DISTILLING JUDICIAL IDEOLOGY

by

DANIEL RIVKIN

(Under the Direction of Richard Lee Vining)

ABSTRACT

A judge's ideology is her set of ideas and principles and her view of how society should work, how power should be allocated, and to what ends it should be used. One way to measure judicial ideology is to find an indicator of a jurist's preferences and isolate it from as many constraining factors as possible. Supreme Court justices are the least constrained of all jurists, particularly when writing non-majority opinions, and the citations they include in them provide a convenient unit of measurement. By determining the ideological polarity of each citation in a non-majority opinion in a concrete set of cases, I produce ideology scores for their authors within the legal fields to which those cases relate. I then compare these estimates with the justices' Segal-Cover scores and median Martin-Quinn scores for that same period to determine their relative accuracy and usefulness in forecasting.

INDEX WORDS: Supreme Court Justices, Non-majority opinions, Ideology, Citation

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DEDICATION

This work is dedicated to my beloved grandfather Roman Rivkin and to his brother Abram, two people who believed in me and in this project more than I did. Their love, kindness, and peculiar Jewish-Ukrainian wit made the whole idea of this project seem a little less crazy and overwhelming.

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CHAPTER 1

INTRODUCTION

Purpose Of The Study

Since at least the middle of the twentieth century, political scientists have suggested that American judges are not neutral in their arbitration of legal disputes and that their decisions are influenced by extralegal factors (Pritchett, 1969; Schubert, 1965). The chief extralegal factor of interest is ideology, which many scholars believe leads jurists to pursue a political agenda through their rulings. Most of the emphasis in the search for this ideological behavior is placed on the Supreme Court. In fact, some scholars go so far as to equate the ideological the justices with that of members of the elected branches (Segal & Spaeth, 2002, pp. 320-321) arguing that the opinions of the Court, just like the dictates of any other political institution, are the product of clashes between liberal and conservative blocs. Other authorities, in particular jurists themselves, fiercely deny any significant ideological influence on judicial decision-making. Those within the field of political science who argue that the judiciary is professional and ideologically neutral tend attribute the apparent existence of cohesive judicial voting blocs to the complexity of American jurisprudence (Pritchett, 1969) America's legislative and judicial institutions (Bailey & Maltzman, 2008).

The complexity and hierarchical nature of the Judicial Branch are among the main reasons why the study of judicial politics focuses heavily on the Supreme Court: with only nine justices, broad jurisdiction, virtually total docket control, and often the final word on the most controversial issues facing the nation, it is the ultimate subject for students of judicial politics.

But the traditionally reclusive nature of the justices, as well as the myriad unwritten rules governing docket-setting, bargaining, voting, opinion-writing, and other procedures, make the motives of the Court's staff difficult to gauge (Perry, 1991; Provine, 1980)

Glendon Schubert took the first steps towards modeling judicial behavior on the basis of preference in the early 1960 (Schubert, 1963), but most modern literature discussing justices as political actors is built on or against the work of Harold Spaeth. His stimulus response model, developed in conjunction with David Rohde (Rohde & Spaeth, 1976), argued not only that justices have political preferences they wish to enforce, but that these preferences shape their votes in predictable ways. He claimed that generic case facts, such as the identities of the parties, their respective economic positions, whether they came from the private or public sector, and what legal protections they sought predetermined individuals' votes almost regardless case specifics. Conservative justices would always support business against labor, industry against regulators, and police against criminal defendants, while liberal justices would take the reverse positions.

In a series of articles and books written throughout the 1980s, 1990s, and early 2000s he fleshed out and reinforced this attitudinal model, including other divisive issues such as affirmative action, gun rights, and the death penalty, and demonstrating a tendency to constantly take the same side in cases that dealt with them (Segal & Spaeth, 1996; Brenner & Spaeth, 1995; Epstein, Segal, & Spaeth, 2001; Spaeth H. J., 1983). Many other scholars, most notably Spaeth's student Jeffery Segal, have followed in his footsteps, contending that Supreme Court Justices have their own pet issues and specific policy agendas that they wish to advance, not only through their votes but also through agenda-setting. There are still those, particularly among legal

professionals, who argue that justices are consciously neutral[1]. Yet it is a matter of general consensus in modern judicial scholarship that Supreme Court Justices have certain policy preferences, whether they are conscious of this or not. The question that still remains unanswered is to what extent those preferences actually influence justices' votes. Spaeth's results certainly could be explained by purely attitudinal motivations, but there are other potential explanations. The collegial rules and norms of the federal judiciary could force judges to moderate their views (Howard, 1981), confining them to a mutually acceptable spectrum. Alternatively, even a judge not averse to confrontation may be compelled to strategically check his own ideological impulses in order to advance his goals in a complex legal system. He may be willing to compromise on some issues in order to ensure majority support for others (Perry, 1991). He may also take care in formulating his opinion to ensure that it does not allow his policy goals to be subverted bureaucratically (Baum, 2010, p. 145)

