute, and, having read significant portions of each of these decisions, the justices devote a great deal of ink to the discussion of how faithfully agencies adhere to (or not) those statutes. I think the reason for the apparent lack of the House’s influence here is, as suggested by the significance of both legal variables, that the Court is primarily interested in imposing stability and predictability on the law in this area. As such, it is not that Congress’s preferences do not matter. It is only, I suspect, that the preferences of Congress contemporary with the decision of the Court fade to insignificance relative to the preferences of Congress as expressed in relevant enabling statutes.

Second, the preferences of the president did not achieve significance. On the one hand, this is surprising given the broad influence the president wields in the policy process. On the other hand, given the high proportion of economic cases and cases raising statutory rather than Constitutional questions included in the set, and given that the model’s originators generally found the House to be more influential than the president in both of these categories of cases, it is perhaps less surprising that presidential preferences fail to reach significance when those of the House do as well. Additionally, if stability in the law is the Court’s goal in this area, it might, once again, be expected that the preferences of contemporary elected leaders would exert little influence on outcomes. If such stability is as important to the effective function of agencies as I have argued, political leaders might see some measure of value in it even when they are not particularly fond of the outcomes it might produce.

Finally, and perhaps most interestingly of my hypotheses that have not found support, the ideological preferences of the Court as measured by the median justice do not rise to significance. While the expectation was that the overall impact here would be significant but
small compared to other, especially legal, factors, to find no significant relationship between the ideological preferences of the Court and decision direction is unexpected and potentially important for a few reasons. Generally speaking, scholars of the Court accept that one of the most important factors in determining how the Court decides cases are the policy preferences of the justices (e.g. Epstein and Knight 1998; Segal and Spaeth 2002). Identifying an area of the law where those preferences hold very little sway may help us better grasp the context inside of which attitudinal factors are at their strongest and weakest. While perhaps of less importance to the subfield but with greater bearing on my initial question in this chapter, only one group of cases that Pacelle and colleagues evaluated with the integrated model did not find a significant impact for attitudes: Constitutional economic cases. In those cases, precedent direction was significantly and positively related to decision direction, as was on-point precedent which is omitted here. The president’s policy preferences were also significantly but negatively related to decision direction, and the impact of issue evolution was not significant. In addition to different mixes of significant factors other than the lack of attitudinal impact, very few of the cases examined here are Constitutional economic cases. Using Pacelle’s classifications, a mere sixteen of the 318 cases I have identified pose Constitutional economic questions. Given this, the lack of attitudinal impact displayed here resulting from a high proportion of such cases within the larger set can likely be ruled out.

With these results, there appears to be some evidence to support the idea that the identified cases are significantly different from the full set of cases tested by the integrated model’s authors. This is perhaps not surprising, as a non-randomly selected subset seems somewhat likely to differ in important ways from the larger set from which it is taken. Still, the

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98 I do not present the limited findings here as conclusively supportive of this possibility, particularly in light of some potential weaknesses in the measures employed which I will discuss in a moment. That being said, I do think that the totality of my findings in this chapter at least warrants further investigation into the matter.
results from the full model are unusual in their lack of attitudinal and strategic influences, and the question of distinctness seems worth pursuing. Fortunately, the model’s originators also tested a number of subsets of cases with the model themselves. By similarly restricting my cases and comparing my results to theirs, I hope to provide a more complete answer about the separate nature of these cases. Unfortunately, I will not be able to recreate each test that they performed, as my set includes only forty-two Constitutional cases. Given the number of independent variables in the model, applying it to these cases would not prove fruitful.

*Area Comparisons*

While evaluating Constitutional cases in my data may not be possible, a brief discussion of what Pacelle and colleagues found in these cases should prove useful. In the full set of Constitutional cases, the model found that the median justice’s policy preferences, precedent, on-point precedent, and issue evolution stage exerted significant influence on the direction of the final decision. Constitutional civil rights and liberties cases were similar in their mix of influential factors, but precedent drops from significance while the preferences of the president rise to it. Constitutional economic cases were significantly impacted by precedent direction, the presence of on-point precedent, and the preferences of the president. So, while Constitutional cases cannot be isolated within my set for similar analysis, it can at least be seen that the set taken as a whole exhibits a different mix of influences than any of these groups.

Table 4.3 displays the results of the integrated model as applied to the full range of non-
Table 4.3 Integrated Model: All Non-Constitutional Cases

<table>
<thead>
<tr>
<th></th>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>1.51</td>
<td>.31</td>
</tr>
<tr>
<td></td>
<td>(1.47)</td>
<td></td>
</tr>
<tr>
<td>President</td>
<td>-.09</td>
<td>-.02</td>
</tr>
<tr>
<td></td>
<td>(.33)</td>
<td></td>
</tr>
<tr>
<td>House</td>
<td>.33</td>
<td>.07</td>
</tr>
<tr>
<td></td>
<td>(1.22)</td>
<td></td>
</tr>
<tr>
<td>Senate</td>
<td>-.05</td>
<td>-.01</td>
</tr>
<tr>
<td></td>
<td>(2.93)</td>
<td></td>
</tr>
<tr>
<td>Precedent</td>
<td>.94**</td>
<td>.19</td>
</tr>
<tr>
<td></td>
<td>(.14)</td>
<td></td>
</tr>
<tr>
<td>Evolution</td>
<td>-.27</td>
<td>-.06</td>
</tr>
<tr>
<td></td>
<td>(.20)</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>.79</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.61)</td>
<td></td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>.00</td>
<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-164.90</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>275</td>
<td></td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

Constitutional cases in my set. This provides a total of 228 observations, with the only variable reaching a significant impact being precedent direction. In the full set of non-Constitutional cases from the 1953-2000 terms analyzed by Pacelle and colleagues, precedent was similarly significant and positively related to the dependent variable. However, in that set of cases, all other independent variables also had a significant impact on decision direction. Rather than attitudinal, strategic, and legal factors each rising to significance, only a legal variable appears to exert significant influence here. This seems an important difference.

Table 4.4 reports the results of the integrated model applied only to economic cases. The definition of an economic case used here is somewhat expanded as compared to that used by Pacelle, Curry, and Marshall (2011). Some of the cases I included were not coded as dealing with either economic or civil liberties issues. My analysis in the next chapter required all cases to fall into one of these two categories, so examined these uncategorized cases and shifted each into the category that most closely matched the subject matter of the case.

---

102 Supreme Court, presidential, and House preferences each had positive relationships with decision direction, as did precedent direction and the presence of on-point precedent. Senate preferences and issue evolution stage were negatively related to decision direction.

103 The definition of an economic case used here is somewhat expanded as compared to that used by Pacelle, Curry, and Marshall (2011). Some of the cases I included were not coded as dealing with either economic or civil liberties issues. My analysis in the next chapter required all cases to fall into one of these two categories, so examined these uncategorized cases and shifted each into the category that most closely matched the subject matter of the case.
The \( n \) here is 228, and once again only precedent achieves significance while remaining in the expected direction. By comparison, the integrated model indicated that all factors other than presidential preferences exerted significant influence on decision direction\(^{104}\) for the full set of economic cases examined by its authors. Again, this seems an important difference, particularly in the lack of Court preferences influence on decision direction. However, there is something to keep in mind about these cases. A large number of these economic cases, sixty-six\(^{105}\) to be exact, involve the Internal Revenue Service. As discussed in a previous chapter, these cases are often of very low salience to the Court and are, perhaps, approached more with grim determination than genuine interest by the justices. Given this, and given that such cases make up almost a third of the total economic cases, it could be that the inclusion of such cases is suppressing the influence of the Court’s preferences. If, for the sake of argument, it is assumed that the other branches are similarly disinterested in the workings and actions of the IRS,\(^{106}\) the inclusion of these cases might also suppress the impact of their preferences as well.

Table 4.5 uses the same set of economic cases analyzed in table 4.3 but removes the sixty-six IRS cases from the group. This gives an \( n \) of 161 and, despite the lack of tax law involved, finds significant impact on decision direction only in the direction of precedent. Neither the attitudinal nor strategic factors make significant contributions, representing a distinct break from the larger universe of economic cases examined by Pacelle and colleagues. This is, along with the other results discussed here, encouraging, as it seems to bolster the idea that these

\(^{104}\) And, once again, the relationship between decision direction and Court and House preferences, along with precedent direction and the presence of on-point precedent were positive. Senate preferences and issue evolution stage were still negatively related.

\(^{105}\) For those of you that recall that the IRS was involved in seventy-two of the cases studied here, the count here is accurate. Four of these IRS cases are coded as addressing civil liberties by Pacelle. For anyone interested, these four cases are: United States v. Lasalle National Bank, United States v. Euge, Bob Jones University v. United States, and Hernandez v. Commissioner of Internal Revenue. Two others, Commissioner of Internal Revenue v. John W. Banks, II and Michael J. Knight v. Commissioner of Internal Revenue are coded as neither economic nor civil liberty issues.

\(^{106}\) This is an admittedly unsafe assumption.
### Table 4.4 Integrated Model: All Economic Cases

<table>
<thead>
<tr>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>-0.41 (1.66)</td>
</tr>
<tr>
<td>President</td>
<td>-0.23 (.38)</td>
</tr>
<tr>
<td>House</td>
<td>-0.96 (1.43)</td>
</tr>
<tr>
<td>Senate</td>
<td>1.30 (3.51)</td>
</tr>
<tr>
<td>Precedent</td>
<td>0.90** (.16)</td>
</tr>
<tr>
<td>Evolution</td>
<td>-0.36 (.21)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.99 (.64)</td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>0.00</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-137.31</td>
</tr>
<tr>
<td>N</td>
<td>228</td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

### Table 4.5 Integrated Model: Economic Cases Excluding IRS Cases

<table>
<thead>
<tr>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>-1.47 (1.98)</td>
</tr>
<tr>
<td>President</td>
<td>0.04 (.46)</td>
</tr>
<tr>
<td>House</td>
<td>-1.23 (1.80)</td>
</tr>
<tr>
<td>Senate</td>
<td>3.39 (4.52)</td>
</tr>
<tr>
<td>Precedent</td>
<td>0.93** (.19)</td>
</tr>
<tr>
<td>Evolution</td>
<td>-0.34 (.25)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.65 (.82)</td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>0.00</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-96.09</td>
</tr>
<tr>
<td>N</td>
<td>160</td>
</tr>
</tbody>
</table>

*p<.05, **p<.01
cases are indeed unique. Having said that, there are some potential issues with these findings that should be discussed. While the apparent lack of attitudinal influence on the outcomes of these cases is in line with my expectations, it is also highly unusual. While I suspect that this result is an accurate representation of the influence of attitudes on these administrative cases, there are two alternative explanations that I believe are worth mentioning.

First, as Lauderdale and Clark (2012) have pointed out, there are in fact many median justices on the Court. Depending on the issue area the Court is addressing, a number of justices might occupy the influential median ideological position. If the cases I have identified do in fact, as I posit, represent a coherently unique subset of Court cases, it is possible that the cross-issue median justice is often or perhaps always different from the administrative law median justice. If this were the case, it could be that attitudes as measured by the cross-issue median justice exert little to no influence on outcomes, as they have here. While I cannot conclusively rule out this possibility, to test it directly is beyond the scope of this study. Furthermore, the ubiquity of the measure in large observation pool research of the Court should mean, at the least, that the results arrived at here should share any such inbuilt bias with other studies using the measure and remain comparable.

I have also considered the possibility that, given the fairly high proportion of unanimous decisions reached in these cases and the necessity of non-unanimous decisions for ascertaining position on the attitudinal spectrum, the measure of preferences in this sector of the law might be somewhat underdeveloped. Once again, however, some additional description should prove useful. Comparing the full set of Court cases heard in and between the 1977 and 2007 terms and

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107 I do not think that this possibility is especially likely, but thought that it seemed worth mentioning for theoretical reasons.
108 Using the minVotes variable in the Supreme Court Database, 129 total decisions in my set of 318 had no justices voting for a minority position. This accounts for 40.57 percent of the total cases included.
administrative cases, the administrative cases actually exhibited a slightly lower proportion of unanimous decisions than the full set.\textsuperscript{109} With this being the case, I am more comfortable with the idea that additional attitudinal impact is not being masked by a lack of non-unanimous cases for inclusion in the measure of attitudes. Still, 189 observations spread across thirty-one terms of the Court may not be sufficient to get an accurate picture of where the justices preferences in these cases lie.

The final comparison group is civil liberties cases.\textsuperscript{110} For all civil liberties cases examined by Pacelle, Curry, and Marshall (2011), the model found that the median justice’s policy preferences, precedent, on-point precedent, and issue evolution stage exerted significant influence on the direction of the final decision. Table 4.6 reports the results of the integrated model as applied to these administrative civil liberties cases.

The results are quite surprising in that none of the included variables rise to significance. Precedent comes closest, but not quite close enough. The directionality of each independent variable is similar to that displayed in the analysis of the full set of cases, though the president’s preferences are positive rather than negative here. The preferences of the Court are closer to significance here\textsuperscript{111} than they have been in any of the other analyzed case groups, but remain farther from significance than precedent.

I will admit some confusion at this particular outcome. My best guess at explaining it consists of two components. The first of these is that the focus on civil liberties weakens the otherwise pervasive influence of the law for this group of cases by enticing the justices into a

\textsuperscript{109} Again using the minVotes variable in the Supreme Court Database, 1536 total decisions in the full set of 3744 had no justices voting for a minority position. This accounts for 41.03 percent of the cases included.

