AN INTEGRATED APPROACH TO JUDICIAL DECISION MAKING

IN THE STATE SUPREME COURTS

by

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(Under the Direction of Jeffrey Yates)

ABSTRACT

Two prominent theories of legal decision making provide seemingly contradictory explanations for judicial outcomes. In political science, the Attitudinal Model suggests that judicial outcomes are driven by judges' sincere policy preferences -- judges bring their ideological inclinations to the decision making process and their case outcome choices largely reflect these policy preferences. In contrast, in the law and economics literature, Priest and Klein's well-known Selection Hypothesis posits that court outcomes are largely driven by the litigants' strategic choices in the selection of cases for formal dispute or adjudication -- forward thinking litigants settle cases where potential judicial outcomes are readily discernable (e.g. judicial attitudes are known), hence nullifying the impact of judicial ideological preferences on case outcomes. I believe that the strategic case sorting process proposed in the law and economics literature does, in fact, affect the influence of judge ideology or attitudes on judicial outcomes. However, these two perspectives can be effectively wed to provide an integrated model of judicial decision making that accounts for the influences of both the strategic behavior of litigants and the attitudinal preferences of judges. I test this integrated model of decision making on case outcomes in state supreme courts in the United States and employ an interactive specification to assess the influence of judicial ideology on outcomes while simultaneously accounting for litigants' (and justices') strategic case sorting behavior.

INDEX WORDS: State supreme courts, Attitudinal Model, Selection Hypothesis

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TABLE OF CONTENTS

Page

LIST OF TABLES

Page

LIST OF FIGURES

Page

CHAPTER 1

INTRODUCTION

Legal decision making literature has been largely guided by two seemingly contradictory theories: the Attitudinal Model, posited by political scientists, which suggests that outcomes are determined by ideological preferences of judges; and, the Selection Hypothesis, advocated by law and economics scholars, which claims that decisions are products of the litigants' strategic choices in the selection of cases for formal dispute. Despite the prevalence of both models in their respective fields, few studies have endeavored to integrate these two ideas to present a more nuanced and complete explanation of legal decision making. In the presence of this theoretical impasse, the literature on legal decision making is incomplete.

Emanating from criticisms of the classic legal model, which maintains that outcomes are primarily influenced by the facts of the case, the Attitudinal Model claims that justices are no different than other political actors in that they follow their personal policy preferences (Segal and Spaeth 1993). Dworkin has written extensively on this matter, maintaining that "[i]t remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively" (1988, 38). Dworkin does, however, recognize that a judge must reflect upon his own intellectual and philosophical beliefs to make such decisions, but notes that "this is a very different matter from supposing that those convictions have some independent force in his argument just because they are his" (118). The Attitudinal Model has enjoyed considerable acclaim from judicial politics scholars, and few seriously doubt that personal ideology plays a role in the decisions that justices make. Although the Attitudinal Model has been most widely applied to the U.S. Supreme Court where scholars have argued that the institutional structure of the High Court is particularly well suited for ideology to play a critical role, it has also been extended to decision making of the lower courts where it has done much to

enhance understanding of legal outcomes (e.g., Brace and Hall 1993, Hall and Brace 1989, Brace and Hall 1995, Hettinger, Lindquist, and Martinek 2004).

Despite its prevalence in theories of legal decision making, the Attitudinal Model has been unable to tell a complete story. A different group of scholars have spent considerable time evaluating court decision making, albeit with a different focus. Most commonly used in the arena of law and economics, the Selection Hypothesis, most famously posited by Priest and Klein (1984), suggests that political scientists take a step back from their judge-focused theories and look instead to a different set of actors: those bringing the case to court. In fact, the Attitudinal Model may be better understood by considering how it works within a larger set of influences and litigation dynamics. Scholars of the Attitudinal Model fail to recognize, according to proponents of the Selection Hypothesis, the role that other players have in the judicial process. As Friedman reminds us "[t]he perils of interdisciplinary scholarship are apparent in relentless efforts by scholars to patrol the bounds of their discipline, " (2006, 272) and this oversight can be quite costly. Cross points out that "[t]hose cases that reach a judicial decision are the cases that the parties have chosen not to settle and thus represent a subset of disputes chosen by the parties, not by the judges" (2003, 1491). In fact, courts are reactive institutions that rely completely on litigants to bring issues before them for legal resolution. The bottom line is simply that courts cannot hear cases that are not chosen for appeal by litigants. Many scholars (Waldfogel 1995; Siegelman and Donohue 1995; Shavell 1996; Kessler, Meites, Miller 1996; Siegleman and Waldfogel 1999) have utilized the Selection Hypothesis to explain case outcomes, but Priest and Klein authored the seminal study (1984). To put it simply, Priest and Klein claim that litigants take their cases to trial when they are uncertain of the outcome. When outcomes are obvious, litigants choose to be efficient, or effective in their use of time, money, and risk, and therefore

settle their cases. From this premise, selection theorists argue that litigants have likely considered the attitudes and ideologies of the justices. Given that litigants are aware of the ideological proclivities of the courts, as well as other factors such as the strength of evidence and legal standard, they settle cases that have relatively clear outcomes before they get to court. In this regard, the cases that are heard by the courts are not random, but rather are the product of a careful sorting process by strategic litigants.

However, while most disputes are readily classified or sorted by the litigants, some disputes are more challenging to categorize as winners or losers. A number of factors can make such classification difficult. First, some cases hinge on issues that are not subject to an obvious left-right ideological quality. Second, some issues constitute legal questions of first impression – that is, they are new legal issues or are plagued by factual complexity or ambiguity. These types of "indeterminate" cases, Selection Model theorists argue, are the ones that end up going to trial and typically result in a 50-50 win rate for any given set of litigants - a phenomenon described by Priest and Klein as "the fifty percent rule." Moreover, these case outcomes are not readily explained by judicial attitudes or ideology unlike those more predictable cases in which judicial preference is more apparent. To recap, it is the indeterminate cases that are "close" or in which the parties have widely divergent views as to potential outcome that will not settle and end up going to trial, and, once there, the adjudicated outcomes for the litigants are usually a toss-up, or about fifty-fifty.

Critics of the Attitudinal Model complain that it allows no room for the possible strategic considerations of the litigants (Priest and Klein 1984). In this regard, Selection Theorists bemoan the scope of the Attitudinal Model's consideration. Its range, they claim, is too limited. The Attitudinal Model does not consider the fact that there are selection effects that brings a

nonrandom group of cases before it for resolution. If the 50-50 process is working then the cases heard are likely those in which there is not an apparent ideological outcome. Baum advises against reliance on single-solution models like the Attitudinal Model, although he concedes that "the assumption that justices act solely on the basis of their policy goals has advanced our understanding of the Court a good deal" (1994, 761). According to Baum, this line of research should move towards the consideration of other approaches.

Perhaps because they have long been considered at odds with each other, these two theories have seen little academic interplay. To some degree, this may be attributable to the fact that the two theories emanate from different academic fields. Selection Model theories are commonly forwarded by law and economics scholars, while the Attitudinal Model is usually posited by scholars in political science. But, as Friedman (2006) reminds us, there is much to learn from well-executed combinations of two academic fields. Friedman has not been the only scholar to recognize the utility of cross-disciplinary work. Indeed, many scholars have lamented the lack of interplay between the legal and political science domains. Epstein and King echo the sentiments of Friedman, claiming that scholars should take into account the lessons of past studies. In particular, they warn that "[f]ailure to do so is more than wasteful; it also decreases the odds that the 'new' research will be as successful as the original because the researcher is, in effect, ignoring the collective wisdom gained from the first piece" (2002). Perhaps the best explanation for this particular theoretical disconnect in the literature is that law and economics focuses primarily on the effect of litigant selecting, or sorting, strategies in trial courts while the Attitudinal Model is most often employed to explain variation in Supreme Court decisions or justices' voting choices. Indeed, little attention has been given to the intersection of these two theories (but, see Cross 2003 and de Figueriredo 2005).

The goal of this study is to wed these two theories in order to provide a more nuanced and complete explanation of court outcomes. Much like the recently added consideration of institutional features to court literature, this study endeavors to bring attention to an additional important element in legal decision making.

