The Politics of Abortion: Testing the Attitudinal Model in the Fifth and Ninth Circuits

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Abstract
Judicial decision-making, especially on hyper-politicized issues like abortion, has confounded political scientists for decades. While many political scientists agree that judges take more than just the law into account, scholars of both law and politics have found little consensus on the degree to which extra-legal variables affect case outcomes. Scholars of the attitudinal model such as Segal and Spaeth have found that judges are heavily influenced by their personal policy preferences. However, these scholars have relied on dichotomous coding mechanisms that obscure the different degrees to which judges vote conservatively or liberally. The strictly binary coding of case outcomes as either liberal or conservative, without any consideration of the language of opinions themselves, gives us an incomplete picture of the degree to which the attitudinal model is truly at work when judges issue their decisions. Thus, this study employs a textual analysis to investigate the extent to which the attitudinal model explains judicial decision-making. The attitudinal model was tested by studying cases decided within the last twenty years on the highly contentious and politicized issue of abortion. The case list was narrowed to cases decided in the liberally-oriented Ninth Circuit and the conservatively-oriented Fifth Circuit. The results of this study highlight the nuance of circuit court decision-making on the issue of abortion, revealing that ideological voting at the circuit court level is much more complex than previously believed.

Key Words: Judicial Decision Making, Abortion, Fifth Circuit, Ninth Circuit, Attitudinal Model, Judicial Politics, Judicial Behavior

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Introduction
Abortion access and reproductive justice more broadly remain some of the most polarizing issues within and beyond the American legal system. While discussing abortion and the law, one would be remiss to not mention the landmark Supreme Court abortion case Roe v. Wade, 410 U.S. 113 (1973). In 1973, the Supreme Court issued Roe v. Wade, supra, sending shock waves through the American public as it established that the right to privacy undergirds the right to abortion. As such, the decision mandated that states may not regulate abortion within the first trimester. It is difficult to overstate the social and political impact of Justice Harry Blackmun’s majority opinion in Roe v. Wade, supra but suffice it to say that the decision provoked intense ideological and political debates about federalism, bodily autonomy, and democracy that are still ongoing today.

The Court’s decision came at a time of intense public division over reproductive rights and abortion access. Beginning in the early 1970s, the Democratic Party began to advocate for abortion rights on the grounds of ensuring women their bodily autonomy. Meanwhile, the Republican Party continued to oppose abortion procedures on moral and religious grounds. In fact, abortion was a major talking point in the 1972 presidential election, less than a year before the decision in Roe v. Wade, supra was handed down. During this election, President Nixon stressed the abortion argument hoping to win over Catholic voters who traditionally supported Democrats and social conservatives who were skeptical of the rising feminist movement with its supposed calls for “abortion on demand.” This sharp division over abortion rights was also clear in public opinion polling. In 1973, a Gallup poll conducted just months before the Court’s ruling found that 46% of Americans supported legalized abortion within the first three months of pregnancy, 45% of Americans opposed it, and 9% reported feeling

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undecided. If abortion was controversial before Roe v. Wade, supra, the Supreme Court’s decision only intensified the debate.

Discussions about the dangers of ideological voting on the Supreme Court abounded in the aftermath of Roe v. Wade, supra. Self-proclaimed “pro-life” activists argued that decisions like Roe v. Wade, supra “had no authentic basis in the Constitution” and that “it constituted the most extreme example of ‘judicial activism’ in this century.”

Groups like the Women for the Unborn and the Celebrate Life Committee passed out pamphlets in 1973 arguing that “one does not have to be a trained lawyer to recognize that increasingly… ‘the Constitution is what the judges say it is.’” These anti-abortion activists argued that judges had abandoned their judicial duties to interpret and apply the written law. These activists suggested that what drove judges were non-legal factors, including their desire to advance policy agendas and maximize their own preferences by determining for themselves exactly what the law meant. In effect, these activists asserted that Roe v. Wade, supra was undemocratic and thus represented a profound threat to the Court’s legitimacy in the eyes of the American people.

More recently, some have even suggested that Roe v. Wade, supra stoked greater political polarization over the issue of abortion by further entrenching the ideological positions about abortion on either side of the political aisle. For instance, during closing arguments in a case on same-sex marriage in California, Judge Vaughn Walker asserted that he was dubious about issuing a decision that would promote backlash like Roe v. Wade, supra which had “plagued our politics for

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4 Ibid, 41.
David Brooks of the New York Times echoed this sentiment stating that “Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th century American. When he and his Supreme Court colleagues issued the Roe v. Wade, supra decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life since.” As these statements illustrate, abortion rights and Roe v. Wade, supra were and remain highly controversial and partisan issues that continue to divide the American public and even the American judiciary.

While not all Americans held these views, they nevertheless demonstrated a growing skepticism that judges adhered to the law alone in their decision-making. With this in mind, political scientists over the last thirty years have leaned into these debates and sought to uncover the complexity and nuance of judicial decision-making by seeking to identify the legal and extra-legal factors that influence a judge’s decisions. Two of the most prominent political scientists in the field of judicial politics, Jeffrey A. Segal and Harold J. Spaeth, have curated models suggesting that one of the main driving forces in judicial decision-making is a judge’s political ideology, and by extension each judge’s desire to maximize their personal policy preferences. This notion was enshrined in what they termed the attitudinal model, which will be a main focus of this article.

As the most publicly prominent and powerful court in the country, the Supreme Court has attracted the most scholarly attention on judicial decision-making. However, while the Supreme Court is often hailed as the court of last resort in the American legal system, this conception of the high court overlooks the fact that most cases decided in federal court never make their way to the Supreme Court. Instead, circuit courts function as the de facto court of last resort for a majority of federal cases. Circuit court judges thus hold tremendous power: each year they are responsible for issuing the final judgment on

7 Ibid.
the constitutionality of thousands of state statutes. Given the obvious importance of circuit courts in the American political landscape, behavioral political scientists have taken an increased interest in the decision-making habits of panel judges on the U.S. Courts of Appeal.8,9 The relevance of circuit courts is especially salient for studying judicial decision-making in reproductive rights cases, since hundreds of abortion and reproductive health statutes are passed and evaluated in circuit courts across the country every year. State restrictions on abortion rights in recent years have attempted to erode the rights established by Roe v. Wade, supra, and they have been successful in part because of cases like Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). In the 1993 decision, the Court abandoned the trimester framework of Roe v. Wade, supra and instead permitted states to impose restrictions on abortion so long as states do so before fetal viability and as long as these restrictions do not impose an undue burden on an individual’s access to an abortion procedure. By adopting the “undue burden” standard, the Court’s decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, supra granted states greater latitude to impose restrictions than had been granted under Roe v. Wade, supra, since concepts of “undue burden” and “viability” were more flexible and thus more open to potential manipulation by state actors hoping to limit abortion access.

Given cases like Planned Parenthood of Southeastern Pennsylvania v. Casey, supra, it is not surprising that the Guttmacher Institute reported that in 2020, state legislatures across the country introduced 289 provisions that aimed to restrict reproductive health care access.10 These included bills to curb abortion access, cut back on

10 Elizabeth Nash et al., State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other, December 15, 2020,
insurance coverage for contraceptives, and limit funding for sexual health education. Notably, since 2011, 483 anti-abortion provisions have successfully passed at the state level.\textsuperscript{11} Not surprisingly, support for these provisions falls rather consistently along party lines, with majority Democrat state legislatures preventing the passage of abortion and reproductive health restrictions and majority Republican state legislatures passing these regulations. In effect, conservative states, in particular, Arizona, Kentucky, Ohio, and Texas, have passed hundreds of these statutes within the last ten years, causing the closure of multiple abortion clinics across the country.\textsuperscript{12} As these examples indicate, much of the abortion debate is occurring in state legislatures and has stirred political disputes that fall largely along party lines. Consequently, the circuit courts represent an excellent avenue to study a high volume of abortion cases and investigate the extent to which extra-legal factors, such as a judge’s political ideology, affect case outcomes.

This study will build on existing scholarship about Supreme Court and circuit court decision-making, specifically with cases involving abortion and reproductive freedom: that is, cases involving access to reproductive health care services like contraception. It will not only test the attitudinal model utilizing traditional methods but also propose new text-based methodologies which can more accurately capture the nuance of and extent to which a judge’s political ideology plays a role in their decision-making on the specific issue of reproductive rights.

