2.   *Modern-Day Proxies for Ideology*

Scholars studying the effects of ideology on Supreme Court decisionmaking initially used approaches similar to those used by Professor Pritchett. Scholars found patterns of voting behavior, and interpreted them to mean that ideology affected decisionmaking.[1] Yet the very thing those scholars wanted to explain—votes on the merits—were used to create the measure of ideology that was used to "explain" the votes. Do you see the problem with this? It's circular!

The independent variable in studies like these is ideology, which is measured using the votes themselves. The dependent variable is the vote as well. It's not surprising at all that these things are related to one another, since they're precisely the same thing. Indeed, a finding such as this is just as "profound" as finding a perfect relationship between temperatures measured in degrees Fahrenheit and degrees Celsius; it just doesn't make any sense to call one the dependent variable, one the independent variable, and then get excited when they are strongly related.   Obviously they are. Unfortunately, much of the early work on the attitudinal model suffered from this tautology, using votes to measure ideology (or attitudes), which were then used to "explain" the votes themselves. Doing so provides no explanation at all.

a.   **Appointing President as Proxy**

Rather than drawing assumptions about judges' ideologies based on their votes, more recent studies often use the party of the appointing President as a proxy for judicial ideology. For example, as we've seen, that is how Professor Revesz measured judicial ideology in his study of the D.C. Circuit.

While reliance on the party of the appointing President avoids the circularity problem that haunts studies like Pritchett's, it has its own drawbacks. Indeed, one of Judge Edwards' specific complaints about Professor Revesz's study relates to the decision to code judges' "ideology" based on the party of the appointing president. Judge Edwards found this to be extremely problematic. (We've broken up Judge Edwards' argument for ease in considering it.)

> 1. "As Revesz's title suggests, 'ideology' is a major component of his study. Here choice of language matters tremendously. The loaded word 'ideology' makes headlines and attracts attention; it is therefore very striking that Revesz never bothers to proffer a definition of this all-important term. Rather, he explains that he will use as a proxy for ideology 'the views generally held by the party of the appointing President.' This approach raises a number of serious problems."[2]

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[1] *See* **David W. Rohde and Harold J. Spaeth, Supreme Court Decision Making (1976); Glendon A. Schubert, The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963 (1954).**
[2] *Id.* **at 1347.**

2. "The threshold problem is that Revesz does not provide an explanation of the usefulness of the proxy of the party of the appointing President as a basis for judicial ideology…. Rather obviously, the categories 'Democrat' and 'Republican' do not necessarily match sympathy towards greater or lesser degrees of environmental protection. The policies of individual Presidents—to say nothing of judges—may diverge greatly on such a complex topic. Without providing *some* statistical measure of the significance of the asserted correlation between political party and environmental policy, it is suspect for Revesz to assume that his ideological proxy is meaningful."[3]

3. "But more importantly, Revesz never explains why the supposed high political profile of the D.C. Circuit, even if it were established fact, would ensure a close connection between the ideology of an appointing President and the ideology of an individual judge…. [N]umerous Supreme Court Justices, past and present, have famously disappointed the parties of the Presidents who appointed them by their independence and unpredictability…."[4]

Judge Edwards' complaint goes to the heart of using what is called a *proxy*. It is a simple fact of empirical study that often you cannot code the variables (dependent and independent) for precisely what you want to study. Instead, you oftentimes have to rely on one variable that is easy to measure that stands in for, or represents, another. The variable that stands in is called a proxy variable. Here, Revesz used political party of the appointing President is a proxy for ideology. What is the argument for its use as a proxy? In what ways is it limited?

In his own study of decisionmaking in the circuit courts, which we will examine below, Professor Cass Sunstein provided this rationale for using the political party of the appointing President to measure judges' ideology:

Presidents are frequently interested in ensuring that judicial appointees are of a certain stripe. A Democratic president is unlikely to want to appoint judges who will seek to overrule *Roe v. Wade* and strike down affirmative action programs. A Republican president is unlikely to want to appoint judges who will interpret the Constitution to require states to recognize same-sex marriages. It is reasonable to hypothesize that as a statistical regularity, judges appointed by Republican presidents…will be more conservative than judges appointed by Democratic presidents.[5]

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[3] *Id.*
[4] *Id.* at 1348-1349.
[5] Sunstein, Schkade & Ellman, *supra*, at 303.

Look back at the tables in the previous section. Does the party of the appointing President help explain the voting blocs of Justices we see? On the more modern Court, five Republican appointees vote together most of the time. But, of the remaining four Justices (Breyer, Souter, Stevens, and Ginsburg), two are Democratic appointees and two are Republican appointees. Using party to as a proxy for ideology simply does not work very well for some Justices, like Justices Blackmun, Stevens, and Warren—all Republican appointees who were very prominent liberals during their time on Court. President Eisenhower once quipped that appointing Justice Warren was "the biggest damned-fool mistake I ever made."[6] What do you think causes such "mistakes"? Are there motivations other than ideology that might account for Presidents' choices for the Supreme Court?[7]

b. Segal-Cover Scores

To break out of some of the perceived the problems associated with using Justices' votes or the party of the appointing President to measure ideology, Professor Jeffery A. Segal and his collaborator Professor Albert D. Cover invented a novel approach that looks at newspaper editorials about Supreme Court nominees.[8] Editorial boards oftentimes write opinions about nominees to the Court and their suitability for the job. Not surprisingly, more liberal boards like the *New York Times* tend to favor more liberal nominees; more conservative boards like the *Wall Street Journal* favor more conservative nominees. Segal and Cover collected all editorials written about all nominees to the Court—including those who were never confirmed—by four leading national newspapers. They did this from the nomination of Chief Justice Earl Warren forward.

Here is how Professors Segal and Cover describe the construction of their measure:

> We started by conducting a content analysis of a source that contains comparable information on each justice since Earl Warren: statements in newspaper editorials from the nomination by the president until the confirmation vote by the Senate. Newspaper editorials are one of the few independent sources of information that contain comparable data on each justice. Only editorials prior to confirmation by the Senate were examined, for editorials after confirmation will undoubtedly be influenced by votes a justice casts and thus are not independent of those votes. We selected four of the nation's leading papers, two with a liberal stance (the *New York Times* and *Washington Post*) and two with a more conservative outlook (the *Chicago Tribune* and *Los Angeles Times*).

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[6] CONG. QUARTERLY, THE SUPREME COURT: JUSTICE AND THE LAW 175 (3rd ed. 1983).
[7] See Edwards/Livermore at 1919 (citing personal relationships and party building as alternative motivations);
[8] Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

To conduct the content analysis, we trained three students to code each paragraph for political ideology. Paragraphs were coded as *liberal*, *moderate*, *conservative*, or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[9]

Segal and Cover then constructed a measure of liberalism by taking the difference in the number of liberal paragraphs and conservative paragraphs, dividing by the total number of applicable paragraphs, and rescaling to an interval where 0 is unanimously conservative, and 1 is unanimously liberal. This avoids the circularity problem because the editorials are written before the Justice decides any cases. Figure XX shows the resulting Segal-Cover scores from Chief Justice Warren to Justice Sotomayor.

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[9] *Id.* at 559.
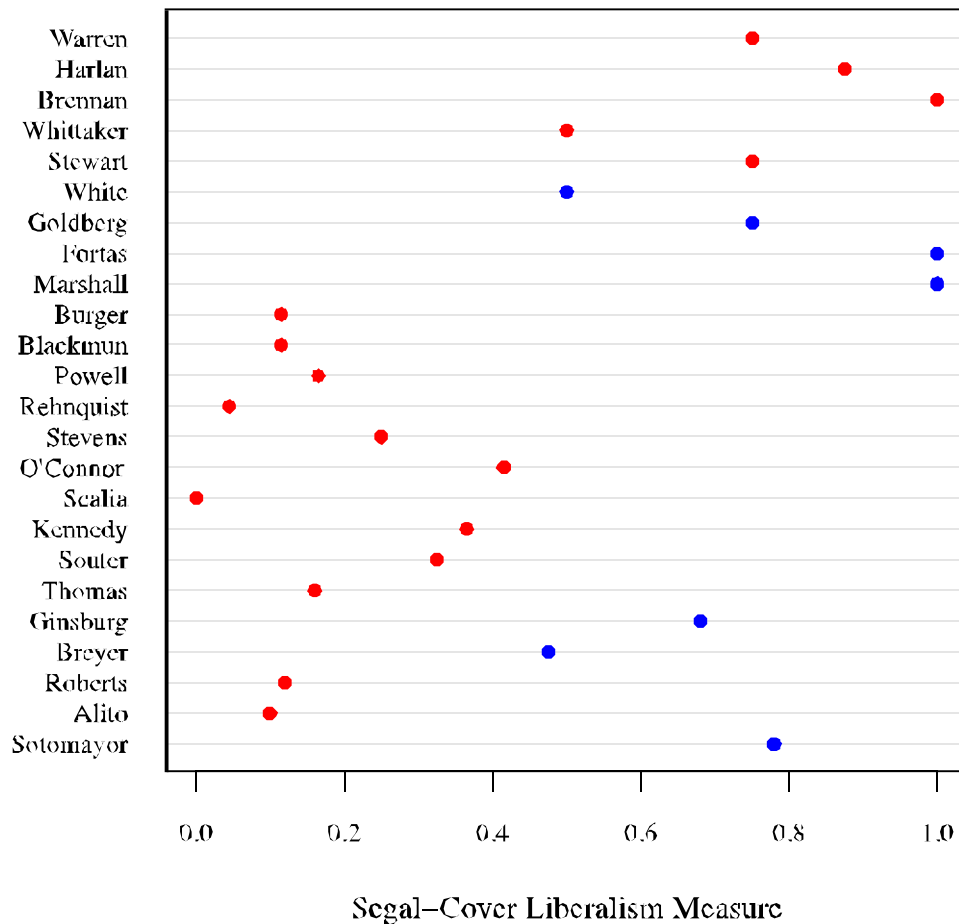
Figure XX. Segal-Cover measure of judicial liberalism for justices confirmed 1953-2009. Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Data obtained from http://www.stonybrook.edu/polsci/jsegal/qualtable.pdf (accessed July 14, 2010). Republican nominees marked in red; Democratic nominees marked in blue. [We should change one of the dots to an x or something similar that's visible in black and white.]

