PLSC 476: Empirical Legal Studies

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"Legal" Influences on Judicial Behavior

- Normative ideal...
- Include:
  - The Constitution, laws, legal / Court rules
  - *Case facts*
  - *Precedent*
- *Constraint* on ideology ("balls and strikes")
- *Operationalization*?

Segal (1984): Case Facts

- U.S. Supreme Court search and seizure cases, 1962-1981 ($N = 123$)
- Outcome: Whether the search was found to be reasonable (=1) or not (=0)
- Predictors:
  - Nature of the intrusion (Home vs. Business vs. Car vs. Person)
  - Extent of the intrusion (Full search vs. "Stop and frisk")
  - Prior justification (Warrant, Probable cause)
  - Arrest (Incident / After Lawful or Unlawful)
  - Exceptions (additive index)
  - "Change" (personnel changes on the Court)
- Method: *Probit regression*

Table 1. Probit Estimates for Search and Seizure Decisions

Variable	MLE	S.E.	MLE/S.E.
Home	−2.31	.61	−3.78***
Business	−2.19	.64	−3.41***
Car	−2.02	.63	−3.21***
Person	−1.28	.54	−2.37**
Search	− .77	.44	−1.76*
Warrant	.95	.45	2.14*
Probable cause	− .32	.38	− .84
Incident lawful arrest	2.30	.81	2.84**
After lawful arrest	1.22	.50	2.47**
After unlawful arrest	− .57	.63	− .91
Exceptions	1.36	.35	3.91***
Change	.16	.07	2.26*
Constant	1.34		
Est R^2	.57		
$-2 \times$ LLR (X^2_{12})	56.68**		
Mean of dependent variable	.55		
% categorized correctly	76		
$n = 123$			

Issues with Segal (1984)

- *Aggregate* (case-level) analysis
- Single issue area: Generalizable? Extensible?
- *Retrospective* case facts...
- What about ideology?

George and Epstein (1992)

"How legal and extralegal models of judicial decision making perform in head-to-head competition."

Details

- SCOTUS death penalty decisions, OT1971-1988 ($N = 64$).
- Outcome: Whether ($= 1$) or not ($= 0$) the Court affirmed imposition of the death penalty.
- Recall:
  - 1972: Court struck down the death penalty as applied (*Furman v. GA*)
  - 1976: Court affirmed its constitutionality within limits (*Gregg v. GA*)
  - 1982-88: Expanded its reach (e.g., *Barefoot v. Estelle*)

George and Epstein (1992) (continued)

Legal factors:

- **Crime** in question (1 = proportional crime)
- Claim of a **death-qualified** jury (1 = not raised)?
- **Particularized circumstances** of the case (1 = no attempt to limit application)
- **Aggravating factors**? (1 = no claim of aggravating factors)
- **Psychiatric exam**? (1 = exam conducted correctly)

George and Epstein (1992) (continued)

Extralegal factors:

- **Political environment** (0/1/2 for Dem/GOP president / Senate)
- **Court change** (counter)
- Experienced **defense counsel** (1 = not)
- Repeat player **state** (1 if TX, GA, FL)
- Brief by the **U.S. solicitor general** (1 = present)
- Who **appealed** (1 = state, 0 = defendant)

Table 1

Probit Estimates for Legal and Extralegal Models of Decision Making Capital Punishment Cases, 1971–1988 Terms of the U.S. Supreme Court

VARIABLE	LEGAL MODEL COEFFICIENTS	EXTRALEGAL MODEL COEFFICIENTS
Death-Qualified (DQ)	.94* (.61)	—
Crime (CR)	1.49** (.73)	—
Particularized circumstances (PC)	1.46*** (.44)	—
Aggravating factors (AG)	1.01** (.50)	—
State psychiatric examination (SP)	1.38** (.62)	—
Political environment (PE)	—	1.88*** (.60)
Court change (CC)	—	.70** (.30)
Appellant (AP)	—	1.74*** (.57)
Defendant counsel (DC)	—	1.20** (.56)
State (ST)	—	1.29*** (.49)
Solicitor general (SG)	—	2.67*** (1.07)
Constant	−5.35	−5.87
−2 × log-likelihood ratio	18.82***	36.69***
% categorized correctly	75	81

Issues with the Models

The "Legal Model"

"...the legal model contains an inherent flaw. Because it only considers legally relevant facts, it will continue to forecast liberal outcomes as attorneys capitalize on existing precedent even though "the law" may not actually move in that direction."

The "Attitudinal Model"

"...stare decisis does constrain the array of available legal options. Accordingly, abrupt alterations in the political environment may not necessarily translate into concomitant, contemporaneous doctrinal change."