In the following section, I elaborate on both the Attitudinal Model and the Selection Hypothesis, exploring the origins of the two theories, tracing their respective roles in the literature, and giving an update on their current statuses. Because they provide a natural laboratory for investigation, state supreme courts are complementary to a study of decision making. As Jaros and Canon have recognized, state supreme courts are valuable institutions to study because "they are the important allocators of state political systems [and] are final interpreters of common law and of most state and local legislation" (1971, 322). Furthermore, these courts add valuable observations to the study of collegial decision making, which "only expands the opportunities for the collection of meaningful information" (323). Neubauer likewise acknowledges that state supreme courts have become important policy makers in recent years, partially because litigants have turned to them to resolve "nastier, noisier, and costlier issues" like tort reform, same-sex marriages, and parental rights in divorce cases (2004). The increase of variation provided by the 50 individual courts, along with the rising importance of state supreme courts as policy makers, sets up an ideal venue for testing an integrated theory of legal decision making. In the next section, I outline a method for effectively wedding the two theories to produce an integrated explanation for decisions of state supreme courts, which simultaneously accounts for litigants' strategic case sorting and the influence of judicial attitudes or ideology. I then elaborate on the types of cases used to perform this study, explain in greater detail the methodology that guides the study, and present the promising results of an integrated

approach. In conclusion, I reflect on the utility of applying this integrated model to state supreme court decision making, and provide suggestions for how future research might incorporate such approaches.

CHAPTER 2

THE ATTITUDINAL MODEL

Prior to the Attitudinal Model, the legal model was the dominant method utilized to explain judicial decision making. According to classical legal scholars, decisions were guided solely by a system of logically consistent principles, concepts and rules where personal preferences and ideologies were simply not considered an important component of decision making. Indeed, "judging was more like finding than making, a matter of necessity rather than choice" (Edwards 1972, 420). Beginning in the 1920s, however, scholars began to question the validity of this assumption. By the 1940s, the behavioralism movement shifted into the forefront of political science research, paving the way for it to become a science of prediction and explanation. Herman Pritchett's *The Roosevelt Court: A Study in Judicial Politics and Values* was among the first books of its kind in its systematic evaluation of court decisions. Pritchett centered his study on questions like "If judges were merely 'declaring' the law rather than making it, why did they so often disagree?" (1948). Schubert (1962), however, offered the first working definition of a model that considered the preferences of judges. The basic contribution of Schubert lies in his "ideal points," or the positions of justices on an ideological continuum ascertained from their judicial beliefs. But it was Rohde and Spaeth who ushered the Attitudinal Model to its current status, giving meticulous definitions to otherwise obscure terms with their book *Supreme Court Decision Making* (1976). In particular, they define an "attitude" as:

> A (1) relatively enduring, (2) organization of interrelated beliefs that describe, evaluate and advocate action with respect to an object or situation, (3) with each belief having cognitive, affective, and behavioral components. (4) Each one of these beliefs is a predisposition that, when suitably activated, results in some preferential response for the

> attitude object or situation, or toward the maintenance of preservation of the attitude itself. (5) Since an attitude object must always be encountered with some situation about which we also have an attitude, a minimum condition for social behavior is the activation of at least two interacting attitudes, one concerning the attitude object and the other concerning the situation (2).

Unlike Schubert, Rohde and Spaeth recognize that judges act economically when rendering their decisions, taking goals, rules, and situations into account (Segal and Spaeth 2002, 279). These goals, according to Rohde and Spaeth, are policy goals, and the judges want outcomes to closely approximate their preferences (1976). The rules of the game likewise play an important role in judicial decision making. On this point, Rhode and Spaeth speak specifically to the Supreme Court and the institutional factors that influence the justices. While not all state supreme court judges are life tenured, the U.S. Supreme Court justices obviously are, a point that Rohde and Spaeth argue allows the Supreme Court justices to vote their true policy preferences with little repercussion. In addition, lack of electoral or political accountability, lack of ambition for higher office, and posture as the true court of last resort with a discretionary docket separates the Supreme Court from other lower level courts. Institutional factors, such as the presence of discretionary dockets and elections, have been shown by other scholars to have statistical importance in judicial decision making at the state level as well. For example, Hall finds that the behavior of southern state supreme court justices is affected by the presence of elections (1992). In fact, she finds that "to appease their constituencies, state supreme court justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the majority instead of dissenting on politically volatile issues" (428). While not underestimating the importance of personal preferences for judicial behavior, Hall

introduced an institutional factor that deserves attention when explaining judicial decision making. Her study provides evidence that such decision making is more complex than previously believed, and that judges do in fact feel the pressure of accountability. While this pressure does not quell personal preferences, it does seem to encourage strategic voting (which may renounce those preferences) in the name of job security. Additional studies likewise indicate that electorally accountable judges tend to reflect public opinion in highly salient issue areas (Kulinski and Stanga 1979; Gibson 1980; Brace and Hall 1990), while others have found that state supreme court judges often deviate from the desires of the public in lower visibility issues (Benesh and Martinek 2002). Jaros and Canon (1971) step outside traditional methods for evaluating decision making and look at dissent as a characteristic of courts rather than of individual judges to "increase understanding of the relative roles of some major categories of explanatory variables" (323). Their study, along with the findings of other prominent scholars like Langer (2002) and Brace and Hall (1993), provides ample support for the notion that institutional characteristics matter, a finding that calls into question the effect of ideology on decisions, and therefore the single-handed power of the Attitudinal Model.

Unsurprisingly, not all scholars of judicial decision making immediately shared the convictions of the Attitudinal Model. Following the publication of *The Supreme Court and the Attitudinal Model* (1993) and *The Supreme Court and the Attitudinal Model Revisited* (2002) some complained that Segal and Spaeth had done little to statistically undermine the legal model, and relied too heavily on anecdotal evidence (Gillman 2001). Among the skeptics, Baum considered the broad rejection of law's influence required "an intuitive" leap that may be quite reasonable, but is not supported by the evidence provided by the Attitudinalists (1994, 4). Segal and Spaeth first claimed that the contentions of the legal model were too vague to be falsified,

but later developed a theory and test that undermined the notion that judges are influenced by precedent with *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (1999). This addition to the Attitudinal Model is especially important because it responded to Legal Theorists who rejected the Attitudinal Model because it lacked a falsifiable test of legal theory (Gillman 2001). *Majority Rule* evaluated the influence of a critical element of the legal model (precedent), and concluded that judicial adherence to precedent is quite low. This finding marks an important contribution to judicial decision making literature. But, others persist in criticism. Hammond, Bonneau, Sheehan (2006) fault Segal and Spaeth for "mixing metaphors," or basing their theory of decision making on two hypotheses about behavior, namely the psychological and rational-choice metaphors. Although these two theories are somewhat synergistic, Hammond et al. insist that the Attitudinal Model needs considerable clarification.

Notwithstanding these criticisms, the Attitudinal Model has become a cornerstone of judicial decision making theory. As Gillman points out, in "the university, and increasingly even within the ranks of the law professorate, it is widely considered a settled social scientific fact that law has almost no influence on the justices" (2001, 466). He adds that the work of these positivist-empiricists has become so universally recognized that it is "considered the common sense of the discipline that Supreme Court justices should be viewed as promoters of their personal policy preferences rather than interpreters of law" (466). According to a wide array of scholars of judicial decision making, the Attitudinal Model stands on solid ground. Although critics may argue over its dominance, few contest its importance. As Hammon, Bonneau and Sheehan recognize: "[t]he Attitudinal Model has become the most widely recognized and influential representation of decision-making on the Supreme Court, and little can be published without citing at least some of the arguments by Spaeth and associates" (2005, 39). The authority

of the Attitudinal Model is evident in state supreme court literature as well, evidenced by the recent development of ideology scores for justices at the state level (Brace, Langer, Hall 2000). These scores have been embraced by numerous scholars of state politics and judicial decision making, and have enjoyed much success in explaining outcomes. Additionally, the plethora of evidence supporting the continued claim that personal ideology strongly influences case outcomes cannot be overlooked. In short, as Baum notes, "[t]he Attitudinal Model in its various versions has been the most influential conception of judicial behavior in political science" (1997, 25).