Eyeball the chart. What do you think? How did they do? You can see that the measure does fairly well differentiating *within* political party, especially among Republicans. The Republicans nominated by President Eisenhower are notably more liberal than those appointed by Presidents Nixon, Reagan, and Bush I and II.

Taken at face value, the scores make a lot of sense. Justice Scalia is measured as the most conservative justice nominated to the court; Justices Fortas, Brennan, and Marshall are the most liberal. There are some misses, too, especially Justice Blackmun. And Justices Stevens and Souter are coded as more conservative than Justices O'Connor and Kennedy, although—as the tables in the previous section showed—Stevens and Souter tended to vote with Democratic appointees Breyer and Ginsburg?

What do you see as the utility of this measure? Do you see any problems?

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c. Giles-Hettinger-Peppers Scores

As clever as the Segal-Cover scores are, they are going to present a challenge for any study of the lower courts, because there may not be much in the way of editorials for most lower court judges.[10] But as we've seen, there are shortcomings with using the party of the appointing President. Not all Republican appointees are the same; neither are all Democratic appointees. The question is what else could be used to distinguish among different nominees selected by the same President.

Professors Michael Giles, Virginia Hettinger, and Todd Peppers have developed a measure that seeks to differentiate among appointees by exploiting information about how the appointment and confirmation process actually works.[11] Article II, Section 2 of the Constitution stipulates that the president nominates judges with the "Advice and Consent of the Senate." By custom, the White House oftentimes confers with home-state senators—particularly those from the President's own party—when there are vacancies in the Courts of Appeals and the District Courts. The Senate Judiciary Committee also provides "blue slips" to both home-state Senators to solicit their input into the nomination process. The home-state Senators either approve or disapprove of prospective nominees, or sometimes just don't return these pieces of paper to the committee. This is the formal way that the norm of "senatorial courtesy" works in the Senate. Some would go as far as to claim that home-state Senators of the president's party essentially pick nominees for the lower federal courts.[12] Others argue that a nomination will not go forward without support from the home-state Senator.[13] Because of the tradition of senatorial courtesy, there are good reasons to think that Republican from Texas would look very different than a Republican from Maine, or that a California Democrat is different from a South Carolina Democrat.

Professor Giles and his colleagues decided they needed a measure of ideology that took account of not only the appointing President, but the home-state Senators as well.

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[10] Corey Rayburn Yung argues that "a similar approach at the lower federal courts is simply impossible because of the limited, and event-driven coverage of other federal judges." Corey Rayburn Yung, *Judged by the Company you Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1149 (2010). At the state level, Professors Paul Brace, Laura Langer, and Melinda Gann Hall note that a Segal-Cover type approach at the state level would be exceedingly difficult to implement. Paul Brace, et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000). However, a Segal-Cover type approach has been used for at least one state. In a study of the California Supreme Court, Emmert and Traut capitalize on the comparatively high salience surrounding the California Supreme Court to use a Segal-Cover approach to measure ideology. Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22 AM. POL. Q. 41 (1994).
[11] Michael W. Giles, et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).
[12] Asked about his role in the judicial nomination process during the Reagan administration, Texas senator Phil Gramm stated, "I'm given the power to make the appointment. . . . The people elected me to do that." Cragg Hines, *Dispensing Legal Plums*, HOUSTON CHRON., Apr. 21, 1985, at 1.
[13] Harold Chase, FEDERAL JUDGES: THE APPOINTING PROCESS 7 (1972).

To construct their measure, they needed a good measure of ideology in Congress. While there are a handful of viable options, they chose the state-of-the-art and widely used ideological scores of members of Congress and presidents developed from by roll call record by Professors Keith Poole and Howard Rosenthal.[14] These scores differentiate presidents and Senators within the same political party.

Professor Giles and his colleagues assume that presidents will appoint members close to themselves in this ideological space, and that same-party Senators will as well. When there is no same-party Senator, the nominee gets the president's score. When there is a same-party Senator (or two), the nominee gets the Senator's score (or the average of the two Senators scores). This measure captures some of the heterogeneity within the Democratic and Republican parties. Their method can be applied to the study of district court judges as well, or in the few states with similar selection systems.[15]

Is the choice of whether to use the party of the appointing President or the GHP measure consequential? In practice, no. Indeed, these measures are so strongly correlated that we reach almost exactly the same inference regardless of the measure used. The results of nearly every study that uses party of the appointing president would be exactly the same if the GHP measures were used instead.[16] One reason this is the case is that today our political parties are very polarized. While there are differences within the parties, the differences *across* parties are far more stark. The GHP measure differentiates within party, but those differences are dwarfed by the differences between Democrats and Republicans, which is what is picked up by the political-party-of-President proxy.

d. Scaling and Martin-Quinn Scores

Justices can serve on the Supreme Court for a very long time; Justice Stevens, for example, served almost 35 years before stepping down in 2010.[17] During long careers we might expect some Justices to change their minds about important policy questions. As we have noted, Harry Blackmun, who was nominated by President Nixon, was one of the most liberal justices on the Court by the end of his career. But, by all accounts, Justice Blackmun started out rather conservative.[18]

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[14] Keith T. Poole & Howard Rosenthal, IDEOLOGY AND CONGRESS (2008).

[15] Christina L. Boyd, *The Impact of Courts of Appeals on Substantive and Procedural Success in the Federal District Courts* (2010) (working paper).

[16] For example, Professors Gregory C. Sisk and Michael Heise find that the choice of measure doesn't matter much in their study of religious freedom cases in the circuit courts. Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005). And so, too, for a myriad of other studies we discuss below. The substantive conclusions are strikingly similar regardless of the strategy employed.

[17] Sheryl Gay Stolberg and Charlie Savage, *Stevens' Retirement is Political Test for Obama*, N.Y. TIMES, Apr. 9, 2010, at A1.

[18] Linda Greenhouse, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005); Lee Epstein, et al, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?* 101 NW. U. L. REV. 1483 (2007).

None of the measures we have discussed thus far can account for this sort of change, because they all measure ideology *at the time of confirmation*. Look at Figure XX; does Justice Blackmun's score seem accurate throughout his career? Another problem, as mentioned before, is that some of the measures don't work very well outside of the domain of civil rights and civil liberties cases.[19]

An alternative measurement strategy was developed by Professors Andrew D. Martin and Kevin M. Quinn.[20] Their goal was three-fold: to develop a measure of ideology that was applicable across a number of issue areas, that allowed for the comparison over time even of justices who had not served together on the Supreme Court, and that would allow the locations of justices to shift during their tenure on the Court.

The Martin-Quinn model is a "spatial" model, meaning that it identifies the Justices' legal positions as what are called "ideal points" along a left-right ideological spectrum. In order to understand the concept, think about a case in which the Justices could take legal positions that ranged across a scale from the left to the right. One good example is the legal standard to apply in a case of claimed sex discrimination. In *Frontiero v. Richardson*, 411 U.S. 677 (1974), the Supreme Court was asked to decide whether the medical and dental benefits provided by the military to families of service members should differ based on the gender of the service member. Under existing law, the wives of service members were simply presumed to be dependent and therefore entitled to benefits. But if the husband of a female service member wanted benefits, the couple had to prove that he actually depended upon her for over one-half of his support. The question was whether that discrimination was constitutional under the Equal Protection Clause. Not only did the Justices differ on the outcome, but they also differed on the legal standard that should apply. Some of the Justices (Brennan, Douglas, Marshall, and White) believed that the law should be evaluated under a "strict scrutiny" standard under which very few laws discriminating on the basis of sex would survive. Consider this a position toward the left of the scale. Other Justices (Powell, Burger, and Blackmun) believed that discrimination on the basis of sex should be reviewed under a "rational basis" standard, which was much more forgiving of governmental discrimination. This is a position to the right end of the scale. But among those Justices who would apply rational basis scrutiny, all but one voted to strike down the law in *Frontiero*. The sole exception was Justice Rehnquist, who applied rational basis scrutiny to uphold the law, placing his legal position even further to the right. And although in *Frontiero* itself there was no majority for any clear position, a few years later, in *Craig v. Boren*, a majority of the Justices agreed on an "intermediate scrutiny" position that was somewhere in the middle. Figure XX depicts these positions. Do you see how each of these options can be thought of as points on a "left-right" scale?

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[19] Epstein & Mershon, *supra*.

[20] Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).
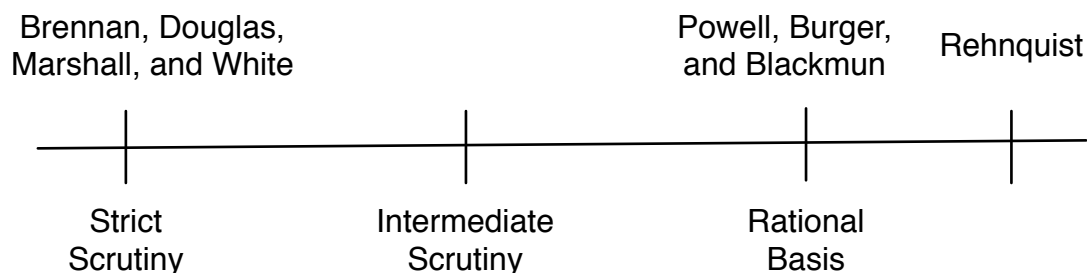
Figure XX. The policy dimension in *Frontiero v. Richardson*, 411 U.S. 677 (1974).