\textsuperscript{11} Ibid.
Literature Review

Judicial decision-making, especially on hyper-politicized issues like reproductive rights, has confounded political scientists for decades. While many political scientists today agree that judges take more than just the law into account when resolving cases, scholars of both law and politics have found little consensus on the degree to which extra-legal variables influence case outcomes. For instance, scholars continue to question the extent to which a judge’s personal policy preferences, the existence of other judges on the court, or public opinion sway judges one way or another in a particular case.\textsuperscript{13,14,15}

One of the main ideological divides among scholars of judicial decision-making is between Formalists and Realists.\textsuperscript{16} The Formalist view assumes that judicial decision-making can be explained using the formula:

\[ R \times F = D \]

where “\( R \)” represents the rule of law, “\( F \)” represents the facts of the case, and “\( D \)” stands in for the decision of the judge.\textsuperscript{17} Formalism argues that the only extra-legal variable judges consider when making their decisions are the facts of the case. Thus, the Formalist theory suggests that judicial decision-making is a straightforward and mechanical process whereby judges merely evaluate the facts of a case.

\textsuperscript{13} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model.}
\textsuperscript{17} Ibid, 6.
and faithfully apply the relevant case law. It conceptualizes judges as impartial and unbiased actors unlikely to be swayed by their own political preferences, pressure from outside groups, or other non-legal variables.

On the other hand, Realists argue that judges make their decisions before even hearing oral arguments or meeting the lawyers on either side. They posit that law, both written Constitutional law and even existing precedent, have little, if any, influence on case outcomes. Instead, they argue that judicial behavior may be explained by a number of factors unique to each judge. Some might vote in a particular way because of what they had for breakfast, as some Legal Realists suggest. Others may seek to maximize the outcome of a particular policy or may feel pressured by ongoing trends among the American public. No matter the reasoning behind a judge’s decision, Realists agree that judges find the relevant law to support their written opinions after they have made up their mind on how they wish to rule in a particular case. They thus view judges as unprincipled insofar as they base their decisions not on the law alone but rather on extra-legal factors, including but not limited to their political preferences, their own conception of what is right and wrong, or simply how they are feeling on the day they first hear a case.

Political scientists have evaluated these competing theories by applying them to Supreme Court decision-making. Scholars have even gone so far as to offer theoretical models that attempt to explain the reasons why judges decide cases in the ways they do. These models, mainly the legal model, the attitudinal model, and the strategic model,

are among the most widely accepted.\textsuperscript{20} The main focus of this paper will specifically be the attitudinal model. This study will evaluate to what extent the attitudinal model may be used to accurately predict the outcome of recent reproductive rights cases in the Fifth and Ninth circuit courts. By doing so, this study will expose the strengths and weaknesses of the attitudinal model, by utilizing new methodologies that help fill gaps present in existing scholarship.

Models of Judicial Decision-Making
To put it simply, the legal model asserts that the law matters.\textsuperscript{21} It suggests that judges base their decisions on the facts of the case before them as well as one or more of the following considerations: the plain meaning of the applicable law, the legislative and Framers’ intent, legal precedent, and a need to balance the interests of the parties involved when no clear law applies in a particular case.\textsuperscript{22,23} Advocates of the legal model believe that the process of legal decision-making is akin to a science.\textsuperscript{24} It assumes judicial decision-making is straightforward in the sense that judges observe the facts of the case and subsequently issue an opinion based solely on an impartial application of the relevant law or their own logical deduction. Such a model assumes that the law contains the remedy to any case or controversy that comes before the court: thus, law can be seen as possessing its own internal logic.\textsuperscript{25}

\textsuperscript{22} Mark C. Miller, \textit{Judicial Politics in the United States} (Boulder, Colo.: Westview Press, 2015), 182.
\textsuperscript{23} Arthur Auerbach, "POSC 426: Week 5, Day 1" (lecture, Los Angeles, CA, September 29, 2020).
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
One of the defining characteristics of the legal model is that it assumes judges do not rely on outside sources to direct their vote in a particular case. As laid out by judicial decision-making scholar Howard Gillman, the legal model assumes judges are restrained in their decision-making since they may rely only on established law or their reading of legislative intent when deciding cases.²⁶ It assumes that judges do not rely on knowledge from other disciplines like economics or psychology to inform their decision-making process or balance the interests of the parties involved. Further, it rejects the more modern notion that judges are merely political players who support plaintiffs or defendants depending on the extent to which a judge can maximize his or her own policy preference. This model holds judges in high esteem and assumes they are impartial arbiters of legal disputes. It is a much more traditional view of judging and still today is the model widely taught in law schools today, which is not surprising considering that the maxim underlying this model is that law matters.²⁷ As such, most judges today would assert that they follow the legal model in their personal decision-making. In fact, in a study of appeals court judges, over 90% of judges interviewed claimed that in cases where precedent was “clear and relevant,” it would significantly impact their decision-making.²⁸

Although the legal model is considered one of the more traditional models of judicial decision-making, it has nevertheless been harshly criticized by scholars of the behavioralist school. The legal model was the predominant model of the early 20th century, but by the 1950s the behavioralist revolution in political science was brewing. Increasingly, scholars became less concerned with studying legal institutions and structures and more interested in evaluating legal and

²⁶ Gillman, "What's Law Got to Do with," 466.
²⁷ Ibid, 466.
political behavior at the individual level. They were skeptical of the legal model with its singular emphasis on the relevance of law in judicial decision-making and wished to examine judicial decision-making from a more empirical perspective. Put another way, they wanted to reinvigorate the more scientific aspects of political science. Thus, the behavioral revolution in political science inaugurated a move away from purely qualitative analysis of political institutions and behavior toward a broader analysis that involved both qualitative and quantitative methods of analysis.

In the realm of judicial decision-making, this behavioral revolution translated into the outgrowth of new scholarship and thus new models of judicial decision-making that evaluated judges’ voting behavior. These new models took at face value what judges claimed they based their decisions upon and instead sought to uncover the extra-legal variables that motivated judges’ decision-making process. The attitudinal model was a direct outgrowth of the behavioral revolution. Proponents of the attitudinal model posit that judges, in particular Supreme Court justices, decide cases in ways that allow each judge to maximize his or her personal policy preferences. The notion that judges seek to maximize their own policy preferences is derived from rational choice theory in economics. This theory, as summarized by William Riker, states that:

“1. Actors are able to order their alternative goals, values, tastes and strategies. This means that the relation of preference and indifference among the alternatives is transitive…

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31 Martin and Hazelton, "What Political," 512.
32 Ibid, 512-513.
2. Actors choose from available alternatives so as to maximize their satisfaction.”

The second statement is of primary relevance to the attitudinal model. It suggests that actors operate in ways that allow them to maximize their personal utility. When applied to judicial decision-making, rational choice theory has been interpreted by scholars to suggest that judges maximize their personal utility by maximizing their personal policy preferences, which is an extension of their ideological orientation. The premier scholars of the attitudinal model, Jeffrey Allen Segal and Harold J. Spaeth, crystallized the attitudinal model in the following statement: “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.” Segal and Spaeth argue that judges who vote in line with the attitudinal model act as policy-makers who closely resemble politicians instead of unbiased arbiters of the law.

The attitudinal model takes into account that judicial decision-making is more nuanced than the legal model would like to admit. It recognizes that judges are not perfectly impartial and that they do take extra-legal variables into account. However, a truly comprehensive study of the attitudinal model, such as this one, must not overlook the model's weaknesses. First, it does not provide tremendous depth into the complexity of judicial decision-making. It is similar to the legal model in the sense that it identifies only one motivating factor for judges in their deliberations. For these reasons, both models overlook the possibility that judges may balance multiple legal and extra-legal variables when deciding cases, especially when deciding cases on highly politicized issues like abortion, capital punishment, or gun control. Another weakness of the attitudinal model is that it fails to account for

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33 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 97-98.