CHAPTER 3

THE SELECTION HYPOTHESIS

Selection Theory has enjoyed a long history in law and economics literature (e.g., Landes 1975). Generally speaking, scholars in this arena have taken a different focus than judicial scholars, looking to the impact of litigant case selection to explain case outcomes. The basic hypothesis is that litigants consider the strength of their cases before deciding to appeal. In the cases with clear cut outcomes, cases settle. It is those cases that are not easily discernable for one side or the other that make it to the courts. This theory has been most popularly posited by Priest and Klein (1984), who claim that courts do not hear a random sample of cases. Beyond this contention, however, Priest and Klein argue "that plaintiff win rates at trial approach 50 percent as the fraction of cases going to trial approaches zero" (5). Essentially, Priest and Klein argue that courts do not hear a random sample of cases because litigants assess their probabilities of winning using their knowledge of the ideological make up of the courts along with other concerns like evidence and legal standard. Those cases that see their day in court are those without easily discernable qualities. For instance, some cases are not readily associated with an ideological proclivity. Other cases may be among the first of their kind, so judicial reaction is difficult to predict. Also, litigants may be overly confident (or doubtful) about the strength (or weakness) of their case, and choose to litigate (or settle) when settling (or appealing) was the better option. These "uncertain" cases typically result in a 50-50 win rate for litigants, according to Priest and Klein. In fact, Priest and Klein tested their theory in both Illinois and Ohio courts and found that "plaintiff victories will tend toward 50 percent whether the legal standard is negligence of strict liability, whether judges or juries are hostile or sympathetic" (5).

Of course, litigants strive to be efficient in their litigation decisions, and settle when

outcomes are clear because this results in both lower costs and less time. Strategic litigants will carefully weigh their cases, considering, among other factors, the ideology of the judges that will hear the case. Therefore, if litigants are certain about the outcome of the outcome of their case, they will settle. If uncertainty exists, the litigants will choose to litigate. In this regard, the effect of ideology on case outcome has been considered before the case is heard by the court. Therefore, ideology does not directly influence judicial decision making, according to Selection Theory proponents, because its impact has already been considered by the litigants. This theory has enjoyed wide application in the law and economics field; indeed it has been noted that "few results in the law and economics of litigation have sparked as much interest as the hypothesis, associated with an article by Priest and Klein, that states that plaintiff win rates at trial approach 50 percent as the fraction of cases going to trial approaches zero" (Kessler 1996, 233).

Priest and Klein were concerned with how well appellate cases epitomized the entirety of litigation and legal disputes. That is, those cases that actually make it to the courtroom are a minute sample of original cases, and appellate cases are even a smaller fraction of that number. As they note, "[m]ost legal scholars…either ignore the problem of the representativeness of appellate decisions or presume representativeness" (1994, 3). In an effort to correct for this oversight, Priest and Klein develop a model that clarifies the relationship between disputes settled and disputes litigated. Their model is one of pure economics, in other words one that is determined by the expected costs of litigation and settlement – "including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement" (4). Assuming that litigants develop rational estimates of judicial decisions, Priest and Klein's model predicts that those cases chosen for litigation will be neither random nor representative. In fact, their model

demonstrates that, regardless of ideology of judges and the substantive standard of law, there is a strong bias toward a 50% success rate for litigants (5).

Taking a step back from this intuitive theory, the focus turns to the decision process of the litigants. If judge's decisions are driven by their attitudes or personal preferences, strategic litigants take these ideologies into account, and decide accordingly whether to settle or appeal their cases. With ideology accounted for on the front end, it should not affect those cases that actually make it to the courtroom. Similarly, litigants consider other trends of the court. If they can ascertain adherence to other norms (such as those preferred by the legalistic, strategic or other schools of judicial decision making), then these factors are taken into account in the decision to settle or try a case. Therefore, the potential influences of these factors are nullified.

Notwithstanding the appeal of Priest and Klein's premise, there has been ample criticism of the 50 percent theory. Early empirical studies were not generally supportive. Chief among them is a study by Wheeler, Cartwright, Kagan, and Friedman (1987), which finds that stronger parties retain an edge over weaker parties in a wide range of case types at the state supreme court level, mainly due to the greater litigation capabilities of stronger parties. Drawing from the framework of Galanter (1974, 1975), Wheeler, et al. explore case outcomes in state supreme courts and focus on explanations for courtroom advantages. Galanter believed such advantages were products of three main sources: repeat players (usually "haves") are experienced and know how to conform their behavior and claims; "haves" are better equipped financially to carry out and continue the litigation process; and, repeat players are strategically advantaged. Wheeler, et al. suggest additional reasons that "haves" are likely to come out ahead in the litigation process. Market economies, they claim, are "designed to protect property and written contracts and to sustain the basic health of socially important business enterprises" (408). Likewise,

administrative laws are geared toward protecting democratically elected governments, so in "hard or doubtful cases involving challenges to governmental action by individuals, supreme court judges might feel constrained to rule in favor of the government party" (408). Furthermore, the judicial process itself may be biased against "have nots" because judges do not usually come from working class backgrounds, possibly resulting in them according "greater legitimacy to established interests and doctrines by virtue of attitudes acquired in their legal careers and social relationships" (408). Finally, the financial resources of stronger parties allow them to settle cases in which they fear loss but pursuing those with good chances of victory. Successful strategic decisions are usually made by richer, more experienced parties (409). This early challenge to Priest and Klein provides, at least at face value, convincing evidence that win rates will not hover around 50%.

Quite often, any variation from a precise 50 percent win rate is considered to be evidence against Priest and Klein's theory. Among the critics, Shavell (1996) considers the lack of clear supporting data for the theory reason enough to "conclude that it does not seem appropriate to regard 50 percent plaintiff victories as a central tendency, either in theory or in fact" (493). Although win rates for any subset of litigants almost always vary from 50 percent, Waldfogel (1998) notes that "because this theory predicts 50 percent *only as a limiting implication*, plaintiff win rates deviating from 50 percent do not by themselves provide evidence against [Priest and Klein's theory]" (475, emphasis added). More current studies, often using more sophisticated analyses, have confirmed the validity of the 50 percent rule. Indeed, Waldfogel goes on to find that

> [t]he process of actual pretrial adjudication and settlement…appears to eliminate both high- and low-quality cases from the pool proceeding to trial. Consequently, the selection

> of cases for trial results in plaintiff win rates at trial approaching 50 percent. [C]ases both above and below the decision standard are settled or adjudicated out of the filed pool, leading to a tendency toward central, not extreme, plaintiff win rates at trial (475).

In a similar manner, Kessler, Meites, and Miller's (1996) study provides support for the 50 percent rule. Using data from more than 3,000 cases decided by the Seventh Circuit Court of Appeals between 1982 and 1987, they use a multimodal approach to understanding the selection of cases for litigation. Simply put, this approach does not rely on one overarching theory to predict trial outcomes. Rather, they uncover the conditions under which case outcomes might vary from 50 percent, and after controlling for these factors, confirm a tendency toward 50 percent win rates. Finally, Siegelman and Donohue (1995) investigate the outcomes of employment discrimination cases to test the validity of the Priest-Klein theory. They find that "higher unemployment rates induce a significant rise in the number of cases, but these incremental cases are substantially weaker than the average cases filed when unemployment rates are lower" (451). Their model confirms the predictions of the Priest-Klein theory, namely that weaker cases should be weeded out, and more likely to settle. This, in turn, leads to less obvious cases going to trial, and a 50 percent win rate for the plaintiffs in their study.

As these studies and others indicate, scholars of law and economics have generally been supportive of Priest and Klein's basic premise that win rates hover around 50% (when proper controls are introduced), an important feature of legal outcomes for scholars of decision making. Much like the Attitudinal Model, Selection Theory has become a widely accepted notion in its field. If outcomes do typically match the underpinnings of the Selection Hypothesis, deviations from win rates of 50% provide valuable information, too. When win rates vary, other factors that are important components of decision making are likely playing a role in outcomes. By

evaluating the environments in which outcomes vary from 50%, we can take a critical step in uncovering other significant variables of decision making.

