HETEROGENEITY IN SUPREME COURT DECISION MAKING: HOW
SITUATIONAL FACTORS SHAPE PREFERENCE-BASED BEHAVIOR

DISSERTATION

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By

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ABSTRACT

The study of Supreme Court decision making in political science research has been heavily influenced by the attitudinal model, which contends that justices' decisions are dominated by their personal policy preferences (Segal and Spaeth 2002). While scholars differ in their acceptance of the attitudinal model, with some arguing for the influence of legal and strategic considerations, most assume that policy preferences exhibit a uniform impact across all situations in which justices make decisions. This assumption has allowed scholars to make broad generalizations about justices' behavior, but my dissertation argues that there exists meaningful and systematic variation, or *heterogeneity*, in the impact of policy preferences that can be explained theoretically and tested empirically. The goal of the dissertation is to relax this uniformity assumption in order to identify and explain the extent to which the impact of justices' policy preferences on their choices varies across different situations.

Using a psychologically-oriented framework, I develop a theory specifying the mechanisms—*attitude strength* and *accountability*—that explain variation in the preference-behavior relationship. I posit that situational factors associated with each mechanism influence the magnitude of preference-based behavior. In particular, I hypothesize that (1) factors associated with the Court's immediate environment, (2) external strategic considerations, and (3) legal considerations will explain variation in the

preference-behavior relationship. The theory offers a systematic perspective for how situational factors *interact* with policy preferences to produce outcomes. Moreover, by incorporating strategic and legal considerations, the theoretical framework engages each of the three principal theories of Supreme Court decision making.

I employ a multilevel (hierarchical) modeling framework to test the hypotheses, and I execute three empirical analyses, each constituting a separate chapter. Each analysis specifies random coefficient models that are designed to test a set of the hypotheses. The first analysis, in Chapter 3, tests whether hypothesized case-level factors within the Court's immediate environment have shaped preference-based behavior for portions of the Warren (1962-1968 terms), Burger (1975-1985 terms), and Rehnquist Courts (1994-2004 terms). The results provide uniform support for some of the hypotheses across all three Court eras, uniform rejection for others, and mixed support across Court eras for others.

The second analysis, executed in Chapter 4, examines the degree to which external strategic considerations—public opinion and the preferences of the other branches of government—shape preference-based behavior. The results reveal that (1) public opinion exhibits an effect contrary to expectations and (2) ideological consensus within Congress and between Congress and the President is capable, under certain conditions, of constraining the magnitude of preference-based behavior. Finally, Chapter 5 empirically assesses the impact of precedent-related legal considerations on the preference-behavior relationship. The results reveal a compelling role for legal considerations, namely that they are capable of governing the magnitude of preference-based behavior on the Court.

On the whole, the theory and findings contribute to the literature on Supreme Court decision making by underscoring the idea that the preference-behavior relationship on the Court is shaped by the varying situations that confront the justices from case to case and year to year.

To my parents, Jim and Kathy Bartels, for instilling in me the values of hard work,

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FIELDS OF STUDY

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CHAPTER 1

INTRODUCTION: PERSPECTIVES ON SUPREME COURT DECISION MAKING

One of the central concerns in political science is explaining how governmental

actors make decisions. Scholarship on the Supreme Court gives primary attention to the

ways that various considerations influence the choices that the Court's justices make.

While various models of decision making exist (which I discuss in detail below), political

scientists studying Supreme Court decision making have been most influenced by the

attitudinal model, which contends that justices decide cases almost exclusively on the

basis of their personal policy (or ideological) preferences, defined as justices'

conceptions of good public or legal policy (Schubert 1974; Rohde and Spaeth 1976;

Segal and Spaeth 1993, 2002). This contention typically provides a starting point for

analyses of justices' behavior, with scholars—even critics of the attitudinal model (e.g.,

Epstein and Knight 1998)—underscoring at the outset the central role of justices' policy

preferences.

Moreover, scholars of judicial behavior, like those who study other government

institutions, typically assume that policy preferences exhibit a *uniform impact* on decision

making across all situations in which choices are made. This assumption has allowed

scholars to make broad generalizations about justices' behavior without an accompanying

interest in conditions that may strengthen or weaken the effects of preferences. While some scholars have suggested exploring these conditions (Gibson 1991; Baum 1997), there has been only limited theoretical and empirical inquiry into the possibility of variation in the strength of the relationship between justices' policy preferences and their choices.

My dissertation undertakes such an inquiry. I argue that there exists meaningful variation, or *heterogeneity*, in the degree of preference-based behavior across various contexts that can be explained theoretically and tested empirically. The goal of the dissertation is to ascertain and explain a particular type of heterogeneity in Supreme Court decision making, namely the extent to which the relationship between justices' policy preferences and their choices (hereinafter, "preference-behavior relationship" or "preference-based behavior") varies across different situations.

Such an examination is substantively important for a number of reasons. First, understanding the conditions under which certain relationships hold—in this case, the relationship between policy preferences and justices' choices—serves a broader scientific goal of expanding our knowledge about how and why justices decide cases in various ways. Second, the analysis represents a departure from the literature on Supreme Court decision making by highlighting the importance of *context*. That is, certain cases and contexts provide justices with different situations, and I examine how situational factors *interact* with policy preferences to produce legal outcomes. A focus on contextual decision making offers more enriched and realistic portrayals of decision making. Third, the theoretical perspective I put forth provides a significant addition to existing models of Supreme Court decision making by recognizing that policy preferences are indeed

influential, but importantly, the degree to which they are influential is a function of the situations that confront the justices across cases and contexts. This contextual variation has consequences for judicial outcomes. Fourth, the dissertation's examination of heterogeneity in decision processes is applicable to studies of other forms of decision making (e.g., congressional decision making, voting behavior, citizen opinion formation) where heterogeneity has been examined only to a limited degree.

After reviewing extant theoretical perspectives of Supreme Court decision making in this chapter, Chapter 2 develops a theory of Supreme Court decision making—embedded within a psychologically-oriented framework motivated by insights on the attitude-behavior relationship—that specifies the conditions under which policy preferences will exhibit a greater or lesser impact on justices' choices. The theory posits that two mechanisms—*attitude strength* and *accountability*—explain variation in the preference-behavior relationship. Characteristics associated with cases and the political context are hypothesized to affect each mechanism to a certain degree and thus help determine the impact of those mechanisms on the preference-behavior relationship.

Chapters 3, 4, and 5 present three types of empirical analyses that are designed to test a set of the hypotheses. In each analysis, I hope to make a methodological contribution by employing a multilevel, or hierarchical, modeling framework that maps the theoretical hypotheses onto a statistical model with a high degree of congruence. Such a methodological framework has rarely been employed in the judicial behavior literature. Chapter 6 offers conclusions and discussions of the dissertation's implications for our understanding of Supreme Court decision making.

THEORETICAL PERSPECTIVES ON SUPREME COURT DECISION MAKING

The traditional view of judicial decision making is characterized succinctly by Gibson's (1983, 9) elegant statement that justices' decisions "are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." Gibson's troika coincides with the three primary models of judicial decision making: the attitudinal model (*what they prefer to do*), the legal model (*tempered by what they think they ought to do*), and the strategic perspective (*constrained by what they perceive is feasible to do*). In some shape or form, all three perspectives have something to say about the nature of the relationship between justices' policy preferences and their choices. I discuss each model below.

The Attitudinal Model

Arguably the dominant model in Supreme Court decision making, the attitudinal model has its roots in three waves of research. The foundations of the attitudinal model are in the legal realism movement of the early to mid-1900s (see George and Epstein 1992; Segal and Spaeth 2002, Chapter 3). In response to the *mechanical jurisprudence* perspective, or the notion that judges' decisions are completely determined by legal and doctrinal considerations, legal realists, including Pound (1931), Frank (1930, 1950), and Llewellen (1951), contended that judges were motivated to act in accordance with their personal values and beliefs. The notion that judges decided cases based solely on careful legal reasoning—e.g., the use of precedent and legal rules—was a myth, according to realists.

Pritchett (1948) essentially ushered these arguments into the political science mainstream as a result of his seminal study, *The Roosevelt Court*. Pritchett emphasized, and provided empirical evidence for, the explanatory and predictive value of a realist model whereby a set of attitudinal factors other than legal considerations affected justices' decisions. The work of Schubert (1962, 1965, 1974), Spaeth (1961, 1963, 1964, Spaeth and Peterson 1971), and Ulmer (1960, 1965) carried Pritchett's arguments to a higher level and fully implemented an initial wave of attitudinal research from a behavioralist perspective. Using psychometric scaling techniques, most notably Guttman scaling, these scholars produced two major conclusions. First, two primary values underlay Supreme Court voting: political—or civil liberties—liberalism and economic liberalism. Second, for each of these issue areas, a single liberal-conservative dimension underlay the justices' votes. Thus, according to this wave of scholarship, justices' decisions on legal issues could best be captured by the attitudes, or personal policy preferences, of the justices on a couple of different issue areas. These studies also concluded that structural dimensions, such as considerations regarding federalism and the norm of deference toward Congress and administrative agencies, were subordinate to the justices' substantive policy preferences (e.g., Spaeth 1964). That is, justices did not adhere to a norm of restraint by deferring to the decisions made by the political branches. Instead, justices deferred to the other branches only when they agreed with the substantive policy outputs produced by those bodies (e.g., Spaeth 1964; Spaeth and Teger 1982).

While this first wave of scholarship lacked a firm theoretical story for *why* justices based their decisions on personal policy preferences, a second wave of work

sought to provide such a rationale. Rohde and Spaeth (1976) and Spaeth (1979) argued that justices are primarily motivated by policy goals; this would later be characterized as justices being "single-minded seekers of legal policy" (George and Epstein 1992, 325). That is, justices attempt to translate their personal policy preferences into legal policy. Second, Rohde and Spaeth argued that three factors endemic to the Supreme Court allow justices to act on their policy preferences: (1) they are electorally unaccountable, (2) they do not possess progressive ambition for higher offices within the political system, and (3) the Supreme Court is the court of last resort that controls its own docket, and also, no other court can overrule its decisions. The lack of external constraints, then, is what allows justices to act on their personal policy preferences, unconstrained by external actors and purged of any motive to deviate from acting on the basis of policy preferences. According to Rohde and Spaeth (1976, 72), "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." Similar to the first wave of scholarship, Rohde and Spaeth, using more updated cumulative scaling evidence, argued that Supreme Court voting possesses a rather simple structure. Three underlying values—freedom, equality, and "New Dealism"—could explain roughly 85% of the justices' votes during the Warren Court and the beginning of the Burger Court. More importantly, these authors again maintain the argument that justices' votes run along a single left-right dimension that reflects the personal policy preferences of the justices.

The third, and perhaps most theoretically solid, wave of attitudinal model scholarship arguably started with Segal and Cover's (1989) attempt to produce an

independent, media-based measure of justices' policy preferences based on editorials from four major newspapers written around the time of a justice's confirmation process. This type of measure, the authors argued, escaped the traditional criticism in judicial behavior research that justices' preferences were inferred from their voting records. Using this independent measure, then, offered an exogenous proxy for justices' policy preferences, and Segal and Cover, as well as a follow-up study by Segal et al. (1995), provided evidence that the scores correlated very highly with justices' aggregate voting records.

In perhaps the most theoretically and empirically impressive statement of the attitudinal model yet, Segal and Spaeth (1993) presented the theoretical argument of the attitudinal model—expanding upon the same arguments used in Rohde and Spaeth—and marshaled systematic empirical evidence showing that justices' decisions on search and seizure cases are strongly influenced by their personal policy preferences.[1] Nine years later, Segal and Spaeth (2002) followed up on their study, which included updated evidence and responses to critics who argued that the authors set up the legal model as a straw man. Segal and Spaeth's (1993, 65) depiction of the attitudinal model can be summarized by their widely-cited statement that the Supreme Court "decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal." That is, for a given case,

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[1] Contemporary versions of the attitudinal model by Rohde and Spaeth (1976) and Segal and Spaeth (1993, 2002) concede that factors other than policy preferences, most notably strategic considerations involving the projected actions of fellow justices, exhibit significant influences in the stages preceding the final vote on the merits (e.g., certiorari voting, opinion assignment, opinion drafting). However, the bottom line, according to these scholars, is that the justices' final votes on the merits are strongly influenced by justices' policy preferences.

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if one can place the two legal alternatives in a left-right policy space relative to the

justices' policy preferences, the attitudinal model contends that justices will simply vote

for the alternative nearest to their ideological preference.

Legal Perspectives and "Hybrid Models"

Unlike the attitudinal model, legal models contend that when deciding cases,

justices are guided by legal rules and structures. A pure legal model suggests that justices

engage in a process resembling "mechanical jurisprudence." That is, they completely

suppress their personal ideological preferences toward legal policy, and instead, their

decisions are solely a function of (1) relevant precedent(s), or *stare decisis*, (2) the plain

meaning of the constitution or statute, and/or (3) the original intent of the

founders/legislature. In accord with standard practice in judicial politics, this section

focuses most intently on the first legal factor, *precedent*.[2]

Political scientists, particularly proponents of the attitudinal model, are generally

skeptical of legal models and argue that justices' legal rationales and the use of

precedents to justify decisions are no more than *post hoc* rationalizations for decisions

that are in reality decided on the basis of ideology (see Segal and Spaeth 2002). Also,

given the nature of the Court's process by which it selects cases, most cases the Court

hears present the justices with difficult legal issues for which there are justifiable

precedents supporting both sides of the case. This leaves the justices with a great deal of

latitude to decide cases on the basis of policy preferences and to cherry pick the

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[2] While most scholars focus on precedent when examining the influence of legal considerations, other studies have examined the influence of plain meaning (Howard and Segal 2002) and original intent (Gates and Phelps 1996; Howard and Segal 2002).

precedents that support their preferred alternative (Segal and Spaeth 2002; Spaeth and Segal 1999).

In their systematic empirical test of the legal model, Spaeth and Segal (1999; Segal and Spaeth 1996) argue that if precedent exerts a genuine impact on decisions, then a reasonable test of the legal model is to examine whether justices who dissented in landmark precedents subsequently adhere to precedent in progeny cases where the landmark precedent is operative. Examining such votes of the justices from 1789 through 1995, Spaeth and Segal find that dissenters in landmark cases adhered to precedent in only about 12% of progeny votes.[3] The authors boldly conclude that "the justices are rarely influenced by *stare decisis*" and are almost exclusively influenced by their policy preferences (Spaeth and Segal 1999, 288).

Spaeth and Segal have been applauded for their efforts at a systematic test of the legal model and for the evidence they do render, but one must be careful not to throw the baby out with the bathwater. First, the authors cast the legal model in "all-or-nothing" terms, closely resembling a *mechanical jurisprudence* depiction of the legal model that, as Caldeira (1994) suggests, no political scientist would accept as a viable explanation of how justices make decisions. Setting up the attitudinal model against a dated conception of legal influence calls into question their arguments against the influence of precedent. Related to this point, the authors' evidence does not completely foreclose the potential influence of legal considerations. Many have correctly pointed out that Spaeth and Segal's test of the model does not account for the potential *joint influence of both policy*

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[3] Spaeth and Segal (1999) also present some more nuanced findings about variation across justices in the degree of "preferentialist" versus "precedentialist" behavior.

preferences and legal considerations in a particular voting situation (e.g., Songer 1994).

In a given case, a "hybrid model" may explain justices' choices, where policy preferences

influence choices, but legal considerations also exhibit a degree of influence.

The idea of such hybrid models was advocated by Pritchett (1953, 1954), who

pioneered attitudinal analysis but *did not* foreclose the influence of other factors in

decision making. His work on the Vinson Court argues that "the rules and traditions of

the Court supply institutional preferences with which [justices'] own preferences must

compete" (Pritchett 1953, 323). Thus, to explain justices' decisions, one must specify the

influence of both policy preferences and *institutional preferences* pertaining to judicial

role, precedent, and deference. Similar "integrated models," which specify concurrent

effects of law and ideology, have been advocated and suggested by others as well (e.g.,

George and Epstein 1992; Songer 1994; Baum 1997).

Related to hybrid models, "fact-pattern models" have been put forth as variants of

a legal model. Segal (1984, 1986) has presented evidence that justices systematically

respond to case facts in search and seizure cases in predictable ways. Similarly, George

and Epstein (1992) have argued that an amalgam of legal (in the form of case facts) and

extra-legal factors exhibit significant influences on the Court's death penalty cases. These

models, then, argue that legal factors, in the form of case stimuli, are able to account for a

significant share of the variation in justices' decision making, which would seemingly

challenge the central tenets of the attitudinal model. However, some contend that the

findings uncovered in fact-pattern analyses are consistent with *both* legal and attitudinal

explanations (see Baum 1997, 75-76; Segal and Spaeth 2002, 320-321).

Richards and Kritzer's (2002) *jurisprudential regimes theory*, which I incorporate

and discuss in more detail in Chapter 5, suggests perhaps the most promising avenue for

understanding the influence of legal considerations on justices' choices. These authors

posit an innovative framework for studying the role of law through what they refer to as a

jurisprudential regime, or "a key precedent, or a set of related precedents, that structures

the way in which the Supreme Court justices evaluate key elements of cases in arriving at

decisions in a particular legal area" (Richards and Kritzer 2002, 308). Thus,

jurisprudential regimes highlight the relevant case facts that should guide justices when

deciding a case. Richards and Kritzer test their model in the free expression issue area

and find that the *Grayned* regime significantly altered the manner in which case facts

influenced justices' decisions, thus producing compelling evidence for their perspective

(see also Kritzer and Richards 2003, 2005).

Strategic Perspectives

Strategic perspectives of Supreme Court decision making suggest that certain

factors in the Court's environment exist that obstruct justices from being able to be

completely attitudinal in their decision making. Like the attitudinal model, strategic

perspectives assume that justices are motivated solely by policy goals, that is, they seek

to implement their personal policy preferences into legal policy. But instead of simply

choosing the legal alternative most proximate to one's preference (as predicted by the

attitudinal model), justices take into account how other actors or institutions might

respond to potential outcomes. Regarding who these actors are, two sets of strategic

considerations are put forth by this school of thought: (1) *intra-institutional*

considerations, referring to justices' accounting for how their fellow justices might react to a decision, and (2) *inter-institutional* considerations, referring to justices' accounting for how the other branches (Congress and the President) and the public might react to its decisions.

Murphy's (1964) classic *Elements of Judicial Strategy* offered a compelling strategic view of Supreme Court behavior centering on the collegial factors and constraints involved in coalition building and the opinion-writing process. He also explored the impact of extra-institutional factors with respect to securing compliance and preventing congressional and presidential hostility. Murphy contends that justices' decisions at various stages in the decision-making process—including bargaining and attempts at persuasion—are based on their policy goals, but at times, justices will depart from acting solely on their own personal policy preferences in order to secure an optimal outcome that can survive the test of time. More recent work by Epstein and Knight (1998) and Maltzman, Spriggs, and Wahlbeck (2000) has both theoretically and empirically expanded upon many of Murphy's claims. These works suggest that at various stages of Supreme Court decision making, justices recognize that they must account for the projected actions of their colleagues in order to secure outcomes that are simultaneously optimal and feasible within a given context. This leads justices to pursue actively certain bargaining and accommodation strategies (e.g., Maltzman and Wahlbeck 1996; Wahlbeck et al. 1998).

Separation-of-powers (SOP) models—the *inter-institutional* variety from strategic perspectives—assume that justices are primarily motivated by their policy goals, and as such, they place a high premium on having their decisions survive in the political system.

Since the justices seek to prevent their decisions from being overridden by Congress and the President, they must account for the preferences of the other branches and produce a decision that fails to trigger an override attempt. Scholars such as Ferejohn and Shipan (1990), Eskridge (1991a, 1991b), Ferejohn and Weingast (1992), Spiller and Gely (1992), and Rogers (2001) have produced formal-theoretic SOP models of inter-institutional constraints and have argued that the Court will, under certain conditions, behave strategically—that is, depart from deciding a case based solely on policy preferences—so as to prevent having its decisions overturned.

Again, a key assumption in these models is that the Court wants to avoid at all costs having its decisions reversed by other actors. It is this motivation that induces justices to behave strategically under certain conditions. While numerous formal SOP models exist, there is little empirical evidence for the core contentions (but see Eskridge 1991a, 1991b; Spiller and Gely 1992; Bergara et al. 2002), and Segal (1997) and Segal and Spaeth (2002) have provided systematic empirical evidence refuting many of the empirical implications of SOP models. Moreover, an analytical disconnect exists between SOP models of Supreme Court decision making and the attitudinal model, namely, the former treats the *Court* as the unit of analysis, while the latter treats *justices' choices* as units of analysis. Somewhat surprisingly, this disconnect has rarely, if ever, been confronted, and scholars in both camps continue to talk past each other.[4] Chapter 4,

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[4] For instance, Segal (1997) refutes SOP model predictions with individual-level evidence, showing that only under rare circumstances do a few *justices* show any evidence of being constrained. Bergara et al. (2002) challenge Segal's evidence with *Court-level* evidence concluding that, to the contrary, the *Court* is constrained to a certain extent. For an interesting perspective on judicial independence and levels of analysis, see Ferejohn (1999).

which incorporates strategic arguments, will be able to render some empirical leverage on this disconnect.

Summary

What do we know about Supreme Court decision making? First and foremost, one of the central findings in judicial politics is that justices' votes are strongly influenced by their personal policy preferences. Importantly, this line of scholarship essentially argues that policy preferences guide decisions with equal force across cases and contexts. This view most certainly dominates the study of Supreme Court decision making, despite the fact that its founding father, C. Herman Pritchett, argued that legal and institutional factors are important influences, too, and that scholars should be more cautious about concluding attitudinal dominance. Pritchett states:

> Political scientists who have done so much to put the "political" in "political jurisprudence" need to emphasize that it is still "jurisprudence." It is judging in a political context, but it is still judging; and judging is something different from legislating or administering. Judges make choices, but they are not the "free" choices of congressmen. *Any accurate analysis of judicial behavior must have as a major purpose a full clarification of the unique limiting conditions under which judicial policy making proceeds.* (Pritchett 1969, 42; emphasis added)

Second, while Spaeth and Segal (1999) have brought to bear forceful evidence against the influence of precedent, other legal perspectives demonstrate that case facts serve as significant stimuli to which justices respond in their voting behavior. Most promising, perhaps, from the legal perspective is the Richards-Kritzer (2002) perspective, arguing that particular issue-specific jurisprudential regimes structure the manner in which justices decide subsequent cases in that issue area. Third, within the strategic perspective, some have made the case that both intra-institutional (collegial influence in

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stages before the final vote on the merits) and inter-institutional factors (influence of the other branches of government) serve to constrain justices from acting solely on their policy preferences. While the evidence for the former set of arguments is compelling, the evidence for the latter is thin and has been refuted by scholars in the attitudinal camp. Most importantly, the challenges to the attitudinal model cannot refute that justices' policy preferences are central to explaining the choices justices make.

HETEROGENEITY, CONTEXT, AND DECISION MAKING

A question central to the theoretical and empirical debates discussed above is: What is the nature of the relationship between justices' policy preferences and their choices? In the interest of parsimony and generalizability, most judicial behavioralists have sought answers to this question by estimating a global, uniform impact of policy preferences across a wide variety of situations, without an accompanying interest in conditions that may strengthen or weaken the impact of preferences. Indeed, some scholars have suggested exploring these conditions (Gibson 1983, 1991; Baum 1994, 1997), but most scholarship shares a common assumption, namely that *the relationship between policy preferences and justices' choices is the same across all types of cases and contexts as well as across justices*. As a result, scholars have gained only a partial sense of *when* policy preferences exhibit a greater or lesser impact on justices' decisions. As alluded to in the introductory paragraphs of this chapter, the goal of the dissertation is to explain, ascertain, and test the extent to which there is systematic variation, or *heterogeneity*, in the impact of policy preferences on justices' choices. Across contexts (cases and terms), justices are provided with varying situations when deciding cases.

Depicted in Figure 1.1, the task of the dissertation is to provide a theoretical rationale for and an empirical test of whether and how this situational variation *moderates*—or shapes the magnitude of—the impact of policy preferences on justices' choices.[5] I refer to this general enterprise as *the heterogeneity perspective*.
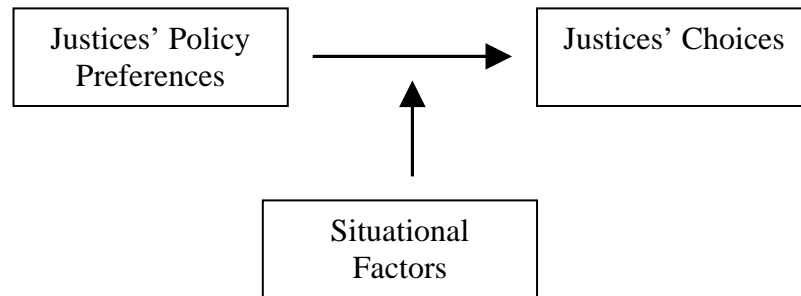
Figure 1.1: The Heterogeneity Perspective—How Situational Factors Moderate the Impact of Policy Preferences on Justices' Choices

On the whole, it is safe to say that scholars have yet to undertake a broad examination of heterogeneity in Supreme Court decision making. However, a couple of exceptions are noteworthy, particularly strategic perspectives and the focus on constraint, which occurs when justices are obstructed from engaging fully in preference-based behavior (Epstein and Knight 1998; Martin 1998). First, the heterogeneity perspective described above resembles the idea of "constraint." For instance, regarding the influence of precedent, Knight and Epstein (1996, 1020) argue that precedent acts as a "constraint

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[5] I stated that scholarship tends to assume a uniform relationship between preferences and behavior across (1) cases and contexts *and* (2) justices. This implies that there are two brands of heterogeneity that could be examined: *situational heterogeneity*, which is discussed in the text and depicted in Figure 1.1, and (2) *individual heterogeneity*, which would examine how the magnitude of preference-based behavior varies across justices. My dissertation examines the former brand of heterogeneity.

on Justices from acting on their personal [policy] preferences." Related to the heterogeneity perspective, this perspective suggests that certain factors—in this case, precedent—*reduce* the magnitude of the preference-behavior relationship.

Martin (1998) presents a systematic analysis of how the SOP structure constrains justices from acting on their personal policy preferences. From a constraint perspective, Martin's evidence indicates that variation in presidential preferences (to the extent that they diverge from justices' preferences) constrains justices from acting on their policy preferences in constitutional cases. Also related to heterogeneity, Gibson (1991) discusses constraint in terms of activism and restraint and in particular, in terms of role orientations (see also Gibson 1978). Gibson (1991, 263) posits that activists can be thought of as "those who tend to rely more on their own values in making decisions, and…restraintists [are] those who rely less on their own values."[6] Spaeth and Segal (1999) highlight heterogeneity across justices in the extent to which they are "preferentialists" versus "precedentialists" in adherence to past landmark precedents.

While these perspectives, particularly the strategic perspective's focus on constraint, bear some resemblance to the heterogeneity perspective, an important difference between the two exists and will become more apparent in the next chapter. Strategic perspectives have highlighted only a limited set of conditions—elements of the political environment (Eskridge 1991; Spiller and Gely 1992; Martin 1998) and collegial interaction (Epstein and Knight 1998; Maltzman et al. 2000)—that may constrain justices from acting on the basis of their policy preferences. Therefore, the heterogeneity perspective I have discussed (and will present in more detail in Chapter 2) is a more

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[6] What Gibson refers to as "values" is basically synonymous with "policy preferences" or "attitudes."

generalized approach than the strategic perspective, since it is interested in an expanded set of factors that explain the *full range of variation in the preference-behavior relationship*. That is, not only do I analyze the factors that might reduce the magnitude of the relationship (as constraint perspectives do), but the factors that might increase it as well. Therefore, the heterogeneity perspective for focusing on variation in the preference-behavior relationship departs from rational choice oriented frameworks employed by past work (Martin 1998; Epstein and Knight 1998).

How can one begin to think theoretically about how situational factors might explain variation in the preference-behavior relationship for Supreme Court justices? Contemporary social psychological perspectives on attitudes and decision making motivate my theoretical framework, presented in Chapter 2, of heterogeneity in Supreme Court decision making. Such perspectives place a central focus on the psychological processes that mediate the relationship between attitudes and behavior as well as the conditions under which attitude-behavior relations are more or less likely to emerge (Eagly and Chaiken 1993, Chapter 4; Fazio and Olson 2003). In specifying the attitude-behavior relation as a *process* of judgment that can be explained, the focus becomes not simply *whether* attitudes guide behavior, but *when* attitudes guide behavior to greater or lesser degrees. As such, I specify the preference-behavior relationship in Supreme Court decision making as a process to be explained theoretically and tested empirically.

Plan of the Dissertation

The plan of the dissertation is to formulate a theory explaining the conditions that enhance or attenuate the relationship between justices' policy preferences and their

choices, and to test empirically the hypotheses flowing from the theoretical framework.

In terms of the scope of the study, a couple of caveats are in order. First, the stage of decision making on which I focus is justices' *decisions on the merits*, that is, justices' choices on cases in which they have granted certiorari, heard oral arguments, and issued a full opinion. Voting data are culled from Spaeth's (2005) *United States Supreme Court Judicial Database, 1953-2004*. The dissertation does not attempt to explain the Court's certiorari stage, or agenda-setting stage, although the insights of the dissertation's theoretical framework could be applied to that stage of decision making.

Second, while the Court hears cases on multiple issue areas—including civil liberties, economics, judicial power, federalism, interstate relations, and federal taxation—the dissertation exclusively examines cases within the civil liberties issue area, which has constituted over half of the Court's plenary agenda from the 1950s onward. Issue areas within civil liberties include criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys. Within the field of judicial behavior, analyzing civil liberties cases has become a modus operandi of empirical inquiry. The primary reason for this practice is because these cases constitute the Court's "volitional agenda," or the Court's *high interest* cases related to its policy goals (Pacelle 1991, 1995). Over time, the Court has shown greater interest in this general issue area. Since the Court takes these cases very seriously, it is argued that this is the issue area where justices' policy preferences have the greatest capacity to exhibit an impact, in contrast to the Court's economics agenda, which Pacelle (1991, 1995) calls the "exigent agenda" due to the lower interest justices attach to this set of cases. Moreover, in the areas of economics, the ideological cleavages are not as clearly defined as they are in civil liberties. In civil

liberties law, liberal legal policy favors individual liberties and rights in the face of government restrictions on those rights and liberties, while conservative legal policy favors allowing certain government restrictions on civil liberties and rights. These differences are not as clear in economics as they are in civil liberties.

Chapter 2 develops a theory, using a psychologically-oriented framework, specifying the mechanisms—*attitude strength* and *accountability*—that explain variation in preference-based behavior. The theory defines a role for situational factors associated with the Court's immediate environment. It also specifies a role for both legal and strategic considerations, thus engaging the principal theories of judicial decision making. I hypothesize that case-level and contextual factors associated with each mechanism systematically influence the impact of policy preferences on justices' choices. The theory offers a systematic perspective, and implies testable hypotheses, for how situational factors *interact* with policy preferences to produce outcomes.

In Chapters 3, 4, and 5, I specify empirical tests that are designed to test a set of the hypotheses. Figure 1.2 depicts the set of hypotheses each empirical chapter tests. A multilevel (hierarchical) modeling framework is well-qualified to test the hypotheses. Hierarchical data structures contain more than one level of analysis, where units from a lower level of analysis are *nested* within units from a higher level of analysis. In each chapter, I specify random coefficient models that provide an opportunity to test explicitly how higher-level situational factors—the factors that are hypothesized to moderate the impact of preferences—explain variation in lower-level relationships, in this case, the relationship between policy preferences and justices' choices. Importantly, the multilevel

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┌─────────────────┐              ┌─────────────────┐
│ Justices' Policy│─────────────▶│ Justices'       │
│ Preferences     │              │ Choices         │
└─────────────────┘       ▲      └─────────────────┘
                          │
                          │
              ┌─────────────────────┐
              │ Case-Level Factors  │
              │ within the Court's  │
              │ Immediate Environment│
              └─────────────────────┘
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Chapter 3

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┌─────────────────┐              ┌─────────────────┐
│ Justices' Policy│─────────────▶│ Justices'       │
│ Preferences     │              │ Choices         │
└─────────────────┘       ▲      └─────────────────┘
                          │
                          │
          ┌─────────────────────────────┐
          │ Strategic Considerations    │
          │ (Public Mood and Preferences│
          │ of the Other Branches)      │
          └─────────────────────────────┘
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Chapter 4

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┌─────────────────┐              ┌─────────────────┐
│ Justices' Policy│─────────────▶│ Justices'       │
│ Preferences     │              │ Choices         │
└─────────────────┘       ▲      └─────────────────┘
                          │
                          │
              ┌─────────────────┐
              │ Legal           │
              │ Considerations  │
              └─────────────────┘
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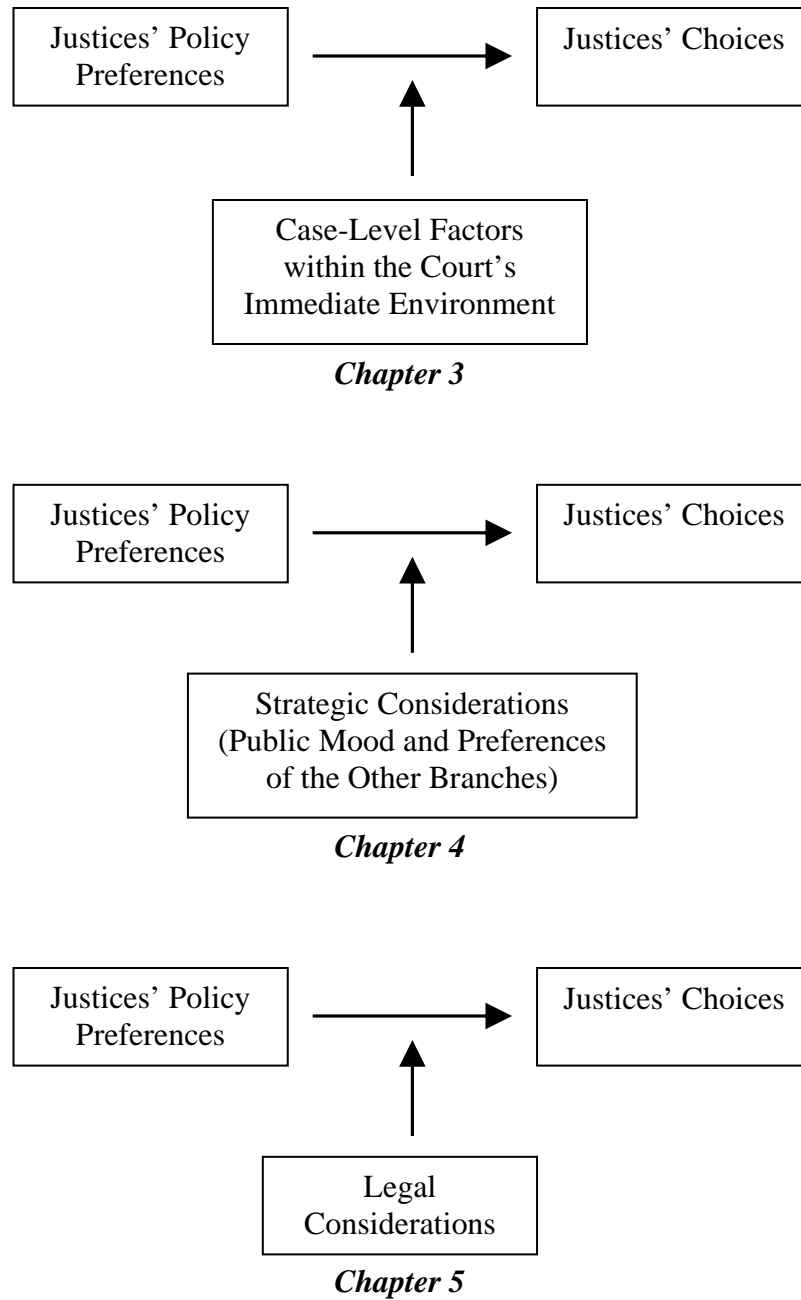
Chapter 5

Figure 1.2: Overview of Chapters Containing Empirical Analyses

modeling framework maps the theoretical specification onto a statistical specification

with a high degree of congruence.

In Chapter 3, I test how six case-level factors within the Court's immediate environment explain variation in preference-based behavior. Three factors (salience, complexity, and issue familiarity) are associated with the attitude strength mechanism and three (interest group environment, U.S. participation, and statutory versus constitutional cases) are associated with the accountability mechanism. The analysis treats justices' civil liberties votes as a two-level hierarchy—*justices' choices* nested within *cases*—to test whether these hypothesized case-level factors explain variation in the impact of policy preferences on choices. Separate models are estimated for portions of the Warren (1962-1968 terms), Burger (1975-1985 terms), and Rehnquist Courts (1994-2004 terms).

Chapter 4 examines whether two contextual-level factors associated with strategic perspectives—public opinion and the preferences of the President and Congress—explain variation in preference-based behavior over time. The empirical analysis employs a three-level hierarchical structure—*justices' choices* nested within *cases* nested within *years*—and contributes to the literature on strategic influences and separation-of-powers perspectives. In addition to the potential direct effects of strategic considerations, the analysis examines a mechanism whereby strategic considerations potentially shape the magnitude of preference-based behavior.

Chapter 5 adopts Richards and Kritzer's (2002) jurisprudential regimes concept and tests how legal considerations shape preference-based behavior in the free expression issue area (1953-1997 terms). The analysis uses a three-level hierarchical structure—*justices' choices* nested within *cases* nested within *years*—to test whether jurisprudential considerations regulate the room policy preferences have to operate and whether they do

so in significantly different ways before and after the regime. Importantly, in addition to examining the direct effects legal considerations exhibit on outcomes (in accord with previous studies), Chapter 5 also examines a different mechanism of influence for legal considerations than what has been examined in the past, that is, the capacity for legal factors to explain variation in preference-based behavior.

In Chapter 6, I summarize the substantive conclusions of the dissertation and discuss the implications the dissertation's core findings have for our understanding of Supreme Court decision making. I also discuss how the dissertation's theoretical framework of heterogeneity in judicial decision making is capable of providing a springboard to other avenues of research, both within and beyond the judicial politics literature.

CHAPTER 2

HETEROGENEITY IN SUPREME COURT DECISION MAKING: THEORETICAL

FRAMEWORK AND HYPOTHESES

This chapter puts forth a theory of heterogeneity in Supreme Court decision

making and presents testable hypotheses that will be put to empirical scrutiny in Chapters

3, 4, and 5. The theory, which attempts to explain the conditions that strengthen or

weaken the impact of policy preferences, is motivated by social psychological

perspectives on the attitude-behavior relationship, and therefore, I briefly review the

primary insights from these perspectives before launching directly into the theory. As a

conceptual clarification, the dissertation treats "policy preferences" and "attitudes"

toward legal policy as synonymous. Thus, the phrases "preference-behavior relationship"

and "attitude-behavior relationship" are treated as interchangeable.

THE ATTITUDE-BEHAVIOR RELATIONSHIP

For years, social psychologists assumed that attitudes—defined as tendencies to

evaluate an object or entity with a degree of favor or disfavor—had a potent and uniform

impact on behavior (Eagly and Chaiken 1993; Fazio and Olson 2003). In response to

critics of this assumption who suggested that many attitude-behavior correlations were

minimal (e.g., Wicker 1969), scholars shifted the focus of inquiry from *whether* attitudes guide behavior to *when* attitudes guide behavior (e.g., Zanna and Fazio 1982). Importantly, social psychologists have specified the psychological processes by which attitudes guide behavior and the individual and situational characteristics that moderate the attitude-behavior relationship. Two such characteristics stand out.

Attitude strength, an individual-level characteristic, is one of these moderators; the stronger the attitude, the more likely it will impact behavior (Petty and Krosnick 1995; Miller and Peterson 2004). There are multiple facets of attitude strength (see Miller and Peterson 2004), and I highlight two especially relevant to the dissertation. Fazio (e.g., Fazio et al. 1982; Fazio and Williams 1986; Fazio 1986) has long argued that *attitude accessibility*—defined as the association in memory between an attitude object and its evaluation—moderates the attitude-behavior relationship. Attitude accessibility ranges from "non-attitudes" (Converse 1970), where no evaluative orientation comes to one's mind upon exposure to an object, to automatic activation (e.g., Fazio 1995), where an evaluative orientation immediately comes to mind upon exposure to an attitude object. The key finding from Fazio's research program is that the more accessible the attitude, the more likely it will influence behavior.

Some social psychologists have also emphasized that *attitude importance*, a second variety of attitude strength, moderates the impact of attitudes on behavior, for example, in the degree of issue voting in the electorate (Krosnick 1988, 1990). According to these studies, individuals differ over the importance they attach to certain policies; the more important the issue is to them, the more potently their issue positions will affect their vote choices. While accessibility represents the degree to which a consideration is

able to be culled from memory, importance relates to the level of personal salience people attach to certain issues.

In media effects research, attitude strength can be thought of as a contextual-level, as opposed to an individual-level, characteristic. According to some (e.g., Iyengar and Kinder 1987), the media have an agenda-setting function such that when they cover an issue, the public as a whole believes that this issue is more important to the nation compared to when the media does not cover an issue. In this conception, the mass public is the object of a universally distributed signal, in this case, media coverage of an issue. I will have more to say about contextual versus individual-level variation below, since it relates to my conception of attitude strength in Supreme Court decision making.

The second key factor of interest in determining the nature and magnitude of the attitude-behavior relation is *motivation*. In social psychology, motivation is often treated as situational; under different conditions, people have different motivations to behave in various ways (e.g., Fiske and Taylor 1991; Kunda 1990; Fazio and Towles-Schwen 1999). Of course, many judicial specialists adopt the assumption that Supreme Court justices are motivated solely by policy goals, that they seek to impose their personal policy preferences on legal outcomes. Baum's (1994, 1997) multiple goals framework for judges, which adopts social psychological insights, is largely a response to the one-goal assumption long dominant in Supreme Court decision-making research. While justices may be motivated by policy goals under various conditions, under other conditions, justices may be motivated by accuracy goals, for instance, seeking to achieve both good law and good policy (Baum 1997). Furthermore, justices may be motivated in part to please various legal and public audiences (Baum 1997, 47-55). According to Baum and

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others, the key is to ascertain the conditions under which a particular motivation, or a combination thereof, becomes operative.

Social psychologists who have posited the multiple processes by which attitudes guide behavior—ranging from deliberative, reasoned processes (Fishbein and Ajzen 1975) to more spontaneous processes where attitudes are strongly predictive of behavior (Fazio 1990; Fazio and Towles-Schwen 1999)—have highlighted motivational factors that initiate people into one process over another (e.g., Fazio and Towles-Schwen 1999). Inquiries into the processes by which attitudes are influential in a decision-making context parallel other social psychological perspectives, including schematic perspectives (Fiske and Taylor 1991) and motivated reasoning (Kunda 1990), that describe top-down versus bottom-up reasoning processes. In a top-down process, the generic predispositions people bring to a judgment context dictate how they process new information in front of them. Top-down processing can be biased processing, where the importance of the data and evidence are downplayed and the importance of one's predispositions are elevated. Bottom-up processing, on the other hand, entails careful scrutiny of the facts and evidence at hand in a decision context; in this data-driven reasoning process, a person attempts to suppress the influence of his or her predispositions or biases and instead be guided objectively by the facts and evidence. In short, one's motivations in a given decision context determine which type of reasoning process a person engages in.

Accountability—defined as an "implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others" (Lerner and Tetlock 1999, 255)—is a key situational factor affecting motivation. People who possess some level of accountability know their decisions are going to be assessed and reviewed by

external audiences and entities and therefore may possess a "fear of invalidity" (Fazio and Towles-Schwen 1999), which means they may be highly motivated to "get the decision right" and be as accurate as possible. Therefore, accountability induces a bottom-up reasoning process, where one suppresses attitudinal biases (to a degree) and is influenced by more objective considerations (Fazio and Towles-Schwen 1999). In short, increasing accountability levels should reduce the influence of attitudes on behavior (Fazio and Towles-Schwen 1999; Schuette and Fazio 1995).

THEORETICAL FRAMEWORK

Embedded within these general perspectives, I posit that two key mechanisms influence the nature and magnitude of the preference-behavior relationship for Supreme Court justices: *attitude strength* and *accountability*. The theoretical framework contends that certain situational characteristics—factors that vary across both cases and years—affect each mechanism to a certain degree and thus help determine the impact of those mechanisms on the preference-behavior relationship. This section proceeds in two parts. First, I discuss what it means for the impact of policy preferences to vary across different situations. In doing so, I present theoretical scenarios by which a situational characteristic may enhance or attenuate the impact of policy preferences on justices' choices. The second part of this section presents theoretical rationales and testable hypotheses for how particular situational factors associated with each mechanism of influence affect the preference-behavior relationship. The empirical analysis chapters (3, 4, and 5) will revisit the hypotheses and the rationales for each.

Specifying the *Impact of Policy Preferences*

What does it mean for a situational characteristic to affect the preference-behavior relationship for justices? Below, I discuss how a particular *case-level* factor, e.g., salience or case complexity, might explain variation in the preference-behavior relationship.

In social psychological studies and judicial decision-making studies alike, the impact of preferences is posited and assessed in comparative terms; that is, *variation* in preferences *across justices* explains the propensity of casting a liberal or conservative vote. Thus, if preferences are influential, then for a typical case, liberal justices will be significantly more likely than conservative justices to cast a liberal vote in a given case. Put another way, as one's preferences for liberal (conservative) legal policy increase, the propensity of casting a liberal (conservative) vote increases as well, *ceteris paribus*. Segal and Spaeth's (2002, Chapter 8) evidence from the search-and-seizure issue area shows that, controlling for relevant case facts, as policy preferences become more liberal, the probability of casting a liberal vote significantly increases. It is important to highlight this issue of *relative comparisons* when parsing out the empirical implications of the heterogeneity perspective.

To understand the full range of variation that exists in the preference-behavior relationship, Figure 2.1 represents two extreme scenarios of the impact of policy preferences. The X-axis represents justices' policy preferences ranging from conservative to liberal. The Y-axis represents the justices' behavior in the form of the probability of casting a liberal vote in a given case. First, the solid, steep line represents a situation where policy preferences are completely determinative of behavior. For a given case, controlling for various case stimuli, extreme conservatives are 100% likely to cast a
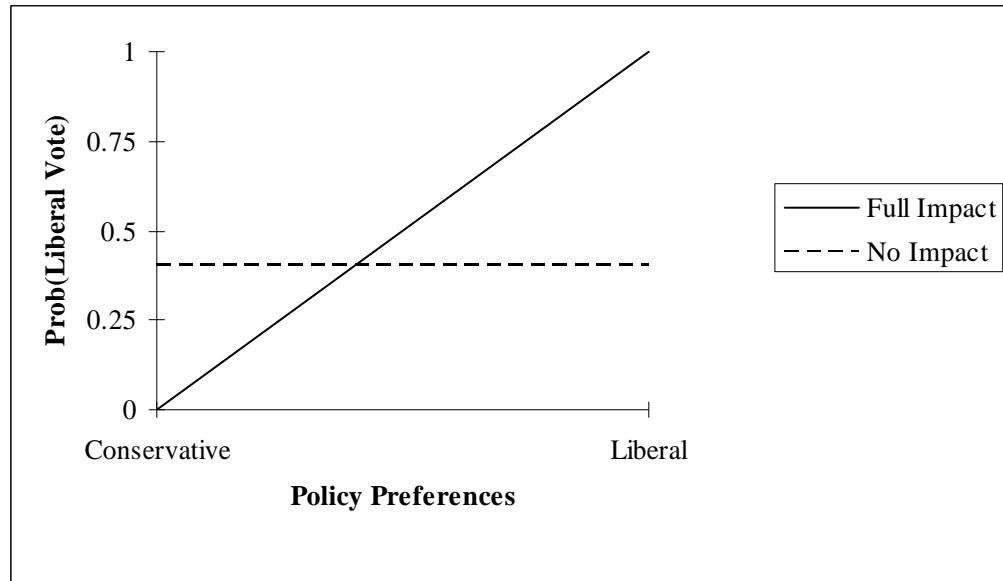
Figure 2.1: Two Extreme Scenarios of the Impact of Policy Preferences

conservative vote, and extreme liberals are 100% likely to cast a liberal vote. There is

extreme ideological polarization in such a decision context, suggesting that the decision

turns strongly on justices' policy preferences. At the other extreme, represented by the

dashed, flat line, policy preferences provide no means of differentiating the votes of the

justices, suggesting that preferences have no impact. In this instance, consensus in voting

propensities exists across justices, such that liberal justices are no more likely to cast a

liberal vote than conservative justices.

The dissertation seeks to explain the range of variation in preference-based

behavior between these two extreme scenarios depicted in Figure 2.1. The theoretical

framework posits that certain situational characteristics in a given decision context can

either *enhance* or *attenuate* the impact of policy preferences on justices' choices. Related

to Figure 2.1, *enhancement* means that the line representing the preference-behavior relationship becomes steeper (tending toward the "Full Impact" scenario in Figure 2.1), and *attenuation* means that the line becomes flatter (tending toward the "No Impact" scenario). "Attenuation" is akin to strategic theorists' conception of "constraint" (Epstein and Knight 1998; Knight and Epstein 1996), which, as alluded to previously, calls attention to the similarities between the heterogeneity and strategic perspectives.[1]

Figures 2.2 and 2.3 represent scenarios by which certain situational characteristics can either enhance or attenuate the impact of policy preferences. Note that these are highly stylized scenarios. For the sake of illustration, assume that these scenarios refer to *case-level factors* that enhance or attenuate preference-based behavior. Figure 2.2 depicts theoretical enhancement scenarios. The solid line represents a sort of "baseline" effect of preferences, and, in this example, it shows that an extreme conservative's probability of casting a liberal vote is 0.25, a true moderate 0.5, and an extreme liberal 0.75. Given the relative comparison interpretation discussed above, the baseline plot shows that, *ceteris paribus*, liberals are significantly more likely than conservatives (and moderates) to cast a liberal vote in a given case.

There are two scenarios by which a case-level characteristic enhances the impact of policy preferences relative to the baseline. The first, depicted in the long-dashed line, is what I refer to as the "enhancement-polarization" effect. In this scenario, a case-level characteristic induces ideologically-polarized behavior amongst the justices, relative to

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[1] As explained above, this framework for understanding the impact of preferences centers on the steepness of the line representing the relationship between preferences and behavior. Another way of thinking of heterogeneity would center on a "goodness-of-fit criterion," where the goal would be to ascertain differences, across contextual conditions, in how much of the *variance* in voting behavior is explained by policy preferences.

baseline behavior. This is seen in comparing the steepness of each line's slope; the steeper the slope, the stronger the impact of policy preferences and the more polarized justices are in their ideological voting. The presence of some case-level characteristic (compared to the baseline) causes liberals to be even more likely to cast liberal votes and conservatives to be more likely to cast conservative votes. The second type of enhancement is what I refer to as "asymmetric enhancement," depicted in Figure 2.2 as the short-dashed line. In this scenario, a case-level characteristic enhances the impact of preferences, but it does so asymmetrically. Ideologically-based behavior is bolstered to a greater extent among liberals compared to conservatives, or vice versa. For instance, Figure 2.2 depicts liberals as significantly more likely to cast a liberal vote compared to
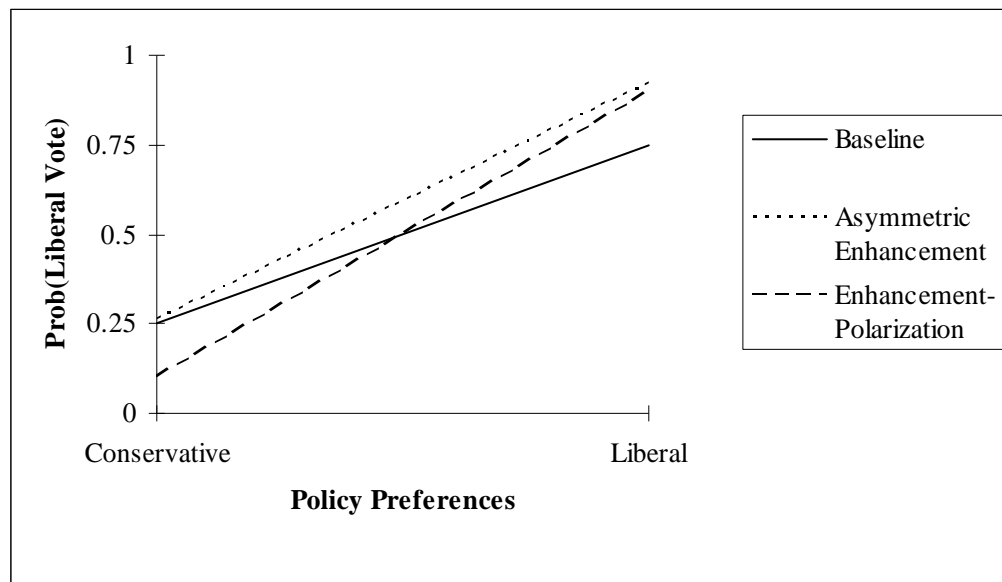
Figure 2.2: Theoretical Enhancement Scenarios

the baseline, while extreme conservatives barely stray from their default positions. In this scenario, it is important to examine how moderates behave. In this example, conservative-leaning moderates appear to be about 50% likely to cast a liberal vote. The case characteristic appears to pull everyone in the liberal direction, including the pivotal moderates, leading to the increasing prospects of a liberal case outcome. An asymmetric enhancement pattern suggests that a case-level factor is exhibiting multiple paths of influence: (1) As an enhancer of preference-based behavior, which is the focus of the heterogeneity perspective, and (2) as an overall influence on the case outcome.