34 Segal and Spaeth, *The Supreme Court and the Attitudinal Model*, 89.
the possibility of ideological change over time.\textsuperscript{35} For instance, when testing the attitudinal model, political scientists label judges as either liberal or conservative based on the party of the President who nominated them to the Court. Adherents to the attitudinal model thus view judges as consistently liberal or consistently conservative, since the party of the President who nominated them is immutable. In effect, the attitudinal model does not provide for the possibility that a judge may become more conservative or more liberal over time.

The strategic model thus emerged as the natural outgrowth of the behavioral revolution. The strategic model, as influenced by the writings of Walter Murphy, is predicated on the notion that judges are not simply apolitical actors who apply the law according to ideals such as justice or fairness.\textsuperscript{36} Rather, adherents to the strategic model recognize that judges, in particular those on the Supreme Court, are driven by non-parametric goals and that such goals do not always further a judge’s particular policy preference.\textsuperscript{37} A judge’s non-parametric goals could, for example, include a desire to preserve the legitimacy of their court or practice judicial restraint. The strategic model further explains that judges often have to act tactically to pursue such goals, since they face certain internal and external constraints.\textsuperscript{38}


\textsuperscript{37} Lee Epstein and Jack Knight, \textit{The Choices Justices Make}, (Washington, D.C: CQ Press, 2005), 138-139.

According to the strategic model, there are two main types of institutional constraints that judges face. The first type, internal institutional constraints, relates to the institution of the Court itself and may include the roles and actions of their colleagues as well as regulations regarding decision making and opinion assignment. Similarly, the strategic model identifies that Supreme Court judges may also face external constraints from the Executive branch, Legislative branch, and the American public. These constraints include the will of the American people, Presidential veto, or Congressional override. According to the strategic model, these institutional constraints, combined with judges’ non-parametric goals, drive judges’ strategic decision-making.

Scholarship on Court Decision Making in Reproductive Rights Cases

Few scholars have yet ventured into conducting empirical research into the attitudinal model specifically in circuit court reproductive rights cases. However, scholars like Segal and Spaeth have made notable headway in uncovering the predictive abilities of the attitudinal model. Segal and Spaeth conducted a quantitative test of the attitudinal model’s ability to predict case outcomes. In their study, Segal and Spaeth tested the attitudinal model in cases coming before the Supreme Court between 1953 and 1990. They narrowed their sample size to only include cases pertaining to the policy areas of criminal procedure, civil rights, First Amendment claims, due process, attorneys, unions, economic activity, judicial power, federalism, federal taxation, and privacy. Segal and Spaeth incorporated a small number

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40 Cross and Nelson, "Strategic Institutional," 1447.
41 Segal and Spaeth, *The Supreme Court and the Attitudinal Model*, 256-260.
of abortion cases into their analysis since these cases concerned the policy area of “privacy.”

Segal and Spaeth’s data suggested that with respect to the Supreme Court, the attitudinal model is roughly 80% effective in determining case outcomes across their chosen policy areas. While the scholars revealed the attitudinal model to be statistically significant in forecasting judicial decisions, their analysis was limited in that it only tested the attitudinal model in the Supreme Court and not in lower courts like circuit or district courts. In addition, their study provided evidence that the attitudinal model was predictive in privacy cases yet did not zero in on abortion cases. Due to the political salience of an issue like abortion, one would expect judges’ voting to be more driven by their ideological beliefs than less politicized issues like contract law. Consequently, one would expect the attitudinal model to be highly predictive in abortion cases, but by grouping abortion cases under the broad title of “privacy,” Segal and Spaeth obscured the extent to which the attitudinal model can predict the outcome of abortion cases specifically.

In 1995, the political scientists Segal, Songer, and Cameron conducted a study of the attitudinal model’s predictive capabilities in circuit courts. The authors tested the attitudinal model using circuit court judges’ votes in search and seizure cases between 1961 and 1990. To code judges as either liberal or conservative for the purposes of testing the attitudinal model, Segal, Songer, and Cameron looked first to the partisanship of the judge’s nominating president, which is a practice consistent with most quantitative analyses of the attitudinal model. However, Segal, Songer, and Cameron went one

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42 Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge: Cambridge University Press, 2002).
44 Segal, Songer, and Cameron, "Decision Making," 237.
step further by also factoring in the location of the judge’s panel into the coding of judges as either liberal or conservative. Segal, Songer, and Cameron coded judges from southern states as more conservative than their non-southern counterparts. They justified their coding methodology by arguing that scholarship from Songer and Davis revealed that judges from southern states were generally more conservative than non-southern judges. This unique methodology revealed that the attitudinal model accurately predicted the outcome of 71.2% of search and seizure cases. Thus, the attitudinal model proved to be significantly less predictive of circuit court case outcomes than Supreme Court case outcomes. This study suggests that the attitudinal model is highly predictive of case outcomes, but only in search and seizure cases. It was silent on the predictive abilities of the attitudinal model on the issue of abortion. Consequently, this study further illuminates a consistent gap in judicial decision-making literature.

Nearly five years after the publication of Segal, Songer, and Cameron’s 1995 study, Songer, Sheenhan, and Haire published a comprehensive examination of circuit court decisions between 1925 and 1988. In total, they studied over 15,000 cases spanning the issue areas of labor relations, criminal appeals, as well as First and Fourteenth Amendment violations. Like Segal, Songer, and Cameron, Songer, Sheenhan, and Haire also coded judges as liberal or conservative based on the party of the nominating president and the judge’s location. Their data revealed the attitudinal model to be only 66% effective in anticipating a judge’s vote. Despite finding the attitudinal model to be significantly less effective in predicting case outcomes than earlier studies suggested, the authors offered little explanation for why they found the attitudinal model to be much less predictive.

47 Ibid.
48 Ibid, 104-105.
predictive of case outcomes than Segal and Spaeth had found. Thus, one goal of this project will be not only to test the attitudinal model in circuit court abortion cases but also to muse on what factors account for differences in the attitudinal model’s predictive abilities across other courts.

In 2004, Sunstein, Schkade, Ellman and Sawicki conducted a comprehensive study of judicial decision-making in federal three-judge circuit panels.\(^{49}\) They studied 6,408 cases spanning issue areas including, but not limited to, abortion, capital punishment, affirmative action, sexual harassment, LGBTQ rights, and congressional abrogation of state sovereign immunity.\(^{50}\) The cases that Sunstein et al. chose to study included circuit court decisions related to abortion between 1970 and 2004, which amounted to 146 abortion cases. Across each issue area, Sunstein et al. sought to evaluate whether the attitudinal model remained a strong predictor of judicial voting in cases involving highly politicized topics. The variables they used to test the attitudinal model were typical of past scholarship on the attitudinal model. Judges were coded as either liberal or conservative according to the party affiliation of the judge’s appointing president. The judge’s political ideology thus served as the independent variable. Sunstein et al. picked a simple singular dependent variable: the outcome of the case. These case outcomes were labeled as pro-life (i.e. conservative) “if a judge voted at all to support the pro-life position,” and as pro-choice (i.e. liberal) in all other instances.\(^{51}\) With these variables in place, Sunstein et al. found that ideological voting occurred in roughly 59% of abortion cases.\(^{52}\) As such, they found the attitudinal model to be less predictive of case outcomes than Segal and Spaeth had.


\(^{50}\) Ibid, 17.

\(^{51}\) Ibid, 157.

\(^{52}\) Ibid, 56-110.
While this study provided helpful insight into judicial decision-making in abortion cases, the methodology ultimately limited the depth of analysis the authors could provide. Scholars like Illinois solicitor general and law professor Carolyn Shapiro have raised similar concerns over the methodologies chosen to investigate the attitudinal model.53 In her article, aptly titled “Coding Complexity,” Shapiro critiques the binary formula developed by Segal and Spaeth to label case outcomes strictly as either “liberal” or “conservative.” She primarily takes issue with Segal and Spaeth’s emphasis on case outcomes rather than the language of opinions to inform whether or not a judge’s decision can be considered more left or right-leaning. She argues that such coding mechanisms obscure legal complexity. For instance, she suggests that two justices could agree on “outcome,” but the opinions themselves may not be uniformly conservative or uniformly liberal.54 Shapiro even notes that other critics have crystallized this same argument by claiming that “the binary outcome coding cannot measure whether a particular opinion is moderately liberal (or conservative) or more extremely ideological.”55

The strictly binary coding of case outcomes without any consideration of the language of opinions themselves gives us an incomplete picture of whether the attitudinal model is truly at work when judges issue their decisions. Further, the text of the opinions must not be overlooked, because the rationales and qualifiers used by judges undoubtedly influence a case’s potential impact. Tiller and Cross echoed this same sentiment when they wrote “‘the language of the opinion [that] at least purports to establish the rules to govern

54 Ibid, 486.
55 Ibid, 486.
future cases,’ provides important information for which the attitudinal model...fails to account.” These scholars have highlighted the need to re-imagine coding mechanisms when studying the attitudinal model. They have underscored the need for methodologies that take into account the possibility that cases may fall anywhere along an ideological spectrum.

