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2015

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UNIVERSITY OF CALIFORNIA, SAN DIEGO

Essays on Judicial Behavior Under Institutional Constraint

A dissertation submitted in partial satisfaction of the
requirements for the degree Doctor of Philosophy

in

Political Science

by

Jeremy Daniel Horowitz

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2015

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Chair

University of California, San Diego

2015

DEDICATION

I want to thank everyone who gave so generously of their time to provide advice and guidance on portions of this dissertation -- especially Gary Jacobson and Mike Bailey. Thanks also to Judges Nora Manella and Raymond Fisher, wonderful mentors and phenomenal jurists who first set me on the path to studying how and why judges do what they do.

This dissertation is dedicated to my family, with my deepest appreciation for their unwavering support. And particularly to Nora, for her steadfast love and encouragement, and to Aaron, Gabe and Zach, for making it all worthwhile. Dad's done, guys. Let's go play.

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ABSTRACT OF THE DISSERTATION

Essays on Judicial Behavior Under Institutional Constraint

by

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Doctor of Philosophy in Political Science

University of California, San Diego, 2015

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Federal judges are constrained by their need to maintain legitimacy. To this end, numerous formal and informal institutions structure how they perform their duties. Obeying these generally applicable rules allows judges to demonstrate fealty to a higher principle operating above the concerns of partisan politics. This dissertation examines how judges work within this system to pursue their preferences, sometimes using judicial tools to circumvent the constraints and sometimes using the constraints themselves to advance their goals. The first two essays examine the use of

dissents from denial of rehearing en banc (DDRs) in the federal courts of appeals. DDRs are voluntary, published, non-precedential opinions criticizing the circuit court for choosing not to rehear a case. The first chapter uses an original dataset of every DDR from the courts of appeals from 1969 to 2012 (nearly 1000 cases) to test the impact of a DDR author's ideology on the signal of cert-worthiness it provides to litigants and the Supreme Court. I find that litigants treat a DDR as a strong signal they should seek certiorari regardless of its author's ideology, but the Supreme Court has been much more inclined to grant certiorari when the DDR author is ideologically conservative. The second chapter assesses political polarization in the courts of appeals by looking at DDR coalition data from 1943 to 2012 (nearly 1300 DDRs). I find that many circuits use DDRs in a polarized fashion, the polarization increased markedly in the 1980s, and the polarization is largely attributable to appointing presidents. The third chapter examines how Supreme Court justices use the institutional requirement that they support their decisions through the citation of relevant precedent to enhance the Court's legitimacy. Using Fowler et al.'s (2007) measure of precedent centrality I test the hypothesis that the Court cites more authoritative precedent in cases that might cause the public to question its legitimacy. The data indicate that in these situations -- departures from governing case law, actions particularly salient to the public, and direct challenges to the actions of the coordinate branches -- the Court's decisions cite more authoritative case law to support its holdings.

INTRODUCTION

Analysis of judicial decisionmaking falls somewhat uneasily within the umbrella of political science research. Most analysts agree that judges, like other actors within the political system, seek to further their policy preferences subject to systemic constraints.¹ Identifying and defining such preferences and constraints, however, is by no means a clear or obvious task, given the unique role judges play in the federal system of government.

Federal judges enjoy lifetime appointments (subject to good behavior), unaccountable for their position to any electorate or other supervisory authority.² This does not mean they are entirely unchecked, however. The requisite tradeoff for their favored position, at least in the public imagination, is fealty to a higher principle. The public is willing to obey judicial decrees -- even those with which they disagree -- and give judges considerable leeway in their decisions, so long as they have the sense that judges are guided by more than simple partisan preferences in their decisionmaking (Gibson and Caldeira 2011; Scheb and Lyons 2001).³ If the public loses that

¹ Although this proposition is uncontroversial in political science circles, many judges and a number of legal academics disagree vehemently. Trained in the legal formalist tradition, which contends that judges logically deduce their conclusions from established legal propositions relevant to the dispute at hand, these detractors bristle at the notion that judges' policy preferences determine legal outcomes. Nevertheless, even these critics would likely concede that judges' preferences impact their decisions when legal sources -- constitutions, statutes, canons of statutory interpretation, precedents, the common law, and so forth -- fail to provide clear guidance. Thus, their opposition seems to be based not on the idea that personal preference could *ever* influence judicial decisionmaking, but rather over the relative pull of these preferences compared to that of case law and other legal sources.

