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Source: *The American Political Science Review*, Vol. 83, No. 2 (Jun., 1989), pp. 557-565

Published by: American Political Science Association

Stable URL: <http://www.jstor.org/stable/1962405>

Accessed: 24/08/2008 14:34

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IDEOLOGICAL VALUES AND THE VOTES OF U.S. SUPREME COURT JUSTICES

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It is commonly assumed that Supreme Court justices' votes largely reflect their attitudes, values, or personal policy preferences. Nevertheless, this assumption has never been adequately tested with independent measures of the ideological values of justices, that is, measures not taken from their votes on the Court. Using content analytic techniques, we derive independent and reliable measures of the values of all Supreme Court justices from Earl Warren to Anthony Kennedy. These values correlate highly with the votes of the justices, providing strong support for the attitudinal model.

The fundamental assumption about the behavior of Supreme Court justices—that their votes are strongly dependent upon their attitudes, values, or personal policy preferences—has never been adequately tested with *independent* measures of the attitudes or values of justices.¹ We use a systematic content analysis to derive reliable measures of the ideological values of Supreme Court justices that are independent of the votes they later cast. Despite potential problems of measurement error in the data, our scores correlate quite highly with the votes cast by the justices in civil liberties cases from 1953 through 1988.

Attitudes, Values, and Judicial Behavior

The study of judicial behavior begins with C. Herman Pritchett's *The Roosevelt Court* (1948). The book systematically examines dissents, concurrences, voting blocs, and ideological configurations

from the nonunanimous decisions rendered by the justices from 1937 to 1947. Pritchett does not provide a theory of Supreme Court decision making; there is no doubt a limit to how many breakthroughs a single book can make. Nevertheless, the theoretical assumptions of the study were made clear in the introduction: "This book, then, undertakes to study the politics and values of the Roosevelt Court through the nonunanimous opinions handed down by its justices" (p. xii), acknowledging that the justices are "motivated by their own preferences" (p. xiii).

It is Schubert (1965), drawing most heavily on the work of Coombs (1964), who first provides a well-delineated theory of judicial decision making. According to Schubert, justices have ideal points (*i*-points) in multidimensional, ideological space. These points represent the justices' "own syndrome of attitudes" (Schubert 1965, 27). Case stimuli (*j*-points), presented to the justices for approval or disapproval, can similarly be measured in the same multidimensional

space: "The decision of the Court in any case will depend upon whether the case dominates, or is dominated by, a majority of *i*-points" (p.38).

Rohde and Spaeth (1976) also develop a multidimensional attitudinal model. Their most basic assumption is that "each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences" (p. 72). The Court's structure grants the justices great freedom "to base their decisions *solely* upon personal policy preferences for a number of reasons: (1) the lack of electoral accountability, (2) the lack of ambition for higher office, and (3) the fact that the Supreme Court is the court of last resort" (p. 72; emphasis added).

The attitudes and values described in these works are taken from the votes cast by the justices. While there is much to learn from this approach—these books are rightly placed among the leading ones in judicial behavior—there are limits as well. One cannot demonstrate that attitudes affect votes when the attitudes are operationalized from those same votes. As Schubert himself recognized, "The book is full of talk about the attitudes of Supreme Court justices, but the attitudinal differences delineated and denoted obviously are hypothetical rather than empirical constructs, because the data analyzed are based on observations of judicial votes in the decisions of cases—and not even on judicial responses to questionnaire items" (1974, xii).

There is only one previous effort to derive independent measures of the values of Supreme Court justices: Danelski's 1966 examination of Justices Brandeis and Butler. Danelski content-analyzed speeches given by the justices prior to their appointment to the Court. Support for or opposition to *laissez faire* correlated with the direction of solo dissents in economic

cases by these two justices. While this work is innovative, the reliability of the data is unknown, and only two justices are studied. Independent evidence for the attitudinal model must rest on a firmer foundation.

Greater efforts have been made to examine the effects of attitudes on the decisions of lower court judges, often through the use of surveys and questionnaires. Nagel (1963) found differences between liberal and conservative judges across four separate issues. Unfortunately, the presentation of the results in terms of the percentage of judges above or below court averages makes it difficult to assess the strength of the relationship. Gibson (1978) found that attitudes alone could explain only 14% of the variation in the decisions of Iowa trial court judges. Nardulli, Flemming, and Eisenstein (1984) report a negative bivariate relationship between a judge's belief in punishment and plea-bargained sentences. In their multivariate model the relationship remains negative for crimes that are not serious, and is positive only for the most serious crimes.