\textsuperscript{110} As with the economic cases previously discussed, my definition of civil liberties cases is somewhat broader than that employed by Pacelle, Curry, and Marshall (2011). The cases included here as civil liberties cases were not all classified as such in their work, though many of them were. The two sets of criteria are, however, largely comparable if not identical.

\textsuperscript{111} The coefficient of 3.96 and standard error of 2.30 give us an $\alpha$ of .085.
Table 4.6 Integrated Model: All Civil Liberties Cases

<table>
<thead>
<tr>
<th></th>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>3.96</td>
<td>.81</td>
</tr>
<tr>
<td></td>
<td>(2.30)</td>
<td></td>
</tr>
<tr>
<td>President</td>
<td>.10</td>
<td>.02</td>
</tr>
<tr>
<td></td>
<td>(.56)</td>
<td></td>
</tr>
<tr>
<td>House</td>
<td>2.92</td>
<td>.59</td>
</tr>
<tr>
<td></td>
<td>(2.07)</td>
<td></td>
</tr>
<tr>
<td>Senate</td>
<td>-5.13</td>
<td>-1.04</td>
</tr>
<tr>
<td></td>
<td>(4.75)</td>
<td></td>
</tr>
<tr>
<td>Precedent</td>
<td>.47</td>
<td>.10</td>
</tr>
<tr>
<td></td>
<td>(.25)</td>
<td></td>
</tr>
<tr>
<td>Evolution</td>
<td>-.22</td>
<td>-.05</td>
</tr>
<tr>
<td></td>
<td>(.38)</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>.33</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.20)</td>
<td></td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>.24</td>
<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-55.21</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>93</td>
<td></td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

greater degree of personal investment in the outcome of these cases than might otherwise hold for the broader administrative context. The second is that, despite this increased degree of personal investment, the administrative aspects of the case still mean that legal stability is of great importance and thus suppresses the likelihood of outright attitudinal action.

There is one other thing that should be remembered about these cases: they include the highly contentious criminal procedure cases. While there are not an especially large number of these cases, only 16 in total, the overall number of cases examined in Table 4.6 is only 93. Table 4.7 examines this same body of cases but excludes criminal procedure cases in an attempt to examine whether or not these cases are strongly influencing the results seen above.

Filtering the cases in this way brings the total number of observations quite low, but they remain at a technically acceptable if not ideal level for analysis. Doing this also appears to bring
the results into harmony with the trends of significance previously observed. Precedent direction once again exerts significant and positive influence on decision direction while all other variables fail to reach significance. It appears that the ideologically divisive criminal procedure cases were enough to obscure the influence of precedent in this small set of cases even if their influence was not sufficient to elevate attitudes to significance.

Conclusion

So where does this leave us? Comparing the results here with Pacelle and colleagues’ integrated model of Court decision making, it appears that there is evidence of administrative cases representing a distinct area of evaluation by the justices. Analysis of the full set of cases provided evidence of a mix of significant factors distinct from the relevant factors in the full set or the subsets of Pacelle et al.’s (2011) cases. The area comparisons here likewise proved distinct from their counterparts in the original study. Of particular interest is the general strength of legal
factors\textsuperscript{112} in explaining decisions made in these cases to the exclusion of often-relevant attitudinal and strategic factors. Pacelle, Curry, and Marshall (2011) found legal factors to be influential in every issue area they examined.\textsuperscript{113} However, other factors had a significant effect on the decision direction of cases in each of the areas they examined.

As discussed in the previous chapter, many of these cases were decided unanimously. The strong apparent influence of the law and the muted impact of attitudes on display, in light of the proportion of unanimous decisions on display here, seems to make sense. Depending on one’s view of the Court, such a pattern can be read in one of two general ways: either there was little disagreement because the law was so clear, or the justices were not particularly interested in the outcome and thus decided to go in the direction the law pointed.

The lack of strategic influence still seems a bit strange on its face. While the lack of readily apparent impact of presidential party on decision direction in Chapter 3 hinted at the White House playing a perhaps diminished role here when compared to other areas of the law, the outcome might still be seen as an unexpected one given the connections between the president and executive agencies. I explore this relationship a bit more in the following chapter.

I believe the lack of significance in the case of both Congressional chambers is perhaps not so difficult to explain. While it might be expected that the Court would act strategically and defer to the wishes of Congress in these cases due to the cases being overwhelmingly economically and statutorily focused in nature, such expectations overlook an important aspect of administrative law. Stability in the law is an important value to be pursued if agencies are to know what they need to do and how they might go about doing it. While Congress as an institution will be very influential in creating the framework inside of which agencies work, their

\textsuperscript{112} Administrative civil liberties cases before dropping criminal procedure cases notwithstanding.
\textsuperscript{113} And the direction of precedent to be influential in each area other than Constitutional civil liberties cases. Even here, issue evolution and on-point precedent exerted significant influence.
influence will likely be more rooted in the statutes of the past than the political passions of the moment. If a stable, predictable application of the law is as important as I believe it to be in this issue area, it makes a great deal of sense that the Court would not make their decisions primarily or even heavily based on the preferences of those working in the Capitol today. Congress’s very real influence on agencies should instead be more time-lagged in nature. I think that this presents an interesting and likely fruitful avenue for additional examination, but I will leave that for another day.

There is, I think, sufficient evidence of both coherence and distinctiveness on display here to justify treating the examination of the body of cases identified in Chapter 3 as meaningful and potentially useful endeavor. This being established, I will now proceed to attempt to address the question that the previous 119 pages have been building to: how does the Supreme Court evaluate the actions of federal agencies?
Chapter 5

Evaluation of Administrative Action

We now arrive at the main event, so to speak. I have discussed the role of both the Supreme Court and the federal bureaucracy as powerful and important actors in the national policy process, reviewed literature relevant to the functions of both the Court and agencies, identified, isolated, and discussed a body of Supreme Court cases that focus on the interactions between these actors, and conducted an analysis that provides evidence that this body of cases represents a coherent and unique area of the Court’s jurisprudence. Up to this point, however, I have not lived up to the promise of this work’s title and addressed the question of how the Court actually evaluates the various and sundry actions of federal agencies. I shall now attempt to correct that.

Before I begin, though, it seems worth taking a moment to discuss why I think this is a question worth answering in the first place. Virtually any activity or program undertaken by government will be placed in the hands of a federal agency to carry out. If, as Lowi (1986) argues, Congress is in the habit of delegating authority while proving deficient in setting clear goals and boundaries, these programs and activities might either fail to serve as intended or vastly overstep what would generally be viewed as the appropriate boundaries. Of course, agencies are not only beholden to Congress. The president also has a wide variety of tools at his disposal to manage the bureaucracy. If, however, as Wilson (2000), Croley (2003) and Pika (2017) have argued, there are serious limitations to the overall level of oversight and control the president can exert, then review of those questionable administrative actions that the president cannot monitor and Congress will not stir itself to collectively notice will fall to the courts.

114 Or threat, depending on the reader’s interests.
115 This might be directly or indirectly, through means such as grant administration or contracting with the private sector. In either case, the larger point still stands.
If the courts play a substantial role in the process, it seems worth knowing how they will execute this duty. While the Supreme Court is unique and distinct from the rest of the federal judiciary, it does sit at the pinnacle of the third branch of government. What the Court does and how the Court does that will influence what the circuit and district courts do. Furthermore, the Court’s rulings will influence the goals that agencies pursue and the means by which they pursue them.

I have previously discussed three models of understanding the Court’s decision making. The attitudinal model holds that each of the justices are single-minded pursuers of their own preferred policy outcomes. The legal model posits that the justices follow and apply the dictates of the law as embodied in the Constitution, relevant statutes, and, perhaps most importantly, the Court’s own precedent. The strategic model\textsuperscript{116} expects the Court to, at least from time to time, bow to the wishes of the elected branches due to the web of interdependence the federal government is built upon and the lack of direct enforcement mechanisms the Court possesses.

Each of these models has important implications for the specific way the Court wields its influence over agencies, especially if one particular approach is dominant. If the justices approach administrative cases primarily as predicted by the attitudinal model, it might be proper to view any Congressional delegation of authority to an agency as ultimately a potential delegation of authority to the Court. If the legal model is the best predictor of the Court’s decisions, it could be appropriate to view the justices as focusing on policing the boundaries that the elected branches have set.\textsuperscript{117} If strategic considerations dominate, it might be expected that the Court would attempt to enforce the contemporary will of the elected branches on agencies. While such an arrangement might have some positive effects on reinforcing democratic control,

\textsuperscript{116} I focus on inter-branch strategy here, though strategic interactions between the justices are also very important.
\textsuperscript{117} Though the Court’s own role in interpreting those boundaries should still not be ignored.
it also has the potential to introduce significant levels of instability into administrative considerations as the preferences and priorities of elected officials shift with those of the electorate. Given the expansive nature of the modern administrative state, it seems useful to know under which, if any of these, set of arrangements agencies might be operating.

Data and Model

The data used for this analysis are the same described in Chapter Three and used in Chapter Four. The same body of cases are employed, and several of the variables that have been used descriptively or analytically in previous chapters make a reappearance alongside a few new ones.

For the dependent variable, I chose to use whether or not the government position in the case prevailed. Given that my interest is how the Court evaluates administrative action, the wins and losses of the agencies seemed the most appropriate dependent variable. Government victories are coded 1, while government losses are coded 0. This information was obtained by examining the petitioner, respondent, and partyWinning variable in the Supreme Court Database (Spaeth 2016). In the five cases where different government actors were both petitioner and respondent, I coded the case 1 if the actor that received the support of the Solicitor General was successful. Because my dependent variable is binary in nature, I will be using logistic regression to test the model.

Before I continue, it seems worth elaborating on why government success or failure is the most appropriate dependent variable for this analysis. Decision direction, which is used as the dependent variable in a large proportion of modern studies of the Court, seems inappropriate here. The coding of decision direction is based on the issue area of the case being examined, and

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118 Summary statistics for all independent variables are provided in Table 5.1.
119 In all five such cases, the SG supported the petitioner.
issue area coding generally does not make an accounting of the presence or absence of administrative factors which are at the center of this work. Additionally, both the practical and normative applications of this study revolve principally around examining under what conditions government actions are upheld or struck down by the Court. While decision direction incorporates concepts of pro- or anti-government impact, the usefulness of these components is limited by the aforementioned issue area-based coding and far less direct than simply examining whether or not the government’s position prevailed.

The first independent variable included is whether or not the government acted as petitioner in a given case. This will be referred to in the following tables as Government as Petitioner. The government has an extremely high rate of success when acting as the petitioner before the Court. Cases where the government is acting as the petitioner are, by their nature as cases of choice for the SG, likely to be important in some way to either the president or the government more broadly. For example, the many tax cases included in the group of cases examined here have real bearing on how the U. S. government carries out one of its core functions. Given this, it seems important to examine whether or not the government bringing the case to the Court has significant impact in and of itself on the likelihood of success. This variable is coded as a 1 if the government is listed as the petitioner in the Supreme Court Database and a 0 if it is not. I expect the impact of this variable to be both positive and statistically significant controlling for the effects of the other independent variables included.

The second independent variable is the presence or absence of administrative rulemaking. This will be referred to in the following tables as Rulemaking Occurred. The previously discussed language of the Mead (2001) decision indicates that the Court should, following that decision, give greater deference to agency action when the agency has engaged in notice-and-

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120 Compared to the merely very high win rate it has as respondent.
comment rulemaking that empowers it to take the actions in question. If the Court is taken at its word, it can also be assumed that it showed similar deference to actions with supporting regulations during the *Chevron* (1984) era. Given the importance the Court has placed on promulgating relevant regulations in *Mead*, it seems important to include the presence of such activity in the model.

In order to determine whether or not rulemaking activity occurred, I read through the syllabus and majority opinion of the included cases. I looked for mentions of formalized regulations\(^{121}\) that would allow or require the agency to take the action that it took. Cases where such regulations were mentioned are coded 1, those that were not are coded 0. Most often, a reference to agency regulations appearing in the Code of Federal Regulations (CFR) was the first sign that such regulations existed. However, a simple CFR citation was not sufficient to code a case as a 1 absent other information. The regulation mentioned had to have some bearing on the action taken by the agency. I have tried to err on the side of overinclusion, and have coded cases as 1 if there seemed to be some sort of substantive connection between the regulation and the agency’s action. I have also coded cases as 1 if the question the Court addressed was whether or not the agency possessed the authority to promulgate a given regulation or whether the agency properly applied, enforced, or interpreted one of its own regulations. In some instances, the information contained in the syllabus was sufficient to rule a case in, but cases were not ruled out without examining the majority opinion as well.

In some cases, the Court made mention of regulations that had been established through notice-and-comment procedures but went on to note that those regulations would prohibit the activity the agency engaged in. These cases were coded as 0. There were also a few cases where

\(^{121}\) Regulations that were made through the notice-and-comment process rather than through methods such as the ruling letter at the center of *Mead*. 
the Court discusses regulations that did have a bearing on the actions taken by an agency, but were not finalized until after the action in question was taken. These cases are also coded 0.

Given the language in the *Mead* (2001) decision, I expect the impact of this variable to be both significant and positive controlling for the effects of the other independent variables included.