Whether or not such institutional restrictions affect the judicial decision-making process, the fact is that they cannot be accounted for by a model that considers only justices' final votes. Moreover, if these votes are considered to be results of judicial ideology, then using them to measure the influence of that ideology presents obvious issues of circularity. On the other hand, the use of indirect measures, such as preliminary votes, opinion assignments, etc. exposes us to a horde of exogenous variables that are difficult to control for, and sometimes even to identify (Fischman & Law, 2009). Because of the inherent "unobservability" of ideology, and the uncertainty of where the law ends and personal politics begin within the "black box" of a judge's mind, political scientists need a very particular measure of judicial ideology. It must be close

[1] as evidenced by a debate waged between Judge Patricia Wald and professors Benjamin Tiller and Frank Cross in a 1999 issue of the *Columbia Law Review* (Tiller & Cross, 1999a; Tiller E. H., 1999b; Wald, 1999)

enough to the final vote on the merits to be definitive of the justice's intent, and yet distant enough to be distinct from that same vote. Furthermore, in order to be as precise as a vote to affirm or to reverse, each individual unit of this measure must be ascribable to an individual justice and under his direct control. I intend to derive precisely such a measure by examining the dissenting and concurring opinions written by various justices in a specific set of cases, as well as the ideological bent of the case citations they chose to include in or exclude from those opinions.

Contribution Of This Study

The use of citations as a variable in a study of judicial decision-making is not original to my study; in fact the data for it came from the work of Tom Clark and Benjamin Lauderdale on placing judicial decisions in doctrinal space (Clark & Lauderdale, 2010a). However, their project was more focused on the role of ideology in the negotiations that surround opinion-writing. They asked, in short, which justice's ideology matters, and under what circumstances? My purpose, on the other hand, is to determine how liberal or conservative a justice is regardless of circumstances. Phrasing the question this way, with no reference to any institutional factors, allows me to base my scores on non-majority opinions and to distil pure ideology from them. The resulting scores are thus both free from the influence of coalition-forming politics and independently applicable to each justice. The resulting scores are thus independent from many of the court's institutional constraints and applicable to individual justices.

Of course ideological scores for justices already exist, namely those of Segal and Cover (1989), and Martin and Quinn (2002), but they each have their weaknesses. Although ground-breaking for its time, the faults of the Segal-Cover method are rather obvious. Because the scores

are based not on the justices themselves but on the subjective beliefs of newspaper commentators regarding those justices, their internal validity is inherently suspect. What is more, because all of the explanatory data comes from a single point in time, (the period between a justice's nomination and confirmation) its predictive validity is entirely dependent on the weak assumption that a justice's ideology never changes. The unsurprising result is the failure of Segal-Cover to correctly capture the ideologies of such maverick justices as Felix Frankfurter, Earl Warren, David Souter and John-Paul Stevens.

Martin and Quinn's scores are immune from these flaws, but at a high cost. Their dynamic probability model predicts a justice's political ideal point in a given year based on the ideology of all his previous votes. This structure provides them with a large data-set capable of accommodating the idea of judicial preference change, but it raises serious concerns of circularity. The very notion of judicial ideology and different ideal points for different judges is based on the jurists' differing votes. Consequently using a judge's past votes to predict his future voting preferences makes the distinction between the explanatory and response variables blurry at best. Leaving these issues aside for a moment, Martin and Quinn's failure to control for such variables as the time-period, the case type, and the impact of the court's collegial norms also weakens the content validity of their measure. This is particularly problematic in their case, because it raises the question of whether the changes in voting records that we observe are indeed caused by altered ideal points, or by something else entirely.

As an alternative, I propose to measure and predict judicial ideology based not on votes but on citations. If we grant Martin and Quinn's premise that each justice's vote on a constitutional case can be classified using as liberal-conservative dichotomy, then the opinion that this vote supported can also be classified in the same way. An opinion written to support a

justice's liberal vote is itself liberal, and the same principal holds for opinions backing conservative votes. Of course the conclusions of an opinion cannot be used directly to predict or explain its author's vote, since its own ideological value is derived *a priori* from that vote. However this value, which I posit remains permanently attached to the opinion, is independent of the ideology of any future opinion in which it is cited, and thus of the votes taken by the latter opinion's author. Yet I believe (for reasons that will be explained later) that the choice to cite a past decision, at least in a non-majority opinions, is up to the author alone and can therefore be used to explain his or her ideology. I hypothesize that the ideological tenor of a justice's citations will be directly related to that of his or her votes. On the whole, the more often a justice chooses to make conservative, rather than liberal citations, the more conservative his voting record will be, and the more often he chooses liberal citations, the more liberal will be his voting record.