CHAPTER 4

INTERSECTION

Despite its acceptance by law and economics scholars, political science approaches to explaining judicial decision making have given only scant attention to the Selection Hypothesis. Failure to consider the effect that pre-adjudication decisions may have on judicial decisions is a serious oversight. A handful of studies, however, have considered a more complete picture of legal decision making. Songer, Cameron, and Segal (1995) used a random sample of search and seizure criminal appeals cases to find that defendants' decisions to appeal were a function of the likelihood of winning, which is, at least to some extent, related to the ideology of the justices. But it is two more recent studies that have made the theoretical connections between the Attitudinal Model and the Selection Hypothesis. Cross's (2003) study gives a detailed summary of four leading theories of judicial decision making, including legal theory, political theory, strategic theory, and selection theory. He goes on to test the ability of each theory using U.S. Court of Appeals cases, and finds that, when controlling for the legal and ideological dimensions of cases, the potential consequences of selection effects are not significant. De Figueiredo (2005) followed with a more straightforward examination of the intersection of the Attitudinal Model and the Selection Hypothesis, recognizing that "law and economics models (which do consider selection) do not generally consider judge ideology at the time of case outcomes, judicial politics models (which do consider judge ideology) generally do not consider case selection" (502). His study uses telecommunications regulatory cases in the D.C. Circuit Court of Appeals to evaluate judicial ideology at the case selection level and the case outcome level. Ideology is significantly related to both the decision to appeal and the outcome of the case, which provides only partial affirmation for the Selection Hypothesis. To be sure, judicial

ideology affects case sorting for appeal, but it persists beyond this process to impact that outcome itself.[1] Despite the important inroads that these studies have provided, neither is able to successfully challenge one of the major theories. Furthermore, neither is able to precisely assess the actual effect that strategic case sorting has on judicial ideology when explaining judicial decision making.

The overarching goal of this paper is the development of a more nuanced approach to decision making, one that considers the entire legal process. Guiding this goal is the belief that the Attitudinal Model and the Selection Hypothesis can be combined to provide an integrated approach to evaluating such decisions. Selection theory may be helpful in defining the parameters of the Attitudinal Model. As noted previously, institutional features of the state supreme courts are important factors in explaining decision making. Likewise, it is important to consider the pathway by which cases reach these courts, and the discretion that courts have over their dockets. Besides the benefit of having a natural laboratory provided by the 50 distinct courts, this discretionary review feature of the state supreme courts is important to consider. That is, 40 states have developed intermediate appellate courts to alleviate the case load of the states' high courts, while the remaining states leave all appealed cases to be heard by the state supreme court. As Neubauer has recognized

> Discretionary review at the highest level transforms the nature of the judicial process. The high court is no longer merely reacting to disputes brought to it by disgruntled litigants; rather, it is selecting those disputes in which it chooses to participate. In states

[1] de Figueirido does admit, however, that ideology may persist because the FCC may not be acting strategically, possibly due to lack of motivation and heavy case loads (520).

with intermediate courts of appeals, the court of last resort is characterized by high discretion and low caseloads (410).

The presence of a discretionary docket leaves the state's highest court free to devote ample attention to cases that raise significant policy questions (Tarr and Porter 1988). Brace and Hall (1995) found that explanations of judicial choice must carefully consider the impact of institutional context (5). Furthermore, in their study of tort decisions in state supreme courts, Brace, Yates, and Boyea found it more likely that the effect of ideology is present in those states that have intermediate courts, rather than those that spend most of their time dealing with relatively minor disputes (2006).

Litigant pathways to the court also merit attention. There is ample reason to believe that litigants are strategic in their decisions to appeal. Parties choosing to appeal after losing in lower levels incur considerable costs, while winning parties of the lower level courts may also decide to strike a deal if their opposing party is considering appeal due to the high costs and risk of reversal in the state supreme court. Accordingly, litigants' strategic sorting produces a pool of cases that are not randomly distributed. Instead, the cases that make it to court are usually not amenable to settlement either because their outcomes are not easily predicted.

However, litigants often make "errors" in their decisions to appeal, meaning their decisions either overestimate their chances of winning or underestimate the likelihood of victory. A number of factors may contribute to an inaccurate decision, including a simple misperception of the relative strength of one's case, a commitment to the promotion of a cause or movement, or a morphing of the case once it reaches the court. Oftentimes, a litigant frames his case with regard to a set of issues that the court overlooks, instead focusing on other issues present in the case. For these reasons, while litigants' strategic sorting of disputes may work to undermine the

influence of judicial ideology (as Priest and Klein's 50 percent rule suggests), litigants are often inaccurate or ineffective in their case sorting, resulting in cases that do lend themselves to ideological decision making by the courts.

Priest and Klein's pure selection hypothesis scenario posits that all cases with predictable outcomes are selected out of adjudication through settlement, and so litigation outcomes are comparable to a coin toss, or 50-50. In reality, however, we know that litigants make mistakes in their predictions and sometimes engage in purposive behavior that is not merits outcome motivated. This leads to departures from the strict selection hypothesis and, accordingly, deviations from 50 percent win rates for any subset of litigants (e.g. liberal or conservative outcome seeking parties). The Attitudinal Model suggests that judges make decisions based upon their sincere ideological preferences and the ideological preferences of the justices of the state supreme courts are likely well known by the litigants bringing suit. Two additional features of state supreme courts bear discussion. Ten state supreme courts maintain non discretionary dockets, while the remaining 40 have at least some choice in the cases they hear. It is possible, therefore, that discretionary courts can undermine litigants' strategic case sorting because they have the ability to ignore cases and issues they do not wish to address - possibly "cherry picking" cases for review that do lend themselves to attitudinal decision making.

To investigate the possibility that discretionary dockets influence outcomes, two paths are explored. First, the manner in which the dependent variable is constructed circumvents this issue because it utilizes case outcomes, focusing on the end game, so the effect that a discretionary docket (or lack thereof) may have in the model is inherent in the constructed dependent variable. Secondly, to assure that this difference in would not impact the model, a t-test that checks for significant differences between deviations in states with and without discretionary dockets was

conducted, and the results indicate no discernable difference in outcomes due to this feature.[2] Given these two precautions, we can be assured that deviations from .50 do not turn on discretionary versus non-discretionary courts.

In this thesis I endeavor to provide insights on a puzzle of judicial politics: if justices base their decisions on their ideological preferences, and their preferences are known, then litigants should nullify the effect of such preferences through strategic case selection. In fact, it is likely that this does indeed happen, but not in all instances. Recall that that the strategic sorting process of litigants is burdened by error and non-outcome motivated behavior. Despite the insignificant effects of discretionary dockets previously outlined, it remains possible that litigants' strategic case sorting may be undermined in certain instances by the presence of a discretionary docket. Consequently, strategic case sorting likely does avert attitudinal decision making, but only where it is pervasive and effective. Where we find evidence of effective and pervasive strategic case sorting we might well expect to find the influence of justices' attitudes on Court outcomes to be largely nullified. Where strategic case sorting is not effective or pervasive, justices' attitudes should have a strong influence on Court outcomes. In other words, when deviation from 50% increases, we anticipate that ideology becomes more important.

[2] Criminal cases: $Pr(|T| > |t|) = 0.1975$; Civil Government cases: $Pr(|T| > |t|) = 0.9015$

CHAPTER 5

METHODOLOGY

While the Attitudinal Model posits the rather intuitive concept that attitudes affect legal decision making, measuring the ideology of individual justices of state courts has not been as straightforward. Indeed, the mere ambiguous nature of attitudes and ideologies makes this a difficult task. Because the Attitudinal Model claims that justices base their decisions "on the facts of the case juxtaposed against their personal policy preferences" (Segal and Spaeth 312), the personal attitudes and ideologies of justices must be estimated as a function of this model. However, techniques for estimating the preferences of political actors commonly suffer from circularity issues. Consider the liberal judge who is deemed so because he votes liberally. His ideology is categorized as liberal because his votes have been liberal.

In hopes of ameliorating this circularity concern at the Supreme Court level, Segal and Cover developed independent conservative-liberal scores for the justices. Although it was commonly thought that Supreme Court justices looked to their personal policy preferences and values to render decisions, this idea was not adequately tested until the work of Segal and Cover (1989). Previous measures used actual court votes to ascertain ideological leanings. However, Segal and Cover content analyzed newspaper editorials to uncover independent sources of ideology. Brace, Langer, and Hall (2000) have provided similar approximations for state supreme courts that are comparable within and across states. Their contextually based measure is derived from careful evaluation of partisan affiliation, state ideology at time of accession to the bench, and elite ideology (of those selecting the judge). Because state supreme court judges reach the bench in varying manners, Brace, Langer, and Hall consider the method of selection and the corresponding ideology. For example, in those states that appoint their supreme court

justices, the authors evaluate elite ideology because "knowing something about the preferences of actors appointing judges provides a best guess about the judges' preferences" (397). Preferences of elected judges, on the other hand, are estimated using the corresponding electorate's ideology. To account for party identification, the authors weight the derived ideology score to acquire an adjusted ideology measure. Validity tests of this measure "provide evidence that [the] weighting strategy adequately captures the explanatory power of partisan affiliation on [the] adjusted ideology measure" (398).