Figure 2.3 depicts theoretical attenuation scenarios. The first is "attenuation-consensus," depicted as the long-dashed line. In this scenario, a case characteristic ideologically *unifies* the justices around a more consensual position, relative to the
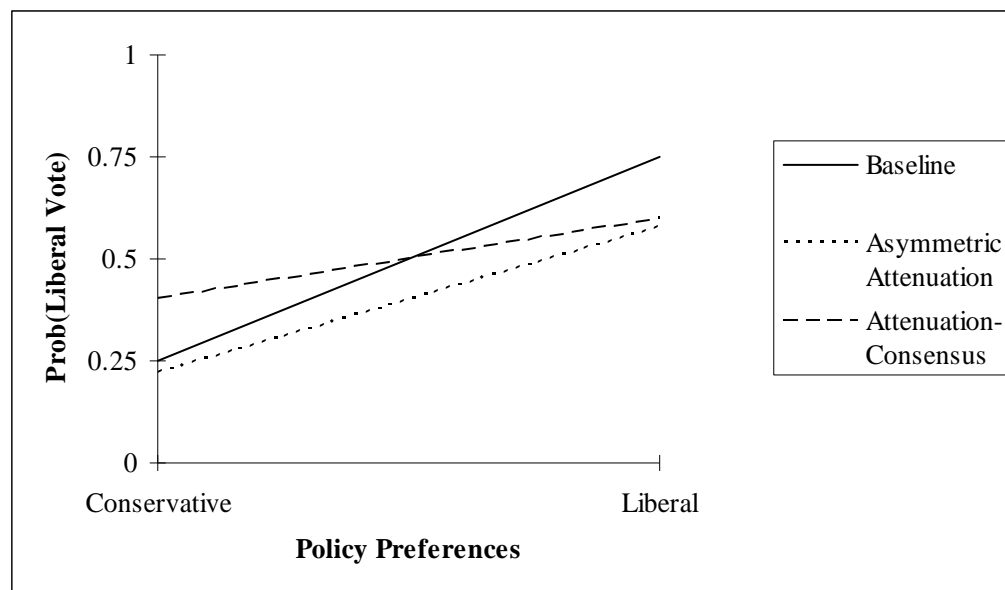
Figure 2.3: Theoretical Attenuation Scenarios

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baseline. The slope of the line is much less steep, meaning that the impact of policy

preferences is reduced. Compared to the baseline, conservatives are less likely to engage

in their typical conservative behavior, and liberals are less likely to engage in their typical

liberal behavior. The second scenario is "asymmetric attenuation," depicted as the short-

dashed line in Figure 2.3. In this scenario, a case characteristic induces one group of

justices—either liberals or conservatives—to deviate from their baseline preference-

based behavior. Without loss of generality, Figure 2.3 depicts liberals as being

significantly more willing to cast a conservative vote, relative to the baseline, and

conservatives just barely more likely to cast a conservative vote. Like its counterpart in

Figure 2.2, in this scenario, a case characteristic induces all justices, but especially

liberals, to tend toward a conservative vote. Again, it is important to see how the

moderates, as pivotal actors, behave in this scenario. Note how moderates would be

pulled toward a conservative vote, meaning that, compared to baseline behavior, the

characteristic seems to increase the overall likelihood of a conservative case outcome.

This pattern again, like its enhancement counterpart, suggests that a case-level factor

exhibits multiple paths of influence—attenuating preference-based behavior and

influencing the case outcome.

Having provided a conceptual framework for understanding how certain

situational characteristics can enhance or attenuate preference-based behavior, I now

move to a discussion that hypothesizes particular situational characteristics associated

with attitude strength and accountability that shape the magnitude of preference-based

behavior.

Attitude Strength

The first mechanism posited to affect the preference-behavior relationship is attitude strength.[2] In the context of Supreme Court decision making, attitude strength is defined as the degree to which justices' preferences toward an issue are activated once they are confronted with a case. I posit that particular case stimuli prime policy preferences to differing degrees. My conceptualization of attitude strength is slightly different from social psychological perspectives in terms of the units over which strength varies. In social psychological studies (e.g., Fazio 1995; Krosnick 1988), strength varies across *individuals*; person A may possess very strong attitudes toward an attitude object, yet person B may not have not have strong feelings at all for the same object. In my perspective, strength is treated as a contextual factor that varies across *cases*. Certain case-level factors activate strength to varying degrees, and these factors are treated as universally-dispersed signals to the justices, much like how the media's coverage of a policy issue, as mentioned above, is dispersed to the mass public in studies of media effects (Iyengar and Kinder 1987).

I posit that three case-level factors are associated with attitude strength. First, justices are likely to exhibit stronger preference-based behavior on issues with which they have high familiarity. In my perspective, previous experience with an issue is a *case-level* characteristic, as opposed to a factor that varies across justices. Legal issues can be thought of as either established "blue chip" issues that have been decided on many times, or relatively new issues that are just making their way into the legal system. Search-and-

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[2] I use the term "attitude strength" instead of "preference strength" because it has a long history of inquiry in social psychology (see Petty and Krosnick 1995) and possesses an increasingly important presence in political science (see Miller and Peterson 2004). I view the two terms as synonymous.

seizure cases provide a good example. The Court has been deciding these types of cases for years, and as a result, justices maintain less uncertainty about their policy positions on this issue. Thus, when justices are confronted with a search-and-seizure case, strong policy preferences are going to be primed, leading to ideologically-polarized voting behavior. However, for newer issues on which the Court has rarely decided, policy preferences toward the issue may not become activated to the same degree, perhaps leading to a more ideologically-consensual voting situation.

To put it simply, my conceptualization of issue familiarity taps into the notion that certain issues that come before the Court are either relatively new or relatively old issues. This assumes further that issue familiarity is an objective case-level factor that all of the justices perceive in the same manner. But this seems like a very reasonable assumption given the nature of justices' career paths. For example, Justice Breyer in the 1994 term (his first term) is more than likely going to perceive issue familiarity in a particular case the same as the long-serving Justice Rehnquist because it is safe to assume that before his justiceship began, Justice Breyer kept up with the legal issues swirling around the federal courts. Moreover, like so many other justices, Breyer served as a judge previously.[3]

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[3] The validity of this assumption may be threatened by the possibility of acclimation effects (e.g., Hagle 1993), whereby a justice may overcome a learning curve in the first couple of years of service with respect to perceptions of issue familiarity. However, since issue familiarity is assumed to be an objective case-level factor and since most justices in the modern era have had either prior experience as a judge or prior experience in a law-related job, the assumption that all justices—new and old—will hold similar perceptions of issue familiarity seems very reasonable. Some notable exceptions to the norm of possessing prior judicial experience include Justice Clark, who worked in the Justice Department for President Truman; Chief Justice Warren, who was Attorney General and Governor of California; Justice Rehnquist, who worked in the Justice Department for President Nixon; and Justice Powell, who worked in private practice and who was a past president of the American Bar Association.

Thus, cases with higher issue familiarity should invoke enhanced preference-based behavior across justices, something akin to an "enhancement-polarization" effect in Figure 2.2. This line of reasoning implies the following hypothesis:

Hypothesis 1: Increases in issue familiarity will enhance the magnitude of the preference-behavior relationship.

The second strength-related characteristic is *case complexity*. Cases with multiple legal provisions and multiple issues will make it more difficult for both (1) the activation of a strong policy preference, since justices might have preferences in two different directions on each of the separate issues present in the case, and (2) the determination of where the alternatives of the case lie in policy space relative to the justice's policy preference.

Case complexity is related to what Epstein and Segal (2006) have dubbed "value conflict" in Supreme Court decision making. Value conflict exists when a second issue within a case exerts a countervailing force against a justice's preferred position on the primary substantive legal issue. Epstein and Segal (2006) argue that a non-trivial number of cases in the First Amendment issue area are rife with value conflict. For instance, the propensity of supporting a free speech claim (the liberal position) may increase for conservative justices and decrease for liberal justices when such a free speech ruling would favor the right of anti-abortion groups to protest outside of abortion clinics. In this example, the countervailing forces are clear. Recall that in general, liberal justices are typically more supportive of free speech claims, and conservatives are typically more lenient toward allowing governmental regulations of free speech. Yet in this case, a liberal ruling in support of free speech would support a *conservative* cause, i.e., the right

of anti-abortion groups to protest outside of abortion clinics. This countervailing issue pulls conservative justices in the direction of *supporting* the free speech claim (a liberal position) and liberals in the direction of *not supporting* free speech (the conservative position). Epstein and Segal find that in some cases with these countervailing forces during the Rehnquist Court, conservative justices (particularly Thomas and Scalia) were actually *more likely* to support First Amendment claims (the liberal position) than liberal justices (Stevens, Ginsburg, Souter, and Breyer).

My conceptualization of case complexity is akin to Epstein and Segal's notion of value conflict, except that it is a bit more diffuse. While Epstein and Segal set out to pinpoint the cases where this value conflict exists, my conceptualization of complexity contends that the *potential* for this type of conflict is going to be greater as the number of issues and/or legal provisions in a case increases. As this capacity increases, I contend, the preference-behavior relationship will decrease. I posit the following hypothesis:

Hypothesis 2: Increases in case complexity will attenuate the preference-behavior relationship.

The third strength-related characteristic is case *salience*, which implies that the case is of high importance to the justices. It is safe to assume that justices recognize the importance of a case as they become familiar with its substance (e.g., Epstein and Segal 2000), and it is in these salient cases that justices will attempt to optimize the chances of implementing their policy preferences into legal policy. I posit that salient cases will prime strong policy preferences across justices, and thus, increases in salience will enhance the preference-behavior relationship.

The above conceptualization of salience is called "contemporaneous salience" (Epstein and Segal 2000) because it represents what the justices themselves perceive to be particularly important cases *at the time they are being considered*. Moreover, contemporaneous salience is mostly exogenous in nature, meaning that the processes by which justices come to perceive a case as salient are largely unknown. If these considerations are mostly internal and unaffected by other actors' perceptions of salience, then the exogeneity quality of salience is not problematic. But what if justices' perceptions of salience are influenced by what other actors think is important? Beyond the justices, we know that some Supreme Court cases are especially salient to external audiences, including political activists, policy and interest groups, the media, and the public. If justices' perceptions of salience for a given case are influenced by what these other actors believe is salient, then, beyond being a factor associated with attitude strength, salience may also be associated with *accountability*. For instance, in cases that conservative policy groups believe to be important, perhaps Justice Scalia, who frequently gives public speeches to these policy groups, feels accountable to these groups in some way. In cases perceived to be highly important to the mass public writ large, perhaps Justice O'Connor, as the "swing justice" on the Rehnquist Court, was particularly constrained from voting on the basis of her policy preferences.

Thus, it is possible that salience may act vis-à-vis an attitude strength and/or accountability mechanism. Moreover, as the examples in the previous paragraph hint at, the two mechanisms may operate differently on different sets of justices, for example, strong ideologues versus moderates. These are mostly empirical questions, and the

analysis in Chapter 3 will illuminate the above speculation. For now, I simply state the

following hypothesis:

> **Hypothesis 3**: Increases in case salience will enhance the magnitude of the
> preference-behavior relationship.

Accountability

Accountability, defined as a justice's perceived implicit or explicit obligation to

justify and/or defend the merits of a legal decision to an external audience, is a key factor

determining motivation. My theoretical framework calls attention to the notion that in

some cases, justices may feel accountable to a particular audience or entity, which will

affect their motivations and thus, the nature of preference-based behavior in a case (Baum

1997, 47-55). Accountability can be triggered, I contend, any time an external entity is

either directly involved in a case or potentially impacted by the Court's decision. In some

instances, justices may feel accountable to Congress, the executive branch, the legal

community, the interest group environment, or the public. Accountability is a sort of

constraint induced by the Supreme Court's role in the legal and political system.

Importantly, I contend that accountability is a situational factor that attenuates the impact

of policy preferences (Figure 2.3), leading to less ideologically-polarized behavior.

Moreover, accountability to a particular entity may be manifested via multiple routes,

which, as will be seen below, is the case for both Congress and the executive branch.[4]

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[4] Three different means for the executive branch are posited: Solicitor General participation, statutory
versus constitutional interpretation, and the ideological composition of the presidency. For Congress, two
means are posited: statutory versus constitutional interpretation and the ideological composition of
Congress.

My adoption of the accountability mechanism may be regarded as somewhat unexpected since most scholarship tends to define the Supreme Court as the governmental body that is *least accountable* to any other actor or institution. Recall the theoretical foundations of the attitudinal model: justices are free from the reigns of accountability by which other actors in government (e.g., the President, members of Congress, agencies, cabinet secretaries) are highly constrained. Since justices are free from these external constraints that would otherwise impose accountability on them, they have unbridled discretion to do what they want—pursue their policy goals and decide cases almost exclusively on the basis of their policy preferences.

The constraints to which attitudinal theorists (i.e., Segal and Spaeth 2002) refer might be dubbed "overt constraints," such as the prospects of the Court being overruled by other actors and/or the Court having its powers curbed. Note that these are precisely the constraints that inter-institutional strategic theorists (Eskridge 1991a; Spiller and Gely 1992; Epstein and Knight 1998; Epstein, Knight, and Martin 2001; Martin 1998; Rogers 2001) contend *do* constrain the justices from acting on the basis of their policy preferences. Thus, while attitudinalists and strategic theorists disagree over whether constraints exist in the first place, both agree nonetheless that constraint is possible only when an external actor (such as the Congress or the President) is capable of launching overt reprisals (e.g., overrides and court-curbing) against the Court in response to a decision or group of decisions. While I posit that a set of such overt accountability-related factors (such as statutory versus constitutional interpretation, the preferences of the other branches, and public opinion) might constrain the justices, I also contend that some more subtle and indirect accountability-related factors—namely, the interest group

environment and Solicitor General participation—exist that might constrain the justices. Described in more detail below, the entities in this latter set share an important feature: while these entities cannot directly launch reprisals against the Court like Congress and the President can, they possess important characteristics such that the justices may find it in their interests to account for their positions.

The first accountability-related factor is the *information environment*, specifically the nature and balance of *amicus curiae*, or "friend of the Court," briefs in a case. Interest groups, who make up the bulk of amicus participation, serve an important informational function for the justices (e.g., Caldeira and Wright 1988; Kearney and Merrill 2000; Collins 2004), and therefore, accountability to these groups may be triggered to varying degrees depending on the case. I posit that justices will be sensitive to the degree of *consensus* or *polarization* that exists in the interest group information environment. As the information environment becomes more polarized—i.e., as the number of briefs supporting each side becomes increasingly balanced—justices will be more *unconstrained* to vote their policy preferences; accountability to the interest group environment as a whole would be low because there are groups supporting both sides equally. But as the information environment becomes increasingly consensual toward a position, justices may feel increasingly accountable to this existing consensus.

While interest groups do not explicitly wield sticks in order to influence the Court, it is reasonable to assume that justices care about their standing with these groups for reasons concerning both self-presentation and institutional integrity (Baum 1997). To the extent that there is a consensual interest group environment, justices would have a difficult time justifying why they voted against such a consensus. Moreover, in terms of

implementation and the longevity of a particular decision, interest groups could use the fact that there was consensus as a rallying cry to mobilize their members against a decision that went against such a consensus. Thus, given the above arguments, I posit Hypothesis 4.

> **Hypothesis 4**: Increasing levels of ideological consensus in the information environment will attenuate the magnitude of the preference-behavior relationship.

The second accountability-related factor involves justices' accountability to the *executive branch via the Office of the Solicitor General* (OSG), which represents the United States government when it is either a direct party or *amicus curiae* in a case. The OSG's success in the Supreme Court is well-documented (e.g., Segal and Reedy 1988; Segal 1990; Pacelle 2003; Ditslear 2003). I take previous perspectives on the OSG's influence a step further by arguing that justices maintain a sense of *accountability* to the OSG, which is rooted in two sources.

The first source centers on the informational benefits justices receive from the OSG and the credibility associated with the OSG. Often called the "tenth justice," the Solicitor General has earned a wealth of credibility with the Court that comes from the OSG's sensitivity to its role "between law and politics" (Pacelle 2003). That is, the OSG possesses a complex goal structure inducing it to balance its interest in serving the President with its fidelity to the law and to the Court (Pacelle 2003, Chapter 1). The OSG and the Supreme Court have built a trusting relationship over time that is maintained regardless of the party of the President who appointed the Solicitor General. As the ultimate "repeat player," the OSG possesses a wealth of legal resources and a finicky

case-screening strategy that makes it an extremely valuable informational source as well as an ally to the justices.

The second source of influence centers on a norm of deference given to the executive branch over other actors. While some scholarship contends that justices defer to a governmental body only when they agree with the substantive decision produced by that body (Spaeth 1964; Spaeth and Teger 1982), other work suggests that executive success in front of the Court is a result of deference (e.g., Segal 1984, 1990; Segal and Reedy 1988; Salokar 1992; Pacelle 2003).[5]

Both sources of influence—credibility due to informational benefits and deference toward the executive branch—are related in that credibility breeds deference and vice versa. Moreover, I contend that both map onto the heterogeneity perspective quite well. In its purest form, deference can be thought of as a norm that *restricts the room preferences* have to operate. Thus, if deference is operative in a case, then two effects should be seen: (1) the magnitude of the preference-behavior relationship will decrease, and (2) the object of deference will have a greater likelihood of winning before the Court compared to when it does not participate. Previous studies of executive success and deference have focused primarily on the second effect without considering deference toward the OSG as a norm that restricts, or constrains, preference-based behavior. Thus, I posit Hypotheses 5a:

> **Hypothesis 5a**: OSG participation as a direct party will attenuate the impact of justices' policy preferences, relative to when there is no OSG participation in a case.

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[5] McGuire (1998) concludes that OSG success is the result of superior expertise of the OSG compared to other litigants. Moreover, Deen, Ignagni, and Meernik (2003) suggest that the OSG's influence as *amicus curiae* has declined over time. My analyses in Chapter 3 have implications for Deen et al.'s findings.

Furthermore, since the U.S.'s interest in civil liberties cases (the focus of the empirical

tests in Chapter 3) is typically in the conservative direction, I expect an "asymmetric

attenuation" pattern to emerge. That is, compared to a baseline of no U.S. participation,

conservatives will be only slightly more inclined to cast a conservative vote, while

moderates, and especially liberals, will be significantly more likely to cast a conservative

vote. Given the effect on moderates, then, OSG participation as direct party has the

capacity to exhibit two paths of influence—the influence stated in Hypothesis 5a and the

ability to increase the overall propensity of a conservative case outcome, relative to when

there is no U.S. participation.

In its role as amicus curiae, as opposed to its role as direct party, the OSG is free

to choose sides in a case and typically participates to further the administration's views

on legal matters. Given the credibility of the OSG on legal matters, the expectation is as

follows:

> **Hypothesis 5b**: OSG participation as amicus curiae will attenuate the impact of
> justices' policy preferences, relative to when there is no OSG participation.

Since OSG participation as amicus could consist of a mixture of liberal and conservative

positions depending on the party of the administration, no strong expectation emerges

regarding whether the attenuation will reflect a pattern of asymmetry (as is the

expectation for U.S. as direct party) or consensus.[6]

The third characteristic that may prime accountability levels is whether or not the

case involves *statutory interpretation*. Strategic perspectives have generally assumed that

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[6] Chapter 3 contains auxiliary tests for whether the specific ideological position (i.e., liberal or
conservative) taken by the OSG moderates the impact of preferences (relative to the baseline of no OSG
participation).

the Court is more constrained in its statutory decisions, as opposed to constitutional cases, because Congress and the President can reverse the Court's statutory rulings (e.g., Eskridge 1991; Spiller and Gely 1992; Epstein and Knight 1998). In essence, these scholars have argued that the Court possesses more of a "fear of reversal" from the other branches for statutory cases. On the other hand, some have suggested that the Court is more constrained in its *constitutional* cases (Epstein et al. 2001) because reprisals against decisions with which the other branches disagree could come in the form of attacks against the Court as an institution (e.g., changing the Court's jurisdiction). According to Epstein et al., the consequences for producing countermajoritarian constitutional decisions are far more severe than the consequences of producing countermajoritarian statutory decisions.

As the above paragraph demonstrates, some theoretical controversy exists over whether constitutional or statutory decision making exhibits more signs of constraint. In short, I opt for the latter, which seems to be supported by more literature than the former. Pertaining to accountability, it is plausible to expect that since statutory interpretation cases are the domain of both the Court *and* Congress, the justices may feel more accountable to the Congress in these cases. Hausegger and Baum's (1999) analysis of the Court's override invitations to Congress in statutory interpretation cases suggests that indeed justices may be more willing to suppress ideologically-polarized decision making in statutory cases. Since cases *not* involving statutory interpretation, most notably constitutional cases, are primarily the domain of the judicial branch, justices may feel less

accountable for their constitutional decisions than for cases involving statutory

interpretation.[7] This line of reasoning suggests the following hypothesis:

> **Hypothesis 6**: The preference-behavior relationship will be weaker for statutory than for constitutional cases.

The next elements of accountability are two *external strategic considerations*:

public opinion and the *ideological composition of the other branches*. Below, I will

discuss only the general theoretical issues at hand as well as the general hypotheses to be

tested. Chapter 4, which is devoted to testing these hypotheses, will delve into these

issues in far more detail.

In specifying these two strategic factors under the accountability umbrella, the

dissertation integrates insights from strategic perspectives (Eskridge 1991a; Epstein and

Knight 1998; Mishler and Sheehan 1993; Flemming and Wood 1997; McGuire and

Stimson 2004) and specifies each element not only as a potentially direct effect on

justices' decisions, which past scholarship has done, but also as a *moderator* of the

impact of policy preferences (e.g., Martin 1998). Why might the justices yield to the

preferences of the public and the other branches? While justices are not electorally

accountable, some scholars connect accountability to the mass public with the Court's

lack of formal enforcement powers, which makes it reliant on the public and the other

branches of government to implement its rulings (Canon and Johnson 1999; McGuire and

Stimson 2004). Some also argue that the Court avoids policy confrontations with the

other branches to preempt Court-curbing attempts and overrides of its decisions

(Eskridge 1991a, 1991b; Epstein et al. 2001).

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[7] I will frequently refer to "statutory" versus "non-statutory" cases. Most (about 80%) non-statutory cases are constitutional cases, and the remainder of non-statutory cases (about 20%) includes supervision of lower courts and federal common law.

Paralleling the posited effects of the interest group environment, I argue that if these strategic considerations are influential, the mechanism by which they will be effective turns on justices' sensitivity to the degree of *ideological consensus* that exists in the political environment. Generally, I contend that as public mood or the ideological configuration of the other branches becomes increasingly consensual, the magnitude of preference-based behavior will decrease. If justices care about both their personal standing and the standing of the Supreme Court as an institution with these important entities, then as policy consensus increases in a particular direction (either liberal or conservative), two effects should occur: (1) the degree of preference-based behavior should decrease, and (2) the propensity of case outcomes should tend toward the direction of policy consensus in public mood or the other branches. Given that the Court possesses neither the purse nor the sword, justices need to maintain good will with the other branches and with the public at large. If there is a large consensus in the political environment, then the justices, holding all else equal, would seemingly want to suppress what could be perceived to be highly ideologically-based decisions. These two effects suggest that, compared to when there is *polarization* in the political environment—in which justices are more *unconstrained* to decide cases based on their policy preferences—an asymmetric attenuation effect should occur, whereby there is both attenuation in the impact of preferences and an overall shift in the case outcome in either the liberal or conservative direction. I posit the following two hypotheses.

> **Hypothesis 7**: As ideological consensus in public opinion increases, the impact of justices' preferences on behavior will decrease.

Hypothesis 8: As partisan or ideological consensus increases either within or between Congress and the President, the impact of justices' preferences on behavior will decrease.

For example, if public preferences increasingly tend toward liberalism, justices may feel more accountable to the public than if public preferences exhibit clear divisions, i.e., they show polarization. If ideological consensus exists either within or between Congress and the President, justices may similarly feel more accountable to these actors than if there were polarization. Chapter 4, as mentioned, discusses these hypotheses in more detail and provides empirical tests of them.

The fifth and final element of accountability is *legal considerations*, in particular *precedent*. Below, I will discuss the general theoretical issue at hand as well as the general hypothesis to be tested. However, Chapter 5, which is devoted to testing this general hypothesis, will go into far more detail in terms of what specific hypotheses will be tested.

With few exceptions, as alluded to in Chapter 1, political scientists remain dubious about the impact of legal considerations, particularly precedent, on justices' decisions (Spaeth and Segal 1999; Segal and Spaeth 2002). In addition to its potentially direct effect on justices' choices, I specify precedent as a *moderator* of the preference-behavior relationship, a specification that Chapter 4 discusses in greater depth. Justices are socialized to be accountable to the body of past precedents (Braman 2004), which in turn means they are accountable to the legal audiences—judges, lawyers, and law professors—who comment on and interpret those precedents. While many argue that equally strong precedents support both sides of many cases, Richards and Kritzer's jurisprudential regimes theory (2002; Kritzer and Richards 2003, 2005) contends that as a

result of certain jurisprudential regimes (that is, legal structures defining the criteria that should guide justices in deciding cases), cases vary in the extent to which the weight of past precedent is determinative of an outcome. I contend that this legal structure *regulates the room policy preferences have to operate*. For cases in which the weight of precedent is weak, justices will have wide latitude to engage in preference-based behavior. But for cases in which the weight of precedent is particularly strong, justices have less latitude to decide the case based on their policy preferences. Thus, the general hypothesis related to legal considerations can be stated below:

> **Hypothesis 9**: As the weight of past precedent becomes stronger and more determinative of the outcome in a given case in an issue area (as determined by a jurisprudential regime), the preference-behavior relationship will decrease.

Chapter 5 combines the *jurisprudential regimes* concept (Richards and Kritzer 2002) with the heterogeneity approach I have outlined thus far. I contend that a jurisprudential regime sets up a legal framework regulating the room policy preferences have to operate, such that in cases after the regime, jurisprudential factors will explain variation in preference-based behavior in significantly different ways than in cases before the regime.

To preview the empirical analyses in Chapters 3-5, the six case-level moderators posited in Hypotheses 1-6 are amenable to being analyzed together in a single model because they are all case-level factors within the Court's immediate environment. Testing Hypotheses 7, 8 and 9, which posit the effects of strategic and legal considerations, requires different research designs from what is required to test Hypotheses 1-6. These hypotheses require their own research design and therefore, separate chapters. Moreover, the strategic hypotheses (7 and 8) are distinct from Hypotheses 1-6 and Hypothesis 9 in

that the factors (public opinion and the preferences of the other branches) vary over *years*, while the factors associated with the other hypotheses vary across *cases*.

CONCLUSION

Motivated by insights from social psychological perspectives on the attitude-behavior relationship, this chapter has developed a theory and produced testable hypotheses specifying situational characteristics associated with *attitude strength* and *accountability* that explain variation in the relationship between policy preferences and justices' choices. The chapter has also developed a conceptual criterion for assessing how certain situational characteristics are capable of enhancing or attenuating the impact of policy preferences on choices. Chapters 3-5 will translate the theoretical model and this associated conceptual criterion into a statistical model via a multilevel modeling framework.

Hypotheses 1-6 specify that certain *case-level factors* within the Court's immediate environment explain variation in preference-based behavior on the Court. Factors associated with attitude strength include salience, complexity, and issue familiarity; factors associated with accountability include the interest group information environment, U.S. participation via the Office of the Solicitor General, and statutory interpretation. Chapter 3 tests these six case-level hypotheses using data from portions of the Warren, Burger, and Rehnquist Courts and specifying two-level hierarchical statistical models.

Hypotheses 7 and 8 posit that two sets of strategic considerations—public opinion and the preferences of the other branches of government—explain variation in

preference-based behavior. By testing this mechanism of influence, the dissertation integrates important theoretical arguments put forth by strategic perspectives of Supreme Court decision making. Chapter 4 tests the general tenets posited by these hypotheses using civil liberties data from the 1953-2003 terms. These two situational characteristics, falling under the accountability umbrella, differ from the previous factors in that they vary over *years* as opposed to cases. This requires the specification of three-level hierarchical statistical models.

Hypothesis 9 posits that legal considerations—cast as case-level factors— moderate the impact of policy preferences on choices. Importantly, the theoretical framework incorporates legal considerations—a bedrock concept in judicial behavior research—and therefore integrates insights from legal models of decision making. Combining jurisprudential regimes theory with the heterogeneity perspective, Chapter 5 tests the general tenet put forth in Hypothesis 9 using data from the free expression issue area (1953-1997) and specifying three-level hierarchical statistical models.

CHAPTER 3

EMPIRICAL ANALYSIS OF HOW CASE-LEVEL FACTORS WITHIN THE

COURT'S IMMEDIATE ENVIRONMENT SHAPE PREFERENCE-BASED

BEHAVIOR

This chapter tests Hypotheses 1-6 using data from the Spaeth (2005) database

consisting of justices' votes on all formally-decided civil liberties cases from three

Supreme Court eras: the 1994-2004 terms of the Rehnquist Court, the 1975-1985 terms of

the Burger Court, and the 1962-1968 terms of the Warren Court.[1] I examine each of the

three Court eras separately. The choice to examine these three Court eras was made for

several reasons. First, testing the hypotheses in three different eras subjects the

hypotheses to more rigorous empirical scrutiny by examining how each hypothesis holds

up across time. Thus, the chapter provides a rich over-time analysis of how and why, for

example, some factors may have shaped preference-based behavior in one era and not in

another. In analyzing the data, I will make such cross-Court comparisons.

Second, for the research design discussed in more detail below, it would be

optimal to examine natural courts (or at least Court periods that experience minimal

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[1] The Supreme Court's terms begin on the first Monday in October and typically last until the following
June. The year associated with the term corresponds to the year during which the first Monday in October
falls. For example, the 1994 term commenced in October 1994 and concluded in June 1995.

membership change) separately, since natural courts experience no personnel change. This reduces potential bias induced by membership change (Baum 1992) and other changes over time. The Rehnquist Court from the 1994-2004 terms provides an ideal testing situation, since this era provides data spanning eleven terms without a single membership change. During this period, the Court consisted of Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

I also examine an eleven-term period during the Burger Court during which only one membership change occurred. From the 1975-1980 terms, the Court consisted of Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, Blackmun, Rehnquist, Powell, and Stevens. For the 1981-1985 terms, Justice O'Connor replaced Justice Stewart.

The Warren Court era is more difficult to analyze given that there were frequent membership changes and, unlike the Burger and Rehnquist eras, there is a lack of long time spans with little or no membership change. The optimal time period to analyze is the 1962-1968 terms of the Warren Court, which provide seven terms of data during which two membership changes occurred. This period can also be considered a fairly cohesive era since it coincides with what many refer to as the "Second Warren Court," which produced the bulk of liberal legal change often attributed to the Warren Court. From the 1962-1964 terms, the Court's members were Chief Justice Warren and Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White, and Goldberg. For the 1965-1966 terms, Justice Fortas replaced Justice Goldberg. Justice Marshall replaced Justice Clark for the 1967-1968 terms. The first replacement (Fortas for Goldberg) does not appear to pose any problems in terms of ruling out bias due to membership change because Fortas

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and Goldberg had similar, liberal ideologies. The second replacement (Marshall for Clark) poses some concern, given that Clark was moderate and Marshall was liberal. However, including the 1967 and 1968 terms is beneficial due to: (1) the extra time span covered and the extra data gained, and (2) the fact that this period, as mentioned, represents a cohesive Court era corresponding to the "Second Warren Court."

Chapter 3 unfolds as follows. First, I discuss the research design used to test Hypotheses 1-6. I employ a multilevel modeling framework and specify random coefficient models to test the hypotheses. Model specification is discussed in detail, followed by a discussion of data and measurement. I then discuss the results from each of the analyses. After drawing broad conclusions about the results across the three Court periods, I conduct some auxiliary analyses to investigate further the effects of U.S. participation on the preference-behavior relationship.

RESEARCH DESIGN: A MULTILEVEL MODELING FRAMEWORK

A multilevel (hierarchical) modeling framework (Raudenbush and Bryk 2002; Steenbergen and Jones 2002; Skrondal and Rabe-Hesketh 2004) is well-qualified to test Hypotheses 1-6. Hierarchical data structures contain more than one level of analysis, where one level is nested within another level. In a two-level hierarchical structure, which will be used in this chapter, units from the lowest level of analysis (level-1 units) are nested within units from a higher level of analysis (level-2 units). In many quantitative analyses of Supreme Court decision making, the *choices of the justices* from a given set of cases are the only recognized units of analysis (e.g., Segal and Spaeth 2002; Richards and Kritzer 2002). While judicial scholars undoubtedly recognize that

additional levels are present, studies very rarely incorporate hierarchical structures into empirical analyses (but see Martin 1998; Zorn 2001; Martin and Quinn 2002). The use of this methodology, then, is an advance in providing a means both to analyze the type of data employed here, and most importantly, to explain heterogeneity in Supreme Court decision making. More specifically, the multilevel modeling framework allows one to model explicitly how higher-level variables (case-level factors) explain variation in lower-level effects (the impact of preferences on choices).

Model Specification

This section discusses model specification for the two-level hierarchical structure, *justices' choices nested within cases*. Justices' choices are level-1 units and cases are level-2 units.[2] For all analyses, the dependent variable—a justice's vote in a case—is dichotomous, where "1" is a liberal vote and "0" is a conservative vote. The goal of the analyses is to test whether the six hypothesized case-level (level-2) variables exhibit a significant impact on the relationship between policy preferences and justices' choices. Random coefficient specifications (particularly Model 2 discussed below) allow for explicit tests of Hypotheses 1-6. A secondary, yet still important, goal of the analyses is to ascertain whether each case-level factor exhibits a direct effect on the case outcome. Thus, the framework allows me to assess empirically whether and how each case-level

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[2] Two additional levels of analysis exist as well. First, the year level will be incorporated in the three-level analyses in Chapters 4 and 5. The second is the justice level. For this chapter, "cases" are the more significant level-2 units for purposes of my theoretical framework. Moreover, the policy preferences variable most likely accounts for the bulk of variation that exists between justices.

factor exhibits multiple paths of influence, both on the preference-behavior relationship, which is central to my heterogeneity framework, and on the case outcome.

I employ a hierarchical generalized linear model, which specifies the sampling model for the dependent variable, the link function, and the structural model. For binary dependent variables, a Bernoulli sampling model is used, and I use a logit link. For the logit link, first define $\Pr(Y_{ij}=1) = p_{ij}$, which is the probability of a liberal vote for choice i in case j. Then define η_{ij} as the log-odds of p_{ij}: $\eta_{ij} = \log[p_{ij} / (1 - p_{ij})]$. This allows one to specify the log-odds as a linear function of the level-1 independent variables.

For each analysis (i.e., Rehnquist, Burger, and Warren analyses), I specify two structural models. Model 1 is a simple *random coefficient model* (without level-2 covariates) designed to test simply whether the impact of preferences varies significantly across cases. Model 2 is the fully-specified *random coefficient model* testing whether the hypothesized level-2 factors systematically explain variation in impact of policy preferences.[3] Consider Model 1:

$$\eta_{ij} = \beta_{0j} + \beta_{1j}PREF_{ij} \qquad \text{[Level-1 equation]}$$

$$(1) \quad \beta_{0j} = \gamma_{00} + u_{0j} \qquad \text{[Level-2 equations]}$$

$$\beta_{1j} = \gamma_{10} + u_{1j}$$

The first equation in Model 1 above is the level-1 equation.[4] The i subscript indexes level-1 units (choices), and the j subscript indexes level-2 units (cases). $PREF_{ij}$ is a justice's policy preference associated with choice i in case j. The level-2 equations, which

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[3] In addition to Model 2, some auxiliary models related to Model 2 will also be tested.

[4] Note that while I present separate sets of equations for each level of the model, the parameters are estimated simultaneously. This is seen more explicitly below where I write the model in its single-equation reduced form.

are the second and third equations, are what explicitly make this a *random coefficient specification*; namely, the random coefficients (β_{0j} and β_{1j}) are each modeled as a function of a stochastic error component.

β_{0j} is a random intercept that varies across cases. γ_{00} is the "average" intercept, and u_{0j} is the level-2 stochastic error term, or random effect, for the intercept. Importantly, u_{0j} captures *unobserved heterogeneity* across cases, that is, unmeasured variability in case-level factors that may affect the outcome, η_{ij}. β_{0j} can be thought of as each case possessing its own individual propensity of being decided in a liberal direction. As many judicial scholars find it important to control for case facts (e.g., Segal 1986; Segal and Spaeth 2002), which amount to *observed* heterogeneity that might affect the outcome, the random intercept specification seems to be an alternative way to account for case differences, albeit of an unobserved nature, when one does not have measured case facts variables. This seems like a most valuable strategy for analyses (like those in this chapter) examining all civil liberties cases pooled together, where it is not feasible to include case facts variables as one would for issue-specific data (e.g., search-and-seizure cases).

β_{1j} represents the *impact of justices' policy preferences on choices* and is specified to vary across cases. Substantively, this specification is directly connected to the dissertation's theoretical framework, which posits that the *impact of policy preferences varies across cases*. In the third equation of Model 1, γ_{10} is the "average" impact of policy preferences, and u_{1j} is the level-2 stochastic component, or random effect, associated with the preferences coefficient. Substantively, u_{1j} accounts for

unobserved case-level heterogeneity that may explain variation in the impact of policy

preferences.

The level-2 error components, u_{0j} and u_{1j}, are assumed to have a bivariate normal

distribution. Thus, var(u_{0j}), var(u_{1j}), and cov(u_{0j}, u_{1j}) can each be estimated. The estimates

of the two variance components have important substantive meanings. When var(u_{0j}) > 0,

one concludes that significant unobserved heterogeneity exists across cases in the overall

propensity for a case to be decided liberally. When var(u_{1j}) > 0, one concludes that

significant variation exists in the *impact* of preferences across cases, which again is the

crux of the theoretical framework. Before attempting to model the impact of policy

preferences as a function of case-level covariates, which Model 2 does (as directed by the

theoretical framework presented in Chapter 2), it is generally recommended that one first

determine whether there is significant variance to explain (Raudenbush and Bryk 2002;

Hox 2002). Thus, testing whether var(u_{1j}) > 0 is the goal of Model 1.

Model 2 below includes the level-2 covariates connected to the theoretical

perspective. The structural model can be written as:

$$\eta_{ij} = \beta_{0j} + \beta_{1j}PREF_{ij}$$

(2) $\beta_{0j} = \gamma_{00} + \gamma_{01}SAL_j + \gamma_{02}COMP_j + \gamma_{03}ISSUEFAM_j + \gamma_{04}INFO_j + \gamma_{05}USAMICUS_j + \gamma_{06}USPARTY_j + \gamma_{07}STAT_j + u_{0j}$

$\beta_{1j} = \gamma_{10} + \gamma_{11}SAL_j + \gamma_{12}COMP_j + \gamma_{13}ISSUEFAM_j + \gamma_{14}INFO_j + \gamma_{15}USAMICUS_j + \gamma_{16}USPARTY_j + \gamma_{17}STAT_j + u_{1j}$

The level-1 equation is the same as in the previous specification. But in this

model, β_{0j} and β_{1j} are specified to be a function of the case-level covariates associated

with attitude strength and accountability. Importantly, β_{1j}, which represents the

preference-behavior relationship, is now modeled as a function of a *systematic*

component (vis-à-vis the case-level factors) and a *stochastic component*. Note how

modeling the preference-behavior relationship in this way mirrors how one would model

any other social or behavioral process in, for example, a regression equation modeling

some dependent variable as a function of both systematic and stochastic components.

Estimates of the γ coefficients in the β_{1j} equation, which are also called *cross-

level interaction* effects, provide critical tests of whether the case-level factors associated

with attitude strength and accountability explain variation in the preference-behavior

relationship, as posited by Hypotheses 1-6. γ_{11} represents the impact of *salience* on the

preference-behavior relationship, and the remaining γ parameters represent analogous

effects for complexity, issue familiarity, information environment, U.S. as amicus, U.S.

as a direct party, and statutory versus non-statutory cases. u_{1j} represents the impact of

unobserved case-level heterogeneity on the preference-behavior relationship.

Significance tests and substantive interpretations of the γ coefficients will be used to

gauge whether and how much the hypothesized case-level factors explain variation in the

impact of policy preferences.

To understand further the meaning of the model's parameters (particularly the γ

parameters in the β_{0j} equation), Figure 3.1 contains the reduced-form representation of

Model 2. The reduced-form equation is written by substituting the level-2 equations into

the level-1 equation. Note that while the reduced-form equation in Figure 3.1 is a single-

equation rewriting of Model 2, I have partitioned the equation into its four primary

components. Explicit in Figure 3.1 are the cross-level interaction terms; note that the

policy preferences (*PREF$_{ij}$*) variable from the level-1 equation is interacted with each of

the level-2 factors posited to explain variation in the preference-behavior relationship.

$$\eta_{ij} =$$

Effects on case outcome	$\gamma_{00} + \gamma_{01}SAL_j + \gamma_{02}COMP_j + \gamma_{03}ISSUEFAM_j + \gamma_{04}INFO_j + \gamma_{05}USAMICUS_j + \gamma_{06}USPARTY_j + \gamma_{07}STAT_j +$
Avg. effect of preferences	$\gamma_{10}*PREF_{ij} +$
Cross-level interactions	$\gamma_{11}SAL_j*PREF_{ij} + \gamma_{12}COMP_j*PREF_{ij} + \gamma_{13}ISSUEFAM_j*PREF_{ij} + \gamma_{14}INFO_j*PREF_{ij} + \gamma_{15}USAMICUS_j*PREF_{ij} + \gamma_{16}USPARTY_j*PREF_{ij} + \gamma_{17}STAT_j*PREF_{ij} +$
Error components	$u_{0j} + u_{1j}*PREF_{ij}$

Figure 3.1: Reduced-form Representation of Model 2

Because of these interactions, each of the γ parameters in the first two sets of parameters (*effects on case outcome* and *avg. effect of preferences*) represent *conditional effects*. For example, since salience and policy preferences are interacted, γ_{01} represents the impact of salience on the case outcome when the policy preferences variable is equal to zero. Moreover, γ_{10} represents the impact of policy preferences when *all* of the case-level variables with which the policy preferences variable is interacted are set to zero.

Since a secondary goal of the analysis is to be able to ascertain the "typical" effects of each of the case-level variables on the case outcome, I *mean center* the level-1 (policy preferences) and level-2 (case-level) variables. With the mean-centering approach (a commonly-employed strategy), γ_{01} represents the *direct effect of salience on the case outcome* (i.e., the propensity of a liberal case outcome) since it is now the effect of salience when the policy preferences variable is set at its mean value, which is zero given mean-centering. This interpretation can be made because when the policy preferences variable is set at its mean value, this represents the effect of the case factor on the

theoretical *median*, or pivotal, member of the Court. The same interpretation can be made for the remaining case-level variables in the second set of parameters in Figure 3.1.

Also, with mean-centering, γ_{10} now represents a sort of "typical" impact of policy preferences since it is the effect when *all* of the case-level variables are set at their mean, or baseline, values (which are zero given mean-centering). Referring to both Model 2 and Figure 3.1, while the γ parameters from the β_{0j} equation represent the effects of the case-level factors on the case outcome (given the above interpretation), u_{0j} represents unobserved heterogeneity in the propensity of a liberal case outcome across cases. Moreover, the reduced-form representation shows that the composite error term is heteroskedastic, since it is a function of the level-1 covariate, policy preferences.

Data and Measurement

As mentioned, the data come from the Spaeth (2004) database consisting of justices' votes on all formally-decided civil liberties cases from the 1994-2004 terms of the Rehnquist Court, the 1975-1985 terms of the Burger Court, and the 1962-1968 terms of the Warren Court.[5] For the Rehnquist Court analysis, the data consist of 4,349 choices (level-1 units) nested within 485 cases (level-2 units). For the Burger Court analysis, the data consist of 8,306 choices nested within 945 cases. For the Warren Court analysis, the data consist of 3,384 choices nested within 389 cases.

The dependent variable is a justice's vote in a case, where "1" is a liberal vote and "0" is a conservative vote. I follow Spaeth's (2005) coding convention for what

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[5] I use the standard case selection criterion (see Epstein, Segal, Spaeth, and Walker 2003) to filter out formally-decided civil liberties cases from the Spaeth database: ANALU = 0 (citation) or 4 (split vote); DEC_TYPE=1, 6, or 7; and VALUE $\leq$ 6.

constitutes liberal and conservative votes. In civil liberties cases, liberal votes favor

individuals claiming liberties or rights over government's restrictions of those liberties or

rights, while conservative votes favor the converse. Measuring justices' policy

preferences, the key level-1 covariate of interest, is a complicated issue in judicial

politics. As an alternative to the widely-used Segal-Cover (1989) scores, I use a measure

based on justices' immediate past behavior.[6] Specifically, the measure captures a justice's

average propensity to cast a liberal vote based on *the proportion of liberal votes s/he cast*

in the previous term. Appendix A presents a more detailed justification for using this

measure over Segal-Cover scores. For interpretation purposes, I rescaled the preferences

variable so that it is mean-centered and ranges from roughly -1 to 1 (Appendix B contains

descriptive statistics).[7] For all three analyses, using the lagged preferences measure

means that for level-1 units of observation associated with justices serving their first

terms, the preferences variable is missing data. For the Rehnquist Court, since the 1994

term was Justice Breyer's first term, policy preferences for Breyer are missing data in the

1994 term. This excludes 42 level-1 units from the analysis, meaning there are 4,307

usable level-1 units. For the Burger Court, there are 123 missing data for the preferences

variable, resulting in 8,183 usable level-1 units. And for the Warren Court, there are 142

missing data, resulting in 3,242 usable level-1 units.

Moving on to measures of the level-2 covariates, for *case salience*, I adopt the

measure developed by Epstein and Segal (2000), a dichotomous indicator for whether or

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[6] Martin and Quinn's (2002) ideal point estimates present another alternative to Segal-Cover scores. The measure I use based on lagged behavior is highly correlated with Martin-Quinn scores.

[7] Specifically, I first recoded the original lagged proportion liberal measure to a 0 to 1 scale. I then multiplied this value by 2, and finally mean-centered that value.

not the case appeared on the *New York Times* front page the day after it was decided.[8]

Case complexity has been measured using factor scores retrieved from a factor analysis of the number of issues in the case, the number of legal provisions, and the number of opinions written in the case (Maltzman and Wahlbeck 1996).[9] I have found that this measure does not possess satisfying measurement properties given the lopsided distributions of both the number of legal provisions and issues (see Table B.2 in Appendix B for the 1994-2004 terms). Therefore, I opt for a three-category ordinal measure, where "0" represents a case containing one legal provision and one issue, ".5" represents a case containing either more than one legal provision or more than one issue, and "1" represents a case containing more than one legal provision and more than one issue.

Issue familiarity should tap the degree to which a case involves a "blue chip" issue in the legal system, or how often the Court has previously heard the issue. Using Spaeth's (2005) "issue" variable, for each case in a given term, I calculated the number of times the Court had previously decided cases in the same issue area dating back to 1953. For example, for each case in the 1994 term, the variable taps the number of times the Court had heard cases in the same issue area spanning the 1953 through 1993 terms. Given the skewness of the variable and since it is reasonable to expect diminishing

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[8] Even though the measure is temporally subsequent to justices' choices, Epstein and Segal (2000) argue that the measure taps *contemporaneous* salience. The measure correlates highly with the number of amicus briefs filed in a case, another measure used to tap salience (Maltzman et al. 2000).

[9] For purposes of my analysis, I drop *number of opinions* as an indicator of complexity.

returns with increases in the number of times the Court has previously decided on the issue, I use the natural logarithm of this variable.[10]

In measuring *information environment*, the first accountability variable, the goal is to tap polarization (ranging from *consensus* to *dissensus*) by capturing both the *intensity* and *ideological division* in the configuration of amicus curiae briefs. I adopt a measure akin to ambivalence measures used in public opinion research (Thompson et al. 1995; McGraw et al. 2003). The measure is:

Information environment polarization = [(L + C) / 2] – | L – C |

"L" is the number of amicus briefs supporting the liberal position, and "C" is the number of amicus briefs supporting the conservative position.[11] The first term in the equation— the average between the number of liberal and conservative briefs—captures the *intensity* of the informational environment, and the second term—the absolute value of the difference between liberal and conservative briefs—captures *ideological division*

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[10] Note that the issue familiarity measure is not parallel across the three Court eras analyzed here. For the Rehnquist Court, the measure goes back about four decades, while for the Warren Court, the measure only goes back a decade. Overall, the goal is to measure issue familiarity within the modern era of civil liberties law, and 1953 provides a reasonable starting date for this modern era. Stemming from Chief Justice Stone's "Footnote Four" in *United States v. Carolene Products* (1938), the "preferred position doctrine" initiated an important change in civil liberties law. The doctrine intended to elevate the importance of civil liberties issues compared to economics issues. Justices who adhered to the doctrine would eventually increase the frequency of civil liberties cases on the Court's agenda, but this adherence did not reach a critical mass until the mid-1950s (Pacelle 1991, 1995). Thus, using 1953 as a start date for the issue familiarity measure for all three Court eras is justifiable given that it constitutes a reasonable beginning to what can be thought of as modern civil liberties law. For all Courts, even for the Rehnquist Court that begins in the 1994 term, I want to capture the entire history of issue frequencies dating back to 1953.

[11] For all cases, I examined the U.S. Reports and counted the number of amicus briefs in favor of both the liberal and conservative sides of the issue. I did not count amicus briefs regarded as neutral by the U.S. Reports. For the 2003 and 2004 terms for which the U.S. reports were not yet available, I used Lexis-Nexis, which indexes amicus briefs for each case. I also did not count amicus briefs regarded as neutral by Lexis-Nexis. In reality, while regarded as neutral briefs since they do not explicitly advocate for one of the parties in the case, these briefs actually to tend to support one side in a case. Given the relatively small number of neutral briefs and given past practices, I found it impractical to go through each neutral brief to ascertain whether it actually supported one of the parties in a case.

between liberal and conservative briefs. I recoded the measure so that it ranges from 0 to 1. Higher values of the measure indicate higher levels of ideological polarization (i.e., lower consensus).

Using Spaeth's database and the U.S. Reports, *U.S. as a direct party* is coded as "1" when the U.S. was a direct party in a case, and "0" otherwise. *U.S. as amicus curiae* is also a dichotomous indicator, where "1" indicates such participation, and "0" indicates otherwise. Since U.S. participation is operationalized as a three-category nominal variable that has been dummied out, the γ coefficients for *U.S. party* and *U.S. amicus* in the statistical models represent comparisons to the excluded group, which is the absence of U.S. participation. Finally, *statutory interpretation* is coded as "1" when a case involves statutory interpretation and "0" otherwise.[12]

To facilitate the interpretation of the model's coefficients discussed earlier in the chapter, I mean-centered all independent variables, including policy preferences and each level-2 variable. Raudenbush and Bryk (2002) and Hox (2002) suggest such an approach, even for dichotomous variables (Hox 2004, Chapter 4), and the next section highlights how this aids in the substantive interpretations of the statistical results. Appendix B includes descriptive statistics for all variables, for both the original coding and the mean-centered transformations, for each of the three eras. Mean-centering has no effect on the γ coefficients in the β_{1j} equation; that is, these coefficients are the same regardless of whether or not one mean-centers. As discussed earlier in relation to the reduced-form representation of Model 2, mean-centering primarily aids in interpreting the γ coefficients

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[12] This measure is based on the "auth_dec" variable in the Spaeth (2005) database.

Case-Level Factor	Enhancement or Attenuation Effect on Preference-Behavior Relationship?	Expected effect from β_{0j} Equation	Expected effect from β_{1j} Equation
Attitude Strength			
Salience	*Enhancement*	None	$\gamma_{11} > 0$
Complexity	*Attenuation*	None	$\gamma_{12} < 0$
Issue Familiarity	*Enhancement*	None	$\gamma_{13} > 0$
Accountability			
IG Information Environment	*Enhancement*[13]	None	$\gamma_{14} > 0$
U.S. Amicus	*Attenuation* (relative to no U.S. participation)	None	$\gamma_{15} < 0$
U.S. Party	*Attenuation* (relative to no U.S. participation)	$\gamma_{06} > 0$	$\gamma_{16} < 0$
Statutory	*Attenuation* (relative to non-statutory)	None	$\gamma_{17} < 0$

Table 3.1: Summary of Hypotheses and Expected Effects in Empirical Analyses

in the β_{0j} equation, where each γ represents the direct effect of a case-level characteristic on the propensity of a case being decided liberally. Table 3.1 summarizes the hypotheses presented in Chapter 2 along with the corresponding expected effects from the models.

RESULTS

While a number of estimation procedures are available for fitting multilevel models, Rodriguez and Goldman (2001) refer to maximum likelihood estimation and Bayesian simulation via Markov chain Monte Carlo (MCMC) estimation as two

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[13] Hypothesis 4 states that increasing consensus in the interest group environment will attenuate the preference-behavior relationship. However, the variable for this concept ranges from consensus (the lowest value) to polarization (the highest value). Therefore, I expect that increasing interest group polarization will enhance the preference-behavior relationship (which is another way of phrasing Hypothesis 4).

"standards" for fitting these models.[14] For all models in this chapter, I use maximum likelihood estimation, which entails acquiring the unconditional distribution of the outcome by integrating out the random effect(s). Gauss-Hermite quadrature is a standard procedure for numerical integration, but Skrondal and Rabe-Hesketh (2004, Chapter 6; Rabe-Hesketh et al. 2002) suggest that adaptive quadrature is a more accurate method for integrating out the random effects. I employ the adaptive quadrature routine, using 12 integration points to produce the results presented in this chapter. Using GLLAMM (Rabe-Hesketh et al. 2004; Skrondal and Rabe-Hesketh 2004), an add-on software package to Stata, I estimated the models proceeding iteratively, first using 4 integration points, then using 8, and finally 12. To facilitate convergence, each model used as start values the estimates from the previous specification (see Rabe-Hesketh et al. 2004).

Before presenting the Model 2 results, I discuss the results from Model 1 for the Rehnquist, Burger, and Warren Courts, testing whether significant variation exists in the impact of policy preferences across cases. The critical test is whether $var(u_{1j}) > 0$, and I use likelihood ratio tests comparing the random coefficient model specified in Model 1 to a reduced random intercept model (without a random coefficient for the preferences coefficient).

The null hypothesis for the likelihood ratio test is that $var(u_{1j})=0$. The results provide strong evidence to reject the null hypothesis for the Rehnquist ($\chi^2=300.12$, df=2,

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[14] Other procedures, such as penalized quasi-likelihood (PQL) and marginal quasi-likelihood (MQL), can produce biased estimates of the variance components for binary response models (see Rodriguez and Goldman 1995, 2001). When one employs uninformative priors in the Bayesian context, the primary difference between maximum likelihood and MCMC centers on computational efficiency. With the two-level models estimated in this chapter, efficiency is not an issue. For the three-level models estimated in Chapters 4 and 5, as I will discuss in those chapters, maximum likelihood becomes computationally impractical, and therefore, I employ MCMC in those chapters.

p<0.001), Burger (χ^2=232.40, df=2, p<0.001), and Warren (χ^2=42.70, df=2, p<0.001) Courts. These findings signal that there is significant heterogeneity to be explained in the preference-behavior relationship across cases.

