

CRUCIAL AND ROUTINE DECISIONS:
WHY IDEOLOGY AFFECTS U. S. SUPREME COURT DECISION-MAKING
THE WAY IT DOES

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Abstract

Models using judicial ideology to explain Supreme Court decision-making remain controversial due to their apparently limited explanatory scope. Civil liberties and civil rights decisions and those concerning economic policy appear to be well explained by the ideological attitudes of the justices. However, decisions in other areas show little relationship to these attitudes.

I suggest that this is due to the differing character of the decisions made by the Court in different areas. Following G.L.S. Shackle and Paul Davidson, I hypothesize that decisions made in the civil rights and liberties and economic policy areas are *crucial decisions*; i.e. decisions by the justices that creatively change their environments through the exercise of judicial review. Long and short term expectations concerning crucial decisions cannot be generated efficiently since discrete probabilities cannot be attached to each outcome. Instead, each justice's deliberations will concentrate on the possibility of highly detrimental or favorable outcomes which could occur. These "focus outcomes" will be evaluated in terms of the ideological preferences of the justices. Thus, in types of cases where the justices are more likely to make crucial decisions, it is more likely that ideology will affect decision making. In issue areas where more stable environments are present, the justices can make *routine decisions*, i.e. decisions which follow probabilistic expectations and which stabilize over time. For these issues, ideology is less likely to be a useful explanatory factor. I test this theory with an analysis of Supreme Court cases in different issue areas and end with some observations concerning the consequences of my findings.

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INTRODUCTION

Ideology has long been the centerpiece of models of U. S. Supreme Court decision-making. The basic idea is simple: the votes taken by the justices in particular cases are a function of the their ideological preferences, the facts in the cases, and their calculations concerning the reactions to their decisions by other justices and by outside political actors. Actual application of ideology to explain U.S. Supreme Court decisions, however, reveals limitations. Empirical research using various indicators for the justices's ideological attitudes has been successful in explaining decisions in civil rights and liberties cases and, to a lesser extent, economic policy cases. Other areas of policy have remained intractable. Using Spaeth's categorization of issue areas for the Court's decisions, Epstein and Mershon (1) show that the most common measure of the justices's preferences - the values scores developed by Segal and Cover (2) - is unable to provide effective models for the justices's decisions in cases involving federal taxation, federalism, and judicial power (3). These are not policy areas where we would expect ideological concerns to be muted. Why should the ideological preferences of the justices be activated for civil rights and liberties cases and economic policy matters, but not for these questions?

Scholars using ideological models have noticed this discrepancy, of course, but have failed to offer a convincing explanation for it. The usual response has been that ideological attitudes only work as predictors for civil rights and liberties and economic policy cases because these are the only issues the justices care deeply about or that are salient enough cause a response (4). Leaving aside the circularity of the argument, research on American political elites suggests that this can-

not be correct. Executive and legislative elites have attitude structures that are highly constrained by ideology, consistent, and influential on their decisions across the policy board (5). If the justices have similar attitudes - and there is every reason to believe they do - why should they only care about some issues and not others, especially since their position in our political system puts only limited restraint on their decision-making (6)? Given this inconsistency, it is easy to see why critics of ideological models remain unconvinced. Either the justices are voting their preferences or they are not. If they are, there is no reason presently stated in the theory to exclude any issues from the influence of their attitudes.

This paper is an attempt to show why the effect of ideological preferences in models of the Supreme Court's decisions works the way it does. First, I present an analysis of the expectations justices can form about the results of their decisions. On the basis of this analysis, I suggest that for many kinds of cases the conditions for rational choice cannot be met consistently and that, as a consequence, justices use their policy preferences to reach decisions. I argue that the differential effect of attitudinal indicators in empirical studies turns on the type of decisions that are made in particular classes of Supreme Court cases. I then present an examination of court decisions that supports this assertion and some conclusions about the ramifications these ideas have for studies of Supreme Court decision-making.

ENVIRONMENTS, EXPECTATIONS, AND ROUTINE DECISIONS

There are two main ideological approaches to Supreme Court decisionmaking: the attitudinal and separation of powers models (7). The attitudinal model holds that the Court's institutional protections strongly limit the extent that influences in and out of the Court impinge on the justices's decision-making. Supreme Court justices are appointed to their seats and have proven im-

possible to remove. Further, their decisions are to all intents and purposes final. Congressional action and constitutional amendment can overturn the Court's decisions, but their use is too episodic to be an effective restraint. Finally, the justices have few ambitions that can be satisfied by outside actors; *quid pro quo* does not exist for them (8). Internal restrictions are also ineffective; while the justices do negotiate concerning the content of their opinions and other matters, their ideological attitudes control their final decisions (9). As a consequence, the justices will vote rationally and "sincerely"; i.e. their votes on most issues will conform to their policy preferences. Thus, if researchers can identify the attitudes of the justices, it should be possible to predict their decisions, at least on the merits, with accuracy.

The attitudinal model has proven to be a successful research tool (10), but it has been challenged recently by the re-birth of Murphy's (11) approach emphasizing strategic interaction. Scholars using this separation of powers approach also see the justices as maximizers of their policy preferences, but deny the institutional insulation that is the central assumption of the attitudinal model. They emphasize instead the bargaining that characterizes opinion formation within the Court and the need to consider the action of other branches of government in the "separation of powers games" that could begin after the Court's opinions have been issued. This perspective sees decisions on the merits as the cumulative product of a series of bargains between the justices based on the desire to maximize preferences within an environment constrained by endogenous and exogenous institutional limits. Again, the ideological preferences of the justices take a central, though more constrained, role in explaining the final tilt of the Court's cases (12).

There is an implicit assumption in both models, however. The final decisions that the justices make, like the decisions of other political actors, do not pay off at once. All justices see the effect of their decisions on the application and interpretation of the law taking place over an extended period. Since both the attitudinal and separation of powers models presume that justices are policy maximizers, both must presume that each justice has some state of knowledge concerning what they can predict today concerning the consequences of their decisions in the future. This leads to the central implicit question in both models: what expectations do the justices have about their final decisions?