The present study assesses state supreme court legal decision making using court liberalism as the dependent variable. Although the measure of preference estimated by Brace, Langer, and Hall[3] has greatly advanced the study of state supreme courts, a number of scholars, including the authors themselves, have noted that the scores are best utilized as predictors of specific case types at the individual level.[4] In a preliminary analysis using the scores to explain state supreme court decision liberalism, I found that the explanatory power of the scores at the aggregated level is severely limited.[5] Despite the contribution to legal decision making literature, these ideology scores are not well-suited for this aggregate level study of state supreme court decision making. However, some form of court preference is necessary to model this integrated theory. Therefore, this study measures the environment of each state court based upon all decisions for each year except the case type being modeled, similar to the method used

[3] These data are made available from Laura Langer and can be accessed at http://www.u.arizona.edu/~llanger/NSFNaturalCourtsData.htm. Both Texas and Oklahoma have two court systems, one civil and one criminal, so the ideology scores used correspond to the correct case types.

[4] Bonneau, et al. (2000) recognize this and develop individual level ideology scores based upon the Langer scores. Although this development is a worthy enhancement, it does not quell the problem in aggregate level studies. Wilhelm (2007) and others have noted the higher predictive power of the scores for issue specific research.

[5] Bivariate regression showed that ideology, as measured by this technique, had no statistically significant effect ($p<.05$) on liberal outcomes.

by Epstein, Hoekstra, Segal and Spaeth (1998) in their investigation of preference change in the U.S. Supreme Court. For example, to gain a measure of court ideology for the criminal appeals model, a liberal-conservative vote measure (coded 0 for conservative and 1 for liberal) was averaged (per state year) for all decisions in the dataset except criminal appeals decisions. The purpose of this study is not to address the fallibility of the available state supreme court ideology scores; rather, it is to understand the conditions under which judicial ideology matters. Although representing ideology based on other decisions is not ideal, the purpose is not to develop an independent measure of ideology—again, it is to test whether litigant selection conditions the effect of ideology.

Modeling the Integrated Theory

To evaluate the ability of the integrated theory, two types of cases have been selected for evaluation, criminal appeals cases and civil government cases[6] in the state supreme courts from 1995-1998.[7] Two distinct case types were selected to show that an integrated approach to the study of decision making is beneficial across issue areas. Both case types possess, on average, an ideological slant that is conducive to the study of decision making. The proportion of liberal outcomes per term for each state is employed as the dependent variable. For criminal appeals cases, liberal decisions are those that rule in favor of the defendant against the state, while civil government case outcomes classified as liberal are usually those in which the individual is victorious over the government. Of course, there are instances in which a government victory would be considered liberal, and these are noted in the dataset and properly coded. The criminal

[6] Civil government cases fall into a general category of issues including elections, first amendment issues, government regulation, practice of law, public contracts, privacy issues, or torts.

[7] Data for this project is derived from The State Supreme Court Data Project (compiled by Paul Brace and Melinda Gann Hall), which can be found at http://www.ruf.rice.edu/~pbrace/statecourt.

appeals model is estimated using 9,009 cases and the civil government model contains 7,047 cases, all coded for ideology, indicating a liberal outcome or a conservative outcome. This variable is collapsed by state and year and its mean is calculated and used as the dependent variable, resulting in 200 observations for each case type.[8]

The explanatory variables are likewise straightforward. As previously outlined, the presence of discretionary dockets was considered in a preliminary analysis by a simple t-test (two-group mean-comparison test that compared deviation from .5 in states with discretionary dockets and those without) and found no statistically significant difference in deviations from .50 between states with discretionary dockets and those without discretionary dockets.[9] As a result, one model including all state supreme courts (i.e. discretionary and non-discretionary dockets) is appropriate. The State Supreme Court Data Project compiled all cases heard by state supreme courts for 1995-1998, and contains 21,000 decisions reached by over 400 state supreme court justices.

To represent the Selection Hypothesis portion of the theory, we turn to the predictions of Priest and Klein who suggest that strategic sorting by litigants should lead to win rates that hover around 50 percent, and I find this to be mostly true in the state supreme court setting.[10] In the criminal appeals cases, outcomes are generally more conservative, so this figure hovers at lower percentages. The expectation is that where win rates approach 50 percent, case sorting should be effective and ideology should not play a significant role in determining outcomes. However, when win rates deviate from 50 percent, ideology should come into play, and the goal is to

[8] The analysis is weighted by the number of cases heard by each state supreme court for each year.

[9] Criminal cases: $Pr(|T| > |t|) = 0.1975$; Civil Government cases: $Pr(|T| > |t|) = 0.9015$

[10] See Figures 3 and Four in the Appendix.

provide an estimate of the pervasiveness of litigants' case sorting. To provide a gauge of the extent of case sorting (and a representation of the environment) the absolute deviation from 50 percent win rates is calculated and used as an independent variable in the integrated model.[11] This deviation is interacted with the ideology variable and employed as the independent variable of interest in the integrated model to assess the conditional influence of ideology as levels of case sorting effectiveness change. This variable will allow us to see the effect of judicial ideology on court decision outcomes as conditioned by the Selection Hypothesis (i.e. level of deviation from the 50% rule). Judicial ideology should matter least when litigants are successful in their case sorting and more when litigants do a poor job sorting. Therefore, the primary hypothesis is: The influence of judicial ideology on court outcomes should be greater when strategic case sorting is less effective.

To model the integrated theory, I use the Panel Fixed Effects Regression with Vector Decomposition estimation method developed by Pluemper and Troeger (2004). Because deviation and the interaction term (deviation*ideology) as measured in this model do not vary much, this technique is particularly useful. This method uses three stages of regression and allows for the inclusion of time-invariant (or "sluggish") explanatory variables. The first stage estimates a pure fixed effects model to obtain estimates of unit effects while the second stage decomposes the fixed effects vector into two parts: one part explained by the time-invariant and/or almost time-invariant variables and a second unexplainable part (the error term of the

[11] Some readers may have concerns with the fact that the Deviation variable contains a component of the dependent variable in its construction. While such concerns are acknowledged, one should note that use of forms of, or components of, a dependent variable on the right hand side of a regression equation are not necessarily inappropriate when theory or methodological reasons suggest their use (e.g. including a lagged dependent variable in a time series or time series cross-sectional model). In the research design, the Deviation variable presents the best method of representing the effectiveness and pervasiveness of strategic case sorting. Furthermore, the correlation between "deviation" and the dependent variable "ideology" is low in both case types (Criminal Cases: -.19; Civil Government Cases: .0023)

second stage). Finally, the third stage reestimates the original model by pooled OLS, but it includes the time-invariant variables and error term from the second stage.

Results

Tables One and Two provide the results for the integrated model posited by this paper for criminal appeals and civil government cases, along with the basic model of decision making as a baseline for comparison. The results provide evidence that the consideration of the environment of deviation from the fifty percent rule impacts decision making as the integrated model has strong explanatory ability. As expected, the interaction term is significant in both models, indicating that the integrated theory is viable. Since some of the component terms of the interactions are statistically significant and some are not it is important to consider the conditional nature of these results. To aid the interpretation of the interaction, we turn to Freidrich's (1982) classic work that explains that the coefficients and standard errors for an interaction's component terms represent the values for the component term when the other related component term is at a particular level. Therefore, the components' coefficients and standard errors are highly conditional, and difficult to substantively interpret. Brambor and his associates prove helpful by clarifying the conditional nature of the variables. Basically, the relationship between the dependent variable (Y) and the component term of interest (X), is conditioned by the level of the other component term of the interaction (Z), which is considered the modifying variable. Therefore, the coefficient and standard error associated with the relationship between Y and X may vary, depending upon the levels of the modifying variable, Z. Figures One and Two represent the conditional relationships graphically. The solid line denotes the marginal effects of Ideology as Deviation (from 50%) increases. The 95% confidence interval lines around the solid sloping line indicate the conditions in which Ideology has as

statistically significant effect on Court liberalism. The figures show the marginal effect of Court Ideology as the modifying variable, Deviation, varies. The solid line denotes the marginal effects of Ideology as Deviation (from 50%) increases. In both figures we see that neither measure of ideology is statistically significant when Deviation is at or near zero – in other words when case sorting leads to approximately 50% outcomes. Thus, when case sorting is especially effective and pervasive, the attitudes or ideology of the justices is nullified. However, as case sorting becomes less effective (i.e. deviations from 50% go up), justice ideology emerges an increasingly influential explanation for Court liberalism. The Criminal Appeals figure indicates that when Deviation reaches a level of about .28, the influence of ideology comes into play, and its effect becomes increasingly large as deviation increases. For Civil Government cases, ideology's impact becomes statistically significant around .10, meaning its impact is seen at lower levels of deviation, but its relationship is similar to that of Criminal Appeals cases (increasingly larger at higher levels of deviation). In sum, these figures suggest exactly the type of conditional relationship between judicial ideology and strategic case sorting that I anticipated.