The next step, of course, is to test Hypotheses 1-6 from the heterogeneity perspective using the Model 2 specification. I present results from the Rehnquist Court first, followed by the Burger Court and finally, the Warren Court. The primary reason for discussing results from the three Courts in reverse chronological order is that the findings are most congruent with expectations for the Rehnquist Court, a bit less congruent with expectations for the Burger Court, and most defiant of expectations for the Warren Court. Thus, my presentation of the results builds from least complex (the Rehnquist Court) to most complex (Warren Court), and along the way, I speculate on why conflicting findings exist across Courts. This progression from Rehnquist to Warren also sets up the auxiliary analyses I will present. Finally, in conjunction with Table 3.5, I present a summary comparison of results from the three Courts eras at the end of this section.

Model 2 Results for the Rehnquist Court

The results from the random coefficient model (Model 2) for the Rehnquist Court are displayed in Table 3.2. Three sets of estimates are presented: (1) effects of the case-level covariates on the average propensity of a case to be decided in a liberal direction (estimates from the β_{0j} equation), (2) effects of the case-level covariates on the impact of preferences, including the average effect of policy preferences (estimates from the β_{1j} equation), and (3) the variance-covariance components of the random effects. Note that the parameters listed in the tables correspond to those in the Model 2 equations. For all

analyses presented in this chapter, *p*-values in the β_{0j} equation are based on two-tailed tests since I do not possess strong expectations for the direction of the effects for most variables. For the β_{1j} equation, *p*-values are based on one-tailed tests since I do indeed possess directional expectations for these effects.

Also presented in Table 3.2 are two likelihood ratio tests that assess overall model fit and more specifically, they ascertain whether the specified hierarchical structure, particularly the random coefficient specification (for both the intercept and the preferences coefficient), is statistically appropriate for the data. The first test compares the full model specification (i.e., Model 2) to a regular, pooled logit, which contains no recognized hierarchical structure (but does contain the exact same independent variables as Model 2). The null hypothesis for this test is that the random effects terms for both the random intercept and random coefficient are zero; in other words, the null states there is no reason to account for the two-level hierarchical structure and the data can be pooled. The results of this likelihood ratio test, as reported in Table 3.2, allow me to reject the null hypothesis. The second likelihood ratio test compares the Model 2 specification to a reduced random intercept model. The null hypothesis for this test is that the random effects term for the random coefficient (for policy preferences) is zero; in other words, there is no need to account for the random coefficient for policy preferences. The results of this test also allow me to reject the null hypothesis. Both tests, then, strongly support the specification set forth in Model 2. Compared to both reduced specifications, the fully-specified random coefficient model is more statistically appropriate for the data, providing justification for the two-level nesting structure and multilevel modeling framework.

Turning to the results, and beginning with the attitude strength variables, Table 3.2 indicates that in the β_{0j} equation, *salient* cases were significantly more likely to be decided in a liberal direction than non-salient cases. I will have more to say about this finding, which was unexpected, in the next section, but the finding seems to be supported by anecdotal evidence that the Rehnquist Court—though widely considered a "conservative court"—has been willing to issue liberal decisions on high salience cases, for example, one of the Michigan affirmative action decisions,[15] the Texas sodomy case,[16] the enemy combatant cases,[17] and the upholding of Miranda.[18] Neither of the other two attitude strength factors exhibited a significant impact on the case outcome.

Moving to the accountability variables in the β_{0j} equation, the coefficient for *U.S. as a direct party* is negative, as expected, and statistically significant at the $\alpha=0.05$ level. This means that cases in which the U.S. was a direct party were significantly more likely to be decided in a conservative direction than cases in which the U.S. was not involved. This finding supports other research (e.g., Segal 1984) and is generally intuitive since the U.S. government often possesses conservative interests in civil liberties decisions. The

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[15] The 2003 decision in *Gratz v. Bollinger* (539 U.S. 244) ruled the University of Michigan's use of a points system at the undergraduate level unconstitutional. However, in *Grutter v. Bollinger* (539 U.S. 306), the Court upheld the Michigan Law School's use of race as a general consideration in the application process.

[16] In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas law that made it illegal for homosexuals to engage in sodomy.

[17] In 2004, the Court issued three significant rulings concerning enemy combatants related to the war on terror. In *Rasul v. Bush* (542 U.S. 66), the Court ruled that detainees at Guantanamo Bay should be given habeas corpus rights. In *Hamdi v. Rumsfeld* (542 U.S. 507), the Court ruled that Hamdi, an American citizen and detainee, had the right to challenge his enemy combatant status and that federal courts are not required to defer to the Executive Branch's determinations of what constitutes an enemy combatant. In the third case (*Rumsfeld v. Padilla*, 542 U.S. 426), the Court did not issue a substantive ruling on whether the President was authorized to detain a U.S. citizen determined to be an enemy combatant, and ruled instead that Padilla filed his habeas petition in the wrong jurisdiction.

[18] In *United States v. Dickerson*, 530 U.S. 428 (2000), the Court upheld the landmark *Miranda* ruling.

	Coeff.	(SE)	p
Estimates From β_{0j} Equation (Effects on Case Outcome):			
Intercept, γ_{00}	-0.347	(0.203)	0.087
Salience, γ_{01}	1.401	(0.490)	0.004
Complexity, γ_{02}	-0.224	(0.828)	0.787
Issue Familiarity, γ_{03}	0.075	(0.205)	0.715
Information Environment, γ_{04}	-3.075	(2.201)	0.162
U.S. Amicus, γ_{05}	-1.214	(0.505)	0.016
U.S. Party, γ_{06}	-1.313	(0.535)	0.014
Statutory, γ_{07}	0.460	(0.422)	0.276
Estimates From β_{1j} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), γ_{10}	4.590	(0.294)	<0.001
Salience, γ_{11}	1.236	(0.591)	0.018
Complexity, γ_{12}	-0.049	(0.983)	0.480
Issue Familiarity, γ_{13}	0.430	(0.249)	0.042
Info. Environment, γ_{14}	2.036	(2.682)	0.224
U.S. Amicus, γ_{15}	-0.842	(0.626)	0.089
U.S. Party, γ_{16}	-1.453	(0.655)	0.013
Statutory, γ_{17}	-0.771	(0.510)	0.065
Variance-Covariance Components:			
var(u_{0j})	15.763	(2.026)	
var(u_{1j})	12.032	(1.985)	
cov(u_{0j}, u_{1j})	0.483	(1.519)	
Log likelihood = -1751.51			
Number of choices (level-1 units): 4,307			
Number of cases (level-2 units): 485			
Likelihood Ratio Tests:			
Full Model versus Regular, Pooled Logit Model:			
χ^2=1783.65, df=3, p<0.001			
Full Model versus Random Intercept Model:			
χ^2=275.58, df=2, p<0.001			

Note: p-values in the β_{0j} equation are based on 2-tailed tests, while those from the β_{1j} equation are based on 1-tailed tests.

Table 3.2: Random Coefficient Model of Heterogeneity in Supreme Court Decision

Making, Rehnquist Court (1994-2004 Terms)

effect of *U.S. as amicus* (relative to the baseline of no U.S. participation) is also negative and statistically significant at α=0.05, suggesting that in both participatory capacities, the Office of the Solicitor General was influential in shaping case outcomes.

More interesting in Table 3.2 are the estimates from the β_{1j} equation, which directly test Hypotheses 1-6 from the heterogeneity perspective. First, the estimate of γ_{10} represents the average effect of policy preferences, conditional on the other variables held at their mean values. Unsurprisingly, the typical impact of policy preferences is potent and statistically significant, such that as justices' liberalism levels increase, the probability of a liberal vote increases as well. The remainder of the γ estimates test whether hypothesized case-level variables moderate the impact of policy preferences.

The results indicate that two attitude strength variables—*salience* and *issue familiarity*—explain variation in the preference-behavior relationship at statistically significant levels. As expected, salience enhanced the impact of policy preferences relative to the non-salient cases; the finding suggests that the impact of policy preferences on justices' choices was significantly different between salient and non-salient cases. I will discuss this finding, in conjunction with the effect of salience on the average propensity of a liberal decision, in more detail in the next section. Furthermore, as expected, increases in issue familiarity produced an enhanced impact of preferences. Thus, for "blue chip" issues, Rehnquist Court justices were more likely to divide along ideological cleavages than for newer issues that had not been heard by the Court as frequently. The effect of complexity on the preference-behavior relationship is in the correct direction, but fails to attain statistical significance. Thus far, there is fairly strong support for the heterogeneity perspective; significant variation exists in the preference-

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behavior relationship, and two of the strength-related case variables—salience and issue familiarity—significantly explain variation in this relationship.

Results from the β_{1j} equation for the accountability variables indicate that *U.S. as a direct party* exhibits a statistically significant impact on the preference-behavior relationship. The results, then, indicate that the effect of U.S. as a direct party was not only as an influence on the overall propensity of the case to be decided conservatively (relative to no U.S. participation) during the Rehnquist Court, but it also attenuated the magnitude of the preference-behavior relationship. While this finding will be discussed in more detail below in the substantive interpretation of the results, it highlights a multifaceted impact of the OSG heretofore not uncovered. That is, the OSG's participation as a direct party is capable of both reducing the degree of ideological polarization that might otherwise exist *and* influencing the overall case outcome. Moreover, the coefficient for U.S. amicus is negative, as expected, and achieves statistical significance at the less stringent α=0.10 level. Like its role as direct party, then, the OSG in its amicus curiae capacity appears capable of exhibiting multiple paths of influence: both as an influence on the case outcome and as attenuating the magnitude of preference-based behavior.

In the context of U.S. amicus participation, Segal (1990) argues that the OSG's level of success (in the form of the influencing the case outcome) is largely rooted in the Court's *deference* toward the OSG. My findings for the Rehnquist Court provide even stronger evidence that the OSG's success as both direct party and amicus curiae is rooted in deference toward the OSG. The OSG not only influences the case outcome in both capacities, but also *reduces* the amount of preference-based behavior, relative to when the

OSG does not participate. Think of deference as a norm that *constrains* the amount of room policy preferences have to operate; if such a norm is operative, then the presence of the object of deference (here, the OSG) will both constrain (or attenuate) preference-based behavior significantly and increase the likelihood of success for that object's position (relative to a baseline). If this is the mechanism by which a deference norm operates on the Court, then the findings from the Rehnquist Court analysis bolster Segal's (1990) claims that the Court shows significant deference toward the OSG in both its direct party and amicus curiae roles. I return to this discussion in the next section on substantive interpretations as well as in the Burger and Warren Court analyses.

Regarding the effect of statutory interpretation, as some strategic perspectives expect, the impact of policy preferences in statutory cases was significantly reduced compared to non-statutory cases. This result provides empirical evidence that justices seem to constrain themselves ideologically in statutory cases, which are the domain of both the legislative and judicial branches, compared to non-statutory cases, which are usually left unperturbed by the legislative branch (especially constitutional issues, of course). The coefficient for information environment (γ_{14}) is in the expected direction but is statistically insignificant; the ideological configuration of amicus briefs did not significantly shape preference-based behavior at a statistically significant level.

Substantive Interpretations – Rehnquist Court

To get a better understanding of the substantive magnitude and nuance associated with the effects discussed above, I estimate and present average partial effects (APEs) for various quantities of interest (e.g., Wooldridge 2002, 2005). APEs are akin to typical

predicted probabilities used in numerous post-estimation analyses, but they are particularly valuable in models with unobserved heterogeneity since they average over this heterogeneity in the sample. Thus, APEs allow one to compute the expected value (in terms of a probability) of a liberal decision for a particular value of a variable of interest, while averaging across the distribution of unobserved heterogeneity. I present substantive interpretations for the statistically significant case-level variables from the β_{1j} equation for each model in two different forms. The first form, depicted in Figures 3.2-3.5, provides a very general substantive view of how the each case-level variable alters the preference-behavior relationship. The second form, depicted in Figures 3.6 and 3.7, is more of a justice-centered view showing how two of the more interesting variables shape the preference-behavior relationship.

For Figures 3.2-3.5, the X-axis is policy preferences, and for these figures, the policy preferences variable is represented in its original form—the proportion of liberal decisions for a justice in term t-1 (ranging from zero to one). The vertical axis is the predicted probability of a liberal decision. The lines in each graph represent the probability of a liberal choice by a justice in a particular case corresponding to a given policy preference, while holding the particular case-level variable of interest constant at a particular value. The remaining variables are held constant at their mean values, and since these are APEs, the calculations average over the distribution of the unobserved heterogeneity. Note how these figures can be compared to the theoretical scenarios presented in Figures 2.2 and 2.3 in Chapter 2.

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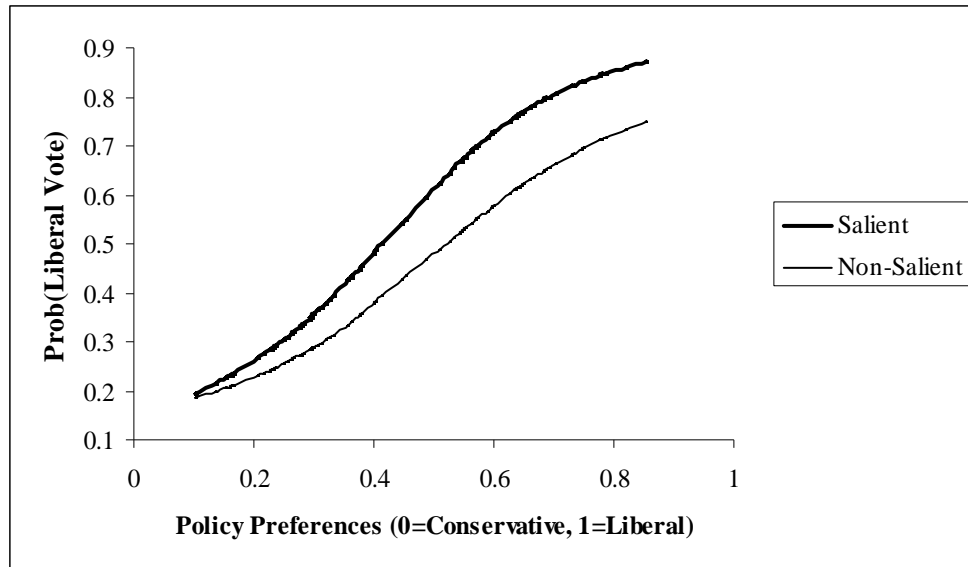
Figure 3.2: General Effect of Salience on the Preference-Behavior Relationship,

Rehnquist Court, 1994-2004

First, Figures 3.2 and 3.3 illustrate in general how the two significant attitude

strength variables explain heterogeneity in the preference-behavior relationship. Figure

3.2 illustrates how salience enhanced the impact of preferences, relative to non-salient

cases. Ideological divisions in salient cases appear to be greatly enhanced compared to

non-salient cases. Moreover, the pattern in Figure 3.2 strongly resembles an "asymmetric

enhancement" effect, like the scenario portrayed in Figure 2.2 in Chapter 2. That is,

liberals were far more likely to cast a liberal vote in salient cases, but conservatives were

not far more likely to cast conservative votes in salient cases, compared to non-salient

cases. In fact, it appears as if strong conservatives' voting behavior remained largely

unchanged from non-salient to salient cases.

Most interesting is how salience influenced moderate conservatives. Recall from the discussion in Chapter 2 that an "asymmetric enhancement" effect suggests that the presence of a case-level characteristic not only enhances the impact of policy preferences (the steepness of the slope), but it also has a direct effect on the case outcome such that it increases the overall propensity of a case to be decided in a particular direction (either liberal or conservative). In addition to showing how salience increased preference-based behavior, Figure 3.2, then, illustrates how the coefficient for salience (γ_{01}) in the β_{0j} equation works. Salience, in general, increased the overall propensity for a case to be decided in a liberal direction. This effect was most crucial for the behavior of the pivotal moderate conservatives (Justices Kennedy and O'Connor), who were more likely to cast *liberal* votes in salient cases compared to non-salient cases.[19] I elaborate on this finding more in the next section on the justice-specific results.

Figure 3.3 presents the general effect of issue familiarity. The low familiarity plot holds this variable constant at its 5th percentile, while the high familiarity plot holds the variable constant at its 95th percentile. The goal here is to compare preference-based behavior for issues that the Court had previously decided with less frequency against

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[19] In patterns where the case-level factor exhibits an asymmetric impact (like salience), the manner in which the case-level factor influences pivotal justices could also be a byproduct of how I measure justices' policy preferences. Using a continuous, interval measure means that the pivotal justices fall in between the pattern exhibited by the more extreme conservatives and extreme liberals. For salience, then, it might be the case that the interval-level assumption for policy preferences ensures that salience moves moderates in the liberal direction because moderates simply fall in between a pattern whereby conservatives are largely unfazed and liberals engage in ideologically-bolstered behavior. For salience only, I have experimented with treating policy preferences as a nominal variable with three categories: conservatives, liberals, and moderates. A nominal-level measure of preferences relaxes the assumption that moderates fall between the pattern evinced by liberals and conservatives. Using this nominal measure instead, I found a pattern similar to that displayed in Figure 3.2 (and subsequent figures in this chapter); that is, salience increased the moderate conservatives' propensities to cast liberal votes. Thus, I am fairly confident that the asymmetric patterns are not artifacts of the interval-level measurement assumption for policy preferences. Of course, the interval assumption for the policy preferences variable is used exclusively in the literature, and I believe that the general issue of the level of measurement for policy preferences should be explored more fully.
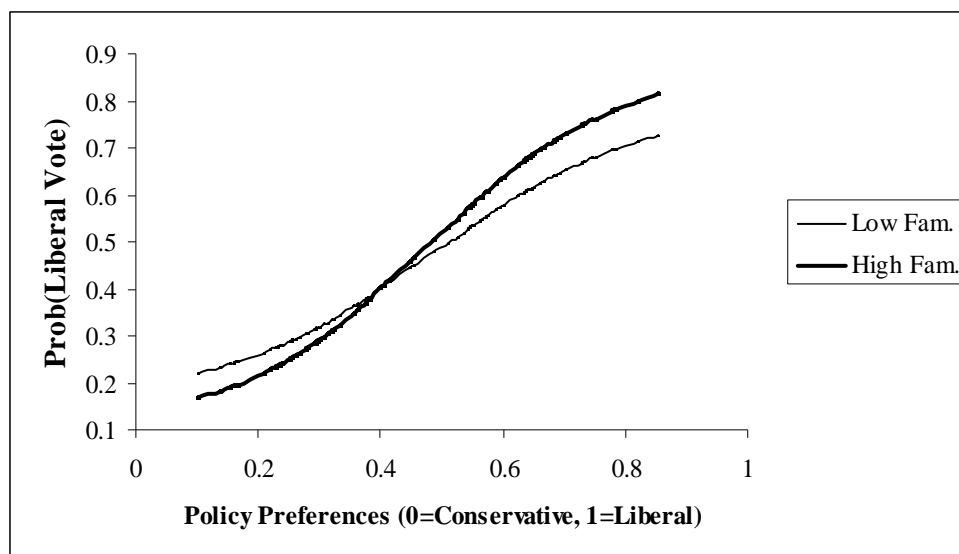
Figure 3.3: General Effect of Issue Familiarity on the Preference-Behavior Relationship, Rehnquist Court, 1994-2004

behavior in "blue chip" issues on which the Court had plenty of experience deciding. Figure 3.3 shows how the Court's high familiarity with an issue in a case enhanced the impact of preferences. Note how the slope of the high familiarity curve is much steeper than the low familiarity curve, and moreover, the pattern resembles an "enhancement-polarization" effect. That is, liberals were more likely to cast liberal votes and conservatives were more likely to cast conservative votes for high familiarity issues compared to low familiarity ones. The effect appears to be especially pronounced for liberals. Unlike salience, issue familiarity exhibited no direct effect on the case outcome, which was expected. This is seen in the figure, and, of course, in the β_{0j} equation for which the issue familiarity coefficient is not statistically significant.
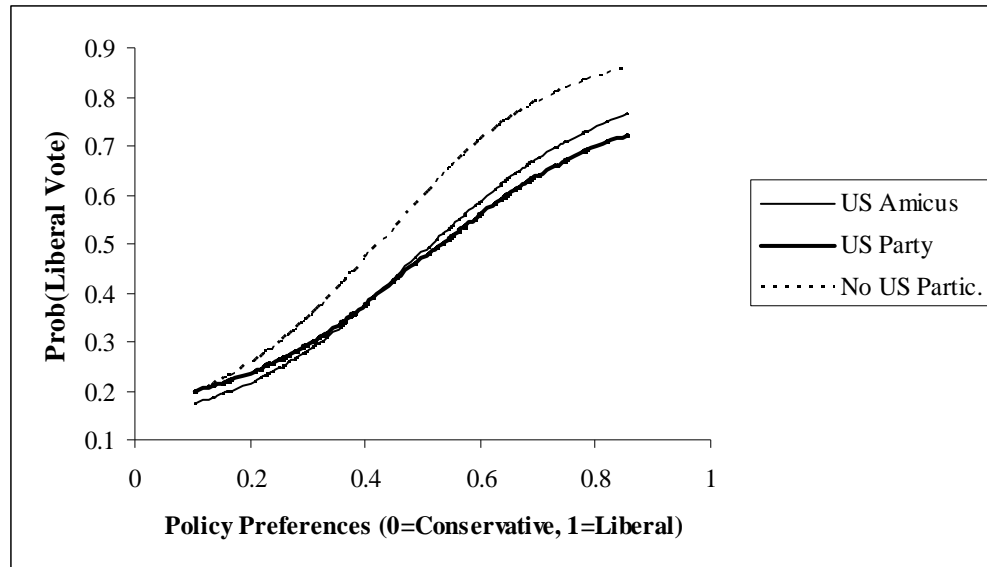
Figure 3.4: General Effect of U.S. Participation on the Preference-Behavior Relationship, Rehnquist Court, 1994-2004

Figure 3.4 displays the general effect of U.S. participation on the preference-behavior relationship. The solid bold line represents U.S. as a direct party, and the solid thin line indicates U.S. as amicus curiae. First, the figure shows how the impact of preferences was attenuated when the U.S. was a direct party, relative to when it was not involved. Moreover, the plot resembles an "asymmetric attenuation" pattern, such that liberals were far more likely to vote in a *conservative* direction in cases when the U.S. was direct party, and conservatives were not moved to a great extent. Related to the asymmetric attenuation pattern, the graph illustrates how the direct effect of U.S. as a direct party on the case outcome and the attenuation effect on the impact of preferences work in conjunction with each other. That is, U.S. participation as direct party had the general effect of increasing the overall propensity of the Court to decide a case

conservatively, which was expected given that the U.S.'s interests (in its role as a direct party) in civil liberties cases are often conservative.[20] But, especially for liberal justices, the graph also suggests a type of deference effect discussed above as this group was most likely to be moved in a conservative direction when the U.S. was a party relative to when the U.S. did not participate.

Furthermore, the results do not necessarily reveal that the three conservatives were *not* deferential. Indeed, given their baseline conservative voting propensities, the capacity for an increased conservative propensity was small indeed. But for liberals, the capacity for increased conservative voting propensities was vast. More generally, the graph and the finding suggest that one of the mechanisms by which the OSG is so successful in front of the Court, at least in the front of the Rehnquist Court from 1994-2004, is because the justices, particularly liberals, are more likely to suppress the ideological bases for their decisions when the U.S. is a direct party.

Figure 3.4 shows that U.S. participation as amicus curiae had a similar asymmetric attenuation effect on the preference-behavior relationship. Compared to no U.S. participation, U.S. as amicus both increased the propensity of a conservative outcome and reduced the net amount of preference-based behavior. The latter effect was expected, but since the U.S. often acts in the interests of the president's agenda when it participates as amicus, the direct effect of this mode of participation on the case outcome was unexpected, particularly because this time period covers both the Clinton and George W. Bush administrations, and therefore, contains OSG participation by Democrats and Republicans. Auxiliary analyses later on in the chapter address this issue in more detail.

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[20] As direct party, the U.S. took the conservative position 83.6% of the time from 1994 to 2004.
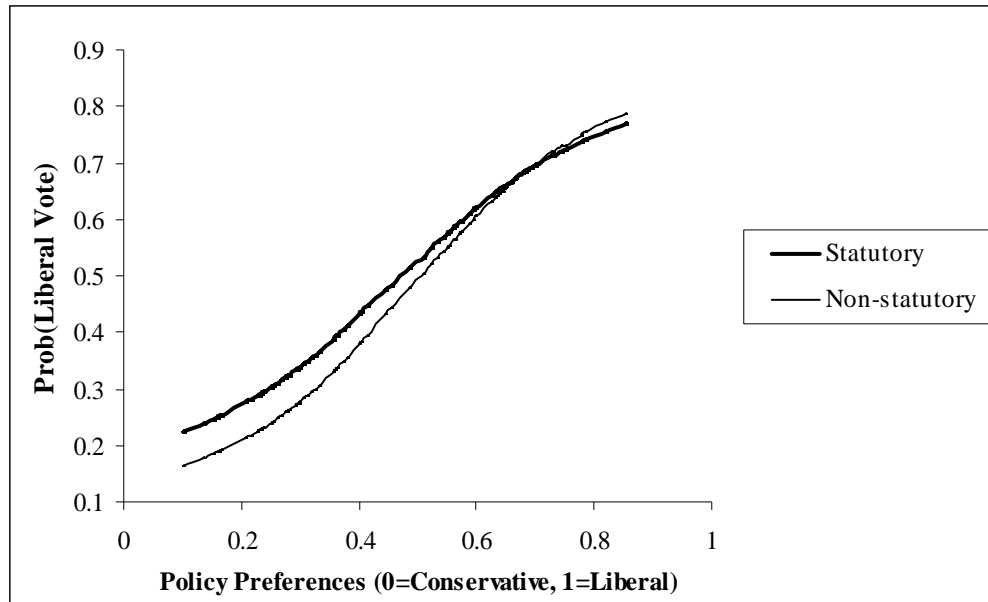
Figure 3.5: General Effect of Statutory Interpretation Cases on the Preference-Behavior

Relationship, Rehnquist Court, 1994-2004

As of now, it is evident that, in general, both modes of U.S. participation served to

constrain the magnitude of preference-based behavior, thus suggesting the manner in

which the Court shows deference to the OSG.

Figure 3.5 presents the general effect of statutory versus non-statutory cases on

the preference-behavior relationship. Although the magnitude of the effect does not

appear to be particularly large, the figure shows that the preference-behavior relationship

was indeed attenuated in statutory cases relative to non-statutory cases. The pattern

resembles a sort of compromise between attenuation-consensus and asymmetric

attenuation pattern. In statutory cases, conservatives were more likely to move away from

their default positions (relative to non-statutory cases), but liberals, with the exception of

the extreme (Justice Stevens), barely strayed from their non-statutory positions. While

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this finding should not be overstated given that neither liberals nor conservatives (nor moderates) strayed too far from their non-statutory tendencies, it does shed some light on debates over whether justices are more constrained in statutory versus constitutional cases (e.g., Eskridge 1991; Epstein and Knight 1998; Epstein et al. 2001). In line with some strategic perspectives, the results suggest that in statutory cases, justices behave in a more ideologically-constrained manner than in non-statutory cases.

The second set of post-estimation analyses, depicted in Figures 3.6 and 3.7, presents APEs for two of the more compelling effects—salience and U.S. participation—from a justice-centered perspective. The figures present the average probability of each justice deciding a case liberally, while manipulating the case-level variables (salience and U.S. participation) of interest. For each justice, I calculated his or her average policy preference over the full range of analysis. Thus, for a given case characteristic, the results reflect the average propensity of each justice casting a liberal vote over the eleven terms analyzed. In both figures, the X-axis orders the justices from conservative to liberal based on justices' average preference scores for the eleven-term span.

Figure 3.6 presents these results for salience. The general pattern in this figure resembles that of Figure 3.2—"asymmetric enhancement." The four liberals (Justices Stevens, Souter, Ginsburg, and Breyer) were, on average, significantly more likely to cast liberal votes in salient cases compared to non-salient cases. In fact, for each of the liberal justices, the probability of a liberal vote increased by between 0.14 and 0.15 as salience varied from trait-absent to trait-present; this is a substantively large magnitude indeed. While the ideological behavior of the liberals was bolstered, the three conservatives
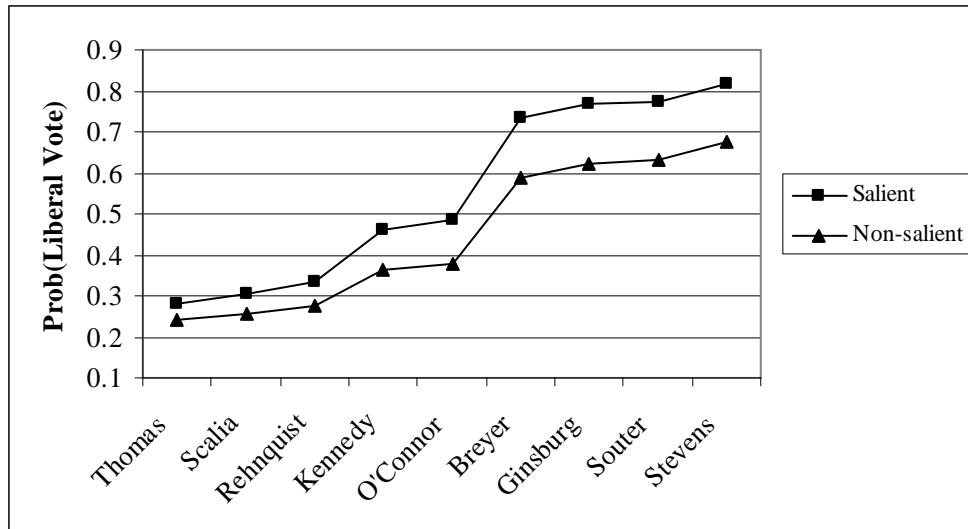
Figure 3.6: Justice-Specific Effects of Salience on the Preference-Behavior Relationship, Rehnquist Court, 1994-2004

(Justices Thomas, Scalia, and Rehnquist) were quite steadfast in their behavior; they remained conservative in their voting tendencies regardless of salience.

Crucial to this analysis is the behavior of the "swing justices," Justices Kennedy and O'Connor. The figure shows that the average probability of casting a liberal vote in non-salient cases was about 0.37 for Kennedy and 0.39 for O'Connor. However, in salient cases, Justice Kennedy's estimated average probability of a liberal vote increased to 0.46, and O'Connor's to 0.48. Thus, while their conservative colleagues were barely swayed in salient cases, Kennedy and O'Connor, the moderate conservatives and pivotal members of the Court, were significantly *more likely to cast liberal votes in salient cases* (relative to non-salient cases). This finding is one I did not necessarily anticipate, and it presents a puzzle ripe for an explanation.

One possible explanation for this effect is that salience operates via different mechanisms across different sets of justices. The results from the Rehnquist Court suggest that it operated as an attitude strength moderator (producing ideological bolstering) for the more "die-hard" liberals (Breyer, Ginsburg, Souter, and Stevens), yet failed to register any influence on "die-hard" conservatives (Thomas, Scalia, and Rehnquist). And for the moderate conservatives (Kennedy and O'Connor), for whom salience constrained them from acting in accord with their ideological "default" positions, salience acted through an *accountability* mechanism as opposed to the attitude strength mechanism.

Baum (1997, 47-55) contends that justices care a great deal about their standing with certain audiences, including policy and legal groups and the media. Sowell (1994) goes a step further and argues that a "Greenhouse Effect"—named after Linda Greenhouse, the *New York Times* Supreme Court reporter—might exist, and others have suggested that it exists mainly for "weakly conservative" Supreme Court justices who had not worked in Washington D.C. prior to their arrival on the Supreme Court and therefore had not been exposed to the so-called "liberal legal culture" that supposedly exists in D.C. O'Connor and Kennedy both fit this bill. This phenomenon suggests that under certain conditions, susceptible justices' voting behavior might reflect their desire for praise from the media, which Sowell suggests exerts left-leaning pressures on judges. Salient cases would be obvious candidates for these conditions under which certain justices, namely O'Connor and Kennedy, might make decisions that reflect liberal-leaning media pressures. I will return to this finding when discussing the results from the Warren and Burger Courts.
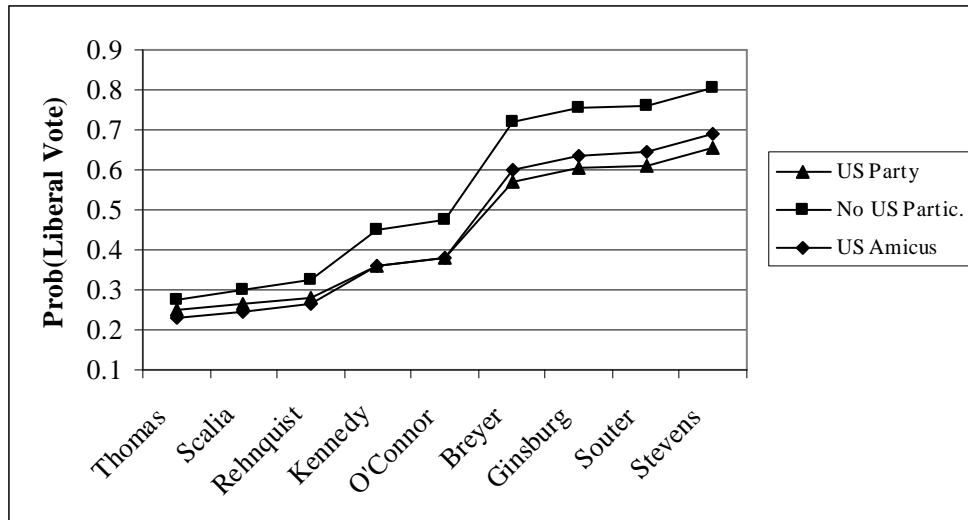
Figure 3.7: Justice-Specific Effects of U.S. Participation on the Preference-Behavior

Relationship, Rehnquist Court, 1994-2004

Finally, Figure 3.7 presents the justice-specific analysis highlighting the impact of

U.S. as a direct party and amicus curiae. The general pattern, of course, resembles Figure

3.4. The four liberals were moved most (in the conservative direction) by the presence of

the U.S. as a direct party, relative to no U.S. participation. For each liberal, the

probability of a conservative vote increased by about 0.15 when this variable changed

from no U.S. participation to U.S. as a direct party. Justices O'Connor and Kennedy were

also more likely to cast conservative votes when the U.S. was a direct party compared to

when it did not participate. The three conservatives were again obstinate in their

ideological voting; their propensity to cast a conservative vote remained unchanged in the

presence of the U.S. as a direct party. This is sensible since the U.S. often takes the

conservative position, and therefore, liberals, and to a lesser extent moderates, have more

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capacity for movement in the conservative direction than conservatives. The pattern for

U.S. as amicus curiae is nearly identical to that of U.S. as a direct party.

Model 2 Results for the Burger Court

The results from the random coefficient model (the Model 2 specification) for the

Burger Court are displayed in Table 3.3. First, assessing overall model and fit and the

appropriateness of the multilevel random coefficient specification, the two likelihood

ratio tests strongly support the specification set forth in Model 2. Compared to both the

regular, pooled logit and the random intercept model, the fully-specified random

coefficient model is more statistically appropriate for the Burger Court data, again, as

was the case with the Rehnquist Court data, providing justification for the hierarchical

nesting structure and random coefficient model posited here.

Beginning with the attitude strength variables from the β_{0j} equation in Table 3.3,

salient cases were significantly more likely to be decided in a liberal direction than non-

salient cases (p=0.05). As was the case with the Rehnquist Court, the Burger Court

results indicate that for cases of high importance, case outcomes were more likely to be a

liberal compared to less important cases. This finding will be revisited below in

conjunction with the results from the β_{1j} equation. As for the other two strength-related

variables, neither exhibited a significant impact on the case outcome, as was expected.

Moving to the accountability variables in the β_{0j} equation, the coefficient for *U.S.

as a direct party* is negative, as expected, and statistically significant at α=.05. As was

seen in the Rehnquist Court model, this means that cases in which the U.S. was a direct

party were significantly more likely to be decided in a conservative direction relative to

cases in which the U.S. did not participate. Once again, since the U.S. government often possesses conservative interests in civil liberties decisions, this shows that the OSG exhibited significant influence as direct party, compared to other actors, during the Burger Court.[21] Mimicking the Rehnquist Court results, the effect of *U.S. as amicus curiae* (compared to no U.S. participation) is negative and statistically significant. During the Burger Court, in both participatory capacities, the OSG was successful in influencing the Court's outcomes. While the information environment exhibited no significant influence on case outcome, statutory interpretation cases were significantly more likely than non-statutory cases to be decided in a liberal direction during the Burger Court.

Moving to the estimates from the β_{1j} equation in Table 3.3, the estimate of γ_{10}, representing the typical impact of preferences, is again, as in the Rehnquist Court, potent and statistically significant. The remaining results from the β_{1j} equation indicate that two attitude strength variables—*salience* and *issue familiarity*—exhibited statistically significant effects on the preference-behavior relationship. Once again, these results for the attitude strength factors mimic the findings from the Rehnquist Court. During the Burger Court, salience enhanced the impact of policy preferences relative to non-salient cases. Furthermore, as expected, issue familiarity enhanced the magnitude of preference-based behavior on the Burger Court, suggesting that for "blue chip" issues, justices engaged in more ideologically-bolstered behavior than for newer cases that had not been heard by the Court as frequently. For the Burger Court, as was the case for the Rehnquist

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[21] From 1975 through 1985, the U.S. took the conservative position in 81.1% of the cases in which it was direct party. This figure is very similar to the figure from the Rehnquist Court data (83.6%).

	Coeff.	(SE)	p
Estimates From β_{0j} Equation (Effects on Case Outcome):			
Intercept, γ_{00}	-0.352	(0.128)	0.006
Salience, γ_{01}	0.652	(0.334)	0.051
Complexity, γ_{02}	0.183	(0.430)	0.670
Issue Familiarity, γ_{03}	0.154	(0.131)	0.239
Information Environment, γ_{04}	-0.496	(1.621)	0.760
U.S. Amicus, γ_{05}	-0.723	(0.335)	0.031
U.S. Party, γ_{06}	-2.450	(0.302)	<0.001
Statutory, γ_{07}	0.970	(0.286)	<0.001
Estimates From β_{1j} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), γ_{10}	4.297	(0.166)	<0.001
Salience, γ_{11}	1.346	(0.374)	<0.001
Complexity, γ_{12}	-0.337	(0.457)	0.230
Issue Familiarity, γ_{13}	0.493	(0.137)	<0.001
Info. Environment, γ_{14}	-0.967	(1.700)	0.285
U.S. Amicus, γ_{15}	0.672	(0.365)	0.033
U.S. Party, γ_{16}	-0.088	(0.319)	0.392
Statutory, γ_{17}	-0.992	(0.302)	<0.001
Variance-Covariance Components:			
var(u_{0j})	11.980	(1.041)	
var(u_{1j})	5.433	(0.827)	
cov(u_{0j}, u_{1j})	-1.615	(0.671)	
Log likelihood = -3384.20			
Number of choices (level-1 units): 8,183			
Number of cases (level-2 units): 945			
Likelihood Ratio Tests:			
Full Model versus Regular, Pooled Logit Model:			
χ^2=2912.61, df=3, p<0.001			
Full Model versus Random Intercept Model:			
χ^2=199.68, df=2, p<0.001			

Note: p-values in the β_{0j} equation are based on 2-tailed tests, while those from the β_{1j} equation are based on 1-tailed tests.

Table 3.3: Random Coefficient Model of Heterogeneity in Supreme Court Decision

Making, Burger Court (1975-1985 Terms)

Court, the effect of complexity on the preference-behavior relationship is not statistically significant, but it is in the expected direction.

Turning to the accountability factors, results from the β_{1j} equation indicate that the impact of policy preferences in statutory cases was significantly reduced compared to non-statutory cases. This finding, along with the same finding from the Rehnquist Court, bolsters expectations from strategic perspectives that justices are more ideologically constrained in statutory cases. The coefficient for information environment (γ_{14}) is in the wrong direction, and is far from statistical significance, suggesting that for both Rehnquist and Burger Courts, the ideological configuration of amicus briefs had no discernible impact on the preference-behavior relationship. So far, then, the findings from the Rehnquist and Burger Courts are similar: salience, issue familiarity, and statutory interpretation all exhibit significant effects on the preference-behavior relationship. The key difference between these two Court eras centers on the effect of U.S. participation.

While *U.S. as a direct party* significantly attenuated preference-based behavior on the Rehnquist Court, it exhibited a statistically *insignificant* impact during the Burger Court. While results from the Rehnquist Court indicated that direct party participation by the U.S. influenced *both* the overall propensity of the case to be decided conservatively (relative to no U.S. participation) *and* the magnitude of the preference-behavior relationship, results from the Burger Court suggest that this mode of participation exhibited *only* the former path of influence. The finding suggests that the type of deference granted to the OSG as direct party (rooted in both the attenuation and direct effect mechanisms) during the Rehnquist Court was not granted to the OSG during the Burger Court.

Another significant difference between the Burger and Rehnquist Courts is the effect of U.S. participation as amicus curiae on the preference-behavior relationship. Recall that U.S. as amicus curiae attenuated preference-based behavior during the Rehnquist Court. During the Burger Court, U.S. as amicus, relative to no U.S. participation, had the exact opposite effect: it *enhanced* preference-based behavior at a statistically significant level. Thus, the OSG in its amicus curiae capacity was able to exhibit multiple paths of influence, but via different means than during the Rehnquist Court. That is, it was able to influence the case outcome on the Burger Court, but participation in this mode also produced ideologically-*polarized* behavior by the justices.

Substantive Interpretations – Burger Court

In this section, I present substantive interpretations, using APEs, for the same case-level variables as analyzed for the Rehnquist Court. Recall that the first form, depicted in Figures 3.8-3.11, provides a very general substantive view of how each case-level variable shaped the preference-behavior relationship. The second set, depicted in Figures 3.12 and 3.13, is the justice-centered view of how two of the more interesting variables shape preference-based behavior.

First, Figures 3.8 and 3.9 illustrate in general how the two significant attitude strength variables explain heterogeneity in the preference-behavior relationship on the Burger Court. Figure 3.8 illustrates how salience enhanced the impact of preferences, relative to non-salient cases. The pattern of influence is similar to that revealed for the Rehnquist Court. Moreover, the pattern in Figure 3.2 strongly resembles an "asymmetric enhancement" effect. That is, liberals (especially Justices Marshall and Brennan) were far
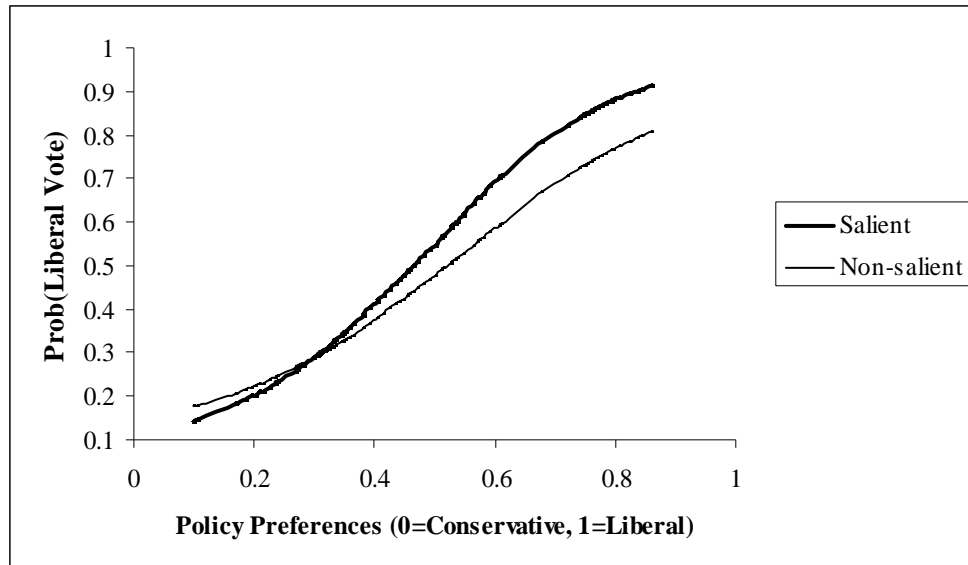
Figure 3.8: General Effect of Salience on the Preference-Behavior Relationship, Burger Court, 1975-1985

more likely to cast liberal votes in salient cases, and, with exception to the most conservative of conservatives (Justice Rehnquist), most conservative justices were *not* far more likely to cast conservative votes in salient cases, compared to non-salient cases. As was the case for the Rehnquist Court, Figure 3.8 reveals the dual influences salience exhibited, both as a direct effect on the case outcome and as an enhancer of the preference-behavior relationship. Again, this effect was most crucial for the behavior of the pivotal members in the center of the Burger Court (Justices Blackmun, Stewart, Powell, and White), who were more likely to cast *liberal* votes in salient cases compared to non-salient cases. Compared to the Rehnquist Court, though, Figure 3.8 displays that the impact of salience on the case outcome (that is, that salience increases the propensity
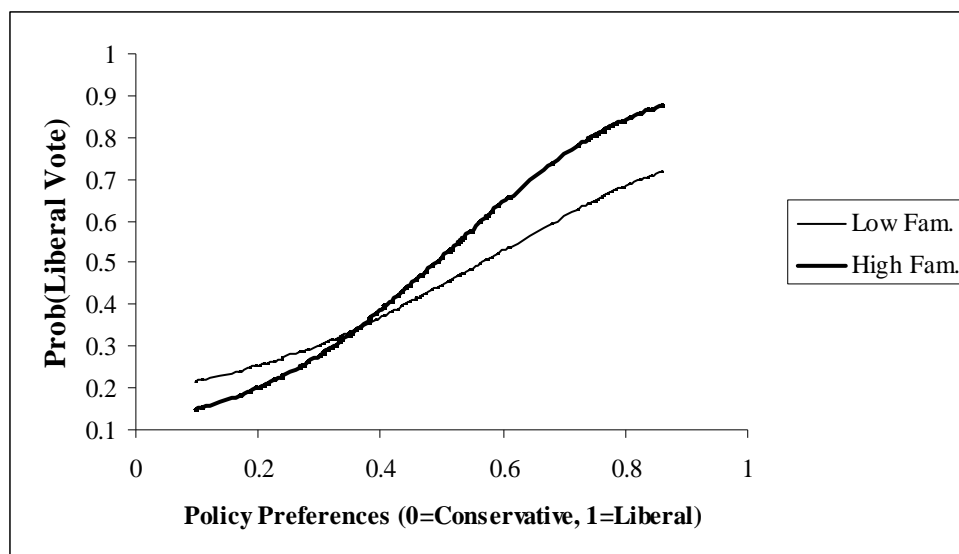
Figure 3.9: General Effect of Issue Familiarity on the Preference-Behavior Relationship, Burger Court, 1975-1985

of a liberal decision) was not as strong on the Burger Court. This was also seen in comparing the effect of salience in the β_{0j} equation between the Burger and Rehnquist analyses.

Figure 3.9 presents the general effect of issue familiarity. Once again, the low familiarity plot holds this variable constant at its 5th percentile, while the high familiarity plot holds the variable constant at its 95th percentile. Figure 3.9 shows how the Burger Court's high familiarity with an issue in a case enhanced the impact of preferences, resembling an "enhancement-polarization" effect akin to the Rehnquist Court analysis. That is, liberals were more likely to cast liberal votes and conservatives more likely to cast conservative votes for high familiarity issues compared to low familiarity ones. The
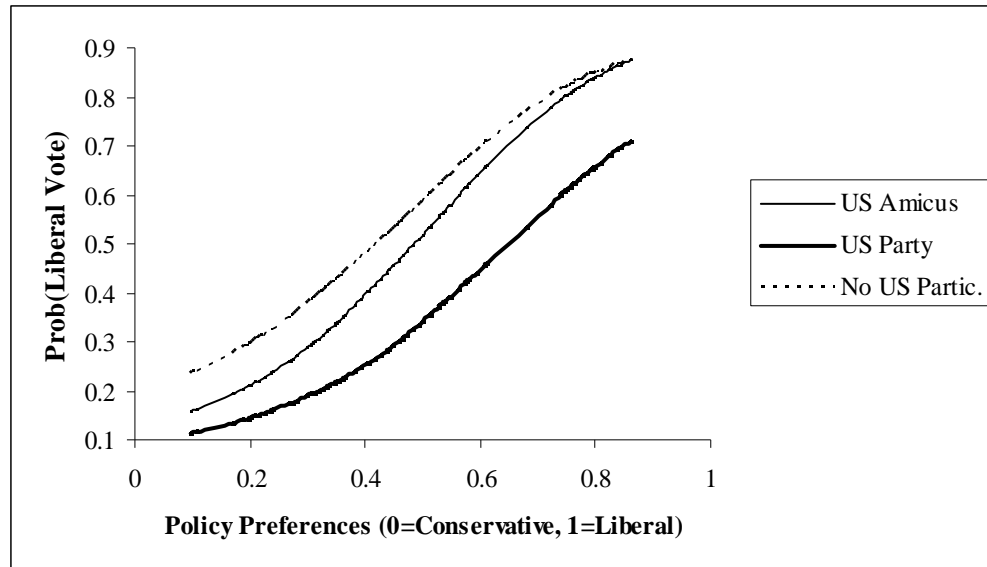
Figure 3.10: General Effect of U.S. Participation on the Preference-Behavior

Relationship, Burger Court, 1975-1985

effect appears to be especially pronounced for liberals. Unlike salience, issue familiarity

exhibited no direct effect on the case outcome, which was expected. This is seen in

Figure 3.9 and, of course, in the β_{0j} equation for which the issue familiarity coefficient

was not statistically significant.

Figure 3.10 displays the general effects of U.S. participation on the preference-

behavior relationship for the Burger Court. The solid bold line represents U.S. as a direct

party, and the solid thin line indicates U.S. as amicus curiae. First, unlike the Rehnquist

Court, the figure shows how the impact of preferences was *not* attenuated when the U.S.

was a direct party, relative to when it was not involved; note how the lines run parallel to

each other and possess similar steepness levels. The graph does illustrate the direct effect

of U.S. as a direct party on the case outcome. That is, U.S. participation as direct party

increased the overall propensity of the Court to decide a case in the conservative direction. Thus, the results suggest that the Burger Court granted the Office of the Solicitor General a degree of deference, but unlike during the Rehnquist Court, this deference was not multifaceted. It appears that while the OSG influenced the case outcome, OSG participation as direct party elicited the same level of preference-based behavior as when there was no OSG participation.

Figure 3.10 also provides a more nuanced depiction of how U.S. as amicus curiae affected the preference-behavior relationship on the Burger Court. The figure reveals an asymmetric enhancement pattern, where, relative to no OSG participation, OSG as amicus shifted conservatives and moderates in a conservative direction, while liberals were largely unfazed. Again, by moving the moderates, the OSG as amicus was able to exhibit a significant effect on the case outcome (compared to no OSG participation).

Figure 3.11 presents the general effect of statutory versus non-statutory cases on the preference-behavior relationship. Note that the magnitude of this effect during the Burger Court was considerably larger than for the Rehnquist Court. Figure 3.11 further shows how the preference-behavior relationship was indeed attenuated in statutory cases relative to non-statutory cases, but unlike the Rehnquist Court, the pattern resembles "asymmetric attenuation" due to the direct effect (in the liberal direction) of statutory versus non-statutory cases on case outcomes during the Burger Court (from the β_{0j} equation in Table 3.3). During the Burger Court, in statutory cases, only conservatives and moderates were more likely to deviate from their non-statutory positions. Note that it is the liberals who were largely unfazed when faced with statutory or non-statutory cases.
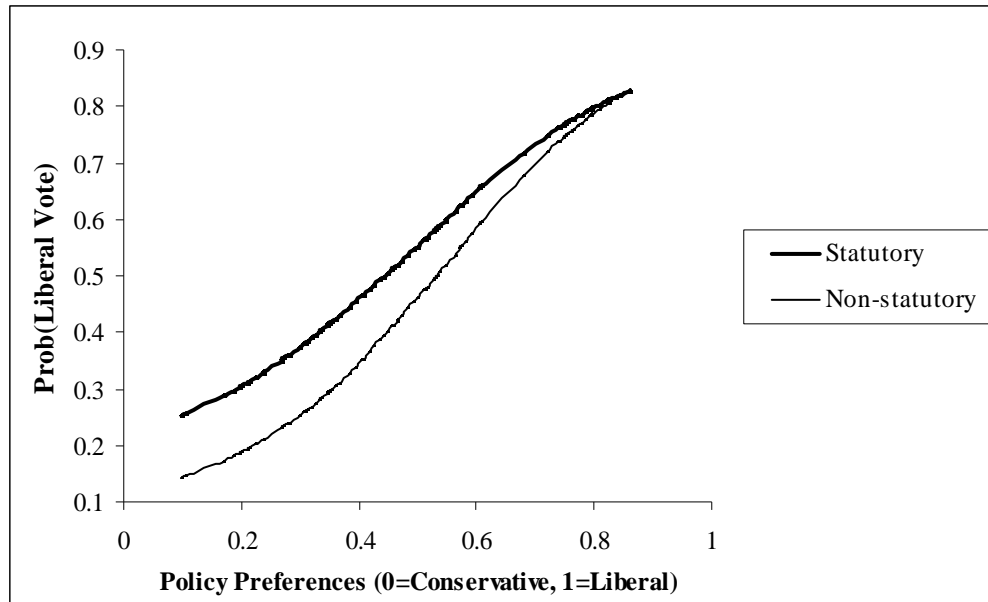
Figure 3.11: General Effect of Statutory Interpretation Cases on the Preference-Behavior

Relationship, Burger Court, 1975-1985

Overall, the results suggest that in statutory cases, Burger Court justices behaved in a

more ideologically-constrained manner than in non-statutory cases.