The answer given to this question is the main difference between the two views. The separation of powers model assumes that the justices will have expectations about possible consequences for their decisions due to action by other branches of government; the attitudinal model assumes away the need for any defensive action by the Court, except in very dire circumstances. But notice what expectations have *not* been addressed by either approach: expectations about the actual outcome of the decisions in the working of the law. These expectations have not been addressed in the literature using either model because both assume that the justices are making decisions under conditions of probabilistic risk (13). Often misleadingly called decision making under conditions of uncertainty, this idea requires that the justices make actual probability estimates concerning the outcomes of their decisions. It also assumes that the justices do not have perfect knowledge of the future and will often be mistaken in their views. There is one further condition, however, which is usually not articulated: decision-making under conditions of probabilistic risk also assumes the existence of an independent and stationary, i.e. an *ergodic*, environment (14).

To see why this is the case, consider how the justices must form expectations using probabilistic risk. First, the justices must array their choices among potential outcomes so as to assess their gains and losses. This, in turn, assumes that the justices have enough knowledge to make a rational choice among different outcomes and that they do so at their own risk since their information flows are incomplete. This chain of circumstances, however, requires that the environmental processes that generated the dispute are independent of the justices's choices between outcomes. Further, the environment must be independent of the effects of their decisions as well (15).

This may strike some as incongruous, but such a framework is necessary to make rational decisions. If the justices's decisions can alter the environment that generates disputes, then the possibility of forming expectations about outcomes over time is undermined by the constant shifting of environmental states. Forming probability estimates about particular decisions, then, becomes problematic as well. In other words, decision-making under probabilistic risk depends on the justices forming expectations based not on a truly uncertain environment, but on *a lack of information about a certain environment*. If the environment is stable, the course of their decisions can be compared to a Darwinian selection. Over time, as decisions are made, the justices will be able to see what the underlying processes generating disputes are and choose the course of action most compatible with both the processes and their preferences (16). Votes cast that correspond to the environmental processes will be successful in maximizing the justices's influence over legal policy. If the justices's votes are cast rationally over time, they should converge on positions as close to the stationary processes of the environment as their preferences allow (17). An ergodic environment also provides the justices with a basis for expectations about future out-

comes; they should be similar to the outcomes from past decisions on similar matters. In short, to use Davidson's (18) terminology, both the attitudinal and separation of powers models assume that the justices are making *routine* decisions involving straightforward (although risky) actuarial choices between a limited set of environmentally determined outcomes.

CRUCIAL DECISIONS

There are probably many situations in Supreme Court decision-making where the ergodic assumption makes good sense. Given the (relatively) unchanging cast of characters, their intimately known proclivities, and the number of decisions negotiated between them, it would be plausible to say that routine decisions involving rational and strategic calculations characterize the Court's work in writing opinions and, perhaps, its interactions with other institutions (19). What is less plausible is the uniform application of this framework to the Court's decisions on the merits, a major focus in both models.

To see why this is so, I will suggest an alternative description of the justices's expectations. What if the environment in which the justices operate creates situations where ergodic processes do not exist? What if forming stable expectations about the outcomes of their final decisions is not possible? In short, what if the justices do not know what the actual long term effects of their decisions will be and *know that they do not know* (20)?

But how could environments become so destabilized? The answer here lies in the character of the Court's decisions on the merits. In many areas, they are almost certainly what Shackle calls a *crucial experiment*. For Shackle, crucial experiments occur when

“... the person concerned cannot exclude from his mind the possibility that the very act of performing the experiment may destroy forever the circumstances in which it was performed.” (21).

Since crucial decisions change environments so that the conditions that led to the original choice are not repeatable, the *future is transmutable* (22). Indeed, if we concede the possibility that at least some of the justices’s decisions on the merits are crucial, then the environment which generates the disputes they hear is *non-ergodic*, i.e. truly uncertain, in character. It cannot, as a matter of logic, exhibit long term or short term stationary processes because the justices’s decisions have changed the legal environment in ways that preclude the successful repetition of certain kinds of disputes. This in turn means that the probability assessments necessary to make rational decisions under conditions of risk cannot be calculated reliably and that past decisions are not a guide to future outcomes. Further, it means that the justices’s assessments of the outcomes of their decisions will recognize that history is unpredictable and that the future need not turn out as they intend (23). To put this another way: in many instances, the justices are legal entrepreneurs.

When I assert that justices will not be able to assign exact probabilities - even mistaken ones - to particular courses of action, I do not mean that they will be unable to make some judgments. Shackle (24) points out that decisionmakers in a situation of true uncertainty can assess outcomes so far as to say that many possibilities are equally likely to occur. What, then, is the gauge used to reach final decisions? Here we must turn to Shackle’s concept of “potential surprise” (25). In non-ergodic environments, there is a distribution of choices and their outcomes, both good and bad in the view of actors. From these, there will be many outcomes that actors will see as equally likely and a few outcomes that are so equally unlikely as to be dismissed. Between the two are

outcomes that have just enough initial plausibility to be considered possible and which embody the maximum negative and positive potential surprise that might be realized from action. It is these points - what Shackle (26) calls “focus outcomes” - that dominate the choices made by individuals in non-ergodic environments. They must weigh the plausibility that their decision could lead to a truly disagreeable surprise against the plausibility that it could lead to a very pleasant one and act accordingly. As Davidson (27) says, they act *sensibly* in the face of true uncertainty.

(Figure 1 about here)

This argument is embodied in Figure 1. Here, the degree of potential surprise felt by a decisionmaker is Y , the distribution of decision outcomes X . There is a threshold of potential surprise Y_H which actors consider so unlikely as to be impossible. Outcomes X_L to X_H are what Shackle (28) calls the “inner range” of outcomes that decisionmakers find equally likely to occur; hence their zero reading on the scale of potential surprise. Actors will also consider a range of outcomes which they think less likely, but plausible enough to be concerned about. A comparison of the upper and lower focus outcomes (“what I stand to gain” and “what I stand to lose”) - F_L and F_H - will dominate decision-making in non-ergodic environments (29).

WHY IDEOLOGICAL PREFERENCES EFFECT SUPREME COURT

DECISIONMAKING THE WAY THEY DO

How does this framework help us to explain why the attitudinal and separation of powers models work in a selective fashion on votes on the merits? The key is a distinction between the

type of decisions the justices make in different types of cases. That in turn depends on the extent to which the environments that generate disputes are amenable to stabilization.