The third independent variable I include is whether or not the agency action in question involved formal adjudication. This variable will be referred to in the following tables as Formal Adjudication. I include this because, like notice-and-comment rulemaking, the *Mead* decision states that formal adjudication has often been involved in the application of *Chevron* deference during the *Mead* and *Chevron* eras and I wish to evaluate this claim. The basic process for coding this variable was similar to that of coding the regulatory variable in that I read the syllabus and majority opinion looking for the Court to mention formal adjudicatory activity. However, as what exactly constitutes formal adjudication is less well-defined than what constitutes notice-and-comment rulemaking, my approach here is a bit less refined. If an Administrative Law Judge (ALJ) or Immigration Judge was involved in the agency’s decision making process, I code the case as 1. If no such official was involved, the case is coded as 0.

While this approach to coding the variable may overlook some instances of activity that might be considered formal adjudication, it at least allows me to be confident that those cases that are coded 1 do involve activity that can be classified as such. Such possible exclusions are not ideal. However, it seems to me that, when dealing with a concept that lacks well-defined outer boundaries, the prudent course of action is to include only those instances that can be said with certainty to meet the desired criteria. Once again taking the Court at its collective word, I expect both this and the rulemaking variable to positively and significantly impact the likelihood of the government’s position prevailing before the Court controlling for the effects of the other

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122 Per 8 CFR 1000.1, Immigration Judges are classified as administrative judges.
independent variables.

The fourth independent variable included is the presence or absence of a high rate of dissension in the justices’ final vote. This variable will be referred to in the following tables as High Dissension. I include this variable as a proxy measure of issue salience in a given case. There is evidence to suggest that the justices’ preferences are likely to be more impactful on decisions in cases of high rather than low salience (Unah and Hancock 2006). Given this, it seems appropriate to include a measure of such salience in an attempt to tease out any potential sources of attitudinal influences in this area. However, the more commonly used measure of contemporary salience based on the appearance of a case in the *New York Times* (Epstein and Segal 2000) seems inappropriate to use in this context. I believe this to be so due to the nature of the cases being examined. While the outcomes of administrative cases have substantive importance for the functioning of our nation, I suspect that the subject matter involved in such cases will rarely be the sort of thing that captures the attention of the public at large or would offer much incentive to buy a newspaper.

Cases with three or four dissenting votes are coded as 1 while all others are coded as 0 for this variable. My choice of three dissents to be the demarcation point for the coding of this variable is based on two factors. First, almost 14 percent\(^{123}\) of the cases in my dataset involve less than nine justices participating at the decision stage. Using three dissents as the cutoff allows for these cases to be meaningfully included. Second, even for those cases where all justices are

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\(^{123}\) While all nine justices cast a vote in the vast majority (276) of the cases, there are 38 cases where 8 justices participate in the decision, 5 cases where 7 justices participate in the decision, and 1 case where only 6 justices participate in the decision (this one was decided by a unanimous decision). I apply the 3-vote dissent threshold to all cases for the coding of this variable.
participating, a full third of the total number of justices dissenting seems to me to be worthy of attention, particularly given the large proportion of unanimous cases included in the data.124

In comparing this measure to the *Times* based measure of salience, there is little agreement. In total, there are 122 cases with high levels of dissension as defined above while only 38 of the cases in my dataset made an appearance in the *New York Times*. Of those 38 cases making an appearance, only 24 also displayed high levels of dissension. I suspect that the reasons for this are those I have already provided. However, there is at least a modest link between this measure and the use of the *Times*. In the article where they initially proposed the use of the *New York Times* as a source for information about salience, Epstein and Segal (2000) noted that cases with higher rates of dissension in the final vote were more likely to be considered salient than those cases with fewer or no dissenting votes. Given the links between high issue salience and the increased impact of attitudes as well as low issue salience and the potential for greater deference to elected officials and/or precedent (Pacelle, et al. 2011), I expect the impact of this variable to be both significant and negative controlling for the effects of the other independent variables included.125

I also think that I should take a moment to discuss a potential issue with this variable. I acknowledge the possibility of concerns about this variable being too closely connected to my independent variable. This is reasonable, given that both the level of dissension and the party winning the case are a part of the larger process of the Court reaching its final decisions. However, I argue that, while there are important connections between these variables beyond the scope of what I have hypothesized, that the two are not so closely related as to make including High Dissension in the analysis counterproductive. Empirically, while the values for these two

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124 129 of the 318 cases, or 40.57 percent, of the cases examined here were decided unanimously.
125 Given the reputation and the general success of the Solicitor General, it might also be expected that the level of dissension involved to be lower than might otherwise be the case.
variables are correlated to one another to an extent, this correlation is relatively low and within generally accepted limits of covariance. Theoretically, while both are the product of the Court’s decision making process, they are not inherently bound together. A 9-0 or 5-4 decision can be in the favor of the petitioner just as easily as it can be in the favor of the respondent. As discussed in Chapter 3, high dissension seems to be proportionally higher in government losses, and that is in fact what initially spurred me to consider this variable for inclusion. However, if there were no reason whatsoever to suspect a connection between High Dissension and whether or not the government’s position prevails, there would also be no reason to include it. Finally, high levels of dissension are used here not because I think that the existence of such dissension is itself meaningful. Instead, I include it as an indicator of a theoretically important but difficult to measure factor.

The next two variables included in the model are relatively straightforward and deal with the issues addressed in each case. I include separate variables for cases involving Constitutional questions and civil liberties questions. These variables will be referred to in the following tables as Constitutional Question and Civil Liberties Question, respectively. Each case is coded 1 for each variable if the corresponding subject matter is addressed, 0 if it is not. The coding for these variables is not inherently connected or interdependent, so a given case could potentially be

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126 The correlation between whether or not the agency position prevailed and High Dissension is -0.1975.
127 Employing the variable in a way that implied it was meaningful in and of itself would, I think, be troubling. Theoretically, the idea that high levels of dissention directly contribute to whether or not the government wins seems tenuous at best. From a practical standpoint, this information would be effectively useless as scholars and the parties would have access to this information at the same time that they also had access to the decision itself.
128 Both of these variables are taken from Pacelle’s data, with one caveat. 31 cases of the 318 included were coded as dealing with neither questions of civil liberties nor economic issues. After consulting with Pacelle, I read through these 31 cases and reclassified each as either more focused on economic or liberties questions. As doing this resulted in every case falling into one category or the other (with 3 cases displaying elements of both), I chose to include the presence of the less numerous less numerous civil liberties issues as a variable here.
coded 0 or 1 for both of these variables. Both are included due to the general acceptance in the modern literature on the Court of their role in the justice’s decision making process. As previously discussed, the preferences of the justices are generally more impactful in high salience cases (Unah and Hancock 2006). Often, though not always, cases involving Constitutional questions and questions involving civil rights and liberties are such cases. I suspect that the Court will generally be unlikely to tolerate bureaucratic intrusions into the realm of civil liberties or to uphold agency action that has been challenged on Constitutional grounds. Therefore, I expect both of these variables to be significantly and negatively related to government victory controlling for the effects of the other independent variables.

The seventh variable included is whether or not there is an apparent ideological incongruity between the position taken by the Solicitor General and the expected preferences of the president in a given case. This variable will be referred to in the following tables as SG/President Incongruity. This is included based on a relationship found by Bailey et al. (2005) between the justices, the SG, and the president. They find that the SG can be more influential when arguing for a position that is in opposition to the one that would be predicted on the basis of the president’s ideology. In other words, “A justice is more likely to support a conservative S. G. when the S. G. advocates a liberal rather than a conservative outcome” (Bailey, et al. 2005, p.81).

This effect can be viewed in three different but connected ways. First, it can be seen as a form of attitudinal influence. The SG is, despite presenting a different sort of ideological argument than he or she normally might, suggesting an outcome that is perhaps more in line with the sincere policy preferences of some of the justices. Those justices may be more likely to

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129 There are 93 civil liberties cases and 43 Constitutional cases. 27 cases involve both Constitutional and civil liberties questions.
support an outcome that is closer to their preferred one than a given SG might typically make. The second view is that acting in such an ideologically unusual manner might be a sign of the quality of the legal argument being made. The basic logic of this second interpretation is the same that many of us use when evaluating the claims of others: the argument a person makes for their preferred outcome, or an outcome that is personally beneficial, may need to be heavily scrutinized; the argument someone makes against their preferred outcome, or for an outcome that does not directly benefit them, may appear more trustworthy. The third possibility is that, when behaving in this manner, the Court views the SG as the lawyer for the people rather than for the president. It is not necessary to reject one view entirely and to accept only the other. Instead, the three possibilities can be seen as complementary, each indicating one way that the particulars of a case might influence the justices. Such a view is compatible with the large body of scholarship that rejects purely attitudinal or legal explanations for judicial behavior.

In order to examine Bailey, Spriggs, and Maltzman’s (2005) findings in this specific context, I have constructed a simple measure of ideological incongruity between the Solicitor General and president. I begin, as Bailey et al. do, with the assumption that the SG and president are, at least in their official functions, closely linked in terms of ideology. I also assume that Republican presidents are generally ideologically conservative while Democratic presidents are generally ideologically liberal. Following from these assumptions, I will say that an SG for a Republican president arguing for a liberal position represents an instance of ideological incongruity. The SG for a Democratic president arguing for a conservative position would also

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130 And the context is quite different, as their study examined a different time frame (1953-2002 terms), was restricted to cases involving civil liberties questions, and focused on the votes of the individual justices rather than the full Court.

131 For the five presidents whose administrations are included in the timeframe of this study, the common space scores used throughout this work support this assumption. The common space scores are -.475 for Carter, .564 for Reagan, .463 for H.W. Bush, -.475 for Clinton, and .531 for W. Bush.
indicate such incongruity. To determine if such an incongruity exists, I simply compare the party of the president during the term during which a case was heard\textsuperscript{132} to the ideological direction of the argument the SG presents.\textsuperscript{133} If an incongruity as described above is found, I code the case as a 1. Otherwise, it is coded as a 0. I expect the impact of this variable to be both positive and significant controlling for the effects of the other independent variables.\textsuperscript{134}

The eighth variable is ideological congruence between the position taken by the Solicitor General and the preferences of the median justice, further building on Bailey, Kamoie, and Maltzman’s (2005) findings. This variable will be referred to in the following tables as SG/Court Congruity. In the same paper as previously discussed, Bailey et al. (2005) also find evidence to support the idea that the Solicitor General can have increased effectiveness when arguing for an outcome that is ideologically appealing to the justices. This is in keeping with the broader literature’s acceptance of the impact of the preferences of the justices on case outcomes, and I include this variable as a means of examining the impact of these attitudes on the outcomes of administrative cases. Similar to the previous variable, I have coded this one based on a comparison of ideological direction of the position taken by the SG\textsuperscript{135} with ideological preferences of the median justice as measured by common space score. I code a case as 1 if the position argued by the Solicitor General is liberal and the common space score takes on a negative value or if the position argued by the Solicitor General is conservative and the common space score takes on a positive value. Otherwise, a case is coded as 0. Given the general power of judicial attitudes in explaining the outcomes of cases before the Court, I expect the impact of

\textsuperscript{132} I use the party of the president during the first part of the term, since the terms of the Court do not correspond entirely to calendar years.
\textsuperscript{133} This measure of direction is also taken from Pacelle’s data.
\textsuperscript{134} In the event that the impact of this variable was significant and negative, the outcome might be read as evidence of strategic influence.
\textsuperscript{135} Once again taken from Pacelle’s data.
this variable to be both positive and significant controlling for the effects of the other independent variables included.\textsuperscript{136} It is, however, important to note that this is not a direct measure of judicial attitudes. Using whether or not the government’s position prevailed as my dependent severely complicates any attempt to approach the impact of the justices’ preferences in a straightforward manner. I do include the variable as an indirect way of trying to measure any such potential impact.

The ninth variable included is ideological congruity between the direction of the position taken by the Solicitor General and the direction of the relevant precedent in the case. This variable will be referred to in the following tables as SG/Precedent Congruity. I again use Pacelle’s coding for the direction of the position taken by the SG and the precedent direction data from Pacelle, Curry, and Marshall (2011) used in Chapter 4 to construct this variable. If both the SG’s position and the direction of relevant precedent are coded as conservative or liberal, I code the case as a 1. If one of these factors is coded as liberal and the other conservative, I code the case as a 0. Given my argument that legal stability is highly important for decisions rendered in this area of the law and the evidence from the previous chapter to this effect, I expect the impact of this variable to be both significant and positive when controlling for the other included variables.

The final variable I include in the model is whether or not the case was decided during the \textit{Chevron} (1984) era. This variable will be referred to in the following tables as Chevron Era. The evolution of the Court’s approach to granting deference to agencies can be traced through three distinct eras.\textsuperscript{137} The first of these, embodied in the logic of the \textit{Skidmore} (1944) decision, assumed no particular deference on the Court’s part to agency decisions, but neither did it

\textsuperscript{136} Though the results of the previous chapter tempt me to expect something else.