CHAPTER 6

CONCLUSION

Any assessment of judicial decision making must consider the broader context of litigation. Like Priest and Klein cautioned, the adjudicated cases that are typically studied are the end result of a much longer and involved process and are not necessarily representative of the set of underlying disputes leading to those cases. A model that focuses solely on the judges themselves grossly underestimates the power of other factors in the legal process that surely influence outcomes. Such a belief led to the hypothesis that when case sorting is effective (and outcomes approach 50% win rates), judicial ideology is largely nullified, and when outcomes deviate from 50%, judicial ideology plays a much bigger role in predicting outcomes. In sum, these results lead to two primary observations regarding the Attitudinal Model: 1) its direct influence is conditioned on the effectiveness of litigants' dispute sorting; and 2) attitudes have *both* direct effects and indirect effects on legal outcomes in state supreme courts, since justices' attitudes likely influence the set of disputes that are brought before the courts.

This approach to assessing the intersection of these two theories is surely not the only method, and the logical extension of this research is obviously the pursuance of more precise methods of analyzing litigant selection effects. Given the results presented here, I maintain that selection considerations are relevant and have important implications for the way we think about legal decision making.

Besides the utility of integrated models, this study briefly highlighted the limited ability of existing ideology scores in predicting outcomes at the state level. This finding bears at least brief mention, especially as it applies to future research. A plethora of explanations may account for the inability of the existing ideology scores to predict outcomes as they are presently

measured. Because this study aspired to speak about courts generally, the median measure of ideology would be utilized to represent courts at the aggregate level. Although this score theoretically varies from 0-100, the actual variance in the data is considerably smaller. Without a greater range, the impact of this variable on decision making is certainly constrained. Furthermore, the actual sources of these scores lack variance as well. For example, in states with elected judges, citizen ideology plays a sizeable role in acquiring judicial ideology. This means that when two different judges (e.g. a Democrat and a Republican) are elected, the same citizen ideology score is used to develop both judicial ideology scores. Even further, research has shown that citizen ideology itself is largely stable over time. Although the scores are adjusted for party identification, this does not significantly alter the median measure of court ideology. The most obvious solution to this issue is the development of a superior representation of ideology in the state supreme courts. Alternatively, future researchers may consider constructing a similar integrated model on the individual level, utilizing the scores developed by Bonneau, et al.

All in all, the consideration of litigant case sorting in legal decision making greatly enhances our understanding of outcomes in state supreme courts. The findings presented here should not be interpreted as contrary to the Attitudinal Model. In fact, the results here are complementary—they provide convincing evidence that expanding the scope of the Attitudinal Model by considering the strategies of litigants enhances our understanding of the decisions that judges make.

BIBLIOGRAPHY

Baum, Lawrence. *What Judges Want: Judges' Goals and Judicial Behavior* 47 Political Research Quarterly 749, 761 (1994).

Baum, Lawrence. The Puzzle of Judicial Behavior (1997).

Baum, Lawrence. Judges and Their Audiences: A Perspective on Judicial Behavior (2006).

Brace, Paul and Melinda Gann Hall. *Studying Courts Comparatively: The View from the American States* Political Research Quarterly, Vol. 48, No. 1, 5-29 (1995).

Brace, Paul and Melinda Gann Hall. *Neo-Institutionalism and Dissent in State Supreme Courts* The Journal of Politics, Vol. 52, No. 1 pp. 54-70 (1990).

Brace, Paul and Melinda Gann Hall. *Integrated Models of Judicial Dissent* The Journal of Politics, Vol. 55, No. 4, pp. 914-935 (1993).

Brace, Paul, Laura Langer, Melinda Gann Hall *Measuring the Preferences of State Supreme Court Judges* The Journal of Politics 62 (2), 387–413 (2000).

Benesh, Sarah and W. Martinek *State Supreme Court Decision Making in Confession Cases* Justice System Journal (2002).

Brambor, Thomas, William Clark, and Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses* 13 Political Analysis 1 (2005).

Cross, Frank. *Decisionmaking in the U.S. Circuit Courts of Appeals* 91 California Law Review 1457 (2003).

de Figueiredo, John M. Strategic *Plaintiffs and Ideological Judges in Telecommunications Litigation* 21 Journal of Law, Economics, & Organization 501 (2005).

Epstein, Lee and Gary King *The Rules of Inference* 69 The University of Chicago Law Review (2002).

Epstein, Lee, Valerie Hoekstra, Jeffrey A. Segal and Harold J. Spaeth. *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices* The Journal of Politics, Vol. 60, No. 3, pp. 801-818 (1998).

Friedman, Barry *Taking Law Seriously* 4 Perspectives on Politics 261, 272 (2006).

Gillman, Howard. *Review: What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making* 26 Law and Social Inquiry 466 (2001).

Hall, Melinda Gann *Electoral Politics and Strategic Voting in State Supreme Courts*

The Journal of Politics, Vol. 54, No. 2, pp. 427-446 (1992).

Hammond, Thomas, Christopher Bonneau, and Reginal Sheehan, Strategic Behavior and Policy Choice on the U.S. Supreme Court (2005).

Hettinger, Virginia A., Stefanie A. Lindquist, Wendy L. Martinek. *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals* American Journal of Political Science 48 (1), 123–137 (2004).

Jaros, Dean and Bradley C. Canon *Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges* Midwest Journal of Political Science, Vol. 15, No. 2, pp. 322-346 (1971).

Kessler, Daniel, Thomas Meites, and Geoffrey Miller *Explaining Deviations From the Fifty-Percent Rule: A Multimodel Approach to the Selection of Cases for Litigation* XXV Journal of Legal Studies 233 (1996).

Landes, William and Richard A. Posner *The Independent Judiciary in an Interest-Group Perspective* The Journal of Law and Economics, vol. 18 (1975).

Langer, Laura. Judicial Review in State Supreme Courts SUNY Press (2002).

Pluemper, Thomas and Troeger, Vera E., *The Estimation of Time-Invariant Variables in Panel Analyses with Unit Fixed Effects* Political Analysis (2004).

Priest, George and Benjamin Klein *The Selection of Disputes for Litigation* 13 The Journal of Legal Studies 1, 4 (1984).

Pritchett, Herman. The Roosevelt Court (1948).

Rohde, David R. and Harold J. Spaeth, Supreme Court Decision Making 2 (1976).

Schubert, Glendon. The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices (1965).

Segal, Jeffrey A. and Albert D. Cover *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 American Political Science Review 558 (1989).

Segal, Jeffrey A. and Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993).

Segal, Jeffrey and Harold Spaeth *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (1999).

Segal, Jeffrey and Harold J. Spaeth. The Supreme Court and the Attitudinal Model Revisited (2002).

Shavell, Steven. *Any Frequency of Plaintiff Victory at Trial Is Possible* The Journal of Legal Studies, Vol. 25, No. 2. pp. 493-501 (1996).

Siegelman, Peter and John J. Donohue III *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis* 24 The Journal of Legal Studies (1995).

Siegelman, Peter and Joel Waldfogel. *Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model* The Journal of Legal Studies, Vol. 28 (1999).

Songer, Donald, Charles Cameron, and Jeffrey Segal, *An Empirical Test of the Rational-Actor Theory of Litigation*, 57 Journal of Politics 1119 (1995).

Tarr and Porter. State Supreme Courts in State and Nation. Yale University Press (1988).

Waldfogel, Joel. *The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory* The Journal of Political Economy 103, pp. 229-260 (1995).

Waldfogel, Joel. *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation* 61 Journal of Law and Economics 453 (1998).

Wheeler, S., B. Cartwright, R. Kagan, and L. Friedman. *Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts* Law and Society Review (1987).