These low or negative correlations should not be surprising given what is known from the social psychology literature. The earliest research in social psychology found little or no relationship between attitudes and behavior. Wicker (1969) concluded from his review of numerous studies that there is little relationship between the two. More recently, however, scholars have found some relationships between attitudes and behavior and have shifted their focus from whether attitudes affect behavior to the conditions under which attitudes affect behavior (see McGuire 1985; Petty and Cacioppo 1981). For example, relationships are enhanced when subjects' thoughts are internally focused (Scheir and Carver 1980) and when attitudes are formed as the result of direct experience (Fazio and Zanna 1981). Relationships are strongest for those high

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in self-esteem (Sjoberg 1978) and maturity (Henschel 1971). Nevertheless, even when relationships are found, attitudes typically explain only 10% to 40% of the variation in behavior (Petty and Cacioppo 1981, 24-27).

Despite these results, the freedom given to Supreme Court justices to act upon their ideological values (Rohde and Spaeth 1976) gives hope that strong correlations can be found between independent measures of their values and their votes on the Court. We turn now to our efforts at measuring the values of the justices.

The Justices' Ideological Values

Acquiring independent measures of the ideology of Supreme Court justices is not a simple task. As Tate stated,

It is difficult to imagine what independent measures of judicial values could be used. . . . Attitude surveys, often used to measure the values (and role perceptions) of sitting lower court judges, have their limitations when most of the justices being analyzed are dead. An alternative method, inferring values from written works of judges (Danelski 1966), might be applicable in principle, but would require a research investment which is well beyond the resources of most researchers if applied to 25 justices. (Tate 1981, 365)

As part of a separate study we conducted a content analysis on the ideological values of all justices from Earl Warren to Anthony Kennedy from newspaper editorials in several of the nation's leading newspapers (Segal, Cover, and Cameron 1988). Although these measures must be used with caution, we believe that such measures can be justified under certain circumstances. First, though, we describe how the measures were obtained.

We started by conducting a content analysis of a source that contains comparable information on each justice since Earl Warren: statements in newspaper editorials from the nomination by the president until the confirmation vote by the Senate. Newspaper editorials are one

of the few independent sources of information that contain comparable data on each justice. Only editorials prior to confirmation by the Senate were examined, for editorials after confirmation will undoubtedly be influenced by votes a justice casts and thus are not independent of those votes. We selected four of the nation's leading papers, two with a liberal stance (the *New York Times* and *Washington Post*) and two with a more conservative outlook (the *Chicago Tribune* and *Los Angeles Times*).

To conduct the content analysis, we trained three students to code each paragraph for political ideology. Paragraphs were coded as *liberal*, *moderate*, *conservative*, or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.² The justice's ideology (*JI*) is then measured by the formula $JI = (\text{liberal} - \text{conservative}) / (\text{liberal} + \text{moderate} + \text{conservative})$. This formula leads to a scale ranging from +1.0 (unanimously liberal) through .0 (moderate) to -1.0 (unanimously conservative).

The measures, presented in Table 1, are reliable. We assessed reliability by using all three coders on a 25% random sample of the data. Using pi as our index of inter-coder reliability (see Krippendorff 1980), a result of .72 was achieved. This is significant at $p < .001$.

We believe that the scores accurately measure the perceptions of the justices' values at the time of their nominations. While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas,

Table 1. Justices' Values and Votes

Justice	Values ^a	Votes ^b
Warren	.50	78.1
Harlan	.75	41.9
Brennan	1.00	77.9
Whittaker	.00	43.4
Stewart	.50	51.5
White	.00	43.4
Goldberg	.50	89.6
Fortas	1.00	80.4
Marshall	1.00	79.7
Burger	-.77	29.7
Blackmun	-.77	42.9
Powell	-.67	37.9
Rehnquist ^c	-.91	19.5
Stevens	-.50	56.3
O'Connor	-.17	30.9
Rehnquist ^d	-.91	23.0
Scalia	-1.00	34.7
Kennedy	-.27	40.0

^aDerived by authors. The range is -1.00 (extremely conservative) to 1.00 (extremely liberal).