So how do you figure out what these ideal points are for a particular justice over the course of a number of cases, and how the justices' ideal points relate to one another? The Martin-Quinn model uses a lot of computing power to do this, "estimating" two things at one time. First, it essentially does what Professor Pritchett did, but for all cases decided since 1937. The model looks at all the votes in all the cases and figures out the agreement pattern among the Justices. This alone provides a great deal of information about where the Justices stand in relation to one another. But then the model does a second thing. Given the information about where the justices are located, the computer is able to find out in each case where the "cutpoint" is – i.e. the point on the court where the majority and the dissent divided. So, if a decision is 5-4 in a conservative direction, then the cutpoint is between the median justice and the Justice immediately to her left. If the decision is 6-3 in a liberal direction, the cutpoint falls between the six most liberal justices and the three in dissent. Knowing the agreement information, and the cutpoints, the computer then does the best job it can of predicting which justices fell onto which side of which cases. The model has proven reasonably accurate, correctly predicting some 75% of the Justices' votes

This may seem a bit of computational magic – and perhaps it is – but take a look at Figure XX, which shows the positions of the Supreme Court Justices from 1994 to 2008. Because the scores are dynamic, each justice is represented by a line. (Compare that to the points of the Segal-Cover scores.) Justice Thomas is on the far right; Justice Stevens is on the far left. Interestingly, since 2001, Justices Thomas and Scalia have seemed to diverge. Up through the 2004, Justice O'Connor is identified as the median justice. This makes sense because of the many 5-4 majority coalitions in which she participated, joining four other colleagues, sometimes those on her left, and sometimes those on her right. Since the 2005 term, Justice Kennedy is the swing Justice on the Court. Justices Alito and Roberts are squarely on the right, but not as conservative as Justices Scalia and Thomas. If you knew much about the Supreme Court during this period, you'd think that the Martin-Quinn model is doing a pretty good job. In fact, the Martin-Quinn scores have proven to be quite predictive of the justices' ideology relative to one another, and thus extremely useful in empirical studies of the Supreme Court. Indeed, Martin-Quinn scores are considered state-of-the-art and are widely used.[21]

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[21] For more technical details, see Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS
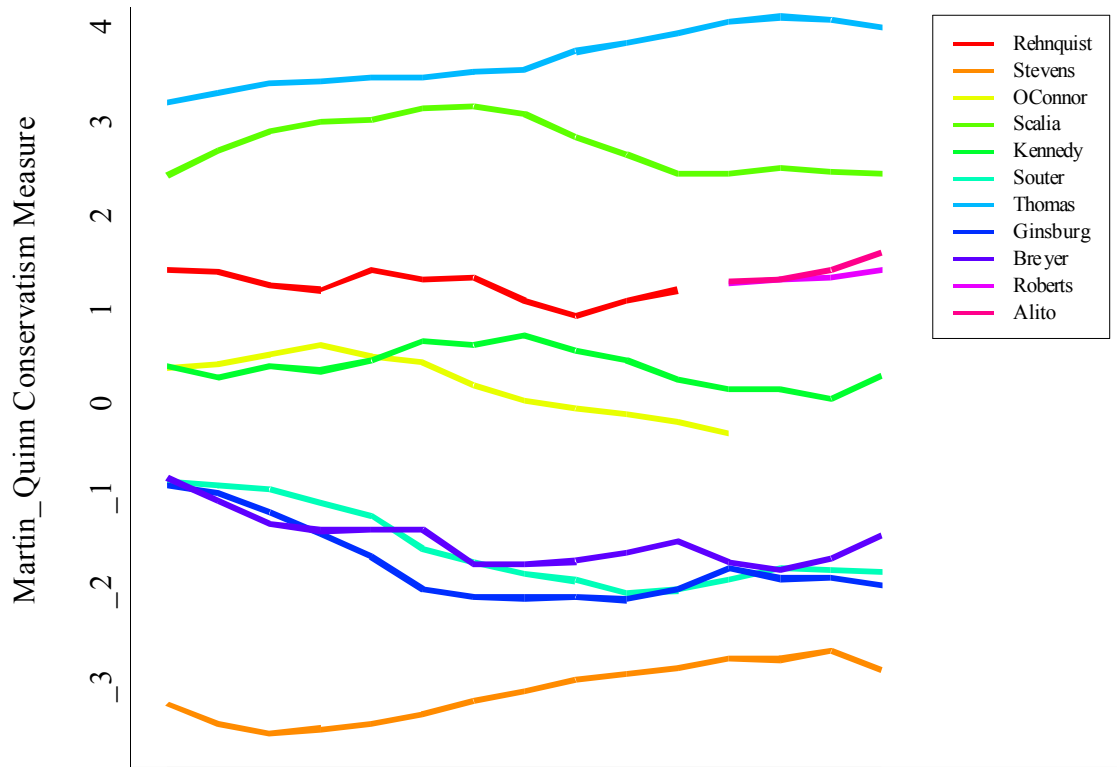
Figure XX. Martin-Quinn measure of judicial conservatism, 1994-2008 terms. Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999,* 10 POL. ANALYSIS 134 (2002). Data obtained from http://mqscores.wustl.edu/measures.php (accessed August XX, 2010
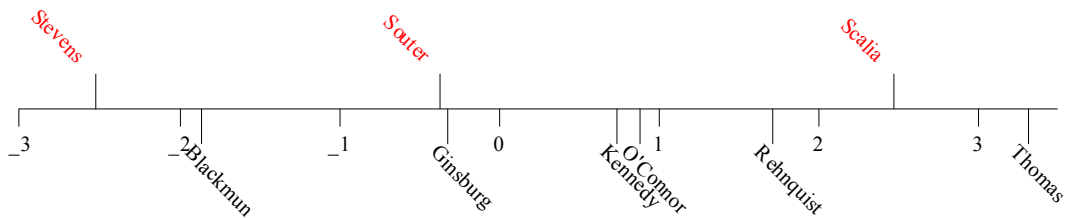
134 (2002); Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275 (2005).

FOR DISCUSSION

1.	Think about each of the methods described above. Can you see advantages? Shortcomings? Think in particular about how useful each would be for various courts. Would one method be useful for Supreme Court justices but less so for lower courts? Vice versa?

2.	With regard to political party, can you think of any value to this approach other than as a proxy? Does appointing party of the President offer any insight as a dependent variable standing alone?

3.	How useful are Segal-Cover scores? Although Professor Segal and his colleagues initially constructed their "scores" based on editorials in four leading publications, they later expanded the set of newspapers to include the *St. Louis Post-Dispatch* and the *Wall Street Journal*.[22] Why do you suppose they did that? Also, Segal-Cover methodology treats all paragraphs written by all editorial boards over a fifty year time period equally. What are the potential downsides from doing this? Can you think of a better approach?

4.	Unlike in the natural sciences when measuring things like length, weight, or temperature is relatively easy, measuring latent (unobservable) concepts like ideology in the social sciences is far more difficult. What do we have to assume to use political party of the appointing President as a measure of ideology? What do we have to assume to use the GHP measures? Which set of beliefs is more reasonable?

5.	One interesting finding of the Martin-Quinn model is that sometimes a single ideological dimension does just fine to explain behavior, even across different areas like economics or federalism cases. But sometimes a single dimension doesn't work very well. The below graph orders the Justices based on their behavior during the entire 1993 Term – the Term when *Smith v. United States* was decided. You may remember that this is one of the cases where the Court considered whether trading a gun for drugs was a "use" under federal sentencing law. Justice O'Connor wrote the majority opinion in that case. To show this, we have highlighted in red and placed above the line the dissenting Justices in *Smith*, with the majority Justices appearing in black below the line:

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[22] **Jeffrey A. Segal, et al.,** *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, **52 J. POL. 812 (1995).**

Stevens   Souter   Scalia

_3   _2   _1   0   1   2   3
      Blackmun   Ginsburg   Kennedy O'Connor   Rehnquist   Thomas

Martin_Quinn Scores for the 1993 T   erm

What do you see? Does the ideology of the justices explain their behavior in this case? What do you suppose is doing the work? Is "law" what explains the outcome of this case?

D. Judges' Decisions as the Dependent Variable

Following the lead of the attitudinal model, the working hypothesis of the studies we have seen is that judicial ideology affects judicial decisionmaking. We have discussed measuring the primary independent variable—ideology—in a variety of ways. next step is to address the dependent variable—the thing we wish to explain. (As we will see in a moment, we need to control for other independent variables that might also explain the dependent variable.)

When coding any variable, a coding protocol can be assessed in two ways: whether it is valid and whether it is reliable. A *valid* measure is one that is actually measuring the thing that we hope to measure. For example, in the previous section we discussed concerns that coding for the political party of the appointing President may not be an accurate—or valid—measure of judicial ideology. A *reliable* measure is one that consistently produces the same measure each time it is applied. A bathroom scale would be reliable so long as it returned the same reading every time you stepped on it; it could do so reliably whether or not it gave an accurate weight measure.

When coming up with a dependent variable (at least on a "collegial" court, i.e., one that has several judges hearing each case) the easiest thing to do is to sort judges or justices into those who support the majority judgment and those who do not. That is what Professor Pritchett did in his studies of the Roosevelt Court. One simply has to look at the majority opinion, and see whether every other justice concurs in the disposition or not. This approach is reliable and easily replicable. But even here there can be complications: for example, when there are only partial concurrences for the disposition (e.g. when one of the Justices notes neither to affirm or reverse the judgment below flat out, but would remand to the lower court for decision on further issues.)

Despite its advantages in ease of application, Pritchett's approach has serious limitations. First, as noted, it can be employed only in a collegial court, not in a trial court where only one judge is responsible for a decision. Second, while sorting judges into majority and dissent shows agreement about the disposition of each case, it tells us

nothing about the *substance* of the decisions. What did the court actually *do*? Who won and who lost? Did the majority rule for the criminal defendant, or the state? Did the corporation win, or the individual alleging employment discrimination? If we are interested in learning about the effects of judicial ideology, we may want to know more about judges' decisions than studies like Pritchett's can tell us. To that end, scholars have developed other coding schemes, such as coding outcomes as liberal or conservative.