Sunstein, Schkade, Ellman and Sawicki anticipated many of these criticisms in their own research, but they failed to answer for them. While explaining their decision to code case outcomes as liberal or conservative, the authors write “[b]y ‘stereotypically liberal votes,’ we mean to identify a simple, crude measure, and we do not venture anything especially controversial. Of course, these measures are too crude to capture all of what it means to be ‘liberal’ or ‘conservative.’ But because of the sheer number of cases and votes, the simplicity of the measures can be counted as a virtue, enabling us to produce informative comparisons.” While Sunstein et al. produced data that was easily understandable and shareable, what they gained in clarity they lost in analytical depth. They failed to utilize a methodology that could capture the complexities of case outcomes that do not fall squarely within either a conservative or liberal camp.

The dichotomous approach to coding case outcomes is particularly troublesome when applied to abortion jurisprudence. Litigation involving abortion rights and reproductive freedom more generally is complex and multi-faceted. For one, abortion litigation regularly involves courts evaluating the constitutionality of abortion legislation that includes multiple prohibitions on a woman’s right to choose. In effect, courts often uphold certain aspects of abortion legislation while striking other parts down. Evidence of this complex dissection of abortion legislation by judges was clear in one of the most prominent abortion cases ever decided by the Supreme Court: Planned Parenthood of Southeastern Pennsylvania v. Casey, supra. In this particular case, the Supreme Court evaluated a case moving up from

56 Ibíd, 487.
57 Sunstein et al., Are Judges, 19.
the Third Circuit Court of Appeals concerning the constitutionality of a 1982 Pennsylvania abortion ban. This law, known as the Pennsylvania Abortion Control Act of 1982, mandated a 24 hour waiting period, spousal notification, and the patient’s informed consent. Additionally, the law required that a minor seeking an abortion receive consent from one parent in order to move along with the procedure.\textsuperscript{58}

In a tension-filled 5-4 decision, the Supreme Court upheld most of the abortion restrictions noted in the Pennsylvania Abortion Control Act of 1982 but struck down the spousal notification requirement, as the majority argued that such a mandate imposed an undue burden on abortion access. According to Sunstein et al.’s methodology, the outcome of \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, \textit{supra} would have been coded as “conservative” since the majority did vote in at least one respect to uphold the pro-life position.\textsuperscript{59} But the outcome of this case surely cannot be coded just as conservatively as an opinion that upheld all aspects of an abortion ban or that specifically upheld an informed consent requirement, like in \textit{Thornburgh v. American College of Obstetricians and Gynecologists}, 476 U.S. 747 (1986). Additionally, the judges signing on to the majority opinion in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, \textit{supra} were considered more moderate-leaning conservatives than the judges in the minority, with some even noting that the language of the majority opinion was more liberal than the highly conservative dissenting opinion. Thus, complex abortion cases like \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, \textit{supra} underscore the need for a coding mechanism that accounts for cases that do not fall squarely on either extreme end of the liberal to conservative ideological spectrum.

In response to criticisms of current coding formulas, more recent scholarship of the attitudinal model has proposed new coding


\textsuperscript{59} Sunstein et al., \textit{Are Judges}, 157.
mechanisms. In his dissertation, Auerbach sought to better understand judicial decision-making in death penalty cases at the circuit court level. His study included tests of the effectiveness of multiple models, including the attitudinal model, in predicting the outcome of capital punishment cases decided between 1980 and 2004. Auerbach’s methodology was unique in that he used a coding continuum to evaluate his chosen cases. He separated case outcomes into six major categories: “(1) strong anti-death penalty; (2) moderate anti-death penalty (3) minimal anti-death penalty; (4) minimal pro-death penalty; (5) moderate pro-death penalty; (6) strong pro-death penalty.”

No study of the attitudinal model in abortion cases has yet incorporated a coding continuum that takes into account the complex ideological voting that occurs among circuit court judges. We have yet to uncover the full picture of the attitudinal model’s effectiveness in predicting court case outcomes because past scholars of the attitudinal model have labeled case outcomes in a rudimentary way that fails to account for the reality that case outcomes do not fall easily into either the conservative or liberal ends of the ideological spectrum. In response to past critiques of methods used to study the attitudinal model, this study will propose and test a new methodological approach, influenced by Auerbach, that better captures the nuance of judicial decisions. With this new methodology in hand, this study will reveal the predictive abilities of the attitudinal model within the arena of highly politicized abortion cases and examine whether judicial decision-making is primarily motivated by judges’ views on the issue of reproductive rights.

**Hypothesis**

The hypothesis for this study is that when coding case outcomes binarily as either liberal or conservative, the attitudinal model will still
be shown to be somewhat predictive of case outcomes in circuit courts but not as predictive as Segal and Spaeth suggested it would be at the Supreme Court level. More specifically, the hypothesis is that my preliminary test of the attitudinal model, which will utilize a traditional binary coding methodology like that utilized by Segal and Spaeth, will produce results similar to those produced by Sunstein et al., who found the attitudinal model to be only predictive of case outcomes in roughly 59% of abortion cases decided at the circuit court level. After coding cases on the continuum, however, this study hypothesizes that analyzing these cases on a scale from strong anti-abortion stances to strong pro-abortion stances will reveal that the traditional coding mechanisms used to test the attitudinal model obscure the reality that judges do not simply vote in a strictly conservative or liberal manner. Rather, they also take moderate positions, particularly when the panel ideology is mixed. As such, the attitudinal model can be seen as less effective at predicting moderate case outcomes than Segal and Spaeth originally suggested. Panel ideology is not the sole factor driving judicial decision-making and thus the attitudinal model cannot fully explain the multitude of factors driving judicial behavior.

Methodology
This study examines 35 abortion cases decided in federal circuit courts between 2005 and 2020, so this study will be picking up where Sunstein et al. left off in 2004. The case selection process for this study was heavily influenced by that in Sunstein et al.’s study of circuit courts. To identify all relevant abortion cases for their analysis, Sunstein et al. searched Lexis Nexis for “core-terms (abortion) and date after 1960 and constitution” and “abortion and constitution!”62 The present study used the same search terms to identify cases, but instead of “date after 1960,” the terms “date after 2004” were used and 35 cases were chosen. In order to test the attitudinal model, as this study sets out to do, scholars must be able to identify and code the authoring judge. For this reason, per curiam opinions - opinions that do not identify a

singular authoring judge and instead are published on behalf of the court - were excluded from consideration in this study. Nevertheless, due to the presence of over 800 abortion cases having been decided among the 13 circuits, omitting per curiam opinions nevertheless left plenty of relevant cases to examine.

The present study begins with abortion cases in 2005. Even though Sunstein et al.’s study evaluated cases from all 13 circuit courts, the time constraints of this study and the sheer number of abortion cases decided in circuit courts over the past 15 years make it possible to only study two circuits. The Fifth and Ninth Circuits will serve as the main circuits of focus on this study. The Fifth and Ninth Circuits were chosen in order to ensure that the judicial panels to be investigated included judges across the ideological spectrum. The Fifth Circuit contains courts with jurisdictions in Texas, Louisiana, and Mississippi. It is regarded as one of the most conservative circuits in the country, which is not surprising given that the states of Texas, Louisiana, and Mississippi have historically been hostile to abortion access and reproductive freedom.63 In contrast, the Ninth Circuit is generally viewed as a more liberally-oriented circuit. The Ninth Circuit is more geographically expansive than the Fifth Circuit, as it contains within its circuit districts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.64 The ideologically distant Fifth and Ninth Circuits serve as perfect circuits to examine because studying them will ensure that the study answers questions about how the attitudinal model may predict the voting behaviors of both liberal and conservative judges.