The second set of post-estimation analyses, depicted in Figures 3.12 and 3.13,

present justice-centered substantive results for salience and U.S. participation. The

figures were constructed using the same procedures as described above with respect to

Figures 3.6 and 3.7.[22] Figure 3.12 presents these results for salience. The general pattern

in this figure resembles that of Figure 3.8—"asymmetric enhancement." Note how the

figure shows that this pattern is primarily anchored in the behavior of Justices Brennan

and Marshall, the Court's most liberal members, and to a lesser extent Justice Stevens,

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[22] Note that Figures 3.12 and 3.13 include all ten justices who served during this period. Recall that
O'Connor replaced Stewart from the 1981 term onward.
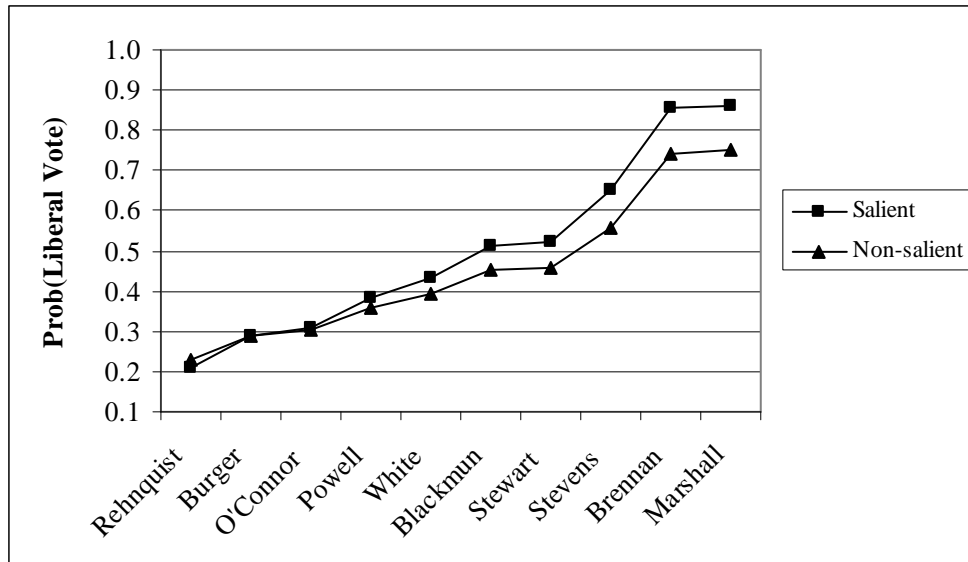
Figure 3.12: Justice-Specific Effects of Salience on the Preference-Behavior

Relationship, Burger Court, 1975-1985

the Court's third most liberal member during this period. For these three justices, the

probability of a liberal vote increased between 0.10 and 0.11 as salience varied from trait-

absent to trait-present. The three liberals, then, engaged in ideologically-bolstered

behavior in salient cases, compared to non-salient cases, while the more conservative

members of the Court (Justices Rehnquist, Burger, and O'Connor) remained steadfast

regardless of salience levels.

As was the case for the Rehnquist Court, crucial to Figure 3.12 is the behavior of

the "swing justices," or the pivotal center of the Court. From the 1975 through 1980

terms, the center of the Burger Court, depending on the case, arguably consisted of

Justices Stewart, Blackmun, White, and Powell. Justice White was typically more liberal

on civil rights issues, but fairly conservative on most other civil liberties issues (e.g.,

criminal procedure). Justice Blackmun had become more liberal since he started in 1970, but had not reached his liberal zenith that would come later in his career. Across issue areas, Justices Stewart and Powell could probably most be counted on as the "swing voters." Figure 3.12 shows that salience had the most interesting effect on two of the moderate justices: Blackmun and Stewart. The figure shows that the estimated average probability of casting a liberal vote in non-salient cases was 0.45 for Blackmun and 0.46 for Stewart. However, in salient cases, Justice Blackmun's estimated average probability of a liberal vote jumps to 0.51, and Stewart's to 0.52. Thus, while their conservative colleagues were barely swayed in salient cases, Blackmun and Stewart, two of the moderate and pivotal members of the Court, were significantly *more likely to cast liberal votes in salient cases* (relative to non-salient cases). The figure also shows that the other two center members—Powell and White—were barely swayed in the liberal direction in salient cases.

The general pattern of influence that salience exhibited during the Burger Court is similar to that of the Rehnquist Court. I speculated that one explanation for this effect is that salience operates via different mechanisms across different sets of justices. The results from the Burger Court again seem to support this speculation. Salience appeared to operate as an attitude strength moderator (producing ideological bolstering) for the more "die-hard" liberals (Marshall, Brennan, and Stevens), yet failed to register any influence on conservatives (Rehnquist, Burger, and O'Connor). And for the moderates (particularly Blackmun and Stewart), salience arguably acted not through the attitude strength mechanism, but via an *accountability* mechanism, as these justices were more likely to cast liberal votes in salient cases compared to non-salient cases.

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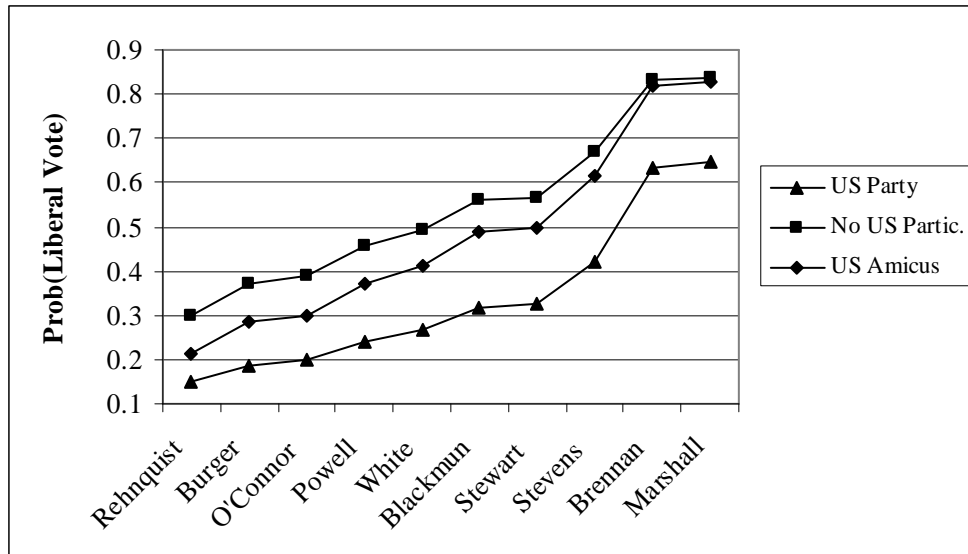
Figure 3.13: Justice-Specific Effects of U.S. Participation on the Preference-Behavior

Relationship, Burger Court, 1975-1985

Finally, Figure 3.13 presents the justice-specific analysis highlighting the impact

of U.S. as a direct party and amicus curiae. The general pattern, of course, resembles

Figure 3.4. While direct party participation by the OSG did not attenuate the preference-

behavior relationship on the Court, note the substantively large effect this mode of

participation had on the overall case outcome, compared to no U.S. participation. For

each justice, the estimated probability of a conservative vote increased by between 0.15

and 0.25. The figure also shows that as direct party, the OSG could in general count on

supermajorities for the conservative position. Note how even Justice Stevens' probability

of casting a conservative vote given OSG participation as a direct party was relatively

high (close to 0.60).

The figure also shows the asymmetric enhancement effect, which was unexpected, of U.S. as amicus curiae. Note that this finding is largely driven by Justices Brennan and Marshall, who remained steadfast in their voting propensities regardless of whether U.S. is amicus compared to when it does not participate. Unlike these two liberals, the remaining justices were increasingly likely to cast conservative votes when U.S. is amicus.

As discussed, results from the Burger Court have much in common with the Rehnquist Court with one exception: U.S. participation. I return to this issue after a discussion of the Warren Court results.

Model 2 Results for the Warren Court

The results from the random coefficient model (the Model 2 specification) for the Warren Court are displayed in Table 3.4. The two likelihood ratio tests strongly support the specification set forth in Model 2. Compared to both the regular, pooled logit and the random intercept model, the fully-specified random coefficient model is more statistically appropriate for the Warren Court data. Thus, for the Rehnquist, Burger, and Warren Court data, the strong statistical support for the full random coefficient specification suggests that modeling Supreme Court voting data as a two-level hierarchy is statistically superior to pooling the data and ignoring the hierarchical structure.

Beginning with the attitude strength variables from the β_{0j} equation in Table 3.4, *salient* cases were again more likely to be decided in a liberal direction than non-salient cases, although the effect falls just short of the standard level of significance ($p=0.06$). As was the case with the Rehnquist and Burger Courts, the Warren Court results indicate that

in cases of high importance, outcomes were more likely to be liberal than in cases with lesser importance. While issue familiarity did not exhibit an impact on case outcome, complexity did. As complexity increased, cases were more likely to be decided in a conservative direction, though this effect is marginally significant ($p=0.08$).

Moving to the accountability variables in the β_{0j} equation, the coefficient for *U.S. as a direct party* is, in accord with the Rehnquist and Burger findings, negative and statistically significant, suggesting once again that cases in which the U.S. was a direct party were significantly more likely to be decided in a conservative direction relative to cases in which the U.S. did not participate. Even in the very liberal Warren Court era, the U.S. government, which frequently took the conservative position in civil liberties decisions, exhibited a significant influence as a direct party.[23] However, unlike the Rehnquist and Burger Court results, the effect of *U.S. as amicus* (compared to no U.S. participation) is statistically insignificant, suggesting that in only one participatory capacity (direct party) was the Office of the Solicitor General influential in affecting the Court's outcomes. The interest group information environment exhibited no significant influence on case outcome (in accord with Rehnquist and Burger analyses). As was the case with the Burger Court, statutory interpretation cases were more likely than non-statutory cases to be decided in a liberal direction during the Warren Court; but note that this effect does not attain standard statistical significance levels ($p=0.125$).

Compared to the Burger and Rehnquist Courts, the estimates from the β_{1j} equation in Table 3.4 reveal that the hypothesized case-level factors, on the whole, exhibit the least

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[23] From 1962 through 1968, the U.S. took the conservative position in 83.6% of the cases in which it was direct party. Across the three Court eras, then, this percentage is very comparable.

	Coeff.	(SE)	p
Estimates From β_{0j} Equation (Effects on Case Outcome):			
Intercept, γ_{00}	1.704	(0.171)	<0.001
Salience, γ_{01}	0.648	(0.346)	0.061
Complexity, γ_{02}	-0.808	(0.459)	0.079
Issue Familiarity, γ_{03}	-0.036	(0.145)	0.802
Information Environment, γ_{04}	-0.753	(2.008)	0.708
U.S. Amicus, γ_{05}	0.279	(0.501)	0.577
U.S. Party, γ_{06}	-1.361	(0.409)	<0.001
Statutory, γ_{07}	0.655	(0.427)	0.125
Estimates From β_{1j} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), γ_{10}	2.759	(0.195)	<0.001
Salience, γ_{11}	0.433	(0.367)	0.119
Complexity, γ_{12}	0.436	(0.480)	0.182
Issue Familiarity, γ_{13}	0.224	(0.148)	0.065
Info. Environment, γ_{14}	-1.365	(2.011)	0.249
U.S. Amicus, γ_{15}	-0.332	(0.524)	0.263
U.S. Party, γ_{16}	-0.205	(0.417)	0.311
Statutory, γ_{17}	-0.854	(0.434)	0.025
Variance-Covariance Components:			
var(u_{0j})	7.167	(0.960)	
var(u_{1j})	2.512	(0.760)	
cov(u_{0j}, u_{1j})	-1.908	(0.720)	

Log likelihood = -1360.84

Number of choices (level-1 units): 3,242

Number of cases (level-2 units): 389

Likelihood Ratio Tests:
  Full Model versus Regular, Pooled Logit Model:
         χ^2=835.34, df=3, p<0.001
  Full Model versus Random Intercept Model:
         χ^2=39.92, df=2, p<0.001

Note: p-values in the β_{0j} equation are based on 2-tailed tests, while those from the β_{1j} equation are based on 1-tailed tests.

Table 3.4: Random Coefficient Model of Heterogeneity in Supreme Court Decision

Making, Warren Court (1962-1968 Terms)

amount of systematic influence on the preference-behavior relationship. As I will explain

in more detail below, I believe this is partly due to the lack of ideological variation across

the Warren Court justices.

First, the estimate of γ_{10}, representing the typical impact of preferences, is again,

like the Rehnquist and Burger data, potent and statistically significant. The remaining

results from the β_{1j} equation indicate that *salience*, as it did during the Rehnquist and

Burger eras, enhanced the preference-behavior relationship, though not at standard levels

of statistical significance (p=0.12). Also in common with the Rehnquist and Burger

analyses, the results suggest that *issue familiarity* enhanced the magnitude of preference-

based behavior on the Warren Court, but not quite at standard levels of significance

(p=0.065). Finally, unlike in the Burger and Rehnquist Courts, the effect of complexity

on the preference-behavior relationship was *positive*, but not statistically significant.

Turning to the accountability factors, results from the β_{1j} equation indicate that

only one case-level factor exhibited a statistically significant effect on the preference-

behavior relationship: *statutory versus non-statutory cases*. In common with the Burger

and Rehnquist Courts, the result suggests that Warren Court justices were more

ideologically constrained in statutory compared to non-statutory cases. The coefficient

for information environment (γ_{14}) is in the wrong direction, and is far from statistical

significance; thus, for all three Courts, the ideological configuration of amicus briefs had

no significant impact on the preference-behavior relationship.

Moving to the effect of U.S. participation, Table 3.4 reveals that *U.S. as a direct

party* exhibited a statistically *insignificant* impact on the preference-behavior relationship

during the Warren Court. While results from the Rehnquist Court indicated that direct

party participation by the U.S. influenced *both* the overall propensity of the case to be decided conservatively (relative to no U.S. participation) *and* the magnitude of the preference-behavior relationship, results from the Warren Court mirror those from the Burger Court: the direct party mode of participation significantly affected the case outcome, but *not* the magnitude of the preference-behavior relationship. This finding suggests that, unlike the Rehnquist Court, deference toward the OSG as a direct party was not rooted in the multiple mechanisms of influence during the Warren and Burger Courts.

Regarding the effect of U.S. as amicus curiae, while results from the Rehnquist Court revealed an attenuation effect and Burger Court results revealed an enhancement effect, results from the Warren Court reveal that U.S. participation as amicus failed to influence the magnitude of preference-based behavior. Thus, the OSG in its amicus curiae capacity failed to exhibit either path of influence, that is, neither on the case outcome nor the preference-behavior relationship. The differences across the three Court eras in the influence of U.S. participation beg further investigation, and I present and discuss auxiliary analyses after presenting substantive interpretations from the Warren Court.

Substantive Interpretations – Warren Court

In this section, I discuss substantive interpretations, using APEs, for the same case-level variables as analyzed for the Rehnquist Burger Courts. Figures 3.14-3.17 provide the general substantive view of how each case-level variable shapes the preference-behavior relationship.

Before discussing the core of the results, it is worth noting a general difference in these graphs compared to the Burger and Rehnquist Courts. The difference centers on a lack of *ideological variation* across justices during the Warren Court. Thinking about the heterogeneity framework and the conceptual rationale I presented in Chapter 2 regarding what the impact of preferences means, the greatest capacity for heterogeneity in Supreme Court decision making exists when there is maximum ideological variation on the Court. Such variation occurs when on a given Court, there are justices on the conservative end, justices in the middle, and justices on the liberal end. The Burger and Rehnquist Courts possess a distribution of policy preferences across justices that is fertile ground for detecting heterogeneity in preference-based behavior. From the descriptive statistics presented in Appendix B, note how the standard deviations for the policy preferences variable for the Burger and Rehnquist Courts are greater than the standard deviation from the Warren Court.[24] Moreover, from the descriptive statistics of the non-transformed policy preferences variable, note that the range of this variable is much greater for the Burger and Rehnquist Courts compared to the Warren Court. Thus, the *capacity* for heterogeneity in preference-based behavior is greater on the Burger and Rehnquist Courts due to the decent amount of ideological variation that exists on these Courts. But for the Warren Court, there is not as much of a capacity to detect heterogeneity in preference-based behavior due to the lack of ideological variation across the justices.

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[24] Appendix B also shows that the mean of the policy preferences variable is much higher for the Warren Court compared to the other two Courts. For the original, non-transformed policy preferences variable (lagged proportion of liberal votes), the mean of policy preferences for the Warren Court is 0.70, while the means for the Burger and Rehnquist Courts are 0.48 and 0.47, respectively. Thus, in addition to possessing relatively low variation, the distribution of preferences for the Warren Court is skewed toward the liberal direction.

In accord with what we know about the liberal Warren Court, this lower capacity

for heterogeneity in preference-based behavior is primarily due to a lack of justices

anchoring the conservative end of the Court and the predominance of liberal justices

(Justices Douglas, Goldberg, Fortas, Warren, Brennan, Marshall, and Black). The most

conservative member during this period was Justice Harlan, yet his average preference

score (on a scale where 0 is most conservative and 1 is most liberal) was 0.44. Indeed,

Harlan might be considered a moderate on the Rehnquist Court.[25] And the second-most

conservative member is Justice Clark, who has an average preference measure of 0.52. In

essence, then, there are two groups of justices during this era of the Warren Court:

liberals and *moderates*. Thus, for the Warren Court, the *impact of preferences* is

conceptualized as how much more likely liberals are to cast a liberal vote than *moderates*,

since it is moderates who anchor the right. This presents a clear contrast to the Burger

and Rehnquist Courts, where there was a third group of justices: conservatives.

Moving to a discussion of the substantive interpretations and keeping the above

discussion in mind, Figures 3.14 and 3.15 illustrate how salience and issue familiarity

explain heterogeneity in the preference-behavior relationship on the Warren Court.

Figure 3.14 slightly resembles an "asymmetric enhancement" effect and is somewhat

similar to that revealed for the Rehnquist and Burger Courts while not nearly as

pronounced. That is, the liberals were slightly more likely to cast liberal votes in salient

cases, yet the moderates (Harlan, Clark, White, and Stewart) appear not to have altered

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[25] Though I cannot make explicit comparisons over time with my preference measure (e.g., Baum 1989), I am only trying to make the very general point that Harlan, while the most conservative member on the Warren Court, probably does not mirror the most conservative member on the Burger Court (Justice Rehnquist) or the Rehnquist Court (Justice Thomas). Moreover, Harlan's more moderate preferences could be a result of the Court's agenda.
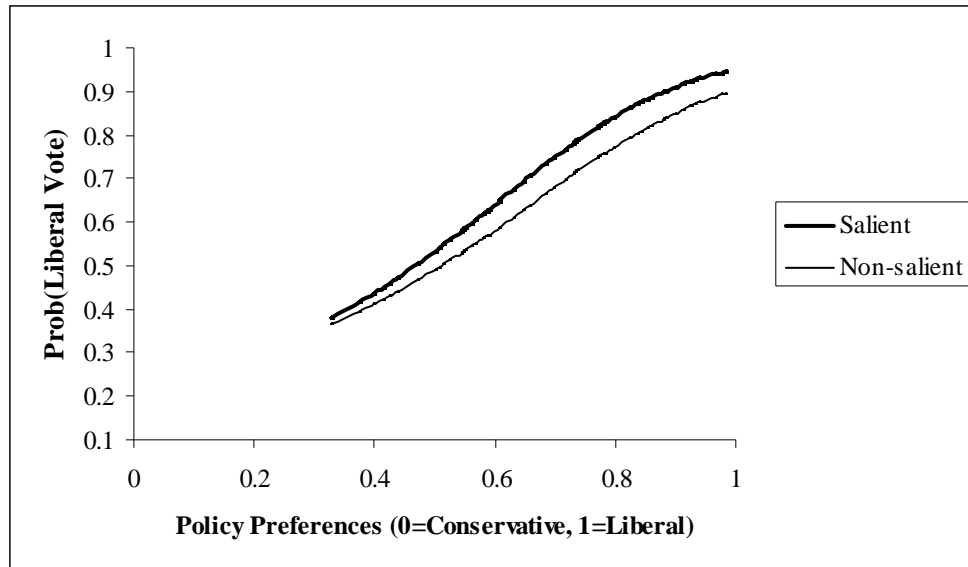
Figure 3.14: General Effect of Salience on the Preference-Behavior Relationship, Warren Court, 1962-1968

their voting propensities in salient versus non-salient cases. As was the case for the previous two analyses, the asymmetric enhancement effect was most crucial for the behavior of the pivotal members of the Warren Court, but again, recall that the pivotal members throughout this area were liberals (most likely Justices Black and Brennan), who were more likely to cast liberal votes in salient cases compared to non-salient cases. But this is not surprising given that we would expect both their salient and non-salient voting propensities to be in the liberal direction. Thus, the claim I made that salience arguably exhibited different mechanisms across different sets of justices is not supported in the Warren Court, partly due to the lack of ideological variation, an issue discussed above.
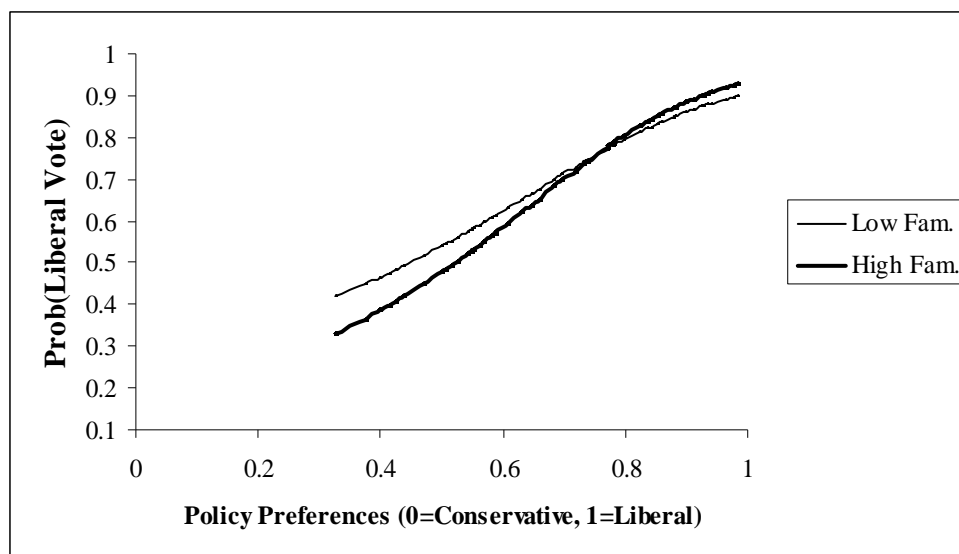
Figure 3.15: General Effect of Issue Familiarity on the Preference-Behavior Relationship, Warren Court, 1962-1968

Figure 3.15 presents the general effect of issue familiarity and the graph shows how the Court's high familiarity with an issue in a case enhanced the impact of preferences, resembling an "enhancement-polarization" effect akin to the Rehnquist and Burger Court analyses. That is, Warren Court liberals were more likely to cast liberal votes and moderates were more likely to cast conservative votes for high familiarity issues compared to low familiarity ones. Unlike in the Burger Court, where the effect was more pronounced for liberals, the effect appears to have been especially pronounced for the Warren Court moderates, who increased their conservative voting propensities to a greater extent than liberals increased their liberal voting propensities in cases with which the justices possessed high familiarity.
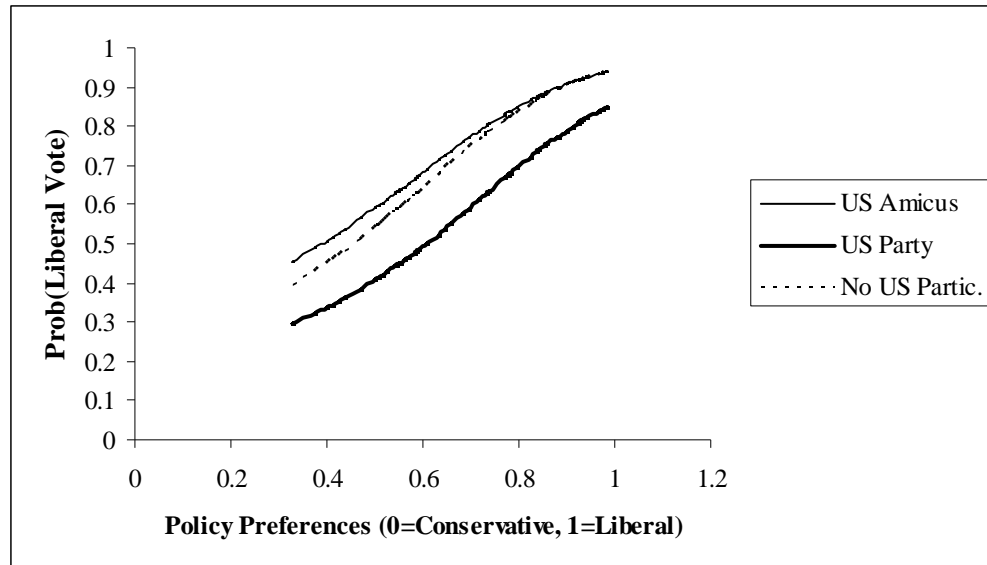
Figure 3.16: General Effect of U.S. Participation on the Preference-Behavior

Relationship, Warren Court, 1962-1968

Figure 3.16 displays the general effects of U.S. participation on the preference-behavior relationship for the Warren Court. The figure clearly shows how the impact of preferences was *not* attenuated when the U.S. was a direct party, relative to when it was not involved. As was the case with the Burger Court (but unlike the Rehnquist Court), note how the lines run parallel to each other and possess similar steepness levels. Like the Burger Court, though, the graph illustrates the direct effect of U.S. as a direct party on the case outcome. As direct party, the U.S. had the general effect of increasing the overall propensity of the Court to decide a case conservatively. Thus, the results suggest that the Warren Court, like the Burger Court, granted the OSG a degree of deference, but unlike during the Rehnquist Court, this deference was one-dimensional. While the OSG affected the case outcome, OSG participation as direct party elicited the same level of preference-
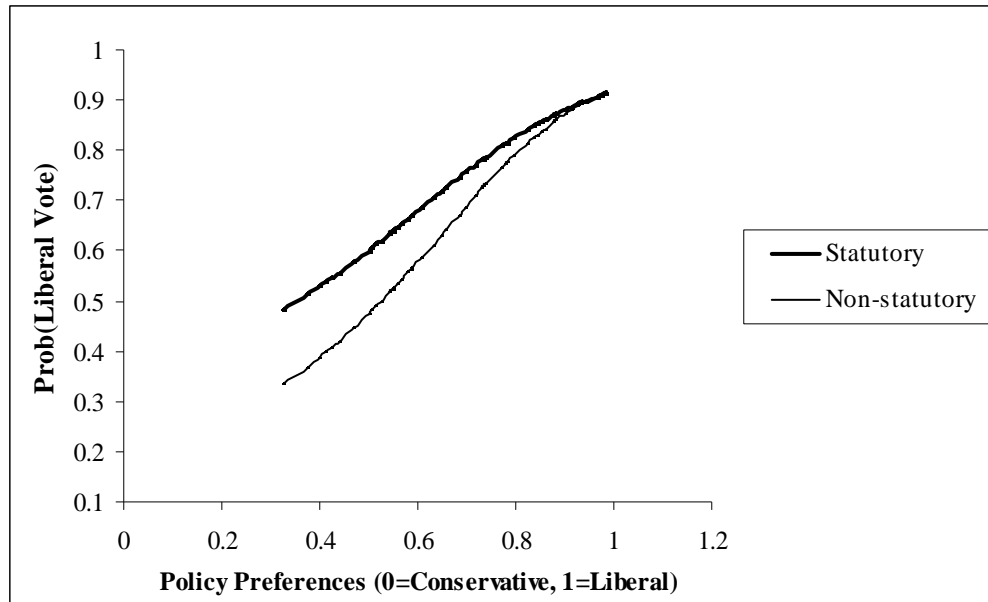
Figure 3.17: General Effect of Statutory Interpretation Cases on the Preference-Behavior Relationship, Warren Court, 1962-1968

based behavior as when there was no OSG participation. Figure 3.16 also demonstrates how U.S. as amicus curiae affected neither the magnitude of the preference-behavior relationship nor the case outcome.

Figure 3.17 presents the general effect of statutory versus non-statutory cases on the preference-behavior relationship. Note that the magnitude of the effect during the Warren Court is considerably larger than for the Rehnquist Court and more closely resembles the pattern seen for the Burger Court. Figure 3.17 reveals an "asymmetric attenuation" effect. In statutory cases, only moderate liberals and moderates were more likely to move away from their more conservative positions in non-statutory cases. As was seen in the Burger Court analysis, the liberals did not alter their liberal voting propensities to a great extent when faced with statutory or non-statutory cases. In accord
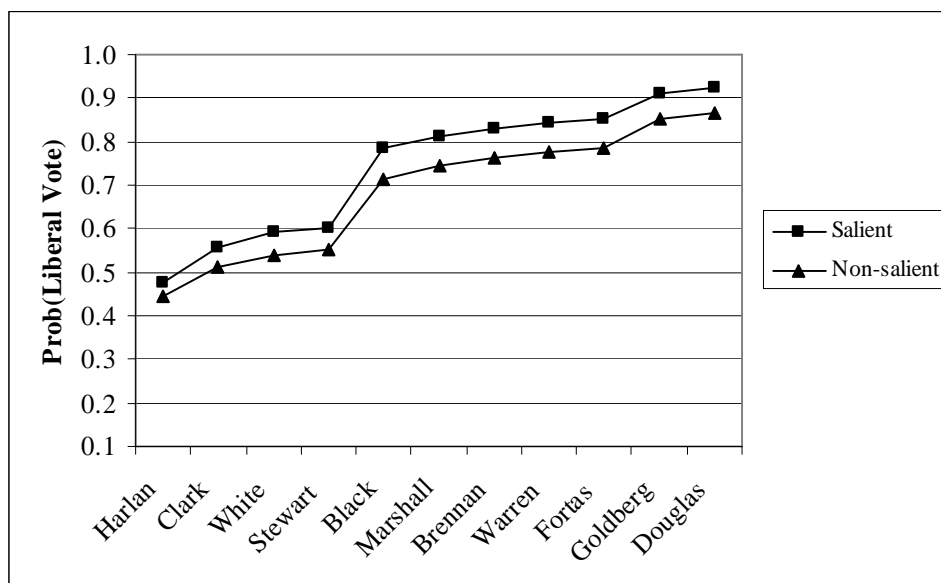
Figure 3.18: Justice-Specific Effects of Salience on the Preference-Behavior

Relationship, Warren Court, 1962-1968

with Burger and Rehnquist analyses, the results suggest that in statutory cases, justices

behaved in a more ideologically-constrained manner than in non-statutory cases.

Figures 3.18 and 3.19 present justice-centered substantive results for salience and

U.S. participation. The figures were constructed using the same procedures as described

with respect to Figures 3.6 and 3.7.[26] Figure 3.18 presents these results for salience, and

the graph does not add anything substantial beyond what was revealed in Figure 3.14.

The figure does delineate nicely the two blocs of justices—liberals and moderates—

during this period. Justices Black, Marshall, Brennan, Warren, Fortas, Goldberg, and

Douglas made up the liberal core that was able to constitute liberal majorities in many

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[26] Note that Figures 3.18 and 3.19 include all eleven justices who served during this period. Recall that
Fortas replaced Goldberg in 1965, and Marshall replaced Clark in 1967.
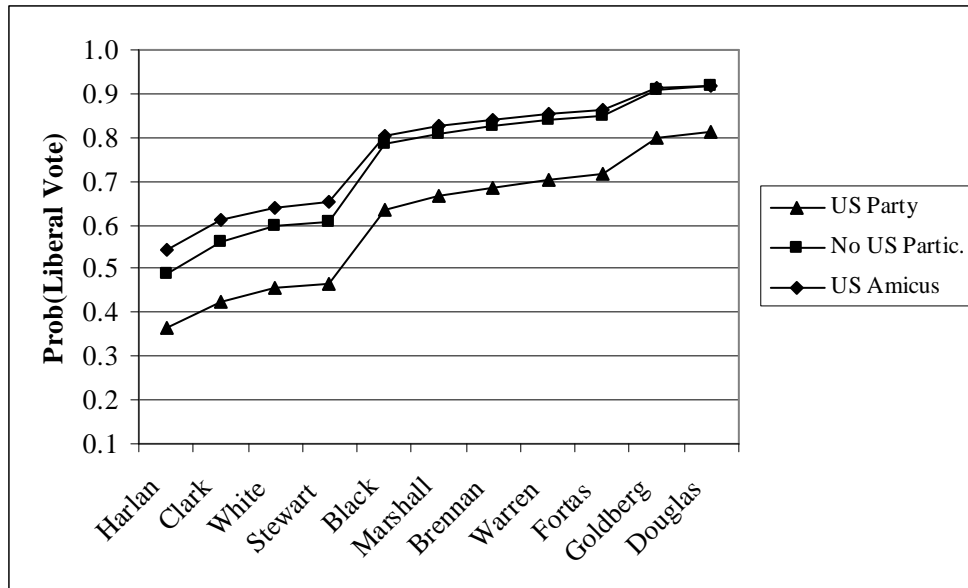
Figure 3.19: Justice-Specific Effects of U.S. Participation on the Preference-Behavior

Relationship, Warren Court, 1962-1968

cases. The moderates consisted of Justices Harlan, Clark, White, and Stewart. For each

group, the lines representing the preference-behavior relationship appear to run roughly

parallel to each other for each group of justices. The figure does show the very liberal

tendencies during the Warren Court. For instance, in a typical salient case, the two most

liberal justices—Goldberg and Douglas—were more than 90% likely to cast liberal votes.

The remaining liberals were not too far behind this figure (80-90% likelihoods). Also, in

salient cases, the moderates—except for Harlan—were more than 50% likely to cast

liberal votes, suggesting that liberal outcomes in salient cases were highly likely indeed.

The general pattern of influence salience exhibited during the Warren Court, then,

is somewhat similar to that of the Burger and Rehnquist Courts. But given that lack of

ideological variation on the Warren Court compared to the other two Courts, the potential

explanation I posited that salience operates via different mechanisms across different sets of justices is not as capable of being applied to the Warren Court. As I have mentioned, the capacity for heterogeneity in Supreme Court decision making is, a priori, simply not as vast for the Warren Court compared to the Burger and Rehnquist Courts.

Finally, Figure 3.19 presents the justice-specific analysis highlighting the impact of U.S. as a direct party and amicus curiae. While direct party participation by the OSG did not attenuate the preference-behavior relationship on the Warren Court, the figure displays the substantively large effect direct party participation had on the overall case outcome, compared to no U.S. participation. For each justice, the probability of a conservative vote increased by between 0.10 and 0.15 when U.S. participation varied from no participation to direct party participation. While the U.S. increased its propensity of success as direct party, the figure also shows that, a priori, the OSG generally could not count on majorities for the conservative position. Note that while each liberal exhibited a decreased propensity of a liberal vote when U.S. was a direct party, all were still above the 50% threshold of a liberal vote (e.g., Black had a 63% chance of casting a liberal vote when U.S. was a direct party).

Summary

The results from the Model 2 specifications provide uniform support for some of the hypotheses across all three Court eras, uniform rejection for others, and mixed support across Court eras for others. To recapitulate the findings presented so far, Table 3.5 presents a summary of the effects of the case-level factors on the preference-behavior relationship for each of the three Court eras. For the statistically significant (at the

α=0.05 level) and marginally significant (at the α=0.10 level) effects, the table indicates whether the case-level factor enhanced or attenuated preference-based behavior and lists the pattern of influence the factor exhibited.

Table 3.5 shows that one of the hypotheses associated with attitude strength—case complexity—uniformly exhibits no significant impact on the preference-behavior relationship across all three Court eras, but that the issue familiarity hypothesis receives uniform support across all three Court eras. This provides evidence for the notion that for cases with which the Court has higher familiarity as a result of the issue being actively decided on in the legal system, preference-based behavior is consistently enhanced relative to low-familiarity issues. Moreover, across all three eras, issue familiarity exhibited an enhancement-polarization pattern of influence, suggesting that increases in issue familiarity produced ideological bolstering among both liberals and conservatives.

The salience hypothesis comes close to attaining uniform support across all three Court eras. The effect of salience on the preference-behavior relationship was significant in the Burger and Rehnquist Courts, and close to significant in the Warren Court analysis. The results indicate that salience enhanced preference-based behavior in general, but the asymmetric enhancement pattern of influence—especially pronounced in the Rehnquist and Burger Courts—suggests a more nuanced effect of salience since salience increases the propensity of a liberal case outcome. The results led me to speculate that salience may work via different mechanisms across different types of justices. Given a salient case, conservatives are largely unfazed, liberals engage in ideological bolstering, and moderates (typically moderate conservatives) exhibit an increased liberal voting propensity. This suggests that while salience works via the attitude strength mechanism

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Case-Level Factor	Effect on Preference-Behavior Relationship		
	Warren Court	*Burger Court*	*Rehnquist Court*
Attitude Strength			
Salience	None	Enhancement (AE)	Enhancement (AE)
Complexity	None	None	None
Issue Familiarity	Enhancement* (EP)	Enhancement (EP)	Enhancement (EP)
Accountability			
Info. Environment	None	None	None
U.S. Amicus	None	Enhancement (EP)	Attenuation* (AA)
U.S. Party	None	None	Attenuation (AA)
Statutory	Attenuation (AA)	Attenuation (AA)	Attenuation (AC/AA)

* Indicates an effect with marginal significance (at the α=0.10 level)

Letters in parentheses represent how the case-level factor (for only the statistically significant ones) affects the nature of the preference-behavior relationship, as specified in Chapter 2 (corresponding to Figures 2.2 and 2.3).

      EP=Enhancement-Polarization
      AE=Asymmetric Enhancement
      AC=Attenuation-Consensus
      AA=Asymmetric Attenuation

Table 3.5: Summary of the Significant Effects on the Preference-Behavior Relationship Across Courts

for liberals, it may work via an *accountability* mechanism for moderates and moderate conservatives. This would lend evidence in favor of a contention that moderates and moderate conservatives are attentive to certain audiences (policy groups, the media) and that self-presentation considerations have an impact on these justices' decisions. More specifically, the findings could be consistent with a "Greenhouse Effect," whereby in salient cases in particular, susceptible justices' (O'Connor, Kennedy, Blackmun, Stewart)

voting behavior might reflect their desire for praise from the media, which Sowell (1994)

suggests exerts left-leaning pressures on justices.

Another possibility for how moderate and moderate conservative justices'

increasing liberal voting propensities in salient cases is that it could be a function of the

measure employed. The Epstein-Segal (2000) salience measure, which operationalizes

salient cases as those that appear on the front page of the *New York Times* the day after

the decision is announced, could be disproportionately tapping liberal decisions if a

liberal bias exists in the *New York Times*. While I have justified the use of this measure a

bit thus far, a further justification centers on the issue of *who decides what is salient*. A

quick response is the *media* themselves, who essentially define what is and is not salient.

As the "leader of the pack," the *New York Times* plays a role in defining what is salient.

The *Times* is not a dictator in this task, of course, as it represents a national constituency,

relies on subscriptions and advertising dollars to stay in business, and thus, the *Times*

seeks to represent, to an extent, the views of its constituents, the American people. The

bottom line is, then, that even if there is a bias—large or small—in the cases that the *New*

York Times places on the front page, it matters most what people *perceive* is salient, and

these perceptions of salience, for better or worse, are often set by the media, and more

specifically, the *New York Times* in its capacity as the leader of the pack.

Moving to the accountability summaries in Table 3.5, the information

environment hypothesis receives no support across all three eras, while the statutory

versus non-statutory hypothesis receives uniform support across all three Court eras. In

accord with strategic perspectives, the results indicate that justices are more ideologically

constrained in statutory versus non-statutory cases. The results also revealed that

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statutory cases induce an asymmetric attenuation pattern of influence, especially for the Burger and Warren Courts. For the Rehnquist Court, the pattern resembles asymmetric attenuation more than attenuation-consensus. Across all three eras, in statutory cases, conservative justices were more likely to deviate from their more conservative positions they took in non-statutory cases. But liberals were, for the most part, unfazed in their liberal propensities regardless of whether the case was statutory or non-statutory.

U.S. participation, as direct party and amicus curiae, exhibits the most inconsistent findings across the three time periods. During the Rehnquist Court, both modes of U.S. participation exhibited expected effects, that is, both attenuated preference-based behavior (amicus with marginal significance) and both exhibited an asymmetric attenuation pattern of influence. But these results do not hold for the Burger and Warren Courts. Direct party participation had no effect on preference-based behavior; amicus curiae participation *enhanced* preference-based behavior during the Burger Court yet had no effect during the Warren Court.

On the whole, the findings suggest that the influence of the Office of the Solicitor General, as both a direct party and amicus curiae, has grown more potent over time, particularly in its ability to attenuate the magnitude of preference-based behavior. This evidence appears to challenge the evidence produced by Deen, Ignagni, and Meernik (2003), who contend that the OSG's influence as amicus curiae has *decreased* over time. However, it is important to note that Deen et al. examine aggregate success rates—the proportion of times the OSG wins as amicus—over time, which is a more diffuse measure of influence. The evidence I have produced thus far examines how participation

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by the OSG as direct party and amicus curiae (compared to when it does not participate) influences both case outcomes and the magnitude of preference-based behavior.

Moreover, the inconsistent findings regarding U.S. participation across the three Court eras beg the question of whether there are some conditions under which OSG participation as either direct party or amicus curiae affects the preference-behavior relationship. The next section contains two sets of auxiliary analyses that test whether the impact of U.S. participation on preference-based behavior is conditional on the political party of the Solicitor General or the ideological position taken by the OSG (as amicus) in a case.

AUXILIARY ANALYSES FOR THE EFFECTS OF U.S. PARTICIPATION

In this section, I further investigate the influence of U.S. participation on the preference-behavior relationship by asking whether its effects depend on either (1) the ideological position taken by the Office of the Solicitor General as amicus or (2) the political party of the President who appointed the Solicitor General (SG). Unlike its direct party role, the OSG, as amicus curiae, is free to support either side of the case, and it often adopts the position of the president (e.g., Segal 1990, 137-140). Thus, it may be the case that the justices (or certain types of justices) respond to liberal versus conservative position-taking by the OSG in different ways. I also investigate whether the impact of both direct party and amicus participation by the OSG on the preference-behavior relationship is conditioned by the party of the president who appointed the SG.[27] For

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[27] From here on in, I assume that the Solicitor General is of the same party as the President who appointed him.

instance, during the relatively conservative Rehnquist Court, did Democratic Solicitors

General during the Clinton administration exhibit the same degree of influence as

Republican Solicitors General during the George W. Bush administration?

Auxiliary Analysis 1: Liberal versus Conservative OSG Position-Taking as Amicus

Table 3.6 provides a breakdown of liberal versus conservative position-taking by

the OSG as amicus curiae during portions of the Warren, Burger, and Rehnquist Courts

that I have examined thus far. During the Warren Court period under examination, the

OSG as amicus took the liberal position 79% of the time and the conservative position

only 11% of the time.[28] This is not surprising given that Solicitors General during this

period were Democrats appointed by Presidents Kennedy and Johnson. Note that the U.S.

Reports list amicus participation as neutral ("No Position" in Table 3.6) if the OSG did

not specifically advocate for one of the direct parties in the case; during the Warren

Court, the OSG was neutral about 9% of the time.

During the 1975-1985 terms of the Burger Court, conservative amicus position-

taking eclipsed liberal position-taking, which again seems logical given the

preponderance of Republican SGs during this era.[29] Table 3.7 shows that position-taking

differed between the Democratic and Republican eras. During the Carter presidency, the

Democratic Solicitor General took the liberal position 48% of the time and the

conservative position 29% of the time. But during the Ford and Reagan presidencies,

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[28] Archibald Cox served as Solicitor General from 1961-65, Thurgood Marshall from 1965-67, and Erwin Griswold from 1967 to the end of my data for the Warren Court.

[29] Appointed by President Nixon, Robert Bork served as Solicitor General from 1973-1977. Wade McCree, appointed by President Carter, served from 1977-1981. Rex Lee, a President Reagan appointee, served from 1981-1985, and Charles Fried served from October 1985 to the end of my data for Burger Court.

Position of OSG as Amicus	Court		
	Warren	Burger	Rehnquist
Liberal	42	67	71
%	79.3%	32.8%	39.4%
Conservative	6	97	101
%	11.3%	47.6%	56.1%
No Position	5	40	8
%	9.4%	19.6%	4.4%
Total	53	204	180
%	100%	100%	100%

Table 3.6: Position-Taking by OSG as Amicus Curiae Across Courts

Position of OSG as Amicus	Burger Court		Rehnquist Court	
	Dem OSG	Rep OSG	Dem OSG	Rep OSG
Liberal	28	39	59	12
%	48.28%	26.71%	53.15%	17.39%
Conservative	17	80	47	54
%	29.31%	54.79%	42.34%	78.26%
No Position	13	27	5	3
%	22.41%	18.49%	4.50%	4.35%
Total	58	146	111	69
%	100%	100%	100%	100%

Table 3.7: Position-Taking by OSG as Amicus Curiae Stratified by Party of the Solicitor General

Republican Solicitors General took the conservative position about 55% of the time and the liberal position 27% of the time. During the Rehnquist Court period under examination, conservative position-taking outnumbered liberal position-taking on the whole, but when broken down by the Clinton versus George W. Bush administrations, the

same type of pattern emerges as seen in the Burger Court.[30] For Clinton Solicitors

General, the liberal-to-conservative ratio was 53% to 42%, and for George W. Bush

Solicitors General, the conservative-to-liberal ratio was 78% to 17%. The latter ratio is

striking indeed, suggesting that the Bush administration, in conjunction with the OSG,

sought to take an overwhelming number of conservative positions in front of the

Rehnquist Court.

These descriptive statistics reveal, particularly during the Burger and Rehnquist

Courts, that there is a good amount of balance between liberal and conservative position-

taking by the OSG. The first auxiliary analysis tests whether the effect of U.S. as amicus

on the preference-behavior relationship is distinct when the U.S. takes the conservative

versus liberal position. Thus, in this analysis, I estimate a model similar to the Model 2

specification described in this chapter, except that U.S. participation is a four-category

nominal variable instead of a three-category variable. The categories are: U.S. as amicus

supporting the liberal side, U.S. as amicus supporting the conservative side, U.S. as a

direct party, and no U.S. participation (the baseline category). I conduct this analysis for

the Burger and Rehnquist Courts only. I exclude analyzing the Warren Court given the

maldistribution of amicus position-taking during this time period.

Table 3.8 presents the results in condensed form, namely, it only includes the

relevant U.S. participation variables; the remaining five variables in the Model 2

specification were included in the model, but are excluded from Table 3.8 due to space

considerations. For the Burger Court, the results reveal some interesting findings. First,

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[30] Solicitors General during the Clinton administration were Drew Days (1993-96), Walter Dellinger (1996-97), and Seth Waxman (1997-2001). Solicitors General during the George W. Bush administration were Theodore Olson (2001-04) and Paul Clement (2005-current).

	Burger Court			Rehnquist Court		
	Coeff.	(SE)	p	Coeff.	(SE)	p
Estimates From β_{0j} Equation (Effects on Case Outcome):						
U.S. Amicus, Lib. Pos.	1.120	(0.516)	0.030	0.506	(0.638)	0.428
U.S. Amicus, Cons. Pos.	-2.009	(0.437)	<0.001	-2.657	(0.568)	<0.001
U.S. Party	-2.265	(0.293)	<0.001	-1.303	(0.511)	0.011
Estimates From β_{1j} Equation (Cross-Level Interactions):						
U.S. Amicus, Lib. Pos.	-0.626	(0.551)	0.128	-0.269	(0.811)	0.370
U.S. Amicus, Cons. Pos.	1.791	(0.509)	<0.001	-0.554	(0.710)	0.218
U.S. Party	-0.252	(0.308)	0.207	-1.266	(0.633)	0.023

Note: The remaining five case-level factors were included in the model, but excluded from this table due to space considerations.

Table 3.8: Random Coefficient Model – Testing the Effect of OSG Amicus Position-Taking

liberal amicus position-taking significantly increased the propensity of a liberal outcome (seen in the β_{0j} equation) relative to no OSG participation. Moreover, liberal position-taking as amicus appears to have *attenuated* preference-based behavior (as hypothesized regarding OSG amicus participation in general), but not at a statistically significant level (p=0.13). Conservative position-taking by the OSG during the Burger Court also significantly affected the propensity of a conservative case outcome. This shows that the OSG was influential as amicus (in terms of influencing the case outcome) when it took both the liberal and conservative positions. Results from the β_{1j} equation show that the enhancement effect of OSG as amicus revealed in Table 3.3 is driven largely by conservative position-taking by the OSG, and not by liberal position-taking. This suggests that the nature and magnitude of the preference-behavior relationship during the
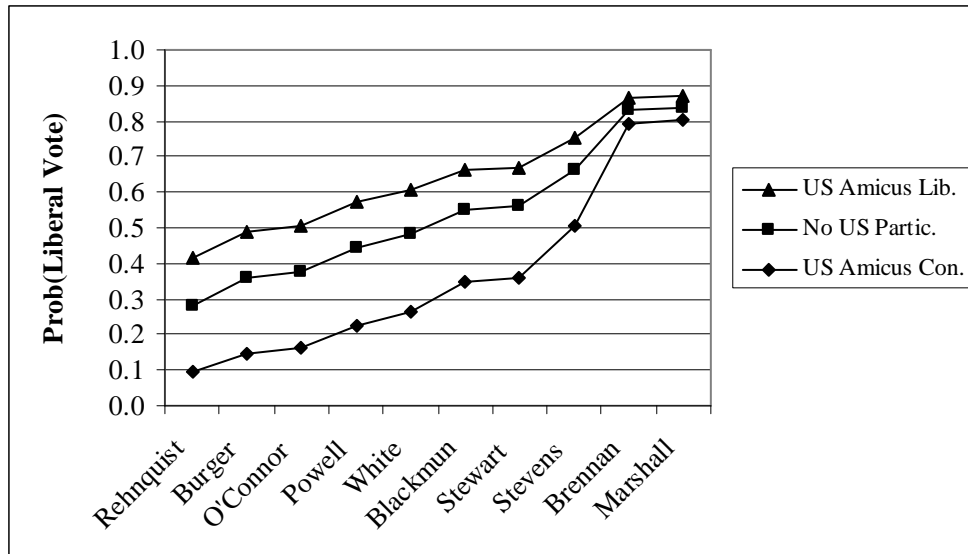
Figure 3.20: Justice-Specific Effects of U.S. Amicus when Taking the Liberal or

Conservative Position, Burger Court, 1975-1985

Burger Court was conditional on the ideological position taken by the OSG. Liberal

versus conservative position-taking exhibited diametrically opposed effects on

preference-based behavior.

Figure 3.20 presents the substantive interpretations of these results in the form of

APEs. In addition to showing the overall increase in the propensity of a conservative

decision when the OSG took a conservative position, Figure 3.20 succinctly reveals how

the OSG's conservative position-taking resulted in more ideologically-polarized decision

making compared to when the U.S. did not participate. The effect appears to be driven by

the two most liberal members of the Burger Court, Justices Marshall and Brennan. These

two justices were not swayed when the OSG took the conservative position, in contrast to

the remaining justices who engaged in more conservative voting propensities. When the
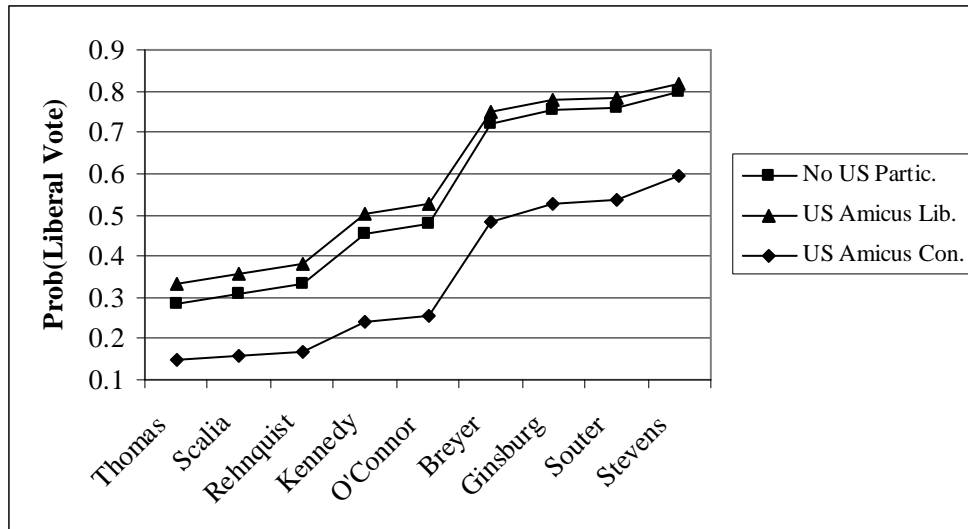
Figure 3.21: Justice-Specific Effects of U.S. Amicus when Taking the Liberal or Conservative Position, Rehnquist Court, 1994-2004

OSG took the liberal position, the overall increase in a liberal case outcome is evident in Figure 3.20; one can also see the slight attenuation pattern of influence, relative to no U.S. participation, of OSG participation as liberal amicus. Although the effect does not reach even the $\alpha=0.10$ level of significance, the result shows that liberal position-taking by the OSG had the expected effect (attenuation) on the preference-behavior relationship.

Figure 3.21 displays the substantive interpretation of the OSG position-taking results for the Rehnquist Court. In conjunction with Table 3.8, the results demonstrate the significant effect of conservative position-taking by the OSG as amicus on the case outcome and the insignificant effect of liberal position-taking. Note how Justices Breyer, Ginsburg, and Souter in particular were each estimated to have about a 50% likelihood of voting in the conservative direction when the OSG took a conservative position, and

Justices Thomas, Scalia, and Rehnquist were about 85% likely to cast a conservative vote under this condition. This finding seems to indicate that the justices granted the OSG a great amount of deference when it took the conservative position (see Segal 1990). This vast degree of deference is not accorded to the OSG when it took the liberal position; note how the justices' voting propensities were largely unfazed by liberal position-taking compared to when the OSG did not participate. Also, in accord with the results from the Table 3.8, Figure 3.21 shows that neither conservative nor liberal position-taking by the OSG as amicus exhibited a significant impact on the preference-behavior relationship. Note how all three lines representing the preference-behavior relationship run roughly parallel to each other, signaling that the magnitude of preference-based behavior was not significantly altered between the three categories.

Overall, the results from these two analyses show that when breaking down OSG amicus participation into liberal and conservative position-taking, the impact of OSG participation as amicus curiae is a more nuanced phenomenon, especially for the Burger Court. The precise nature of the influence of OSG participation as amicus curiae depends on the ideological position taken by the OSG. Moreover, stratifying by liberal versus conservative amicus position-taking by the OSG refines the previous findings concerning the changing influence of OSG as amicus over time. While both liberal and conservative amicus position-taking by the OSG influenced case outcomes during the Burger Court, only conservative amicus position-taking has significantly influenced case outcomes in the Rehnquist Court. These findings, then, do lend conditional support to Deen et al.'s (2003) evidence of a decreasing trend in the OSG's influence on case outcomes when acting as amicus curiae.