Table 4

An Integrated Model of U.S. Supreme Court Decision Making

VARIABLE	COEFFICIENT
Death-qualified (DQ)	1.23
	(1.14)
Crime (CR)	2.86**
	(1.21)
Particularized circumstances (PC)	1.13**
	(.66)
Aggravating factors (AG)	1.05*
	(.68)
State psychiatric examination (SP)	2.19***
	(.86)
Political environment (PE)	2.25***
	(.79)
Court change (CC)	.64*
	(.39)
Appellant (AP)	1.55**
	(.79)
Defendant counsel (DC)	1.08**
	(.62)
State (ST)	1.90***
	(.64)
Solicitor general (SG)	1.93*
	(1.44)
Constant	−13.66
−2 × log-likelihood ratio	48.99***
% categorized correctly	88

Note: Standard errors are in parentheses. N = 64. Of these cases, the Court affirmed the imposition of the death penalty in 45%.

*$p \leq .10$.
**$p \leq .05$.
***$p \leq .01$.

G&E: Conclusions

- Not "either / or," but "both / and."
- "(L)egal factors have the greatest impact at the early stages of an issue's life; as it evolves, however, extralegal variables dominate."

Precedent

- Reliance on previous cases/decisions that are "similar"
- Common law systems
- Goal: Ensuring consistency
- Types:
  - "Binding" vs. "Persuasive"
  - "Vertical" vs. "Horizontal"

Precedent and the U.S. Supreme Court

Conventional Wisdom:

- SCOTUS precedent binds the justices
- Especially true for opinions in which the justice "signed on"

Segal & Spaeth (1996)

- Institutional factors $\rightarrow$ No influence for precedent, BUT
- Observational equivalence in behavior

Segal and Spaeth (1996)

Key point:

> *"When future related cases are decided, it is impossible to distinguish whether justices in the original majority who adhere to their position are following precedent, are following their original revealed preferences, or are following some combination of the two. We do, however, have a test of precedent for those justices who were in the minority. If they subsequently adopt the majority position, arguably they did so out of respect for precedent..."*

Segal and Spaeth (1996)

Design:

- Begin with "landmark" precedents ($N = 131$) from the Warren and Burger Courts; take a 40% random sample ($N = 54$)
- Find all "progeny" of those cases via *Shepard's Citations* ($N = 146$)
- Examine votes in progeny cases by justices who dissented in the original precedents ($N = 346$)
    - Support original (dissenting) position = "preference"
    - Support majority position = "precedent"

Segal and Spaeth (1996)

Table 1. Justices' Support for Preference and Precedent

Justice	Preference	Precedent	% Preference
Douglas	17	0	100.0
Clark	5	0	100.0
Warren	1	0	100.0
Rehnquist	55	1	98.2
Marshall	49	2	96.1
Brennan	38	2	95.0
Stevens	15	1	93.8
O'Connor	11	1	91.7
White	42	4	91.3
Burger	20	3	87.0
Blackmun	25	4	86.2
Black	6	1	85.7
Harlan	8	2	80.0
Stewart	12	6	66.7
Powell	10	5	66.7
Totals	314	32	90.8

Precedent: Another Look

Idea:

- SCOTUS occasionally overrules its own precedents...
- Conventional wisdom: Only when "clearly erroneous" (at a minimum)
- Segal-Spaeth: Whenever there is a majority to do so

Two phenomena:

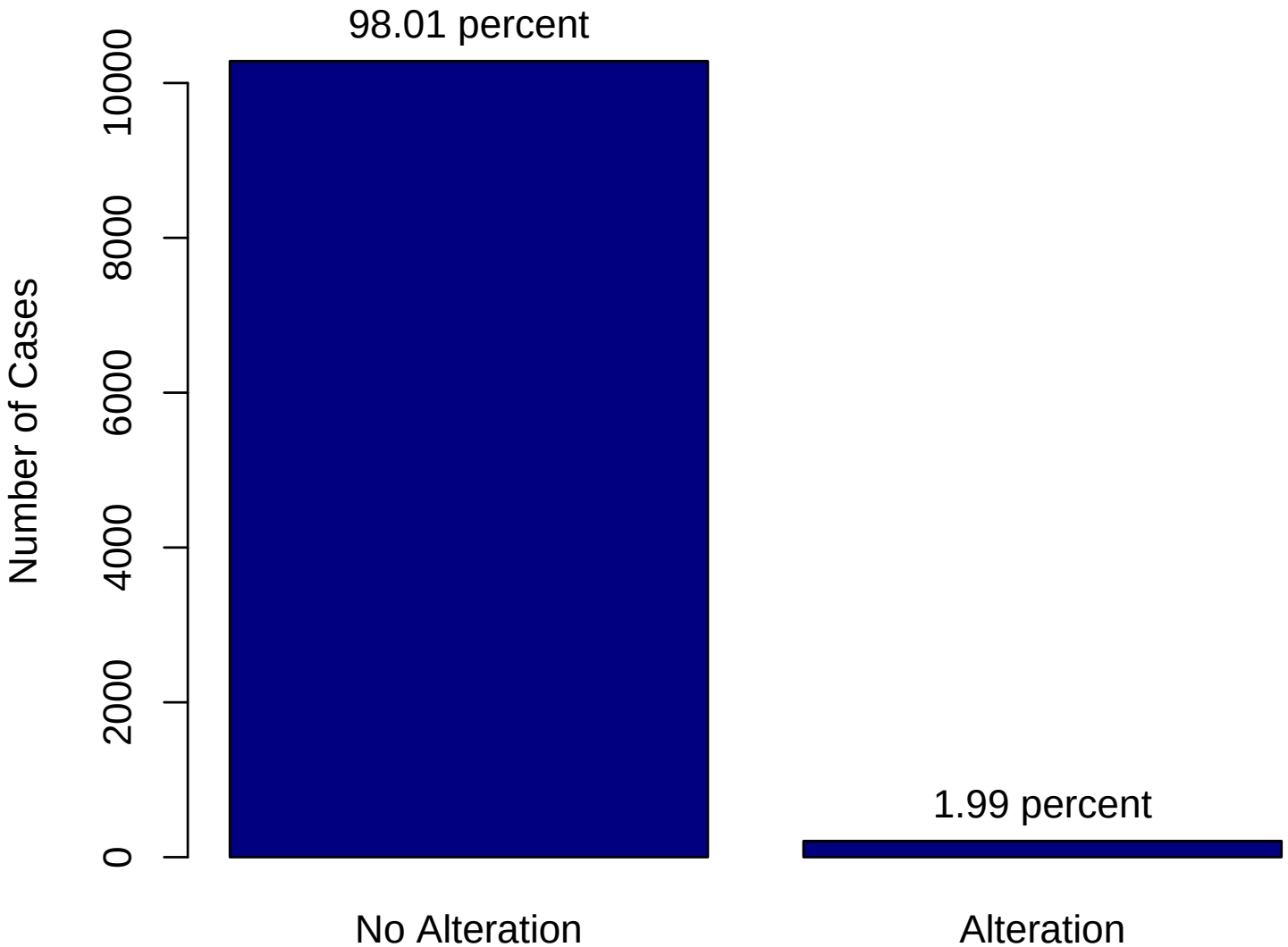
- *Majority size*
  - CW implies large(r) majorities for overruling precedent
  - S&S implies no difference
- *Ideological voting*
  - CW: *Weaker* correlation between ideology and voting in precedent-altering cases
  - S&S: Ideological voting will be *at least as prevalent* (if not more so) in precedent-altering cases

49 Formal Alteration of Precedent

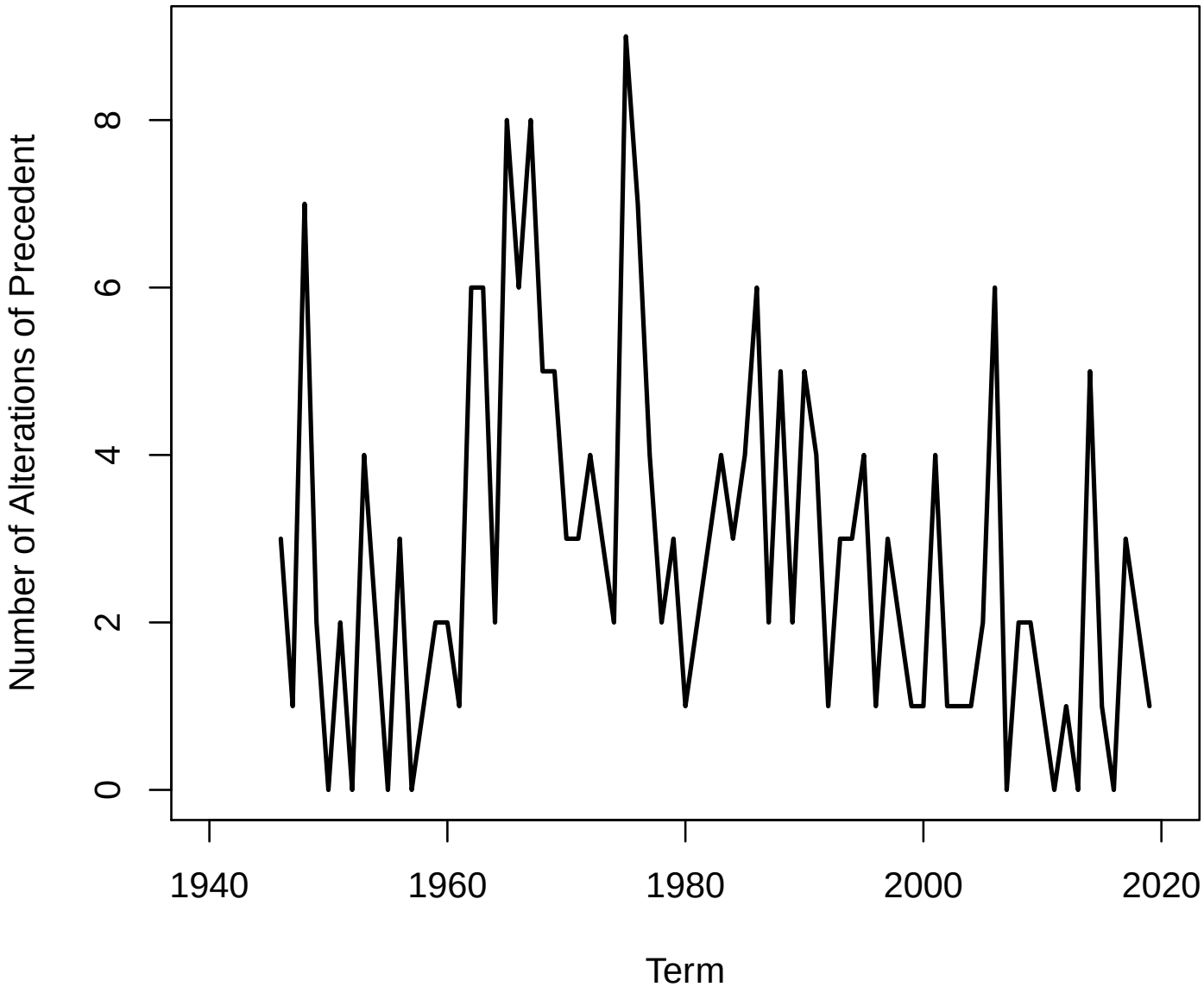
Variable Name	Spaeth Name	Normalizations
precedentAlteration	ALT_PREC	varPrecedentAlteration (2)