To test this assertion, I compile citation-based scores for a fixed group of justices over a fixed period of time in all cases relating to specific legal areas. I establish the criterion validity of my measure by using these scores to arrange the selected justices on a liberal-conservative continuum and then comparing my rankings to those derived from the Martin-Quinn and Segal-Cover scores. I then use these citation-based scores to predict the ideological tenor of each justice's voting record in all cases belonging to those same legal areas for the two terms subsequent to my chosen time slice. The same test is then repeated twice, substituting first Segal and Cover's scores and then Martin and Quinn's for my own. The results will allow me to compare the predictive power of my methodology against that of other methods currently available.

Expected Results

Although I expect my scores to outperform those that currently exist, my work should not be interpreted as a direct challenge to Drs. Martin and Quinn. In fact I expect that my measure will place the justices under consideration in the same relative ideological positions that they occupy on the Martin-Quinn spectrum. I foresee Justices William J. Brennan, Thurgood Marshal, and Stevens to have large negative (liberal) scores, justices Warren E. Burger and William H. Rehnquist to have large positive (conservative) scores, and justices Harry Blackmun, Byron R. White, Lewis F. Powell, and Potter Stewart, to be relatively close to 0 (neutral). However because I use citations from non-majority cases, the scores I will provide are based only on the words written by each individual justice, of his own volition and under no political pressure. Each score will represent one justice's personal beliefs, and it will change only if they do.

CHAPTER 2

THE DATA

What We Need to Know

The citations made by a justice in a non-majority opinion provide a relatively unclouded view of his or her political leanings. With the pressures of bargaining and the responsibility of issuing a binding judgment removed, the author must answer only to the demands of his mind and conscience. At first glance this may seem an overly bold statement, considering that the norms of jurisprudence require all judicial decisions on any issue to correspond with previous rulings on that issue (Lyons, 1985). But these norms are nowhere near as restrictive as their gravity might lead us to believe. Given the disagreement that controversial cases have generated among past justices and the great volume and variety of litigation that the Supreme Court has processed throughout its history, it would be possible to find precedent supporting almost any mainstream political opinion on any significant legal issue (Douglas, 2000; Segal & Spaeth, 2002, p. 79).

However, while their precedential value may be roughly equivalent, providing the same level of theoretical support and intellectual cover, the lines of reasoning and policy implications that can be derived from politically divergent principles are wildly different. In fact it is often over the question of which precedents ought to be cited in the opinion of the Court that voting coalitions among justices are forged and broken (Clark & Lauderdale, 2010b). It is therefore logical to posit that in any given case the authors of non-majority opinions choose their citations with the same careful eye toward policy and with far greater autonomy.

With that in mind, all that is needed to create a citation-based measure of judicial ideology are the opinions written by a distinct group of justices within a set time period in all cases relating to a predefined area of the law, as well as all the precedents related to that area. If the same justices are faced with the same legal questions during the same time period, then presumably their choice of precedents is confined to the same finite pool and influenced by the same extraneous factors. Under these conditions and the pressure-free circumstances of composing non-majority opinions, any discrepancy in their choice of which precedents to cite should reflect their personal ideological preferences.

Ideally, such data should be collected in as many distinct areas of law and for as many justices as possible. The ideology for each citation should be coded, and a time-series cross-sectional analysis of the results for each justice in each area should be conducted to account for nuance and variability in each individual's political views. Given the preliminary nature of this study and the limits of my resources, I will need to rely on third-party data and work within its limitations. Yet it is worth noting that for any scholar with sufficient time and assistance and a desire to expand my work, the necessary raw data should be available for every justice who has ever served and the methodology quite easy to replicate.

For my present purposes, however, the data-set compiled by Clark and Lauderdale for their study on the ideological nature of judicial voting coalitions contains the necessary information regarding citations in opinions dealing with questions Freedom of Religion and Search and seizure. For each citation made, Clark and Lauderdale provide an ideological tilt. In coding these citations, they keep in mind not only the policy repercussions intended or inferred by the precedent's original author, but also the manner in which the citing justice treats that precedent. In some cases a justice may intentionally weaken a precedent he or she cites as

controlling, usually by arguing in dicta that it should be applied far more narrowly than it has been in the past. In such cases the ideological polarity assigned to the citation by Clark and Lauderdale is often the opposite of that which appears in Harold Spaeth's Supreme Court Database. Also distinguishing Clark and Lauderdale's data is the inclusion of negative citations, precedents that were not mentioned in one justice's opinion even though they were included in the opinion of another. In doing so, the former is implicitly stating that the omitted precedent does not control the case at hand, arguing, at least, that this precedent should be read more narrowly, if not overturned outright (Clark & Lauderdale, 2010a).