Auxiliary Analysis 2: Effects of U.S. Participation Stratified by Solicitor General's Political Party

The second auxiliary analysis tests whether the effects of U.S. participation, both as direct party and amicus curiae, on the preference-behavior relationship are distinct between Republican and Democratic Solicitors General. Since the U.S. does not have the discretion it does in amicus position-taking (Segal 1990), the percent of the time the OSG takes the conservative position should be similar across party lines, which generally has been the case over time. During the Burger Court, Republican OSGs took the conservative position 81.5% of the time, and Democratic OSGs took the conservative position 80.6% of the time. During the Rehnquist Court, the analogous figure for Republican OSGs is 89.3%, for Democratic OSGs, 81.0%.

I estimate models similar to the Model 2 specification described in this chapter, except that U.S. participation is now a five-category nominal variable with the following categories: Amicus participation by a Democratic OSG, amicus participation by a Republican OSG, direct party participation by a Democratic OSG, direct party participation by a Republican OSG, and no U.S. participation (the baseline category). Since there was no change in the party of the President during the Warren Court, I conduct this analysis for the Burger and Rehnquist Courts only.

Table 3.9 presents the results including only the relevant U.S. participation variables. Results for the Burger Court indicate that while both Democratic and Republican OSGs significantly influenced the case outcome as direct party, only Republican OSGs, and not Democratic OSGs, significantly influenced the case outcome as amicus. Moreover, we can see how the enhancement effect on preference-based

	Burger Court			Rehnquist Court		
	Coeff.	(SE)	p	Coeff.	(SE)	p
Estimates From β_{0j} Equation (Effects on Case Outcome):						
U.S. Amicus, Democrat	-0.707	(0.528)	0.180	-0.671	(0.560)	0.231
U.S. Amicus, Republican	-0.735	(0.380)	0.053	-2.089	(0.655)	0.001
U.S. Party, Democrat	-2.286	(0.426)	<0.001	-1.574	(0.577)	0.006
U.S. Party, Republican	-2.554	(0.341)	<0.001	-0.795	(0.706)	0.260
Estimates From β_{1j} Equation (Cross-Level Interactions):						
U.S. Amicus, Democrat	0.145	(0.546)	0.395	-0.799	(0.702)	0.128
U.S. Amicus, Republican	0.922	(0.422)	0.014	-0.843	(0.799)	0.146
U.S. Party, Democrat	-0.539	(0.431)	0.105	-1.258	(0.709)	0.038
U.S. Party, Republican	0.151	(0.359)	0.337	-1.794	(0.826)	0.015

Note: The remaining five case-level factors were included in the model, but excluded from this table due to space considerations.

Table 3.9: Random Coefficient Model – Testing the Effect of U.S. Participation Broken Down by the Solicitor General's Political Party

behavior by U.S. as amicus, as was revealed in Table 3.3, is driven by Republican OSGs, who, unlike their Democratic counterparts, significantly enhanced the preference-behavior relationship. Also, the expected attenuation effect of U.S. participation as direct party comes close to standard levels of statistical significance (*p*=0.105) for the Democratic OSG; for Republican OSGs, direct party participation failed to exhibit a significant effect on the preference-behavior relationship. I do not report any graphical presentations of these auxiliary analyses for the Burger Court as they do not reveal any compelling patterns beyond what has been reported. Overall, the results indicate that the nature and magnitude with which both forms of U.S. participation affected preference-based behavior on the Burger Court was conditional on the political party of the OSG.

Finally, moving to the Rehnquist Court results, Table 3.9 indicates that amicus participation by Republican OSGs significantly influenced the propensity of a conservative case outcome, while Democratic OSGs as amicus exhibited no such significant effect. The results are the *opposite* for the U.S. as a direct party: case outcomes were significantly more likely to be conservative for Democratic OSGs during the Rehnquist Court, while they were *not* significantly more likely to be conservative for Republican OSGs. When breaking down U.S. amicus participation between Republican and Democratic administrations, the results now reveal that both attenuated the preference-behavior relationship, but not at a statistically significant level. Finally, compared to no U.S. participation, both Republican and Democratic OSGs significantly attenuated preference-based behavior as direct party.

Graphical presentations of these results, again using APEs, are presented in Figures 3.22 and 3.23. In Figure 3.22, note the potent effect of OSG amicus participation by Republicans; the liberal justices, moderate conservatives, and conservatives were all much more likely to vote conservatively given Republican OSG amicus participation compared to no OSG participation. However, no justice followed suit for OSG amicus participation by Democrats. The three strong conservatives were unfazed, and both the moderate conservatives and the four liberals moved in the *conservative* direction when the Democratic OSG participated as amicus curiae.

For U.S. as a direct party, as seen in Figure 3.23, note the increases in conservative voting propensities for the three conservative justices and the two moderate conservatives during the Clinton administration compared to the George W. Bush administration. Overall, the results indicate that the Rehnquist Court granted more

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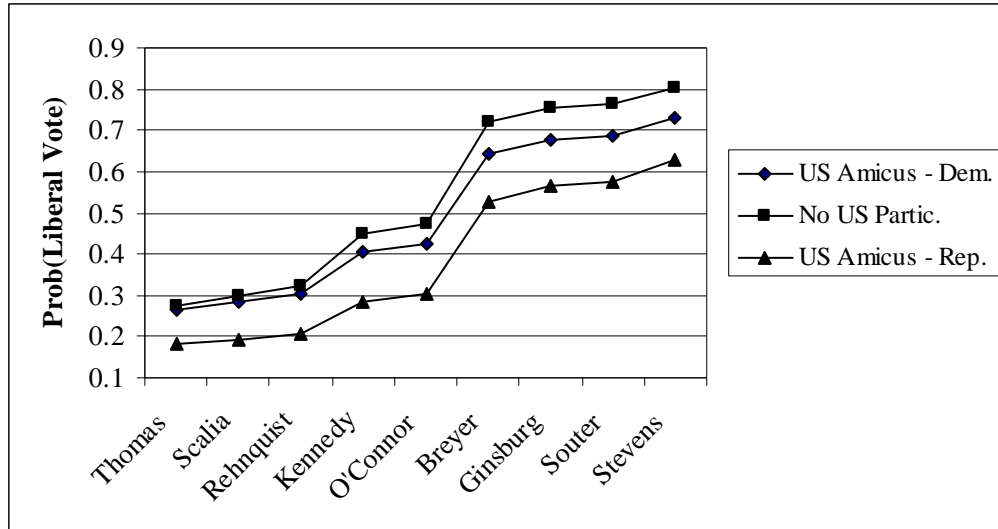
Figure 3.22: Justice-Specific Effects of U.S. Amicus for Democratic versus Republican

Solicitors General, Rehnquist Court, 1994-2004
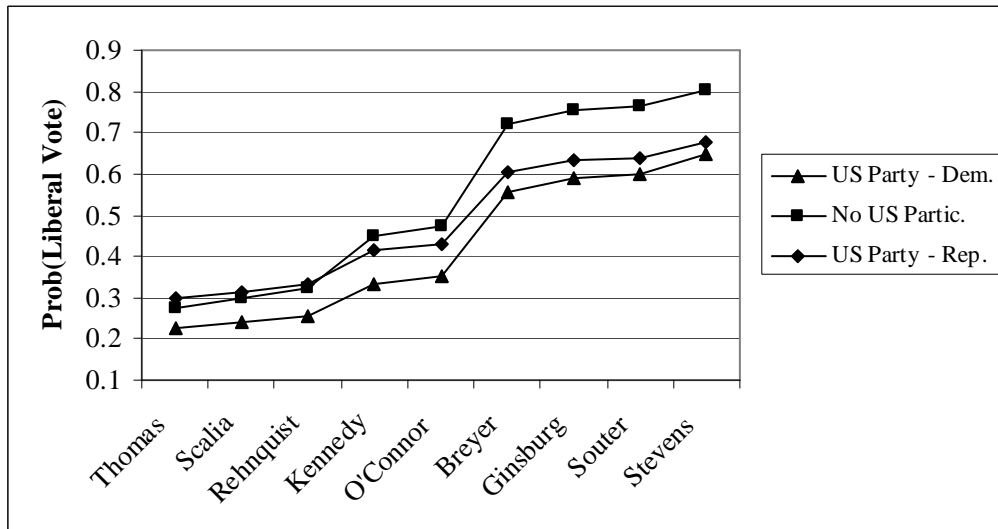
Figure 3.23: Justice-Specific Effects of U.S. Party for Democratic versus Republican

Solicitors General, Rehnquist Court, 1994-2004

deference to Republican OSGs as amicus, but it granted more deference to Democratic

OSGs as direct party. Moreover, Democratic OSGs exhibited dual effects on Rehnquist

Court decision making: both by directly affecting the case outcome *and* attenuating the

preference-behavior relationship. Thus, the level of deference given to the OSG as both

direct party and amicus curiae was conditional on the political party of the OSG.

Moreover, somewhat counterintuitively given the generally conservative nature of the

Rehnquist Court, greater levels of deference were granted to Democratic OSGs as direct

party than Republican OSGs.

CONCLUSION

This chapter has set out to test Hypotheses 1-6 for the three different Court eras to

ascertain the degree to which the hypotheses hold up over time. Overall, the findings

discussed above, the recapitulation of those results, and the auxiliary analyses provide

significant empirical evidence that, contrary to those who assume that the impact of

preferences is constant across a wide variety of situations, *preference-based behavior*

varies across cases, and it does so in interesting and systematic ways. The evidence

reveals that some case-level factors associated with attitude strength and accountability

are capable of significantly shaping the nature of preference-based behavior in a

compelling manner that has implications for legal outcomes. Moreover, some of these

factors, especially U.S. participation, exhibit quite different effects on the nature and

magnitude of preference-based behavior over time.

The discussion of the results in this chapter and the summaries presented in Table

3.5 suggest that the attitude strength factors exhibit more consistent effects across the

three Court eras than the accountability factors. In particular, the patterns of influence for salience and issue familiarity on the preference-behavior relationship were consistent across the three eras. However, the statutory interpretation variable was the only accountability-related factor that exhibited a consistent pattern of influence. This evidence might suggest that attitude strength, as I have conceptualized it, is the more potent mechanism underlying the preference-behavior relationship. Future research on this comparison between the influences of the attitude strength versus accountability mechanisms on the preference-behavior relationship will be able to dissect this issue in more detail.

From a research design and methodology standpoint, this chapter demonstrates how a multilevel modeling framework can be applied to analyses of judicial decision making. With a focus on the levels of analysis present in Supreme Court decision making, the multilevel framework allows one to model explicitly how higher-level variables (case-level factors) explain variation in lower-level effects (the impact of preferences on justices' choices).

Overall, then, this chapter has attempted to expand the intellectual community's knowledge of Supreme Court decision making by systematically examining case-level conditions within the Court's immediate environment that strengthen or weaken the impact of policy preferences on the choices justices make. I have underscored the notion that the preference-behavior relationship on the Court is shaped by the varying situations and conditions that confront the justices from case to case. The following chapters test how two specific types of situational factors—strategic considerations and legal considerations—shape the nature and magnitude of the preference-behavior relationship.

CHAPTER 4

EMPIRICAL ANALYSIS OF HOW EXTERNAL STRATEGIC CONSIDERATIONS

SHAPE PREFERENCE-BASED BEHAVIOR

What role, if any, do elements of the external political environment—namely

public opinion and the preferences of the other branches—play in Supreme Court

decision making? Theoretical and empirical scholarship has provided mixed conclusions

on the extent to which and the processes by which these types of considerations may

influence the choices justices make. With some exceptions, scholars who study the role

of strategic considerations in Supreme Court decision making tend to focus exclusively

on the *direct effects* of these considerations on decisional outcomes, as opposed to

specifying the degree to which strategic considerations affect the magnitude of the

preference-behavior relationship on the Court. Strategic considerations, then, may exhibit

multiple roles in decision making—both as a direct influence on case outcomes *and* as a

moderator that determines the magnitude of the relationship between policy preferences

and behavior. In highlighting this latter role, since it fits squarely within the heterogeneity

framework put forth in this dissertation, this chapter tests the extent to which public

opinion and the preferences of Congress and the President explain variation in

preference-based behavior on the Supreme Court. Moreover, the research design put

forward in this chapter sheds light on whether external strategic considerations exhibit

direct effects on the Court's outputs. Below, I present a brief review and assessment of

relevant work that posits the influence of external strategic considerations on Supreme

Court decision making.

As I discussed in Chapter 1, the attitudinal model (Segal and Spaeth 2002) posits

that the justices are largely unaccountable to both the public and the other branches of

government. Moreover, given that Congress and the President rarely revisit the decisions

of the Court or attack the Court's jurisdictional capacity, justices possess no incentives to

behave strategically, and therefore, they never need to account for how Congress or the

President might respond to their decisions. On the other hand, strategic theorists who

posit the influence of the separation-of-powers (SOP) structure argue that justices often

do possess incentives to anticipate how Congress and the President might respond to their

decisions, and therefore, they cannot necessarily behave sincerely on the basis of their

policy preferences (Eskridge 1991a; Ferejohn and Weingast 1992; Spiller and Gely 1992;

Epstein and Knight 1998; Martin 1998; Bergara et al. 2002). Instead, a justice's decision

calculus explicitly accounts for how these external actors might respond to his or her

choice. According to strategic perspectives, the impact of these external factors is rooted

in justices' pursuit of their policy goals, which leads them to possess a strong desire for

their decisions to survive in the political system (Eskridge 1991a; Epstein and Knight

1998; Martin 1998). Thus, a strategic justice will not necessarily vote sincerely in accord

with his or her preferences, but will consider the potential consequences, with respect to

the other branches, resulting from his or her decision in a case. According to strategic

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perspectives, the forecast of these consequences plays a significant role in justices'

decision processes.

Most SOP perspectives have assumed that since justices possess policy-driven

motivations to have their decisions survive in the political system, they are more likely to

be more constrained in *statutory* decisions rather than *constitutional* decisions (e.g.,

Eskridge 1991a, 1991b; Epstein and Knight 1998, Chapter 5). This is due to the fact that

Congress and the President can override the Court's statutory decisions with standard

legislation, yet a constitutional amendment is required to override a constitutional

decision (but see Meernik and Ignagni 1997). The evidence in Chapter 3, for all three of

the periods studied, supports the general contention that the justices are generally more

ideologically constrained in statutory cases compared to constitutional cases. However, as

alluded to in Chapters 1 and 3, some scholars have made the case that external strategic

considerations may indeed affect the Court's constitutional decision making as well (e.g.,

Rosenberg 1992; Meernik and Ignagni 1997). Epstein, Knight, and Martin (2001)

contend that justices may actually be *more* constrained in their constitutional decision

making because the potential of congressional reprisals may come in the form of Court-

curbing (e.g., stripping the Court of its jurisdiction to hear certain constitutional cases),

which could diminish the power and prestige of the Court as a political institution. The

prospects of these types of reprisals, according to Epstein et al., are far more ominous

than having their statutory decisions overturned by Congress. On the whole, little

empirical evidence exists for the impact of congressional and presidential preferences on

the choices justices make (but see Spiller and Gely 1992; Bergara et al. 2002), and Segal

(1997) and Segal and Spaeth (2002) have produced evidence that rejects many of the SOP hypotheses.

Regarding the impact of public opinion on the justices, some scholarship argues that since the justices are mindful that they are partly reliant on the public for the full implementation of their policies, they must account for the general ideological nature of the public (Mishler and Sheehan 1993; Flemming and Wood 1997; Stimson et al. 1995; McGuire and Stimson 2004). Stimson et al. (1995) and McGuire and Stimson (2004) claim that a mechanism by which justices incorporate public preferences into their decision processes is via *rational anticipation*. That is, they "sense the [public's] mood of the moment, assess its trend, and anticipate its consequences" (Stimson et al. 1995, 545). Therefore, "strategic justices must gauge the prevailing winds that drive reelection-minded politicians and make decisions accordingly" (McGuire and Stimson 2004, 1019).

Some studies claim to have found empirical evidence of a *direct link* between public opinion and Supreme Court decision making (Mishler and Sheehan 1993; Link 1995; Flemming and Wood 1997; Stimson et al. 1995; McGuire and Stimson 2004). Yet others (e.g., Norpoth and Segal 1994) contend that any evidence of an association between public opinion and justices' choices is highly indirect. The impact of public opinion, according to the latter view, is a function of the way justices are appointed to the Court. Public preferences influence electoral outcomes, which directly affect what type of President and Senate are elected. Then, of course, the President and Senate decide who will be on the Court. This line of reasoning hearkens back to Dahl's (1957) argument that the Court will always be ideologically aligned with the President and Congress due to the institutional mechanisms for putting people on the Supreme Court. According to Norpoth

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and Segal (1994), then, the direct effects of public opinion on judicial outputs that certain studies have inferred are actually indirect, and they work through the selection process. This argument could be extended to those who argue for a direct effect of congressional and presidential preferences on the Court's outputs, which would essentially reduce it to Dahl's contention of an ideological alignment between the Court and the other branches rooted in the selection process.

All scholarship discussed above has highlighted the *direct effects* of external strategic considerations on justices' choices and contends that evidence in support of this link warrants the conclusion that the political environment *constrains* Supreme Court decision making. As alluded to in previous chapters, the issue of constraint is directly related to the heterogeneity perspective put forth in this dissertation. I contend that instead of a direct effect of strategic considerations on justices' choices, constraint actually refers to how strategic considerations *shape the magnitude of the relationship between preferences and behavior*. Put another way, constraint obstructs the ability of justices to do what they want, that is, vote their sincere policy preferences. Constraint, then, entails that strategic factors reduce the degree of preference-based behavior on the Court, a linkage that fits squarely within my heterogeneity framework and the theoretical attenuation scenarios in Chapter 2. Martin's (1998) analysis attempts to test for this mechanism of influence by the SOP structure. He finds little evidence of constraint on the whole, but his findings suggest that the President exhibits a significant amount of constraint on the Court in constitutional decision making. Recall that my heterogeneity perspective is more general than the concept of constraint in that my framework seeks to

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explain the entire range of variation in preference-based behavior, as opposed to factors that only reduce, or constrain, the degree of preference-based behavior.

The primary goal of this chapter, then, is to ascertain whether external strategic considerations affect the preference-behavior relationship, a task directly connected to the dissertation's heterogeneity framework about how situational factors shape the magnitude of preference-based behavior. This mechanism of influence is also explicitly tied to the concept of *constraint* as I have described it both in this chapter and previous chapters. A secondary goal of this chapter is to test empirically for the *direct effects* of external strategic considerations on the Court's outputs. Note that this latter task is connected more closely with the bulk of scholarship on strategic considerations (e.g., Spiller and Gely 1992; Mishler and Sheehan 1993; Flemming and Wood 1997; Bergara et al. 2002; McGuire and Stimson 2004).

CONCEPTUAL FRAMEWORK

Why would justices, who possess no direct accountability connections to either the other branches of government or the public, be constrained by these external strategic considerations? As alluded to above, various theoretical rationales exist for why the justices might want to account for the preferences of these external entities (e.g., Spiller and Gely 1992; Ferejohn and Weingast 1992; Mishler and Sheehan 1993; McGuire and Stimson 2004). It makes sense why members of Congress (MCs) or the President would want to follow what Stimson et al. (1995) call a "rational anticipation" strategy, given the direct accountability link to the public. But why would Supreme Court justices follow such a strategy given they are not explicitly bound by public demands? As I alluded to in

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Chapter 2, while justices may never reach the levels of accountability to the public that

MCs and Presidents maintain, it seems reasonable that justices are at least mindful of

public preferences in the interest of maintaining a good standing—both as individuals and

as part of a major institution of government—with the general public and the other

branches of government (e.g., McGuire and Stimson 2004; Baum 1997). Thus, it might

follow that justices possess a degree of accountability to these audiences *depending on*

how they are configured. Put another way, there are situations in which the justices might

find it in their interests to consider the nature of the political environment, both public

opinion and the preferences of the other branches. Working through an accountability

mechanism, this situational variation, I contend, will explain the degree of preference-

based behavior on the Court.

Under what conditions will justices be more likely to feel accountable to the

public and other branches of government? I argue that the mechanism by which these

considerations will be effective turns on justices' sensitivity to the degree to which the

political environment is either *ideologically-consensual* or *ideologically-polarized*.

Figure 4.1 illustrates this general conceptual scheme for how consensus or polarization in

the political environment might affect preference-based behavior. The figure is relevant

to both consensus in public opinion and consensus within and between the other branches

of government.

Figure 4.1 depicts three general types of configurations the political environment

can take on. The middle situation on the X-axis in Figure 4.1 represents a perfectly

polarized political environment, where the environment is evenly split between liberal

and conservative policy directions. In public opinion, this would occur when 50% of the

public support liberal policy direction, and 50% support conservative policy direction. With respect to the other branches of government, polarization can take several forms. When thinking of Congress alone, polarization could occur when half of the members of Congress (MCs) are liberal, and half are conservative. When thinking of both Congress and the President together, polarization can be thought of in terms of divided versus unified government; divided government implies a more polarized political environment than unified government. Figure 4.1 implies that divergence away from the polarization point represents increasing ideological consensus toward either the conservative or liberal direction. An example of increasing consensus in public opinion would be when the percentage of people supporting liberal policy increases above 50% and the percentage of people supporting conservative policy direction decreases below 50%. More specifically, this would be an example of increasing liberal consensus.

My primary theoretical contention is that *the accountability mechanism will become increasingly operative as the degree of ideological consensus in the political environment increases*. I argue that increasing consensus *regulates the amount of room preferences have to operate*, as displayed in Figure 4.1, so that as consensus increases in either the liberal or conservative direction, the magnitude of preference-based behavior will decrease. For example, if public preferences increasingly tend toward liberalism, justices may feel more accountable to the public than if public preferences exhibit clear divisions, i.e., they show polarization. One reason why the justices may feel accountable to increasing consensus is because the Court possesses "neither the purse nor the sword" (e.g., Mishler and Sheehan 1993; Flemming and Wood 1997; Epstein and Knight 1998; McGuire and Stimson 2004). Thus, with no official enforcement mechanisms, the Court

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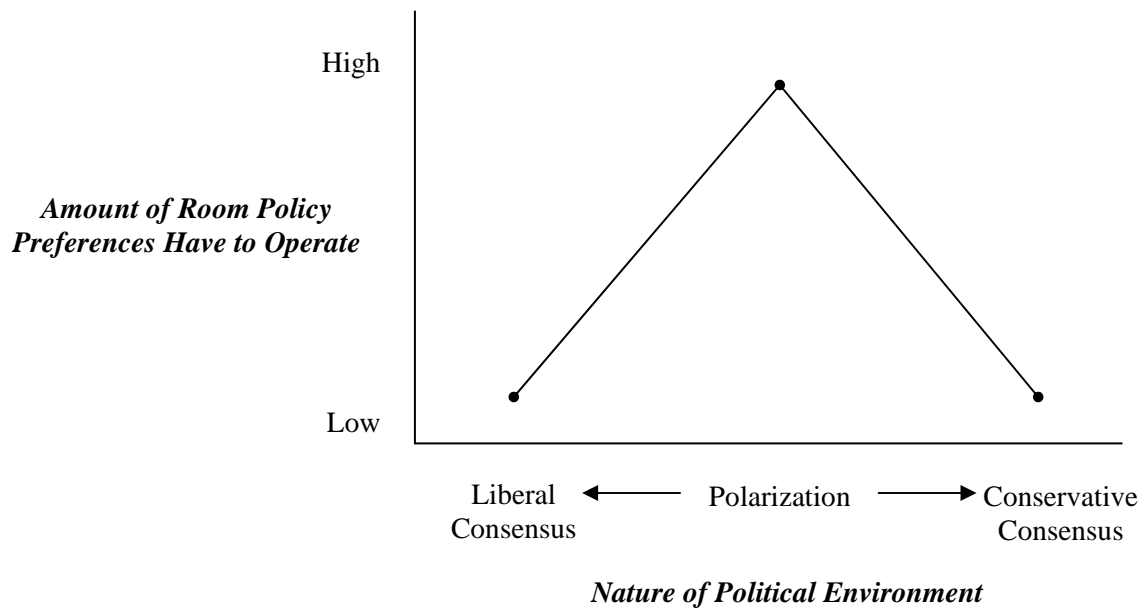
Figure 4.1: How Polarization and Consensus Regulate the Room Policy Preferences Have to Operate

relies on the public and the other branches of government to enforce its rulings. The informal mechanism of the Court's enforcement is its institutional legitimacy grounded in the public's perception of the Court as an impartial and legally-grounded decision-maker (e.g., Casey 1974; Caldeira and Gibson 1992; Gibson et al. 2003). Therefore, justices might seek to maintain a sense of good will with the other branches of government and with the public at large in order to sustain the Court's mystique and institutional legitimacy, which helps ensure that its policies will be properly implemented and respected. The more sizable the political consensus in either the public or the other branches, the more likely the Court would open itself to attacks that its decisions turn on ideological grounds instead of objective, well-reasoned grounds. Thus, the justices might

find it in their interests to suppress what might be perceived as ideologically-polarized behavior in the face of increasing political consensus.

Another reason the Court might feel accountable to an increasing consensus in the political environment centers on the argument by strategic theorists that the Court seeks to avoid political confrontations with the other branches. As Pritchett (1961, 25) states, "In general there are two lines of strategy which Congress can employ when it undertakes to engage in controversy with the Supreme Court. One is to attack the decisions of the Court to which it objects. The other is to attack the Court as an institution." Moreover, some scholars (e.g., Rosenberg 1992; Epstein et al. 2001) argue that while these weapons are rarely brandished by Congress, the mere threat that Congress could attack the Court is often sufficient to keep the Court in line. Rosenberg (1992; see also Epstein et al. 2001) goes so far as to suggest that given the various "sticks" that Congress could potentially wield against the Court, the *threat*, and not necessarily the passage, of court-curbing or decision-reversal legislation may be sufficient for Congress to impose constraint on the Court. As political consensus in the political environment increases, the justices, feeling more accountable to this consensus, would seemingly want to suppress what could be perceived to be highly ideologically-based decisions because the more consensus, the more the potential for political reprisals, either in the form of attacks on the Court's decisions or attacks on the Court as an institution. However, when polarization exists in the environment, the lack of consensus in the environment lessens the need to feel accountable to external political entities because it would be more difficult to generate a political coalition against the Court.

If justices care about both their personal standing and the standing of the Supreme Court as an institution with these important entities, then as ideological consensus increases toward either the liberal or conservative direction (which implies divergence away from the polarization point), two effects should occur: (1) the degree of preference-based behavior should decrease (the effect central to my heterogeneity framework), and (2) the propensity of case outcomes should tend toward the direction of consensus in public mood or the other branches (the direct effects on outputs central to most strategic perspectives). The hypotheses below capture the first of these two effects.

Hypothesis 7 below states the expectation for the effect of consensus in public mood on the magnitude of preference-based behavior.

Hypothesis 7: As ideological consensus in public opinion increases, the impact of justices' policy preferences on behavior will decrease.

I break down Hypothesis 8 from Chapter 2 into two hypotheses. Hypothesis 8a focuses on how consensus *within* Congress shapes preference-based behavior. Much of the work on strategic theory has focused most closely on how the Court strategically accounts for the potential responses from Congress, primarily because of the means Congress has of attacking the Court, as stated in the Pritchett quote above (see also Murphy 1964; Spiller and Gely 1992; Epstein et al. 2001).

Hypothesis 8a: As ideological consensus increases *within* Congress, the impact of justices' policy preferences on behavior will decrease.

Hypothesis 8b focuses on consensus *between* Congress and the President. The effect posited in Hypothesis 8a may be contingent on whether the President is ideologically aligned with Congress. If congressional consensus exists, but the President is not ideologically aligned with this consensus, then the constraining effect of congressional

consensus will be dampened. A party-based manifestation of consensus between

Congress and the President is unified government, while a manifestation of polarization

between the two branches is divided government. An ideologically-oriented type of

between-branch polarization would be when congressional consensus tends toward, for

example, the conservative direction, but the President is a Democrat, and therefore is not

aligned with that consensus. Thus, I posit Hypothesis 8b:

> **Hypothesis 8b**: As partisan or ideological consensus increases *between* Congress and the President, the impact of justices' policy preferences on behavior will decrease.

RESEARCH DESIGN, DATA, AND ANALYSIS

As in Chapter 3, a multilevel (hierarchical) modeling framework presents unique

statistical modeling opportunities for ascertaining the empirical validity of the hypotheses

stated above. The multilevel modeling framework accommodates the central theoretical

issue at hand, that is, it can assess how higher-level contextual factors—the degree of

polarization and consensus in public opinion and the other branches of government—

explain variation in the relationship between policy preferences and the choices justices

make. The models estimated in this chapter employ a three-level hierarchical structure:

justices' choices nested within cases nested within years. Justices' choices are level-1

units, cases are level-2 units, and years (i.e., the Court's terms) are level-3 units.

This framework is also capable of integrating research designs from past strategic

analyses into a single integrated model. I noted in Chapter 1 that past studies have tended

to talk past each other because they analyze similar hypotheses at different levels of

analysis. Studies by Spiller and Gely (1992) and Bergara et al. (2002) are at the Court

level, while Segal's (1997) refutation of these findings is at the individual level.

Furthermore, studies by Mishler and Sheehan (1993), Stimson et al. (1995), and McGuire

and Stimson (2004) are at the aggregate level (or year level), while Flemming and

Wood's (1997) analysis is at the individual level. My multilevel framework specifies

three levels of analysis—choices, cases (Court level), and years (aggregate level)—in one

model to examine: (1) how external strategic considerations exhibit a direct effect on

outcomes (like past studies do), and (2) how external considerations shape the magnitude

of preference-based behavior (which is central to my heterogeneity framework). Below, I

discuss my measurement strategy for the key variables. I then discuss model specification

and estimation.

Data and Measurement

To test the hypotheses, I analyze data consisting of justices' votes on all formally-

decided civil liberties cases from the 1953-2003 terms of the Court.[1] The data consist of

28,190 choices (level-1 units) nested within 3,220 cases (level-2 units) nested within 51

years (level-3 units). The dependent variable—a justice's choice in a case—is

dichotomous, where "1" is a liberal vote and "0" is a conservative vote. Additionally, to

respond to claims in the literature about whether the Court responds to the political

environment differently in statutory versus constitutional cases, I also analyze data

separately for these two sets of cases. For statutory cases, the data consist of 12,178

choices (level-1 units) nested within 1,394 cases (level-2 units) nested within 51 years

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[1] Case selection criterion: ANALU = 0 (citation) or 4 (split vote); DEC_TYPE=1, 6, or 7; and VALUE $\leq$ 6.

(level-3 units). For constitutional cases, the data consist of 16,003 choices (level-1 units)

nested within 1,825 cases (level-2 units) nested within 51 years (level-3 units).[2]

The key measurement strategy entails mapping the concepts from the

polarization-consensus framework discussed previously onto a set of empirical measures

capable of assessing whether elements of the political environment shape the magnitude

of preference-based behavior. First, to measure the degree of consensus in public opinion,

I employ Stimson's (1999) measure of public mood for the previous year. Public mood

represents "global preferences for a larger, more active federal government as opposed to

a smaller, more passive one across the sphere of all domestic policy controversies"

(Stimson et al. 1995, 548). The decision to lag public mood one year is in accord with

previous studies (e.g., Stimson et al. 1995; Flemming and Wood 1997; McGuire and

Stimson 2004). Recall the temporal nature of the Court's terms. For instance, the 1995

term of Court lasts from October 1995 to June 1996, with the great majority of decisions

being handed down in calendar year 1996. To implement a lagged measure of public

mood, public mood from calendar year 1995 corresponds with Supreme Court data from

the 1995 term (October 1995 to June 1996).

My conceptual framework requires that I convert public mood into a measure that

ranges from polarization to consensus; moreover, a measure is needed that can

differentiate liberal consensus from conservative consensus, as depicted in Figure 4.1.

Figure 4.2 plots public mood from 1953-2003. The measure theoretically ranges from 0

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[2] Classifications of statutory versus constitutional cases were made via the "AUTH_DEC" variable in the Spaeth (2004) database. Following Epstein et al. (2001), the following types of cases were classified as statutory: supervision of lower courts, interpretation of an administration regulation or rule, and federal common law. One case in the database was not given an "AUTH_DEC" entry and was classified as neither statutory nor constitutional.
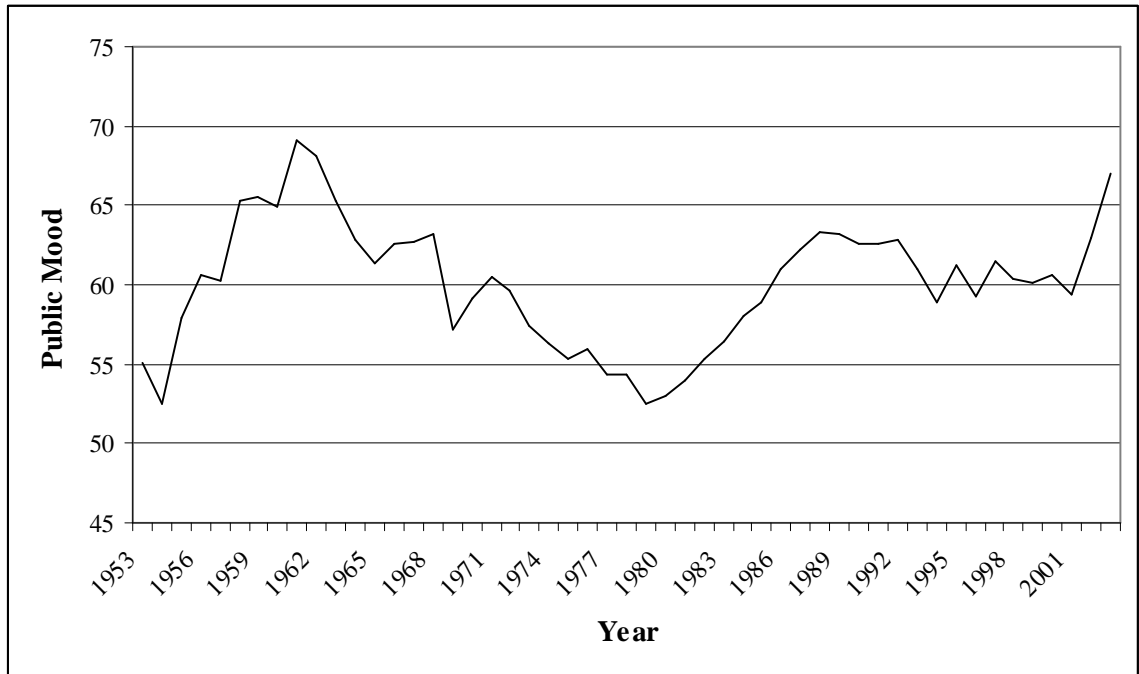
Figure 4.2: Public Mood, 1953-2003

to 100, where 0 represents completely conservative mood, 100 represents completely

liberal mood, and 50 means that the mood is evenly split between liberal and

conservative policy direction (see Stimson et al. 1995, 548). Here, 50 would represent the

highest degree of polarization in public mood. Divergence from 50 toward 100 represents

increasing liberal consensus, and divergence from 50 toward 0 represents increasing

conservative consensus. Over this 51-year time span, note how public mood never falls

below 50. This means that there is never a degree of conservative consensus in public

mood. Instead, public mood during this time span can be thought of in terms of the

degree of liberal consensus only. To measure consensus, then, I simply take the mood

measure at each time period and subtract 50. This generates a measure that theoretically

ranges from 0, which represents polarization in public mood, to 50, which represents the

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highest degree of liberal consensus in public mood. In reality, the measure ranges from a low of 2.50 (which occurred in 1954) to a high of 19.12 (which occurred in 1961). I then recoded this measure so that it ranges from 0 to 1.

To capture analogous measures of the degree of ideological consensus for Congress and the President, I employ two types of measures: (1) a party-based measure and (2) an ideology-based measure. Each will be employed in separate models. For both measures, the configuration of Congress and the President corresponds temporally to current Court data. For instance, the configuration of Congress and the President in 1995 corresponds to the 1994 term of the Court (which lasts from October 1994 to June 1995). This assumes that if the justices are responsive to the other branches, they respond to the environment as it currently is. Thus, the 1994 elections brought about a change in the configuration of Congress, which took effect in January 1995.

First, the party-based measure taps whether there is unified or divided government. Unified government represents consensus in the political environment between Congress and the President, while divided government represents polarization between the two branches; note how this measure is relevant to Hypothesis 8b.[3] Moreover, to represent whether unified government is in the Republican or Democratic direction, I employ a nominal operationalization with three categories: Republican government, Democratic government, or divided government. I treat divided government as the baseline, or excluded group.[4]

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[3] To be explicit, unified government occurs when one party controls the Presidency, the House, and the Senate. When this condition is not met, there is divided government.

[4] I also employ a simple dichotomous measure, for whether there is unified or divided government, but no differences in the substantive results emerge when using this measure versus my nominal measure.
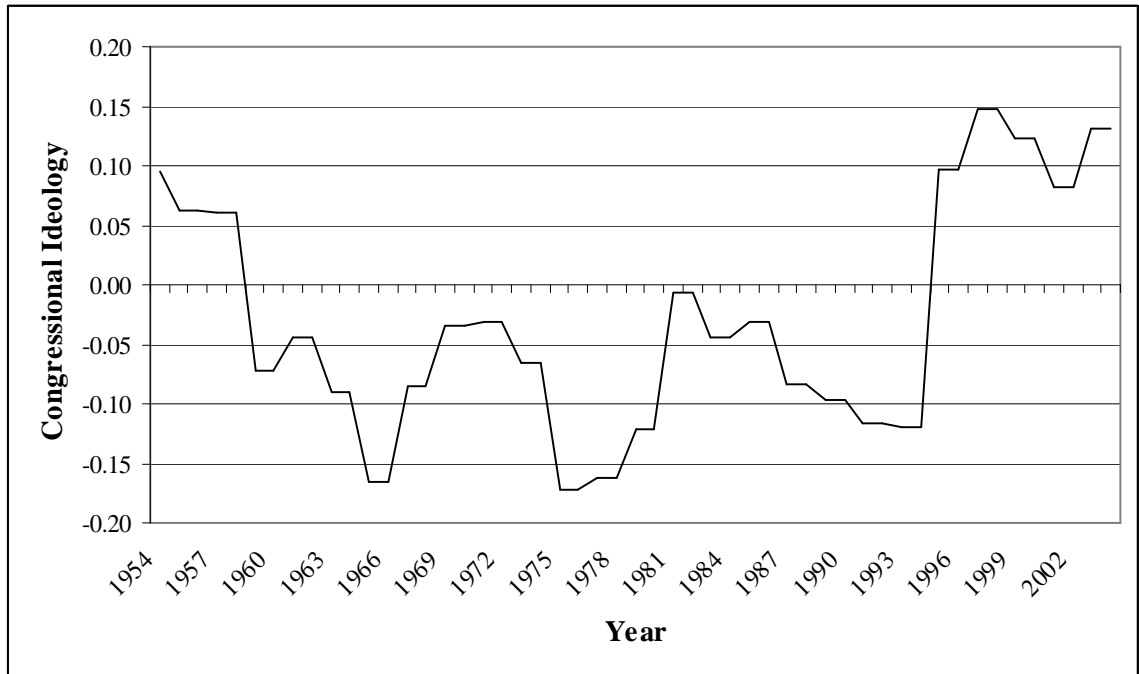
Figure 4.3: Congressional Ideology, 1954-2004

Next, the ideology-based measurement strategy seeks to capture the degree of

ideological consensus (1) *within* Congress (relevant to Hypothesis 8a) and (2) *between*

Congress and the President (relevant to Hypothesis 8b). First, this requires a measure of

congressional ideology. To capture justices' perceptions of the congressional

environment, I first calculate the House and Senate medians for each year using

NOMINATE Common Space scores from the first dimension (Poole and Rosenthal

1997). Common Space scores allow one to make direct comparisons across both time and

across chambers. Then, to measure justices' beliefs about overall congressional

preferences, I employ Martin's (1998) strategy of calculating the midpoint between the

House and Senate medians for each year. I plot this measure from the years 1954 through

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2004 in Figure 4.3. Negative scores represent more liberal Congresses, and positive

scores reflect more conservative Congresses; 0 represents a moderate Congress.

Of course, this measure ranges from liberal to conservative, yet I require a

measure that ranges from polarization to consensus. A congressional median of 0 would

represent the highest level of polarization in Congress. It would mean that half of the

members are more conservative than the median member, and half are more liberal.

Divergence away from 0 in the positive direction represents increasing consensus in the

conservative direction, while divergence away from 0 in the negative direction represents

increasing liberal consensus. To create a measure of generic congressional consensus

(regardless of whether it is in the liberal or conservative direction), I simply take the

absolute value of my congressional median measure. This congressional consensus

measure ranges from 0.007, which represents the lowest amount of congressional

consensus (and the highest level of polarization), to 0.172, which represents the highest

level of consensus. I recode this variable so that it ranges from 0 to 1.

Two more steps are required for my ideology-based measurement strategy. First,

to distinguish between the effects of conservative and liberal consensus on preference-

based behavior, I create a dummy variable equaling "1" if consensus is in a liberal

direction and "0" if consensus is in a conservative direction.[5] I then interact this dummy

variable with the congressional consensus measure, which offers the ability to test

whether liberal consensus has a significantly different effect on the preference-behavior

relationship than conservative consensus. Second, I employ a measurement strategy to

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[5] Put another way, this dummy variable equals "1" if the original congressional median measure plotted in
Figure 4.3 is less than zero, and "0" if the original congressional median measure is greater than zero.

assess how ideological consensus *between* Congress and the President shapes preference-based behavior. The goal is to test whether presidential alignment or non-alignment with the direction of congressional ideology conditions the impact of congressional consensus on preference-based behavior. Thus, I create another dummy variable equaling "1" if the President's ideology is in the same direction as Congress's, and "0" if the President's ideology and Congress's ideology are in two different directions. I use President's party as a proxy for the direction of ideology. Thus, if congressional ideology is in the liberal (conservative) direction and the President is a Democrat (Republican), then the presidential alignment dummy variable equals "1"; otherwise, it equals "0". Expecting that presidential alignment will strengthen the constraining effect of congressional consensus on preference-based behavior and non-alignment will weaken this constraining effect, I interact the presidential alignment variable with the congressional consensus variable.

As was noted in Chapter 3 and discussed in more detail in Appendix A, measuring justices' policy preferences is a complicated issue in the judicial behavior literature that requires careful attention in various types of judicial decision-making analyses. Since the analyses in this chapter cover longer time spans, I employ Martin and Quinn (2002) scores, which are estimates of justices' policy preferences from a Bayesian item response measurement model.[6] No measure is perfect, and this measure possesses

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[6] The item response model from which Martin-Quinn scores are derived strongly resembles the level-1 equation in the main model specification to be discussed, except that preferences are specified as a latent variable in Martin and Quinn's model. Martin and Quinn's (2002) model specifies a case-varying intercept (unobserved case-level heterogeneity), and the impact of preferences is also specified to vary across cases. Thus, justices' ideal point estimates are those that best generate the underlying voting patterns in the data given the certain assumptions made (i.e., controlling for unobserved case heterogeneity, allowing the impact of preferences to vary across cases, and allowing justices' preferences to change over time).

strengths and weaknesses, as discussed in more detail in Appendix A. The major

strengths of these scores are that they allow for comparisons across justices and across

time, something my lagged proportion liberal measure employed in Chapter 3 cannot

account for. While I believe that Martin and Quinn measures are best-suited for this

analysis, I also employed Segal and Cover (1989; Segal et al. 1995) scores, which are

based on pre-nomination editorials from four major newspapers. To demonstrate

differences in these results across models using these two measures, Appendix C includes

results using Segal-Cover scores for the analyses that examine all civil liberties cases

together.[7]

      To facilitate interpretation, Martin and Quinn scores are transformed so that they

are mean-centered.[8] I also mean-centered each of the level-3 variables discussed above.

The motivation for mean-centering these variables is the same as discussed in Chapter 3.

Descriptive statistics of the variables used in this analysis are presented in Appendix B.

Model Specification

      As mentioned earlier, the models estimated in this chapter employ a three-level

hierarchical structure: *justices' choices nested within cases nested within years*. Justices'

choices are level-1 units, cases are level-2 units, and years (i.e., the Court's terms) are

level-3 units. For all analyses, the dependent variable—a justice's choice in a case—is

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[7] I will allude to the differences between the sets of results employing the two preferences measures in footnotes.

[8] Martin-Quinn scores originally range from about –4 (liberal) to 4 (conservative). To transform Martin-Quinn scores, I first switched the sign and then transformed the variable so that it ranges roughly from –1 (conservative) to 1 (liberal). I did this by first recoding Martin-Quinn scores to range from 0-1, then multiplying this value by 2, and finally mean-centering that value. Note that this transformation is perfectly correlated with the original Martin-Quinn scores and does not in any way alter substantive conclusions.

dichotomous, where "1" is a liberal vote and "0" is a conservative vote. For binary

dependent variables, a Bernoulli sampling model is specified, and I use a logit link. For

the logit link, first define $\Pr(Y_{ijt}=1) = p_{ijt}$, which is the probability of a liberal vote for

choice i in case j in year t. Then define η_{ijt} as the log-odds of p_{ijt} (i.e.,

$\eta_{ijt} = \log[p_{ijt} / (1 - p_{ijt})]$), which allows one to specify the log-odds as a linear function of

the level-1 independent variables.

I specify two varieties of structural models. I estimate each variety for (1) all civil

liberties cases, (2) statutory cases only, and (3) constitutional cases only. Both

specifications, which are discussed in more detail below, are three-level random

coefficient models. *Model 1* tests the hypotheses using the party-based measure for the

consensus between Congress and the President. Model 1 can be written as:

(Level-1 equation)　　$\eta_{ijt} = \beta_{0jt} + \beta_{1jt}PREF_{ijt}$

(Level-2 equations)　　$\beta_{0jt} = \gamma_{00t} + u_{0jt}$
　　　　　　　　　　$\beta_{1jt} = \gamma_{10t} + u_{1jt}$

(Level-3 equations)　　$\gamma_{00t} = \pi_{000} + \pi_{001}Mood_t + \pi_{002}DemGov_t + \pi_{003}RepGov_t + r_{00t}$
　　　　　　　　　　$\gamma_{10t} = \pi_{100} + \pi_{101}Mood_t + \pi_{102}DemGov_t + \pi_{103}RepGov_t + r_{10t}$

Model 2 tests the hypotheses using the ideology-based measurement strategy for

consensus within Congress and between Congress and the President. It has identical

level-1 and level-3 equations as Model 1, but the level-3 equations are:

(Level-3 equations)　　$\gamma_{00t} = \pi_{000} + \pi_{001}Mood_t + \pi_{002}Cong_t + \pi_{003}LibCong_t +$
　　　　　　　　　　　$\pi_{004}Pres_t + \pi_{005}Cong_t*LibCong_t + \pi_{006}Cong_t*Pres_t$
　　　　　　　　　　　$+ r_{00t}$
　　　　　　　　　　$\gamma_{10t} = \pi_{100} + \pi_{101}Mood_t + \pi_{102}Cong_t + \pi_{103}LibCong_t +$
　　　　　　　　　　　$\pi_{104}Pres_t + \pi_{105}Cong_t*LibCong_t + \pi_{106}Cong_t*Pres_t$
　　　　　　　　　　　$+ r_{10t}$

In the level-1 equation for both specifications, $PREF_{ijt}$ is a justice's policy preference associated with choice i in case j at time t. β_{0jt} is a random intercept that varies across cases and years, and it can be thought of as the propensity of a liberal outcome. Note that there are no observed level-2 variables specified in this model. However, as in Chapter 3, this specification accounts for unobserved case-level heterogeneity in both the intercept (via the random effect, u_{0jt}) and the slope associated with policy preferences (via the random effect, u_{1jt}). Previous studies, most at the aggregate level, that have examined the influence of external strategic considerations have employed designs incapable of accounting for this case-level heterogeneity that is known (particularly from Chapter 3) to affect both the case outcome and the preference-behavior relationship. Thus, accounting for this unobserved case-level heterogeneity improves confidence in the inferences about the core parameters of interest by accounting for both the shifting propensities of liberal outcomes and differing degrees of preference-based behavior across cases.

Since all of the independent variables tapping elements of the political environment are year-level variables, they enter in the level-3 equations. For both specifications, γ_{00t} represents the yearly propensity of liberal outcomes. γ_{10t}, which is the central equation for testing the core hypotheses, represents the preference-behavior relationship across time and is specified as a function of the year-level factors hypothesized to shape preference-based behavior; the effects in the γ_{10t} equation are cross-level interaction effects, which are seen more clearly in the reduced-form representation of Model 1 depicted in Figure 4.4.

In Model 1, both level-3 equations are a function of consensus in public mood ($Mood_t$) and the party-based measures for the configuration of the other branches of

	$\eta_{ij} =$
Effects on annual outcomes	$\pi_{000} + \pi_{001}Mood_t + \pi_{002}DemGov_t + \pi_{003}RepGov_t +$
Avg. effect of preferences	$\pi_{100}PREF_{ijt} +$
Cross-level interactions	$\pi_{101}Mood_t{*}PREF_{ijt} + \pi_{102}DemGov_t{*}PREF_{ijt} +$ $\pi_{103}RepGov_t{*}PREF_{ijt} +$
Error components	$u_{0jt} + r_{00t} + u_{1jt}PREF_{ijt} + r_{10t}PREF_{ijt}$

Figure 4.4: Reduced-form Representation of Model 1

government ($DemGov_t$ and $RepGov_t$). Since each of these level-3 variables is mean-centered, the effects in the γ_{00t} equation represent the direct impact of each variable on the annual propensity of liberal outcomes. Table 4.1 summarizes expectations for both Models 1 and 2 for parameters from both the γ_{00t} and γ_{10t} equations. Although I operationalize the political environment variables somewhat differently from previous studies for purposes of tying them into my polarization-consensus framework, past studies provide some expectations for the direction of the effects in the γ_{00t} equation. First, in accord with findings by Stimson et al. (1995) and McGuire and Stimson (2004), I expect that $\pi_{001} > 0$, which means that as liberal consensus in public mood (which again ranges from polarization to liberal consensus) increases, the propensity for liberal outcomes will increase as well. For the party-based measures, strategic perspectives suggest that I should expect $\pi_{002} > 0$, which means that outputs will be more liberal when there is Democratic government compared to divided government. Moreover, if $\pi_{003} < 0$, then Court outputs are more conservative when there is Republican government

$$\eta_{ij} =$$

Effects on annual outcomes	$\pi_{000} + \pi_{001}Mood_t + \pi_{002}Cong_t + \pi_{003}LibCong_t + \pi_{004}Pres_t + \pi_{005}Cong_t*LibCong_t + \pi_{006}Cong_t*Pres_t +$
Avg. effect of preferences	$\pi_{100}PREF_{ijt} +$
Cross-level interactions	$\pi_{101}Mood_t*PREF_{ijt} + \pi_{102}Cong_t*PREF_{ijt} + \pi_{103}LibCong_t*PREF_{ijt} + \pi_{104}Pres_t*PREF_{ijt} + \pi_{105}Cong_t*LibCong_t*PREF_{ijt} + \pi_{106}Cong_t*Pres_t*PREF_{ijt} +$
Error components	$u_{0jt} + r_{00t} + u_{1jt}PREF_{ijt} + r_{10t}PREF_{ijt}$

Figure 4.5: Reduced-form Representation of Model 2

compared to divided government. My heterogeneity framework suggests specific expectations from the γ_{10t} equation, which contains how these factors explain variation in the preference-behavior relationship. From Hypothesis 7, I expect that $\pi_{101} < 0$, implying that liberal consensus will reduce preference-based behavior. Also from Hypothesis 8b, I expect that $\pi_{102} < 0$ and $\pi_{103} < 0$, indicating that unified government of both the Democratic and Republican varieties, respectively, will attenuate preference-based behavior compared to divided government.

To view more clearly the working parts of Model 2 (particularly the cross-level interactions), the reduced-form representation of Model 2 is depicted in Figure 4.5. The same interpretive logic discussed with respect to Model 1 applies to Model 2. Table 4.1 summarizes the expected effects for both the γ_{00t} and γ_{10t} equations. For Model 2, the same expectations emerge for the effects of consensus in public mood for both the γ_{00t} equation ($\pi_{001} > 0$) and the γ_{10t} equation ($\pi_{101} < 0$) for the reasons stated above. Recall

Year-Level Factor	Expected Effect from γ_{00t} Equation (Court Outcomes)	Expected Effect from γ_{10t} Equation (Preference-Behavior Relationship)
Model 1		
Consensus in Public Mood	$\pi_{001} > 0$	$\pi_{101} < 0$
Democratic Government	$\pi_{002} > 0$	$\pi_{102} < 0$
Republican Government	$\pi_{003} < 0$	$\pi_{103} < 0$
Model 2		
Consensus in Public Mood	$\pi_{001} > 0$	$\pi_{101} < 0$
Congressional Consensus	None	$\pi_{102} < 0$
Liberal Congress (Dummy)	$\pi_{003} > 0$	None
Presidential Congruence (Dummy)	None	None
Cong. Consensus*Liberal Cong.	None	None
Cong. Consensus*Pres. Congruence	None	$\pi_{106} < 0$

Table 4.1: Summary of Expected Effects in Empirical Analysis

that the congressional consensus measure ranges from polarization to consensus in either

the liberal or conservative direction, so there is no directional expectation for the effect of

this variable on Court outcomes in the γ_{00t} equation. But for the γ_{10t} equation, Hypothesis

8a suggests that $\pi_{102} < 0$, implying that congressional consensus will reduce preference-

based behavior.

Recall that, via its interaction with congressional consensus, the dummy variable

measuring whether congressional consensus is in the liberal or conservative direction

primarily serves to determine whether consensus has a different effect across liberal and

conservative Congresses. But for the liberal Congress dummy by itself, it is reasonable to

expect, from strategic perspectives, that in the γ_{00t} equation, $\pi_{003} > 0$, meaning that annual

outputs will be more liberal when there are liberal Congresses compared to conservative

Congresses. For both the γ_{00t} and γ_{10t} equations, no clear expectation emerges for the effect of the interaction between congressional consensus and the liberal Congress dummy. For the interaction between congressional consensus and presidential congruence, no expectation emerges for its effect on Court outcomes in the γ_{00t} equation, but for the γ_{10t} equation, Hypothesis 8b suggests that $\pi_{106} < 0$. This effect suggests that presidential alignment with the ideological direction of congressional consensus will further attenuate (above and beyond the effect of congressional consensus) preference-based behavior. For ease of interpretation, the results section contains more simplified interpretations of the effects (particularly the interactions) from Model 2.