While a majority of previous studies of the attitudinal model employ a quantitative regression analysis to evaluate how predictive the attitudinal model is in judicial decision-making, this study incorporates both qualitative and quantitative methods of data collection. This

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64 Ibid.
unique approach, as discussed earlier, is necessary for garnering a more holistic and nuanced understanding of the complexity of judicial behavior and decision-making. Instead of labeling case outcomes strictly as either liberal or conservative, the methodology will follow Auerbach’s lead by coding each case along a continuum. 65 The continuum for this study features three possible classifications: (1) strong pro-abortion rights (2) moderate (3) strong anti-abortion rights. Evidently, this study will not classify case outcomes as either liberal or conservative but will rather place cases on the continuum with a scale ranging from 1 to 3.

For the preliminary quantitative test of the attitudinal model, the singular independent variable was the political ideology of the authoring judge. As is consistent with previous studies of the attitudinal model, a judge’s ideology or personal policy preference was informed by the party affiliation of each judge’s nominating president.66,67,68 The first dependent variable in this study was the outcome of the case. The same methodology used by Sunstein et al. to code case outcomes as either liberal or conservative was utilized. Therefore, a decision that upheld any anti-choice provisions would be coded as “1” and a decision upholding the pro-choice position would be coded as “0.”

For the second test of the attitudinal model utilizing both qualitative and quantitative methods, five additional variables were tested. Utilizing these variables allows this study to expand on the level of analysis offered by Sunstein et al. These last five variables were dependent on qualitative data and thus were evaluated through a textual analysis of each case. The justification for these chosen variables can be found in recent scholarship that has identified specific language and code words used in Supreme Court opinions that scholars like Paula Abrams have suggested indicate anti-abortion or

65 Auerbach, "Death and Politics," 78.
67 Sunstein et al., Are Judges, 153.
68 Segal and Spaeth, The Supreme Court and the Attitudinal Model, 253.
pro-choice sentiments among judges. In her article on the language of abortion stigma in the Supreme Court, Abrams identifies how judges both hostile to and supportive of abortion discuss patients seeking abortions, physicians who perform abortions, and the abortion procedure itself in starkly different ways. One of her most salient arguments is that legal opinions that champion the right to choose (i.e. opinions that are liberal) on the whole feature more scientific language to describe the abortion process and those involved in it. On the other hand, legal opinions that stray away from scientific language about abortions instead tend to feature emotionally charged language that assigns blame to women seeking abortions and conjures up images of violence tend to be more hostile to abortion rights’ (i.e. more conservative).  

The first of these secondary dependent variables was the language used to describe the person seeking an abortion. A case outcome was given a point if the majority opinion included language that referred to the individual seeking the abortion as “mother” instead of “woman.” The second dependent variable was the language used to describe prenatal life. The case outcome was given a point if the majority opinion included language that referred to the fetus as something other than the scientific terms fetus or embryo. A case outcome would be given a point, for example, if the authoring judge referred to the fetus as “child,” “baby,” or “unborn.” The next dependent variable was the language employed to discuss the abortion procedure itself. If an opinion featured the word “murder” or referred to abortion as taking a life, then it would be given a point. The fifth dependent variable was the word choice for physicians who perform abortions. A case outcome was given a point if the authoring judge described an abortion physician as an “abortionist.” The final

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dependent variable was the language used to discuss the abortion patient’s emotional state. Anytime a judge wrote about a patient’s potential to experience regret, the case outcome was given a point.

With these multiple dependent variables at play, the 35 cases studied received a score ranging anywhere from 0 to 5. If a case received a score of 0-1, it was coded as strong pro-abortion rights. If a case received a score of 2-3, it was coded as moderate. Finally, if a case received a score of 4-5, it was coded as strong anti-abortion rights. The benchmark for testing whether or not the attitudinal model was effective in predicting the outcome of these cases is 80%, as laid out by Segal and Spaeth. If the attitudinal model was able to predict the outcome of these cases 80% of the time or more, then this study will be seen as demonstrating the statistical significance of utilizing the attitudinal model to predict case outcomes in abortion cases decided in the Fifth and Ninth Circuit Courts of Appeals.

Further, this study also measured the effects of institutional influence on case outcomes to determine whether instances of ideological voting changed according to the panel makeup. To measure this, the cases were evaluated in four distinct groups. The first group included cases decided by panels of three Democratic appointees. The second group included cases decided by panels composed of two Democratic appointees and one Republican appointee. Next, the third group was made up of cases decided by panels with two Republican appointees and one Democratic appointee. The fourth and final group was composed of cases decided by panels of three Republican appointees. Each case was then placed on the continuum, allowing for an evaluation of the percentage of times in which DDD, DDR, RRD, and RRR panels voted strongly in support of abortion rights, moderately in support of abortion rights, and strongly in opposition to abortion rights.

Results
Testing the Attitudinal Model
This research utilizes two distinct methodologies to test the attitudinal model. To begin, the attitudinal model was evaluated using traditional
quantitative methodologies like those utilized by Segal and Spaeth to
determine to what extent judges engage in ideological voting.\textsuperscript{70} All of
the cases under consideration in this study were heard before three-
judge panels. The preliminary test of the attitudinal model, however, is
only concerned with the political ideology of the authoring judge and
the case outcome. This test of the attitudinal model was used to
determine whether the attitudinal model is as predictive of judicial
voting as Segal and Spaeth, and later as Sunstein et al, predicted it was
or whether there has been a recent decline in judges’ ideological voting
habits.\textsuperscript{71,72}

Of the 35 cases under consideration in this study, 22 featured
an opinion handed down by a judge coded as conservative and 13
featured an opinion handed down by a judge coded as liberal. Not
surprisingly, a majority of the judges who were coded as conservative
served on the Fifth Circuit, while a majority of the judges who were
coded as liberal served on the Ninth Circuit. These results underscore
Broscheid’s argument that the Fifth Circuit is generally regarded as a
more conservative circuit than other circuits. In this case, the Fifth
Circuit is not just more conservative in terms of the decisions it hands
down but also in terms of the ideological make-up of the judges on its
panel.\textsuperscript{73} The same may be said of the Ninth Circuit, which appears
more liberal not only because of its tendency to promote more liberal
decisions but also because it encompasses a large number of judges
who were appointed by Democratic presidents.

Once the panel ideology for each case was identified, the
outcome of each case was coded as either liberal or conservative.
Further, if the case decision fell in line with the pro-abortion rights
position it was coded as liberal, and if the case decision fell in line with
the anti-abortion rights position, it was coded as conservative. As
noted earlier, the methodology for this preliminary quantitative study

\textsuperscript{70} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}.
\textsuperscript{71} Ibid.
\textsuperscript{72} Sunstein et al., \textit{Are Judges}.
\textsuperscript{73} Broscheid, "Comparing Circuits," 188.
of the attitudinal model was modeled on the methodology set forth by Sunstein et al., who also examined the attitudinal model’s predictive abilities in abortion cases heard by circuit courts. Sunstein et al. explained that in their study, “outcomes were coded as pro-life or pro-choice; if a judge voted at all to support the pro-life position, then the vote was counted as a pro-life vote.”74 In order to produce results that could be fairly compared to Sunstein et al., cases in the present study were also coded as anti-abortion (also known as pro-life) if the panel voted at all in support of the anti-abortion position.

Utilizing this binary coding mechanism, 51.42% of the 35 cases studied were coded as anti-abortion rights while 48.57% of cases were coded as pro-abortion rights. The 35 cases under consideration were representative of all abortion cases decided between 2005 and 2020, so the reality that there is a roughly even split between liberal and conservative case outcomes suggests, at least at first glance, that there is little evidence that the Fifth and Ninth Circuit collectively lean more anti-abortion rights or pro-abortion rights.