1. Revesz and the D.C. Circuit

Recall Professor Revesz's study of decisionmaking on the D.C. Circuit. Revesz's intuition was that the judges' ideologies—measured by the party of the appointing President—affected their decisions. His dataset consisted of environmental cases involving the EPA.

In order to examine his intuition that the judges' decisions were influenced by their ideologies, Revesz had to measure how the judges actually ruled in each case, in a way that captured something that might have been affected by ideology. What would you do? In most cases in the circuit courts of appeal, the court is approving (affirming) or disapproving (reversing) the decision of the lower court. In most EPA cases, however, the party challenging the EPA's action appeals directly to the D.C. Circuit from the agency decision, without going through the district court first. The D.C. Circuit then decides whether to affirm or reverse what the EPA has done. One option for Revesz, then, was to code the D.C. Circuit's decisions for whether they affirmed or reversed the EPA. Such an approach would be fairly straightforward. Can you see the problem though? It wouldn't tell us much about the ideological valence of the court's decisions. Sometimes the agency will do things that will favor environmentalists, and sometimes it will do things that will favor industry groups. A coding method that focused on whether the D.C. Circuit affirmed the agency's decision couldn't distinguish between decisions that were pro-environment and decisions that were pro-industry.

What Professor Revesz did was focus on who was challenging the EPA's action. Rather than just coding affirmances or reversals, Revesz classified each challenger as either an industry challenger (who sought to limit regulation) or an environmental challenger (who sought to increase environmental protection). For each case, he then coded whether the judge voted to reverse the EPA or not—in other words, whether the judge agreed with the challenger's position. For industry challenges, reversing the EPA would a pro-business disposition; for environmental challenges, reversing the EPA would be a pro-environment decision. We might plausibly call the first type of decision "conservative" and the second type "liberal."

As noted, Revesz's study confirmed his intuitions about the effects of judicial ideology on decisions in environmental cases. He found that, beginning in the 1980s, Republican appointees were more likely to reverse EPA decisions when challenged by industry than their Democratic-appointee colleagues. When environmental groups challenged EPA decisions, judges appointed by Democratic presidents were more likely

to reverse than those appointed by Republicans. Revesz concluded that "ideology significantly influences judicial decisionmaking on the D.C. Circuit."[23]

2. Supreme Court and Court of Appeals Databases

Professor Revesz's study of the D.C. Circuit focused on one issue-area: environmental law. Revesz reasoned that decisions favoring environmental groups would appeal to political liberals, and decisions favoring industry would appeal to conservatives. Using a similar approach, other scholars have coded decisions across a range of different issue-areas as "liberal" or "conservative" based on who won and who lost. The most salient example of this is the Supreme Court Database (http://supremecourtdatabase.org), first developed and released in the 1980s by the attitudinalist Professor Harold Spaeth. The Supreme Court Database is a treasure trove of information about every case decided by the Supreme Court since 1946. It includes information about who the litigants were, how the case got to the Supreme Court, the issues and legal provisions considered in the case, who won, who lost, and the manner in which each justice voted. (A group of scholars currently is backdating the Supreme Court Database to the beginning of the Supreme Court's first decision.)

In each case in the Supreme Court Database, Professor Spaeth and his research team coded every Justice's vote as either liberal or conservative. Each case has an issue area, such as criminal procedure, or labor-management relations. And each issue area has its own rule for labeling outcomes liberal or conservative, as shown below.[24]

1. In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys, [votes are coded as liberal if they are (and conservative if they are not)]

- pro-person accused or convicted of crime, or denied a jury trial

- Pro-civil liberties or civil rights claimant . . .

- Pro-child or juvenile

- Pro-indigent

- Pro-Indian

- Pro-affirmative action

- Pro-neutrality in establishment clause cases

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[23] Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit, supra,* at 1719.
[24] *Online Code Book*, SUPREME COURT DATABASE, http://supremecourtdatabase.org/ documentation.php?var=decisionDirection (last visited Apr. 25, 2013).

- Pro-female in abortion

- Pro-underdog

- Anti-slavery

- Anti-government in the context of due process, except for takings clause cases where a pro-government, anti-owner vote is considered liberal . . .

- Violation of due process by exercising jurisdiction over nonresidents

- Pro-attorney

- Pro-accountability and/or anti-corruption in campaign spending

- Pro-privacy vis-à-vis the 1st Amendment where the privacy invaded is that of mental incompetents

- Pro-disclosure in Freedom of Information Act issues except for employment and student records

2. In the context of issues pertaining to unions and economic activity, [votes are coded as liberal if they are (and conservative if they are not)]

- pro-union except in union antitrust where liberal = pro-competition

- anti-business

- anti-employer

- pro-competition

- pro-liability

- pro-injured person

- pro-indigent

- pro-small business vis-a-vis large business

- pro-state/anti-business in state tax cases

- pro-debtor

- pro-bankrupt

- pro-Indian

- pro-environmental protection

- pro-economic underdog

- pro-consumer

- pro-accountability in governmental corruption

- pro-original grantee, purchaser, or occupant in state and territorial land claims

- anti-union member or employee vis-a-vis union

- anti-union in union antitrust

- anti-union in union or closed shop

- pro-trial in arbitration

- pro-state in state and territorial land claims

3. In the context of issues pertaining to judicial power, [votes are coded as liberal if they are (and conservative if they are not)]

- pro-exercise of judicial power

- pro-judicial "activism"

- pro-judicial review of administrative action

4. In the context of issues relating to federalism, [votes are coded as liberal if they are (and conservative if they are not)]

- pro-federal power

- pro-executive power in executive/congressional disputes

- anti-state

5. In the context of issues pertaining to federal taxation, [votes are coded as liberal if they are (and conservative if they are not)] pro-United States

6. In interstate relations, miscellaneous, and private law issues, [votes are coded as unspecifiable] for all such cases.

A similar database, developed by Professor Donald Songer, collects information about decisions in the federal courts of appeals

(http://artsandsciences.sc.edu/poli/juri/appct.htm). Like the Spaeth database, the Songer database codes decisions by issue area, and classifies each judge's decision as "liberal" or "conservative." Unlike the Supreme Court database, however, the Court of Appeals database classifies some decisions as "mixed"—meaning that "the judge voted for an intermediate outcome, for example to affirm a criminal conviction but reduce the sentence; in other words, he cast a liberal vote on one issue and a conservative vote on another in the same case."[25]

FOR DISCUSSION

1.   After looking at the coding rules for the Supreme Court Database, can you see any difficulty? Do you agree with all the coding choices? Sometimes it is not easy or obvious whether a Supreme Court decision is "liberal" or "conservative," which can lead to errors of classification. Can you identify any cases in which this might be a problem? Think about Lawrence v. Texas, striking down a Texas anti-sodomy law, or a case in which the Supreme Court strikes down hate speech rules as a violation of the First Amendment. See Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 Sup. Ct. Rev. 1, 11-12 (2005); [cite Anna Harvey article here]

2.   What would you do if a case involves more than one issue? *United States v. Lopez* involved a challenge to a federal law that prohibited possession of a firearm within proximity to a school. In *Lopez*, the Court struck down the federal law in question and, in so doing, invalidated a criminal conviction. *Lopez* is an important cases on the (legal) issue of federalism, but it also involved a criminal proseuction. The Spaeth database codes a case as "liberal" if it reverses a criminal conviction and "conservative" if it limits national power on federalism grounds. Which issue should prevail? (The Spaeth database codes *Lopez* as a federalism case, and accordingly as conservative.) Is it possible to resolve such intra-case conflicts without sacrificing either the reliability or the validity of the measure? Professor Ernie Young has argued that the answer is no:

> When the prearranged criteria conflict, one of two things seems likely to happen: The Coders may resolve the conflict based on some gestalt judgment that would be difficult to articulate and defend. Alternatively, the coders might analyze the doctrinal issues in the case to determine which dimension of the decision (e.g., *Lopez*'s restriction of national power or its windfall to the individual defendant) is more salient. But this approach accords a critical role to doctrine that the attitudinalists generally deny. In any event, the indeterminacy of coding cases . . . casts considerable doubt on the attitudinal model's great strength—its strong predictive success.[26]

3.   Can you think of other ways that you might be able to take a set of opinions and create a dependent variable that *didn't* rely on a liberal-conservative coding?

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[25] **Landes & Posner** ***Rational Judicial Behavior 776.***
[26] **Young,** *supra,* **at 12.**

4.   Professor Revesz's solution required him to determine whether a challenger is an industry challenger or an environmental challenger. Just as judges don't wear blue or red robes to tell us their ideology, litigants don't come with labels attached either. How would you figure out what type of challenger a particular litigant was in a case? What do you suppose Professor Revesz did?

5.   Can you think of a type of study where looking at affirmances and reversals would be more interesting than looking at who won or who lost?

6.   Some studies that look at collegial courts—courts like the U.S. Supreme Court or the circuit courts where panels of judges decide cases—use the outcome of the *case* as the dependent variable. Other studies, like Professor Revesz's, treat the decisions reached by *each judge* in the case as the dependent variable. Which do you think is better? In which situations would you prefer one over the other?

E. Control Variables, and Law

1.   *The Problem of Omitted Variable Bias*

It is not enough to have a dependent variable we want to explain and an independent variable that explains it. Why? Suppose we are interested in testing the effect of the length of felony sentences on crime rates. We us the average sentence for felonies as our explanatory or independent variable and the statewide crime rate as our dependent variable.   We find that crime rates are indeed lower in states with longer felony sentences, and that the relationship is a strong one – the longer the sentences, the more we bring down crime rates. So, our hypothesis is proven, right?

Not necessarily.   Suppose that another researcher points out that state unemployment rates might have causal effect. So, we add that as another independent variable. And upon doing so we learn that the relationship between unemployment rates and crime rates is itself strong and statistically significant. But our results also suggest that the relationship between felony sentences and crime rates is much weaker than we originally thought, though still significant. What have we learned? That to address crime rates we may need to do something about unemployment, and that though felony sentences may matter, it may not be nearly as much as we originally thought.