Finally, for Models 1 and 2, the γ_{00t} equations contain stochastic components at level three (r_{00t}) that represent *unobserved heterogeneity* in the response, that is, unmeasured variability in *year-level* factors that could affect the outcome. The specification of r_{00t} serves an important purpose for judicial voting data that cover longer time spans. It essentially allows one to be more confident in the inferences regarding the parameters of interest because it controls for unobserved year-to-year variation in the propensity of liberal Court outcomes. Thus, this specification increases one's confidence, for instance, that the core inferences about the effects of the strategic factors are not an artifact of membership change. Membership change can be considered a year-level factor that may affect the overall propensity of a liberal decision, and so the specification of r_{00t} is one way of accounting for this type of variation. Also, the stochastic component in the γ_{10t} equations, r_{10t}, accounts for unobserved year-level heterogeneity that may explain variation in the impact of policy preferences. Accounting for this unobserved heterogeneity in the impact of preferences is again useful in analyses covering longer

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time spans. It accounts for unmeasured changes in preference-based behavior that undoubtedly occur from year to year and allows one to be more confident in the inferences about the core parameters.

The level-2 error components, u_{0jt} and u_{1jt}, and the level-3 error components, r_{00t} and r_{10t}, are each assumed to have bivariate normal distributions, and therefore, one estimates var(u_{0jt}), var(u_{1jt}), and cov(u_{0jt}, u_{1jt}) for level two and var(r_{00t}), var(r_{10t}), and cov(u_{0j}, u_{1j}) for level three.

Estimation

Rodriguez and Goldman (2001) refer to maximum likelihood (ML) estimation and Bayesian estimation via Markov chain Monte Carlo (MCMC) as two "standards" for estimating multilevel models with binary responses.[9] ML, which I used in Chapter 3, requires integrating out the random effect(s) to acquire the unconditional distribution of the outcome. This requires either numerical integration using quadrature-based methods (Skrondal and Rabe-Hesketh 2004) or Monte Carlo integration (see Train 2003). Numerical integration becomes more computationally demanding as the number of random effects increases. In a three-level model with four random effects as I have specified in this chapter, quadrature-based ML becomes unfeasible.

Therefore, for reasons of computational feasibility, I adopt the second "standard," employing Bayesian simulation via MCMC. Specifically, I use Gibbs sampling—the most widely-used MCMC routine—as implemented in WinBUGS 1.4.1 (Spiegelhalter et

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[9] Other procedures, such as penalized quasi-likelihood (PQL) and marginal quasi-likelihood (MQL), can produce biased estimates of the variance components for binary response models (see Rodriguez and Goldman 1995, 2001).

al. 2004). The goal of Bayesian inference is to estimate the posterior distribution—*the distribution of a parameter conditional on the data*.[10] The posterior, the workhorse of Bayesian inference, is constituted by two key components: the *prior* distribution of the parameter and the *likelihood*, or the "data." Thus, when one specifies minimally informative prior information about a parameter (e.g., zero mean and large variance), the posterior reduces to the likelihood and one draws inferences similar to those one would draw using frequentist (likelihood) analysis.

MCMC avoids numerical integration of multidimensional integrals inherent in multilevel models with random effects by relying on the Monte Carlo principle: we can learn anything about a random variable, *Y*, by sampling many times from the probability distribution that generated *Y*. MCMC applies this principle to a joint posterior distribution, treating the parameters as *random variables*. The joint posterior is the joint distribution of the unknown parameters conditional on the known "data." To approximate the joint posterior, the Gibbs sampler samples iteratively from the full conditional distributions derived from the joint posterior (see Gill 2002, 311-16; Gelman et al. 2003; Rodriguez and Goldman 2001, 342-43). As the number of simulations increases, the process approaches the "target" distribution, i.e., the joint posterior. One can then simply summarize the posterior for a given parameter by communicating the mean, standard deviation, and certain percentiles of the posterior draws.

All models in this chapter employ non-informative (diffuse) priors, meaning that the likelihood (the data) dominates the prior in constituting the posterior; therefore,

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[10] For a comprehensive overview of Bayesian data analysis using MCMC, see, e.g., Gelman et al. (2003), Gill (2002), and/or Congdon (2003).

inferences are similar to what would be made using ML.[11] For each model, I specified

three parallel Markov chains,[12] and convergence was assessed via the Gelman and Rubin

(1992) test (see also Gelman et al. 2003; Congdon 2003).[13] Using this test for all models

in this chapter, convergence was apparent for all parameters of interest after 30,000

iterations. Discarding the first 15,000 samples, all results are based on the last 15,000

samples. Based on these samples, the results tables present the posterior mean, standard

deviation, and 90% "Bayesian credibility intervals" (explained below) for three sets of

estimates: (1) effects of the year-level covariates on the annual propensity of liberal

outputs (estimates from the γ_{00t} equation), (2) effects of the year-level covariates on the

preference-behavior relationship (estimates from the γ_{10t} equation), and (3) the variance-

covariance components of the random effects. Recall that since the key variables

(consensus in public mood and the other branches of government) in this chapter are

level-3 variables, the effects are *year-level* effects. Thus, estimates from the γ_{00t} equation

represent how level-3 variables affect the Court's outputs across years, and estimates

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[11] The random effects associated with both the random intercept and random slope at both levels two and three are distributed as bivariate normal. I specify uniform distributions for the standard deviations of the variance terms at each level (Gelman 2005). Also, the γ parameters are each assumed to be normally distributed. I use standard diffuse priors for the γ's, with means 0 and precisions of 0.001; a precision is the inverse of the variance, so a precision of 0.001 is equivalent to a variance of 1000.

[12] For all models, good starting values were required to achieve convergence. I first ran a reduced random intercept logit model and used the coefficients from that model as starting values for a one-chain model. Following Congdon (2003), I performed an initial run of 1000 iterations and used the mean and the upper and lower bounds, respectively, of the 95% confidence interval for each parameter as start values for each of the three chains. I experimented with other start values for the three-chain model and used various start values for two-chain models as well, using suggestions from Congdon (2003), and the results are highly stable across all specifications.

[13] This requires monitoring the potential scale reduction (R), which taps differences between the 3 chains, for all parameters; convergence is achieved when R is very close to 1 for all parameters of interest. When R is close to 1, it indicates that the chains are overlapping and the Gibbs sampler is approaching the target distribution.

from the γ_{10t} equation represent how level-3 variables affect the preference-behavior relationship across years.

Bayesian credibility intervals are analogous to (yet conceptually distinct from) confidence intervals in frequentist analysis. Credibility intervals communicate the "range of plausible values of an unknown parameter" and possess intuitive appeal because they "define the posterior probability that a parameter lies in such an interval" (Raudenbush and Bryk 2002, 402).[14] To infer that a variable exhibits a non-zero effect, we want to know how much of the posterior's mass is greater than or less than zero (depending on whether the expected effect is positive or negative). For instance, to conclude a positive effect, it is necessary to have a high posterior probability that the parameter is greater than zero. I report 90% credibility intervals—the 5th and 95th percentiles of the posterior distribution—in order to assess whether at least 95% of the posterior's mass is greater than zero (for a positive effect) or less than zero (for a negative effect). I use this 95% standard to determine the statistical significance of the effects, and in the tables, I place an asterisk next to intervals where at least 95% of the posterior is greater than or less than zero. If the 5th percentile is greater than zero, then there is at least a 95% posterior probability that the effect is positive. If the 95th percentile is less than zero, then there is at least a 95% posterior probability that the effect is negative. This inferential strategy is consistent with basic one-sided Bayesian hypothesis testing (Gill 2002, 203-07), which is in turn analogous to the use of one-tailed tests in classical, or frequentist, hypothesis

[14]This is in contrast to frequentist interpretations, which rely on asymptotics to infer that "if we were to draw an infinite number of samples of size *N*, the 'truth' would fall within our calculated confidence interval 95% of the time." Despite these differences, the practical distinctions between Bayesian and frequentist means of inferring whether effects are distinguishable from zero are minor for purposes of this analysis.

testing. I also highlight effects that are significant with at least 90% posterior probability with a pound ([#]) sign; note that I do not, however, report the 80% credibility intervals (i.e., the 10th and 90th percentiles) upon which the 90% criterion is based.

Results

I now discuss the results from both Models 1 and 2 for (1) all civil liberties cases and (2) for statutory and constitutional cases separately. For the data consisting of all civil liberties cases, MCMC estimates of the Model 1 parameters are presented in Table 4.3, while Model 2 estimates are presented in Tables 4.4 and 4.5. Goodness-of-fit summaries for both Models 1 and 2 (for all civil liberties cases) are presented in Table 4.2. Note again that the models reported in the body of the chapter employ Martin-Quinn measures of justices' policy preferences. Appendix C reports MCMC estimates (for models analyzing all civil liberties cases) of Models 1 and 2 that employ Segal-Cover scores. The results between models employing the two measures produce some substantively conflicting conclusions. While Appendix A includes a discussion of why I think that Martin-Quinn measures are superior to Segal-Cover scores given the type of data I am examining, the conflicting findings suggest that the discussion of the results should be taken as less than conclusive.

I first discuss model fit for Models 1 and 2 that examine all civil liberties data together. I assess model fit and comparison via the "deviance information criterion" (DIC) (Spiegelhalter et al. 2002). DIC is a Bayesian model comparison statistic that combines deviance (-2*log-likelihood) with a measure of a model's complexity. The

	Model 1	*Model 2*
Full model compared to:		
1. Pooled model with no random coefficients	33680.0	33630.0
2. Random Intercept only at both level-2 and level-3	19530.0	19490.0
3. Random Coefficients at level-2 only	17160.0	17140.0
Full Model:		
Three-level random coefficient model	17140.0	17130.0

Numerical entries are DIC statistics for each model. Lower values indicate better model fit.

Table 4.2: Assessing Model Fit and Comparison Using the Deviance Information Criterion (DIC)

statistic is particularly useful in comparing various multilevel modeling specifications.[15] When comparing models using the same data, lower DIC values indicate better fit. Table 4.2 presents a set of DIC statistics that compare the full three-level random coefficient models presented here (for both Models 1 and 2) with three different reduced models: (1) a pooled logit that ignores altogether the multilevel structure of the data, (2) a model that only specifies random intercepts (and not random preferences coefficients) at levels two and three, and (3) a two-level random coefficient model that ignores years as a third level of analysis. Note that the exact same independent variables that are used in the full model are used in each reduced model.

For both Models 1 and 2, the DIC statistics indicate that the full three-level random coefficient models provide the best fit of the data compared to the three reduced

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[15] One can compare non-nested models using the DIC statistic, but comparison requires use of the exact same data.

models. These results provide statistical justification for the posited three-level

hierarchical structure and the random coefficient model specification, where random

intercepts and random coefficients (for policy preferences) are specified at both level two

(the case level) and level three (the year level). For Models 1 and 2, note that the DIC

statistics for the full model are very close to the third reduced model employing random

coefficients at level two only. This indicates that the level-3 random effects do not

explain much of the unobserved heterogeneity in the intercept and preferences

coefficient, respectively. It also indicates that of the total variance at level three in the

intercept and slope, the level-3 covariates appear to explain a great deal of that variance.

Conditioning on this observed heterogeneity reduces the unobserved heterogeneity to a

fairly small amount.

Model 1 Results. I now discuss the Model 1 results in Table 4.3. First, estimates

from the γ_{00t} equation show that, as expected, increasing liberal consensus in public mood

has produced an increased propensity for liberal Court outputs. The posterior probability

that this effect is positive is well over 95%. While there are some differences between my

conceptual and operational approach for examining the direct effects of public opinion,

this general effect is in accord with past studies discussed earlier, particularly McGuire

and Stimson (2004). Contrary to expectations put forth in Hypothesis 7, the effect of

public mood on the preference-behavior relationship (π_{101} in the γ_{10t} equation) is *positive*,

suggesting that as liberal consensus in public mood has increased, the net amount of

preference-based behavior has also *increased*. Moreover, this effect is significantly

different from zero, as over 95% of the posterior mass is greater than zero. This finding

completely contradicts the mechanism by which I posited public opinion would constrain

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		Posterior Summaries		
	Mean	S.D.	90% Bayesian Credibility Interval

	Mean	S.D.	90% Bayesian Credibility Interval
Estimates from γ_{00t} Equation (Effects on Court Outcomes):			
Intercept, π_{000}	0.63	0.11	[0.45, 0.80]*
Public Mood Consensus, π_{001}	1.52	0.47	[0.75, 2.29]*
Democratic Govt., π_{002}	0.34	0.25	[-0.07, 0.74][#]
Republican Govt., π_{003}	-0.68	0.53	[-1.54, 0.19][#]
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	7.81	0.21	[7.46, 8.16]*
Public Mood Consensus, π_{101}	1.48	0.77	[0.20, 2.73]*
Democratic Govt., π_{102}	0.26	0.40	[-0.40, 0.92]
Republican Govt., π_{103}	0.05	0.89	[-1.39, 1.56]
Level-2 Variance-Covariance Components			
var(u_{0jt})	14.54	0.71	[13.40, 15.75]
var(u_{1jt})	28.90	1.99	[25.70, 32.23]
cov(u_{0jt}, u_{1jt})	-1.10	0.68	[-2.22, 0.00]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.30	0.13	[0.12, 0.55]
var(r_{10t})	0.50	0.31	[0.10, 1.07]
cov(r_{00t}, r_{10t})	0.21	0.14	[0.01, 0.46]
		N=28,190 (choices); J=3,220 (cases); T=51 (years)	

* Indicates that at least 95% of the posterior is greater than or less than zero.
[#] Indicates that at least 90% of the posterior is greater than or less than zero.

Table 4.3: MCMC Estimates from Three-Level Random Coefficient Model (Model 1),
All Civil Liberties Cases, 1953-2003 Terms

preference-based behavior on the Court. Indeed, no evidence of constraint, as I have

posited it, exists. Over the past 50 years, consensus in public opinion has significantly

enhanced preference-based behavior instead of constraining it. Overall, the findings so

far present a complex view of the processes by which public opinion influences Supreme Court decision making. While it has exhibited a sensible direct effect on annual outputs, it has exhibited a counterintuitive effect on the preference-behavior relationship. I return to further speculation of this puzzle below.

Table 4.3 also indicates that overall, the party-based measures do not exhibit very potent effects on Supreme Court decision making. Recall that the dummies for Democratic and Republican unified government represent effects relative to the baseline of divided government, and their effects on the preference-behavior relationship (from the γ_{10t} equation) provide empirical tests of Hypothesis 8b. The direct effects of Democratic (π_{002}) and Republican (π_{003}) government (relative to divided government) on Court outcomes, as seen in the γ_{00t} equation, are in the expected directions. Thus, in Democratic eras outputs have been more liberal than in eras of divided government and in Republican eras, outputs have been more conservative. Both effects fall short of significance with at least a 95% posterior probability, but both are significant at the 90% posterior probability level. Results from the γ_{00t} equation, then, indicate that party control of government has altered somewhat the propensity of liberal Court outputs.

Moving to the γ_{10t} equation in Table 4.3, the effects of both unified government dummies are in the incorrect direction; the expected direction is negative, yet both are positive. However, both estimates are insignificant.[16] Thus, the results refute Hypothesis

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[16] Model 1 results using Segal-Cover scores (Appendix C, Table 1) suggest that, like the results employing Martin-Quinn scores, consensus in public mood has both increased the propensity of liberal outputs and enhanced preference-based behavior; but only the former effect is significant with at least a 95% posterior probability. Unlike in Table 4.3, results using Segal-Cover scores indicate that party control of government has exhibited null effects on annual outcomes. However, the results do indicate, unlike in Table 4.3, that Democratic unified government (relative to divided government) has significantly attenuated preference-based behavior, while Republican unified government has not had the same attenuation effect. Overall, as I

8b, suggesting that consensus between Congress and the President (in terms of party control of government) has not constrained the magnitude of preference-based behavior compared to when there has been divided government. Given there are only three years of Republican government in my data, I specified an additional model (not included here) where I included a dummy variable indicating whether there was unified or divided government. Like the results presented in Table 4.3, the results from that model further suggest that unified government has not constrained preference-based behavior relative to divided government.

The Model 1 results provide evidence against both Hypotheses 7 and 8b. They suggest that as liberal consensus in mood has increased, the magnitude of preference-based behavior has increased as well. The findings also suggest that neither the Court's civil liberties decisions from 1953 to 2003 nor the magnitude of preference-based behavior has been directly affected by party control of government. Do these effects differ by constitutional versus statutory decision making? Recall that many strategic perspectives contend that external strategic considerations operate more strongly in statutory decision making as opposed to constitutional decision making (Eskridge 1991a, 1991b; Epstein and Knight 1998, 140), yet some argue the converse (Epstein, Knight, and Martin 2001; Martin 1998). Rather than present the results from these models in table form, I will simply summarize them, particularly because the results do not represent a significant departure from those presented in Table 4.3. For both statutory and constitutional decision making, the effects of party control of government exhibited a null

have alluded to, there are some notable differences between results using Martin-Quinn versus Segal-Cover scores.

impact on preference-based behavior. Thus, regardless of pooling cases together or stratifying them by constitutional versus statutory cases, the results are the same: party control of government has had no significant impact on preference-based behavior over the past half decade. Thus, no evidence for Hypothesis 8b emerges using party-based measures of consensus between Congress and the President.

Before moving to the results from Model 2, it is worth noting briefly the variance-covariance components of the random effects in Table 4.3. Note the sizable share of unobserved heterogeneity in both the intercept and the preferences coefficient at level two. Since there are no level-2 (case-level) covariates, it is not surprising that the model detects a substantial amount of case-level heterogeneity in both case outcomes and preference-based behavior; the DIC statistics produced earlier suggested statistical support for the incorporation of this case-level heterogeneity. As I have stated, accounting for these unobserved case-level effects allows one to be more confident about the core substantive conclusions regarding the effects of the year-level factors. Note also that there is a small amount of unobserved heterogeneity in the level-3 components, which represents variation left unexplained by the year-level factors.[17] These observations about the variance-covariance components of the random effects are applicable to results from the subsequent models as well. I now move to a discussion of the results from Model 2, which employs ideology-based, as opposed to party-based, measures of ideological consensus for Congress and the President.

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[17] Recall from the DIC statistics that little was gained (by way of model fit) by incorporating random effects at level three. This suggests that after conditioning on the level-3 covariates, minimal unobserved heterogeneity remains at level three.

Model 2 Results. Table 4.4 presents MCMC results from Model 2 for all civil

liberties cases. The effect of liberal consensus in public mood is the same as in Model 1.

Increases in public mood consensus have produced a significant increase in the

propensity of liberal outputs, and, contradicting Hypothesis 7 yet again, liberal consensus

has *enhanced* the preference-behavior relationship. What could be underlying this

counterintuitive effect? Recall my theoretical argument for the mechanism by which

public opinion affects justices' decision-making processes: as public opinion tends

toward consensus in either the liberal or conservative direction, the room for preferences

to operate decreases. From Figure 4.2, recall that the public mood measure is always in

the liberal direction. Since the overall direct effect of public mood on the propensity for

liberal outputs is in the expected direction, the enhancement effect of liberal consensus is

probably an asymmetric one, akin to Figure 2.2 in Chapter 2.[18] Liberal consensus in

public mood may evince a similar asymmetric-enhancement effect that salience exhibited

in Chapter 3. That is, given increases in liberal consensus, liberals may be especially

moved in the liberal direction, conservatives may stay put, and pivotal moderates may

tend toward the liberal direction in which public consensus pulls them.

As I speculated with respect to salience, the possibility remains that different

mechanisms operate on different types of justices. While conservatives may be unfazed

for the most part, liberal consensus in public mood may act as an attitude strength

mechanism for liberals, inducing them to engage in ideologically-bolstered behavior as

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[18] Presenting post-estimation figures analogous to those presented in Chapter 3 is more difficult to do in a
Bayesian computational context. Computing average partial effects using the maximum likelihood
estimation in the GLLAMM package (in Stata) is straightforward. However, computing these effects in
WinBUGS is less than straightforward, and I have yet to figure out a way to present figures plotting how
the level-3 variables alter the preference-behavior relationship.

liberal consensus in mood increases. However, for moderates, liberal consensus in mood

may act via an accountability mechanism, as posited in Hypothesis 7, leading them to

increase their liberal tendencies in accord with liberal consensus. Another possibility is

that the effects of public mood are clouded by the indirect effect of the selection process.

While my multilevel modeling framework controls for between-year variation, it is

possible that no quantitative research design is fully capable of isolating the direct effect

of public opinion on both the propensity of liberal outputs and the preference-behavior

relationship.

Table 4.4 also presents the effects of ideological consensus within Congress and

between Congress and the President. Recall that the effects of congressional consensus in

both the γ_{00t} and γ_{10t} equations (π_{002} and π_{102}, respectively) are conditional on levels of the

liberal Congress and presidential alignment dummies. But since these latter two variables

are mean-centered, the effects of congressional consensus in both equations represent

"typical" effects of this variable. While no expectation exists for the effect of

congressional consensus on Court outcomes in the γ_{00t} equation, the results indicate that

increases in congressional ideology from polarization to consensus (regardless of whether

it is liberal or conservative consensus) have increased the propensity of liberal Court

outputs. From the γ_{10t} equation, congressional consensus, again holding the dummies for

liberal Congress and presidential alignment at their mean values, appears to have

constrained the degree of preference-based behavior. The effect falls just short of

achieving significance since not quite 95% of the posterior mass is less than zero, but it is

	Posterior Summaries		
	Mean	**S.D.**	**90% Bayesian Credibility Interval**
Estimates from γ_{00t} Equation (Effects on Court Outcomes):			
Intercept, π_{000}	0.70	0.11	[0.51, 0.88]*
Public Mood Consensus, π_{001}	1.63	0.49	[0.82, 2.43]*
Congressional Consensus, π_{002}	-0.80	0.44	[-1.53, -0.08]*
Liberal Congress, π_{003}	0.38	0.30	[-0.11, 0.87]
Presidential Alignment, π_{004}	0.10	0.27	[-0.35, 0.55]
Cong. Consensus*Lib. Cong., π_{005}	2.95	1.45	[0.57, 5.32]*
Cong. Consensus*Pres. Align., π_{006}	-0.72	1.01	[-2.35, 0.94]
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	7.92	0.21	[7.58, 8.28]*
Public Mood Consensus, π_{101}	1.71	0.76	[0.48, 2.96]*
Congressional Consensus, π_{102}	-1.10	0.70	[-2.23, 0.04]#
Liberal Congress, π_{103}	0.29	0.49	[-0.49, 1.09]
Presidential Alignment, π_{104}	0.18	0.41	[-0.49, 0.85]
Cong. Consensus*Lib. Cong., π_{105}	4.99	2.27	[1.22, 8.69]*
Cong. Consensus* Pres. Align., π_{106}	-1.26	1.54	[-3.76, 1.28]
Level-2 Variance-Covariance Components			
var(u_{0jt})	14.49	0.73	[13.33, 15.74]
var(u_{1jt})	28.76	2.06	[25.55, 32.26]
cov(u_{0jt}, u_{1jt})	-1.08	0.66	[-2.17, 0.01]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.25	0.12	[0.08, 0.47]
var(r_{10t})	0.24	0.23	[0.00, 0.70]
cov(r_{00t}, r_{10t})	0.07	0.11	[-0.08, 0.26]
	N=28,190 (choices); J=3,220 (cases); T=51 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.

# Indicates that at least 90% of the posterior is greater than or less than zero.

Table 4.4: MCMC Results from Three-Level Random Coefficient Model (Model 2), All

Civil Liberties Cases, 1953-2003 Terms

significant at the less stringent 90% posterior probability level.[19] This finding provides

some evidence for Hypothesis 8a, that increases in consensus *within* Congress have

attenuated preference-based behavior.

The effect of whether Congress has tended in the liberal versus conservative

direction on the Court outcomes (π_{003} from the γ_{00t} equation) is positive, suggesting that

the Court has produced more liberal outputs during liberal-leaning Congresses compared

to conservative-leaning ones, but insignificant. I did not anticipate a direction for the

effect of this same variable in the γ_{10t} equation, and the effect (π_{103}) is not significant.

The remaining two interaction terms, and the subsequent interpretations of them,

present key tests of the ideological explanation of congressional and presidential

influence on the preference-behavior relationship. The first interaction term

(congressional consensus by liberal Congress) tests whether the effect of congressional

consensus on both annual outcomes (from the γ_{00t} equation) and the preference-behavior

relationship (from the γ_{10t} equation) is significantly different depending on whether

congressional ideology is in the liberal or conservative direction. First, from the γ_{00t}

equation, the posterior summary of the π_{005} parameter indicates that the impact of

congressional consensus on Court outcomes has been significantly different depending on

whether Congress tended toward liberalism or conservatism. More importantly, for

purposes of refining Hypothesis 8a, this interaction effect, π_{105}, in the γ_{10t} equation

suggests that congressional consensus has exhibited significantly different effects on

preference-based behavior depending on whether Congress was in the liberal or

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[19] Using Segal-Cover scores, as seen in Table 2 in Appendix C, this effect is also negative but falls well short of significance at the 95% posterior probability level.

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conservative direction. More specifically, the interaction effect shows that the

constraining effect of congressional consensus on the preference-behavior relationship is

significantly dampened (i.e., less constraining) in liberal Congresses compared to

conservative Congresses. I explain a simpler interpretation of this interaction effect, using

Table 4.5, shortly.

The second interaction term (congressional consensus by presidential alignment)

tests whether the effect of congressional consensus on both annual outputs (from the γ_{00t}

equation) and the preference-behavior relationship (from the γ_{10t} equation) is significantly

different depending on whether or not the President was aligned with the ideological

direction of Congress. This interaction, which from the γ_{10t} equation provides a test of

Hypothesis 8b, is able to assess how consensus or polarization *between* Congress and the

President affects preference-based behavior. First, I did not expect a direction of the

effect of this interaction for the γ_{00t} equation, and the effect is insignificant. However, in

the γ_{10t} equation, I expected a negative effect for this interaction term. Indeed, the effect

is negative, which implies that when the President has been in ideological alignment with

Congress (suggesting consensus between Congress and the President), the constraining

effect of congressional consensus has been significantly greater (i.e., more constraining)

compared to when the President has not been ideologically-aligned with Congress.

However, this effect is not significant, as less than a 95% posterior probability exists that

the effect is less than zero.[20] The following section analyzes this interaction more clearly.

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[20] The results using Segal-Cover scores (Appendix C, Table 2) indicate that the congressional consensus by liberal Congress interaction is not significant in either the γ_{00t} or γ_{10t} equations. Moreover, the congressional consensus by presidential alignment interaction is positive and significant in the γ_{00t} equation and negative but insignificant in the γ_{10t} equation. Thus, the first interaction indicates further differences between models

Table 4.5 spells out a simpler interpretation for how the impact of congressional consensus on both annual outcomes and the preference-behavior relationship is conditional on (1) whether Congress was liberal or conservative (relevant to Hypothesis 8a) and (2) whether or not the President was ideologically-aligned with Congress (relevant to Hypothesis 8b). For both the γ_{00t} and γ_{10t} equations, recall that the effect of congressional consensus is conditional on the values of the liberal Congress dummy variable and the presidential congruence variable. First, expression 1 below identifies the relevant elements from the γ_{00t} equation necessary to gauge the conditional effects of congressional consensus on Court outcomes.

(1) $\quad \pi_{002}Cong_t + \pi_{005}Cong_t*LibCong_t + \pi_{006}Cong_t*Pres_t$

Next, expression 2 factors out congressional consensus ($Cong_t$) from each term in expression 1, thus providing a clear depiction that the direct impact of congressional consensus on Court outputs is conditional on the values of the liberal Congress and Presidential congruence dummies.

(2) $\quad (\pi_{002} + \pi_{005}LibCong_t + \pi_{006}Pres_t)Cong_t$

Equation 3 below provides an analogous depiction of expression 2 for the γ_{10t} equation (for the conditional effect of congressional consensus on the preference-behavior relationship).

(3) $\quad (\pi_{102} + \pi_{105}LibCong_t + \pi_{106}Pres_t)Cong_t$

One can then calculate estimates for the effects of congressional consensus on both Court outputs and the preference-behavior relationship under four conditions, that is,

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employing the two preferences measures, particularly with respect to the preference-behavior relationship part of the model. For the second interaction, the results are similar.

where there is (1) a liberal Congress, (2) a conservative Congress, (3) presidential alignment with Congress, and (4) presidential non-alignment with Congress. When calculating effects for the first two conditions, the presidential congruence dummy is held constant at its mean. When calculating effects for the third and fourth conditions, the liberal Congress dummy is held constant at its mean. In accord with Friedrich's (1982) analysis of interpreting interactions, one could then calculate coefficients for each condition by simply plugging in the appropriate values for the liberal dummy and the presidential congruence dummy in expressions 2 and 3 and then solving the expression. Friedrich also shows how to calculate standard errors associated with each effect. In the Bayesian computational context, one can simply integrate these calculations into the joint posterior and then retrieve posterior summaries (including Bayesian credibility intervals to determine significance) for the effects of congressional consensus under each of the four conditions. Table 4.5 reports the results from this estimation.

The top half of Table 4.5 reports the conditional effects of congressional consensus on Court outcomes, and the bottom half reports conditional effects on the preference-behavior relationship. First, regarding the ideological direction of Congress, note that congressional consensus in the liberal direction has had a null direct effect on annual outputs, but congressional consensus in the conservative direction has significantly increased the propensity of conservative Court outputs. Though not directly connected to my heterogeneity framework, these results shed empirical light on strategic perspectives. The results suggest that movement in congressional ideology from polarization to *conservative* consensus has significantly elevated the propensity for the

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		Posterior Summaries	
	Mean	**S.D.**	**90% Bayesian Credibility Interval**
Effect of Cong. Consensus on Court Outcomes, Conditional On:			
Liberal Congress	0.07	0.49	[-0.73, 0.87]
Conservative Congress	-2.89	1.25	[-4.94, -0.82]*
Pres. Alignment	-1.20	0.74	[-2.40, 0.03]#
Pres. Non-Alignment	-0.48	0.60	[-1.47, 0.52]
Effect of Cong. Consensus on Preference-Behavior Relationship, Conditional On:			
Liberal Congress	0.36	0.73	[-0.82, 1.54]
Conservative Congress	-4.63	2.00	[-7.89, -1.31]*
Pres. Alignment	-1.79	1.16	[-3.66, 0.12]#
Pres. Non-Alignment	-0.54	0.91	[-2.01, 0.96]

* Indicates that at least 95% of the posterior is greater than or less than zero.
# Indicates that at least 90% of the posterior is greater than or less than zero.

Table 4.5: Effects of Congressional Consensus, Conditional on Ideological Direction of Congress and Presidential Alignment (Model 2)

Court to produce conservative outputs. However, the same effect does not emerge as congressional ideology has moved from polarization to liberal consensus.

More directly connected to the heterogeneity framework and Hypothesis 8a, the results in the bottom half of Table 4.5 indicate that, holding presidential alignment constant, congressional consensus in the liberal direction has had a null effect on the preference-behavior relationship, while consensus in the *conservative* direction has significantly attenuated preference-based behavior. These results, then, provide mixed support for Hypothesis 8a. Moreover, the results suggest that consensus in the conservative direction exhibits multiple paths of influence: both as a direct effect on

annual Court outputs, and by reducing the magnitude of preference-based behavior. The two paths, in conjunction with one another, suggest evidence of multifaceted congressional influence heretofore not uncovered. Of course, the qualification is that this multiple-path influence of congressional consensus is limited to situations where there has been congressional consensus in the conservative direction, but not the liberal direction.

Moving to the effects of congressional consensus conditional on presidential alignment, I did not anticipate the direction of these effects on Court outcomes (in the top half of Table 4.5). Moreover, the results suggest that neither effect is significant with 95% posterior probability, but congressional consensus conditional on presidential alignment comes close to being significant. Moving to the bottom half of Table 4.5, which empirically assesses Hypothesis 8b, the results indicate that when the President has been ideologically-aligned with Congress, increasing congressional consensus has reduced preference-based behavior. While the effect falls short of significance at the 95% posterior probability level, it is significant at the 90% level. But when the President has not been ideologically aligned with Congress, the effect of congressional consensus has been about one-third the magnitude compared to when presidential alignment has existed. Moreover, this effect is insignificant. The results are suggestive of how Congress and the President in conjunction with each other constrain preference-based behavior on the Court. Ideological alignment between the President and Congress (a form of inter-branch

consensus) has produced a greater amount of constraint on preference-based behavior

than has non-alignment, a finding that provides some support of Hypothesis 8b.[21]

Summary

Since I have presented numerous results with mixed findings for and against the

hypotheses, I present in conjunction with Table 4.6 a compact recapitulation of the

findings for both Models 1 and 2 and how they relate to the hypotheses. Table 4.6

indicates the direction of the effects of the year-level factors on both annual outputs and

the preference-behavior relationship. Italicized entries for the direction of the effects

suggest that the results were unexpected or contradicted expectations. Alongside each

year-level factor, I have indicated the hypothesis to which each effect corresponds; this

correspondence is relevant to the effects on the preference-behavior relationship.

First, as summarized in Table 4.6, the Model 1 and Model 2 results provided

evidence directly contradicting Hypothesis 7, suggesting that consensus in public mood

has exhibited an enhancement effect on preference-based behavior instead of an

attenuation effect as expected. However, consensus in public mood has exhibited a direct

impact on Court outputs in the expected direction, a finding from both Models 1 and 2. In

other words, increasing liberal consensus in public mood has been associated with an

increasing propensity for the Court to produce liberal outputs.

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[21] It might also be informative to examine the effect of presidential congruence conditional on whether Congress was in the liberal or conservative direction. For both the γ_{00t} and γ_{10t} equations, this would require the inclusion of a triple interaction (and subsequent interpretations) between congressional consensus, presidential congruence, and liberal Congress. But given the limited number of years analyzed here (51), there is not a suitable number of combinations in the data between presidential congruence and the ideological direction of Congress to conduct a meaningful analysis of this issue.

	Direct Effects on Court Outcomes	**Effects on Preference-Behavior Relationship**
Year-Level Factor		
Model 1		
Public Mood Consensus (Hypothesis 7)	Positive*	*Enhancement**
Democratic Government (Hypothesis 8b)	Positive[#]	*Insignificant*
Republican Government (Hypothesis 8b)	Negative[#]	*Insignificant*
Model 2		
Public Mood Consensus (Hypothesis 7)	Positive*	*Enhancement**
Congressional Consensus (Avg. Effect) (Hyp. 8a)	Negative*	Attenuation[#]
Congressional Consensus, *Conditional On*:		
Liberal Congress (Hypothesis 8a)	*Insignificant*	*Insignificant*
Conservative Congress (Hypothesis 8a)	Negative*	Attenuation*
Presidential Alignment (Hypothesis 8b)	*Negative*[#]	Attenuation[#]
Presidential Non-Alignment (Hypothesis 8b)	*Insignificant*	*Insignificant*

Italicized entries represent effects that were either unexpected or contradicted expectations.
* Significant with at least a 95% posterior probability
[#] Significant with at least a 90% posterior probability

Table 4.6: Summary of Results from Models 1 and 2, All Civil Liberties Cases, 1953-2003 Terms

Second, as seen in the Model 2 summary in Table 4.6, some evidence exists for Hypothesis 8a, which pertains to the effect of ideological consensus *within* Congress on the preference-behavior relationship. Congressional consensus, on average (regardless of whether it tended toward the liberal or conservative direction), has attenuated preference-based behavior, though only at the 90% posterior probability level. This provides evidence in support of Hypothesis 8a. When congressional consensus is differentiated by whether it has tended toward the liberal or conservative direction, the assessment of

Hypothesis 8a is refined. That is, congressional consensus in the liberal direction exhibited a null effect on preference-based behavior, while conservative consensus exhibited a significant impact on preference-based behavior. Thus, the impact of congressional consensus on the preference-behavior relationship seems to be one-sided, providing mixed support for Hypothesis 8a. Furthermore, results indicated that in addition to constraining preference-based behavior, conservative congressional consensus also exhibited a direct effect on Court outputs, suggesting multiple paths of influence for this variety of consensus.

Third, Table 4.6 summarizes the evidence with respect to Hypothesis 8b, which posits the influence of consensus *between* Congress and the President. Model 1, which employs the party-based measures of consensus in governmental control, provides no support for Hypothesis 8b, suggesting that neither Republican nor Democratic unified government (relative to divided government) constrained preference-based behavior. However, some evidence emerged for the direct effects of the party-based variables on Court outputs. Results from Model 2, which employ ideological measures, provide some evidence in support of Hypothesis 8b. The results suggest that when the President has been aligned with the ideological direction of Congress, congressional consensus has constrained (with a 90% posterior probability) preference-based behavior. However, when the President has not been aligned with the ideological direction of Congress, congressional consensus has exhibited a null impact on preference-based behavior. Providing some support for Hypothesis 8b, the results suggest that the Court is more constrained when there is ideological consensus *between* Congress and the President compared to when there is a lack of ideological consensus.

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Model 2 Results for Statutory versus Constitutional Cases

The summary above, for Model 2, indicates that across all civil liberties from 1953 through 2003, conditions exist whereby the Court is constrained by the other branches of government. To examine whether these effects are different across constitutional and statutory cases, I estimate the Model 2 specification separately for these two classes of cases.[22] As discussed earlier, debates exist for whether the Court is more constrained by external strategic considerations in its constitutional or statutory decision making. My design is capable of examining these general issues. I present the results from these analyses in summary form in Table 4.7. The full tables of results are presented in Appendix C (Tables C.3 through C.5). Note how the results in Table 4.7 are presented in a fashion very similar to the summaries in Table 4.6. The top half of Table 4.7 presents summaries of the direct effects of the variables on Court outputs, and the bottom half displays summaries for the effects of the variables on the preference-behavior relationship. Note that the four conditional effects presented in Table 4.7 were estimated using the same procedure I discussed earlier in conjunction with expressions 1-3. Italicized entries for the direction of the effects suggest that the results were either unexpected or contradicted expectations. Alongside each year-level factor in the bottom half of the table, I have indicated the hypothesis to which each effect corresponds.

For both statutory and constitutional models, liberal consensus in public mood exhibits the same effect as it did in the pooled analysis. Consensus in mood has exhibited multiple effects: it has increased the propensity of liberal outputs and enhanced

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[22] For both the statutory and constitutional models, model fit and comparison using the DIC statistic strongly resembles the results reported in Table 4.1.

preference-based behavior. While there are no key differences in the effects of public opinion between statutory and constitutional cases, are there differences in the effects of the other branches? Recall that no expectation exists for the average effect of congressional consensus (regardless of whether it is liberal or conservative) on Court outputs. For both statutory and constitutional decision making, the negative effect (seen in the top half of Table 4.7) indicates that increases in congressional ideology from polarization to consensus have increased the propensity of conservative Court outputs. The effect is significant for constitutional decision making but insignificant for statutory decision making.

Moving to the bottom half of Table 4.7, congressional consensus appears to have constrained the degree of preference-behavior (the effects are negative) in both statutory and constitutional cases. However, the effect is significant only at the 90% posterior probability level for statutory decision making and insignificant for constitutional decision making. Thus, Hypothesis 8a appears to be supported to a greater extent in statutory compared to constitutional decision making.

The remainder of Table 4.7 summarizes the effects of congressional consensus conditional on: (1) whether Congress was in the liberal or conservative direction and (2) whether the President was or was not in ideological alignment with Congress. First, as was seen in the Model 2 results analyzing all cases together, liberal consensus has exhibited no significant direct effect on Court outputs for either statutory or constitutional cases. Thus, in both sets of cases, movement from polarization to liberal consensus has exhibited a null impact in the Court's outputs. Moreover, moving to the bottom half of Table 4.7, liberal consensus has also failed to exhibit a significant effect on preference-

	Statutory	*Constitutional*
	Direct Effects on Court Outcomes	**Direct Effects on Court Outcomes**
Year-Level Factor		
Public Mood Consensus	Positive[#]	Positive*
Congressional Consensus (Avg. Effect)	*Insignificant*	Negative*
Congressional Consensus, *Conditional On*:		
Liberal Congress	*Insignificant*	*Insignificant*
Conservative Congress	Negative[#]	Negative*
Presidential Alignment	*Negative**	*Insignificant*
Presidential Non-Alignment	*Insignificant*	*Negative*[#]
	Effects on Preference-Behavior Relationship	**Effects on Preference-Behavior Relationship**
Public Mood Consensus (Hypothesis 7)	*Enhancement**	*Enhancement**
Congressional Consensus (Avg. Effect) (Hyp. 8a)	Attenuation[#]	*Insignificant*
Congressional Consensus, *Conditional On*:		
Liberal Congress (Hypothesis 8a)	*Insignificant*	*Insignificant*
Conservative Congress (Hypothesis 8a)	Attenuation*	Attenuation*
Presidential Alignment (Hypothesis 8b)	*Insignificant*	Attenuation[#]
Presidential Non-Alignment (Hypothesis 8b)	*Insignificant*	*Insignificant*

Italicized entries represent effects that were either unexpected or contradicted expectations.
* Significant with at least a 95% posterior probability
[#] Significant with at least a 90% posterior probability

Table 4.7: Summary of Results from Models 2, Statutory and Constitutional Cases, 1953-2003 Terms

based behavior for both statutory and constitutional cases. Thus, whether one pools these two classes of cases together or splits them apart, it appears as if no evidence exists that ideological consensus in the liberal direction constrains preference-based behavior.

For both statutory and constitutional cases, ideological consensus in the conservative direction has exhibited direct effects on the Court's constitutional outcomes in the expected direction. The effect is negative in both models. For constitutional decision making, the effect is significant at the 95% level, while for statutory decision making, the effect is significant only at the 90% level. These findings do not represent too significant of a departure from the model analyzing all cases together, although, as seen in Appendix C (Table C.5), the direct effect of conservative congressional consensus on the Court's outputs is much larger in constitutional cases compared to statutory cases. This evidence seems to lend at least a hint of support to Epstein et al.'s (2001) contention that the Court may be more influenced by Congress in constitutional cases than statutory ones. Of course, the caveat is that such congressional influence in constitutional cases is limited to situations where consensus is in the conservative direction only.

The bottom half of Table 4.7 indicates that for both statutory and constitutional cases, increases in conservative congressional consensus have significantly attenuated the magnitude of preference-based behavior. Table 5 in Appendix C shows that this effect is slightly larger in the constitutional model. Overall, then, the results provide substantive conclusions similar to those discussed with respect to the Model 2 results analyzing all cases together. First, congressional consensus in the liberal direction has exhibited neither a direct effect on the Court's outputs nor an effect on the preference-behavior relationship. Second, conservative congressional consensus has *both* (1) increased the

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propensity for conservative Court outputs, and (2) attenuated preference-based behavior. The impact of the first path of influence (the direct effect on Court outputs), however, was slightly stronger in constitutional cases. The results again refine Hypothesis 8a, suggesting that the impact of ideological consensus within Congress on preference-based behavior has been conditional on the ideological direction toward which that consensus has tended.

Finally, the bottom half of Table 4.7 reveals that the effects of presidential alignment with Congress on preference-based behavior are similar across statutory and constitutional decision making. The results reveal that congressional consensus constrains the justices more when the President is ideologically-aligned with Congress compared to when the President is not aligned with Congress. For constitutional cases, however, the effect of congressional consensus under the condition of presidential alignment is significant at the 90% level. For statutory cases, this effect falls just short of significance at the 90% level. While there are some minor differences between these two sets of cases, the results generally reflect the conclusions from the Model 2 results analyzing all cases together. Once again, providing some support for Hypothesis 8b, the results are suggestive of the joint capacity of Congress and the President to constrain preference-based behavior on the Court. Inter-branch consensus has produced a greater amount of constraint on preference-based behavior than has the lack of such consensus.

CONCLUSION

This chapter has developed a conceptual framework and research design capable of providing a series of empirical tests of how external strategic considerations—public

opinion and the preferences of the other branches of government—shape the nature and magnitude of preference-based behavior on the Court. Chapter 2 and this chapter have integrated external strategic considerations into my heterogeneity framework, and I have posited that while justices will never be as accountable to public preferences as members of Congress, certain conditions exist whereby the justices may find it in their interests to account for the tenor of public preferences. For reasons of self-presentation or for the integrity and legitimacy of the institution, justices may feel obliged to avoid sending the signal to the public that their decisions are based solely on personal ideology.

Regarding the effects of the other branches of government, I incorporate and add to insights from strategic perspectives by arguing that conditions also exist where the justices may find it in their interests to account for the ideological preferences of Congress and the President. Congress and the President can override the Court's statutory decisions and has done so a non-trivial number of times (Eskridge 1991; Epstein and Knight 1998). And many contend that though the Court is to be final arbiter of what the Constitution means, the justices may be constrained in constitutional decision making because the costs of receiving reprisals (e.g., court-curbing legislation) from Congress in response to controversial decisions are too much to bear. Also, I have argued, as in the case of public opinion, that since justices presumably care how they are personally perceived and how the institution they represent is perceived by members of Congress and the President, it is reasonable to assume that under certain conditions, justices may find it prudent to account for the ideological tenor of these branches of government.

What are these conditions under which justices may find it in their interests to account for these external strategic considerations? I have argued that the mechanism by

which these considerations will be effective turns on justices' sensitivity to the extent to which the political environment is either *ideologically-consensual* or *ideologically-polarized*. I argued that the accountability mechanism will become increasingly operative as the degree of ideological consensus in the political environment increases, and therefore, increasing consensus will *regulate the amount of room preferences have to operate*. While primarily interested in how this consensus affects preference-based behavior, I also discussed how it may directly affect the Court's outputs, as most strategic perspectives do.

The multilevel modeling framework, particularly specifying three-level random coefficient models, presents a unique modeling opportunity for empirically assessing how external strategic considerations constrain preference-based behavior. Results from Model 1 (using the party-based measures for the other branches of government) showed that liberal consensus in public mood has increased the annual propensity for liberal outputs. This result is in accord with past work analyzing the direct effects of public opinion on Court outputs (e.g., McGuire and Stimson 2004). However, in contradiction with Hypothesis 7, the results revealed that liberal consensus in public mood has *enhanced*, instead of attenuated, preference-based behavior. This same enhancement effect was seen in the Model 2 results for all cases together, as well as when I separated statutory and constitutional cases. I speculated that this effect may be akin to the impact of salience in Chapter 3. That is, public mood may act via different mechanisms across different types of justices. For conservatives, it may have exhibited a null effect. For liberals, it may have operated via more of an attitude strength mechanism, where increases in liberal mood served to bolster preference-based behavior among liberals. For

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pivotal moderates (including moderate liberals and moderate conservatives), though, increasing liberal consensus in public mood may have increased their propensities to produce liberal outputs, which would be in line with the direction of public consensus.

Regarding the effects of the other branches of government, with respect to Hypothesis 8b, Model 1 tested a party-based explanation—centering on unified versus divided government—for how consensus *between* Congress and the President has shaped preference-based behavior. Results revealed that party control of government has not exhibited a significant impact on the preference-behavior relationship; and this effect was not modified as a result of separately analyzing statutory and constitutional cases. Model 2 tested an ideology-based explanation for how ideological consensus *within* Congress (Hypothesis 8a) and ideological consensus *between* Congress and the President (Hypothesis 8b) have shaped preference-based behavior. In partial support of Hypothesis 8a, the results suggested evidence of constraint on preference-based behavior induced by ideological consensus within Congress, but the effect was one-sided. That is, increases in ideological consensus in the *conservative* direction have attenuated preference-based behavior, but increasing liberal consensus has exhibited no significant effect. This same effect occurred in separate models for statutory and constitutional decision making.

Moreover, conservative congressional consensus has exhibited multiple paths of influence; it has both attenuated preference-based behavior *and* exhibited a direct effect on annual Court outputs. The same "multiple-path" influence held true for constitutional and, to a lesser extent, statutory decision making. Finally, Model 2 showed that presidential alignment with the ideological direction of Congress made the constraining effect of congressional consensus even more potent, suggesting some support for

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Hypothesis 8b that inter-branch consensus has produced more of a constraint on the Court than inter-branch polarization.

While providing no support for Hypothesis 7 and mixed support for Hypotheses 8a and 8b, the findings have produced interesting insights and compelling empirical implications about how external strategic considerations influence Supreme Court decision making. Although not directly tied to my theoretical framework, I have added to strategic studies that highlight the *direct effects* of public opinion and the other branches of government on Court outputs by analyzing, in addition to these direct effects, the *moderating* effects of external strategic considerations on preference-based behavior. This latter path of influence is more closely linked to the concept of *constraint*, which is conceptualized as how the political environment can sometimes prevent justices from doing what they want, i.e., deciding cases based on their personal policy preferences.

Related to this point, the three-level hierarchical modeling framework integrates three commonly-used levels of analysis used in the literature on Supreme Court decision making—the choice level (level one in my analysis), case level (or institutional level) (level two), and the aggregate level (level three)—into one model. The modeling framework is able to map the theoretical insights of the heterogeneity framework related to external strategic considerations onto the statistical models with a high degree of congruence. With respect to Hypotheses 7, 8a, and 8b, the statistical models explicitly test how contextual-level factors (public opinion and the preferences of the other branches) at level three explain variation in the key level-1 effect, which is, of course, the impact of policy preferences on justices' choices. Moreover, accounting for unobserved

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case-level (level two) heterogeneity in both outcomes and the preference-behavior relationship makes me more confident in the findings produced.

I end this chapter with a couple of caveats. Recall that while I have argued that the Martin-Quinn measure of justices' policy preference is superior to Segal-Cover scores (see Appendix A), the results between models employing each measure produce substantively conflicting conclusions. Therefore, the results and conclusions should be taken as somewhat tentative, yet still informative.

Finally, past studies examining the effects of external strategic considerations have placed a high level of confidence in their results, contending that they have uncovered, for instance, evidence of a *direct influence* of public opinion on the Court's outputs (e.g., McGuire and Stimson 2004). Some scholars may be dubious about these results and, vis-à-vis Norpoth and Segal (1994), contend that such effects are highly indirect and work through the selection process. And others may contend that studies like McGuire and Stimson's aggregate research design have no way of adequately controlling for alternative explanations in a manner yielding a high level of confidence in the results they produce. I take a somewhat middle ground. I believe that my multilevel modeling framework presents a very valid means of empirically assessing the effects of external strategic considerations on Supreme Court decision making (both on annual outputs and the preference-behavior relationship), since the framework integrates three levels of analysis into a single model specification. The specification of three-level random coefficient models introduces controls for unobserved case-level and year-level heterogeneity in both outcomes and the impact of preferences. However, even given these increases in the confidence of my central findings, it might be the case that no

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quantitative research design is fully capable of isolating the direct effects of public opinion and the other branches of government on both the propensity of liberal outputs and the preference-behavior relationship. Moreover, there probably exist other superior research designs to the one I have employed for assessing these effects. It is worth mentioning this caveat because in reality, in studies examining the effects of public opinion and the other branches of government, the empirical difficulty of controlling for Norpoth-Segal-like concerns regarding the selection process looms large.

CHAPTER 5

EMPIRICAL ANALYSIS OF HOW LEGAL CONSIDERATIONS SHAPE

PREFERENCE-BASED BEHAVIOR

Does law influence justices' decisions? If so, how? As scholarship on law and

courts over many years has demonstrated, these are complex questions to theorize about

and empirically assess. Yet as the law has always been and always will be a central

component within intellectual inquiries relating to Supreme Court decision making,

scholars of all theoretical stripes must come to terms with issues of conceptualization,

operationalization, and research design that accompany the study of legal considerations.

The debates about the influence of the law in Supreme Court decision making fit

along a *law-ideology spectrum*. As discussed in Chapter 1, a pure legal model suggests

that justices engage in "mechanical jurisprudence." That is, they suppress their personal

ideological preferences toward legal policy, and instead, their decisions are solely a

function of (1) relevant precedent(s), (2) the plain meaning of the constitution/statute,

and/or (3) the original intent of the founders/legislature. As noted in Chapter 1, the

tendency in the literature is to focus on the first of these influences (precedent), and this

chapter examines the influence of a jurisprudential regime (Richards and Kritzer 2002), which is associated with the precedent concept.[1]

On the other extreme of the law-ideology spectrum, a pure attitudinal model contends that since the Supreme Court is at the pinnacle of the legal system and is not accountable to any other governmental entity, justices are free to decide cases almost exclusively on the basis of their personal policy preferences (Segal and Spaeth 2002). As I discussed in Chapter 1, in between these two extremes fall numerous forms of hybrid models that posit concurrent effects of law and ideology in Supreme Court decision making (e.g., Pritchett 1954; George and Epstein 1992).

Scholars who fall on all points of the law-ideology spectrum tend to share a common characteristic. With some exceptions, scholarship has primarily focused on the *independent, concurrent effects* of law and policy preferences, as opposed to specifying the degree to which law and policy preferences *interact* to produce legal outcomes. That is, legal considerations may exhibit multiple roles in decision making—both as a direct impact on case outcomes *and* as a moderator that determines the magnitude of the impact of policy preferences on justices' choices. It is this latter role that fits squarely within the heterogeneity framework put forth in this dissertation.

This chapter combines Richards and Kritzer's (2002) jurisprudential regimes concept with my heterogeneity framework to test how legal considerations interact with policy preferences and induce heterogeneity in preference-based behavior on the Court.

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[1] While I only focus on the first of these three types of legal considerations, the framework I put forth for how legal considerations are influential could be applied to the second and third types, too. Thus, when I refer to "legal considerations" throughout this chapter, keep in mind that I am primarily referring to the first variety, yet what I posit about precedent could be applicable to the other two varieties as well.

Akin to Knight and Epstein's (1996) conception of precedent as a norm that constrains preference-based behavior, I argue that a jurisprudential regime sets up a framework *regulating the room policy preferences have to operate in future cases*. Thus, in post-regime cases, jurisprudential considerations will systematically explain variation in the magnitude of preference-based behavior on the Court, and they will do so in a significantly distinct manner than they did in pre-regime cases. Using data consisting of justices' votes in free expression cases from 1953-1997, I specify three-level hierarchical models that map the hypotheses onto a statistical model with a high degree of congruence. Beyond providing support for my dissertation's theoretical framework, the chapter contributes to debates regarding the effects of law and policy preferences in Supreme Court decision making and produces compelling evidence of a mechanism by which legal considerations systematically shape preference-based behavior.