A "1" will appear in this variable if the majority opinion effectively says that the decision in this case "overruled" one or more of the Court's own precedents. Occasionally, in the absence of language in the prevailing opinion, the dissent will state clearly and persuasively that precedents have been formally altered: e.g., the two landmark reapportionment cases: Baker v. Carr, 369 U.S. 186 (1962), and Gray v. Sanders, 372 U.S. 368 (1963). Once in a great while the majority opinion will state--again in so many words--that an earlier decision overruled one of the Court's own precedents, even though that earlier decision nowhere says so. E.g, Patterson v. McLean Credit Union, 485 U.S. 617 (1988), in which the majority said that Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484, 35 L Ed 2d 443 (1973) overruled a 1948 decision. On the basis of this later language, the earlier decision will contain a "1" in this variable. Alteration also extends to language in the majority opinion that states that a precedent of the Supreme Court has been "disapproved," or is "no longer good law."

SCOTUS Cases Altering Precedent, 1946-2019



Precedent-Altering Cases By Term, 1946-2019



Split The Data Frames

```
# Separate the "Master" and "Case" data into two piles,
# those where precedent is altered and those where
# it is not:

> AltV <- Master[Master$precedentAlteration==1,]
> NoAltV <- Master[Master$precedentAlteration==0,]

> AltC <- Cases[Cases$AltPrec==1,]
> NoAltC <- Cases[Cases$AltPrec==0,]
```

Majority Coalition Size, By Precedent Alteration

```
> with(AltC, mean(MajVotes,na.rm=TRUE))
[1] 6.67

> with(NoAltC, mean(MajVotes,na.rm=TRUE))
[1] 7.09


> with(Cases, t.test(MajVotes~AltPrec))

Welch Two Sample t-test

data:  MajVotes by AltPrec
t = 4, df = 217, p-value = 0.0001
alternative hypothesis: true difference in means is not equal to 0
95 percent confidence interval:
 0.206 0.633
sample estimates:
mean in group 0 mean in group 1
           7.09            6.67
```

Ideology-Vote Correlations, By Precedent Alteration

```
> with(AltV, cor(Ideology,LibVote,use="complete.obs"))
[1] 0.309
```

```
> with(NoAltV, cor(Ideology,LibVote,use="complete.obs"))
[1] 0.209
```

Summary

- Segal & Spaeth: Justices don't generally follow precedents with which they explicitly disagree
- Precedent-altering majority coalitions are *smaller* than non-precedent-altering ones
- Voting is *more ideological* in precedent-altering decisions than in others.
- See also:
  - Hansford and Spriggs, *The Politics of Precedent on the U.S. Supreme Court* (2008)
  - Renberg, "The Transmission of Legal Precedent in the U.S. Courts of Appeals", in Solberg, Diascro, and Waltenburg, *Open Judicial Politics* (2020)