Clark and Lauderdale note that coding based on these last two characteristics is rather unorthodox, but doing so should make their methodology slightly more accurate than Spaeth's. For this reason I chose to use their citation ideology values as the basis for my scores. For comparison's sake I will also calculate the scores based on the Harold Spaeth's database, but I do not expect any notable differences. Controversial precedents are usually watered down or excluded from opinions when a majority coalition needs to be built (Wahlbeck, Spriggs, & Maltzman, 1998). Otherwise, justices usually prefer to deal with them more tactfully by distinguishing the case currently before them from the one in which they were set down (Segal & Spaeth, 2002, p. 82; Connors, 2008). Seeing as my dataset is composed entirely of non-majority opinions and is severely limited in scope, the impact of the different coding methods should be infinitesimal.

Setting The Scope

Of greater concern than the way in which the data was acquired is the vastness of the time period it encompasses, about half a century. Beyond mere questions of logistics, the need to

narrow down the time-period under consideration is also driven by the potential impact of ideological drift on the study's internal validity. While debate over the actual existence of this phenomenon still rages in the academic community, there is sufficient support for it in recent scholarship to merit controlling for it (Epstein, Hoekstra, Segal, & Spaeth, 1998; Martin & Quinn, 2007). As mentioned earlier, the best way to accommodate for the effects of time in the context of this preliminary study is to minimize its temporal scope, but the time-period must still be long enough to offer a substantively significant set of judges and non-majority opinions. Subjective though it may be, I believe the minimum number of justices for such a study must be nine, a full court. As for the minimum number of opinions a judge must have written to be worth including in the study, I believe it is roughly between ten and twelve, with the reasoning being as follows: From Table 1 we can see that the most hard-line, dissent-prone justices, like Douglas and Brennan, write about 5-6 dissents per term, while the most moderate justices, like Justice Stewart, accrue an average of 2-3 dissents per term, and a powerful Chief like Burger, (unlikely to author dissents by virtue of his position) will still manage to fall into the 10-12 range during his career. Thus this minimum of opinions will ensure that the justice in question is not merely an ideologue appointed during the last year of the study, or a passive, apolitical justice who served out the term of his appointing president and retired, but rather a professionally and ideologically established justice. Under these parameters, a period of between 13 and 15 years was needed.

Given the irregular nature of turnover in the staff of the Supreme Court (Ward, 2003) it was impossible to tailor my time-slice simultaneously to the careers of nine or more justices. Inevitably there would be some justices who sat on the Court during any minimal period chosen but did not write enough opinions to make their ideology clear. There is, however, precedent in

Supreme Court scholarship for the exclusion of justices in a longitudinal study (Mishler & Sheehan, 1996). I focus on the period from 1973 to 1986, comprising the mid-to-late Burger Court, excluding justices O'Connor (appointed 1981) and Scalia (appointed 1986). I selected this period because it was one during which the court was relatively stable, with a total of only three staff changes made by only two presidents (Ford and Reagan), and offered ten justices with a relatively large number of non-majority opinions.

Table 1 shows the number of opinions in Freedom of Religion and Search and Seizure cases during the chosen period for the ten selected justices.

Justice	**Freedom of Religion Opinion Count**	**Search and Seizure Opinion Count**	**Total Opinion Count**
Blackmun	3	26	29
Brennan	9	68	77
Burger	4	7	11
Douglas	1	20	21
Marshall	2	48	50
Powell	7	59	66
Rehnquist	7	34	41
Stevens	6	60	66
Stewart	2	30	32
White	4	61	65

Table 1: Selected Justices' Opinion Count, based on Clark & Lauderdale data, 1973-1986

CHAPTER 3

METHODOLOGY

Measurement

The basic unit of measurement for my ideology scores is the individual citation. Since each precedent can be identified as a political idea, either conservative or liberal, and each citation can be seen as an affirmation or rejection of that idea, the citation itself can be coded as an expression of liberalism or conservatism on the part of a justice. Thus the difference between the respective total numbers of liberal and conservative citations made by a justice in his opinions dealing with a specific area of law can provide a raw ideology for that justices in that field. Of course since every opinion a judge writes must be, at least formally, grounded in precedent, these raw scores must be scaled in order to be comparable among justices and across issue-areas. Therefore each justice's final ideological score will be attained by dividing his raw score by the total number of opinions he wrote in that issue area during the time-period under consideration. At first glance it might seem that some preliminary modifications are required before various citations made in different cases can be added and subtracted to attain the preliminary score, but a brief overview of the interaction among opinions, precedents, and legal issues in American jurisprudence will show that this is not the case.

In the American legal realm all precedents are created equal. So long as a single opinion was joined by a majority of the justices presiding over the case, that opinion and the principles it establishes hold precedential value, unless and until they are explicitly overturned by a majority of the Supreme Court. Although certain highly contentious or “landmark” cases, such as *Brown*

v. Board or *Roe v. Wade* may be more familiar to the general public than are others, the relative status of precedents as such does not vary according to the notoriety of the cases that produced them. It is well-established that federal judges dealing with competing precedents on a single issue cannot simply anoint one as stronger than the other, only reconcile them (Tramposch, 1989). Naturally, this issue does not come up when two precedents argue the same point, but it is logical to posit that the same principle applies.