This is the problem of *omitted variable bias*. It is what empiricists mean when they say they are "controlling for" factors other than the primary independent variable. They are seeking to make sure that what is being observed is not an artifact of something other than what they hope to study. They want to make sure they didn't leave some explanatory factor out. If some factor other than the independent variable helps explain the dependent variable, then results that seem not to be statistically significant may be (and vice versa).

The same problem arises in empirical studies of judging. If we don't compare decisions in like cases, any findings might solely be due to the cases we see, not any true

underlying differences in behavior. Suppose we wanted to test whether more conservative judges are more award harsher sentences than more liberal judges. And so we compare the records of Judge Reynolds, a conservative Republican appointee, and Judge Drew, a liberal Democratic appointee. We find that Judge Reynolds gives sentences that on average are 10 years longer than those of Judge Drew. Would it make sense to conclude that the conservative imposes harsher sentences. Well, maybe. But what if we subsequently learned that Reynolds heard felony cases and Drew misdemeanor cases. That fact alone might explain the different sentences, confounding our conclusion about ideology.

One way to handle this problem in practice is to use something called *regression models*. Regression models let the researcher isolate the effect of key independent variables—like ideology—on the dependent variable *while holding all other variables constant*.

But if one does not include the right set of control variables, things can go very wrong. Judge Edwards has emphasized this point:

> "Omitted variable bias" refers to the possibility that factors which are correlated with the variables studied, but are not included in a study's analytic framework, actually explain the data better than do the factors considered by the investigator. A variable omitted from the study, which is itself related to one or more of the included variables, may explain the data better than the included variables. This problem is most extreme in any sort of univariate analysis: such an analysis, as its name indicates, tests for only one variable, and therefore always allows the possibility that one or more of the multitude of other potentially relevant variables, because of its correlation with an included variable, explains the outcome better than does the variable tested.[27]

Omitted variable bias is an important problem. Simply put, if a scholar does not control for the right set of independent variables, any inferences drawn from a statistical analysis might be wrong (a simpler term for "biased"). Yet omitted variables are only consequential if they are related to the dependent variable. Any empirical study can be criticized for "leaving something out," just as every doctrinal study can be criticized for not synthesizing every case. The weight we can put on the conclusions of a study depend on how thorough and careful a job the analyst does in subjecting their central independent variable to careful scrutiny of possible alternative explanations.

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[27] Edwards, *Collegiality and Decision Making on the D. C. Circuit, supra,* at 1350-1351.

2.   Controlling for Law

There is one type of independent variable that is especially important to consider when studying judicial decisionmaking: law.[28] If the law itself has any bite—and, as we saw in Chapter Two, there are many reasons to think it does—it is important to take the law into account when studying differences in behavior. Otherwise law itself, not ideology, might explain differences in behavior.

Judge Edwards and a co-author find that many empirical studies of judging are lacking in this regard:

> Legal scholars remain interested in trying to use empirical methods—most notably the statistical analysis of case outcomes—to understand the effect of extralegal factors on appellate decisionmaking. In our view, the principal problem with such empirical legal analyses is that they cannot distinguish between legal and extralegal factors without considering and accurately accounting for the most important determinants of appellate decisionmaking: (1) the case records on appeal, (2) the applicable law, (3) controlling precedent, and (4) judicial deliberations. By failing to take account of these core determinants—in part, perhaps, because they cannot be easily or accurately measured—the field of empirical legal studies fails to provide a nuanced understanding of how legal and extralegal factors interact to generate judicial decisions, and likely overemphasizes extralegal factors.[29]

Some scholars have recognized the need to have some control variable for legal doctrine. The problem is that it is not so easy. Stop and think a moment. How would you control for law? What would the variable be?

One good ieas of how to incorporate law as an independent variable is, ironically, Professor Jeffrey A. Segal's work on search and seizure. We say ironically because Segal today is one of the primary proponents of the attitudinal model. Yet, in his early work he seemed very attuned to capturing law in his regressions. During the 1960s and 1970s, the Warren Court begin pushing the law of search and seizure to the left, for example by applying the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). (The exclusionary rule says that courts must throw out any evidence of guilt that was seized as a result of an unlawful search or seizure.) Richard Nixon ran for president in 1968 on a law-and-order platform, and after he was elected had the opportunity to appoint four justices to the Supreme Court, including Chief Justice Burger in 1969. From 1962-1981 the Supreme Court decided over one hundred cases dealing with search and seizure.

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[28] **Professor Edwards also has emphasized another important (and often omitted) variable: deliberation on collegial courts. We discuss that issue in detail in Chapter XX.**
[29] **Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 DUKE L. J. 1897, 1899 (2009).**

Understanding how their rules fit together coherently by reading the cases and focusing on legal rationales was difficult, to say the least.[30]

Rather than read each and every Supreme Court search and seizure case and try to make sense of them all inductively—something that the law professors of the day could do with only limited success—Professor Segal developed what he called a "legal model" of Supreme Court decisionmaking. He studied all of the search and seizure cases from 1962-1981. The dependent variable in the analysis was whether the Court upheld the search. He then coded a number of *legal* factors that he posited (from reading some of the cases) might affect decisionmaking: the nature of the intrusion (if the search took place at the defendant's home, his business, his car, or on his person in public), the extent of the intrusion (if it was a full search and seizure or a limited intrusion such as a stop and frisk or detentive questioning), prior justification (whether there was a warrant or probable cause), arrest (if it was incident to a lawful arrest, after a lawful arrest, or related to an unlawful arrest), and some exceptions such as whether the search and seizure was after a hot pursuit. Of course, Segal also considered the political composition of the Court.[31]

Segal's model proved remarkably successful. Using both legal and political factors, his model correctly classified over three-quarters of the cases used in the study, and the model was able to correctly forecast six of the seven cases decided during the 1981 term of the Court. Professor Segal concluded:

> [T]he model has taken one of the Court's most difficult areas, one characterized as "inconsistent," "bedeviling," and even "a mess" and found for the first time a clear and logical form. The legal model was quite satisfactory, yet evidence suggests that the Court is not immune from considering extralegal characteristics too. Perhaps the reason for the bedevilment is that those who have been bedeviled have been too reliant on the case method as the means for analyzing these decisions. Such reliance seems reasonable enough. The opinion delivered in any given decision more often than not relies upon a single aspect of the case, for example, was there probable cause, or is a search several hours after a lawful arrest reasonable? Yet the decision itself is dependent upon many factors—presumably those mentioned above—that go largely undiscussed in the main body of the opinion. In a probable cause determination, it is all very well to know that probable cause was sufficiently established, but when it comes to understanding the decision itself, we must know where the search took place, the

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[30] *See* Ronald Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 INDIANA. L. J. 329, 329 (1973) (calling the law in this area, "a mess").
[31] Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938-944 (1986); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891 (1984).

extent of the intrusion, and whether any exceptions were present, as well as the makeup of the Court.[32]

Two other models incorporating legal doctrine as an independent variable of Supreme Court decisionmaking are worthy of note. Professors Tracey George and Lee Epstein published an important study of Supreme Court death penalty cases from the 1971 though 1988 terms.[33] They modeled the justices' decisions on whether or not to uphold a judgment imposing death. The authors hypothesized that case outcomes will be influenced by a number of doctrinal factors: whether the killing was intentional, whether the jury was selected to be biased in favor of the death penalty, whether results of state-initiated psychiatric examinations were considered, and whether the mitigating or aggravating circumstances of a particular case had been considered. George and Epstein found that the Court reacted consistently to doctrinal cues as hypothesized, indicating that in this area, using the variables they identified, over some of the cases in their domain, a legal model is effective in explaining outcomes (although the composition of the Court matters as well).

Another study by Professors Mark Richards and Herbert Kritzer incorporated law in a novel way. They argued that "the central role of law in Supreme Court decision making is not to be found in precedents that predict how justices will vote in future cases. Rather, law at the Supreme Court level is to be found in the structures the justices create to guide future decision making...."[34] Richards and Kritzer developed the concept of a jurisprudential regime, which refers to "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area."[35] Based on their reading of the freedom of expression law, they suggested that two 1972 cases, *Chicago Police Department v. Mosley,* 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), established the speech-protective content-neutrality regime. Using a handful of political variables and jurisprudential variables, with interactions at the time of the regime shift, their empirical models show that these two cases fundamentally shifted the jurisprudential approach in this area of law; i.e., these cases defined new a jurisprudential regime. They have applied this approach to other areas of law as well.[36]

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[32] Segal, *Predicting Supreme Court Cases Probabilistically, supra*, at 899-900.

[33] Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

[34] Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making,* 96 AM. POL. SCI. REV. 305, 306 (2002).

[35] *Id.* at 308.

[36] Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827 (2003); Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 33 (2005); Mark J. Richards, Joseph L. Smith & Herbert M. Kritzer, *Does* Chevron *Matter?,* 28 LAW & POLICY 444 (2006). However, some scholars have noted problems with this approach. *See* Scott. *Reconsidering the Impact of Jurisprudential Regimes*, 87 SOCIAL SCIENCE QUARTERLY 380 (2006); Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273 (2010); Herbert M. Kritzer and Mark J. Richards, *Taking and Testing Jurisprudential Regimes*

1. Incorporating law into a study of judicial decisionmaking requires substantive knowledge about an area of law. To incorporate law effectively, it is typically necessary to focus on a *single* area of law. Why do you suppose that's the case? Can you see how developing law as an independent variable is likely to be costly for empirical researchers?

2. There is another difficulty, which becomes apparent when looking more closely at the George and Epstein model. One feature of their model is that the effectiveness of the legal factors in explaining outcomes decreased as time passed. (This was also true of Professor Segal's study.) Do you have any insight into why this might be the case? In a common law system like ours, the law is changes with every decision. Does this affect the efficacy of including legal factors as independent variables? Ultimately what is needed is a way to "model" law so that it can be used as an independent variable. But such a variable is going to need to be dynamic and changeable over time.