^bPercentage liberal in civil liberties cases, 1953-88.

^cValues and votes as Nixon appointee.

^dValues and votes as Reagan appointee.

Marshall, and Brennan are, expectedly, the most liberal, while Scalia and Rehnquist are the most conservative. Harlan and Stewart come out liberal because the debate about them centered around their support for the overriding issue of the day, desegregation. Goldberg is not perceived to be as liberal as Fortas or Marshall because of an even-handedness at the Department of Labor that even the *Chicago Tribune* could support. O'Connor comes out a moderate, given her previous support for women's rights and abortion. Indeed, the only hint of opposition to her came from the Right.³

Measures of *perceived* values are obviously imperfect measures of the *real* values of Supreme Court justices. In a world more attuned to the needs of researchers, Supreme Court justices would annually complete attitude questionnaires on each issue the Court would consider during the year. Neither this nor a single

questionnaire completed at each justice's appointment are likely to happen soon. We must turn instead to indirect methods of measuring the ideological values of justices. Some form of content analysis is needed. The criteria that led us to choose newspaper editorials follow. First, the data must have ideological content. Second, the data must be comparable; the data must exist in similar form for each justice. Third, the data must be independent of the votes the justices cast; the data cannot be rationalizations of votes already cast. Fourth, there can be no systematic errors in the data.

We considered but rejected several possibilities. Coding cases decided by the justices while on lower courts would not work because many justices do not have lower-court experience. Opinions written by the justices are clearly not independent of votes previously made. Speeches made or articles written by justices, when they have ideological content, may be rationalizations or defenses of decisions previously cast. These writings and speeches are independent only of votes not yet cast. Preappointment articles and speeches by justices would be appropriate for analysis, but too many justices have no articles or speeches published prior to selection for the Court. Further, while some justices, such as Douglas (1970), write and speak on ideologically charged subjects, others—for example, Scalia (1976)—write on topics such as oversight of agency decision making.

Senate confirmation hearings often have ideological content and contain comparable data for the overwhelming majority of justices. However, there is likely to be systematic bias in such data. When a nomination is noncontroversial, we are likely to get little or no ideological information from the nominee's statements. O'Connor, for example, thought it in her best interest to refuse to answer virtually all policy questions. When a nominee does agree to address such questions,

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it is usually done in an attempt to satisfy senators that the nominee is not as liberal or conservative as commonly believed. Thus, if we were to code Bork's statements before the Senate Judiciary Committee, we would find Bork consistently stating his support for women's rights and First Amendment rights, precisely because senators had reasons to believe he opposed them. Therefore, the data from confirmation hearings may well be biased.

Newspaper editorials on nominations to the Supreme Court exist on all nominees since Earl Warren, typically have ideological content, and are obviously independent of the votes justices later cast. While editorials presumably are quite accurate in conveying preconfirmation perceptions of the ideology of nominees, these perceptions are not necessarily accurate. For example, our measures suggest that Harlan is a liberal and O'Connor is a moderate. Few would argue that this represents their true values. What effects would such errors have on our analysis? First, we argue that such errors are random. Prior to the editorials' publication, there is no reason to believe that any nominee will be systematically misrepresented in one direction or another. Compare this to statements from judiciary committee hearings, where the errors are systematic—liberals under intense scrutiny try to portray themselves as less liberal, conservatives are less conservative. Second, to the extent that we have random measurement error, we will undoubtedly find weaker correlations than would otherwise be the case (Berry and Feldman 1985). Therefore, the correlation between ideological values and votes that we present is lower than the true correlation. Under such circumstances, if we find low correlations, we cannot state that values are unrelated to votes. If high correlations are found, we will have found the *minimal* level existing in the true relationship.