² Judges at the district court and court of appeals level are subject to reversal, of course, but even a judge with a high reversal rate can keep his judgeship without fear of removal absent any indicia of actual malfeasance. For example, the reversal rate of District Court Judge Manuel L. Real has in some years been estimated at ten times the national average for district court judges (Williams 2009). Despite numerous calls that he be disciplined or removed from the bench, however, he has been a federal judge since 1966 and still maintains a full case load at age 90.

³ Although the contours of such a guiding principle are necessarily unspecific, the Constitution and the rule of law are often cited as potential apolitical touchstones for ideal judicial behavior.

impression and begins to believe that judges lack any such guiding force, the judiciary risks losing its legitimacy.

Loss of legitimacy is particularly worrisome for members of the judiciary -- the "least dangerous" branch, in Alexander Hamilton's memorable phrase (Hamilton et al. 1961, 465) -- because they have no source other than public acceptance to enforce their judgments (Hamilton et al. 1961, 461). The system of checks and balances theoretically gives the judiciary the power to undo policies enacted by a legislative majority, but as Justice Felix Frankfurter explained, its efficacy in this important respect "ultimately rests on sustained public confidence in its moral sanction" (*Baker* 1962, 267). When it loses its legitimacy and, thus, its ability to serve as a final arbiter and protector of minority interests, the loss threatens to place the system's delicate balance in jeopardy. As Judge Harry Edwards warns, if the public believes that judges are nothing more than partisan actors, "the judiciary will be sharply devalued and incompetent to fulfill its role as mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold" (Edwards 1991, 838-39). To counteract this danger, Edwards cautions that judges "bear[] a heavy institutional responsibility to nurture a conception of law and justice as principled ventures, distinct from politics and devoted to some larger conception of the public good" (Edwards 1991, 864).

For judges, then, legitimacy is paramount. Whether due to pre-existing orientation, genuine acculturation on the bench or strategic calculation regarding what the public will tolerate, they take pains to demonstrate an allegiance to the judicial system generally. Members of the judiciary try to show that this fidelity transcends partisanship and serves as an effective check on ideology-based preference maximization. As political scientist Keith Bybee explains, "Judicial legitimacy has

long been understood to derive from what judges do *and* from how they look doing it. Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle” (Bybee 2010, 5).

This need to show adherence to the judiciary as an apolitical ideal, one that functions above the concerns of partisan politics, likely explains the plethora of institutional constraints, both formal and informal, characterizing the judicial environment. The more judges are guided in their performance of their tasks by rules of universal application, the more they are perceived as acting within the system to produce outcomes the law dictates, not merely those they prefer (Gibson et al. 1998, 345).

All levels of the judiciary observe such constraints. Court rules determine which cases a judge hears, where the hearing must be held, and in the appellate courts, who else will sit on the panel. Other rules and norms govern how litigants may bring their cases to the court, how the court must respond to parties’ contentions and how judges may question lawyers during oral argument. Still others dictate how many cases a judge will hear and how many opinions she must write.

Further, informal rules and norms determine how an opinion is written: its order, its tone, the sources that may be relied on and, often, what the outcome must be in light of pre-existing circuit precedent. Indoctrination in these matters runs deep. Every first year law student learns the substance of the law by reading cases that analyze and apply it; over time, she internalizes these facets of “proper” opinion writing as part and parcel of judging. Steeped in these traditions, members of the legal

community would dismiss as illegitimate and unworthy a judge who openly flouted such long-standing conventions.