F. What We Know (and Don't Know) About Ideology and Judging

At this point we've covered the major steps of empirical studies: choosing independent and dependent variables, and constructing (or choosing) a dataset. We've seen some of the things that can go wrong at each step, and what the available measures might leave out. Now we can start to come to grips with the evidence of ideological voting.

1. On Generalization

Taken as a whole, what do we know about ideology and judicial decisionmaking? To answer this question, we must generalize from a set of specific studies (warts and all) to behavior generally. Generalization is the process of taking information about specifics and drawing conclusions about the situation across the board. Generalization is something people do all the time. Indeed, every doctrinal study of law takes a small set of cases and generalizes from them to understand what the law is.

Generalizations can be reasonable or unreasonable. Unreasonable generalizations are a bad thing, and are usually called overgeneralization. Can you see why, for example, taking a study about decisionmaking on the Supreme Court and reaching the conclusion that *all* judges behave ideologically would be unreasonable. Similarly, a study about highly controversial abortion cases in the federal district courts will likely tell us very

little about run of the mill bankruptcy cases. Reasonable generalizations are those that involve judges, in similar courts, deciding similar cases. At bottom, the context in which the study takes place is the context to which we can generalize. Only by looking across multiple studies in multiple domains can we get a clear picture of what judges do.

Studies about judges in a single circuit court in a particular type of case in a short time period tell us something about the precise period of study. But scholars usually are interested in broader, general questions about judicial decisionmaking, public policy, or law. We conjecture that many readers of Professor Revesz's article may have drawn conclusions concerning decisionmaking on the D.C. Circuit generally, and maybe on the entire federal courts of appeals, or even all judges. Judge Edwards is critical of this sort of generalization:

> There is absolutely no reason to believe, nor does Revesz ever suggest, that his limited sample of environmental cases is representative of the D.C. Circuit's jurisprudence generally. I almost hesitate to make such a self-evident point, but, by the overly broad and heedless language of his 'conclusions,' Revesz leaves me no choice.[37]

Throughout his study, Professor Revesz takes pains to point out that his conclusions are about these environmental cases—and no others—before the D.C. Circuit in this time period. His title makes that perfectly clear. At that same time, Professor Revesz uses these findings to speak about the D.C. Circuit generally. Why?

> I do not mean to suggest by this discussion that environmental cases are necessarily unique in giving rise to the types of ideological decisions described in my article. There is no compelling reason to believe that environmental cases would be exceptional in this regard. My own intuition is that a similar pattern would be found with respect to a broader universe of cases in which different administrations had markedly different policy preferences over issues of relatively high political salience.[38]

Ultimately his assertion is empirical. What do you think? What does Revesz's study tell us about decisionmaking in the D.C. Circuit generally? What about other circuit courts?

2. The Supreme Court

To make reasonable generalizations from the specific studies, it's important to compare those that look at judging on comparable courts. We'll start with the U.S. Supreme Court, which sits at the top of our judicial hierarchy.

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[37] **Edwards, *Collegiality and Decision Making on the D. C. Circuit, supra*, at 1344.**

[38] Revesz, *Ideology, Collegiality, and the D. C. Circuit: A Reply to Chief Judge Harry T. Edwards, supra*, at 813-814.

As noted, the strongest advocates in favor of the hypothesis that judicial ideology affects case outcomes are Professors Jeffrey Segal and Harold Spaeth. They are the primary proponents of the attititudinal model. They use Segal-Cover scores as the independent variable, and votes by the justices on the U.S. Supreme Court as the dependent variable.[39] In each area of law, Segal and Spaeth classify the vote each Justice casts as either liberal or conservative, using the methods we discussed above. Then, for each Justice, they calculate the percentage of the time that the Justice votes liberally in the issue area. (This type of variable—where information is combined across a whole bunch of cases—is called an *aggregate* variable.)

With these two variables in hand, the next step is to relate them. Does the percentage of liberal votes of the justices relative to one another seem to be correlated with how liberal or conservative the Segal-Cover score indicated each justice was?

One easy way to evaluate this question is graphically, with something called a scatterplot. See Figure XX, which shows four separate scatterplots; one for each issue area. Each point in each pane of the figure represents a Justice. The dependent variable (Percent Liberal Voting) is on the y-axis; the independent variable (Segal-Cover Score) is on the x-axis. Each point shows percent liberal voting and the Segal-Cover score for each Justice.

To see how well these variables are related to one another, each panel also contains something called a "regression line," which summarizes the relationship between the two variables. If ideology and aggregate voting were unrelated to one another, what shape do you suppose the relationship between these two variables should take? If you answered "a flat line with zero slope" you would be correct. In the lower-right Federalism panel, you'll see a very shallow line. In this pane, the relationship is statistically insignificant: ideology doesn't seem to be explaining variation in behavior across justices. On the other hand, in Civil Liberties and Civil Rights cases, the lines have a very steep slope. Indeed, over sixty percent of the variability in voting is explained by the Segal-Cover scores. In other words, *if you knew nothing other than the Segal-Cover score of each justice, you could correctly predict over sixty percent of the justices' votes*. In these two panes, the relationships are statistically significant. In Economics cases, the relationship isn't as strong, so the line has a lesser slope. In this pane the relationship is significant, but the percentage of explained variance is less.

These findings show pretty convincingly that ideology is significantly related to behavior, at least in the areas of civil rights and civil liberties, and to a lesser extent in economics cases. This is consistent with the findings of Lee Epstein and Carol Mershon, whose separate study shows that Segal-Cover scores are significantly related to voting behavior on the Supreme Court, except in federalism, judicial power, and tax cases.[40]

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[39] Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

[40] Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996). There is a great deal of additional evidence about ideology on the Supreme Court. For a sampling, see Glendon Schubert, THE JUDICIAL MIND 275 (1965); David W. Rohde & Harold J. Spaeth
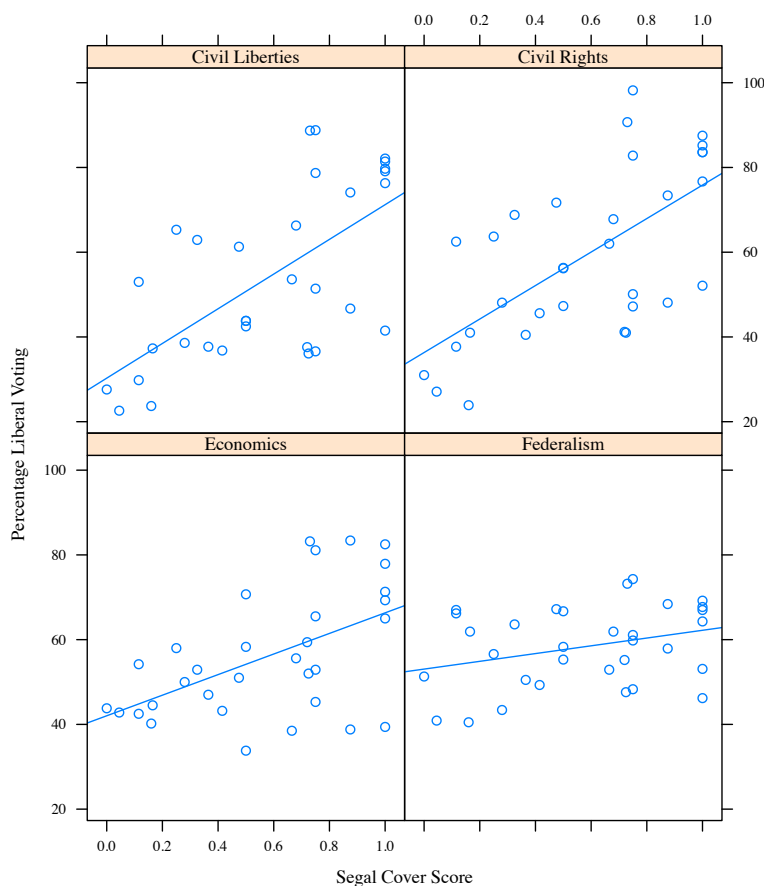
Figure XX. Effectiveness of Segal-Cover scores across issue areas for justices serving during the 1946-2004 terms. The Segal Cover scores are taken from Jeffrey Segal's website http:// www.stonybrook.edu/polsci/jsegal/qualtable.pdf. The voting data come from Lee Epstein et al., *Table 6-4: Aggregate Liberal Voting of Judges, 1946-2004 Terms,* THE SUPREME COURT COMPENDIUM, 4th ed. (2006) at 534-537.

This approach, however, does not control for law in the sense we described in the previous section—that is, simply comparing Segal-Cover scores to votes does not incorporate other information about the case (e.g., the salient legal facts) that we would expect to be important predictors of legal decisions. In an attempt to remedy this problem, Professors Segal and Spaeth expanded the case-facts approach that Professor Segal pioneered in the search and seizure study we discussed above. The earlier study had looked at search and seizure cases decided by the Supreme Court between 1962 and 1981. Segal and Spaeth extended the study through 1998, and examined the effect of ideology (measured by the Segal-Cover scores) while controlling for the same case-specific factors (e.g., the location of the search, the timing of the search, and the presence

SUPREME COURT DECISION MAKING 157 (1976); and Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

of a warrant) that Professor Segal used in his earlier work. They found that, even after controlling for legal factors, ideology has a strong and statistically significant effect.[41] These findings, along with the aggregate vote analysis shown in Figure XXX, constitute some of the strongest empirical evidence for the attitudinal model.