\textsuperscript{137} See Chapter 2 for a more in-depth discussion.
Table 5.1 Independent Variable Frequencies

<table>
<thead>
<tr>
<th></th>
<th>Coded 0</th>
<th>Coded 1</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government as Petitioner</td>
<td>122 (38%)</td>
<td>196 (62%)</td>
<td>318</td>
</tr>
<tr>
<td>Rulemaking Occurred</td>
<td>186 (58%)</td>
<td>132 (42%)</td>
<td>318</td>
</tr>
<tr>
<td>Formal Adjudication</td>
<td>239 (75%)</td>
<td>79 (25%)</td>
<td>318</td>
</tr>
<tr>
<td>High Dissension</td>
<td>196 (62%)</td>
<td>122 (38%)</td>
<td>318</td>
</tr>
<tr>
<td>Constitutional Question</td>
<td>275 (86%)</td>
<td>43 (14%)</td>
<td>318</td>
</tr>
<tr>
<td>Civil Liberty Question</td>
<td>225 (71%)</td>
<td>93 (29%)</td>
<td>318</td>
</tr>
<tr>
<td>SG/President Incongruity</td>
<td>171 (54%)</td>
<td>147 (46%)</td>
<td>318</td>
</tr>
<tr>
<td>SG/Court Congruity</td>
<td>157 (49%)</td>
<td>161 (51%)</td>
<td>318</td>
</tr>
<tr>
<td>SG/Precedent Congruity</td>
<td>142 (45%)</td>
<td>176 (55%)</td>
<td>318</td>
</tr>
<tr>
<td>Chevron Era</td>
<td>146 (46%)</td>
<td>172 (54%)</td>
<td>318</td>
</tr>
</tbody>
</table>

embody any particular level of mistrust in agency exercise of discretion. With the *Chevron* decision, the Court drastically changed its stance on deference, presuming that a reasonable agency interpretation of statutory provisions was valid in the event that the intent of the statute was unclear. Finally, *Mead* (2001) struck a balance between the two, applying *Chevron* deference if an agency had engaged in a relevant exercise of notice-and-comment rulemaking or formal adjudication while turning to the less deferential *Skidmore* standard in the event that such activity did not precede agency action. For this variable, cases have been coded as 1 if they occurred during the period including the 1983 term\textsuperscript{138} through the 1999 term\textsuperscript{139} of the Court. If the case occurred during any other term, it is coded as 0. I include this variable to determine whether or not a case occurring during this period gave the government a higher chance of success. Given *Chevron’s* characterization as the most deferential of these three standards, I expect the impact of this variable to be both positive and significant controlling for the effects of the other independent variables included. The raw count of values for this and the other independent variables can be found in Table 5.1.

\textsuperscript{138} When *Chevron* was decided.

\textsuperscript{139} *Mead* was decided in the 2000 term.
Results and Analysis

Table 5.2 reports the results of the model. I will begin, once again, with the hypotheses that have not been rejected. As expected, the occurrence of rulemaking is significantly and positively associated with the government’s position prevailing before the Court. This finding is both legally important and, in my view, normatively encouraging. Legally, agencies can have a fair measure of confidence that their actions will be upheld so long as they engage in the notice-and-comment process and operate within the boundaries established through it.140 This provides the potential for the sort of legal stability necessary for agencies to effectively pursue their appointed tasks.

This finding might allay some of the fears of scholars concerned with the potential for agencies that are largely insulated from public control to act in a manner divorced from public preferences. This judicial incentivization of engaging in the notice-and-comment process also provides an important opportunity for interested actors in the elected branches and the public sphere to become involved in the regulatory process. As discussed in Chapter Two, the president and Congress have their own tools for managing and influencing agencies. Interest groups and concerned citizens have the potential to influence public attention and opinion to encourage elected officials to put those tools to use should they be disinclined to do so otherwise. However, all of these actors need both time and the information that action may be called for in order to act in an effective manner. The notice-and-comment process provides both of these, as agencies must both publicly announce their proposed rule and delay final action for a defined period after doing so. By finalizing a rule, the agency legally binds itself to taking specific kinds of action in

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140 This should not be understood to mean that agencies can effectively give themselves the authority to do anything and everything their leadership might like through such rulemaking activity, as the Court does not uphold every such rule or action taken under them. There were 185 total cases where no rulemaking occurred. 67 of those resulted in a government loss, while 118 were wins for the government. There were 133 cases where rulemaking occurred. 24 of those were losses for the government while 109 were government wins.
Table 5.2 Likelihood of Government Position to Prevail

<table>
<thead>
<tr>
<th></th>
<th>Model</th>
<th>Discrete Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government as Petitioner</td>
<td>.44 (.28)</td>
<td>.07</td>
</tr>
<tr>
<td>Rulemaking Occurred</td>
<td>.95** (.31)</td>
<td>.16</td>
</tr>
<tr>
<td>Formal Adjudication</td>
<td>.15 (.33)</td>
<td>.03</td>
</tr>
<tr>
<td>High Dissension</td>
<td>-1.04** (.28)</td>
<td>-.18</td>
</tr>
<tr>
<td>Constitutional Question</td>
<td>1.20* (.54)</td>
<td>.20</td>
</tr>
<tr>
<td>Civil Liberty Question</td>
<td>.60** (.34)</td>
<td>.15</td>
</tr>
<tr>
<td>SG/President Incongruity</td>
<td>.54 (.34)</td>
<td>.09</td>
</tr>
<tr>
<td>SG/Court Congruity</td>
<td>.08 (.28)</td>
<td>.01</td>
</tr>
<tr>
<td>SG/Precedent Congruity</td>
<td>.82** (.28)</td>
<td>.14</td>
</tr>
<tr>
<td>Chevron Era</td>
<td>.34 (.28)</td>
<td>.06</td>
</tr>
<tr>
<td>Constant</td>
<td>-.56 (.40)</td>
<td></td>
</tr>
<tr>
<td>Chi-Squared</td>
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<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-163.41</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>318</td>
<td></td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

141 The Pearson $\chi^2$ value for the overall model is 214.05, with a probability of .2208, indicating that the model fits the data well. As a secondary check, evaluation of the model via Receiver Operator Characteristic curve returns a $p$ value of .7592, indicating that the model predicts observed outcomes reasonably well. Collinearity does not appear to be an issue, with the VIF values for the independent variables ranging from 1.04 for Chevron Era to 1.18 for Civil Liberty Question. A correlation matrix of the independent variables indicates that the most extreme values are .2916 for Constitutional Question and Civil Liberty Question and -.2776 for Rulemaking Occurred and Formal Adjudication Occurred. Using a predicted probability equal to or greater than 0.5 of the case being decided in the government’s favor as the cutoff point, the model correctly predicts 75.47% of included observations.
specific ways. Courts may or may not always agree with an agency’s interpretation of their own regulation, but there is evidence here to suggest that the Supreme Court, at least, will defer to the agency if rulemaking has occurred more often than not. By acting in a more deferential manner in instances where agencies have engaged in rulemaking, the Court effectively gives agencies that have the authority to regulate a choice: either submit to greater public and political scrutiny before taking action or submit to greater judicial scrutiny afterwards.

Next, high dissension amongst the justices appears to exert a significant and negative influence on the likelihood of the government’s position to prevail. If my assertion that a high level of dissension does in fact mean that a case is more salient to the justices and that greater salience, in turn, is likely to make the justices less likely to defer to the preferences of other actors in government, then it should not be surprising to see such effect and significance. The real importance of this outcome, I think, could be in providing a starting point to begin to look for the influence of attitudes in this area of the law. The results of the previous chapter, as well as some of the results from this one, do give some support to the idea that attitudes are not as influential in administrative cases as they appear to be in other areas. However, this finding might indicate that such influence is present, albeit in a specific subset of administrative cases.

However, it is possible that high dissension could exert significant influence for reasons other than salience and the resulting activation of attitudinal factors. Table 5.3 was constructed to explore this possibility. The model detailed in the table is identical to the one presented in Table 5.2 except that the variable for high dissension has been removed and the cases have been split into two categories: those cases that exhibit a high degree of dissension and those that do not.

143 If the impact of attitudinal factors is driving the significance of high dissension, it should be

142 Those cases coded as a 1 for the high dissension variable as discussed above.
143 Those cases coded as a 0 for the high dissension variable as discussed above.
expected that some indication of this would appear in the results presented. The most likely place to look for such an indication would be in the impact of ideological congruity between the Solicitor General’s position and the policy preferences of the median justice, indicating that the argument presented and presumably the action taken is directionally compatible with a majority of the Court. This variable should rise to significance, or at the least come closer to doing so, if attitudes are the driving factor of the observed relationship between high dissension and the government’s likelihood of success.

As Table 5.3 shows, ideological congruence between the SG and the median justice does not achieve significance in either the high or low dissension cases. In fact, while the congruity measure is not even remotely close to reaching the .05 threshold in either set of cases, it is marginally closer to doing so in those cases without high dissension than those with it. This seems to pose some problems for the idea that dissension is driven purely or primarily by the influence of attitudes. I will return to this point in a moment, but first I would like to discuss the rest of what is displayed in Table 5.3. The presence of rulemaking activity achieves significance in both sets of cases, consistent with both the hypothesized importance of the variable and its observed impact in Table 5.2. Cases that present a civil liberties question are significantly more likely to result in wins for the government in cases with high dissension, similar to the original model, but this does not appear to hold true for low dissension cases. Unlike the complete set of cases, the presence of a constitutional question does not appear to have significant impact on the outcome of the case for the government when the cases are subdivided in this manner. Finally, an

144 While not completely comparable, the difference between the coefficient and standard error for the SG/Court Congruity variable is also smaller in table 5.2 than in the high dissension cases in Table 5.3. As previously discussed, the variable fails to achieve significance in either version of the model.

145 It seems important to note the impact of the subset of criminal procedure cases within the larger set of civil liberties cases observed in the previous chapter. I suspect this might be relevant here, but I will discuss this at greater length when I address the impact of civil liberties cases in the context of the original model.
### Table 5.3 Likelihood of Government Position to Prevail in the Presence and Absence of High Dissension

<table>
<thead>
<tr>
<th></th>
<th>High Dissension</th>
<th></th>
<th>No High Dissension</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Model</td>
<td>Change in Probability</td>
<td>Model</td>
<td>Change in Probability</td>
</tr>
<tr>
<td>Government as Petitioner</td>
<td>.85 (.47)</td>
<td>.16</td>
<td>.20 (.38)</td>
<td>.03</td>
</tr>
<tr>
<td>Rulemaking Occurred</td>
<td>1.16* (.50)</td>
<td>.21</td>
<td>.95* (.41)</td>
<td>.15</td>
</tr>
<tr>
<td>Formal Adjudication</td>
<td>-.12 (.50)</td>
<td>-.02</td>
<td>.45 (.46)</td>
<td>.07</td>
</tr>
<tr>
<td>Constitutional Question</td>
<td>1.36 (.77)</td>
<td>.25</td>
<td>1.22 (.80)</td>
<td>.19</td>
</tr>
<tr>
<td>Civil Liberty Question</td>
<td>1.24* (.47)</td>
<td>.23</td>
<td>.45 (.51)</td>
<td>.07</td>
</tr>
<tr>
<td>SG/President Incongruity</td>
<td>.81 (.43)</td>
<td>.15</td>
<td>.33 (.38)</td>
<td>.05</td>
</tr>
<tr>
<td>SG/Court Congruity</td>
<td>.10 (.44)</td>
<td>.02</td>
<td>.02 (.38)</td>
<td>.00</td>
</tr>
<tr>
<td>SG/Precedent Congruity</td>
<td>.78 (.44)</td>
<td>.14</td>
<td>.91* (.37)</td>
<td>.14</td>
</tr>
<tr>
<td>Chevron Era</td>
<td>.41 (.46)</td>
<td>.08</td>
<td>.36 (.37)</td>
<td>.06</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.12* (.69)</td>
<td></td>
<td>-.38 (.50)</td>
<td></td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>.00 (.02)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-66.94</td>
<td></td>
<td>-94.34</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>122</td>
<td></td>
<td>196</td>
<td></td>
</tr>
</tbody>
</table>

*p<.05, **p<.01
argument from the SG that is ideologically consistent with relevant precedent displays significant and positive impact on the government’s likelihood of success in low dissension cases but fails to do so in cases with high levels of dissension.

What is to be made of this? On the one hand, one might find some support for my original hypothesis that high dissension is a marker for salience and thus the prominence of attitudes in these results. After all, legal cues in the form of congruence with precedent seem to matter most in those cases with low dissension while not having significant impact in those cases where three or more justices sign a dissenting opinion. The presence of a civil liberties question, generally seen as an area of the law where attitudes are at their most influential, has a significant and positive effect on the government’s chances of victory. Such decisions are generally coded as conservative in nature, and the Court is generally considered to be ideologically conservative during the time under examination.

On the other hand, the primacy of attitudes in explaining the relationship between high dissension and government victory is not entirely clear. First, and most importantly, the variable that stands most closely as a measure of the impact of attitudes fails to achieve significance in either set of cases. Second, as discussed in the previous chapter, the inclusion of criminal procedure cases under the larger umbrella of civil liberties cases appears to have the potential to perhaps be a confounding factor in the analysis of that subset of cases. Finally, the presence of rulemaking activity, representing a legal cue for deferential treatment of agency action, does reach significance in both sets of cases on display.

In light of these competing interpretations, I think an alternative explanation of the impact of high dissension might bear some consideration. I think it is possible that high levels of dissension amongst the justices might be a marker of a certain, high degree of legal ambiguity

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146 To the extent that they can be measured by proxy, as I have attempted to do here.
present in a case. If the Court makes a unanimous decision upholding a government action, it seems reasonable to assume that the relevant laws can pretty clearly be read as permitting the action in question. A unanimous decision against the government would seem to imply the opposite, either because some aspect of the law did not enable an agency to take a given action or because some aspect of the law prohibited the action from being taken, or at least taken in the manner or under the circumstances in question. For those decisions that fall somewhere in between, it seems fair to say that different, competing interpretations of the law exist in the minds of the justices.