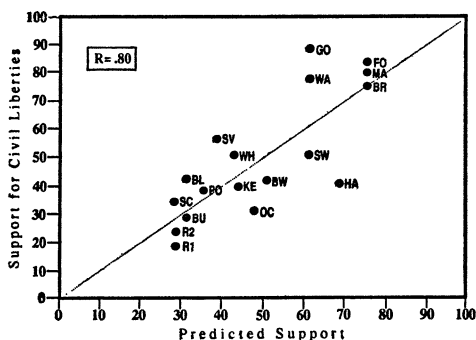
The Dependent Variable

Because the statements in newspaper editorials deal almost exclusively with support by the justices for civil liberties and civil rights, we use as our dependent variable the votes of all justices appointed since the beginning of the Warren Court in all formally decided civil liberties cases from the beginning of the 1953 term through the end of the 1987 term, as derived from the Supreme Court data base compiled by Harold Spaeth at Michigan State University.⁴ Civil liberties issues are those involving criminal procedure, civil rights, the First Amendment, due process, and privacy. Liberal decisions are (1) pro-person accused or convicted of crime, (2) pro-civil liberties or civil rights claimant, (3) proindigent, (4) pro-Indian, and (5) antigovernment in due process and privacy. The data are presented in Table 1.

Results

The results are straightforward: the correlation between the ideological values of the justices and their votes in civil liberty cases is .80 ($r^2 = .64$, adjusted $r^2 = .62$). Regressing votes on our measure of values yields a constant of 51.25 and a slope of 23.44 ($t = 5.34$). The residuals are graphed in Figure 1. The largest residuals belong to Harlan, who is 27.3 percentage points more conservative than expected, and Goldberg, who is 26.4 percentage points more liberal than expected. Brennan, Marshall, Burger, Powell, and Kennedy are within 5 points of predicted values; Whitaker, White, Fortas, and Rehnquist (R1) are within 10. Also within 10 points are Rehnquist (R2), Scalia, and Kennedy, who fit well despite the relatively few votes they have cast. Regression diagnostics demonstrate that the results are remarkably stable; they are not dependent on the scores of any particular justice. Systematically excluding one justice at a time results in correlations

Figure 1. Civil Liberty Support by Ideology



Note: WA = Warren, HA = Harlan, BR = Brennan, WH = Whittaker, SW = Stewart, BW = White, GO = Goldberg, FO = Fortas, MA = Marshall, BU = Burger, BL = Blackmun, PO = Powell, R1 = Rehnquist (1971), SV = Stevens, KE = O'Connor, R2 = Rehnquist (1986), SC = Scalia, KE = Kennedy.

ranging from .77 (Justice Marshall excluded) to .86 (Justice Harlan excluded). The correlation is unchanged if Justice Kennedy's 40 votes are excluded. Given the limits on the relationship between attitudes and values, and the fact that our correlation is attenuated by the measurement error that no doubt exists in the independent variable, the results provide exceptional support for the attitudinal model as applied to civil liberties cases. For the first time support is from measures of values independent of the votes of the justices.⁵

We observe a correlation of .80 between values and votes. If the true correlation is significantly higher than that, does this mean that virtually nothing else directly affects the aggregate decisions of justices?⁶ Traditional modes of analyzing judicial decisions emphasize the importance of legal doctrine and precedent. This is not the place for a complete defense of legal realism, but we do briefly note the following. Supreme Court justices are not bound by the legal doctrines

accepted by the Court majority; they are free to use whatever doctrines fit their own preferences. Precedents are typically found on both sides of any case reaching the Supreme Court; and even if the precedents weigh heavily on one side, justices are free to distinguish or overrule them. While precedent might have some value for some justices, the empirical evidence on the importance of precedent consists of little more than Schubert's (1963) exposition of the votes of Justice Clark in court-martial of civilian personnel and dependents. Gibson (1978) demonstrates the importance of roles—particularly as to judicial restraint—to Iowa judges, but Supreme Court justices need not feel any more constrained by judicial restraint than they do by precedent. Evidence on the Court establishes that judicial restraint is little more than a "cloak for the justices' policy preferences" (Spaeth and Teger 1982, 277; see also Spaeth 1964).

Case facts obviously influence Supreme Court decisions (Segal 1984, 1986), but facts can only explain variance between cases of a particular Court or between the decisions of a particular justice; they cannot explain differences in decisions between justices. That is, fact models try to explain why Justice A votes liberally in one case and conservatively in another; attitudinal models try to explain why Justice A is moderate over a series of cases while Justice B is liberal. Attitudes must have a referent. In the attitudinal model of judicial behavior that referent is the case stimuli, or in Schubert's term, *j*-points. There is no contradiction between the models. They necessarily differ only because the units of analysis differ.