I suggest that the Court's decision-making is inherently at risk of becoming dominated by crucial decisions due to the Court's exercise of judicial review. Many of the Court's decisions on the merits are prototypically crucial, involving as they do changes in the interpretation of statutes and holdings concerning their constitutionality. Given that the justices are facing a situation where one of their major functions is to make crucial decisions, how are they to decide cases to get outcomes they prefer? The answer is to build their decisions around an analysis of focus outcomes. (The Court's practice of arguing cases by using hypothetical situations is an unconscious recognition of this.) If crucial decisions become predominant in an issue area, justices will face cases where the "potential surprise" could exacerbate, for good or ill, outcomes they prefer or abhor. Lacking rational criteria justices would turn, to use Lord Keynes's (30) phrase, to "animal spirits" - their core policy preferences - and use them to evaluate focus outcomes. Or, to be more exact, in types of cases where the Court is more likely to make crucial decisions, it is more likely that ideological preferences will predict the justices's votes on the merits.

I further suggest that in other areas the reinforcement of precedent and the development of exogenous institutions in response to the Court's decisions or other social forces can enhance environmental stability. The justices then face environments where the likelihood of crucial decisions less. In short, the environment *institutionalizes* so as to reduce true uncertainty and make rational decision-making under probabilistic risk plausible. Or, again to be more exact, in types of cases where the Court is more likely to make routine decisions, it is more likely that ideological preferences will *not* predict the justices's votes on the merits.

Why, then, do ideological models work so efficiently for civil liberties and civil rights matters and economic policy decisions? Because these are areas where the institutionalization of policy is particularly difficult and where cases presenting opportunities for crucial decisions are common. Disputes in civil rights and civil liberties matters - arising as they do from the action of markets and the administrative decisions made by myriad public and private organizations - are often the result of crucial decisions by non-judicial actors. Further, the Constitution makes regularization of civil rights and liberties disputes questionable, especially since the Court began the process of incorporation and the civil rights acts were found constitutionally valid. The unstable institutional environments generating civil liberties and civil rights cases, then, lead to the justices making crucial decisions based on their ideological preferences as they attempt to deal with changing social and economic conditions (31).

The environments leading to economic policy cases are also unlikely to stabilize. Here the driving force is the continuing change in productive technique and conditions inherent in capitalist economies. Markets commonly generate disputes that call for substantial revisions in present legal policy. The justices respond by making crucial decisions, again in an attempt to accommodate change. And, again, a non-ergodic environment leads to a dependence on policy preferences as a basis for votes on the merits.

Conversely, why do decisions on some issues - federal taxation, federalism, judicial power - show little relationship to ideological values? The line of thought I have presented suggests that the justices are able to make routine decisions concerning these cases. In these cases there has been considerable regulation of behavior by other public and private institutions and by the Court

itself (32). This lends stability to the environments that breed legal disputes and diminishes the opportunity to make crucial decisions.

TESTING THE MODEL

I cannot bring these ideas to a full test in this article, but I can suggest some initial hypotheses. If this perspective is correct, I would expect those issue areas where ideological preferences are strong predictors of votes on the merits to be characterized by non-ergodic processes. I would also expect that there would be more crucial decisions in issue areas where ideological preferences are the strongest predictors of the Court's votes on the merits. A test of these propositions would help us see if my theoretical speculations might be on track.

Determining whether or not ergodic processes are generating the Court's decisions on different issues must be done indirectly. The ergodic hypothesis requires, at a minimum, that any statistics generated by observations over time are stationary; i.e. that the parameters are independent of time and, by expectation, equal to the sample statistics (33). If this is the case, then sample statistics will provide, either in time series or cross section form, reliable estimates for calculations occurring at any future date, allowing probability estimates to be reliably attached to expectations. Any series that does not exhibit stationary properties over time should be assumed to represent a non-ergodic process since non-stationarity is a sufficient condition for non-ergodicity (34). Accordingly, if the patterns of votes on the merits over time for issues before the Court are not stationary, we can presume that the decisions themselves are representative of a non-ergodic process (35). I hypothesize that:

H1. The issue areas where the Court's votes on the merits show evidence of non-stationarity over time will be issue areas where the ideological preferences of the justices predict their votes on the merits effectively.

Luckily, there is already existing data which makes testing this hypothesis fairly easy. I used the 1946 - 1994 time series of the percent of liberal decisions by issue area reported in the *Supreme Court Compendium* (36) as an aggregate indicator characterizing the Court's votes on the merits. The series are based Spaeth's widely used issue area typology; the data were drawn from his U.S. Supreme Court Judicial Database augmented to include the Vinson court (37). His classifications have been widely used to divide the Court's total caseload into manageable categories for research purposes. I excluded the separate series of cases concerning attorneys since the number of cases in this issue area is so limited. I also excluded the separate series for privacy decisions due to the substantial gaps in the data. However, I included the aggregate civil liberties time series combining criminal procedure, civil rights, 1st amendment, due process, privacy, and attorneys decisions. I estimated one data point in the federal taxation and federalism series and three in the due process series using extrapolations from regressions of each series on time.

Characterizing Supreme Court decisions as crucial or routine is the main problem in testing the second hypothesis. In the Court's context, the justices make a crucial decision when they change the law substantially enough to recast the grounds for future disputes. I postulate that those Court decisions characterized as "major decisions" are most likely to meet this criteria. I hypothesize that:

H2. Those issue areas where the proportion of major decisions are greatest will show the highest correlation between the ideological preferences of the justices and their votes on the merits.

To build a dataset to test this hypothesis, I made an initial decision to restrict the cases analyzed to major decisions made between 1953 and 1994. This maximizes data availability by covering the interval considered in the most relevant recent studies specifically considering the role of ideology in explaining Supreme Court decisions. There is only one avenue to data here: expert classification. I used two listings of major decisions to create the dataset. The first is the list constructed by Joan Biskupic and Elder Witt (38), which many scholars accept as the most representative expert selection (39). I supplemented Biskupic and Witt's list with the annual lists of cases compiled by the *Harvard Law Review* (40). I did this to insure that my final dataset reflected the evaluations of both academic and legal professionals (41). I then classified the combined set of 1953 - 1994 major decisions using ten of the Supreme Court casetypes examined by Epstein and Mershon (42). Since total Supreme Court caseload for each casetype for the 1953 - 1994 time-frame was available (43), it was an easy matter to calculate the proportion of major decisions within each. I was able to include privacy decisions in this examination since all figures are aggregates.