Nor does the strength of a legal argument vary according to the volume of precedent used to support it or with any moral issues that accompany it. Instead, the legal tradition values similarity of circumstances. The more closely the case in which a precedent was set resembles a case presently under consideration, the more legally sound become the argument for applying that precedent to said case, to the exclusion of all similar precedents. In effect, for each legal issue in a given case precedential value is a zero-sum game; it all belongs to the precedent that deals with the issue most closely (Lyons, 1985). This is why, as noted earlier, simply distinguishing a current case from an older precedent-setting decision is an effective way of neutralizing the latter's influence on the former without directly attacking its reasoning.

Of course this begs the issue of case complexity, and the potential that the scores of justices who write opinions on legally complex issues will be inflated. But here the situation is once again simplified by an unwritten norm of the Court, which is that cases should be resolved on the most basic grounds possible (Sunstein, 2001). As illustrated by the case of *Rothergy v. Gillespie County*[2], even when a justice wishes to use a case to make a profound argument regarding judicial philosophy, he will still probe only as far into the dispute under consideration as absolutely necessary. Just how far it is necessary to probe certain legal disputes has been an

[2] 128 S.Ct. 2578 (2008). Thomas, J., dissenting

area of strong disagreement among jurists for many decades, with debates raging over the requirements for justiciability, standing, and special scrutiny. However since views on these disagreements tend to fall very precisely along the traditionally accepted battle-lines between the Court's ideological blocs (Segal & Spaeth, 2002, pp. 233-234), they should not damage the scores' validity.

On the contrary, since one citation is all that is needed to establish which precedent a justice deems to be controlling in a given case, I believe that the main purpose of multiple citations in relation to one issue is to provide backing for a rhetorical argument (much as is the case in academic work) (Cozzens, 1981; Walsh, 1997), Therefore considering each citation as an independent unit of measurement equal to any other citation will only further serve to make my scores more accurate by distinguishing the more and less committed ideologues on either side of the spectrum.

Calculations Based on Clark and Lauderdale Data

Clark and Lauderdale identify each case in their dataset (2010b) as relating either to search and seizure issues or to questions of religious freedom and provide the year and author for each precedent and citation. They code each precedent being cited as having been conservative or liberal and each citation depending on whether it was negative or positive and implicit or explicit, along with any relation that this citation might have to others in that or related cases. After trimming it to accommodate the scope of this project, I made several further modifications to facilitate interpretation.

I used the term "ideological polarity" to show that each citation being made had either a conservative or liberal tilt, an "ideological charge" sort of like the charge of an electron or a

proton. I stipulate, as do Clark and Lauderdale (2010a), that every opinion written in the fields under consideration has this ideological charge (which should not be too much of a stretch, considering that they are both contentious constitutional issues). It is also my contention, as well as Clark and Lauderdale's (2010a), that every time a justice cites one of these opinions he either affirms or weakens it. If he affirms the opinion, then his citation retains the same "ideological charge" (which I term polarity) as the original opinion. If he weakens it, then the polarity is reversed: a statement that weakens a liberal precedent is by its nature conservative, and one that weakens a conservative precedent is liberal. This applies to every single opinion cited in a case, including string citations.

In order to establish 0 as an ideologically neutral point on my scale, I recoded the data in the freedom of religion dataset, assigning each precedent an ideological polarity similar to how charges are assigned to subatomic particles. Each conservative precedent was assigned a polarity value of 1 and each liberal precedent an ideological polarity value of -1. Each citation was then ascribed a value of 1 or -1 based on its type, i.e. whether it was identified as positive (supporting the cited precedent) or negative (negating the cited precedent) respectively. Thus when coding citations for political tilt I was able to assign each citation its appropriate final ideological polarity via simple multiplication. Liberal citations acquired or retained values of -1, and conservative ones acquired or retained values of 1. These final citation polarity values were then grouped and summed by author, and the resulting raw citation score for each justice was divided by the total number of freedom-of religion opinions in the data-set that he authored.

I then repeated the same procedure with Clark and Lauderdale's Search and Seizure data-set.

Each conservative precedent was given a polarity of 1 and each liberal precedent a polarity of -1 and each citation was recorded as positive or negative and ascribed the respective score. The

polarities of citations that undermined their precedents were again reversed, and they were all summed by author and divided by that author's total number of Search and Seizure opinions.

Using Harold Spaeth's Data

To determine the impact of using Clark and Lauderdale's opinion-writing directionality rather than those of Harold Spaeth, I re-calculated each justice's raw score and ideological coefficient based on Spaeth's Supreme Court database (Spaeth H. , 2011). (Spaeth H. , 2011). Using the year, case name and justice name in each cited opinion in Clark and Lauderdale's data, I manually identified the corresponding record in Dr Spaeth's data-set and coded its polarity as 1 or -1 depending on whether it had been identified by Spaeth as conservative or liberal respectively.[3]

I then proceeded to perform the same operations as those done using the original Clark and Lauderdale directionality. I reversed the polarity of negative or undermining citations, and the final citation values were grouped and summed by author. As before, each justice's raw score was divided by the total number of opinions in the data-set for which he was the citing author. Finally, I performed a two-tailed t-test on the two sets of ideological coefficients to determine whether using Spaeth's coding yielded significantly different results.