If it is accepted that the justices are legal experts and act in some capacity as such when they make their rulings, then it is also relatively simple to accept that these different interpretations have some level of legal validity. While some level of expert disagreement can almost always be expected on a given topic, as the number of experts that take a specific interpretation increases, more credence might reasonably be given to that interpretation. If large portions of a panel of legal experts see different, competing interpretations of a given set of laws as valid, it seems reasonable to expect that an agency trying to implement this set of laws faithfully would have difficulty finding the correct interpretation of those laws. This could explain both the significance and the direction of high dissension in the original model. This is merely speculation at this point, as I have no way of directly testing this particular hypothesis at this time. I am also not prepared to entirely abandon the possible explanation of salience for the impact of high dissension on the government’s chances of success before the Court. However, as already discussed, I do not think that the results in Table 5.3 wholly support my original hypothesis for

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147 This is not entirely uncontroversial, as strict attitudinalists might hold that the law, at most, provides a source of potential justification for decisions that each justice would prefer to make given the policy implications of a given case. As a counterpoint to such views, I offer up the large number of unanimous decisions in this area and that the Court reaches more broadly, as well as the evidence presented in the previous chapter to support the idea that the law does exert influence on this body of cases.
the nature of this relationship.

The final hypothesis that finds support in the data is the impact of ideological congruity between the position taken by the Solicitor General and the relevant precedent in a case. The impact of the variable is both positive and significant, indicating that the government’s position is more likely to prevail when the government’s lawyer presents an argument that is consistent with the most applicable case law. Given the findings of Chapter 4 and my general hypotheses about the nature of administrative law jurisprudence, this is not a particularly surprising outcome. It is, however, an important finding. Asking a different sort of question than that asked in the previous chapter and controlling for a different set of factors, strong evidence to support the power of precedent in explaining outcomes in this area of the law is once again found.

Moving on to those hypotheses about the full set of cases that failed to find support, I am once again fortunate that these results are also quite interesting. First, despite the sign being in the correct direction, the government acting as petitioner does not exert a significant influence over the outcome of the case when controlling for the other included variables in this set of cases. This should not be understood to mean that petitioner status for the government makes no difference, since as just discussed the role of the SG in choosing which cases to petition the Court to take is an important and impactful role in the larger process. However, it appears that, controlling for a variety of other factors, petitioner status does not have a significant effect in determining the outcome of a particular administrative case. It is important to understand this in its proper context, though. Examining the full set of cases heard by the Court during the period examined, the petitioner wins almost 63 percent of the time with the respondent prevailing only 37 percent of the time.\footnote{Using the Supreme Court Database’s partyWinning variable, the petitioner won in 2341 of the 3744 cases heard during the 1977-2007 terms of the Court.} By comparison, the federal government, typically represented by the
Solicitor General,\textsuperscript{149} wins almost 65 percent of the time when acting as the respondent and around 74 percent\textsuperscript{150} of the time as the petitioner. In this light, the lack of significance for this variable could be viewed as the result of the inherent benefits of being the federal government or being represented by the Solicitor General as outweighing whatever benefit to acting as petitioner that might exist.\textsuperscript{151}

Next, though the sign is again in the proper direction, the presence of formal adjudication does not appear to have a significant impact on whether or not the government’s position prevails before the Court. Table 5.4 shows the total number of cases that both did and did not involve formal adjudication as well as how many of those cases the government won or lost. Cases where formal adjudication occurred were still almost twice as likely to be won by the government as lost, so, as the positive value for the variable’s coefficient indicates, it does not appear to be an actively detrimental factor for the government. However, this win rate still falls behind the nearly three-to-one victory ratio the government enjoys in cases not involving formal adjudication.

So why the disparity in impact between formal adjudication and rulemaking when the Court has identified both as receiving high levels of deference? Several potential explanations seem plausible. The first that I should mention is the possibility that the manner in which I have coded the variable for the presence of formal adjudication is overly restrictive. While I am confident that those cases I have coded as 1 for formal adjudication do, in fact, involve such adjudication, it is possible that my coding criteria have excluded other, less readily apparent

\textsuperscript{149} The Solicitor General participated directly in the litigation of 314 of the 318 cases included in my data. In the remaining 4 cases, the office submitted an \textit{amicus} brief at the decision stage. The cases where the SG was not a litigant were: \textit{Dirks v. Securities and Exchange Commission} (463 U.S.646), \textit{Board of Governors of the Federal Reserve System v. Dimension Financial Corp.} (474 U.S.361), \textit{Pension Benefit Guaranty Corporation v. LTV Corporation} (496 U.S.633), and \textit{Metro Broadcasting, Inc. v. Federal Communications Commission} (497 U.S.547).

\textsuperscript{150} Making the OSG arguably the most successful law firm to argue before the Court.

\textsuperscript{151} And, perhaps, of any such potential remaining benefits being overshadowed by other factors such as the impact of the law.
cases. I contend that my criteria are a reasonable means to operationalize the study of a somewhat nebulous concept, but reasonable may not mean adequate in this instance. Still, every study has its limitations, and I leave this question to be addressed by future research.

Another possibility does seem worth exploring, though. Given the already discussed importance of issue salience, it should be remembered that many of the cases involving formal adjudication deal with issues such as immigration or labor disputes.\(^{152}\) If the kinds of cases that involve formal adjudication are different from those that involve rulemaking, confounding factors may overshadow the impact of any deference that might otherwise be granted to cases involving formal adjudication. If one set of cases presents more salient issues than the other, it might be expected that these factors would be primarily attitudinal in nature. As I have previously argued that high levels of dissension are an indicator of case salience, it seems appropriate to use the concept to explore this possibility.

Table 5.5 presents the number of cases an agency won and lost in the presence or absence of high levels of dissension in the justices’ final vote. This information is further broken down into two categories: those cases where formal adjudication occurred and those where rulemaking occurred.

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\(^{152}\) Of the 79 cases involving formal adjudication, the three most common issue areas are Unions (26 cases), Civil Rights (18 cases), and Economic Activity (15 cases). Of the 133 cases involving rulemaking, the three most common issue areas are Economic Activity (34 cases), Taxation (34 cases) and Civil Rights (20 cases).
occurred. A few patterns emerge from this information. First, while cases with high dissension did not make up a majority of either set, cases involving formal adjudication make up a higher proportion (42 percent) of high dissension than rulemaking cases (35 percent). Second, the likelihood of success for the government does seem to be higher in cases with low rather than high dissension as previous analysis and discussion would indicate. This effect seems to hold for both rulemaking and adjudicatory cases, though the extent of this effect does appear to differ between the two categories of cases. The government wins just over 75 percent of the formal adjudication cases in the absence of high dissension, but 50 percent when high dissension occurs. For the rulemaking cases, the government wins slightly more than 87 percent of the cases where there is not high dissension and almost 72 percent of the cases where it does occur. Salience as measured by high dissension seems to matter, but to different extents in the two kinds of cases.

There are two other places where the impact of salience specifically or attitudinal factors more broadly might be found to exert differential influence on these two categories of cases. The first is the presence of a civil liberties question. Perhaps disappointingly, there seems to be little difference in the relative proportion of civil liberties cases in each category. 33 percent of the rulemaking cases involve a civil liberties issue while 35 percent of formal adjudication cases do. While there is a difference here, it is not a significant one. The second place to look is the ideological slant of the arguments being presented. I will discuss the impact, or lack thereof, of this variable in greater detail in a moment, but the SG/Court Congruity measure serves as an indicator of ideological agreement between the position being argued by the

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153 These categories are not mutually exclusive. While there is not a great deal of overlap between the variables, there are 12 cases that involved both formal adjudication and rulemaking. Of these 12, 5 also exhibit high dissension.
154 44 of 133 total.
155 25 of 71 total.
Table 5.5 Agency Success, Formal Adjudication, Rulemaking, and High Dissension

<table>
<thead>
<tr>
<th>High Dissension</th>
<th>Formal Adjudication Occurred</th>
<th>Rulemaking Occurred</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agency Won</td>
<td>Agency Lost</td>
</tr>
<tr>
<td>Yes</td>
<td>19 (24%)</td>
<td>16 (20%)</td>
</tr>
<tr>
<td>No</td>
<td>34 (26%)</td>
<td>10 (8%)</td>
</tr>
<tr>
<td>Totals</td>
<td>53 (25%)</td>
<td>26 (12%)</td>
</tr>
</tbody>
</table>

government and the preferences of the median justice. Also disappointingly, this avenue appears to offer little to explain the difference between the sets of cases. 46 percent of the rulemaking cases display congruity between the SG and the median justice, while almost 55 percent of the adjudicatory cases do. While this difference is of greater magnitude than that of the civil liberties cases, I would expect the government to fare better in the cases involving formal adjudication if ideological congruence were the important factor.

Salience appears to exert differential influence on the two sets of cases, but does not seem to account for all of the differences observed between them. Attempts to look at the impact of attitudes by proxy also do not shed much light on the nature of the relationship. So what does this leave us with? One possibility is that there are other confounding factors at play that fall outside of the scope of this study. The issue areas involved might matter in a way difficult to measure here, or the particulars of specific cases might be relevant in a manner difficult to assess through aggregate data analysis. These are ever-present challenges that can certainly not be ruled out here. Another is that the Court, while considering itself deferential in the face of formal adjudication, may simply be less willing to defer to such action than to rulemaking. Third, and not entirely separate from the second explanation, is the possibility that the highest panel of

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156 62 of 133 total.
157 39 of 71 total.
158 More traditional approaches to assessing the impact of attitudes are made difficult to employ due largely to the dependent variable used in the model.
judges in the nation might apply more scrutiny to the quasi-judicial activity of formal adjudication than to the quasi-legislative activity of rulemaking. Fourth and finally, there is the chance that the Court’s discussion in *Mead* of its criteria for deference amounts to hollow words, though the significant impact of rulemaking makes this seem somewhat unlikely. For my part, I am inclined to think that some mixture of possibilities two and three is the driving force of this finding, but that is merely a hunch.

Next, there is the impact of the presence of Constitutional questions in a case. While I was correct about the significance of this variable’s impact, I was wrong about the direction of that impact. It appears that a Constitutional component in an administrative case actually makes a government victory significantly more likely. I believe the problem with my hypothesis here is a misframing of Constitutional issues inside of this particular context. While the justices can generally be viewed as relatively unconstrained and more able to act on their policy preferences in some Constitutional cases, this relationship is more prevalent in cases involving rights and liberties. However, these cases, while addressing a number of issue areas, are different in nature from what might generally be thought of when considering Constitutional cases. Questions of Congress’s authority to make a given statute have been categorically excluded from the data being examined. Instead, the fundamental question these cases pose is whether or not an agency is faithfully and legally executing the responsibilities rightfully delegated to it by the elected branches. While it might be expected that agency actions or rules might violate the Constitution in some instances, if the statute that agency is acting under is itself Constitutional then it should be relatively rare that an action taken within the bounds of that statute would itself be prohibited by the Constitution. Thus, Constitutional questions have a significant, positive impact on the likelihood of the government’s position to prevail for the cases used in this analysis.
The next hypothesis that failed to find support was the impact of civil liberties questions. While the variable is indeed significant, the sign is in the opposite from expected direction. My first suspicion is that what is observed here is an indicator of attitudinal influence in the justices’ decisions. A pro-government stance in civil rights and liberties is coded as a conservative decision. As the Court can generally be viewed as conservative during the period being examined, I should probably have expected the presence of civil liberties questions to increase rather than decrease the likelihood of a government victory. While the area of civil rights and liberties has been the Court’s domain since Brown v. Board (Pacelle, et al. 2011) if not earlier, that does not mean the Rehnquist or Roberts Courts have taken the same approach to the area as the Warren Court. As with the impact of Constitutional questions, the patterns of behavior that would normally be expected from the Court will, I think, be altered here because of the nature of the cases being examined

There is one other factor to consider, though. In Chapter 4, the impact of the inclusion of criminal procedure cases on the larger set of administrative civil liberties cases was apparent. Might a similar impact be felt here? Table 5.6 has been constructed to explore this possibility. It mirrors the model from Table 5.2, but the cases identified by the Supreme Court Database (Spaeth 2016) as criminal procedure cases have been dropped.