Segal and Spaeth's basic result—that ideology matters even after we control for case-specific facts—has held for issues beyond search and seizure. As mentioned earlier, Professors George and Epstein studied the Supreme Court's decisions in death penalty cases between 1972 and 1992, and their results indicated that legal factors were effective predictors of judicial decisions. In their study, they estimated three models: one model with only legal factors, another model with extralegal factors (including a measure of the number of Nixon, Ford, and Regan appointees on the court to capture judicial ideology), and a combined model that includes both the legal factors and the extralegal factors. The combined model provides the best predictive power. In short, their results underscore that law matters, but other factors, including ideology, play an important role, as well.[42]

The Kritzer and Richards study described in the previous section reached similar conclusion. Kritzer and Richards studied how the influence of legal factors changed after a landmark Supreme Court decision. Their analysis spanned a series of studies and many issue areas: free press, free expression, free speech, Establishment clause, search and seizure, and administrative law. They measured ideology using Segal-Cover scores, and they controlled for issue area-specific case factors. Across all areas of law they studied, they concluded that both law and ideology significantly affect judicial decisions.[43]

3. Circuit Courts of Appeals

What about the lower courts? Judges in the Courts of Appeals are sandwiched in the middle of the judicial hierarchy. Their legal opinions may be reviewed by the Supreme Court, and they oftentimes review the work of district court judges. Compared with their colleagues on the Supreme Court, what would your hypothesis be about ideological voting on the Courts of Appeals?

Many studies have been undertaken that look at circuit court judges. We've already seen the conclusions Professor Revesz drew in environmental cases in the D.C. Circuit. But some scholars have gone beyond that set of cases and that court. When Senator Schumer called for considering ideology when confirming federal judges, one of

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[41] Segal & Spaeth, SCAMR, *supra.*

[42] Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making* 86 AM. POL. SCI. REV. 323 (1992).

[43] Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 33 (2005); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827 (2003); Mark J. Richards, Joseph L. Smith & Herbert M. Kritzer, *Does* Chevron *Matter?,* 28 LAW & POLICY 444 (2006); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

the studies he relied on was an early version of a study by Professor Cass Suntein and his colleagues that posed the question: Are Judges Political?[44]

Like Revesz, Professor Sunstein and his colleagues used the party of the appointing President to construct the independent variable: ideology of the judge. They then structured their analysis around a hypothesis that should sound familiar. They describe their *ideological voting hypothesis* in the following way:

> In ideologically contested cases, a judge's ideological tendency can be predicted by the party of the appointing president; Republican appointees vote very differently from Democratic appointees. Ideologically contested cases involve ... issues ... such as affirmative action, campaign finance, federalism, the rights of criminal defendants, sex discrimination, piercing the corporate veil, racial discrimination, property rights, capital punishment, disability discrimination, sexual harassment, and abortion.[45]

To investigate their hypothesis, the authors then had to construct a dataset. Here's what they did:

> We examined a total of 4958 published majority three-judge panel decisions, and the 14,874 associated individual judge's votes, in areas involving abortion, capital punishment, the Americans with Disabilities Act, criminal appeals, takings, the Contract Clause, affirmative action, Title VII race discrimination cases brought by African-American plaintiffs, sex discrimination, campaign finance, sexual harassment, cases in which plaintiffs sought to pierce the corporate veil, industry challenges to environmental regulations, and federalism challenges to congressional enactments under the Commerce Clause... To keep the inquiry manageable, our investigation is limited to recent time periods (sometimes from 1995 to the present, though sometimes longer, certainly when necessary to produce a sufficient number of cases in a particular category).[46]

With each case in hand, the next step was to code their dependent variable. For each area of law they coded whether the vote each judge cast in each case was "stereotypically liberal" or not. In close calls, an outcome was coded "stereotypically liberal" if the party on the liberal side gets any relief.

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[44] Cass R. Sunstein, et al., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. On the Judiciary*, 107th Cong. 765 (2002) (statement of Sen. Schumer).
[45] Sunstein, Schkade & Ellman, *Ideological Voting on Federal Courts of Appeals, supra*, at 304.
[46] *Id.* at 311-313.

Finally, to test their hypotheses, Sunstein et al. compared the behavior of judges appointed by Republican and Democratic judges. We show their main findings with regard to ideological voting in Figure XX. In every area except Takings Clause, Federalism, and Criminal cases, there are statistically significant differences in behavior between judges of the two parties. In some areas of law, these differences are quite large: in Affirmative Action the difference is twenty-six percentage pages, and in both Abortion and Capital Punishment the differences are greater than twenty percentage points.
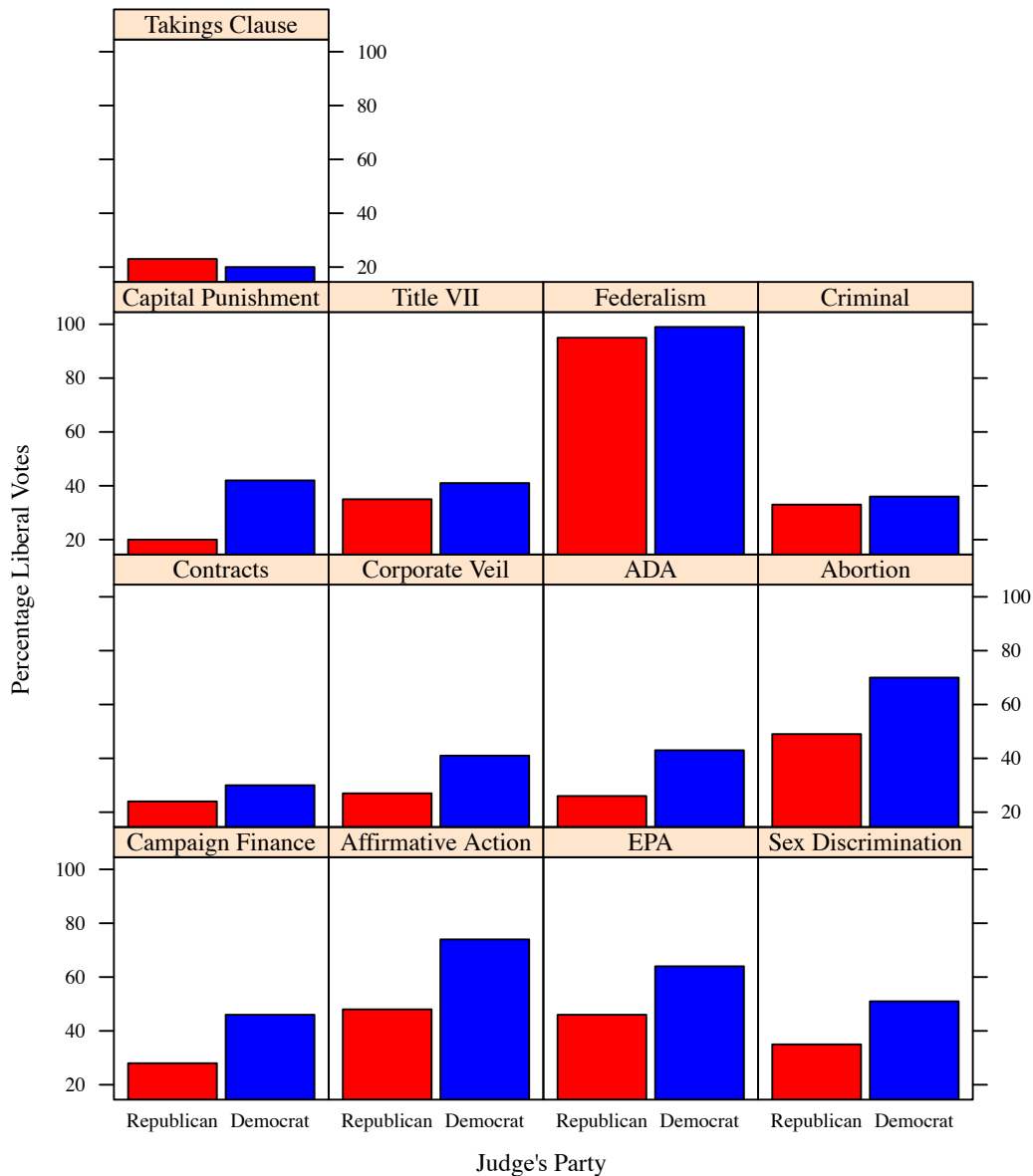
Figure XX. Percent liberal votes for thirteen areas of law comparing Republican and Democrat judges, from the Sunstein, et al., study of the circuit courts. CITE: Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman. 2004. "Ideological Voting on

Federal Courts of Appeals: A Preliminary Investigation." *Virginia Law Review*. 90: 301-354 at 352. The differences in all panels are statistically significant *except* Takings Clause, Federalism, and Criminal cases.

 Here is a sampling of other studies of the circuit courts:

- In an early pair of studies, Professor Sheldon Goldman examined the effect of party affiliation on voting in the U.S. Courts of appeals in the 1960s. He found that the political party of the appointing President was a significant predictor of voting behavior in some issue areas (like labor and personal injury). At the same time, he found no significant ideological effects in other issue areas (such as tax and eminent domain).[47] Goldman's general conclusions—that the party affiliation of the appointing president predicts judicial decisions in some, but not all, issue areas—is consistent with the findings of the study by Sunstein, et al., that we reviewed above.[48]

- In another important work, Professor Frank Cross used a random sample of circuit court opinions from 1925 to 1991, across all areas of law, to examine deference to lower courts and ideological voting on the U.S. Courts of Appeals.[49] Unlike the Sunstein and Goldman studies, Professor Cross's study attempted to control for the law. Deference to lower courts—a major part of Cross's inquiry—often is mandated by the operative standard of review that governs appeals to the courts of appeals. Deference, in other words, is a *legal* factor as opposed to an ideological influence external to law. Cross found that judges on the circuit court regularly defer to their colleagues on the lower courts. The next most important factor in explaining outcomes is the political party of the appointing President. But the magnitude of the party effect is much smaller than deference to the lower courts, and, just as with Professor Revesz's study, there is a great deal of unexplained variance once party is taken into account.

- Another study that attempted to control by law focused on obscenity cases in the courts of appeals from 1957 to 1990. Professors David Songer and Susan Haire concluded that "at least for obscenity cases, significant presidential appointment effects exist even after adding controls for several significant case facts, differences in legal issues raised by the litigants, and differences in the nature of the litigants. These effects are both statistically significant and of a nontrivial magnitude."[50]

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[47] Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited,* 69 AM. POL. SCI. REV. 491 (1975).
[48] Cass R. Sunstein, et al., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).
[49] FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007).
[50] Donald R. Songer and Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 977 (1992).