The attitudinal model also fails to consider internal and external influences on the Court. Walter Murphy's seminal *Elements of Judicial Strategy* (1964) documents innumerable methods for successfully "marshaling the Court" from within. External influences are also likely to exist. The solicitor general is remarkably suc-

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cessful at the certiorari stage (Tanenhaus et al. 1963) and when cases are decided on the merits (Puro 1971, 1981; Scigliano 1971; Segal 1988). This influence exists, at least in sex discrimination cases, even after the facts of the cases have been controlled (Segal and Reedy 1988). So while justices may have a free reign to vote their personal policy preferences, there are forces that limit this discretion. Nonetheless, the ability of the attitudinal model to explain the justices' voting behavior indicates that these influences are minimal. As better measures of the values of the justices are developed across multidimensional space, the limitations of alternative explanations of the justices' aggregate behavior should become ever more apparent.

Notes

There are many people to thank for this article. Jeffrey Segal would like to thank Lee Epstein, Michael Giles, and Thomas Walker, whose conversations on public law helped provide the initial impetus to write the manuscript. The final draft was prepared while Jeffrey Segal was a fellow at the Law and Social Science Program, Northwestern University. The authors would also like to thank Renee Adwar, Yen Giang, and Regina Stephanie Good, who coded the data used in the analysis, and Harold Spaeth, who provided us with a preliminary version of the Supreme Court data base. The project is supported by NSF Grant SES-8812935.

1. We recognize the existence and importance of the Danelski 1966 study, and discuss it in further detail later. Nevertheless, as his study examined but two justices, we cannot consider it a test of the attitudinal model.

2. We provide here a few examples of the types of statements that would lead to a paragraph being coded liberal, moderate, or conservative.

Liberal: "Scarcely more defensible were the numerous questions about Judge Harlan's affiliation with the Atlantic Union. The country would have a sorry judiciary indeed, if appointees were to be barred for belonging to progressive and respectable organizations" (*Washington Post*, 2 March 1955) and "During the McCarthy era he [Fortas] was not afraid to raise a strong voice against those who were bent upon destroying civil liberties under the banner of anticommunism" (*Washington Post*, 30 July 1965). *Moderate:* "On the contrary, Powell's reputa-

tion is as a moderate by Southern standards on race, as a man with deep and humane concern for his fellowman" (*Los Angeles Times*, 24 October 1971). *Conservative:* "Judge Carswell himself admits to some amazement now at what he said in that 1948 speech. He should, for his were the words of pure and simple racism" (*Washington Post*, 10 February 1970) and "He [Nixon] has strongly supported Rehnquist's articulation within the Justice Department of broad authority for surveillance and wiretapping in the pursuit of criminals, and in the qualified form of martial law used during the May-Day demonstrations" (*Los Angeles Times*, 5 December 1971).

3. Rehnquist is included twice, once as associate justice and once as chief justice. While his ideological scores are the same both times, the scores are separate measures, taken from 1972 and 1986, respectively. That they are identical down to two decimal places is partially a coincidence, but mostly a result of the fact that he was viewed as a strong conservative both times.

4. The paucity of editorials prior to Warren prevents us from beginning with earlier justices. Since the data base begins with the appointment of Earl Warren, we have the complete voting record on all included justices.

5. Or one could suggest the following alternative scenario: If judges base decisions on legal values (e.g., precedent, intent of the framers, etc.), not personal values, editorials on nominees with lower court experience would be based on those legal values. Our measures will correlate with their latter votes on the Court, because as justices they will again be basing their votes on their legal values. But if this were the case, lower court experience would provide crucial information that does not exist for those without such experience: the legal values of the nominees. The correlation for those with that information should be higher than the correlation for those without that information. Though the *n*'s are small, the correlation between values and votes for those with judicial experience is .76 (adjusted $r^2 = .53$), while the correlation for those without such experience is .92 (adjusted $r^2 = .81$). While this is not sufficient to claim that lower court experience provides *disinformation* (one might reasonably argue that lower court judges are bound by *stare decisis*, while Supreme Court justices are free to follow their policy preferences), it is clear that lower court service provides no special evidence about how justices will vote, contrary to the implications of legalistic explanations.

6. The findings presented here do not foreclose the possibility of indirect effects on the justices' decisions, such as personal attributes (see Tate 1981), which may influence decisions by affecting the justices' values. Our data enable testing of the first link of the model (attributes affect values) and our results demonstrate the validity of the second link (values affect votes).

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