The results are much the same as in Table 5.2. Rulemaking, constitutional questions, and congruity between the Solicitor General’s position and precedent all have significant and positive impact on the odds of government success. High dissension still has a significant and negative
Table 5.6 Likelihood of Government Position to Prevail, Criminal Procedure Omitted

<table>
<thead>
<tr>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government as Petitioner</td>
<td>.46 (.29)</td>
</tr>
<tr>
<td>Rulemaking Occurred</td>
<td>1.01** (.32)</td>
</tr>
<tr>
<td>Formal Adjudication</td>
<td>.23 (.34)</td>
</tr>
<tr>
<td>High Dissension</td>
<td>-1.08** (.29)</td>
</tr>
<tr>
<td>Constitutional Question</td>
<td>1.54** (.60)</td>
</tr>
<tr>
<td>Civil Liberty Question</td>
<td>.59 (.36)</td>
</tr>
<tr>
<td>SG/President Incongruity</td>
<td>.62* (.29)</td>
</tr>
<tr>
<td>SG/Court Congruity</td>
<td>.10 (.29)</td>
</tr>
<tr>
<td>SG/Precedent Congruity</td>
<td>.85** (.28)</td>
</tr>
<tr>
<td>Chevron Era</td>
<td>.30 (.29)</td>
</tr>
<tr>
<td>Constant</td>
<td>-.65 (.41)</td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>.00</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-156.49</td>
</tr>
<tr>
<td>N</td>
<td>302</td>
</tr>
</tbody>
</table>

*p<.05, **p<.01

The Pearson χ² value for the overall model is 200.25, with a probability of .2251, indicating that the model fits the data well. As a secondary check, evaluation of the model via Receiver Operator Characteristic curve returns a ρ value of .7646, indicating that the model predicts observed outcomes reasonably well. Collinearity does not appear to be an issue, with the VIF values for the independent variables ranging from 1.03 for Chevron Era to 1.18 for Civil Liberty Question. A correlation matrix of the independent variables indicates that the most extreme values are .2916 Constitutional Question and Civil Liberty Question and -.2776 for Rulemaking Occurred and Formal Adjudication Occurred. Using a predicted probability equal to or greater than 0.5 of the case being decided in the government’s favor as the cutoff point, the model correctly predicts 74.83% of included observations.
influence over those same odds. Two noticeable differences do exist, though. Incongruity between the Solicitor General’s position and the expected position of the president given partisan affiliation rises to significance while remaining positive as before.\textsuperscript{160} At the same time, civil liberties questions remain positive but fall from significance. Once again, it appears that the criminal procedure cases, decided in an overwhelmingly conservative manner, alter the nature of the larger group of civil liberties cases in a significant manner.

Why, exactly, is this happening? Are these cases decided in a hyper-partisan manner, or is some other factor or set of factors at play? A closer examination of these 16 cases\textsuperscript{161} seems to be in order to answer these questions. As discussed in Chapter 3, 3 of these cases were decided unanimously, 1 had a single dissent, 2 had 2 dissenting votes, 5 saw 3 justices disagree with the majority, and 5 had 4 dissents. The justice centered data from the Supreme Court Database (Spaeth 2016) indicates that, of the 12 cases with 2 or more dissenting votes, 6 cases exhibit what might be described as a clear ideological split in voting using the relevant justices’ Martin-Quinn scores. In these cases,\textsuperscript{162} the most conservative justices band together to form a majority, sometimes along with one or some of the more moderate justices, in opposition to the liberal ideological wing of the Court. I say mostly because in both \textit{INS v. Lopez-Mendoza} (1984) and \textit{Dow Chemical v. United States} (1986), the median justice sided with the minority but the next most conservative justice sided with the majority. However, in the other 6 cases with 2 or more

\textsuperscript{160} This is important for a couple of reasons, but I will address these in a moment.


dissents, more unusual ideological coalitions form on both sides of the question. The Court’s most conservative member joined with the median justice and a center-left justice\textsuperscript{163} in dissent in *Marshall v. Barlow’s* (1978). Three conservative justices and one of the more moderate liberals\textsuperscript{164} oppose the majority in *U. S. v. LaSalle National Bank* (1978). In *Dickerson v. New Banner Institute* (1983), Justice Marshall, the most liberal member of that Court, joins with the Court’s ideological center to form a majority opposed to a 4-member minority made up of the next 2 most liberal members and the 2 most conservative members.\textsuperscript{165} *National Treasury Employees Union v. Von Raab* (1988) sees Justices Marshall and Scalia both in dissent. Justices Stevens, Scalia, and Souter\textsuperscript{166} provided the dissent in *INS v. Doherty* (1992). *Lopez v. Davis* (2001) has the Court’s median justice in the form of Kennedy and the center-right Chief Justice Rehnquist dissenting alongside the most liberal member of that Court, Justice Stevens.

All of this to say that the almost entirely conservative outcomes of criminal procedure cases observed in this set do not appear to be solely the result of strict ideological voting. While that is certainly a component of these outcomes, there are just as many cases where the expected ideological coalitions do not form. The exact reasons for this are not immediately clear.\textsuperscript{167} There is some evidence, though, that there is more at work in these 16 cases than purely ideological action.\textsuperscript{168}

I ideological incongruity between the Solicitor General and the president is the next hypothesis that fails to find support in the original model, though the discussion of this variable’s impact is changed somewhat by the preceding discussion. In the results presented in Table 5.2,

\textsuperscript{163} Justices Rehnquist, Blackmun, and Stevens, respectively.
\textsuperscript{164} Justices Rehnquist, Burger, Stewart, and Stevens.
\textsuperscript{165} Justices Brenna and Stevens from the liberal wing, Justices O’Connor and Rehnquist from the conservative wing.
\textsuperscript{166} The second most conservative justice, justice just left of median, and the most liberal justice of that Court, respectively.
\textsuperscript{167} Though I suspect that the position of the SG and legal factors are likely to explain at least part of this.
\textsuperscript{168} It is important to be careful about drawing too broad a conclusion from voting patterns from a dozen cases, though.
the influence of incongruity is positive but not significant.\textsuperscript{169} However, when removing criminal procedure cases from the data being examined, the impact of the variable is both positive and significant, indicating that when the SG is arguing for a position that runs counter to the expectations of partisan affiliation, the government’s position is more likely to prevail than would otherwise be the case. Given that the model controls for attitudinal influences in these decisions by including a measure of ideological congruity between the Court and Solicitor General, it seems wise to interpret this variable’s influence primarily as a legal cue. When the Office of the Solicitor General is seen as behaving in an apolitical manner, its arguments carry more authority. If the variable is viewed in this way, the most reasonable manner to interpret these results is, I think, that this is a potentially important legal cue, but less important than conforming to relevant precedent. As such, congruity between the SG and relevant precedent is significant both with and without criminal procedures included, but overshadows the similar influence of SG/presidential incongruity in the confounding presence of criminal procedure cases.

There is an important factor to consider along with this finding, however. This form of incongruity occurs more commonly with Republican than Democratic presidents. The SG took a liberal position in almost 54 percent\textsuperscript{170} of cases when a Republican was in the White House, but took a conservative position in only 33 percent\textsuperscript{171} of cases under Democratic administrations. On the one hand, this is perhaps not surprising since, in most issue areas, the liberal position is the pro-government position. However, there are two ways in which this might prove to be a complicating factor to the results in Table 5.6. The first is that the relationship observed between

\begin{itemize}
  \item \textsuperscript{169} It is perhaps worth noting that the variable has been very close to significance in the original model and the various permutations thereof presented up to this point.
  \item \textsuperscript{170} 108 of 201 cases.
  \item \textsuperscript{171} 39 of 117 cases.
\end{itemize}
the incongruity and the government’s chances of victory could instead stand in for the impact of the direction of the SG’s position. The second possibility is that, since the majority of the cases were heard by the Court under Republican administrations and the Court was primarily conservative during this time, the apparent impact of this incongruity is instead generated by the importance of the president’s party. Further examination of the data seems to indicate that neither of these is the case, however. Neither the ideological direction of the SG’s position nor the president’s partisan affiliation is highly correlated with the SG/Presidential Incongruity variable.\footnote{172} Also, when examining versions of the model presented in Table 5.2 and 5.6 which replace the SG/Presidential Incongruity variable with a variable accounting for the ideological position of the SG’s argument or the party of the president, both substitute variables failed to reach significance.\footnote{173}

Next is the impact of ideological congruence between the Supreme Court’s median justice and the Solicitor General. I have argued that legal factors will be of high importance in determining the outcomes of this set of cases. Other findings in this chapter and the previous one have lent support to this idea. This apparent legal influence does not eliminate the possibility that the Solicitor General and hence the government could not, from time to time, benefit from a measure of ideological congruence with the Court controlling for a variety of other factors. However, it appears that such potential benefits do not play a major part in the outcomes of this set of cases. While the sign is in the correct direction, this form of congruence fails to exert significant influence on the government’s chances of victory when controlling for other

\footnote{172} The correlation between the SG’s position and SG/Presidential Incongruity is .28. The correlation between the president’s party and SG/Presidential Incongruity is -.19.
\footnote{173} SG Position data taken from Pacelle’s data, coded 0 for conservative and 1 for liberal. President’s party coded 0 for Republican, 1 for Democrat. SG Position result, original model: Coefficient .07, Standard Error .32. SG Position result, no criminal procedure: Coefficient .15, Standard Error .32. President’s party result, original model: Coefficient -.38, Standard Error .29. President’s party result, no criminal procedure: Coefficient -.41, Standard Error .30. Other patterns of significance unchanged from original models.
factors. Across the full dataset and controlling for a variety of other factors, the justices do not seem to be more inclined to agree with a position simply because it matches their own ideology. This could be because the justices do not have especially strong interest in the policy outcomes of their decisions in these cases, because the importance of legal stability and predictability is so important in these cases, or due to a combination of the two.

The impact of a case occurring during the *Chevron* era is the final hypothesis that fails to find support. The standard of review set forth in *Chevron* is often described as more deferential to agency action than the *Skidmore* standard that preceded it or the *Mead* standard that followed it. For my part, I tend to agree with this assessment. Be that as it may, it appears that, controlling for a number of other factors, an administrative case occurring during the *Chevron* era does not exert significant influence on the government’s chances of success before the Court. The reasons for this are not readily apparent from the data on display here, but four potential reasons for this lack of significant effect do come to mind. First, there is the possibility that any greater level of deference that existed under *Chevron* is simply bound up in the other independent variables. If the account given in *Mead* is accepted, deference to administrative action in the *Chevron* era was most typically done in the presence of rulemaking activity and/or formal adjudication.

Fortunately, this possibility is relatively simple to test. Table 5.7 has been constructed to

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174 As with the SG/President Incongruity variable, substituting the ideological direction of the SG’s position or the president’s party for the SG/Court incongruity variable does not result in a rise to significance for the new variable or changes in the old.

175 Again, see Chapter 2 for a more in-depth discussion.

176 Deference in this context is a matter of how much weight the Court gives to the relevant agency’s interpretation of the statutory language in question. The standard of review set forth in *Skidmore* makes no particular assumptions of correctness or fault in an agency’s reasoning, instead dealing with each question of interpretation on a highly individualistic basis. The decision in *Chevron* describes a different, two-pronged approach. The Court first looks at the statute to see whether or not the meaning of the language is clear. If so, that meaning is controlling. If not, the agency’s interpretation is assumed to be acceptable so long as it is not clearly outside the boundaries that Congress has established. If the move from *Skidmore* to *Chevron* represents an actual change in jurisprudence, I would expect agencies to find success at a higher rate under *Chevron’s* reasoning.
this end. The results recorded here are based on the same data and model reported in Table 5.2 with two exceptions: the variables controlling for the effects of rulemaking activity or formal adjudication have been removed. If the variable for *Chevron*’s effects fails to reach significance simply because the real effect is bound up in these two other variables, then it should rise to significance in their joint absence. As can be seen, this is not the case. The results are largely similar to those reported in Table 5.2 not only for the *Chevron* variable, but also for the rest. It appears that if *Chevron* actually was an era of greater deference, inquiry would need to be made elsewhere to find evidence of that fact.

The second of the possibilities discussed above is that the Court was already behaving in a more deferential manner to cases where rulemaking activity and/or formal adjudication had taken place prior to *Chevron*. In other words, *Chevron* was a formalization of an informal norm already practiced by the Court rather than a radical shift in applied jurisprudence. While the data used here do include several terms before the *Chevron* decision, the set may not go far enough back in time to detect the shift in the justices’ thinking on administrative matters. The third possibility is that whatever effect *Chevron* might have had is tied up in some combination of the other variables here. I see no specific theoretically sound explanation for this, but neither can I rule it out. Unfortunately, the data I have gathered here do not provide a means of testing these possibilities directly, so for the moment I will have to settle for speculation.

Fourth and finally, there is the possibility that *Chevron* is merely a change on paper and does not represent a real change in Court behavior. This is a possibility that the data I have will allow me to explore to some extent. Table 5.8 presents two versions of the model from Table 5.2 with three modifications. I have removed the Chevron Era variable from both versions and have
### Table 5.7 Likelihood of Government Position to Prevail, Rulemaking and Formal Adjudication Variables Omitted

<table>
<thead>
<tr>
<th></th>
<th>Model</th>
<th>Change in Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government as Petitioner</td>
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<td>.08</td>
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<td>318</td>
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</tbody>
</table>

*p<.05, **p<.01
restricted the data for each to those from a single jurisprudential period. I have also omitted the Constitutional issue variable. This final modification is one of circumstance rather than preference. When limiting the cases by jurisprudential era, there was no variation for this variable in the *Chevron* era as the government won all such cases during that period.\textsuperscript{177} I was thus presented with a choice between omitting the twenty-three Constitutional cases from the analysis or dropping the Constitutional variable. Given the relatively low number of cases available, I chose to maximize my number of observations and drop the variable.

The left column presents the results of the model for those cases that occurred during the *Skidmore* era, while the right column contains the results for the *Chevron* era. My dataset contains only forty-five cases from the *Mead* era, so I have excluded the cases from those terms.\textsuperscript{178} The results for both eras are quite similar to one another and largely, though not entirely, similar to those presented in the original model. The presence of rulemaking and civil liberties questions both have significant and positive impacts on the likelihood of the government’s position to prevail in both sets of cases while high dissension has a significant and negative impact on the likelihood of government success in both. Somewhat interestingly, the sign for the effects of the government acting as petitioner changes to be negative during the *Chevron* era while remaining positive for the *Skidmore* cases. More interestingly, the government acting as petitioner does reach significance if only the Skidmore era cases are examined. Looking more closely at the data, this appears to be attributable to the difference in the overall level of success enjoyed by the government during the *Chevron* era. The government

\textsuperscript{177}The Constitutional issue variable was positive but did not reach significance for the *Skidmore* era cases when included.