Forecasting 1987-1988

After the Segal and Cover scores were first released, Lee Epstein and Carol Mershon (1996) tested their relative predictive accuracy in cases dealing with a variety of legal topics.

[3] It should be noted that two search and seizure cases from Clark and Lauderdale's data-set could not be found in Spaeth's, and the associated opinions were therefore excluded from the new calculations.

Although the Clark and Lauderdale data-set is not nearly broad enough to perform a similar analysis of my citation-based scores, within my current scope I can use the same process to see how accurate they are relative to the Segal-Cover and Martin-Quinn scores. To minimize any possible change in circumstances, while maintaining a substantively significant number of opinions, I will use all freedom of religion (FR) and search and seizure (SS). opinions handed down during the 1987 and 1988 terms. For my response variable I will use each justice's voting record , operationalized as the percentage of conservative votes he or she registered during those two terms in the in the two legal areas I am considering. Using a univariate linear model to regress it on each justice's citation-based score will yield an R^2 value denoting how much of the ideological variation in their voting pattern it explains. The R^2 values produced by re-running the same model using each justice's SC[4] and MQ[5] scores as the explanatory variable coefficients will enable us to judge which technique best predicts judicial voting patterns. Justices Burger and William O. Douglas, both of whom had retired by 1987, are excluded from the models. It should also be noted that the accuracy of this regression is limited by the small number of FR and SS cases available in the 1987 and '88 terms.

[4] "SC" is an abbreviation for Segal-Cover score
[5] "MQ" is an abbreviation for Martin-Quinn score

CHAPTER 4

RESULTS

The Justices' Relative Ideologies

Tables 2-4 below show the raw ideological scores and final coefficients for all the judges in my data-set using both Spaeth's and Clark and Lauderdale's data, as well as the total number of opinions written. Also included is the p-value for a two-tailed t-test of the two sets of coefficients. The results in tables 2 and 3 are for Freedom of Religion and Search and Seizure cases respectively. Table 4 offers the same information for a combination of the values in tables 2 and 3.

As we can see below, freedom of religion cases offer a rather miniscule sample of opinions and consequently also of citations, which is why I ultimately chose to present a table combining them with search and seizure cases. Yet even at this level there are signs of confidence for in my measurement technique. As expected, the justices line up in the same relative ideological order that they possess on the MQ and other scales. Justices Brennan, Marshall, Stevens, and Douglas (admittedly with only one case) occupy the liberal end of the spectrum, while justices Burger and Rehnquist are on the conservative one. Justices Powell and White lie close to one-another on an ideological middle ground. Interestingly Justices Blackmun and Stevens, while in the same relative positions, appear to be far closer ideologically to each other and to Justice Marshall on the citation scale than on that of Martin and Quinn. It may simply be an artifact of the range difference between the two scales for this portion of the data. On the other hand, if this is the case than more importance should be given to the fact that Justice

White, whose MQ score is slightly lower than that of Justice Stewart, is shown to be more conservative than the latter on the citation scale.

Justice	**FR Opinion Count**	**FR Sum Of Ideology**	**FR Ideology Coefficient**	**FR Sum Of Ideology By Spaeth**	**FR Ideology Coefficient By Spaeth**	**Median MQ score 1973-1986**	**SC Ideology Score**
Blackmun	3	-8	-2.67	-7	-2.33	-0.09	0.12
Brennan	9	-43	-4.78	-35	-3.89	-2.92	1
Burger	4	3	0.75	6	1.5	1.6	
Douglas	1	-5	-5	-6	-6	-6.43	
Marshall	2	-4	-2	-6	-3	-3.49	1
Powell	7	-3	-0.43	4	0.57	0.81	0.17
Rehnquist	7	17	2.43	15	2.14	4.21	0.05
Stevens	6	-14	-2.33	-17	-2.83	-0.29	0.25
Stewart	2	-3	-1.5	-3	-1.5	0.52	
White	4	0	0	2	0.5	0.50	0.5

$P < .01$

Table 2: Freedom of Religion scores 1973-1986

Table 3 indicates that the search and seizure subset provides quite a few additional opinions for each justice, including twenty more for Justice Douglas. Chief Justice Burger's opinion count remains anemic, most likely due to the fact that as Chief justice he was nearly always in the majority. His sum of ideology, zero according to both original databases, is also intriguing. It suggests either that his non-majority opinions were carefully balanced ideologically, or else were meant to counter-balance extremes from both sides.