To measure how useful the attitudinal model was in predicting case outcomes, the political ideology of the authoring judge in each case was compared to the partisan outcome of each of the 35 cases. The comparison revealed that the attitudinal model accurately predicted case outcomes in roughly 72% of cases. On its own, 72% is a staggering number, as it suggests that in a vast majority of abortion cases at the circuit court level, judges predictably engage in ideological voting. Segal and Spaeth found that Supreme Court judges engage in ideological voting roughly 80% of the time. Thus the attitudinal model seems to be slightly less predictive of case outcomes in circuit courts than in the Supreme Court. There is a roughly 8% difference in percentages of ideological voting among circuit court judges and Supreme Court justices, suggesting that circuit court judges are less ideologically motivated in their decision-making than Supreme Court justices.

74 Sunstein et al., *Are Judges*, 157.
In comparison, Sunstein et. al found that the attitudinal model predicted case outcomes roughly 59% of the time, with Democrat-appointed judges delivering pro-choice opinions in 67% of cases and Republican appointees delivering anti-abortion decisions in 51% of cases. Sunstein’s results suggested that circuit court judges are less ideological when it comes to decision-making than Supreme Court judges are. In fact, at just 59%, Sunstein et al. suggested that there is very little evidence of ideological voting at the circuit court level. However, the results of the present study suggested otherwise. Sunstein et al. studied cases from 1971 to 2005, so when compared to the results of this current study, circuit court judges appear to be increasingly more inclined to vote in line with the party preferences of the President who appointed them.

What appears consistent over time in both the Sunstein et al. study and the present study is that Republican-appointed judges engage in ideological voting less frequently than their Democrat-appointed colleagues. The present study found that Republican-appointed judges vote conservative in 68% of cases, while Democrat-appointed judges vote liberally in 76% of cases. Sunstein et al. similarly found a 16% difference in ideological voting between liberal and conservative judges, so when compared to the present study it appears that such differences are still apparent but are declining. Nevertheless, both the evidence from the present study and Sunstein et al’s study reveals that both liberal and conservative judges engage in ideological voting, albeit to a lesser degree than their colleagues on the Supreme Court.
Table 1 Attitudinal Model’s Predictability

<table>
<thead>
<tr>
<th>Author of Study</th>
<th>% of Cases Accurately Predicted by Traditional Attitudinal Model Methodologies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Segal &amp; Spaeth</td>
<td>80.00</td>
</tr>
<tr>
<td>Sunstein et al.</td>
<td>59.00</td>
</tr>
<tr>
<td>Sulzer</td>
<td>72.00</td>
</tr>
</tbody>
</table>

After the attitudinal model was tested utilizing traditional coding mechanisms, circuit court judges’ tendency to engage in ideological voting was also tested utilizing a coding mechanism informed by a textual analysis of each abortion case. The cases were coded on a continuum as shown:

---(1)--------------(2)--------------(3)---
| Strong | Moderate | Strong |
| Pro-Abortion Rights | Anti-Abortion Rights |

As mentioned in the methodology section, the cases were coded on this continuum based on 5 different variables that were dependent on the specific language used in each opinion. Of the 35 sample cases under consideration, a majority of cases fell under the strong pro-abortion rights area of the continuum. Unsurprisingly, most of the cases coded as strong pro-abortion rights came out of the liberally-oriented Ninth Circuit. Of the cases that were coded as moderate, there was a fairly even split between those hailing from the Fifth Circuit and those from the Ninth. All of the strong-anti-choice cases came from the conservatively-oriented Fifth Circuit.

To begin, each of the 35 cases was placed on the continuum. Their position on the continuum was then compared to the political party of the authoring judge in each case (Table 1). This methodology revealed that Democrat-appointed judges voted in a “strong pro-
abortion rights” mode in roughly 76.92% of cases, suggesting high levels of ideological voting. They voted moderately in roughly 23% of cases and voted in a “strong anti-abortion rights” mode in 0% of cases. In contrast, Republican-appointed judges appeared to engage in ideological voting at much lower rates. For instance, the results of this study revealed that Republican-appointed judges voted in a “strong anti-abortion rights” mode only 9% of the time. They voted moderately in 22.72% of cases and voted liberally in a staggering 68.1% of cases. Their tendency to vote liberally suggests that conservative judges are not as driven by their political or ideological preferences as their liberal colleagues. A possible explanation for this discrepancy between liberal and conservative judges may be that legal precedent plays a larger role in the decision-making process of conservative judges. This suggests that Republican-appointed judges may believe that legal precedent should play a larger role than ideology when issuing opinions.

Table 2 Ideological Voting w/ Coding Continuum

<table>
<thead>
<tr>
<th>Party of Authoring Judge</th>
<th>% Liberal Voting (Strong Pro-Abortion Rights)</th>
<th>% Moderate Voting</th>
<th>% Conservative Voting (Strong Anti-Abortion Rights)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican</td>
<td>68.10</td>
<td>22.72</td>
<td>9.00</td>
</tr>
<tr>
<td>Democrat</td>
<td>76.92</td>
<td>23.00</td>
<td>0.00</td>
</tr>
</tbody>
</table>

To investigate the cause of the high levels of ideological voting by Democrat-appointed judges in comparison to the lower levels of ideological voting by Republican-appointed judges, this study analyzed the effects of institutional influence on each panel. To do so, each case was again arranged on the continuum and each case’s position on the continuum was analyzed in relation to the political makeup of the panel that heard each case. To begin, the cases with three Republican judges on the panel were evaluated. The quantitative analysis revealed that
strictly conservative panels, referred to as RRR in Table 2, hand down strong anti-choice decisions 22.22% of the time. Similarly, in 22.22% of cases, they hand down moderate opinions that are neither strong pro-abortion rights nor strong anti-abortion rights decisions. In the remaining 55.5% of cases, RRR panels hand down what has been coded as pro-abortion rights decisions. These results suggest that RRR panels hand down strong conservative decisions just as often as they hand down moderate opinions but that most frequently they act counter to their political inclinations by voting in favor of abortion rights. The relatively low percentage of times in which RRR panels hand down conservative decisions suggests that circuit court judges appointed by Republican presidents appear to be relatively unmotivated by their political ideologies when deciding cases. This is consistent with findings by Sunstein et al. that conservative judges engage in ideological voting only about 51% of the time. Consequently, even when the effects of institutional influence on case outcomes are considered, it appears that Republican-appointed circuit-court judges are not exactly hard-line ideologues.

Next, an analysis of ideologically mixed panels of both liberal and conservative judges revealed that having a single liberal judge on a conservative panel drastically affects the degree to which a case is supportive or unsupportive of abortion rights. For instance, in panels made up of one liberal judge and two conservative judges, which will further be referred to as RRD panels, these panels voted in support of abortion rights 17.22% more than RRR panels. In fact, RRD panels did not hand down any strong anti-abortion rights decisions, in comparison to the 22.22% of the time when RRR panels hand down strong anti-choice cases. These results exemplify the strong institutional influence at play in circuit court decision-making, as the presence of even one liberal judge clearly increased the number of pro-abortion rights decisions handed down by conservatively-dominated panels.

For DDR panels, some patterns present in RRD panels remained but there were also significant differences in the rates of ideological voting between the two different panels. Like RRD panels,
panels with two liberal judges and one conservative judge, referred to as DDR panels, never voted in a strongly anti-abortion rights manner. Put differently, the majority liberal panels consistently voted moderately or strongly in support of abortion rights. Specifically, they voted moderately exactly 11.1% of the time. In the other 88.8% of cases, these judges handed down strong pro-abortion rights decisions. These findings reveal that as the number of liberal judges on a panel increases, the likelihood that a case will be decided in a moderate or pro-abortion rights manner also increases. The likelihood of a liberal decision jumps roughly 7% when two liberal judges are added to a panel instead of just one. The same effects are simply not seen when a Republican judge is added to a majority Democrat panel. In fact, there is no statistically significant indication that the likelihood of a conservative decision goes up when just one Republican sits on a panel dominated by two other Democrat-appointed judges. The likelihood of a conservative decision only increases when the panel is dominated completely by Republican-appointed judges.