To test the both hypotheses, I also need data on how well ideological preferences work in predicting votes on the merits for each casetype. Again, this can be done by using prior results. In their valuable study of measurement questions, Epstein and Mershon (44) calculated the relationships (r^2) between the most widely used indicator for judicial attitudes, the Segal and Cover ideological value scores, and the record of liberal voting by the justices for the ten caseload categories I consider here. If the hypotheses are correct, we should expect that these readings would be highest for those casetypes that exhibit non-stationary characteristics and where the highest proportion of major decisions are found.

RESULTS

Testing the first hypothesis involves a close examination of the time series of liberal decisions in each issue area for evidence of non-stationarity. The first step in this process can be found in Figure 2. Here I present line graphs of the percent of liberal decisions in 10 different issue areas (aggregate civil liberties, criminal procedure, civil rights, 1st amendment, due process, unions, economic activity, judicial power, federalism, and federal taxation). The readings (r^2) for the relationship between the degree of liberalism in justices's voting on each issue to their Segal and Cover scores are reported below each graph. In order to make the patterns in the data clearer, I have included a lowess smooth curve in each graph (45).

(Figure 2 about here)

It is immediately clear that the graphs for the first seven issues - those where ideological preferences predict fairly well - show evidence of instability over time. These data series indicate the same lack of stable moments found previously for aggregated data series of the Court's economics and civil rights and liberties cases (46). Focusing on the lowess smooth lines for those case types where the relationship between liberal voting and the Segal and Cover scores is significant demonstrates their non-stationarity most clearly. Only the series for union decisions departs from the overall pattern in these graphs, but it also shows evidence of instability. This finding comes into sharp relief when the first seven graphs are compared to the three at the bottom of the figure. The graphs for judicial power, federalism, and federal taxation cases, where ideological preferences have little explanatory traction, show admirable stability over time, as the first hypothesis predicts.

Visual inspection is an important first step in any data analysis, but more formal testing is required for confirmation of the hypothesis. Table 1 presents two tests for stationarity. The first is the Box-Pierce-Ljung Q test. This tests the null hypothesis that

... the residual autocorrelations r^2 are themselves uncorrelated, normally distributed random variables with mean 0 and variance $1/T$, where T is the number of observations in the time series (47).

Put another way, this means that any autocorrelation in a series is the result of a white noise process independent of time. The test statistic is distributed asymptotically as a χ^2 distribution with the same degree of freedom as there are lags specified for the test. A non-stationary series - which would have non-constant moments - would lead to rejection of the null hypothesis (48). The Q statistic is presented for 22 lags deep in the data. (Since autocorrelation would decrease quickly to zero in a stationary series, this is a quite stringent criteria.) The second is the test for stationarity proposed by Kwiatkowski and his colleagues (49). Hereinafter the KPSS test, it tests a null hypothesis of either trend or level stationarity in a series against the alternative of the presence of a unit root process (50). In Table 1, I present readings for the KPSS test testing the null hypothesis of level stationarity for the first five lags for each of the series of Supreme Court decisions in Figure 1 (51).

(Table 1 about here)

The formal tests of my first hypothesis appear to strongly confirm it. As can be seen, for those series where ideological preferences do a good job predicting the justices's votes the null hypothesis of stationarity can be rejected using both the KPSS test and, with the exception of un-

ion cases, the Q test. On the other hand, the series for judicial power, federalism, and federal taxation decisions show results that require us to fail to reject the null hypothesis for both tests.

The second hypothesis was that the proportion of major decisions for different issue areas would be related to the success of ideological preferences in explaining votes on the merits. This hypothesis is tested in Figure 3. The figure presents a scatterplot correlating the r^2 readings for the relationship between the Segal and Cover scores for justices and the degree of liberalism of their votes on the merits with the proportion of major decisions in each of 10 issue areas (52).

(Figure 3 about here)

The second hypothesis also appears well supported. Those casetypes where ideological preferences predict well are also those with substantial proportions of major decisions. Even more to the point, the issues where ideological preferences did a poor job explaining the justices's voting - federal taxation, federalism, and judicial power - rank lowest in the proportion of major decisions. The correlation is substantial and significant ($r = .70$, $p < .025$), explaining roughly half of the variance. Further, there is a significant and straightforward relationship between indicators; each 1% increase in the proportion of major decisions leads to a 1% increase in the Segal and Cover scores / liberalism of voting r^2 . Given the small number of data points and the aggregate nature of the measures, these readings provide good support for the idea that issue areas where the justices are most likely to make major decisions are the issues where their ideology is most likely to work as an explanation for their votes.

DISCUSSION AND CONCLUSIONS

In this paper I have attempted to present an explanation of the pattern of empirical results observed in studies of Supreme Court decisionmaking that use ideology to explain the Court's votes

on the merits. I described the implicit framework for the justices's expectations embedded in these models and tied it to the assumption of an ergodic environment based on stationary underlying processes. I then pointed out that the Court functions in part in a non-ergodic environment that undermines the decisionmaking assumptions implicit in both the attitudinal and strategic interaction models. I described decisionmaking under conditions of true uncertainty using Davidson's concept of crucial and routine decisions. I speculated that areas of the law which required higher levels of crucial decisions would be most likely to lead the justices's to use ideological preferences as decisionmaking criteria and that those which involved routine decisions would not. I then presented a data analysis testing this proposition that provided support for it.

It is now time to consider the implications for theoretical and empirical aspects of research on Supreme Court decision-making of the new perspective I have presented here. There are two main theoretical consequences of accepting the idea that the justices make some of their decisions in an environment of true uncertainty. The first involves a shift in research focus. Since Schubert's (53) pioneering examination of the Court's decision-making scholars have been explaining the justices's decisions in terms of their policy preferences. Those decisions which could not be explained by reference to those preferences were generally ignored. To some extent this is understandable: why go up blind alleys when ideological explanations lit the main streets? If the model of decision-making proposed in this paper is correct, however, the explanation for the pattern of votes on the merits changes substantially.

I have asserted that the influence of ideological preferences is controlled by an antecedent variable: the type of decision - crucial or routine - that the justices are prone to make in particular kinds of cases. This perspective forces recognition of the substantial role that decision-making

environments can play in influencing how ideology affects votes on the merits. Why, for instance, has there never been a successful attempt - it defeated even Schubert (54) - to characterize the attitudes that influence the justices's decisions in cases involving judicial power, federalism, or federal taxation? If my speculations are correct, this is because the institutional environments for these cases are stable enough to allow the justices to use precedent and past experience to form shared expectations of the outcomes of their decisions. These expectations allow them to put aside ideological responses to cues and behave as their professional socialization would dictate. The argument shifts from contentions about the share ideology and "legal" or "strategic" factors have on votes on the merits for *all* cases to a specification of which type of decision will be most likely to be influenced by each set of factors.