Thus, institutional constraints undoubtedly affect judges and, by extension, their judicial outputs. It is unclear, however, how -- and even if -- students of the judiciary should account for these constraints in their analyses. Does the content of a judge's opinion matter, or should we only assess his ultimate vote? How much does precedent serve as a constraining force in the judicial hierarchy? Does the specter of reviewing court oversight change a lower court judge's behavior? How should we account for multiple judges on a panel when trying to isolate the effects of a judge's ideology? If judges act differently when sitting with colleagues occupying a different part of the ideological spectrum (Sunstein et al. 2006; Cross and Tiller 1998), is this due to strategic considerations (leaving unchanged the judge's underlying preferences regarding the case's outcome), or does the process of deliberation actually change judges' opinions? Does the experience of sitting on the bench and interacting with the same colleagues fundamentally change a judge's perspective over time? Do outcomes change as a court's docket grows and its judges become responsible for more cases? Do litigants act differently based on the identity of the judges hearing their cases, meaning that an assessment of judicial behavior must take selection effects into account?

Arguments over how best to account for formal and informal institutional constraints have led to significant divisions within the community of judicial politics specialists. Scholars in this area disagree not just over the relative weight to be given to such constraints in analyzing judicial behavior and the proper methods of operationalizing their effects but, indeed, whether they should be considered at all. These divisions run so deep that at times they threaten to inhibit development of a

common vocabulary with which to conduct the debate; in some corners, these arguments call into question the relevance of the entire subfield (Maveety 2003, 1-4).

Broadly speaking, political scientists who analyze judicial decisionmaking divide into three camps.⁴ The first, attitudinalists, contend that judicial votes are direct expressions of judges' preferences. The most widely cited proponents of attitudinalism, Jeffrey Segal and Harold Spaeth, summarize their approach with respect to the Supreme Court as follows: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal and Spaeth 2002, 86). To this group, judicial votes are the variable of interest, a judge's preferences trump all other considerations in determining her vote, and institutional factors constitute nothing more than minor, easily surmounted obstacles to the ultimate goal of preference maximization. Precedents can be found (or case holdings manipulated) to support the judge's desired result, and the arguments, concerns and experiences of colleagues on a collegial court have little if any impact on the judge's vote.

A second group, those championing a strategic account of judicial decisionmaking, similarly contends that judges are "single-minded seekers of legal policy" (George and Epstein 1992: 325). Contrary to the attitudinalists, however, proponents of the strategic perspective assert that judges, in their pursuit of policy, take a long view of judicial action. Rather than voting their immediate preference in any given case, judges "are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices

⁴ Each of these camps takes issue with the approach of the legal formalists. Though legal formalism remains the dominant approach taught in American law schools, mainstream political science dismisses it, at least in its strongest form, as "silly" (Caldeira 1994). Nevertheless, most political scientists would agree that judicial opinions must appeal to such legal sources for their legitimacy, even if they disagree about the effect of such a requirement on judges' ultimate votes and opinions.

they expect others to make, and the institutional context in which they act” (Epstein and Knight 1998, 10). These scholars operate from three premises: judges are goal-oriented, they behave strategically, and institutions structure their interactions. They tend to treat ultimate preferences as fixed but individual strategic decisions as flexible, in keeping with the interdependent nature of the judicial actors being analyzed.

Finally, historical institutionalists take a broader view of the importance of institutions. Under their account of decisionmaking, institutions do more than merely structure judicial interactions; they may actually change judges’ ultimate preferences. As judges become acclimated and acculturated to their position, they may internalize the behavioral norms of their court (Hettinger et al. 2003) and may develop a different conception of the proper judicial role (Gibson 1978). More broadly, they may begin to develop feelings of a shared purpose with other members of the court and a sense of duty to the court as an institution, both of which may impact their behavior on the bench (Gillman 1996, 8; Smith 1988, 95). In short, the experience of sitting on the court may itself alter the judge’s preferences. Thus, for scholars in this camp a meaningful analysis of judicial behavior requires accounting for the direct effects of institutional elements, and more generally for the possibility that judges may seek institutional goals as ends in themselves, rather than as a means of promoting policy preferences. As interpretivist Howard Gillman explains, the approach emphasizes moving beyond models based on basic preference maximization to consider “the possibility that the world view of judges is constituted by institutional norms, jurisprudential traditions, and related social structures of power -- which would mean that judges view the law, not as a tool for the promotion of exogenous preferences but as reflective of their most deep-seated professional convictions” (Gillman 1996, 9).