The notion that liberal judges are heavily influenced by their political ideologies when making decisions is underscored by the finding that panels populated by three liberal judges overwhelmingly deliver decisions in strong support of reproductive freedom. For instance, panels featuring three liberal judges voted strongly in support of abortion rights in 80% of the cases considered. They voted moderately in 20% of cases. Of all of the cases decided by DDD panels, none of them were coded as strong anti-abortion. Evidently, when panels are made up of all liberal judges, they engage in ideological voting at exceptionally high levels close to those that Segal and Spaeth suggested Supreme Court justices do. Sunstein et al. proposed that judges’ political preferences are predictive in only 59% of circuit court cases, but the evidence from this research suggests that judges’ political preferences are vastly more predictive in the case of DDD circuit court panels.
Table 3 Ideological Voting w/ Coding Continuum

<table>
<thead>
<tr>
<th>Panel Make Up</th>
<th>% Liberal Voting (Strong Pro-Abortion Rights)</th>
<th>% Moderate Voting</th>
<th>% Conservative Voting (Strong Anti-Abortion Rights)</th>
</tr>
</thead>
<tbody>
<tr>
<td>RRR</td>
<td>55.50</td>
<td>22.22</td>
<td>22.22</td>
</tr>
<tr>
<td>RRD</td>
<td>72.72</td>
<td>27.00</td>
<td>0.00</td>
</tr>
<tr>
<td>DDR</td>
<td>88.88</td>
<td>11.10</td>
<td>0.00</td>
</tr>
<tr>
<td>DDD</td>
<td>80.00</td>
<td>20.00</td>
<td>0.00</td>
</tr>
</tbody>
</table>

Discussion

Attitudinal Model - Traditional Methodology
The results of this study reveal that when viewing cases strictly as either liberal or conservative, the attitudinal model is highly predictive of case outcomes, since it accurately forecasts judges’ votes in 72% of cases. At face value, this high percentage reflects a harsh reality that judges do not appear to be following the law blindly and instead rely heavily on their political ideology to inform their decision-making. Had the judges in the chosen cases been applying the law consistently according to the Legal Model, one would expect judges to rule roughly evenly on abortion cases - at times supporting the liberal position and at times supporting the conservative position. Sunstein et al. found the attitudinal model to be predictive of case outcomes in roughly 59% of circuit court decisions, but it appears that when considering more recent cases decided after 2004, circuit court judges engage in high levels of ideological voting.
It is important to note that Segal and Spaeth found the attitudinal model to be predictive in 80% of Supreme Court cases, so this current study suggests circuit court judges engage in ideological voting less frequently than Supreme Court justices. These results suggest that when only viewing cases as either pro-abortion rights or anti-abortion rights, stereotypes of Supreme Court justices as highly ideological still seem apt for circuit court judges who are often viewed as less political, but who nevertheless appear to be highly politically motivated. On the surface, this study reveals that judges are highly motivated by their political ideologies in the case of abortion.

The results of this study highlight, however, that levels of ideological voting are not equal for Republican-appointed and Democrat-appointed judges. As noted earlier, when taking the coding continuum into account, Democrat-appointed judges authored liberal decisions 76.92% of the time, which differed from the 68.1% of the time that Republican-appointed judges authored liberal decisions. In fact, Republican-appointed judges only issued very strong anti-abortion rights decisions 9% of the time. They were much more likely to issue moderate or liberal decisions than conservative ones. These results indicate that Republican-appointed circuit court judges are not as ideologically or politically motivated as Democrat-appointed circuit court judges. This is somewhat consistent with Sunstein et al’s findings that Republican-appointed circuit court judges vote conservatively 51% of the time and Democrat-appointed circuit court judges vote liberally 67% of the time. They found a clear difference in rates of ideological voting, but the present study suggests that this divide is much larger than Sunstein et al suggested it was.

Sunstein et al. found that the attitudinal model is predictive of case outcomes in roughly 59% of cases, arguing that ideological voting was practically nonexistent at the circuit court level. The rate of ideologically-motivated voting in circuit courts was found to be obviously much higher in this present study - exactly 13% higher than Sunstein found. This sharp increase may be due in part to the differences in the sample cases. For instance, Sunstein et al. chose cases from 1974-2005, while the present study considered more recent cases.
from 2005-2020. Sunstein et al. found that time period does affect case outcomes in some instances. They argued that their data demonstrated that “[i]n the immediate aftermath of a major ruling by the Supreme Court, the difference between Democratic and Republican appointees is sharply dampened, apparently because the legal system is working to ensure conformity with the Court’s ruling.” 75 They go on to explain that following the landmark Roe v. Wade, supra case, ideological voting, even among circuit courts, decreased tremendously because courts actively sought to decide cases that were consistent with the higher court’s ruling on abortion. Sunstein et al. argue that this “dampening” of ideological voting in Roe v. Wade’s wake in part explains the low 59% of cases in which circuit court judges display ideologically-motivated voting behavior. Thus, one possible explanation for the higher rates of ideological voting at play in this current study may be that there has not been a major abortion ruling by the Supreme Court since Roe v. Wade, supra that has had the same dampening influence on ideological voting.

The sample cases chosen in the Sunstein et al. study and this present study may also explain the different levels of ideological voting. The cases in this study came from both the Fifth and Ninth Circuits - two circuits that are generally regarded as more conservative and more liberal, respectively. 76 In contrast, the scope of the Sunstein et al. study was larger and considered cases from all ten circuits, including the D.C. Circuit. Consequently, one might expect levels of politically-motivated decision-making to be higher among judges in the Fifth and Ninth Circuits than among judges in other circuits. Nevertheless, the present study is still useful insofar as it reveals that ideological voting is still prevalent in circuit courts, even though it may be concentrated in specific circuits.

75 Sunstein et al., Are Judges, 88.
The high levels of ideological voting on the Fifth and Ninth Circuits may appear troubling insofar as they suggest that judges act as political puppets who decide cases irrespective of the law. This pattern is not as troubling as it first appears, though, because as Shapiro suggested, the binary coding mechanism of the traditional methodologies used to study the attitudinal model obscures legal complexity. They do not leave open the possibility that a circuit court decision may not be wholly liberal (i.e. pro-abortion rights) or wholly conservative (i.e. anti-abortion rights) and thus obscure the ways in which some case outcomes may be more moderate despite being decided by a majority Republican panel. By extension, the binary coding of panels themselves also limits the depth of analysis possible for understanding judicial decision-making. For instance, the traditional methodologies used to study the attitudinal model code mixed panels as either liberal or conservative based on the political ideology of the majority of judges on the panel. Under this method, DDR panels are labeled liberal while RRD panels are labeled as conservative. While this coding mechanism seems rational, this approach fails to consider how institutional effects, like the addition of a single conservative judge on a liberal panel or a single liberal judge on a conservative panel, can have a statistically significant effect on moderating a case outcome. As such, the attitudinal model provides a limited view of circuit court decision-making that is simplistic and that provides only a macro-level view of judicial decision-making that suggests judges are motivated by politics and politics alone.

Attitudinal Model - Coding Continuum
With the weaknesses of traditional coding mechanisms in mind, the coding continuum was utilized to arrange cases on a sliding scale from strong anti-abortion rights to strong pro-abortion rights. Put simply, the results from the coding continuum revealed that not all abortion decisions handed down by the Fifth and Ninth Circuits are the same. Some are moderately supportive of abortion rights: for example, there

77 Shapiro, "Article: Coding," 486.
are cases in which judges granted standing to pro-life community organizations seeking to put an abortion clinic out of business but also simultaneously ordered an injunction against a state statute that placed an undue burden on abortion providers by requiring that doctors performing abortions obtain admitting privileges at a hospital. By examining the written text of each case, one begins to see that there are levels to abortion decisions: some cases are more moderate than others and these more moderate cases are on average handed down by ideologically mixed panels, since these panels facilitate a process in which the individual judges’ political ideologies are dampened.

The continuum coding mechanism revealed that the cases with the strongest support for abortion rights were overwhelmingly issued by majority liberal panels of two to three judges appointed by Democratic presidents. Support for abortion rights decreased as conservative judges appointed by Republican presidents joined the panel and as was expected, support for abortion rights increased as liberal judges were added to the bench. These results suggest that judges do engage in high levels of ideological voting and thus panel ideology is still a significant influence on judicial decision-making. This present study, and scholarship from Segal and Spaeth as well as Sunstein et al., all suggest that no matter the methodology, time and again quantitative and qualitative data reveal that circuit court judges are influenced by their desire to maximize their personal policy preferences. Therefore, the attitudinal model is still a valid model for predicting some aspects of judicial behavior.