\textsuperscript{178} 2000-2007
<table>
<thead>
<tr>
<th>Variable Omitted</th>
<th>Skidmore Era</th>
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<th>Chevron Era</th>
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<td>Model</td>
<td>Change in Probability</td>
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<td>.09</td>
<td>.27 (.46)</td>
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<td>-.98* (.40)</td>
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<td>1.10* (.49)</td>
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<td>.48 (.46)</td>
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<tr>
<td>N</td>
<td>101</td>
<td>172</td>
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</table>

*p<.05, **p<.01
position prevailed more frequently during the *Chevron* years than those years under *Skidmore*.¹⁷⁹ The success rate for the government is nearly identical across the two eras when acting as petitioner.¹⁸⁰ However, the government found more success as the respondent under *Chevron* than *Skidmore*.¹⁸¹

Perhaps most interesting of all the differences on display here, congruence between the Solicitor General’s position and the direction of precedent significantly influences the government’s chances of victory during the *Skidmore* era while failing to reach significance during the *Chevron* era. This is particularly surprising given the apparent importance of precedent throughout almost every previous portion of the analysis in this and the previous chapter. One possible explanation is that, if *Chevron* does represent a shift towards a greater degree of deference shown to agencies, precedent might be expected to matter less than the agency’s interpretation of relevant law in many cases.¹⁸²

While the results in Table 5.8 do indicate some important similarities between the jurisprudence of the *Chevron* era and the portion of the *Skidmore* era included in the data, they also show some important differences. The fact the government also lost no cases involving Constitutional questions under *Chevron* but did under *Skidmore*, while not directly examined here, also seems to point to some level of substantive difference. So far as the treatment of rulemaking specifically is concerned, the limited number of *Skidmore* terms included prevents me from ruling out the possibility that *Chevron* is a formalization of a pre-existing norm for the

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¹⁷⁹ The government won 129 of 172 cases under *Chevron*, or 75 percent. It won 67 of 101 cases under *Skidmore*, or 66 percent.

¹⁸⁰ The government won 87 of 117 cases as petitioner under *Chevron*, or 74.36 percent. It won 43 of 58 cases as petitioner under *Skidmore*, or 74.14 percent.

¹⁸¹ The government won 42 of 55 cases as respondent under *Chevron*, or 76 percent. It won 24 of 43 cases as respondent under *Skidmore*, or 56 percent.

¹⁸² The government found success at a higher rate when the SG’s position did not conform to precedent under *Chevron* (55 of 79 cases, 69.6 percent) than *Skidmore* (21 of 40 cases, 52.5 percent). However, it also found success at a higher rate when the SG’s position did conform to precedent under *Chevron* (73 of 93 cases, 79.5 percent) than *Skidmore* (46 of 61 cases, 75.4 percent).
evaluation of administrative cases. Further investigation of this particular point would, I believe, require case data reaching farther back into the *Skidmore* period. Still, it appears that the decisions reached in each era were the result of different mixes of influences, though these differences were not sufficient to create a statistically significant difference between the *Chevron* and other eras when controlling for a number of other factors.

**Conclusion**

Have I finally managed to address the question towards which the previous four chapters have been building? While very few answers in the social sciences are definitive, and those provided here are no exception, I do think that this might at least serve as a good start on the matter.

Based on the findings here, it appears that whether or not an agency has engaged in making rules that define the scope and methods of its activities appears to weigh heavily on the Court’s decision to uphold those activities. The government also appears to be more likely to prevail when the Solicitor General seems to be acting in a manner that is consistent with relevant precedent. These are the sorts of outcomes that might be expected in an area of judicial activity where legal factors play a prominent part.

The Court also seems to be generally unlikely to entertain claims of agency overreach based on Constitutional grounds. This might be seen as primarily an oddity of the case selection process employed in collecting the data used here, and I suspect that such arguments would be more likely to be successfully pursued when challenging the statutes that empower agencies, though that is a question for another day. However, this finding might also be taken as a form of strategic consideration on the part of the Court. It might be that the justices primarily view the elected branches as responsible for drawing the boundaries for agencies to work within and leave
that task primarily to Congress and the president. In such an arrangement, the Court’s role would likely be to police those boundaries and to fill in specific gaps as they arose. If defects of government action rooted in Constitutional limits arise, the Court might view those as best dealt with by directly addressing the statutes or executive actions that allowed or compelled them.\footnote{183} This is admittedly a bit of a stretch. That being said, it is a possibility I think merits consideration in the future.

What about the impact of attitudes? Unfortunately, there is not a straightforward way to directly use common measures of attitudinal influence due to the dependent variable used in my model.\footnote{184} However, I have attempted to assess their impact on the likelihood of the government to prevail before the Court through indirect means. To the extent that these proxies are in fact connected to attitudes, it does not appear attitudinal factors are at the forefront of administrative jurisprudence based on the evidence gathered here. If the justices primarily followed their sincere preferences in deciding these cases, I would have expected to see that the government was substantially more successful when the Solicitor General presented arguments that aligned with those of the median justice. This was not the case. This may be because such congruity adds little to the general levels of success enjoyed by the SG. However, making arguments that square with relevant precedent certainly seems to add to the Solicitor General’s already high chances of victory.

Incongruity between the expected ideological position of the president and the position taken by the Solicitor General also seems to increase those chances even more, so long as criminal procedure cases are not being examined.\footnote{185} This incongruence is more common with

\footnote{183} To the extent that such cases are made available to them, of course.\footnote{184} This is, fortunately, not the case for the analysis performed in Chapter 4.\footnote{185} Ideological incongruity between the president and SG was more common under Republican presidents (108 of 201 cases, or 53.73 percent of all cases with a Republican president) than Democratic presidents (39 of 117 cases, or}
Republican than Democratic presidents, though SGs serving Republican presidents still took a higher proportion of conservative positions than their Democratic counterparts. I think that this can be explained primarily by two factors. First, as ideological direction is coded, liberal positions are typically pro-government positions. It should probably not be a surprise that the lawyers representing the government typically took pro-government stances. The second is that, as Bailey, Spriggs, and Maltzman (2008) theorized, this deviation from the expected ideological position can serve as an indicator of a high-quality legal argument.

While attitudes may not be at the core of this area of the law, I do not think that I can safely pronounce them entirely absent. If high dissension is, as I originally argued, a fit marker of case salience, then the government appears to be significantly more likely to lose in less salient than in more salient cases. The government being significantly more likely to win in cases involving civil liberties is the sort of outcome that might be expected from a conservative Court acting on its preferences. That is, of course, precisely the impact observed in this set of cases. At the same time, when the criminal procedure cases are removed from the analytical mix, this impact disappears. Furthermore, when examining those same criminal procedure cases, there does not appear to be a clear and consistent ideological thread running through the voting patterns in the entirety of the group, though such a thread is not wholly absent either. While these findings, taken in combination with those previously discussed, certainly lend credence to the idea that attitudes exert limited impact in administrative cases, it still seems that something more

33.33 percent of all cases with a Democratic president). I suspect that much of this variance is due to pro-government decisions more commonly being considered liberal decisions depending on the issue area and the general presumption that the SG will take a pro-government position. It is worth noting, though, that simply substituting the ideological position of the SG for the SG/President Incongruity variable results in the new variable failing to reach significance even without including criminal procedure cases in the analysis.

There is also the alternative explanation that high dissension is, instead, an indicator of a legally difficult case in this apparently legally-focused realm of law. This idea would require more study than it has received here to accept or reject, but I do think that it is worth further consideration.

In an admittedly cursory manner.
definitive is required to say that they do not matter at all.

This is far from being the definitive exploration of this area of the law. There are both questions left unanswered and answers that raise more questions. I do hope, however, that this can be the start of a larger conversation about this often overlooked but important section of the Supreme Court’s docket.
Chapter 6

Conclusions and Recommendations

The administrative agency is an essential part of modern life. The public expects far more from government than our elected officials and appointed judiciary could ever hope to provide on their own. In order to carry out the will of the people, the U.S. government must rely on a veritable army of bureaucrats to serve as its eyes, ears, hands and feet. In addition to expanding the president’s capacity to see that the laws of the U.S. are faithfully executed, administrative personnel are also called on to interpret the law and, to an extent, to create it.

This arrangement is convenient and, in many ways, beneficial. After all, how many of us really trust our Congressperson to grasp the intricacies of medical research fully? How many of us trust the president to set safety and inspection standards for nuclear power plants? How many of us trust the justices of the Supreme Court to hammer out the details of import and export laws? For these and a host of other tasks that government endeavors to perform, area specialists with deep wells of highly specific knowledge are virtually required in order to act with something beginning to resemble competence. By expanding the number of actors that take part in the process of writing, enacting, and interpreting the law, the amount of these things that can be done is also expanded. Even were Congress to possess the requisite expertise to legislate around the most technical aspects of modern life, it is an institution that moves at an often glacial pace. Despite the capacity to act in a more decisive manner than Congress, the president is, of course, merely a single person. By adding more workers, more work can be done. By having these workers be experts in their respective fields, that additional work can hopefully also be better work.

However advantageous, and probably necessary, this arrangement might be, it is not
without cost. Popular sovereignty is one of the foundational principles\textsuperscript{188} of government in the U.S. Placing a fusion of legislative, executive, and judicial power into the hands of unelected officials that can be quite difficult to remove due to civil service protections\textsuperscript{189} runs a genuine risk of running afoul of that principle. What assurance is there that administrators are acting in accordance with the will of the people, or at least in their interest?

Fortunately, administrative agencies do not operate in a vacuum. These agencies are created by Congress, directed by the president, and scrutinized by the judiciary. Congress sets the tasks and the boundaries for agencies, holds hearings where agency officials are compelled to testify and present records, and is responsible for appropriating the funds needed for the agencies to function. The president can hire and fire top-level personnel, review and intervene in the making of proposed rules, and manage agency direction through executive orders.

The tools at the disposal of each branch to manage the vast array of agencies that the modern administrative state is composed of are flawed as all tools are quite likely to be when the task at hand is of sufficient complexity. While the elected branches of the federal government wield an impressive array of powers with which to manage agencies, it should be remembered that time is limited, the volume of administrative activity that could potentially be reviewed is gargantuan, and there is likely to be little in the way of electoral incentive for officials to engage in significant levels of administrative oversight. Political oversight is possible and does seem to occur to some extent. This oversight, however, has important limits.

In this way, the oversight of agencies provided by the judiciary has something in common with that from the elected branches: limitations. Courts have to wait for cases to be

\textsuperscript{188} Though it is probably fair to say that this is aspirational rather than descriptive. Popular sovereignty is also clearly not the sole foundational principal of U.S. government as evidenced by the Constitution itself in both word and practice at the time of ratification.

\textsuperscript{189} Of course, the civil service system exists largely as a reaction to some of the unattractive costs of more complete political control over administrators.
brought to them rather than seeking them out actively. Engaging in litigation is often an expensive and time-consuming process, potentially limiting the number of individuals or groups that can or will engage in it. Judges will almost certainly be operating at an information disadvantage relative to the agencies they are called on to examine. Some administrative cases have been set beyond the review of Article III courts by Congress.

Despite these limitations, the judiciary also brings some unique advantages to the realm of administrative oversight. Courts, filled as they are with unelected officials and bound by legal procedure, might be able to respond to concerns that are unlikely to rise to the attention of elected officials. While elected officials split their time between developing new policy initiatives, oversight, and campaigning, judges are able to focus on dealing with the cases that are brought to them. While it might be reasonable to expect elected officials who are chosen and rechosen in no small part based on their partisan affiliation and ideological position to act primarily based on those factors, there is some level of expectation that judges will act within the constraints of existing case law.

The way that courts evaluate agencies seems likely to be quite different from the way that legislators or the president evaluate agencies. The distinctiveness of the courts’ role in administrative oversight means that the manner in which they carry out that oversight is worthy of scholarly attention. This study represents one small attempt to shed some light on this important role of the federal judiciary.