HETEROGENEITY AND JURISPRUDENTIAL REGIMES THEORY

In Hypothesis 9 from Chapter 2, I presented the broad expectations for how legal considerations shape the magnitude of preference-based behavior. I presented the general proposition that legal considerations *regulate the room preferences to have to operate*, but they will do so to varying degrees depending on how forcefully a precedent dictates the outcome in a particular case. Richards and Kritzer's (2002) jurisprudential regimes theory presents a useful theoretical and empirical framework for examining and testing this general proposition that law regulates the room preferences have to operate. Below, I review the insights of jurisprudential regimes theory, weave them into my heterogeneity framework, and then present specific, testable hypotheses.

Richards and Kritzer (2002; Kritzer and Richards 2003, 2005) argue that certain precedents create "jurisprudential regimes," which are institutional constructs created by the justices to structure how future related cases should be decided. A jurisprudential regime creates a legal framework for an issue area—e.g., a set of legal criteria or levels of scrutiny to be used for an issue—highlighting how particular case factors should guide justices when deciding future cases within that issue area. In free expression law, Richards and Kritzer argue that two 1972 cases, *Chicago Police Department v. Mosley* and *Grayned v. Rockford*, created a content-neutrality regime that declared a framework of speech-protective standards by establishing the level of scrutiny that should be applied to different types of laws regulating speech. The authors find compelling empirical evidence that the *Grayned* regime significantly altered the manner in which the key jurisprudential factors—namely, types of speech regulations classified by levels of scrutiny accorded to each regulation—influenced post-regime cases compared to pre-regime cases. In particular, Richards and Kritzer found that the Court was more likely to invalidate content-based regulations, which the *Grayned* regime accorded strict scrutiny review (discussed in more detail below), after *Grayned* compared to before. Moreover, as predicted, the Court was more likely to uphold content-neutral regulations, which *Grayned* accorded intermediate scrutiny, compared to content-based regulations after *Grayned*. Overall, Richards and Kritzer highlight a novel institutional approach for explaining and assessing how the law is capable of influencing case outcomes.

Combining jurisprudential regimes theory with my theoretical framework of heterogeneity in Supreme Court decision making, I specify legal considerations, in the form of *jurisprudential factors* associated with the regime, as case-level factors that

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shape preference-based behavior on the Court. A jurisprudential regime essentially dictates how certain case factors should influence decisions in subsequent cases. As depicted in Figure 5.1, Richards and Kritzer (2002) present a "direct effects" approach of jurisprudential factors, such that these factors exhibit significant effects on the *case outcome* in post-regime cases. Although not directly specified in the figure, these effects are assumed to be distinct before and after *Grayned*. Additionally, Richards and Kritzer posit concurrent effects of law and policy preferences—in accord with the hybrid family of models—and do not specify how these two factors interact.

Depicted in Figure 5.2, my perspective posits that not only will jurisprudential factors exhibit direct effects on the case outcome, but they will also *systematically influence the magnitude of preference-based behavior*. Although not directly specified in Figure 5.2, I argue that these factors will influence preference-based behavior in *significantly distinct ways* before and after the regime. This is the crux of my theoretical argument that weds jurisprudential regimes theory with my heterogeneity in decision making approach. It posits that legal considerations, in the form of jurisprudential factors, interact with policy preferences and influence the magnitude of preference-based behavior on the Court.

I contend that the mechanism by which a jurisprudential regime shapes the magnitude of preference-based behavior is by *regulating the amount of room preferences have to operate*. The same jurisprudential factors highlighted by the regime that are to influence case outcomes in post-regime cases (as emphasized by Richards and Kritzer) also serve an additional function: *they determine the conditions under which policy preferences will affect justices' choices with greater or lesser force*. Put another way,

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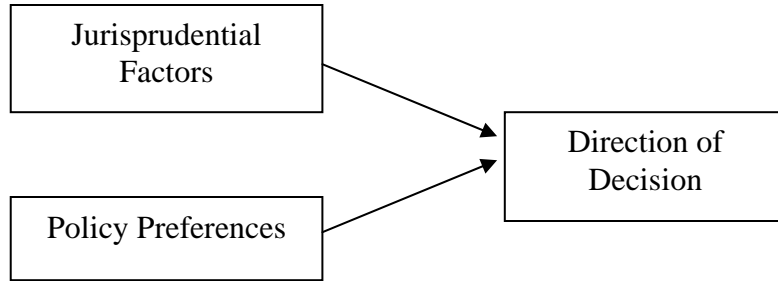
Figure 5.1: Direct Effects Role of Jurisprudential Factors
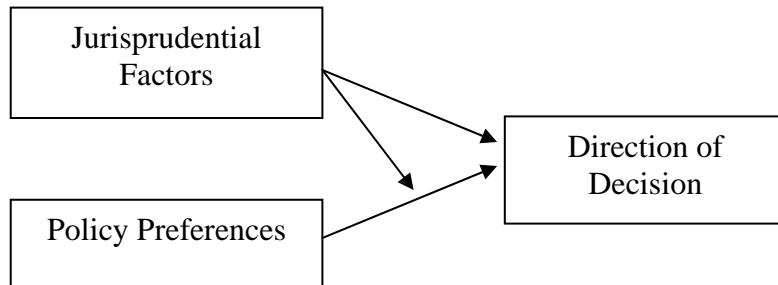
Figure 5.2: The Heterogeneity Framework Specifying the Multiple Roles of

Jurisprudential Factors

these types of legal considerations serve as a constraint on preference-based behavior

(e.g., Knight and Epstein 1996). What is the mechanism of this constraining effect? Since

justices are socialized to be accountable to the body of law that preceded them, they are

accountable to the legal audiences—judges and lawyers—who comment on and interpret

justices' decisions. As has been suggested by others (e.g., Knight and Epstein 1996;

Braman 2004), justices are, at the least, sensitive to the norm of respect for past

precedents and legal frameworks.

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Of course, justices are not bound by this norm, and so the extent to which they adhere to such a norm is a very thorny conceptual and empirical question. But under certain conditions, a past precedent or established legal framework may be so forceful that policy preferences will become less influential and legal considerations will be elevated in importance. For these types of cases in which the regime strongly dictates the outcome, justices have less latitude to decide the case based on their policy preferences; there is little room for preferences to operate. Under other conditions, the body of past law may either be unclear or by construction, it may create situations where policy preferences will have a vast amount of room to operate. For these types of cases, justices will have wide latitude to engage in preference-based behavior. Importantly, my perspective posits the conditions under which legal considerations will constrain preference-based behavior. The key is to specify the conditions that enhance or attenuate preference-based behavior. The jurisprudential regime concept provides an explicit means for doing so.

The next task is to identify and explain how regime-defining jurisprudential factors either enhance or attenuate preference-based behavior. To achieve this task, I rely on a central type of legal structure that a jurisprudential regime creates: *the levels-of-scrutiny* framework.[2] Richards and Kritzer highlight that this type of framework was created by the *Grayned* regime in the free expression issue area. Used by the Supreme Court and other courts, levels of scrutiny define how protective the Constitution should be of certain types of civil liberties and rights and how these rights-protective standards

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[2] Most constitutional texts and treatises contain in-depth discussions of levels of scrutiny analysis (e.g., Chemerinsky 2002, 517-521).

are applied to determine the constitutionality of laws. The framework requires judges to balance the interests of the government in making rights-restrictive laws with citizens' fundamental rights and liberties as granted by the U.S. Constitution.

Three levels of scrutiny suggest different standards of balancing. The lowest level of review is the *rational basis test*. In reviewing the constitutionality of a law, this test grants the government the maximum amount of latitude and deference in making laws that serve a *legitimate* or reasonable purpose. The test places the burden of proof squarely on the individual challenging the law to show that the law threatens individual rights and liberties. The highest level of review is *strict scrutiny*. The converse of rational basis, strict scrutiny gives little deference and latitude to the government. In this test, the burden of proof is on the government to demonstrate a compelling governmental interest for passing such a law. Under strict scrutiny, a law must be narrowly tailored to achieve a vital interest or it will be struck down. In between these two extremes falls *intermediate scrutiny* review, in which a law will be upheld if it is "substantially related to an important government interest" (Chemerinsky 2002, 519). Note that the difference between this level and rational basis centers on the distinction between *important* versus a *legitimate* governmental purpose. For intermediate scrutiny, then, the government bears a fraction of the burden of proof to demonstrate why it must pass a particular law. A moderate level of deference is given to the government, but less than that granted by rational basis and more than what is granted by strict scrutiny.

To many behavioral scholars, these legal tests are conceptually squishy at best. How can the Court be bound by such loosely construed legal frameworks? One of the primary counter-arguments to levels of scrutiny analysis is that justices can make

subjective choices about whether a given case should be accorded a particular type of review. While some justices may claim they are in strict scrutiny mode, others may claim the case is to be accorded intermediate scrutiny. There are a couple of responses to this claim. First, within certain issue areas (free expression, search and seizure, and establishment clause), Richards and Kritzer (2002; Kritzer and Richards 2003, 2005) have argued and presented evidence that these regimes are indeed operative. Moreover, Richards and Kritzer concede the fact that certain regimes have ideological foundations; but once they are in place, regardless of *why* they are put in place, they serve as significant influences on the processing of subsequent cases. Whether justices are influenced by this framework is an empirical question that one can directly test.

Figures 5.3 and 5.4 present two theoretical ways in which a regime that creates a levels-of-scrutiny structure could influence the magnitude of preference-based behavior. For both figures, the X-axis represents the three levels of scrutiny, ranging from rational basis to strict scrutiny. The Y-axis represents the amount of room preferences have to operate. Since this is a stylized example, the Y-axis simply ranges from low to high. Figure 5.3 presents Model 1, where preference-based behavior is a nonlinear function of the levels of scrutiny. This model implies that for the two endpoints, there is minimal room for preferences to operate, but for cases involving intermediate scrutiny, the room for preferences to operate is maximized compared to the other levels. For strict scrutiny, speech-protective standards are maximized and there is a presumption that the law should be struck down. Thus, if strict scrutiny operates as a constraint, justices have minimal latitude to decide the case other than on the basis of whether the government has shown a compelling governmental interest in the case. The same is true of rational basis review. If
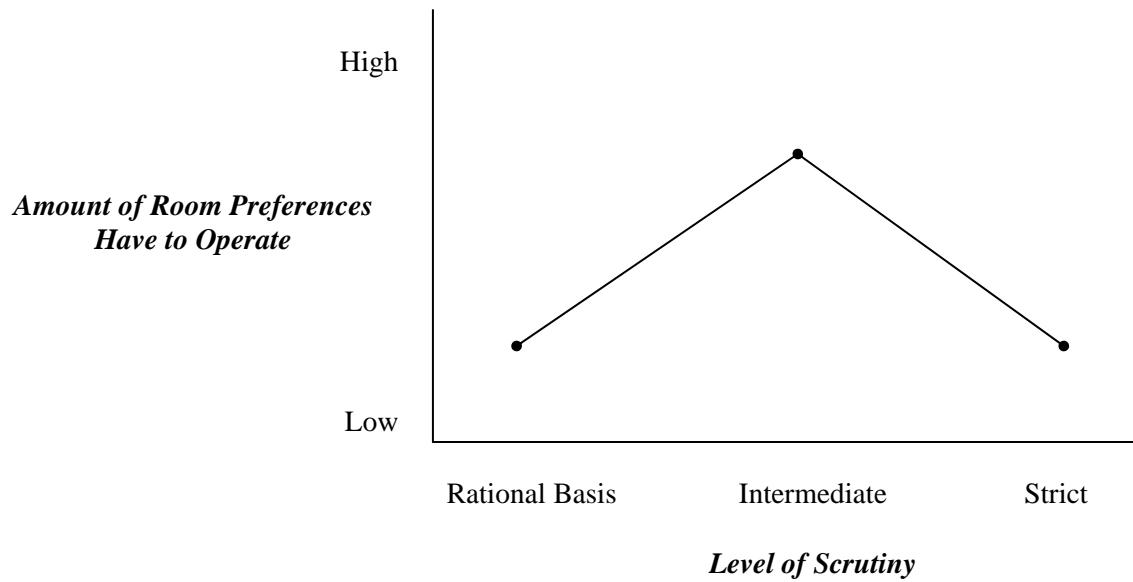
Figure 5.3: The Room Preferences Have to Operate—Model 1

this standard operates as a constraint, then a strong norm of deference toward the

government is operative, and the justices have little latitude to decide the case other than

on the basis of whether the law serves a legitimate purpose.

For the intermediate scrutiny case, Model 1 in Figure 5.3 posits that the room for

preferences to operate is maximized relative to the other two standards. This is because

the burden of proof is shared by both the challenger of the law and the government that

passed the law. Unlike the other two levels, there is no strong presumption of the

constitutionality of the law, and justices are likely to maximize subjectively-based

judgments about how the case should be decided (relative to the other two standards).

One might claim that the other two standards of review will involve subjective judgments

as well, and, as noted above, justices may disagree about which level of review is to be

employed. However, one must keep in mind that I have specified *relative comparisons*

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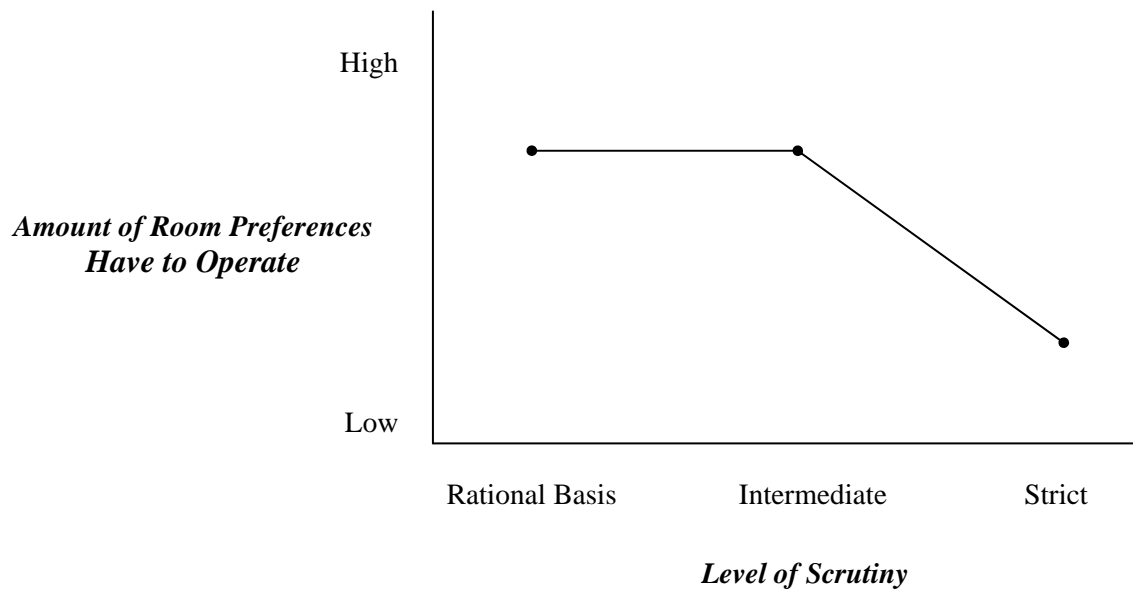
Figure 5.4: The Room Preferences Have to Operate—Model 2

between the three levels of scrutiny, leading to the expectation from Model 1 that the

impact of preferences is expected to be significantly higher for intermediate scrutiny

compared to both rational basis and strict scrutiny review.

Model 2 in Figure 5.4 is similar to Model 1 in that for strict scrutiny review, the

room for preferences to operate is minimized (relative to the other standards) for the same

reasons stated above. However, the difference in Model 2 is that a deference norm toward

the government that passed the regulatory law is not operative, which would accord with

classic behavioral studies of this phenomenon (e.g., Spaeth 1964; Spaeth and Teger

1982). That is, in rational basis review, the room for preferences to operate is the same as

in intermediate scrutiny review because the justices essentially do not grant the

government the same level of latitude to pass laws that serve a compelling governmental

interest as is present in Model 1. Thus, the expectation from Model 2 is that preference-

based behavior will be significantly lower for strict scrutiny cases compared to cases involving both rational basis and intermediate scrutiny review.

Hypotheses for the Free Expression Issue Area

Having stated the broad theoretical perspective about how legal considerations govern the magnitude of preference-based behavior, I discuss the mechanics of the *Grayned* regime in free expression law and state the hypotheses that will be tested in this chapter. Based on a two-track test, the *Grayned* regime classifies various types of governmental regulations into a levels-of-scrutiny framework as discussed above (Richards and Kritzer 2002). First, the regime declares that *content-based* regulations of expression—i.e., when government regulates speech on the basis of the substance or impact of communication—are subject to strict scrutiny. They are presumed to be unconstitutional and the government must show a compelling interest for their upholding. *Content-neutral* regulations—when speech is not necessarily based on content but is regulated based on time, place, and manner restrictions—are subject to intermediate scrutiny, and are less likely to be struck down on face value than content-based regulations. The burden to show a compelling governmental interest is lifted compared to cases involving content-based regulations but is still present to a degree. Two other categories—cases that *do not meet the threshold of First Amendment protection* and *traditionally less protected categories*—are, at face value, less likely to be struck down than both content-based and content-neutral regulations.[3] These two categories are

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[3] The less-protected category includes commercial speech, obscenity, broadcast media expression, expression in non-public forums and schools, union picketing, and libel against private figures (Richards and Kritzer 2002, 311).

essentially accorded rational-basis status, meaning that to be upheld, a government only needs to demonstrate a legitimate or reasonable purpose for passing the law.

Given the structure of the *Grayned* regime and the theoretical framework outlined above, there are two types of hypotheses. First, two competing "post-regime hypotheses" posit how the jurisprudential factors affect preference-based behavior *after* the regime is instituted. Hypothesis 1.1 is implied by Model 1 in Figure 5.3, and Hypothesis 1.2 is implied by Model 2 in Figure 5.4.

> *Hypothesis 1.1 (Model 1)*: After *Grayned*, preference-based behavior will be enhanced for cases involving content-neutral regulations compared to cases involving content-based regulations and the rational basis category; the latter two categories will evince similar levels of preference-based behavior.

> *Hypothesis 1.2 (Model 2)*: After *Grayned*, preference-based behavior will be attenuated for cases involving content-based regulations compared to cases involving both content-neutral regulations and the rational basis category; the latter two categories will evince similar levels of preference-based behavior.

Second, the "regime comparison hypotheses" are applicable to both Models 1 and 2 and for cases both before and after the regime. There are two competing hypotheses:

> *Hypothesis 2.1*: The enhancement effect of content-neutral regulations compared to the other two categories, as stated in Hypothesis 1.1, will significantly increase in magnitude after the regime compared to before the regime.

> *Hypothesis 2.2*: The attenuation effect of content-based regulations compared to the other two categories, as stated in Hypothesis 1.2, will significantly increase in magnitude after the regime compared to before the regime.

Note that there are no specific expectations about how jurisprudential factors will influence preference-based behavior *before* the regime. Instead, I only possess expectations about (1) how jurisprudential factors will shape preference-based behavior as a result of *Grayned*, and (2) that these factors will shape preference-based behavior in significantly different ways after the regime compared to before.

RESEARCH DESIGN, DATA, AND ANALYSIS

As in the previous two chapters, I employ a multilevel (hierarchical) modeling framework to test the hypotheses presented above. I analyze data, first gathered and examined by Richards and Kritzer (2002), consisting of justices' votes on all formally-decided free expression cases decided from the 1953-1997 terms of the Court.[4] Richards and Kritzer (2002, 312) code free expression cases as those that include a "free press, free expression, or free speech issue" according to Spaeth's (2005) Supreme Court database.

Model Specification and Measurement

As was the case for Chapters 3 and 4, the use of the multilevel modeling methodology provides a unique modeling opportunity to translate, with a high degree of congruence, the theoretical propositions discussed above onto a statistical modeling specification. The primary goal of the analysis is to assess how the jurisprudential factors explain variation in the preference-behavior relationship, and the framework allows for a potent empirical assessment of this task. The framework also facilitates a secondary goal of the analysis, which is to assess the direct effects of jurisprudential factors on case outcomes. Recall that Richards and Kritzer's (2002) focus was on assessing these direct effects, and I will discuss how my results compare to their findings.

As in Chapter 4, the models estimated in this chapter employ a three-level hierarchical structure: *justices' choices nested within cases nested within years*. Justices'

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[4] There is a slight difference between my criteria for case inclusion and Richards and Kritzer's. I use the standard case selection criteria as in Epstein et al. (2003), which is to select cases where either "citation" (ANALU=0) or "split vote" (ANALU=4) is the unit of analysis in the Spaeth (2005) database. Richards and Kritzer do not filter out cases based on the ANALU variable.

choices are level-1 units, cases are level-2 units, and years (i.e., the Court's terms) are level-3 units. As I will discuss in more detail, the three-level analysis is especially useful for analyses covering longer time spans. For all analyses, the dependent variable—a justice's choice in a case—is dichotomous, where "1" is a liberal vote (a vote to strike down a regulation of speech) and "0" is a conservative vote (a vote to uphold a governmental regulation of speech). For binary dependent variables, a Bernoulli sampling model is specified, and I use a logit link. For the logit link, first define $\Pr(Y_{ijt}=1) = p_{ijt}$, which is the probability of a liberal vote for choice i in case j in year t. Then define η_{ijt} as the log-odds of p_{ijt} (i.e., $\eta_{ijt} = \log[p_{ijt} / (1 - p_{ijt})]$), which allows one to specify the log-odds as a linear function of the level-1 independent variables.

I specify two types of structural models. Both specifications, which are discussed in more detail below, are three-level random coefficient models. *Specification 1* is designed to estimate two separate models for pre-regime and post-regime cases. For the post-regime model, this specification presents empirical tests of Hypotheses 1.1 and 1.2. Specification 1 can be written as:

(Level-1 equation)　　$\eta_{ijt} = \beta_{0jt} + \beta_{1jt}PREF_{ijt}$

(Level-2 equations)　　$\beta_{0jt} = \gamma_{00t} + \gamma_{01}CB_{jt} + \gamma_{02}CN_{jt} + \gamma_{03q}X_{qjt} + u_{0jt}$
　　　　　　　　　　　$\beta_{1jt} = \gamma_{10t} + \gamma_{11}CB_{jt} + \gamma_{12}CN_{jt} + u_{1jt}$

(Level-3 equations)　　$\gamma_{00t} = \pi_{000} + r_{00t}$
　　　　　　　　　　　$\gamma_{10t} = \pi_{100} + r_{10t}$

Specification 2 is a single model covering the entire time period (1953-1997) and provides critical tests of Hypotheses 2.1 and 2.2, i.e., whether preference-based behavior is explained by the relevant jurisprudential factors in *significantly different ways* before

and after *Grayned*. It has identical level-1 and level-3 equations as Specification 1, but

the level-2 equations are:

(Level-2 equations) $\beta_{0jt} = \gamma_{00t} + \gamma_{01}G_{jt} + \gamma_{02}CB_{jt} + \gamma_{03}CN_{jt} + \gamma_{04}CB_{jt}*G_{jt} +$
$$\gamma_{05}CN_{jt}*G_{jt} + \gamma_{06q}X_{qjt} + u_{0jt}$$
$$\beta_{1jt} = \gamma_{10t} + \gamma_{11}G_{jt} + \gamma_{12}CB_{jt} + \gamma_{13}CN_{jt} + \gamma_{14}CB_{jt}*G_{jt} +$$
$$\gamma_{15}CN_{jt}*G_{jt} + u_{1jt}$$

In examining the level-1 equation for both specifications, $PREF_{ijt}$ is a justice's

policy preference associated with choice i in case j at time t. In Chapters 3 and 4 and

Appendix A, I have already discussed already how measuring justices' policy preferences

is a complicated issue. As in Chapter 4, this chapter employs Martin and Quinn (2002)

scores. Recall that the primary strength of this measure is that it allows for comparisons

across justices and across time, a quality other measures do not possess (see Appendix

A). I also estimated all models using Segal and Cover (1989; Segal et al. 1995) scores,

and the results did not produce significantly different conclusions from those produced

using Martin-Quinn scores. Therefore, I have chosen not to report results from the

models employing Segal-Cover scores. Using the exact same means as I did in Chapter 4

(see footnote 8), I transformed the Martin-Quinn preferences measure so that it is mean-

centered. The motivation for mean-centering this variable, as well as the level-2 variables

discussed below, is the same as discussed in Chapters 3 and 4. Descriptive statistics for

all variables used in this chapter are provided in Appendix B.

For Specifications 1 and 2, the level-2 and level-3 equations are what explicitly

make these models *random coefficient* models, since error terms are associated with each

equation.[5] Examining Specification 1, β_{0jt} is a random intercept that varies across cases

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[5] The models could also be rewritten in their single-equation, reduced form (as I did in Chapter 3).

and years, and it can be thought of as the propensity of a liberal outcome. Substituting the first level-3 equation into the first level-2 equation, as in equation 1 below, the sources of variation in the random intercept for Specification 1 are more clearly displayed:

$$(1) \quad \beta_{0jt} = \pi_{000} + \gamma_{01}CB_{jt} + \gamma_{02}CN_{jt} + \gamma_{03}X_{qjt} + u_{0jt} + r_{00t}$$

π_{000} represents the "average" intercept. CB_{jt} indicates that a case involves a content-based regulation and CN_{jt} means that a case involves a content-neutral regulation in case j at time t. Recall that the jurisprudential variable is a three-category nominal variable (content-based, content-neutral, and the rational basis category) associated with levels of scrutiny, so the rational basis (RB) category is the reference group.[6] Richards and Kritzer (2002, Appendix A) provide a set of criteria for how they code the jurisprudential variables.[7]

Since all level-2 variables are mean-centered, equation 1 provides a means of assessing the direct effects of the jurisprudential factors on case outcomes. γ_{01} represents whether cases involving content-based regulations were typically more likely to be decided in the liberal direction than cases involving the rational basis category, and γ_{02} represents whether content-neutral cases evinced a higher likelihood of a liberal case

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[6] Richards and Kritzer treat the jurisprudential variable as a four-level nominal variable, essentially dividing up the rational basis category into its two parts—the "less protected" category and the "fails to meet First Amendment protection" category. In conducting sensitivity tests, I have concluded that combining these two categories into one rational basis category poses no problems for drawing substantive conclusions about the hypotheses presented.

[7] Richards and Kritzer (2002, Appendix A) rely on the Court's opinions for coding whether cases involve a given type of regulation. Based on high inter-coder agreement, their measures show high reliability. Also, to demonstrate the validity of the measure, they randomly selected 10% of the cases from the data and found 100% agreement between the Supreme Court's determinations of the jurisprudential factor and the lower court's determinations.

outcome than the rational basis category.[8] X_{qjt} represents the Q case-level control variables (X_{1jt}, X_{2jt},... X_{Qjt}) that Richards and Kritzer include in their model.[9] Table 5.1 presents a summary of expected effects (for both Specifications 1 and 2) in both the β_{0jt} and β_{1jt} equations. For the β_{0jt} equation in Specification 1, there are not necessarily any expectations in the pre-*Grayned* era. Recall that Richards and Kritzer were primarily concerned with how the impact of jurisprudential factors significantly changed after *Grayned*, which is the crux of my Specification 2. However, in the post-*Grayned* era, some expectations emerge, which are in accord with Richards and Kritzer. First, since *Grayned* accorded strict scrutiny to content-based regulations of speech, we should expect that after *Grayned*, $\gamma_{01} > 0$, which would indicate that content-based regulations were more likely to be struck down (decided in a liberal direction) than the rational basis category. We might also expect that $\gamma_{02} > 0$, indicating that content-neutral regulations, accorded intermediate scrutiny, were also more likely to be struck down than the rational basis category. Note that these expectations are the same across both Models 1 and 2 (presented in Figures 5.3 and 5.4), since they are effects on the case outcome.

Combining the level-2 and level-3 equations, the β_{0jt} equation for Specification 2 can be written as:

$$(2) \quad \beta_{0jt} = \pi_{000} + \gamma_{01}G_{jt} + \gamma_{02}CB_{jt} + \gamma_{03}CN_{jt} + \gamma_{04}CB_{jt}*G_{jt} + \gamma_{05}CN_{jt}*G_{jt} + \gamma_{06}X_{qjt} + u_{0jt} + r_{00t}$$

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[8] Recall from Chapter 3 that mean-centering has no effect on the γ coefficients in the β_{1jt} equations; that is, these coefficients are the same regardless of whether one mean-centers or not. Employing the same logic as discussed in Chapter 3, mean-centering aids in interpreting the γ coefficients in the β_{0jt} equation, where each γ represents the impact of a case-level characteristic on the case outcome.

[9] For *action*, the categories are: civil (excluded category), criminal, deny expression, deny benefit, disciplinary, lose employment, and regulation. For *government*: state (excluded category), other, private, education, local, federal. For *identity*: other (excluded group), politician, racial minority, alleged communist, military protester, business, religious, print media, broadcast media.

G_{jt} is a dummy variable indicating whether or not a particular case came before or after *Grayned*, and γ_{01} represents whether the average propensity of a liberal decision was significantly different before and after *Grayned*. The two interaction terms ($CB_{jt}*G_{jt}$ and $CN_{jt}*G_{jt}$) serve a similar function as Richards and Kritzer's Chow tests by assessing whether the regime significantly altered the effects of jurisprudential factors (*CB* and *CN*), relative to the baseline, on the case outcome. As seen in Table 5.1, I only possess expectations for the two interaction terms for the β_{0jt} equation in Specification 2. I expect that $\gamma_{04} > 0$, which indicates that content-based regulations will be even more likely to be struck down than the rational basis category after *Grayned* compared to before. Moreover, I also expect that $\gamma_{05} > 0$, indicating that content-neutral regulations will also be more likely to be struck down than the rational basis category after *Grayned*.

For Specifications 1 and 2, the β_{0jt} equation contains stochastic components at levels two (u_{0jt}) and three (r_{00t}) that represent *unobserved heterogeneity* in the response, that is unmeasured variability in both *case-level* and *year-level* factors that could affect the outcome. As I discussed in Chapter 4, the specification of r_{00t} in the level-3 equation serves an important purpose for judicial voting data that cover longer time spans. It essentially allows one to be more confident in the inferences regarding the parameters of interest because it controls for unobserved year-to-year variation in the propensity of a case to be decided liberally. From Chapter 4, recall that this specification, specifically the level-3 equation, is one means of accounting for membership change.

Case-Level Factor	Model 1		Model 2	
	Expected Effect from β_{0jt} Equation	Expected Effect from β_{1jt} Equation	Expected Effect from β_{0jt} Equation	Expected Effect from β_{1jt} Equation
Specification 1				
Pre-*Grayned*				
Content-Based	None	None	None	None
Content-Neutral	None	None	None	None
Post-*Grayned*				
Content-Based	$\gamma_{01} > 0$	$\gamma_{11} = 0$	$\gamma_{01} > 0$	$\gamma_{11} < 0$
Content-Neutral	$\gamma_{02} > 0$	$\gamma_{12} > 0$	$\gamma_{02} > 0$	$\gamma_{12} = 0$
Specification 2				
Grayned	None	None	None	None
Content-Based	None	None	None	None
Content-Neutral	None	None	None	None
Content-Based* *Grayned*	$\gamma_{04} > 0$	None	$\gamma_{04} > 0$	$\gamma_{14} < 0$
Content-Neutral* *Grayned*	$\gamma_{05} > 0$	$\gamma_{15} > 0$	$\gamma_{05} > 0$	None

Table 5.1: Summary of Expected Effects for Models 1 and 2

For Specifications 1 and 2, the β_{1jt} equations are central to testing the hypotheses. β_{1jt} represents the impact of policy preferences on justices' choices (i.e., the preference-behavior relationship) and is specified to vary across cases and time. For Specification 1, the level-2 and level-3 equations can be combined and written as:

$$(3) \qquad \beta_{1jt} = \pi_{100} + \gamma_{11}CB_{jt} + \gamma_{12}CN_{jt} + u_{1jt} + r_{10t}$$

π_{100} is the typical, or average, impact of policy preferences. The parameters associated with the observed case-level factors—*cross-level interaction effects*—represent how

case-level factors explain variation in the impact of policy preferences.[10] Substantively, this specification is directly connected to my theoretical framework, which posits that the *impact of policy preferences varies as a function of jurisprudential factors*.

As seen in Table 5.1, I possess no expectations for the effects of the jurisprudential factors on the preference-behavior relationship for the pre-*Grayned* model. The post-*Grayned* model explicitly tests Hypotheses 1.1 and 1.2. Specifically, γ_{11} and γ_{12} represent how the impact of preferences is shaped by the presence of content-based and content-neutral regulations, respectively, relative to the rational basis baseline. Hypothesis 1.1, in accord with Model 1, posits that after the regime, the magnitude of preference-based behavior for content-based and rational basis cases will be the same. Thus, for the post-*Grayned* model, a finding that γ_{11} is statistically indistinguishable from zero will support Hypothesis 1.1. A finding that $\gamma_{12} > 0$, i.e., that preference-based behavior will be enhanced in content-neutral cases relative to the rational basis category, will also support Hypothesis 1.1.

In accord with Model 2, Hypothesis 1.2 posits that after the regime, the magnitude of preference-based behavior will be significantly lower for content-based cases relative to the rational basis category. Thus, a finding that $\gamma_{11} < 0$ in the post-*Grayned* model will support Hypothesis 1.2. In addition, a finding of γ_{12} as statistically indistinguishable from zero will also support Hypothesis 1.2.[11]

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[10] From Chapters 3 and 4, one can see how both Specifications 1 and 2 could be rewritten in their reduced form to show more clearly the nature of the cross-level interactions.

[11] Testing whether differences exist in preference-based behavior between the content-based and content-neutral categories requires changing the baseline from rational basis to one of the other categories. Results executing this strategy will be discussed below.

Moving to the β_{1jt} equation for Specification 2, combining the level-2 and level-3 equations produces:

$$(4) \qquad \beta_{1jt} = \pi_{100} + \gamma_{11}G_{jt} + \gamma_{12}CB_{jt} + \gamma_{13}CN_{jt} + \gamma_{14}CB_{jt}*G_{jt} + \gamma_{15}CN_{jt}*G_{jt} + u_{1jt} + r_{10t}$$

By interacting the jurisprudential variables with the *Grayned* dummy (i.e., $CB_{jt}*G_{jt}$ and $CN_{jt}*G_{jt}$), Specification 2 tests Hypotheses 2.1 and 2.2, that is, whether the regime variables shaped preference-based behavior in significantly different ways before and after *Grayned*. Note first that γ_{11} is the effect of the *Grayned* regime on preference-based behavior for a typical case; this tests whether the net level of preference-based behavior was altered as a result of *Grayned*. The central parameters for testing Hypotheses 2.1 and 2.2 are γ_{14} and γ_{15}. Hypothesis 2.1 predicts that $\gamma_{15} > 0$, which means that the enhancement effect of the content-neutral category relative to the rational basis category was significantly larger after the regime compared to before. Hypothesis 2.2 predicts that $\gamma_{14} < 0$, meaning that the constraining effect of the content-based category (relative to rational basis) significantly increased in magnitude (i.e., became more negative and constraining) after the regime compared to before.

Finally, for both specifications, the two stochastic components in the β_{1jt} equations, u_{1jt} and r_{10t}, account for unobserved case-level and year-level heterogeneity, respectively, that may explain variation in the impact of policy preferences. As discussed in Chapter 4, accounting for this unobserved heterogeneity in the impact of preferences is

especially useful in analyses covering longer time spans, since it controls for unmeasured changes in preference-based behavior across cases and time.[12]

For the entire 1953-1997 time span, the data consist of 4,334 choices (level-1 units) nested within 494 cases (level-2 units) nested within 45 years (level-3 units). The *Grayned* regime begins during the 1972 term. For the pre-*Grayned* era, the data consist of 1,736 choices nested within 199 cases nested within 19 years. For the post-*Grayned* era, the data consist of 2,598 choices nested within 295 cases nested within 27 years.[13]

Estimation and Results

The same estimation issues come to play in this chapter as in Chapter 4, given the complexity of the three-level hierarchical models specified here. Therefore, for the same reasons I stated in Chapter 4, I use Bayesian estimation via Markov chain Monte Carlo (MCMC) to generate model estimates in this chapter.

Table 5.3 presents MCMC results separately for pre-*Grayned* and post-*Grayned* (Specification 1). Table 5.4 presents MCMC estimates for data covering the entire time span (Specification 2, 1953-1997 terms). Table 5.2, discussed below, summarizes model fit and comparison. The results from Tables 5.2, 5.3, and 5.4 are based on models using the Martin-Quinn preferences measure. All models employ non-informative (diffuse) priors, meaning that the likelihood (the data) dominates the prior in constituting the

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[12] As in Chapter 4, the level-2 and level-3 error components are each assumed to have bivariate normal distributions, which allows for estimation of the variance-covariance components of the random effects.

[13] The reason there are 19 years for pre-*Grayned* and 27 for post-*Grayned* (which adds up to 46 instead of 45 seen in the entire time span) is due to the fact that regime occurs within the 1972 term. Thus, part of 1972 is included in the pre-*Grayned* era, and the other part is included in post-*Grayned* era.

posterior; therefore, inferences are similar to what would be made using maximum

likelihood.[14]

For each model, I specified three parallel Markov chains,[15] and convergence was

assessed via the Gelman and Rubin (1992) test (see also Gelman et al. 2003; Congdon

2003).[16] Using this test, convergence was clearly apparent for all parameters of interest

after 13,000 iterations (using the initial 3,000 iterations as a burn-in). Thus, all results are

based on 10,000 samples. Based on these samples, Tables 5.3 and 5.4 present the

posterior means, standard deviations, and 90% Bayesian credibility intervals for three

sets of estimates: (1) effects of the case-level covariates on the average propensity of a

case to be decided in a liberal direction (estimates from the β_{0jt} equation), (2) effects of

the case-level covariates on the impact of preferences, including the average effect of

policy preferences (estimates from the β_{1jt} equation), and (3) the variance-covariance

components of the random effects. Due to space considerations, Tables 5.3 and 5.4 do not

include the posterior summaries for the case facts variables (X_{qjt}) from the β_{0jt} equation.

Recall from Chapter 4 that the 90% credibility intervals allow one to determine the

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[14] The random effects associated with both the random intercept and random slope at both levels two and three are distributed as bivariate normal. A minimally informative Wishart prior is used for the bivariate normal distribution at each level. Also, the γ parameters are each assumed to be normally distributed. I use standard diffuse priors for the γs, with means 0 and precisions of 0.001; a precision is the inverse of the variance, so a precision of 0.001 is equivalent to a variance of 1000.

[15] In setting the initial values for each chain, the first set was from a reduced random intercept logit model and the other two sets of start values specified the upper and lower bounds, respectively, of the 95% confidence interval for each coefficient. I experimented with other start values for the three-chain model and used various start values for two-chain models as well, employing suggestions from Congdon (2003), and the results are highly stable across all specifications.

[16] This requires monitoring the potential scale reduction (R), which taps differences between the 3 chains, for all parameters; convergence is achieved when R is very close to 1 for all parameters of interest. When R is close to 1, it indicates that the chains are overlapping and the Gibbs sampler is approaching the target distribution.

	Specification 1		Specification 2
Full model compared to:	Pre-*Grayned*	Post-*Grayned*	
1. Pooled model with no random coefficients	1775.20	2989.78	4805.49
2. Random Intercept only at both level two and level three	1304.03	2239.90	3549.97
3. Random Coefficients at level two only	1178.69	1822.16	3012.10
Full Model:			
Three-level random coefficient model	1176.12	1817.39	2996.96

Numerical entries are DIC statistics for each model. Lower values indicate better model fit.

Table 5.2: Assessing Model Fit and Comparison Using the Deviance Information Criterion (DIC)

significance of the parameter estimates. I have placed asterisks next to the effects (for the model coefficients) which are either greater or less than zero with greater than 95% posterior probability.[17]

The results reported below are striking and provide compelling evidence for the role of legal considerations in Supreme Court decision making. Before discussing the findings, I briefly discuss model fit. I assess model fit and comparison employing, as I did in Chapter 4, the "deviance information criterion" (DIC) (Spiegelhalter et al. 2002). Recall that lower DIC values indicate better fit. Table 5.2 presents a set of DIC statistics that compare the full, three-level random coefficient models presented here (for both Specifications 1 and 2) with three different reduced models: (1) a pooled logit that ignores altogether the multilevel structure of the data, (2) a model that specifies only

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[17] Recall from Chapter 4 that this method for determining significance is consistent with one-sided Bayesian hypothesis testing (Gill 2002, 203-07), which is analogous to one-tailed hypothesis testing in classical, or frequentist, analysis.

random intercepts (and not random preferences coefficient) at levels two and three, and

(3) a two-level random coefficient model that ignores years as a third level of analysis.

Across Specifications 1 and 2, the DIC statistics indicate that the full three-level random

coefficient models provide the best fit of the data compared to the three reduced models.

These results provide statistical justification for the posited three-level hierarchical

structure and the random coefficient model specification, where random intercepts and

random coefficients (for policy preferences) were specified at both level two (the case

level) and level three (the year level).

     Results from the β_{0jt} Equations. I first examine estimates from the β_{0jt} equation for

Specifications 1 and 2 to test the extent to which the jurisprudential factors exhibited

direct effects on case outcomes. Recall that these results test the same mechanism of

influence of jurisprudential factors that Richards and Kritzer (2002) examined, and I will

make comparisons between my results and Richards and Kritzer's results. While testing

the direct effects of these factors on case outcomes is a secondary goal of the analysis, the

results are important because they highlight the "direct effects" role of legal

considerations that most scholars have tended to examine.

     First, the posterior summary of the γ_{02} parameter in Table 5.3 indicates that before

Grayned, cases involving content-neutral regulations were significantly less likely to be

overturned (i.e., decided liberally) than the baseline (rational basis) cases. Greater than

95% of the posterior mass for the coefficient is less than zero, suggesting a high posterior

probability that the effect is negative. After *Grayned* implemented the levels-of-scrutiny

framework, however, the results indicate that relative to the rational basis baseline, the

impact of content-neutral cases—now accorded intermediate scrutiny—is no longer

significant. This evidence suggests that the Court accorded content-neutral regulations more deference before *Grayned*, but after *Grayned*, it accorded less deference to this class of cases. These conclusions are in accord with Richards and Kritzer's findings. To test if the effect just discussed is significantly different after the regime compared to before, we look to the *content-neutral*Grayned* interaction effect (γ_{05}) in the β_{0jt} equation in Table 5.4. First, note that the two *Grayned* interactions in the β_{0jt} equation represent an alternative way to test the Richards-Kritzer hypotheses of whether the jurisprudential factors had statistically distinct effects on case outcomes before and after the regime. In Table 5.4, the significant effect of the *content-neutral*Grayned* interaction provides evidence in support of Richards and Kritzer's findings. Thus, the negative impact of content-neutral regulations (relative to the baseline) on the propensity of the case being overturned was significantly attenuated after *Grayned*, suggesting that *Grayned* accorded significantly less deference to governments in the content-neutral class of regulations compared to the baseline.[18] The results suggest that before *Grayned*, content-neutral regulations were more likely to be upheld by the Court than baseline cases, yet after *Grayned*, case outcomes between these two categories did not significantly differ.

Returning to the β_{0jt} equation in Table 5.3, the results indicate that before *Grayned*, the fate of cases involving content-based regulations was not significantly different from baseline cases. While the effect (γ_{01}) is positive and close to being

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[18] The interaction is positive, so the post-*Grayned* effect is significantly "less negative" than the pre-*Grayned* effect.

	Pre-*Grayned*			Post-*Grayned*		
	Posterior Summaries			Posterior Summaries		
	Mean	S.D.	90% Bayesian Credibility Interval	Mean	S.D.	90% Bayesian Credibility Interval
Estimates from β_{0jt} Equation (Effects on Outcome):						
Intercept, π_{000}	1.97	0.89	[0.51, 3.45]*	-0.25	0.70	[-1.41, 0.89]
Content-Based, γ_{01}	0.98	0.72	[-0.18, 2.17]	2.32	0.48	[1.54, 3.12]*
Content-Neutral, γ_{02}	-3.55	1.42	[-5.90, -1.25]*	0.05	0.74	[-1.17, 1.27]
Estimates from β_{1jt} Equation (Cross-Level Interactions):						
Policy Preferences (Avg. Effect), π_{100}	5.38	0.65	[4.35, 6.50]*	5.05	0.54	[4.16, 5.95]*
Content-Based, γ_{11}	1.83	0.92	[0.36, 3.36]*	-1.53	0.79	[-2.85, -0.24]*
Content-Neutral, γ_{12}	0.30	2.02	[-2.98, 3.66]	0.28	1.38	[-1.94, 2.56]
Level-2 Variance-Covariance Components						
var(u_{0jt})	6.74	1.48	[4.63, 9.41]	7.61	1.28	[5.71, 9.88]
var(u_{1jt})	13.23	4.16	[7.34, 20.8]	22.38	4.37	[15.95, 30.13]
cov(u_{0jt}, u_{1jt})	-3.52	1.64	[-6.32, -0.96]	-2.41	1.39	[-4.74, -0.19]
Level-3 Variance-Covariance Components						
var(r_{00t})	0.56	0.42	[0.16, 1.35]	0.51	0.32	[0.16, 1.11]
var(r_{10t})	2.78	2.31	[0.42, 7.14]	2.64	2.09	[0.41, 6.59]
cov(r_{00t}, r_{10t})	0.50	0.72	[-0.37, 1.80]	0.41	0.52	[-0.30, 1.34]
	N=1,736 (choices); J=199 (cases); T=19 (years)			N=2,598 (choices); J=295 (cases); T=27 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.

Table 5.3: MCMC Estimates of Three-Level Random Coefficient Model (Specification 1), Free Expression Cases, Pre-*Grayned* and Post-*Grayned*

significant, the 5th percentile is less than zero, suggesting that a less than 95% posterior probability exists that the effect is greater than zero. After *Grayned* accorded content-

based regulations strict scrutiny review, cases involving content-based regulations were significantly more likely to be decided liberally (struck down) than rational basis cases; note that well over 95% of the posterior mass for this effect (γ_{01}) in the post-*Grayned* model is greater than zero. The evidence suggests that the Court did indeed accord cases involving content-based regulations higher speech-protective standards after the *Grayned* regime was implemented. These conclusions regarding content-based cases correspond to Richards and Kritzer's findings.

But is this effect just discussed significantly different across the regime break? The *content-based*Grayned* interaction effect (γ_{04}) in the β_{0jt} equation in Table 5.4 provides an explicit test. The results indicate that the effect of content-based regulations (relative to the rational basis baseline) on the outcome did *not* significantly differ after *Grayned* compared to before *Grayned*. The interaction effect is in the correct direction (positive), but less than 95% of the posterior mass is positive. The findings regarding content-based cases from Table 5.3 and 5.4 are mixed, especially with respect to Richards and Kritzer's findings. On the one hand, the Specification 1 results suggest that *Grayned* did have a significant impact such that after *Grayned*, content-based regulations—now accorded strict scrutiny—were significantly more likely to be struck down than regulations falling within the rational basis category; yet before *Grayned*, this effect was insignificant. The positive *content-based*Grayned* interaction from Table 5.4 suggests that indeed, the likelihood of content-based regulations being struck down compared to the rational basis group is greater after *Grayned*, but the posterior probability is not high enough to conclude that the difference is distinct from zero.

	Posterior Summaries		
	Mean	S.D.	90% Bayesian Credibility Interval
Estimates from β_{0jt} Equation (Effects on Outcome):			
Intercept, π_{000}	0.55	0.54	[-0.35, 1.44]
Grayned, γ_{01}	-0.24	0.40	[-0.90, 0.42]
Content-Based, γ_{02}	1.84	0.38	[1.22, 2.48]*
Content-Neutral, γ_{03}	-1.26	0.66	[-2.35, -0.16]*
Content-Based*Grayned*, γ_{04}	0.15	0.70	[-1.01, 1.30]
Content-Neutral*Grayned*, γ_{05}	2.68	1.42	[0.35, 5.03]*
Estimates from β_{1jt} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	5.34	0.45	[4.59, 6.08]*
Grayned, γ_{11}	-1.70	0.84	[-3.10, -0.35]*
Content-Based, γ_{12}	0.05	0.64	[-1.01, 1.09]
Content-Neutral, γ_{13}	0.11	1.26	[-1.93, 2.20]
Content-Based*Grayned*, γ_{14}	-3.92	1.35	[-6.15, -1.71]*
Content-Neutral*Grayned*, γ_{15}	0.58	2.73	[-3.94, 5.02]
Level-2 Variance-Covariance Components			
var(u_{0jt})	6.96	0.90	[5.57, 8.55]
var(u_{1jt})	19.93	3.28	[14.92, 25.64]
cov(u_{0jt}, u_{1jt})	-2.80	1.06	[-4.59, -1.12]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.36	0.18	[0.14, 0.71]
var(r_{10t})	3.44	1.79	[1.09, 6.79]
cov(r_{00t}, r_{10t})	0.50	0.43	[-0.12, 1.26]
	N=4,334 (choices); J=494 (cases); T=45 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.

Table 5.4: MCMC Estimates of Three-Level Random Coefficient Model (Specification 2), Free Expression Cases, 1953-1997

The Specification 2 results in Table 5.4 also reveal that the *Grayned* regime did not exhibit an overall significant effect on the propensity of a case to be decided in a liberal direction. Recall that I did not expect a direction for this effect (γ_{01}), and neither did Richards and Kritzer. However, the evidence suggests that in general, free expression regulations were not significantly more likely to be struck down after *Grayned* compared to before.

In Tables 5.3 and 5.4, the variance-covariance components associated with β_{0jt} suggest that a sizable share of case-level and year-level unobserved heterogeneity exists in the outcome process.[19] That is, a significant level of variation exists in the propensity of a liberal decision both over cases and over time that is not accounted for by the observed independent variables. Note that the case-level estimates of the variance are substantially larger than the year-level estimates, which suggests that case-level effects constitute more of the variation in the outcome than year-level effects. Importantly, accounting for this unobserved heterogeneity allows one to be more confident in the core substantive inferences.

Results from the β_{1jt} Equations. The results from the β_{1jt} equations in Tables 5.3 and 5.4 produce evidence pertaining directly to the theoretical framework and are capable of rendering verdicts on the hypotheses presented in this chapter. I discuss the results in Tables 5.3 and 5.4 in conjunction with post-estimation results presented in Figures 5.5 and 5.6. Figures 5.5 and 5.6, which are analogous to the theoretical Models 1 and 2 from

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[19] Recall that the DIC statistics reported in Table 5.2 provide statistical support for the assumption that there is a significant amount of unobserved heterogeneity in the intercept and preferences coefficient at both levels two and three.

Figures 5.3 and 5.4, display estimates of $\hat{\beta}_{PREF}$, which represents the predicted impact of policy preferences on choices, i.e., the magnitude of preference-based behavior, broken down by the three jurisprudential categories for both the pre-*Grayned* and post-*Grayned* eras. Adapting the β_{1jt} equation from Specification 2 (equation 4), calculating each $\hat{\beta}_{PREF}$ simply requires plugging in parameter estimates and the relevant covariate values into the following equation:

$$(5) \qquad \hat{\beta}_{PREF} = \pi_{100} + \gamma_{11}G_{jt} + \gamma_{12}CB_{jt} + \gamma_{13}CN_{jt} + \gamma_{14}CB_{jt}*G_{jt} + \gamma_{15}CN_{jt}*G_{jt}$$

As I did in Chapter 4, I simply integrate these calculations into the joint posterior and then retrieve posterior means for the impact of preferences on choices under each condition. These posterior means for each condition are then reported in Figures 5.5 and 5.6.

First, in looking at Tables 5.3 and 5.4, it is no surprise that for all models, the average impact (π_{100}) of policy preferences (that is, the impact when variables with which the preferences variable is interacted are held at zero, their mean values) is positive and clearly distinguishable from zero. Thus, on average, typical left-right ideological cleavages exist in the propensity to strike down a speech-restrictive regulation; liberals are more likely than conservatives to strike down governmental regulations of speech.