Table 1. Dependent Variable: Proportion of Liberal Outcomes,
Criminal Cases in State Supreme Courts

	Criminal Appeals Basic		Criminal Appeals Integrated	
Variable	**Coefficient**	**SE**	**Coefficient**	**SE**
Ideology	.242*	.088	-.120	.120
Deviation	-	-	-1.53*	.263
Ideology × Deviation	-	-	1.02*	.513
Constant	.183*	.043	.585*	.063
	Adj. R^2 =.03	N=200	Adj. R^2 =.68	N=200

*p<.05

Table 2. Dependent Variable: Proportion of Liberal Outcomes,
Civil Government Cases in State Supreme Courts

	Civil Government Basic		Civil Government Integrated	
Variable	**Coefficient**	**SE**	**Coefficient**	**SE**
Ideology	.294*	.104	-.325*	.155
Deviation	-	-	-1.68*	.410
Ideology × Deviation	-	-	4.23*	.964
Constant	.366*	.043	.613*	.065
	Adj. R^2 =.03	N=200	Adj. R^2 = .27	N=200

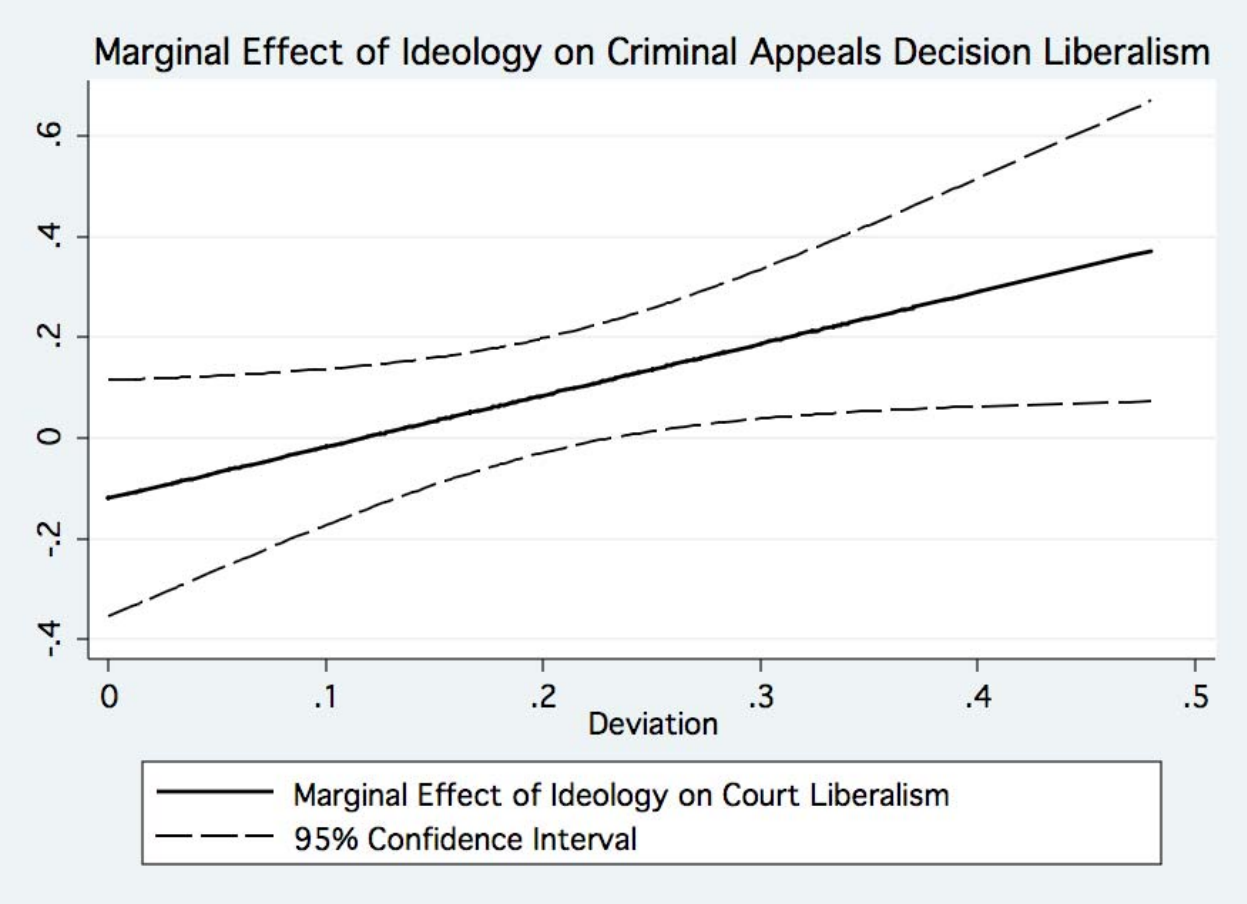


Figure 1. The Marginal Effect of Criminal Appeals Decision Liberalism

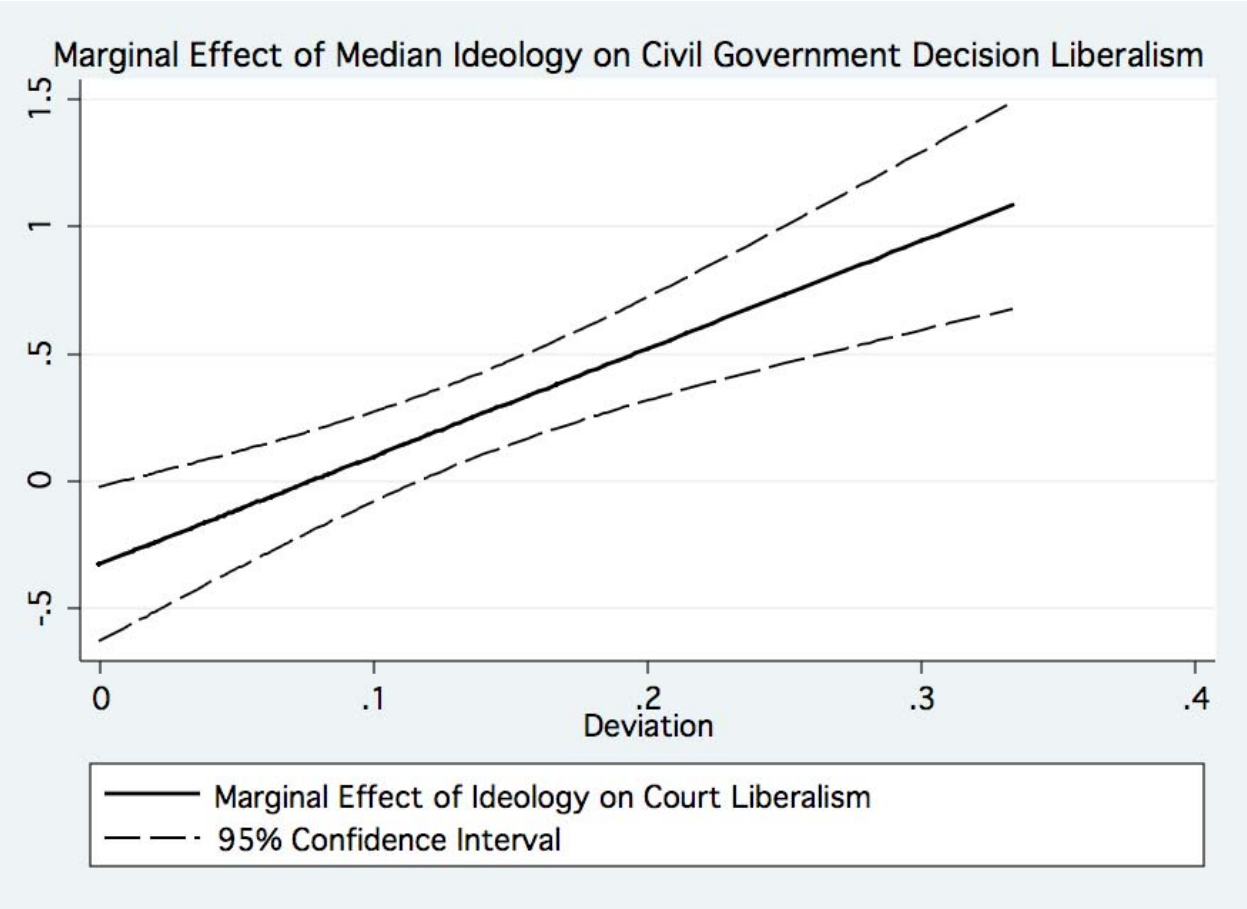


Figure 2. Marginal Effect of Median Ideology on Civil Government Decision Liberalism

APPENDIX

1. Elaboration on Case Types

The criminal appeals cases used for evaluation in this study cover a large array of issues. These issues are delineated in the Codebook of the State Supreme Court Data Project, and include the following: assault, aggravated assault, arson, burglary, disorderly conduct, driving under the influence, drug abuse violation (including possession), drug trafficking, drunkenness, embezzlement, forgery and counterfeiting, fraud, gambling, kidnapping, larceny/theft, liquor laws, manslaughter (negligent and non-negligent), motor vehicle theft, murder, offenses against family and children, prostitution and commercialized vice, rape/sexual assault, robbery, sex offenses, stolen property (buying, receiving, possessing), traffic offenses, vagrancy, vandalism, and weapons (carrying, possessing, concealing).