The other theoretical consequence of the adoption of this framework is a gain in generality. By relaxing one of the assumptions - that of an ergodic environment - at the center of theories of Supreme Court decision-making, I have suggested an explanation of a longstanding empirical anomaly. As we have seen, the present decision-making theory of the policy maximization models has a difficult time explaining the pattern of empirical results the model produces. The usual response to this problem - that ideological preferences only explain certain types of cases (55) - begs the question. The results presented here suggest that a more general model of decision-making where relaxed assumptions about environments show promise of explaining why ideological preferences only affect some decisions the Court makes.

Also, there are some cautions that this study suggests for future empirical research into votes on the merits. As we have seen, some of the time series of liberalism in Supreme Court voting examined here have shown clear evidence of non-stationarity. It would be wise in future studies

of civil rights and economic policy cases over time to check carefully for stationarity before proceeding to posit models for the justices's voting behavior (56). There can be serious consequences for estimators in time series models if the data are non-stationary. Further, the remedies for this problem are usually not more complicated than using first-differenced transformations of the data. Accommodating the "long memory" of the Court's decisions should lead to more explicit modeling of the processes generating the data as well (57). Lack of tests for specific descriptions explaining change in the Court's voting patterns is a common feature of present research. The results presented here indicate that this should change.

There is also the potentially fruitful application of the approach outlined here to normative questions concerning the Court. One of the undercurrents of discontent with ideological models of the Court's decision-making is a deep repugnance for the notion that the justices would allow their policy preferences to guide their decisions. The attitudinal model asserts that the justices often deceive themselves into thinking that their legal arguments are the basis of their decisions on the merits. The approach holds instead that the justices are led by their ideological noses to their decisions; the legal arguments they use are justifications and nothing more (58). It is easy to see why this picture, still adhered to by the model's strongest proponents, leaves scholars of the Court uneasy. After all, the justices are among the most intelligent and experienced people in government and have undergone an extensive socialization process in their profession. Portraying them as commonly lacking the self awareness to know they are voting on the basis of their preferences strains credulity. Accepting that they do strains the norms that uphold the Court's legitimacy (59).

The separation of powers model emerged at least in part as a reaction to this normative *frisson*. By insisting that the Court's decisions on the merits are actually the product of many intermediate decisions resulting from a long negotiating process involving both ideological and legal considerations, separation of powers scholars seek to square the circle created by the attitudinal model. If the justices's final decisions are in part a reflection of their policy preferences and in part a product of legal deliberations and compromise, the norms legitimating the Court are not under as great a stress, the justices can be portrayed as intelligent deliberators instead of dupes, and the empirical results generated by attitudinal scholars can be accommodated (60). The difficulty, of course, is that, while successful in other areas, the separation of powers approach has not proven as empirically useful in explaining decisions on the merits (61).

Crucial decision theory directly assaults this conundrum. It accepts the attitudinal model's main claim by confirming that the justices do use their policy preferences to reach decisions on the merits. However, it is far from accepting that ideological influences are an exercise in self-deception. Instead, the theory postulates that the justices are using ideological preferences to guide decisions in some areas because of the inherent uncertainty of the environments generating disputes (62). The opinions they generate in these issue areas are not blind justifications, but deliberate choices forced by true uncertainty. In other areas, where uncertainty is less endemic, the model suggests that the justices's opinions on the merits would tend to converge over time, demonstrating that the rational strategies envisioned by the separation of powers approach can come into their own in the right circumstances. Note that this framework makes the normative issue involved in using ideological preferences to drive decisions fade into the background. If the justices are making decisions sensibly because the non-ergodic environments generating disputes do

not allow the use of rational calculations, then, instead of imposing their preferences on policy, they are making the best decisions possible under the circumstances and doing so consciously. As a consequence, decisions based on ideological preferences, though far from ideal, are normatively justifiable (63).

A paper that proposes a different way of looking at established research results is almost certain to raise more questions than it answers. The evidence presented here, while preliminary, suggests a very substantial number of relationships involving adherence to precedence, stability of voting, and levels of potential disagreement on the Court that await future research. The entire question of how non-ergodic processes become established and evolve in particular issue areas remains to be examined as well. There is also the problem of the implications for such an approach for other areas of Supreme Court decision-making. It might prove profitable to reconsider strategic interaction on the Court in light of the continuing presence of non-ergodic processes surrounding the Court's votes on the merits. Incorporating non-ergodicity into normative analysis of the Court also has possibilities, as was just shown. In all, much work needs to be done before a programmatic overview of these ideas can be presented. The initial examination presented here, however, suggests that this line of research could not only provide a possible explanation for present empirical results concerning Supreme Court decisionmaking, but should prove invaluable in supporting a more realistic perspective on the Court and its decisions.

NOTES

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1. Epstein and Mershon 1996.

2. Segal and Cover 1989.

3. Epstein and Mershon use Spaeth's classification of the Courts cases to reach these conclusions (Segal and Spaeth 1993). While the operational definition of these issue areas is by no means as broad as their usage in political discourse, the decisions reached in each area - decisions concerning federal tax law, the power of federal courts, and basic divisions of power between the federal and state governments - are by no means trivial.

4. Perry 1991, Pacelle 1991.

5. Kritzer 1979, Jennings 1992, Poole and Rosenthal 1997, Poole 2003, but see Cronin and Fordham 1999.

6. There is evidence that some justices's policy preferences shift over time (Epstein et al 1998). There is, however, no data that suggest that their attitudes at any point in time are not consistent and coherent. Given existing research on other political elites, it would be a surprise if future studies found otherwise.