This second suggestion seems somewhat unlikely, as the ideological range of the justices is narrower in this subset, with a few more liberal justices moving to the right and the more conservative ones moving to the left. The most notable shift is that of Justice Blackmun, who while fifth from the left in the freedom-of-religion subset (as he is on the MQ scale), has the greatest positive coefficient of all in search-and-seizure cases. Also notable is that Justice

Stewart's coefficient remains lower than Justice White's and is now slightly lower than that of Justice Stevens, who also appears to his left on the Martin-Quinn Scale.

Justice	SS Opinion count	SS Sum Of ideology	SS Ideology Coefficient	SS Sum Of ideology By Spaeth	SS Ideology Coefficient By Spaeth	Median MQ score 1973-1986	SC Ideology Score
Blackmun	26	30	1.15	30	1.15	-0.09	0.12
Brennan	68	-211	-3.10	-222	-3.26	-2.92	1
Burger	7	0	0	0	0	1.6	n/a
Douglas	20	-21	-1.05	-17	-0.85	-6.43	n/a
Marshall	48	-107	-2.23	-106	-2.21	-3.49	1
Powell	59	-28	-0.47	-20	-0.34	0.81	0.17
Rehnquist	34	36	1.06	30	0.88	4.21	0.05
Stevens	60	-39	-0.65	-43	-0.72	-0.29	0.25
Stewart	30	-29	-0.87	-26	-0.87	0.52	n/a
White	61	-6	-0.07	-4	-0.07	0.50	0.5

P=.05

Table 3: Search and Seizure scores 1973-1986

As for Table 4, it is included for the sake of completeness and encouragement of further research, but the results it displays should be interpreted carefully. The inclusion of opinions from both subsets under consideration introduces an uncontrolled variable. This may also contribute to the fact that a cross-tabulation of the two citation-based sets of ideology coefficients no longer yields a sufficient p-value to attain statistical significance. However I feel it is worth noting that while in this table both measures return Justice Blackmun to the relative position assigned to him by Martin and Quinn (though now with a positive score), Justice Stewart remains extremely close to Justice Stevens and still to the left of Justice White.

Justice	Opinion	Sum Of	Ideology	Sum Of		Median
Blackmun	29	22	0.759	23	0.79	-0.09
Brennan	77	-254	-3.299	-257	-3.34	-2.92
Burger	11	3	0.27	6	0.55	1.6
Douglas	21	-26	-1.24	-23	-1.10	-6.43
Marshall	50	-111	-2.22	-112	-2.24	-3.49
Powell	66	-31	-0.47	-16	-0.24	0.81
Rehnquist	41	53	1.29	45	1.10	4.21
Stevens	66	-53	-0.803	-60	-0.91	-0.29
Stewart	32	-32	-1	-29	-0.91	0.52
White	65	-6	-0.09	-2	-0.03	0.50

P=.06

Table 4: Combined scores 1973-1986

Forecasts of 1987-1988

As can be seen from Table 5, my citation-based score, while greatly out-performing Segal and Cover's, falls two percentage points short of Martin-Quinn in predicting freedom of religion scores. This shortfall is due in part to my results for Justice White, whom I predict to be perfectly moderate in contradiction to what turns out to be a conservative voting record. It is likely the unavoidable result of using a very small number of cases to predict the behavior of someone known to be the ultimate swing justice (Starr, 1993). Justice Brennan's extreme negative score (more than twice that of Justice Marshall) may also have lowered my R^2, but rather than exposing a weakness in my model, I believe these results indicate strength.

A pure vote-based measure, particularly when applied to a small data-set, cannot show nuance or relative extremity, but mine can. Even if there is a terminal point on the citation-based spectrum after which a justice will always vote liberal or always conservative in a certain set of cases, distinctions beyond that point are still worth knowing. The decision of which way to vote on a case is dichotomous, but the policy-making capacity of a majority opinion is potentially limitless. While an ideologue like Brennan in 1987-88 may be temporarily constrained by the

fact that he is in the minority block, it is important to be able to predict how far he would go if this or other constraints on his power were removed. It is also worth noting that my model predicted Justice Stevens' voting record would have a decidedly leftward tilt, where as his MQ scores placed him just slightly left of center.