The theoretical framework described in this chapter posits that ideological cleavages in free expression law were transformed after *Grayned* implemented a levels-of-scrutiny legal framework. First, the most striking finding from Table 5.3 and Figures 5.5 and 5.6 concerns the before-and-after comparison of preference-based behavior in cases involving content-based regulations (see γ_{11}). Before *Grayned*, cases involving
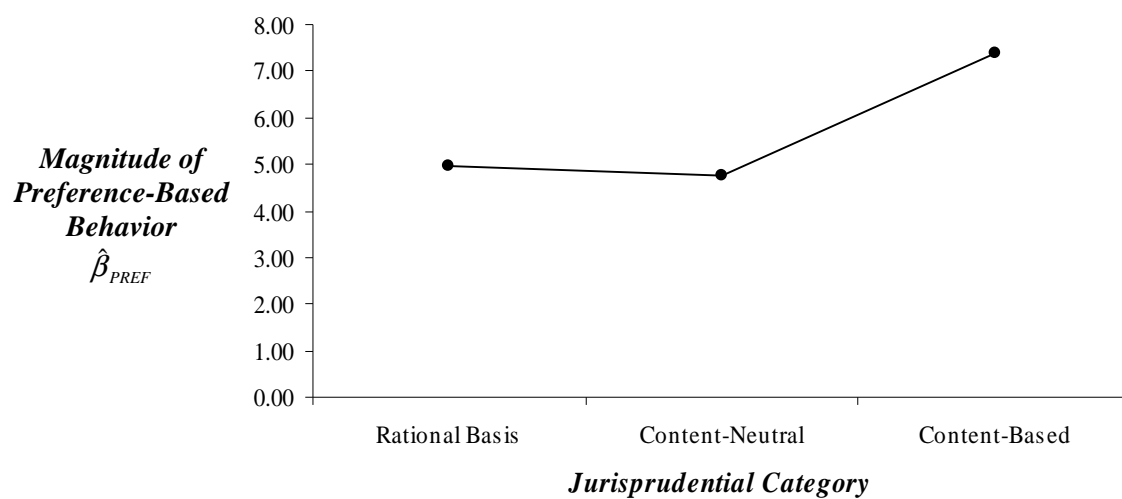
Figure 5.5: Estimates of the Magnitude of Preference-Based Behavior as a Function of

Jurisprudential Categories—Pre-*Grayned*
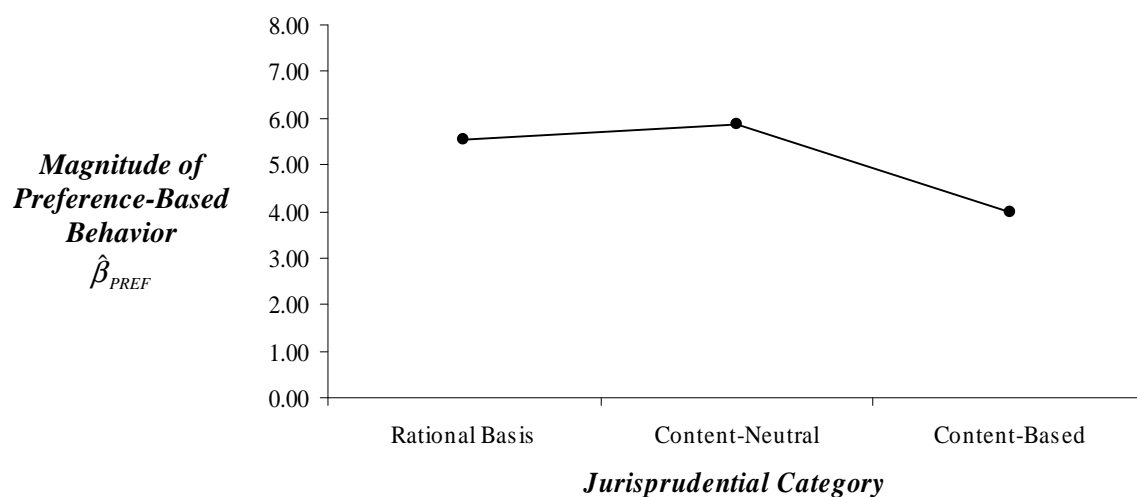
Figure 5.6: Estimates of the Magnitude of Preference-Based Behavior as a Function of

Jurisprudential Categories—Post-*Grayned*

content-based regulations induced significantly *enhanced* preference-based behavior

compared to both rational basis cases and, as seen in Figure 5.5, in cases involving

content-neutral regulations.[20] More than 95% of the posterior mass for γ_{11} is greater than

zero. Note also that before *Grayned*, preference-based behavior did not significantly

differ between cases involving content-neutral regulations and the rational basis category

(see the γ_{12} parameter, which is positive but insignificant). Figure 5.5 clearly displays that

of the three jurisprudential categories before *Grayned*, content-based regulations induced

justices to engage in the *highest* level of preference-based behavior.

However, after *Grayned* accorded content-based regulations strict scrutiny status,

cases involving content-based regulations significantly *attenuated* preference-based

behavior relative to the rational basis baseline—*the exact opposite effect compared to the*

*pre-*Grayned *period* (see γ_{11} from Table 5.3). In the post-*Grayned* model, a greater than

95% posterior probability exists that this effect is less than zero. As was the case before

Grayned, preference-based behavior did not significantly differ between content-neutral

and rational basis cases (see the γ_{12} parameter). And further analysis indicates that

preference-based behavior was significantly attenuated in cases involving content-based

relative to content-neutral regulations.[21]

The effect of jurisprudential factors on the magnitude of preference-based

behavior after *Grayned* is seen more clearly in Figure 5.6. As opposed to the

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[20] Setting *content-neutral* as the baseline category reveals that content-based regulations induced significantly more (with greater than 95% posterior probability) preference-based behavior than content-neutral cases.

[21] Again, setting *content-neutral* as the baseline category reveals that after *Grayned*, content-based regulations induced significantly less preference-based behavior than content-neutral regulations.

enhancement effect (compared to the other two categories) that content-based regulations produced before *Grayned* (as was seen in Figure 5.5), Figure 5.6 shows that after *Grayned*, content-based regulations induced the *lowest* amount of preference-based behavior, again, the exact opposite pattern from what occurred in the pre-*Grayned* era. Note how Figure 5.6 strongly resembles Model 2 from Figure 5.4.

So far, the evidence strongly suggests that *Grayned* indeed regulated the room policy preferences have to operate in a manner consistent with Model 2 from Figure 5.4, thus providing strong support for Hypothesis 1.2 and compelling evidence against Hypothesis 1.1. In other words, the regime significantly reduced the magnitude of preference-based behavior for the category of cases accorded strict scrutiny (content-based regulations) compared to the other two categories. Relative to the rational basis and content-neutral cases, content-based regulations shaped preference-based behavior in *diametrically opposed* ways before and after *Grayned*. Before *Grayned*, content-based regulations evinced the highest degree of preference-based behavior, but after *Grayned*, content-based regulations evinced the lowest degree of preference-based behavior.

The two interaction terms from the β_{1jt} equation in Table 5.4 provide critical tests of Hypotheses 2.1 and 2.2, that is, whether and how the jurisprudential factors altered preference-based behavior in significantly ways before and after *Grayned*. As expected by Hypothesis 2.2, the *content-based*Grayned* interaction effect (γ_{14}) is negative and significant, as well over 95% of the posterior mass of γ_{14} is less than zero. The results strongly indicate, then, that the constraining effect of content-based regulations relative to the baseline that existed after the regime is clearly distinct from the enhancement effect that existed before *Grayned*. This finding provides strong support for Hypothesis 2.2. In

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other words, the manner in which preference-based behavior differed between cases involving content-based regulations and the other two categories was significantly altered after *Grayned* compared to before *Grayned*, as seen in comparing Figures 5.5 and 5.6.

Recall that Hypothesis 2.1 predicted that the *content-neutral*Grayned* interaction effect (γ_{15}) in the β_{1jt} equation in Table 5.4 would be positive. Given the previous findings of a null difference in preference-based behavior between content-neutral and rational basis cases both before and after *Grayned*, it is no surprise that there is no significant difference in these effects across the regime break. Note that the posterior probability that γ_{15} is distinguishable from zero is well less than 95%. These results, then, provide strong evidence against Hypothesis 2.1 and bolster further the validity of Hypothesis 2.2.

Table 5.4 also provides a test of *Grayned*'s net effect on the magnitude of preference-based behavior, as seen in the β_{1jt} equation (γ_{11}). Note that the effect of *Grayned* is negative and significant with 95% posterior probability, suggesting that on the whole, the regime significantly reduced the net amount of preference-based behavior.

Finally, in both Tables 5.3 and 5.4, the variance-covariance components associated with β_{1jt} suggest that sizable case-level and year-level unobserved heterogeneity exists in the impact of policy preferences. This means that there exists variation over both cases and time in preference-based behavior that is not accounted for by the observed variables. Again, the variance estimates at the case level are much larger than those from the year level, suggesting that variation in preference-based behavior is explained more by changes in case stimuli than changes in context that a new term

brings. I reiterate that accounting for this unobserved variation in the impact of policy preferences allows one to be more confident in the core substantive inferences.

Summary

To recap, then, the evidence strongly supports the view that the *Grayned* content-neutrality regime regulated the room policy preferences have to operate in the free expression issue area in a manner consistent with Model 2 in Figure 5.4 and Hypotheses 1.2 and 2.2. The levels-of-scrutiny framework had the effect of significantly constraining preference-based behavior in cases *Grayned* accorded strict scrutiny (content-based regulations) in comparison to cases accorded rational basis and intermediate scrutiny. This constraint was significantly greater after the regime compared to before. In fact, striking evidence revealed that *Grayned* transformed what was previously an *enhancement* effect induced by content-based regulations into the *attenuation*, or constraining, effect described above. The evidence strongly rejects Model 1 and Hypothesis 1.1, which predicted that after *Grayned*, preference-based behavior would be enhanced in cases granted intermediate scrutiny (content-neutral regulations) relative to the other two categories.

Overall, the results reveal a compelling and previously unappreciated role of a variety of legal considerations in Supreme Court decision making. In addition to their role as a direct effect on case outcomes, which previous scholarship (e.g., Richards and Kritzer 2002) has focused on, jurisprudential factors (as a variety of legal considerations) are also capable of exhibiting a second path of influence—regulating the room preferences have operate. Importantly, as a key part of the heterogeneity framework put

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forth by this dissertation, legal considerations govern the magnitude of preference-based behavior on the Court. I have focused on one variety of legal considerations— jurisprudential factors dictated by a jurisprudential regime—but the general framework for these multiple paths of influence (both on the case outcome and on the preference-behavior relationship) could be applied to other varieties of legal considerations as well.

CONCLUSION

This chapter began by posing perhaps *the* fundamental question in the study of Supreme Court decision making: Does law influence Supreme Court decision making, and if so, how? Perspectives across the law-ideology spectrum suggest various alternative explanations ranging from a null effect of legal considerations (Spaeth and Segal 1999) to a mechanical jurisprudence view where legal considerations are completely influential and policy preferences are completely suppressed. In between these extremes fall "hybrid models," which suggest that law and policy preferences exhibit concurrent effects on the Court's outcomes. Aside from this "direct effects" role, I have highlighted that legal considerations can also *moderate*, or shape the magnitude of, the impact of policy preferences on justices' behavior. In addition to examining how law and policy preferences concurrently affect judicial choice, this view highlights how law and policy preferences *interact* to produce judicial outcomes.

Combining jurisprudential regimes theory with my heterogeneity in decision making approach, I have posited a theoretical framework that suggests how a jurisprudential regime shapes preference-based behavior. The legal framework created by a jurisprudential regime regulates the room preferences have to operate by creating

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conditions that either enhance or attenuate preference-based behavior. Figures 5.3 and 5.4 posited two potential models for how a levels-of-scrutiny framework, like that created by the *Grayned* regime in free expression law, regulates the room preferences have to operate and thus, the magnitude of preference-based behavior. Using an innovative multilevel modeling framework that provides unique opportunities for modeling Supreme Court decision making, I have presented MCMC estimates from three-level random coefficient models showing that the *Grayned* regime significantly shaped preference-based behavior in a manner consistent with Model 2 (from Figure 5.4) and Hypotheses 1.2 and 2.2. Moreover, a secondary goal of the analysis was to ascertain the direct effects of these jurisprudential factors on case outcomes, which was the crux of the Richards and Kritzer (2002) analysis. On the whole, my findings for the direct effects largely mirror Richards and Kritzer, suggesting that the propensity for liberal case outcomes across jurisprudential categories was significantly altered by the *Grayned* regime.

Overall, then, the theoretical framework, which incorporates one variety of legal considerations into my heterogeneity framework, and the empirical evidence reveal a heretofore underappreciated mechanism of legal influence. In short, the law exhibits an influence on the justices' decision making, but it is a more nuanced and complex influence that cannot be stated in black-and-white terms. This underscores the value of the heterogeneity in decision making approach, which recognizes that *systematic variation* exists in the magnitude of preference-based behavior that can be explained theoretically and tested empirically. Legal considerations are factors that explain a share of this variation, and a jurisprudential regime specifies the conditions under which factors either enhance or attenuate preference-based behavior. The theoretical framework, then,

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holds great promise for investigating how regimes shape preference-based behavior in issue areas beyond the free expression area examined here. Finally, while this chapter has focused on the precedent variety of legal considerations, the framework could also be applied to the other two varieties of legal influence, i.e., plain meaning and original intent.

CHAPTER 6

CONCLUSION

In Chapter 1, I discussed the general perspectives on Supreme Court decision making and argued that most of what we know about Supreme Court decision making is encapsulated within the three schools of thought present in the literature: the attitudinal, legal, and strategic models. Most central to what we know is that, in accord with the attitudinal model, the choices justices make are strongly influenced by their personal policy preferences. In Chapter 1, I also discussed what we *do not* know about Supreme Court decision making, namely, whether and to what degree conditions exist that strengthen or weaken the relationship between justices' policy preferences and justices' choices. My dissertation has sought to provide a systematic analysis of this general issue by thinking of the impact of preferences on justices' choices as a process to be explained theoretically and tested empirically. I have argued and shown that factors associated with both the attitude strength and accountability mechanisms systematically explain variation, or *heterogeneity*, in the preference-behavior relationship. Thus, the dissertation has attempted to fill a significant gap that has existed in our knowledge of Supreme Court decision making.

In this concluding chapter of the dissertation, I attempt to achieve three general tasks. First, I summarize the principal findings from Chapters 3, 4, and 5. I then discuss the implications of those findings for both future theoretical and empirical research on Supreme Court decision making and beyond. Finally, I present a discussion of what I believe future research can do to enrich further our understanding of the Supreme Court decision making.

SUMMARY OF FINDINGS

In Chapter 2, I developed a theory positing that two mechanisms—*attitude strength* and *accountability*—explain variation in preference-based behavior. I hypothesized that (1) situational factors associated with the Court's immediate environment, (2) external strategic considerations, and (3) legal considerations will explain this variation in preference-based behavior. The theory has offered a systematic perspective for how situational factors *interact* with policy preferences to produce outcomes. Moreover, by incorporating these latter two factors, the theoretical framework has engaged all three of the principal theories of judicial decision making.

Chapters 3, 4, and 5 specified quantitative empirical tests designed to assess the effects of each of the three sets of factors listed above. I argued that a multilevel (hierarchical) modeling framework is well-qualified to test the hypotheses associated with the dissertation's theoretical framework. By specifying the levels of analysis present in Supreme Court decision making (choices, cases, and years) and by specifying random coefficient models, the framework has provided an opportunity to test explicitly how higher-level situational factors—the factors that are hypothesized to moderate the impact

of preferences—explain variation in lower-level relationships, in this case, the relationship between policy preferences and justices' choices. Importantly, the multilevel modeling framework maps the theoretical model onto a statistical specification with a high degree of congruence, thus having allowed for explicit tests of the hypotheses.

Chapter 3

In Chapter 3, I examined how six case-level factors within the Court's immediate environment have shaped preference-based behavior for portions of the Warren (1962-1968 terms), Burger (1975-1985 terms), and Rehnquist Courts (1994-2004 terms). The chapter offered empirical tests of Hypotheses 1-6. Factors associated with the attitude strength mechanism included salience, complexity, and issue familiarity. Factors associated with the accountability mechanism included the interest group environment, U.S. participation via the Office of the Solicitor General, and statutory versus non-statutory cases. The analysis treated justices' civil liberties votes as a two-level hierarchy—*justices' choices* nested within *cases*—to test whether these hypothesized case-level factors explain variation in the impact of policy preferences on choices.

Table 3.5 in Chapter 3 summarized the results of the primary analyses and revealed the extent to which each hypothesis received support across the three Court eras. The case complexity hypothesis was uniformly rejected all three Court eras, but the issue familiarity hypothesis received uniform support across all three Court eras. The salience hypothesis comes close to attaining uniform support across all three Court eras. In Chapter 3, I focused a great deal of attention on the nuanced effect of salience on the preference-behavior relationship. The effect of salience was significant in the Burger and

Rehnquist Courts, and approached significance for the Warren Court analysis. The results revealed that salience enhanced preference-based behavior in general, but the asymmetric enhancement pattern of influence suggested a more nuanced effect of salience. I speculated that salience may work via different mechanisms across different types of justices, suggesting that while salience may have operated via an attitude strength mechanism for liberals, it may have operated via an *accountability* mechanism for moderates and moderate conservatives. More specifically, the findings could be consistent with a "Greenhouse Effect," whereby in salient cases in particular, susceptible justices' (O'Connor, Kennedy, Blackmun, Stewart) voting behavior might reflect their desire for praise from the media, which Sowell (1994) suggests exerts left-leaning pressures on justices. This is a topic that requires more examination by future research.

Regarding the accountability factors, the information environment hypothesis received no support across all three eras, while the statutory versus non-statutory hypothesis received uniform support across all three Court eras. The latter suggests that preference-based behavior was consistently lower in statutory compared to non-statutory cases. U.S. participation, as a direct party and amicus curiae, exhibited the most inconsistent findings across the three Court eras. For the Rehnquist Court period, as expected, both modes of U.S. participation attenuated preference-based behavior and both exhibited an asymmetric attenuation pattern of influence. These same patterns did not hold for the Warren and Burger analyses. For both the Warren and Burger periods, direct party participation had no effect on preference-based behavior, and for the Burger era, amicus curiae participation *enhanced* preference-based behavior. These conflicting findings led me to question whether there were some conditions under which U.S.

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participation as either a direct party or amicus curiae affected the preference-behavior relationship. Results from auxiliary analyses of the Burger and Rehnquist eras revealed that the effects of U.S. participation were, to a degree, sensitive to (1) the ideological position taken by the Solicitor General as amicus curiae and (2) the political party of the President who appointed the Solicitor General.

By systematically examining case-level conditions within the Court's immediate environment that strengthen or weaken the impact of policy preferences on the choices justices make, Chapter 3 has underscored the idea that the preference-behavior relationship on the Court is shaped by the varying situations and conditions that confront the justices from case to case.

Chapter 4

Chapter 4 examined whether two contextual-level factors associated with strategic perspectives—public opinion and the preferences of Congress and the President—have explained variation in preference-based behavior over time. The chapter provided empirical tests of Hypotheses 7 and 8. The empirical analysis employed a three-level hierarchical structure—*justices' choices* nested within *cases* nested within *years*. While the primary goal of this chapter was to analyze the effects of external strategic considerations on the preference-behavior relationship, a secondary goal of the analysis was to examine the direct effects of these factors on Court outcomes. The findings have offered new ways of thinking about how external strategic considerations influence the Court.

The results provided evidence directly contradicting Hypothesis 7. While consensus in public mood exhibited an expected direct effect on Court outcomes, it *enhanced*, instead of attenuated, the magnitude of preference-based behavior. I provided some speculation in Chapter 4 regarding this unexpected effect. Some evidence existed for Hypothesis 8a, regarding the effect of ideological consensus *within* Congress on the preference-behavior relationship. Congressional consensus, regardless of the ideological direction of the consensus, attenuated preference-based behavior. And when congressional consensus was distinguished by its liberal versus conservative direction, the assessment of Hypothesis 8a was modified. Congressional consensus in the liberal direction exhibited a null effect on preference-based behavior, while conservative consensus exhibited a significant impact on preference-based behavior. The findings also indicated that in addition to constraining preference-based behavior, conservative congressional consensus also exhibited an effect on Court outputs.

With respect to Hypothesis 8b, which posited the influence of consensus *between* Congress and the President, results employing the party-based (based on divided versus unified government) measure revealed no evidence supporting this hypothesis. However, some evidence emerged for the direct effects of the party-based variables on Court outputs. The model employing ideological measures, though, provided some evidence supporting Hypothesis 8b. The results suggested that when the President has been ideologically aligned with Congress, congressional consensus has constrained preference-based behavior. However, when the President has not been aligned with Congress, congressional consensus has exhibited a null impact on preference-based behavior.

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Finally, relevant to claims by various strategic perspectives, Chapter 4 analyzed whether the effects discussed above differed between statutory and constitutional cases. On the whole, no substantively significant differences between these two sets of cases emerged, suggesting that external strategic considerations do not have a differential effect on the Court depending on whether the Court is engaged in constitutional versus statutory decision making.

Chapter 5

Chapter 5 empirically assessed whether legal considerations were capable of shaping the magnitude of preference-based behavior. I combined Richards and Kritzer's (2002) jurisprudential regimes concept with my heterogeneity framework to provide testable hypotheses regarding how a jurisprudential regime regulates the room policy preferences have to operate by creating conditions that either enhance or attenuate preference-based behavior. I analyzed data from the free expression issue area (1953-1997 terms) and employed a three-level hierarchical structure—*justices' choices* nested within *cases* nested within *years*—to test the hypotheses. Moreover, a secondary goal of the analysis was to examine the direct effects of jurisprudential factors on case outcomes.

The evidence from Chapter 5 strongly supported the view that the *Grayned* content-neutrality regime shaped the magnitude of preference-based behavior in the free expression issue area in a manner consistent with Model 2 in Figure 5.4 and Hypotheses 1.2 and 2.2. The levels-of-scrutiny framework had the effect of significantly constraining preference-based behavior in cases *Grayned* accorded strict scrutiny (content-based regulations) in comparison to cases accorded rational basis and intermediate scrutiny. I

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produced striking evidence revealing that *Grayned* transformed what was previously an *enhancement* effect induced by content-based regulations into the *attenuation*, or constraining, effect described above.

Overall, the results demonstrated a compelling role of a variety of legal considerations in Supreme Court decision making. In addition to their role as a direct effect on case outcomes, jurisprudential factors were shown to be capable of exhibiting a second path of influence—*regulating the room preferences have to operate*. Legal considerations, then, are a key part of the dissertation's heterogeneity framework; they govern the magnitude of preference-based behavior on the Court. Chapter 5 also discussed that while I focused on one variety of legal considerations—jurisprudential factors dictated by a jurisprudential regime—the heterogeneity framework could be applied to other varieties of legal considerations as well.

IMPLICATIONS

The theory and findings presented in this dissertation have implications for what we know about how justices make decisions and our understanding of the principal theories of Supreme Court decision making. I discussed how most scholarship posits that policy preferences exhibit a uniform impact on behavior across all situations in which justices make decisions. In response to this assumption, one of the primary motivations for this dissertation centered on the notion that understanding of the conditions under which certain relationships hold—in my case, the relationship between policy preferences and justices' choices—serves the broader scientific goal of expanding our knowledge about how and why justices decide cases in various ways. By presenting a theoretical

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framework and producing substantively interesting empirical results relating to these conditions that enhance or attenuate preference-based behavior, I believe I have offered a significant gain in our level of knowledge pertaining to Supreme Court decision making.

Second, and related to the first point, the dissertation has represented a departure from the literature on Supreme Court decision making by highlighting the importance of *context* and *situational heterogeneity*. I have argued and shown that certain cases and contexts provide justices with different situations, and certain situational factors *interact* with policy preferences to produce legal outcomes. This focus on contextual decision making has provided a more enriched and nuanced portrayal of how justices go about deciding cases.

Third, my theoretical perspective centering on heterogeneity in preference-based behavior provides a significant addition to existing theories of Supreme Court decision making by recognizing that policy preferences are indeed influential, but importantly, the degree to which they are influential is a function of the situations that confront the justices across cases and contexts. The concept of situational heterogeneity and how it shapes preference-based behavior is not explicit in any of the principal theories of Supreme Court decision making. Moreover, no study has previously sought to undertake a comprehensive theoretical and empirical examination of heterogeneity in the preference-behavior relationship, even in the face of suggestions for such an inquiry (Baum 1997; Gibson 1991).

Fourth, the dissertation's general framework of heterogeneity in decision processes is applicable to studies of other courts, including lower federal courts in the U.S., state courts, and courts around the world. Studying the conditions under which

ideological preferences influence judges' decisions is not only of interest to the U.S. Supreme Court, of course. The heterogeneity framework is also applicable to other forms of decision making within American politics, including congressional decision making, voting behavior, and citizen opinion formation. In each of these areas, heterogeneity in the ingredients of decision making has only been examined to a limited degree. For instance, for congressional decision making, does the impact of party on members' votes vary across bills and contexts? In voting behavior literature, do certain factors shape the magnitude of the effects of factors in a vote choice model? Regardless of substantive area, then, the dissertation has provided both a theoretical and empirical framework for confronting inquiries of heterogeneity in decision processes.

On the empirical and methodological front, future quantitative empirical work on Supreme Court decision making should take advantage of the opportunities the multilevel modeling framework offers. Throughout the dissertation, I have emphasized that this framework, via the specification of random coefficient models, maps the theoretical propositions of my heterogeneity framework onto a statistical model with a very high degree of congruence. First and foremost, the framework offers an opportunity to model how higher-level variables explain variation in lower-level effects. The higher-level factors are my situational factors, associated with both cases (level two) and time (level three), that are hypothesized to explain variation in the relationship between justices' policy preferences and justices' choices (the level-1 effect).

Second, the framework allows one to account for *unobserved heterogeneity* in the outcome (the propensity of a liberal outcome) at each of the higher levels posited. In the Chapter 3 models, which employed two-level hierarchical models, I was able to account

for unobserved case-level heterogeneity in the propensity of liberal outcomes. As many scholars have underscored the importance of controlling for variation in case facts or stimuli (Segal 1984; George and Epstein 1992; Richards and Kritzer 2002), my random intercept specification represents an alternative way to account for shifting case stimuli. This serves the important end of increasing one's confidence in the inferences about the core parameters of substantive interest. Chapters 4 and 5 presented three-level models that, in addition to specifying cases as level-2 units, posited years (or the Court's terms) as level-3 units. This specification is particularly important for analyses covering long time spans, like those in Chapter 4 (1953-2003) and Chapter 5 (1953-1997). In addition to accounting for unobserved case-level heterogeneity in outcomes, the three-level specification accounts for unobserved year-level heterogeneity that may affect case outcomes. I posited in Chapters 4 and 5 that accounting for this year-level heterogeneity is one way to control for membership change on the Court. Membership change can be thought of as a year-level factor that may explain variation in the Court's outputs. Accounting for this year-level heterogeneity in outcomes, then, increases confidence in the core findings.

Overall, then, I contend that future scholarship analyzing data structures similar to those examined in this dissertation should take advantage of these opportunities that the multilevel modeling framework provides. Moreover, the consequences of *not* incorporating the multilevel framework into these types of analyses could come in the form of mistaken inferences about Supreme Court decision making.

FUTURE RESEARCH

In this final section, I discuss my dissertation's implications for future research on Supreme Court decision making. While I have attempted to provide a systematic analysis of heterogeneity in Supreme Court decision making, a plethora of interesting topics and hypotheses remain open for inquiry.

First, as I alluded to briefly in Chapters 1 and 3, my dissertation focuses solely on situational heterogeneity and does not directly confront the interesting area of individual heterogeneity. An examination of the latter type would entail analyzing how justices differentially employ ideology or other ingredients of decision making. For instance, is Justice Scalia more ideologically-driven than Justice Ginsburg, or vice-versa? Pushing this one step further, it would be interesting to test how justices place different weights on different types of considerations in their decision processes. For instance, are moderate justices more likely to use legal considerations in decision making? Are conservative justices more likely to engage in judicial restraint than liberal justices, as some politicians continue to suggest? Spaeth and Segal (1999) produce some interesting evidence regarding individual heterogeneity by examining the degree to which justices are "preferentialist" or "precedentialist" in their voting on progeny cases related to a landmark precedent. Moreover, my justice-specific, post-estimation results that I presented for the three Court eras in Chapter 3 indirectly confront this notion of individual heterogeneity, particularly by examining which justices' voting propensies were most altered by certain case-level factors.

Another area for future research concerns the examination of various issue areas. In this dissertation, I examined civil liberties cases only, which is in accord with what has

become a standard practice in the literature on Supreme Court decision making. For my

dissertation, analyzing these sets of cases was justifiable for a number of reasons. First,

this general issue area has consumed more than 50% of the Court's docket in the last half

decade. Second, the civil liberties agenda is arguably the most important to the justices,

compared to, for instance, economics cases (Pacelle 1991). Third, the civil liberties

agenda is one where ideological cleavages are clear-cut and therefore represents a rich

context for studying heterogeneity in preference-based behavior. That said, the Court

renders rulings on significant legal questions in other issue areas, too, such as economics,

federalism, and judicial power. Studying heterogeneity in these other areas should be of

paramount interest to scholars of Supreme Court decision making.

Third, one can think of several of other hypotheses that could be posited within

my theoretical framework. While I discussed strategic perspectives of decision making

throughout the dissertation and incorporated external strategic considerations into my

theoretical framework, I did not incorporate *internal*, or intra-Court, strategic factors (a la

Maltzman et al. 2000; Murphy 1964). That is, do elements of the Court's internal

strategic context—e.g., regarding accommodation, bargaining, opinion assignment—

shape the magnitude of preference-based behavior? One internal strategic factor that

could be readily incorporated into my heterogeneity framework centers on the degree of

bargaining and accommodation that occurs in a given case (e.g., Wahlbeck et al. 1998).

One could think of accommodation that occurs between opinion assignment and the final

opinion as a consensus-building process. If the justices are building consensus, it could

result in the reduction of preference-based behavior. This is just one example of how

internal strategic considerations might shape the magnitude of preference-based behavior,

and other elements related to Maltzman, Spriggs, and Wahlbeck's (2000) work could be incorporated as well.

Finally, I end this section by encouraging scholars to continue thinking of better research designs and empirical analyses, of both the quantitative and qualitative varieties, capable of increasing our knowledge of what influences justices' decision-making processes. By employing my multilevel modeling framework, I believe I have provided a crucial step in this search for better designs for studying Supreme Court decision making. But improvements can always be made, of course. An example is my discussion in the conclusion of Chapter 4 surrounding my level of confidence that I am actually tapping the genuine influence of public opinion and the preferences of the other branches. Studies of public opinion and the Supreme Court (Flemming and Wood 1997; McGuire and Stimson 2004) claim to have found evidence of a *direct effect* of public opinion on Supreme Court outputs, yet their designs are largely silent about explicitly ruling out alternative explanations that may render this connection spurious.

The primary alternative explanation, as I discussed in Chapter 4, surrounds Norpoth and Segal's (1994) concern that these effects are highly indirect and are instead a function of the process by which the President and Senate place people on the Supreme Court. While my multilevel modeling framework is able to allay these concerns to a certain extent, I cannot state with complete confidence that my findings rule out Norpoth and Segal's concern. Of course, my primary motivation for Chapter 4 is to examine the extent to which external strategic considerations shape the magnitude of the preference-behavior relationship, so the Norpoth-Segal concern is not as operative as it is in the analysis of the direct effects of these factors on Court outputs. Regardless, future work

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should look to finding better methods and designs for uncovering the genuine effects of factors (both external strategic considerations and beyond) on the Court's outputs.

CONCLUSION

Inquiries into how Supreme Court justices make decisions have provided a vibrant literature filled with various theoretical perspectives and empirical results. My hope is that my dissertation has contributed to this literature and that I have made some progress toward fulfilling the goal of the dissertation, which was to identify and explain the extent to which the impact of justices' policy preferences on their choices varies across different situations. Further related inquiries can go a long way toward providing a means of increasing our knowledge of Supreme Court decision making. The theory and findings contained in this dissertation offer an important contribution to the literature on Supreme Court decision making by underscoring the notion that the preference-behavior relationship on the Court is shaped by the varying situations that confront the justices from case to case and year to year.

APPENDIX A

MEASURING JUSTICES' POLICY PREFERENCES

In measuring policy preferences for various types of analyses and data types, like those conducted across Chapters 3, 4, and 5 in this dissertation, researchers should look to three central qualities. First, it is crucial to use a *valid measure* that *accurately orders* the justices from liberal to conservative. Recall that a policy preferences coefficient is interpreted as how increasing levels of liberalism (conservatism) in policy preferences across justices affect the propensity for justices to cast a liberal (conservative) vote. Thus, a measure that accurately taps, for instance*, how much more liberal* Justice A is than Justices B and C is a necessity for this analysis.

Second, measures of policy preferences should be *independent* of the behavior they are predicting. This invokes the standard "tautological" criticism of some measures that use vote-based measures of preferences and then use those measures to predict the same votes. Congressional scholars have been less worried about this tautological criticism than judicial scholars. Numerous studies of legislative behavior and organization use vote-based measures (e.g., a member's *average* ADA or NOMINATE score) to predict votes.

Third, for analyses that cover relatively long time spans, it is necessary to use a measure that captures *over-time comparability within and between justices*, that is, how to gauge accurately both inter-justice and intra-justice comparability in policy preferences (e.g., Baum 1988, 1989; Martin and Quinn 2002). Intra-justice comparability accounts for potential *changes in justices' policy positions over time* (Epstein et al. 1998). Inter-justice comparability accounts for comparing preferences between justices who served in different eras (e.g., Martin and Quinn 2002; Baum 1989).

Three measures of policy preferences are considered and/or employed throughout this dissertation. The first is the "lagged behavior" measure that I use in Chapter 3; this measure is based on the proportion of liberal votes a justice cast in the previous term, and thus represents a justice's average propensity to cast a liberal vote based on his or her most recent behavior. A second measure is the widely-used Segal-Cover scores, which are based on pre-nomination editorials from four major newspapers assessing the projected level of liberalism or conservatism a justice will evince once on the Supreme Court. The third measure, which is discussed and employed in Chapters 4 and 5, is the Martin and Quinn (2002) scores, which are estimates of justices' policy preferences from a Bayesian item response measurement model.

CHAPTER 3

In Chapter 3, I analyze three Court eras with little to no membership change, so the issue of inter-justice comparability highlighted in the third quality above is not as operative as it is for Chapters 4 and 5. Segal-Cover (1989; Segal et al. 1995) scores, based on pre-nomination editorials from four major newspapers, maximize the second quality discussed above, that is, they are independent of the justices' behavior once on the Court. However, the inexactness of Segal-Cover scores, pertaining to first quality, is a limitation on their value for the purposes of the analyses conducted in Chapter 3. To illustrate how Segal-Cover scores perform with respect to quality 1, I compare Segal-Cover scores with the lagged behavior measure for the 1994-2004 terms of the Rehnquist

Justice	Segal-Cover Score	Justice	Transformed Lagged Behavior Score (Avg. from 1994-04)	Justice	Transformed Martin-Quinn Score (Avg. From 1994-04)
Scalia	-1.00	Thomas	-0.64	Thomas	-0.65
Rehnquist	-0.91	Scalia	-0.57	Scalia	-0.57
Thomas	-0.68	Rehnquist	-0.50	Rehnquist	-0.29
Stevens	-0.50	Kennedy	-0.22	Kennedy	-0.15
Souter	-0.34	O'Connor	-0.17	O'Connor	-0.11
Kennedy	-0.27	Breyer	0.39	Breyer	0.18
O'Connor	-0.17	Ginsburg	0.50	Souter	0.21
Breyer	-0.05	Souter	0.53	Ginsburg	0.25
Ginsburg	0.36	Stevens	0.70	Stevens	0.54

Note: Each measure orders justices from most conservative to most liberal

Table A.1. Comparing Segal-Cover, Lagged Behavior, and Martin-Quinn Scores for the 1994-2004 Terms of the Rehnquist Court

Court. Table A.1 presents a side-by-side comparison of Segal-Cover scores, the lagged behavior measure (averaged over the 1994-2004 terms), and also Martin-Quinn scores (averaged over the 1994-2004 terms),which I will discuss with respect to Chapters 4 and 5. The primary problem with the Segal-Cover scores for the 1994-2004 terms is that they do not account for over-time changes in policy preferences (quality 3) for some justices (namely Stevens and Souter), which has strong implications for the valid ordering of justices from liberal to conservative (quality 1). Segal and Cover (1989) argue that their measure has high correlational validity, but this is based on a correlation between the measure and justices' percent liberal measures *aggregated over their entire careers*. That is, it is an assessment of validity at a different level of analysis (the individual level) from the one I am examining.

As seen in Table A.1, according to Segal-Cover scores, Justice Stevens is the fourth most *conservative* justice, which clearly does not account for Stevens's ideological change he has experienced over his career. Moreover, Justice Souter, who has also undergone ideological change in the liberal direction, is coded by Segal-Cover scores as the median justice during the 1994-2004 period, despite the fact that he is widely considered to be a solid member of the liberal group of four (along with Justices Breyer, Ginsburg, and Stevens). If I were to use Segal-Cover scores in my vote choice model, I would project that Justices Stevens and Souter are more likely to cast *conservative* votes in a given case than Justices Kennedy and O'Connor. Thus, from a face validity standpoint, the lagged behavior measure ranks higher than Segal-Cover scores in both

qualities 1 and 3. Moreover, the lagged behavior measure performs adequately well according to quality 2. Based on behavior in the *previous* term, the measure taps a justice's *average propensity* to cast a liberal vote; it is a justice's *expected value* of liberalism *in comparison to his/her colleagues* for a given term. Moreover, the lagged behavior measure is very highly correlated with Martin-Quinn scores, and both measures classify justices from the 1994-2004 terms in almost the exact same way (Ginsburg and Souter are reversed between the two measures, though they are very close to each other for both).

CHAPTERS 4 AND 5

Chapters 4 and 5 each analyze longer time spans than the Chapter 3 analyses, so the third quality above (in addition to the others), particularly inter-justice comparability, is especially key in deciding which measure of justices' policy preferences to employ. Moreover, aside from the three qualities discussed above, employing the lagged behavior measure in these chapters would mean there would be a substantial amount of missing data, since the lagged behavior measure would exclude choices associated with justices serving their first terms. So the choice is between Martin-Quinn scores and Segal-Cover scores, as alluded to in Chapters 4 and 5.

Again, while Segal-Cover scores rank higher in quality 2, Martin-Quinn scores rank higher in both qualities 1 and 3. As demonstrated in Table A.1, Martin-Quinn scores outrank Segal-Cover scores in validly ordering the justices within eras with little to no membership change. In addition, unlike Segal-Cover scores, Martin-Quinn scores allow for justices' preferences to change over time, and importantly, they allow for comparisons of policy positions for justices who never served with each other. Martin-Quinn scores are superior to Segal-Cover scores, then, with respect to qualities 1 and 3.

The big advantage Segal-Cover scores have over Martin-Quinn scores is quality 2. That is, Segal-Cover scores are completely independent of justices' behavior on the Court, while Martin and Quinn's item response model relies on votes and item response theory to generate the estimates of justices' ideal points that produced those votes. While Martin-Quinn scores do not escape the independence assumption, in an analysis where justices' *choices* are level-1 units of analysis, the measure seems reasonable, especially when assessed using all three criteria outlined above. That is, Martin-Quinn scores tap a justice's *average propensity* (or central tendency) to cast a liberal vote; it is a justice's *expected value* of liberalism *in comparison to his/her colleagues* for a given term. Moreover, in an extensive analysis, Martin and Quinn (2005) contend that the tautological issue (related to quality 2) actually has little practical consequence when Martin-Quinn scores are used as an independent variable in a choice-level analysis, particularly when analyzing justices' votes within an issue area.

APPENDIX B

DESCRIPTIVE STATISTICS FOR EMPIRICAL ANALYSES

CHAPTER 3

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences (transformed)	4307	0.000	0.534	-0.966	1.034
Policy Preferences (non-transformed)	4307	0.465	0.201	0.103	0.854

		Uncentered			
Case-Level (Level-2) Variables	J	Mean	SD	Min	Max
Salience	485	0.219	0.414	0	1
Complexity	485	0.115	0.247	0	1
ln(Issue Experience)	485	3.600	0.976	0	5.215
Information Environment	485	0.527	0.092	0	1
U.S. Party	485	0.365	0.482	0	1
U.S. Amicus	485	0.371	0.484	0	1
Statutory	485	0.421	0.494	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	J	Mean	SD	Min	Max
Salience	485	0.000	0.414	-0.218	0.782
Complexity	485	0.000	0.247	-0.116	0.884
ln(Issue Experience)	485	0.000	0.976	-3.599	1.616
Information Environment	485	0.000	0.092	-0.527	0.473
U.S. Party	485	0.000	0.482	-0.365	0.635
U.S. Amicus	485	0.000	0.484	-0.371	0.629
Statutory	485	0.000	0.494	-0.420	0.580

Table B.1. Descriptive Statistics for Rehnquist Court Data

Number of Legal Provisions	Freq.	Percent	Number of Issues	Freq.	Percent
1	396	81.65	1	462	95.26
2	77	15.88	2	23	4.74
3	9	1.86	Total	485	100.00
4	1	0.21			
5	1	0.21			
6	1	0.21			
Total	485	100.00			

Table B.2. Frequency Distributions for Complexity Indicators, Rehnquist Court

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences (transformed)	8183	0.000	0.531	-0.999	1.001
Policy Preferences (non-transformed)	8183	0.479	0.202	0.099	0.861

		Uncentered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Salience	945	0.168	0.374	0	1
Complexity	945	0.175	0.291	0	1
ln(Issue Experience)	945	2.382	0.958	0	4.060
Information Environment	945	0.257	0.077	0	1
U.S. Party	945	0.343	0.475	0	1
U.S. Amicus	945	0.216	0.412	0	1
Statutory	945	0.301	0.459	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Salience	945	0.000	0.374	-0.168	0.832
Complexity	945	0.000	0.291	-0.175	0.825
ln(Issue Experience)	945	0.000	0.958	-2.383	1.678
Information Environment	945	0.000	0.077	-0.257	0.743
U.S. Party	945	0.000	0.475	-0.341	0.659
U.S. Amicus	945	0.000	0.412	-0.218	0.782
Statutory	945	0.000	0.459	-0.301	0.699

Table B.3. Descriptive Statistics for Burger Court Data

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences (transformed)	3242	0.000	0.538	-1.130	0.870
Policy Preferences (non-transformed)	3242	0.698	0.176	0.327	0.983

		Uncentered			
Case-Level (Level-2) Variables	J	Mean	SD	Min	Max
Salience	389	0.355	0.479	0	1
Complexity	389	0.234	0.345	0	1
ln(Issue Experience)	389	1.885	1.066	0	3.761
Information Environment	389	0.589	0.078	0	1
U.S. Party	389	0.314	0.465	0	1
U.S. Amicus	389	0.136	0.343	0	1
Statutory	389	0.239	0.427	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	J	Mean	SD	Min	Max
Salience	389	0.000	0.479	-0.354	0.646
Complexity	389	0.000	0.345	-0.232	0.768
ln(Issue Experience)	389	0.000	1.066	-1.879	1.882
Information Environment	389	0.000	0.078	-0.589	0.411
U.S. Party	389	0.000	0.465	-0.310	0.690
U.S. Amicus	389	0.000	0.343	-0.138	0.862
Statutory	389	0.000	0.427	-0.240	0.760

Table B.4. Descriptive Statistics for Warren Court Data

Level-1 Variable	N	Mean	SD	Min	Max
			All Cases		
Policy Preferences	28,190	0.000	0.406	-1.180	0.820
			Statutory Cases		
Policy Preferences	12,178	0.000	0.401	-1.183	0.817
			Constitutional Cases		
Policy Preferences	16,003	0.000	0.410	-1.179	0.821
			Uncentered		
Year-Level (Level-3) Variables	**T**	**Mean**	**SD**	**Min**	**Max**
Public Mood Consensus	51	0.458	0.241	0	1
Democratic Govt.	51	0.275	0.451	0	1
Republican Govt.	51	0.059	0.238	0	1
Congressional Consensus	51	0.503	0.271	0	1
Liberal Congress	51	0.706	0.460	0	1
Presidential Alignment	51	0.451	0.503	0	1
			Mean-Centered		
Year-Level (Level-3) Variables	**T**	**Mean**	**SD**	**Min**	**Max**
Public Mood Consensus	51	0.000	0.241	-0.458	0.542
Democratic Govt.	51	0.000	0.451	-0.275	0.725
Republican Govt.	51	0.000	0.238	-0.059	0.941
Congressional Consensus	51	0.000	0.271	-0.503	0.497
Liberal Congress	51	0.000	0.460	-0.706	0.294
Presidential Alignment	51	0.000	0.503	-0.451	0.549

Table B.5. Descriptive Statistics for Civil Liberties Data, 1953-2003 Terms

CHAPTER 5

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences	1,736	0.000	0.490	-0.960	1.040

		Uncentered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Content-Based	199	0.719	0.451	0	1
Content-Neutral	199	0.040	0.197	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Content-Based	199	0.000	0.451	-0.719	0.281
Content-Neutral	199	0.000	0.197	-0.040	0.960

Table B.6. Descriptive Statistics for Free Expression Data, Pre-*Grayned*

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences	2,598	0.000	0.495	-0.937	1.063

		Uncentered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Content-Based	295	0.492	0.501	0	1
Content-Neutral	295	0.092	0.289	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Content-Based	295	0.000	0.501	-0.492	0.508
Content-Neutral	295	0.000	0.289	-0.092	0.908

Table B.7. Descriptive Statistics for Free Expression Data, Post-*Grayned*

Level-1 Variable	N	Mean	SD	Min	Max
Policy Preferences	4,334	0.000	0.464	-0.990	1.010

		Uncentered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Grayned	494	0.597	0.491	0	1
Content-Based	494	0.583	0.494	0	1
Content-Neutral	494	0.071	0.257	0	1

		Mean-Centered			
Case-Level (Level-2) Variables	**J**	**Mean**	**SD**	**Min**	**Max**
Grayned	494	0.000	0.491	-0.597	0.403
Content-Based	494	0.000	0.494	-0.583	0.417
Content-Neutral	494	0.000	0.257	-0.071	0.929

Table B.8. Descriptive Statistics for Free Expression Data, All Cases (1953-1997 Terms)

APPENDIX C

ADDITIONAL MODELS FOR CHAPTER 4

	Posterior Summaries		
	Mean	**S.D.**	**90% Bayesian Credibility Interval**
Estimates from γ_{00t} Equation (Effects on Outcome):			
Intercept, π_{000}	0.27	0.05	[0.18, 0.36]*
Public Mood Consensus, π_{001}	0.76	0.24	[0.38, 1.17]*
Democratic Govt., π_{002}	0.00	0.12	[-0.19, 0.20]
Republican Govt., π_{003}	0.02	0.27	[-0.42, 0.48]
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	1.79	0.08	[1.66, 1.92]*
Public Mood Consensus, π_{101}	0.23	0.31	[-0.27, 0.74]
Democratic Govt., π_{102}	-0.37	0.18	[-0.67, -0.08]*
Republican Govt., π_{103}	0.40	0.36	[-0.18, 0.98]
Level-2 Variance-Covariance Components			
var(u_{0jt})	5.92	0.26	[5.50, 6.35]
var(u_{1jt})	0.11	0.04	[0.06, 0.19]
cov(u_{0jt}, u_{1jt})	-0.71	0.12	[-0.94, -0.55]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.02	0.02	[0.00, 0.06]
var(r_{10t})	0.19	0.06	[0.12, 0.30]
cov(r_{00t}, r_{10t})	0.00	0.02	[-0.04, 0.04]
	N=28,190 (choices); J=3,220 (cases); T=51 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.

\# Indicates that at least 90% of the posterior is greater than or less than zero.

Table C.1. MCMC Estimates from Three-Level Random Coefficient Model (Model 1) Using Segal-Cover Scores, All Civil Liberties Cases, 1953-2003 Terms

	Posterior Summaries		
	Mean	**S.D.**	**90% Bayesian Credibility Interval**
Estimates from γ_{00t} Equation (Effects on Outcome):			
Intercept, π_{000}	0.26	0.06	[0.17, 0.37]*
Public Mood, π_{001}	0.88	0.25	[0.45, 1.29]*
Congressional Consensus, π_{002}	0.43	0.23	[0.05, 0.80]*
Liberal Congress, π_{003}	-0.22	0.16	[-0.47, 0.05]#
President, π_{004}	-0.22	0.15	[-0.46, 0.02]#
Cong. Consensus*Lib. Cong., π_{005}	0.34	0.79	[-0.95, 1.61]
Cong. Consensus*Pres., π_{006}	0.70	0.52	[-0.15, 1.58]#
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	1.85	0.09	[1.70, 1.99]*
Public Mood, π_{101}	0.13	0.35	[-0.45, 0.71]
Congressional Consensus, π_{102}	-0.14	0.33	[-0.68, 0.40]
Liberal Congress, π_{103}	-0.39	0.23	[-0.77, -0.01]*
President, π_{104}	-0.04	0.20	[-0.37, 0.30]
Cong. Consensus*Lib. Cong., π_{105}	-0.63	1.09	[-2.44, 1.13]
Cong. Consensus*Pres., π_{106}	-0.83	0.75	[-2.06, 0.39]
Level-2 Variance-Covariance Components			
var(u_{0jt})	5.94	0.26	[5.52, 6.37]
var(u_{1jt})	0.11	0.05	[0.03, 0.19]
cov(u_{0jt}, u_{1jt})	-0.72	0.22	[-1.08, -0.36]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.02	0.02	[0.00, 0.07]
var(r_{10t})	0.22	0.08	[0.11, 0.37]
cov(r_{00t}, r_{10t})	-0.01	0.03	[-0.06, 0.03]
	N=28,190 (choices); J=3,220 (cases); T=51 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.
\# Indicates that at least 90% of the posterior is greater than or less than zero.

Table C.2. MCMC Estimates from Three-Level Random Coefficient Model (Model 2) Using Segal-Cover Scores, All Civil Liberties Cases, 1953-2003 Terms

| | Statutory Cases | | |
| | Posterior Summaries | | |
	Mean	S.D.	90% Bayesian Credibility Interval
Estimates from γ_{00t} Equation (Effects on Outcome):			
Intercept, π_{000}	0.55	0.15	[0.29, 0.78]*
Public Mood Consensus, π_{001}	1.14	0.69	[-0.03, 2.25]#
Congressional Consensus, π_{002}	-0.71	0.59	[-1.66, 0.25]
Liberal Congress, π_{003}	0.59	0.40	[-0.05, 1.25]#
Presidential Alignment, π_{004}	-0.12	0.36	[-0.75, 0.46]
Cong. Consensus*Lib. Cong., π_{005}	2.41	1.85	[-0.54, 5.53]#
Cong. Consensus*Pres. Align., π_{006}	-2.00	1.34	[-4.12, 0.19]#
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	7.04	0.29	[6.60, 7.53]*
Public Mood Consensus, π_{101}	1.85	1.04	[0.18, 3.59]*
Congressional Consensus, π_{102}	-1.33	0.91	[-2.86, 0.16]#
Liberal Congress, π_{103}	-0.32	0.65	[-1.38, 0.73]
Presidential Alignment, π_{104}	0.36	0.60	[-0.63, 1.36]
Cong. Consensus*Lib. Cong., π_{105}	4.07	2.82	[-0.48, 8.68]#
Cong. Consensus* Pres. Align., π_{106}	-0.81	2.12	[-4.24, 2.67]
Level-2 Variance-Covariance Components			
var(u_{0jt})	18.48	1.44	[16.25, 20.97]
var(u_{1jt})	23.95	2.68	[19.86, 28.59]
cov(u_{0jt}, u_{1jt})	-1.61	1.19	[-3.56, 0.33]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.11	0.14	[0.00, 0.39]
var(r_{10t})	0.42	0.45	[0.01, 1.28]
cov(r_{00t}, r_{10t})	0.06	0.13	[-0.07, 0.31]
	N=12,178 (choices); J=1,394 (cases); T=51 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.
# Indicates that at least 90% of the posterior is greater than or less than zero.

Table C.3. MCMC Results from Three-Level Random Coefficient Model (Model 2) Using Martin-Quinn Scores, Statutory Cases, 1953-2003 Terms

	Constitutional Cases		
	Posterior Summaries		
	Mean	**S.D.**	**90% Bayesian Credibility Interval**
Estimates from γ_{00t} Equation (Effects on Outcome):			
Intercept, π_{000}	0.86	0.15	[0.62, 1.10]*
Public Mood Consensus, π_{001}	2.02	0.65	[0.96, 3.07]*
Congressional Consensus, π_{002}	-1.05	0.58	[-2.00, -0.08]*
Liberal Congress, π_{003}	0.13	0.40	[-0.53, 0.79]
Presidential Alignment, π_{004}	0.18	0.36	[-0.41, 0.76]
Cong. Consensus*Lib. Cong., π_{005}	4.35	1.96	[1.14, 7.57]*
Cong. Consensus*Pres. Align., π_{006}	0.16	1.32	[-2.01, 2.31]
Estimates from γ_{10t} Equation (Cross-Level Interactions):			
Policy Preferences (Avg. Effect), π_{100}	8.74	0.31	[8.20, 9.25]*
Public Mood Consensus, π_{101}	1.85	1.05	[0.15, 3.59]*
Congressional Consensus, π_{102}	-0.99	1.00	[-2.70, 0.59]
Liberal Congress, π_{103}	0.53	0.68	[-0.60, 1.63]
Presidential Alignment, π_{104}	0.12	0.58	[-0.81, 1.08]
Cong. Consensus*Lib. Cong., π_{105}	5.71	3.19	[0.66, 11.02]*
Cong. Consensus* Pres. Align., π_{106}	-2.06	2.12	[-5.48, 1.44]
Level-2 Variance-Covariance Components			
var(u_{0jt})	12.01	0.79	[10.77, 13.35]
var(u_{1jt})	32.99	2.93	[28.42, 38.04]
cov(u_{0jt}, u_{1jt})	-0.95	0.82	[-2.31, 0.37]
Level-3 Variance-Covariance Components			
var(r_{00t})	0.46	0.21	[0.18, 0.83]
var(r_{10t})	0.49	0.48	[0.01, 1.45]
cov(r_{00t}, r_{10t})	-0.04	0.19	[-0.37, 0.25]
	N=16,003 (choices); J=1,825 (cases); T=51 (years)		

* Indicates that at least 95% of the posterior is greater than or less than zero.
\# Indicates that at least 90% of the posterior is greater than or less than zero.

Table C.4. MCMC Results from Three-Level Random Coefficient Model (Model 2) Using Martin-Quinn Scores, Constitutional Cases, 1953-2003 Terms

	Statutory Cases			Constitutional Cases		
	Posterior Summaries			Posterior Summaries		
	Mean	**S.D.**	**90% Bayesian Credibility Interval**	**Mean**	**S.D.**	**90% Bayesian Credibility Interval**
Effect of Cong. Consensus on Propensity of Liberal Outputs, Conditional On:						
Liberal Cong.	0.00	0.66	[-1.07, 1.10]	0.23	0.64	[-0.80, 1.29]
Conservative Cong.	-2.41	1.59	[-5.09, 0.16]#	-4.12	1.70	[-6.91, -1.31]*
Pres. Alignment	-1.81	1.01	[-3.49, -0.19]*	-0.96	0.98	[-2.56, 0.65]
Pres. Non-Align.	0.19	0.78	[-1.05, 1.50]	-1.12	0.78	[-2.40, 0.16]#
Effect of Cong. Consensus on Preference-Behavior Relationship, Conditional On:						
Liberal Cong.	-0.13	1.04	[-1.87, 1.54]	0.69	1.01	[-1.02, 2.31]
Conservative Cong.	-4.20	2.42	[-8.14, -0.23]*	-5.02	2.84	[-9.79, -0.51]*
Pres. Alignment	-1.78	1.62	[-4.40, 0.86]	-2.13	1.64	[-4.87, 0.53]#
Pres. Non-Align.	-0.97	1.18	[-2.91, 1.04]	-0.06	1.28	[-2.18, 2.06]

* Indicates that at least 95% of the posterior is greater than or less than zero.
\# Indicates that at least 90% of the posterior is greater than or less than zero.

Table C.5. Effects of Congressional Consensus, Conditional on Ideological Direction of Congress and Presidential Congruence, Using Martin-Quinn Scores (Model 2)

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