This attempt, much like the oversight it seeks to investigate, carries with it a number of important limitations. My focus here is exclusively on the Supreme Court. This focus is, I think, justified by the importance of the Court in the larger context of the federal judiciary, the practical

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190 The parallel with agencies in this set of arrangements is not lost on me.
191 The extent to which this expectation finds support in practice is an open question.
limitations of large-scale data collection, and preliminary nature of the study. Still, the Court is not the entirety of the judicial branch, and that must be remembered when considering the results arrived at here. The study also focuses on a particular period in time. While this is once again justifiable for practical reasons, the years examined cover neither the entirety of the era of the modern administrative state nor the most recent years of it. Furthermore, the era being examined was, for the Supreme Court, a largely conservative one. Finally, much of the work done here is relatively novel. To the best of my knowledge, neither the case selection criteria discussed in Chapter 3 nor the evaluative model presented in Chapter 5 have been employed before by other researchers. While this novelty brings with it the potential for breaking new ground, it also carries the cost of much of this study not being directly comparable with related literature.\footnote{The use of Pacelle, Curry, and Marshall’s (2011) integrated model of Supreme Court decision making in Chapter 4 is, among other things, an attempt to address this issue to an extent.}

Despite these limitations, I would argue that valuable work has been done here. The analysis in Chapter 5 provides some important insight into when a given agency’s actions might or might not prevail before the Supreme Court. First and foremost, the results here indicate that agencies that set down their statutory interpretations and operational procedures in rules promulgated through the notice-and-comment process have a significantly higher chance of success than those that do not, controlling for other factors. For agencies that are empowered to make rules in this way, engaging in the notice-and-comment process should probably be viewed as a way of protecting themselves from adverse outcomes stemming from potential review by the Court.\footnote{Assuming, that is, that the patterns observed in the data hold true at present.}

Of course, the notice-and-comment process is not without danger if it is assumed that the agency’s goal\footnote{Or perhaps the goal of those in leadership positions with a given agency.} is to enact some sort of most preferred policy within the scope of the authority
given to them. Going through this process provides other actors with both the time and information needed to attempt to mount a response to proposed rules that they are opposed to in some manner. The president might intervene through executive order or, if the financial impact of the proposed regulation is sufficiently high, through Office of Management and Budget review. He or she might also use the visibility of the office to mobilize public opinion in favor of or against the proposed rule. Interest groups might mobilize members to submit comments for or against the rule as well as generally raising public awareness of its potential impact. If the issue is seen as important enough by a Congressional majority or public opinion is sufficiently mobilized in one direction or another, there might even be a direct legislative response. None of these forms of action are guaranteed, a fact which might diminish the potential risks to agency preferred policies being accepted through the notice-and-comment process. However, engaging in rulemaking does at least give a variety of other actors a greater opportunity to intervene than might otherwise be the case.

The results also indicate that if agencies want their actions to be upheld by the Supreme Court, they would be wise to act in accordance with relevant precedent. Chapter 4’s analysis provides evidence that, controlling for other factors, the ideological direction of precedent exerts significant influence on the ideological direction of the Courts decisions in the identified cases. Chapter 5’s analysis similarly provides evidence that when the Solicitor General presents an argument for the government’s position that is consistent with precedent, the government is significantly more likely to find success when controlling for other factors. Taking these findings together, it seems that wise administrators would consider existing case law when contemplating future actions.

\[195\text{ And given the volume of regulatory activity occurring in any given year, the likelihood of any particular proposed rule receiving a high degree of attention should probably be viewed as relatively low.}\]
Administrators should also, perhaps, not feel overly anxious when confronted by a Constitutional challenge to their actions. Chapter 5 provides evidence that such cases are significantly more likely to result in success for the agency in question when controlling for other factors. There are some important caveats that come along with this, though. First, the analysis does not address Constitutional challenges to an agency’s enabling statutes, so I cannot say from these results whether or not the presence of a Constitutional issue should be a comfort to administrators in all instances where they might arise. Second, as with the previous results, more likely to win does not mean guaranteed to win.

Interpreting the application of some of the other findings is a somewhat less straightforward process. In the first round of analysis performed in Chapter 5, the presence of a question involving civil liberties was initially found to significantly increase the likelihood of the government’s position prevailing when controlling for other factors. However, supplemental analysis indicated that this influence was sensitive to, and in fact dependent on, the inclusion of criminal procedure cases in the data. When filtering out criminal procedure cases, the presence of a civil liberties question fell to insignificance, but ideological congruity between that expected from the president based on party affiliation and the position taken by the Solicitor General rose to significance. It might at least be the case that agencies dealing with criminal procedure matters that do not directly involve criminal prosecutions might feel a relatively high degree of confidence in their positions prevailing before the Court. As for ideological incongruence between the president and Solicitor General, I am inclined to interpret the significance of this variable as one indicating the strengths of a litigating position grounded in solid legal argument.

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196 These cases were decided in the government’s favor at an overwhelming rate, though the total number included was somewhat limited. It appears that the inclusion of these cases simultaneously enhanced the apparent impact of civil liberties questions and masked the effects of ideological incongruity between the president and Solicitor General.

197 Which were excluded from the analyzed cases.
rather than political preference.\textsuperscript{198} If this interpretation is accurate, then it might behoove agencies not to hang their hopes on presidential influence to lead them to judicial success in the absence of a sound legal foundation for their actions.

The impact of high dissension is perhaps the most puzzling of the results to find significance here. The variable was included as a proxy for issue salience in an area of the law that seems unlikely to be captured by traditional measures for the concept. While the significant and negative impact of high dissension on the government’s chances of winning a given case was expected, the exact explanation for this result is unclear. I originally hypothesized that, if high dissension between the justices was a suitable stand-in for issue salience, then attitudinal influence\textsuperscript{199} should become apparent when isolating cases with high levels of dissension for analysis. This hypothesis failed to find support. There are a few ways that this could be interpreted. The first and simplest is that high levels of dissension ultimately have no particular relationship to issue salience\textsuperscript{200} but, through a quirk of statistical analysis, appear to here. While I am unable to disprove this possibility, I also find it unconvincing. The second possibility is that my initial hypothesis is accurate, but the relatively small number of cases of the type analyzed here combined with the relatively high proportion of these cases decided unanimously mean that traditional measures of ideological position do a poor job of capturing the justices’ preferences in this particular body of cases. The third possibility is that there is a meaningful relationship between high dissension and the government’s chances of success before the Court, but that the nature of that relationship is not based on issue salience. While I still think that issue salience\textsuperscript{201}

\textsuperscript{198} This aligns with the findings of several studies (e.g. Pacelle 2003; Bailey, et al. 2005; Wohlfarth 2009) and claims made by various OSG attorneys that the office serves as the government’s lawyer rather than merely acting as the president’s advocate before the Court.

\textsuperscript{199} Absent in the analyses in both Chapter 4 and 5.

\textsuperscript{200} Or at least no clear linear relationship.

\textsuperscript{201} Another factor to consider is that many of the cases examined here seem likely to be less salient than, for instance, Constitutional cases addressing the national exercise of fundamental rights and liberties.
makes the most theoretical sense for the impact of high levels of dissent, I have also considered the notion that disagreement between the justices could be the result of a lack of legal clarity in the case being examined. I cannot present evidence to either support or refute this particular possibility, but it may be one worth considering in the future.

The results from the analytical chapters also indicate that quite a few factors that would, on the face of things, appear important in the outcome of these cases do not exert significant influence on that outcome when controlling for other factors. In Chapter 4, the ideological preferences of the president, the House of Representatives, the Senate, and of the Court itself failed to display significant impact on the ideological direction of case decisions. In Chapter 5, the government acting as petitioner, the involvement of formal adjudication in the administrative events leading up to the case, the presence of civil liberty questions when excluding criminal procedure cases, ideological congruity between the median justice and the position taken by the SG in a case, and the case occurring during the period when *Chevron* was controlling precedent all failed to significantly increase the likelihood of government success before the Court.

To put these results into the context of the larger literature about Supreme Court decision making, it seems that legal considerations might be the dominant factor in most of the cases examined. Certainly, the influence of precedent on outcomes in the analysis in both Chapters 4 and 5 points in this direction. If the importance of ideological incongruity between the president and the Solicitor General is, in fact, due to that incongruity being a marker for the quality of the legal arguments being made, that finding also seems to lend weight to this idea. The importance of engaging in notice-and-comment rulemaking is slightly harder to classify, though I lean towards placing it into the legal consideration category as well. In the *Mead* era, it certainly seems appropriate to consider it as such, but there are fewer cases from the *Mead* era included
here than either the *Skidmore* or *Chevron* eras. In those earlier eras, there is no clear connection to precedent. However, agencies engaging in a structured, statutorily created process that allows for the input of multiple actors prior to finalizing a given rule might be seen as carrying more legal weight than other, less formal means of agencies finalizing policy.

In addition to the presence of evidence for legal considerations influencing the outcomes of the administrative cases examined here, the lack of clear evidence supporting either attitudinal or strategic influence needs to be considered as well. In Chapter 4, the preferences of the elected branches failed to exert influence on the ideological direction of the Court’s decisions, as did the ideological preferences of the median justice. If strategic considerations were a key factor in these cases, some combination of the president, House, and Senate should have risen to significance. Similarly, if attitudes were of great importance in these outcomes, the preferences of the median justice should have been significant and positively related to decision direction. In Chapter 5, the government acting as petitioner failed to reach significance and ideological incongruity between the president and Solicitor General had both a positive and significant effect on the likelihood of the government’s position prevailing. If strategic considerations were once again at the fore of this set of cases, it seems that the government acting as petitioner might rise to significance. Similarly, the SG taking a position at odds with that expected from the president should have been either insignificant or significant but negatively related to the chance of government success. Finally, ideological congruence between the median justice and the Solicitor General did not significantly influence case outcomes. If attitudes were a driving force in these cases, it seems that the SG arguing in a manner consistent with the preferences of the median justice should have had a significant and positive relationship with the dependent

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202 I think that a fairly strong argument could be made for judicial deference to agency action being viewed through a lens of inter-branch strategic considerations as well.
Of course, there are some counterarguments that could be made here as well. If the significance of rulemaking is a point in favor of legal considerations, then the insignificance of formal adjudication would seem to be a point against it. As a process, formal adjudication shares the same statutory roots as notice-and-comment rulemaking and is mentioned alongside such rulemaking in *Mead* as a likely sign of an agency’s authority to act with the force of law. Despite this, it never seems to matter in a significant way. The failure of the government as petitioner to reach significance could alternatively be read as a sign of strategic influence, especially since the government wins more than it loses as both petitioner and respondent. If, as I have discussed as a possibility elsewhere, measures of attitudes in this sector of the law are underdeveloped, it could be that attitudes are a stronger factor than they appear to be.

I would stop short of saying that legal considerations are the only considerations that matter in this body of cases. I would say, however, that legal considerations appear to be quite important in this area of the law. If this is the case, I argue that it is primarily due to the importance of legal stability as a practical factor influencing the ability of agencies to carry out their appointed tasks.204

**Future Directions**

Something approaching a clear answer to the questions raised in this study will, of course, require subsequent scholarly endeavors to expand on the work done here. There are a number of ways to expand on the current analysis, some relatively simple and some more

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203 It may be that the lack of apparent attitudinal impact here is connected to the relatively low proportion of cases examined that were decided by very close votes. Of course, the lack of such votes and the large proportion of unanimous decisions also seems to stand in opposition, to some extent, to the idea that the justices are merely single-minded seekers of ideologically-driven policy outcomes.

204 Which could be argued to have value as either a particular kind of attitudinal orientation or, perhaps more likely, as a matter of strategic importance.
difficult. The first, simplest, and perhaps most immediately valuable approach would be to expand the included observations both forwards and backwards in time. This would increase the number of observations substantially, as well as allowing researchers to speak to questions such as whether or not Skidmore has always been used in a manner that gives additional consideration to actions backed by notice-and-comment rulemaking and whether or not the patterns observed here extend in full into the present.\textsuperscript{205} Similarly, the incorporation of relevant cases that directly addressed whether or not agency action was justified but that did not involve the government as a party seems useful for, at the very least, determining whether or not the Court treats those cases differently than the ones where the government is a party. While I think that limiting the cases to those where the government was a party was both justifiable and, as a first attempt at addressing these cases in this manner, desirable, casting the proverbial net a bit wider seems useful for future research. I also think that a deep dive into the substance of the cases included here that exhibit high levels of dissension between the justices with an eye towards what might be driving that dissension would be a worthwhile endeavor. While this is conceptually straightforward, I suspect that a close examination of these cases would represent a significant time investment. It seems the only way to determine what the real importance, if any, of the variable is, though.

Other potential expansions might prove somewhat more difficult than those already discussed but could prove fruitful all the same. Further exploration of the influence of both Congress and the president in this area still seems theoretically warranted. For Congress, it seems possible that examining either the ideological preferences of Congressional committees that oversee the agency involved in a case or the ideology of Congress at the time that the enabling statute in question was passed might be a useful avenue of exploration. For the President,

\textsuperscript{205} The 1944 term, when Skidmore was decided, seems like the ideal point to stop looking further back into the Court’s history.
looking into the potential impact of OMB review of a rule and subsequent actions could provide evidence of greater presidential influence in the process.

I have saved the recommendations that seem most difficult to implement, but potentially most important for a comprehensive understanding of the interactions between the judiciary and the bureaucracy, for last. The first of these is to look beyond the decision stage of the Court’s process and examine which cases do and do not reach the Court. The Solicitor General would be a key player in this endeavor and could be incorporated in one of two ways. The first would be to examine the administrative cases that the SG requests cert for and see which ones the Court accepts. The second is to look beyond the Supreme Court and to explore the various administrative cases available to the Solicitor General to bring to the Court in the first place and then to see for which the Office actually does apply. Such studies could provide valuable information about what ends up on the cutting room floor, so to speak.

My final and most difficult recommendation for future work is this: leave the Supreme Court behind entirely and focus on how the circuits handle administrative cases. The circuits are the courts of last resort for an enormous volume of cases that involve a growing number of issues. This has been done in some small ways already, but I am currently aware of no comprehensive study in the vein of the work presented here that focuses on the intermediate appellate courts. While the Supreme Court is undoubtedly an important player in the process of administrative oversight, the sheer volume of cases handled by the circuits means that they matter as well. An examination of the D.C. Circuit would be a reasonable place to start given the primarily administrative nature of the circuit’s docket. Ideally, though, comprehensive, cross-

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206 Or perhaps below would be more appropriate.
207 The different approaches to similar legal issues taken by the various circuits is also an important factor for understanding the Supreme Court’s activity as the presence of intercircuit conflict is often an indicator of cert being granted.
circuit comparisons of administrative jurisprudence could eventually be compiled.
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