Justice Name	FR Conservative Vote Coefficient 1987-1988	FR Citation-based Score	MQ Score Mean 1987-1988	SC Ideology Score
Blackmun	0	-2.67	-0.98	0.12
Brennan	0	-4.78	-3.64	1
Marshall	0	-2	-4.44	1
Rehnquist	0.83	2.43	2.75	0.05
Stevens	0.33	-2.33	-0.59	0.25
White	0.67	0	0.99	0.5
Powell	n/a[6]	-0.43	n/a	0.17
R^2		0.795	0.815	0.299

Table 5: Predicting Freedom of Religion Votes 1987-1988

At first glance my score performs somewhat poorly in the Search and Seizure category, despite the expansion of the data set, falling just over one percentage point short of Segal-Cover and about four percentage points short of Martin-Quinn. But it should be noted that much of this discrepancy is due to predictions regarding Justice Powell, who retired midway through 1987 and whose MQ score is thus artificial. Justice White is once again difficult to predict, voting more conservatively than even Justice Rehnquist when all three scores showed he should have been moderate. However the results for the other justices are heartening, especially those for

[6] Powell, who retired in 1987 has no FR votes recorded after 1986, so his scores were not included in the FR predictions

Blackmun, whose score, like his voting record for the terms, were indistinguishable from Rehnquist's. This suggest my methodology may create a left-ward skew in the results, but the problem is likely to resolve itself once the data-set is broadened, or else it can be compensated for by a simple data transformation. Overall, these preliminary results offer hope that the citation-based model can give both scholars and practitioners of law a more precise insight into the ideology of all past, present, and future justices.

Justice Name	**SS Conservative Vote Coefficient 1987-1988**	**SS Citation-based Score**	**MQ Score Mean 1987-1988**	**SC Ideology Score**
Blackmun	0.77	1.15	-0.98	0.12
Brennan	0.33	-3.10	-3.64	1.00
Marshall	0.31	-2.23	-4.44	1.00
Rehnquist	0.77	1.06	2.75	0.05
Stevens	0.69	-0.65	-0.59	0.25
White	0.85	-0.07	0.99	0.5
Powell	0.80	-0.47	0.75[7]	0.17
R^2		0.770[8]	0.808	0.782

Table 6: Predicting Search and Seizure Votes 1987-1988

[7] Since Powell has no 1987 or 1988 MQ score, the one for 1986 was used
[8] If Powell is removed from the data-set, this R^2 becomes 0.814

CHAPTER 5

CONCLUSIONS

Judicial Ideology is something of an open secret. Its existence is suggested by many indications and many experts, but it has never been fully acknowledged or unequivocally demonstrated, so its nature and location remain nebulous. Its manifestation and its measurement are often too closely intertwined and too complex to demonstrate it objectively. And any attempt to trace it back to its origin terminates at a dead-end.

Citations from non-majority opinions provide us with a means of measuring judicial ideology that simultaneously addresses two common stumbling blocks, lack of precision and the intrusion of institutional factors. The resulting scores fit well enough into the established view of the justices being measured to appear reasonable. Yet they simultaneously question our notions about individual jurists. They also further underscore the need to look at ideology as a multidimensional concept, allowing for justices to straddle conventional partisan lines. Of course how to do so effectively and how to then create cohesive ideological archetypes for jurists to fit into are still open questions.

This is merely an introductory study, and there are dozens of other justices and thousands more opinions to examine, with data available practically from the ratification of the constitution. I advise those working in this area to use, and perhaps even improve upon, Clark and Lauderdale's coding scheme. While not significant in a survey of this size, the impact of more careful scrutiny of judicial tactics and intent in opinion-writing seems to rise concurrently with the size of the data-pool and may prove fundamental in broader studies.

It should also be noted that one of the possible limitations of citation-based ideology scores is their inability to accommodate for cases in which extralegal factors may lead justices to intentionally author concurrences or dissents that do not reflect their own views. Some researchers suggest that a justice's opinion-writing can be driven by the audience for which he writes. According to Laurence Baum (2010), "judges who want the respect of practicing lawyers, legal academics, and other judges have an incentive to be perceived as committed to the law and skilled in its interpretation." That would "drive judges to give somewhat greater respect for stare decisis, at the expense of their ideology" (Cross, Spriggs II, Johnson, & Wahlbeck, 2010).

Determining the extent to which the desire for elite status or public acceptance influences the content of non-majority opinions is a subject for a separate study. However I suspect that whatever impact this desire may have on the scores I have established here will be quickly diluted by the addition of more data. Although the prospect of a negative reception might serve as a powerful counter-weight to the influence of ideology in high-profile cases, its impact is likely to be far weaker in the vast majority of non-majority opinions, which being written for low-profile cases and having no legal weight what-so-ever, are likely to receive scant scrutiny.

A final puzzle to solve, one that I have only yet mentioned in passing, is how to control for the effect of time on ideology. Admittedly it is the most difficult problem to overcome, but I believe also the most important. If this quandary can be cracked and if this measurement scheme can be honed and extended to the circuit and district level, its results can become far more than fodder for pundits and theorists trying to predict the outcome of cases over which they have absolutely no control. With proper testing and improvement, the process I have outlined may

someday be used by a President and Senate considering a judge for appointment to the Supreme Court, taking much of the mystery (and maybe even a bit of the posturing) out of nomination hearings, and allowing us to see in advance the full impact of placing a particular individual on the nation's highest bench.

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APPENDICES

Appendix A

Data-Set

CL based data set and techniques used in the data process.zip