7. Howard and Segal 2002.

8. Segal and Spaeth 1993, 2002.
9. Howard and Segal 2002, Martin 1999.
10. Segal and Spaeth 1993, 2002 summarize the findings and attendant controversies
11. Murphy 1964.
12. Epstein and Knight 1998, Maltzman, Spriggs, and Wahlbeck 2000, and Epstein and Knight 2000 summarize the approach and findings based on it.
13. Knight 1921.
14. Davidson 1995.
15. Davidson 1995, 1996.
16. Davidson 1995, Dunn 2001. I hope it is obvious here that I am talking about the outcomes over time of the justices's decisions, not about their votes. I am sure that Ruth Bader Ginsberg has a pretty good idea of how Antonin Scalia is going to vote on most civil liberties and rights cases. What I am sure she is *not* certain of is the actual social outcome of different possible decisions in these cases. What she *is* certain of is that Scalia's choices greatly increase the potential for unlikely, but plausible outcomes she finds repugnant. Since she can assume that Scalia is approaching the issue in a similar fashion, the odds for his vote changing are small indeed. Given that the Court's institutional rules require a vote and that the worm might turn some day, it is clear what her choice should be, even if she has no chance of being on the winning side.
17. Davidson 1991.
18. Davidson 1991.
19. Epstein and Knight 1998, Segal 1999.
20. Hicks 1979.

21. Shackle 1955, 6.
22. Davidson 1991, 1993.
23. Davidson 1995, 1996, Rosser 2001.
24. Shackle 1949.
25. Shackle 1949, 11.
26. Shackle 1949, 20.
27. Davidson 1987.
28. Shackle 1949, 13.
29. Shackle 1949, 1955.
30. Keynes 1991.
31. It is not surprising that the Court has tended to favor doctrines of “strict scrutiny” and “invidious discrimination” in these cases. These principles are directly analogous to a liquidity preference among consumers; they allow the Court to face a truly uncertain future by reserving power to deal sequentially with unpredictable circumstances. See Davidson 1991 for the reasoning that suggested this point.
32. Most of the cases reaching the Court on tax matters, for instance, are appeals from the federal Tax Court involving interpretations of regulations in light of taxation statutes. It also implies that there is less need to break with precedent and to substitute policy preferences for formal analysis. This question awaits further research.
33. Davidson 1995.
34. Davidson 1996, Kendall and Ord 1990.
35. Davidson 1995.

36. Epstein et al. 1996.
37. Epstein et al. 1996, 214 - 218.
38. Epstein et al. 1996, 94 - 142.
39. Cook 1993.
40. Harvard Law School, 1954 - 1995.
41. On examination I found that Biskupic and Witt's listing excluded many recent significant cases in areas of labor and economic policy, federalism, federal taxation, and judicial power. While much of the heavy lifting in these areas was done before 1953, it is unreasonable to think that the 1099 economic activity cases heard between 1953 and 1994 produced only 7 major decisions. I think this is the result of an understandable concentration on civil rights and liberties in Biskupic and Witt's selection of cases for these years. However, since the Court is composed of lawyers instead of political scientists or journalists and it is their expectations I am trying to explain, I decided to add the *Harvard Law Review* lists - once purged of cases Biskupic and Witt had already cited - to the dataset to reflect evaluations by legal professionals. I might add that both lists loaded significantly in Cook's 1993 factor analysis of the significance of Supreme Court decisions.
42. Epstein and Mershon 1996. Again, I did not consider the small number of decisions concerning attorneys. I classified the main issue area for each case myself, then checked my coding against the U.S. Supreme Court Judicial Database for 1953 - 94. My decisions agreed with those made by Spaeth and his colleagues in all but a few instances.
43. Epstein et al. 1996, 213.
44. Epstein and Mershon 1996.

45. Cleveland 1994.

46. Lanier, Lebo, Walker 1998, Lebo, Walker, and Clarke 2000.

47. Pindyck and Rubinfeld 1997, 550.

48. The Box-Pierce-Ljung Q test is based on a test statistic derived from the following formula:

$$Q = n(n+2) \sum_{j=1}^m \left(\frac{1}{n-j} \right) \hat{p}^2(j) \rightarrow \chi_m^2$$

Where n is the number of items in the series, m is the number of autocorrelations, j is the number of lags specified, and r_j is the estimated autocorrelation for lag j. See Diggle 1990 for details. The routines I used in STATA used the formula $[\min(n/2) - 2, 40]$ as a criteria for selecting the number of lags. I also examined the correlograms for each series; all, except union cases, showed evidence of significant autocorrelations from zero to 22 lags. Early readings for union decisions also showed significant Q readings.

49. Kwaitkowski et al. 1992.

50. Amano and van Norden 1992, Hendry and Juselius 2000.

51. The zero order KPSS test statistic is derived by the formula below:

$$k_0 = T^{-2} \sum_{t=1}^T s_t^2 / T^{-1} \sum_{t=1}^T e_t^2$$

Where T is the number of items in the series, e_t is the residual of a regression of the series on an intercept and a determinate time trend, and s_t is the partial sum of the series e_t . One then runs the test for different lags and compares results. For long run variances of the series, a non-parametric estimate of e_t is used in the numerator of the formula. Using the Schwert criteria, I ran the KPSS

test for up to 10 lags for each series. See Kwiatkowski et al. 1992 and Baum 1999 for details on the test and its properties.

I chose the KPSS test because its interpretation is similar to the Q test; i.e. both test a null hypothesis of stationarity. It is often paired with an augmented Dickey - Fuller test for comparative purposes. I conducted tests for unit roots for all series using GLS version of the augmented Dickey - Fuller test to be sure of my results. This test has particularly good small sample properties. See Elliot, Phillips, and Stock 1996 and Baum 1999 on these points. All readings supported the conclusions reached by the KPSS test. I will send these additional reports to anyone who is interested.

52. The issue areas are criminal procedure, civil rights, First Amendment, due process, privacy, unions, economic activity, judicial power, federalism, and federal taxation. See Spaeth's 2002 documentation for the coding categories used. Again, I excluded cases involving attorneys for the same reason Epstein and Mershon did: their small number and the substantial gaps in the data series for the issue.

53. Schubert 1965.

54. Schubert 1965, 146 - 157.

55. Epstein and Mershon 1996.

56. Lanier, Lebo, and Walker 1998.

57. Lebo, Walker, and Clarke 2000, Hendry and Juselius 2000.

58. Segal and Spaeth 1993, Segal and Spaeth 1996a, 1996b.

59. Smith 1994, Baum 1994, Brisbin 1996. Brisbin's article is an unusually frank discussion of the widespread disquiet about the implications of the attitudinal model.

60. Epstein and Knight 1998.

61. See Segal and Spaeth 2002, chapter 8 for a review of recent findings concerning decisions on the merits using the separation of powers approach.