Combining the various approaches, James Gibson explains that “judges’ decisions are a function of what they prefer to do, tempered by what they ought to do, but constrained by what they perceive is feasible to do” (Gibson 1983, 9). This quote neatly synthesizes the relative inputs of attitudinalism, historical institutionalism (and, arguably, legal formalism), and the strategic approach. It also explains why an excessive focus on one analytical tradition threatens to obscure or unduly diminish the contributions of the others. In this way, it puts the internecine disputes of the judicial politics community in its proper perspective.

In the essays that follow, I explore how judges respond to institutional constraints in several contexts that illuminate both the nature of judging and the interplay between judicial output and legitimacy. Two of the essays look at how judges exploit an institutional option to advance their preferences free of other institutional constraints. The third examines how Supreme Court justices work within the standard institutional framework to bolster their effectiveness. I do not claim in these essays that one analytical approach is superior in all contexts, to the exclusion of others. Instead, my approach changes depending on the context in order to maximize the advantages of the analytical method used. The first two take an attitudinal perspective because the context allows judges to minimize other institutional factors, while the third takes a strategic approach because strategic considerations are fundamental to the phenomenon being investigated.

The first two essays involve the use of dissents from denial of rehearing en banc (DDRs) in the federal courts of appeals. Judges write DDRs after a majority of active circuit judges have voted against rehearing a panel decision en banc. They are wholly voluntary, have no legal effect, and do not depend on assignment to any particular panel. As such, they represent a means of circumventing the usual

institutional constraints on decisionmaking that serve as a mediating factor between a judge's preferences and her actions. Because they need not be altered to account for other institutional influences (the effect of which may be exceedingly difficult to tease out), DDRs are closer to legislative votes than other forms of judicial activity.⁵ Thus, as an analytical matter, they represent judicial preferences more directly and provide a clearer sense of true underlying ideology than other measures of judicial behavior.

The first essay investigates the use of DDRs as a signaling tool within the judicial hierarchy. Because DDRs constitute the distillation of circuit court judges' preferences, unmediated by institutional factors, they serve as a potent indicator of ideological importance to the author's ideological allies on the Supreme Court. I test the theory that DDRs serve this signaling function and find strong support for it. Since the start of Warren Burger's Chief Justiceship, the Supreme Court has been twice as likely to grant certiorari in cases when a DDR has been written by a Republican rather than a Democratic appointee. Under Chief Justice Roberts, the ideological chasm has grown even wider. Litigants, interestingly, interpret the existence of a DDR as a strong signal of cert-worthiness and do not seem to account for the author's politics in deciding whether to seek Supreme Court review. They are extremely likely to file a cert petition in all cases giving rise to DDRs; the rate of such petitions does not appreciably differ regardless of the DDR author's party affiliation.

The second essay focuses on DDR coalitions -- both the judge who writes the DDR and the judges who concur in it -- to examine the nature of polarization on the courts of appeals. Exploiting the insight that DDRs indicate a judge's preferences without the complications of various institutional modifiers, I look at the ideology of

⁵ Indeed, DDRs may represent personal preferences even more directly than legislative votes because judges, unlike legislators, are not directly beholden to any constituency (cf. Mayhew 1974).

the colleagues a judge joins *with* and those she mobilizes *against* to gain traction on polarization trends within the federal appeals courts across circuits, across presidential cohorts and over time. I also look at trends in the data to clarify the connection between circuit court polarization and polarization in the elected branches. The data show that many (though not all) of the circuit courts of appeals exhibit a substantial degree of political polarization. Collectively speaking, polarization in the circuit courts increased markedly in the 1980s and remained considerable in the subsequent decades. Appointing presidents, more than the Senate or the increasingly divided public, appear to be the driving force in this trend toward ideological division in the courts.