One surprising result of this study, however, was the extent to which institutional factors influenced case outcomes. In other words, the presence of even one liberal judge on a conservative panel or one conservative judge on a liberal panel vastly skewed case outcomes to become increasingly liberal. In particular, the present study revealed that ideological dampening of the majority of the panel occurs most frequently when liberal judges are added to conservative panels. This is evident when looking in particular at the percentages in which panels issue liberal opinions. Absent any liberal judges on the panel, circuit courts issued strong pro-abortion rights decisions 55.5% of the time.
In contrast, when just one liberal judge is added to the panel, the number of instances in which an RRD panel issues a strong pro-abortion rights cases jumps to 72.27%. Thus, even just one additional liberal judge on the panel vastly improves the chances of a liberal circuit court decision. This number reveals that one liberal judge facilitates tremendous ideological dampening of the court’s conservative majority: in fact, the single liberal judge can be said to facilitate their own ideological amplification.

The same extent of ideological amplification and dampening was not seen when conservative judges were added to panels with a liberal majority. DDD panels decided cases in strong support of abortion rights 80% of the time, suggesting a high level of ideological voting. However, when one Republican was added to the panel, the tendency of the panel to vote in a strong anti-abortion rights manner did not at all increase. The data suggests that the addition of a Republican-appointed judge actually increased the tendency of the panel to vote in support of abortion rights. Thus, the ideological dampening of the majority’s political preferences when a conservative judge was added to a majority liberal panel was non-existent. While this may seem counter-intuitive, one possible explanation is the relatively small sample of available cases to study with DDD panels. Only 5 DDD panels were considered in the present study, suggesting that greater evidence of ideological amplification may have been seen had there been more available cases to consider. Nevertheless, with respect to mixed panels, it appears that circuit-court decision-making in abortion cases is much more complex than simply a majority rules system.

This phenomenon in which an individual judge on a panel facilitates the amplification of his or her own policy preferences and the dampening of the opposing party’s policy preferences can best be explained by the phenomenon of the “collegial game.” The notion of the “collegial game” has been adopted by scholars of the strategic
model, also known as institutionalists. They argue that judges who play the “collegial game” capitalized on the diversity of the panel by engaging in informed discussions with other judges on the panel, which presumably improves judges’ decision-making. Deliberation is a focal point of the “collegial game,” whether that be in open conversations between judges or in the circulation of opinions. As such, the institutionalists argue that these processes increase the influence that the median political position of the panel takes on in decision-making. In light of the data presented in this study, the attitudinal model alone is unable to explain the nuance and complexity of some aspects of judicial decision-making, such as the degree to which changes in the composition of a mixed panel may lead to a more moderate case outcome. In light of such findings, it appears that institutional factors, as well as panel ideology, play a role in circuit court decision-making in reproductive rights cases.

Practical Difficulties and Areas for Future Research
While this study is significant because of what it reveals about the nature of abortion decisions and existing models of judicial decision-making, it is important to acknowledge its practical difficulties and limitations. As mentioned in the methodology, this study was restricted to 35 abortion cases decided by the Fifth and Ninth Circuit courts during the period 2005-2020. By no means is this study representative of decision-making in all circuits in all issue areas. Rather, this study tells a particular story about decision-making on abortion in the Fifth and Ninth Circuits, adding to existing scholarship on circuit court decision-making in abortion cases that was previously put forth by Sunstein et al. Future scholarship on the attitudinal model could expand by investigating whether ideological voting also occurs in cases involving other highly politicized policy areas such as gun control, immigration, or LGBTQ+ rights. Future research on this topic could

also certainly utilize a larger sample size and look more broadly at decision-making in the other 11 circuit courts of appeal.

In the future, the continuum of judicial decision-making proposed in this study may also be altered to provide a more expansive view of judges’ rulings in abortion cases. For instance, this study’s continuum was split into three major parts: supportive of abortion rights, moderate, and unsupportive of abortion rights. Future scholars seeking to conduct a similar study may consider including additional sections to the continuum. One could follow Auerbach’s lead by putting forth a six-part continuum tentatively labeled (1) strong pro-choice (2) moderately pro-choice (3) minimal pro-choice (4) minimal anti-choice (5) moderate anti-choice (6) strong anti-choice. The three-part continuum was adopted in this particular study because of the time constraints as well as the comparatively smaller sample size; nevertheless, a six-part continuum is a worthy avenue for future scholarship on judicial decision-making -- not only in abortion cases but in any policy area.

Future research on this particular topic should also consider alterations to variable selection to ensure that the key words being selected are relevant and in line with the current language being used to discuss abortion. Even in the last 25 years, the specific words used to describe the highly controversial issue of abortion, as well as the individuals who undergo it and the doctors who perform it, have changed significantly, necessitating that researchers continually reevaluate their chosen textual variables.

Conclusion
This study offers avenues for future research based on the sincere hope that after reading this study, more scholars will incorporate both quantitative and qualitative methods into their research on judicial decision-making. This study illuminates that investigating the specific language of opinions, especially opinions elucidating a court’s decision on a highly controversial area of policy, is just as important as inspecting the case outcome. In other words, language matters. The language adopted in court opinions indicate the cases’ support or lack
of support for abortion rights and reveals that current methodologies for studying the attitudinal model are too narrow. Those methodologies simply do not allow for nuance in case outcomes because of their strict coding mechanisms.

Language matters not only for understanding case outcomes but also for driving the trajectory of public opinion on such a controversial issue. As scholars like Abrams have argued, courts exert a tremendous influence on the public’s view of highly politicized topics, including abortion. At times, courts have adopted anti-choice buzzwords like “the unborn” and have contributed to abortion stigma by comparing a dilation and evacuation abortion procedure to murdering a child. At other times, though, major court decisions like Roe v. Wade, supra and even Planned Parenthood of Southeastern Pennsylvania v. Casey, supra, have had a hand in increasing acceptance of the right to abortion, even if there is no threat to the pregnant individual or the fetus. In these majority opinions, justices borrowed language from numerous circuit court opinions, pointing yet again to the importance of language in the opinions of circuit courts.

Similarly, this study of judicial decision-making is also significant because it reveals that abortion continues to be a highly ideological issue that divides not only liberal and conservative voters but also liberal and conservative judges. As mentioned earlier, in their study, Segal and Spaeth found that they could predict the outcome of a Supreme Court case with 80% accuracy when they knew whether the judge was liberal or conservative based on the party of the President.

80 Ibid, 321.
who nominated the judges in the majority. However, readers should take comfort in the fact that this study revealed that when case outcomes are viewed more expansively on a continuum, circuit court judges do not appear to be strict ideologues to the extent that Segal and Spaeth suggested Supreme Court judges were. When cases are viewed more expansively on a continuum of outcomes rather than coded strictly binarily as conservative or liberal, one can see that there are institutional, not merely political forces at play. Judges are influenced by their colleagues - in particular, as conservative panels add liberal judges, they have a tendency to reflect the more liberal position. In effect, it appears that judges do engage in a “collegial game” where they are receptive to the arguments and opinions of other judges on the panel, even when those judges may possess political views that diverge from the ideological majority of the panel. In effect, the attitudinal model appears to paint an incomplete picture of the nuances of judicial decision-making. While the attitudinal model believes only politics is at play, it is clear that there are other collegial or institutional forces at play, since ideology alone does not explain why some panels with a majority of conservative judges may still hand down a strong pro-abortion rights decision.

When viewed in light of Sunstein et al.’s conclusions about judicial decision-making in circuit courts, the results of the present study reveal that the degree to which political ideology influences judicial decision-making changes over time. There is no singular explanation for this phenomenon, but it is worth noting that just as individuals change over the course of their lives, so do judges. Consequently, new and improved studies of judicial decision-making will continue to be pertinent and significant as the multitude of variables that influence judges must no longer be conceived of as static. Extra-judicial influences may affect each judge differently across different policy areas as well. Therefore, knowledge of the numerous

factors that drive decision-making may never be known with absolute certainty. Nevertheless, what is clear is that judicial decisions, even at the circuit court level, impact the daily lives of millions of Americans every year. Thus, it is incumbent upon social scientists to better understand the motivations of those judges.
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