62. For a view very like this (though he might be loath to admit it), see Posner 1995, chapter 8.

63. A compatible analysis can be found in Lipkin 2000.

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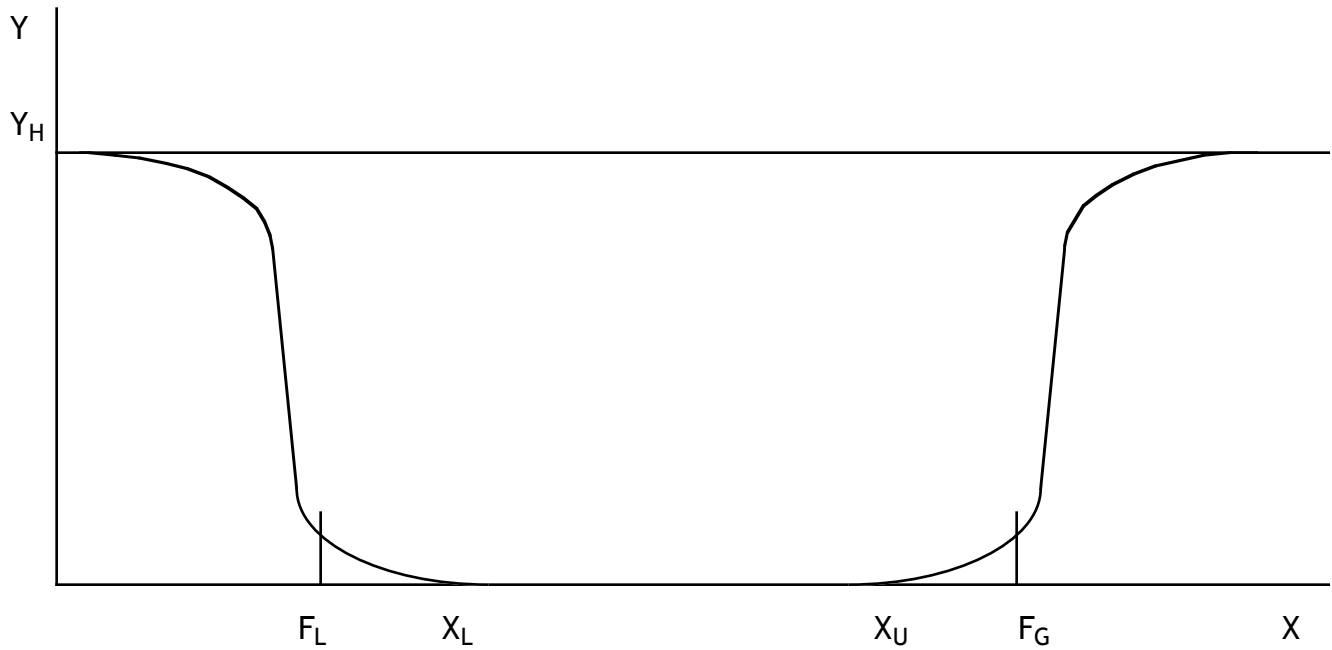
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Figure 1:
Outcome Expectations Under
Conditions of True Uncertainty



Where:

Y : degree of potential surprise

X : distribution of decision outcomes

Y_H : degree of potential surprise representing disbelief

X_L : lower limit of inner range

X_U : upper limit of inner range

F_L : focus outcome for losses

F_G : focus outcome for gains

Figure 2: Time Series of Liberalism of U.S. Supreme Court Decisions by Issue Area: 1946 - 94