The final essay examines how Supreme Court justices work within the current set of institutions governing their behavior to further their ideological goals. I begin with the premise that justices rely on opinion content, and not simply their votes, to pursue these goals. Thus, examining the substance of their opinions can provide useful information about the nature of judicial activity. Based on this proposition I develop a model of citation behavior under which a justice must determine how best to balance citation to two potentially competing sets of precedents: (1) those that are most supportive of her desired result and (2) those that are most authoritative with respect to the main issue in the case. These two sets of precedent may be in tension if the court has recently undergone an ideological shift and wants to move outcomes away from those of its immediate predecessor courts -- older (and thus less authoritative) precedents may reinforce the author's desired outcome, while newer (and thus more authoritative) precedents may dictate the opposite result. Supreme Court justices are allowed to break with precedent, of course, but continued public support for the Court requires that they explain their rationale for such a change in

convincing language. Attempts to change outcomes without directly confronting inconvenient precedents may lead to a lack of legitimacy. Similarly, when the Court invalidates duly enacted legislation, the public may question the Court's power to frustrate the will of the majority. In such circumstances, the Court must take great pains to show the validity of its behavior. Using Fowler et al.'s (2007) measure of precedent centrality, I test the theory that the Court cites more authoritative precedent when its legitimacy is most likely to be questioned: when it departs from governing case law, when its actions are most salient to the public, and when it invalidates the legislative enactments of the coordinate branches. I find that the Court does indeed make careful strategic use of the institutional requirement that it support its decisions through the citation of relevant precedent. It deploys its citations as a tool to increase Court legitimacy when that legitimacy is most potentially imperiled.

Judicial decisionmaking is a tremendously complicated area of inquiry, with judicial ideologies, formal and informal institutional constraints, and particular case facts all jockeying for position to determine the ultimate resolution of a case. The way judges prioritize their preferences, their duty to the law and their duty to the court as an institution may be exceedingly difficult to disentangle. In these essays I endeavor to show that scholars can gain traction on these issues by identifying how judges act in particular settings where sets of these factors are more or less pronounced. Scholars may not be able to arrive at a single unified theory of judicial decisionmaking, but targeted analysis accounting for the specific features of the phenomenon being studied can certainly add to our understanding of component parts of the judicial enterprise. In the aggregate, these efforts are clearly capable of improving our comprehension of the courts.

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CHAPTER 1

The Politics of Non-Precedential Opinions:

Analyzing the Effects of Dissents from Denial of Rehearing En Banc in the Certiorari Process

Abstract: Dissents from denial of rehearing en banc (“DDRs”) have become increasingly popular in recent years among federal appeals court judges. In these published opinions, judges criticize the circuit court for choosing not to rehear a case -- one the initial circuit panel ostensibly decided wrongly. DDRs have no precedential effect but offer a judge the opportunity to publicize her disagreement with the court’s result, even if the judge did not sit on the panel tasked with deciding the case. As such, they are a pure expression of judicial ideology. Scholars have speculated (and judges themselves have confirmed) that judges primarily use DDRs to signal to the Supreme Court that a case is worthy of review. This chapter tests the impact of a DDR author’s ideology on the signal of cert-worthiness it provides to litigants and the Supreme Court, using an original dataset of every DDR from the courts of appeals from 1969 to 2012 (a total of nearly 1000 cases). Litigants are substantially more likely to seek certiorari in cases in which someone has filed a DDR, and do not appear to take the DDR author’s ideology into account in making this decision. The Supreme Court, in contrast, has been much more inclined to grant certiorari in DDR cases when the DDR author is ideologically conservative.

I. Introduction

Federal appeals court judges are, generally speaking, institutionally constrained in what they can do. Court rules govern which cases a judge hears, which other judges he sits with on a panel, when and where that panel meets, how many cases he hears, and how many opinions he must write in a given year. Informal rules and norms further control how he performs his job, dictating how opinions must be structured, what sources may be appealed to in crafting an argument, and often, what the outcome of a given case should be. A judge may have very strong views on a particular issue, but unless he is fortunate enough to be randomly selected to hear a case that presents the issue clearly, he may be hard-pressed to use his judicial role to express his preferences in any meaningful way. Judges may make their views heard through speeches and law review articles, of course, but these avenues have little immediate effect.¹

A judge unhappy with the outcome of a panel's decision may attempt to have the full court -- all active judges on the circuit (as well as any senior judge who was on the original panel) -- rehear the case en banc.² This involves trying to convince a majority of her colleagues that a rehearing is "necessary to secure or maintain uniformity of the court's decisions" or that the case "involves a question of

¹ Indeed, speeches and articles may ultimately prove counterproductive, as they can give rise to a disqualification claim if the judge is subsequently assigned a case presenting the particular issues. For example, Justice Scalia once gave a speech denigrating the merits of the argument that the phrase "under God" in the Pledge of Allegiance violated the constitutional separation of church and state, and was subsequently forced to recuse himself when the argument came before the Supreme Court (Greenhouse 2003).