- In another study, Professors Songer, Martha Humphries Ginn, and Tammy A. Sarver studied tort cases heard by the circuit courts as part of their diversity jurisdiction between 1960 and 1988. In diversity cases, federal courts decide questions involving state law, and the courts of appeals are—for all practical purposes—the court of final review, because the Supreme Court will not take cases that turn on state law. In such cases, the authors argued, "appeals court judges are in the same institutional position as Supreme Court justices except for the power to select which cases they will consider on the merits" because there is virtually no Supreme Court review of these cases, state courts cannot review them, and Congress has never passed a law overturning a decision in this issue area.[51] Their model included an impressive number of control factors, including resource differences between the litigants, state tort law, state ideology, and judicial ideology. Their measure of ideology is a composite measure that combines the political party of the judge, the party of the appointing president, and a number of different measures of presidential ideology. Their findings reveal that, in diversity tort cases, both law and ideology matter. [I wasn't able to figure out how the authors purport to identify the political party of the judge. Do you guys know? After having spent so much time on how to ID ideology, I think we ought to be explicit about this kind of thing.]

4. District Courts

Finally, there are the federal district courts. Studies of judging in the district courts are few and far between. The Rowland and Carp study and the Ashenfelter, et al. study discussed in Section C.2 investigated the importance of political party of the judge in the district courts.[52] When looking at the entire docket, Ashenfelter et al. found no effects of political ideology. However, studying only published opinions in civil liberties cases, Rowland and Carp found significant differences between judges of different parties.

While there are comparatively fewer studies that examine the role of ideology in the decisionmaking process of District Court judges, two studies are illustrative:

- Professor Randall Lloyd studied published district court decisions in reapportionment cases between 1964 and 1983. His results indicate that a district court judge is 55% more likely to vote against a reapportionment plan drawn up by the opposing political party than a nonpartisan plan, even when controlling for

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[51] Donald R. Songer, Martha Humphries Ginn, & Tammy A. Sarver, *Do Judges Follow the Law When there is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 139 (2003).

[52] Professors Rowland and Carp derived the political-party measure from *Who's Who* and other biographical sources. (p.295). Professor Ashenfelter et al. explain that "[s]tandard biographical dictionaries and other sources supplied the political party . . . ." Orley Ashenfelter et. al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. Legal Stud. 257, 266 (1995). [Should we add a brief section discussing these biographical sources on judges?]

the political party of the judge. Moreover, he finds that Democrats are 36% more likely to vote against any reapportionment plan than Republicans.[53]

• Professor Paul Collins, Jr. and his coauthors studied decisionmaking in 48,000 published alien petitions, criminal rights, discrimination, freedom of expression and religion, habeas-corpus, military exclusion, and privacy cases decided between 1938 and 2004 to determine if district court decisionmaking differs in times of war. While they found no evidence of a wartime effect in their statistical analysis, their results indicate that judges appointed by Republican presidents are 11% more likely than Democratic appointees to reach a conservative decision in these cases, even after controlling for the preferences of the circuit court and the U.S. Supreme Court. However, the analysis doesn't include any case- or law-specific factors, nor does it differentiate between issue areas.[54]

FOR DISCUSSION

1. Taken as a whole, these studies support the intuition that the ideology of the judge matters in situations when judges have discretion. Supreme Court justices show the most ideological behavior, circuit court judges less, and trial court judges only in the rare circumstance when they are presented with novel legal questions. These findings are consistent with the meta-analysis—a type of statistical study that combines results from a bunch of other studies—conducted by Professor Daniel Pinello. Pinello looked at every study between 1959 and 1998 that analyzed the effects of ideology (usually gauged by the political party of the appointing President) on judging. He found that in the federal courts, the effects of ideology are greatest in the Supreme Court, less in the circuit courts, and quite small in the district courts.[55] As Professors Gregory Sisk and Michael Heise write,

> Does ideology matter in the selection and decisionmaking of federal judges? Unquestionably. The expanding literature of empirical research on the subject, including our own, makes it starkly clear that the partisan or political dimension is, among others, an inescapable element in understanding judicial behavior. But, at least at the lower federal court level, ideology explains only part of judicial behavior and tends to emerge in certain narrowly defined sets of cases in studies designed to tease out those marginal effects.[56]

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[53] **Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995). Professor Lloyd explains that "[p]arty of the judge was found in published sources, such as '*Who's Who in American Law.*'"**
[54] **Paul M. Collins, Jr. et al., *International Conflicts and Decision Making on the Federal District Courts*, 29 JUST. SYS. J. 121 (2008).**
[55] **Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J 219 (1999).**
[56] Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743, 793-794 (2005).

Do you find it surprising that there is more evidence of ideological judging on the Supreme Court relative to the lower courts? Why do you think this is?

2. Some of the better studies try to take law into account as an independent variable. As we've made clear, this is no easy task. On the Supreme Court, the findings of ideological effects are robust whether one includes law or not. Studies that look at the circuit courts and control for law find some modest ideological effects in some issue areas, just like Professor Revesz did. And the studies that look at district court decisionmaking only find ideological effects in the vanishingly rare cases when opinions are published (and even then, not all the time). Assume that these findings are valid. Do they show that Supreme Court Justices are willfully ignoring the law? Or is there another explanation?

Judge Posner writes that "[t]he Court is awash in an ocean of discretion" and argues that Supreme Court cases continually present new twists, making precedent less than determinative.[57] This is entirely consistent with Judge Cardozo's claim that the indeterminacy law itself provides space for judicial discretion. Even Professor Brian Tamanaha—a critic of empirical studies of judging—recognizes the amount of discretion Supreme Court justices have:

> The Supreme Court hears about one-tenth of 1 percent of federal court cases, a miniscule number winnowed and selected out from the massive total. These are legally uncertain cases or cases that involve bad rules or bad results. They often have political salience. . . . Inevitably the personal views of justices will have an impact in a measurable proportion of their decisions.[58]

It is precisely for this reason that Professor Tamanaha concludes:

> The region of uncertainty is where judges render decisions with the least legal guidance, and where judges' particular mix of legal and social views has the most leeway and impact – though still in a context thick with legal norms. This is why the political views of Supreme Court justices, who hear the highest proportion of legally uncertain cases, manifest a much stronger relationship with their legal decisions (although significantly short of a complete alignment) in comparison with lower court judges.[59]

Indeed, at some level the most interesting question is why we don't see ideological effects in more Supreme Court cases. First, there are a lot of unanimous decisions on the Supreme Court. Can these be explained by ideology? If not, what does explain them? There also are many cases where the votes don't align with common

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[57] *See* Richard A. Posner HOW JUDGES THINK at 272.
[58] Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 197 (2009).
[59] *Id.* at 190.

political views, like the guns-and-drugs cases we examined in Chapter Two. What explains outcomes like these?

3.   Notice that in any number of these studies, in some issue areas like federalism, or judicial power, ideology doesn't relate to behavior? Do you have any ideas why? Do you think it means that these issues aren't political? That the cases are easy? Or perhaps that there are flaws in the way the dependent or independent variables are constructed?

4.   Coding remains a problem in many of these studies, for reasons we have examined. For example, Sunstein et al. decided to code "any relief" as a win. Do you agree with that decision? Suppose a criminal sentenced to thirty years in prison is able to get his sentence reduced by a week due because of a misapplication of law. Does it make sense to treat this type of relief as equivalent to an entire conviction being overturned? Does this have implications for the reliability or validity of the measure? Do you think this approach is more reliable than other possible approaches?

5. Finally, there are important gaps in our knowledge, which point to important areas for future study. First, and most important, almost all of these studies look at public law—law that governs the relationship between individuals and their government, not between private individuals. Indeed, most studies that find an ideological effect are looking at civil liberties cases. Can you see why selecting only these sorts of cases may introduce some selection bias in our conclusions?

The truth is, we simply don't know how much ideology might (or might not) affect behavior in private law disputes. Yet stability in private law is of utmost importance to structuring relationships, economic an otherwise. As Dean Roscoe Pound once wrote:

> The purpose of matured law is not merely to do justice in each concrete cause but also to furnish a rule in advance of action by which men may be guided with assurance in the complicated transactions of modern business; to insure stability of industrial undertakings, to provide assured constancy of the conditions under which property is held and business carried on… They may conceivably perform these functions without law. But if they are to perform them according to law, they must perform them in a certain, uniform way. For certainty and uniformity are the essential attributes of law.[60]

Second, and related, we also don't know much empirically about common law decisionmaking. Professor Revesz's study looked at behavior in cases involving administrative rulings. Many studies look at decisionmaking in constitutional cases, or those that involve statutes. Today the U.S. Supreme Court rarely hears common law cases (although constitutional cases come closest to being a species of common law). We might expect that in common law cases—where judges are, essentially, adapting law to the facts of each case, while maintaining fidelity to existing precedent and broad principles—

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[60] Roscoe Pound, *The Enforcement of Law,* 20 GREEN BAG 401, 408 (1908).

judges will exhibit all sorts of ideological behavior. But Judge Posner disputes this intuition:

> Since common law is explicitly judge created, one might think it would be bound to be even more "lawless" than constitutional adjudication. In fact it is more stable, more objective, more lawlike, and less like "real" legislation than constitutional law is. It deals with subjects in which there is usually a high degree of consensus in both society at large and the judiciary, enabling judges of diverse backgrounds and political commitments to reason from common premises to conclusions that command broad support within the judiciary and the larger political community. That persons of diverse backgrounds, values, and so forth can be brought to agree on a matter is the practical meaning of "objective."[61]

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[61] Richard A. Posner, HOW JUDGES THINK, 82-83 (2008). For a recent study, see Mark P. Gergen and Kevin M. Quinn, *Common Law Judicial Decision Making: The Case of the New York Court of Appeals, 1900-1950*, Paper Presented at the 2011 Emory Conference on Institutions and Lawmaking.