Civil government cases are likewise used to evaluate the ability of the integrated theory, and include the following: apportionment and redistricting, ballot access, campaign spending, contested elections, other election issues, aid to parochial schools, commercial speech, free exercise of religion, libel/slander/defamation, loyalty oath, obscenity, protest/marches/picketing, other first amendment issues, consumer protection, eminent domain, environmental protection, government benefits/welfare/Medicaid, licensing and permits, taxation, transportation, utilities regulation, zoning and planning, other governmental regulation, bar admission, disciplinary proceedings against attorneys, disciplinary proceedings against judge, promulgation of rules and practice, other practice of law issues, affirmative action/minority set-asides, contract enforcement (breech, specific performance), employment discrimination, other public contract issues, abortion, access to information, homosexual rights, mandatory drug testing, mandatory sterilization, right to die, other privacy issues, employee injury and workers' compensation, premises liability, and other torts.

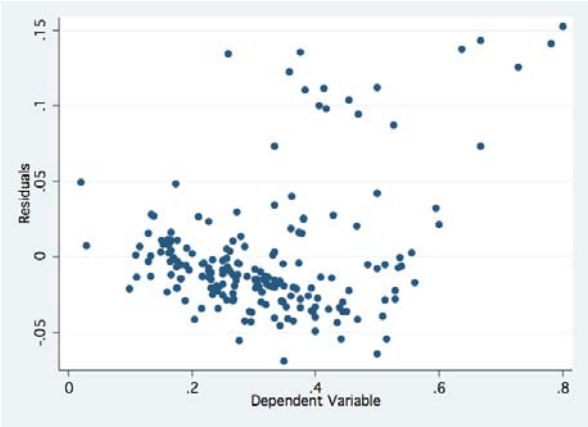
2. Estimator Selection

XTFEVD (Pluemper and Troeger 2004) estimates a three stage panel fixed effects vector decompostion model that allows for the inclusion of time-invariant variables and efficiently estimates almost time-invariant explanatory variables within a panel fixed effects framework. the first stage estimates a pure fixed effects model to obtain an estimate of the unit effects, the second decomposes the fixed effects vector into a part explained by the time-invariant and almost time-invariant variables and an unexplainable part - the error term of the second stage -, and the third stage re-estimates the original model by pooled OLS, including the time-invariant variables and the error term of the second stage, eta. This third step assures to control for collinearity between time-varying and invariant right hand side variables, and adjusts the degrees of freedom.

3. Diagnostics

Because the method used to estimate the two models here is not as well known as some traditional methods, a number of diagnostic tests were run to alleviate concern for regression violations. XTFEVD estimator accounts for unit specific heteroskedasticity, but the scatterplot of the residuals versus predicted values look for heteroskedasticity from other sources. The scatterplot for criminal cases and civil government cases are below, and neither indicates reason

for serious concern, although the slight evidence of heteroskedasticity is a product of variable construction and cannot be avoided given the composition of the model.



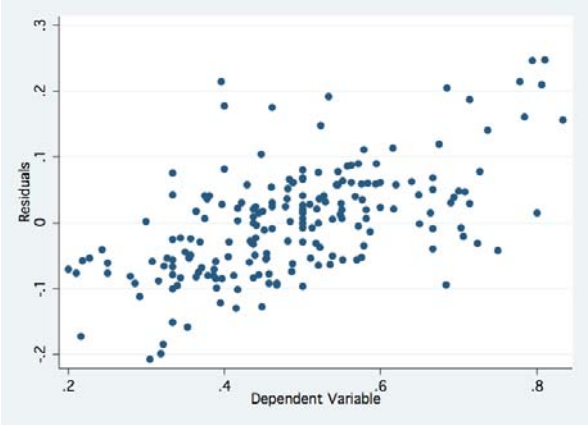


Figure 3
Proportion of Liberal Outcomes for Criminal Appeals Cases by State

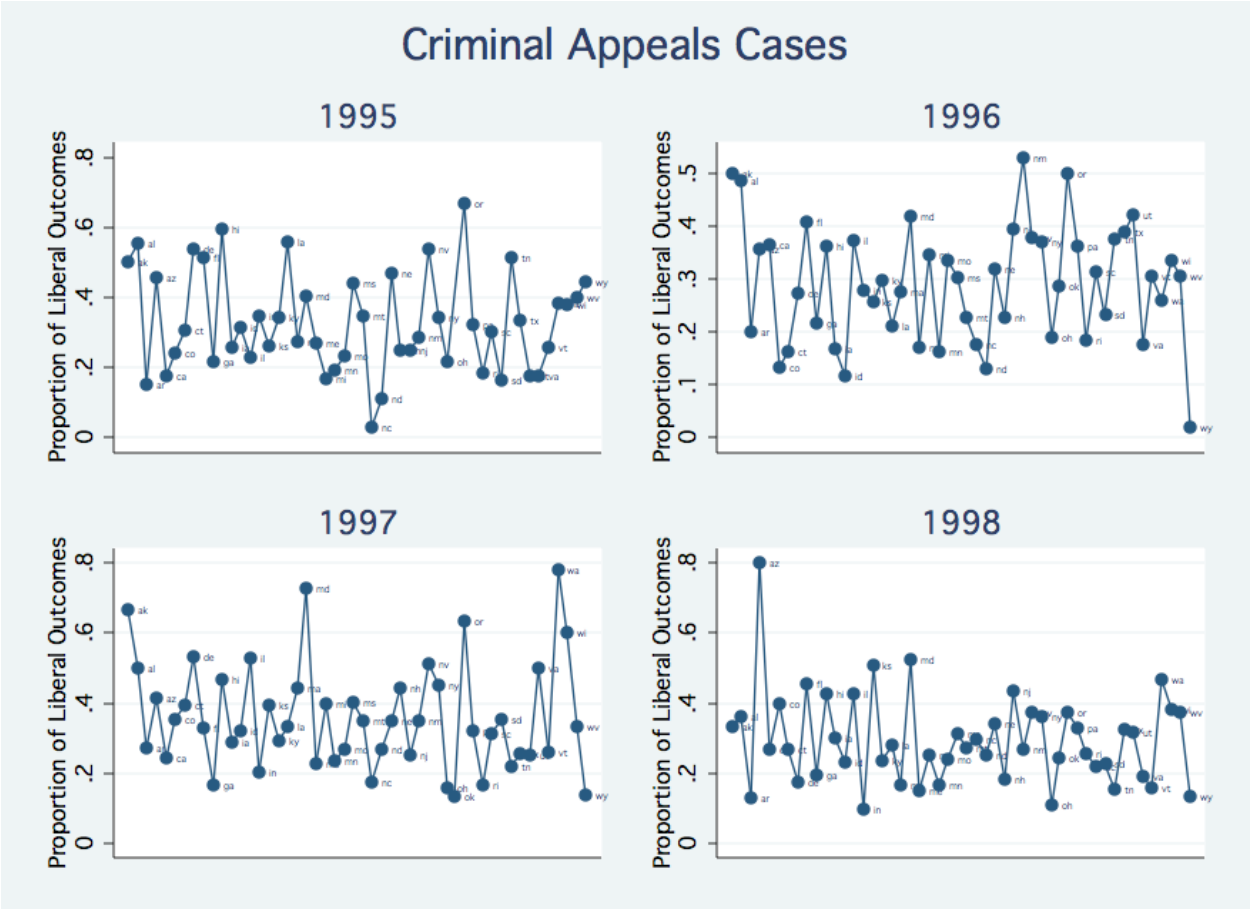


Figure 4
Proportion of Liberal Outcomes for Civil Government Cases by State