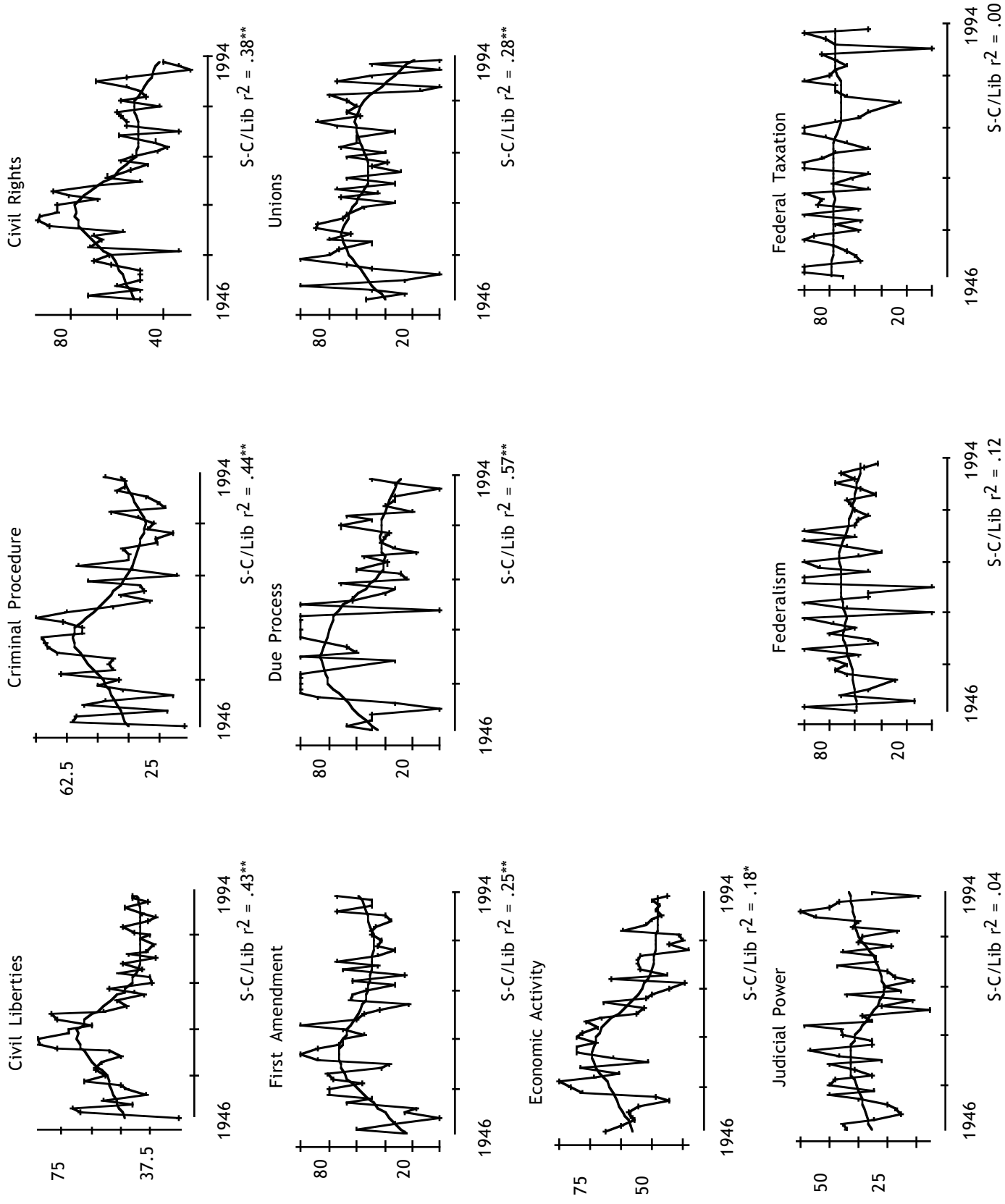
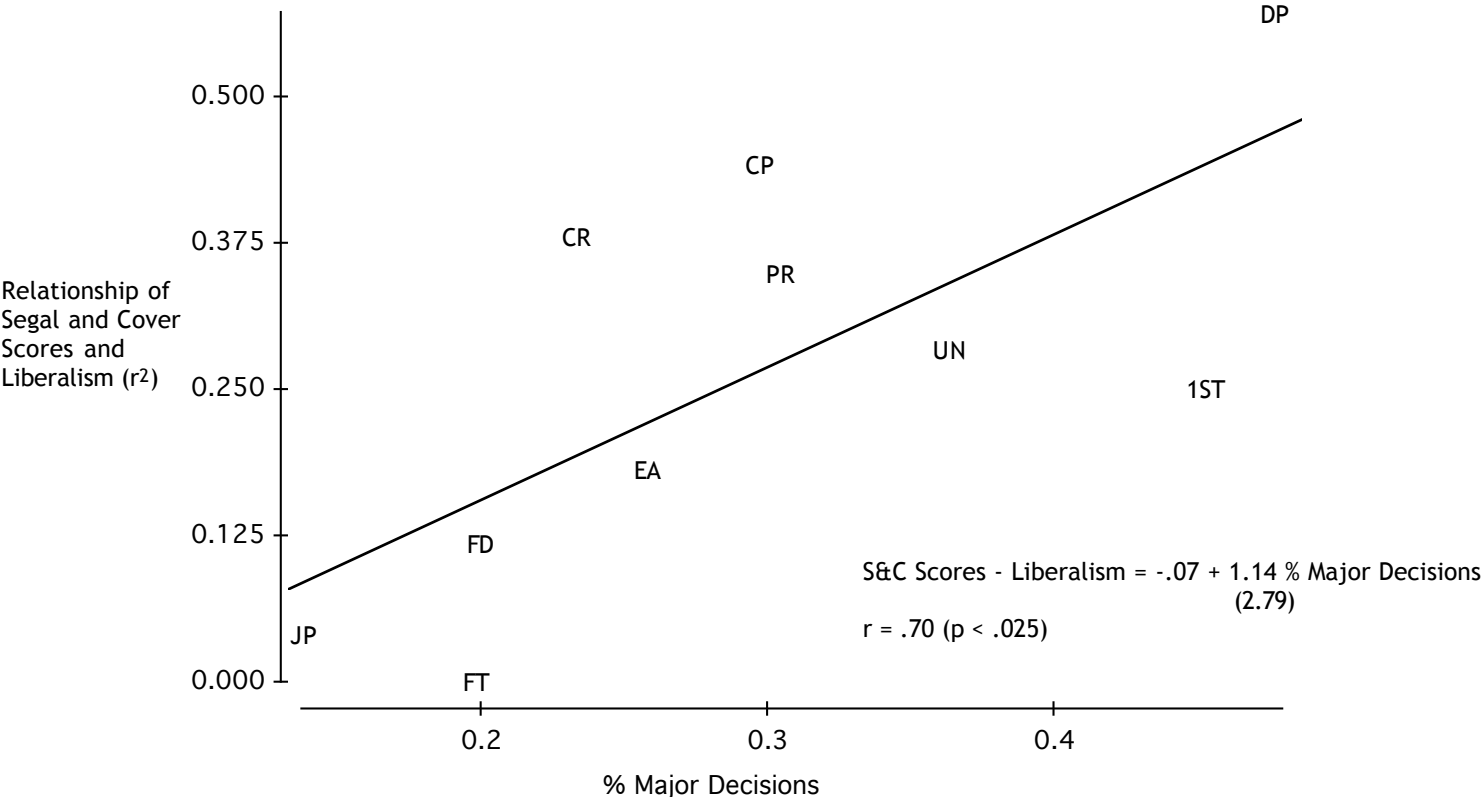


Figure 3: Relationship of the Strength of the Attitudinal Model (Segal and Cover Scores / Liberalism r^2) By Casetype and the Proportion of Major Decisions By Casetype*



* The datapoints have been replaced by abbreviations for the ten U.S. Supreme Court casetypes used by Spaeth (1991) and subsequent authors. The abbreviations are: JP - judicial power; FT - federal taxation; FD - federalism; CR - civil rights; EA - economic activity; CP - criminal procedure; PR - privacy; UN - union activity; 1ST - first amendment; DP - due process.

TABLE 1
 Tests For Stationary of Liberal Voting
 by the U.S. Supreme Court By Issue Area: 1946 - 1994

Issue Area	Box-Pierce-Ljung Q Test (lag 22)	KPSS Test (last 5 lags by Swchwert criterion)				
Civil Liberties	115.148***	.662*	.601*	.558*	.527*	.503*
Criminal Procedure	74.881***	.628*	.575**	.538*	.512*	.491*
Civil Rights	70.105***	.597*	.547*	.513*	.489*	.472*
1st Amendment	36.282*	.487*	.444	.425	.419	.417
Due Process	35.966*	.730*	.685*	.651*	.628*	.602*
Unions	18.323	.568*	.538*	.544*	.547*	.556*
Economic Activity	109.026***	.756**	.695*	.648*	.608*	.574*
Judicial Power	26.787	.141	.137	.135	.135	.138
Federalism	17.725	.099	.103	.100	.101	.103
Federal Taxation	16.477	.192	.208	.220	.223	.218

* p < .05 ** p < .01 *** p < .001