² This is a slight oversimplification. Courts with more than fifteen active judges may opt to have a subset of judges hear the case (28 U.S.C. § 46(c)). To date, only the Ninth Circuit has utilized this procedure, though the Fifth and Sixth Circuits have at times been large enough to do so (Berzon 2011).

exceptional importance” (Federal Rule of Appellate Procedure 35(a)). Pursuing an en banc rehearing is by no means a surefire strategy, however. The other judges on the circuit may be reluctant to rehear a case given the courts’ enormous workloads and the amount of judicial time consumed in en banc rehearsals. A judge seeking en banc rehearing may have a particularly difficult time convincing her colleagues if she is in the ideological minority on her circuit. Even if she could persuade a majority of the circuit that rehearing is warranted on substantive grounds, moreover, some judges are opposed to en banc rehearsals on principle (Solimine 1988). These factors help explain why the rate of en banc rehearing is so low -- according to one recent study, less than 1% of all panel decisions are reheard en banc (Giles et al. 2007).

Judges stymied by these tiny odds are increasingly turning to another tool at their disposal: appending a dissent from denial of rehearing en banc (“DDR”) to the court’s order announcing its refusal to rehear a case. In DDRs judges set out, often in considerable detail, the reasons why they believe the panel erred in its disposition of the case and why the court as a whole erred in opting not to correct the panel’s mistake via an en banc rehearing. Though they are controversial in legal circles -- many scholars and jurists object to DDRs on the grounds that they allow judges to leverage their position to publicly criticize the work of their colleagues despite often having had no role in deciding the case in question (Sur 2006) -- DDRs have nevertheless become extremely widespread. As of the end of 2012, judges have written at least 1,276

DDRs in 1,050 cases.³ Although the first DDRs appeared in the 1940s, the phenomenon is becoming more frequent. Since the beginning of 2001, judges have written more than 500 DDRs. Of the 230 active judges on the courts of appeals since the beginning of 2001, 65% have written at least one DDR, and an additional 17% concurred in at least one DDR written by a colleague. They are used in every circuit court and cover issues spanning all areas of law (Horowitz 2013).

To date, scholars have developed a fairly limited understanding of the reasons why judges write DDRs. The costs of DDRs are clear: they threaten to alienate one's colleagues and they require at least some additional work while providing the authors no workload credit. At the same time, the benefits they offer are by no means obvious, given that they have no precedential value. Most commentators presume that judges write DDRs as a means of attracting attention from the Supreme Court and, hopefully, convincing the Court to grant certiorari. Judges have made this link between DDRs and the certiorari process explicit in their scholarly writings (Wald 1987; Berzon 2011, 2012; Kozinski and Burnham 2012) and sometimes in their DDRs themselves (*Coastal Products* 2009; *In re Ahlers* 1986).⁴ As explained in further detail below, cases with DDRs do at first blush seem to enjoy disproportionate success in obtaining certiorari review.

³ All figures in this chapter are based on results from each of the geographic circuits and the D.C. Circuit, but do not include the Federal Circuit, which I exclude from the study due to its specialized nature.

⁴ It should be noted, however, that not all judges believe in this link between a DDR and certiorari review. Judge James Edmondson, in his concurrence in the denial of rehearing en banc in *Sahyers* (2010: 889), stated, “[A]s near as I can tell, nothing indicates that dissents filed on denials of en banc rehearing make it more likely that the Supreme Court will grant certiorari in a case of our Court.”

But this assumption may oversimplify the relationship between DDRs and certiorari. It is possible that the mere existence of a DDR might convince the Court of a case's cert worthiness, particularly if Supreme Court justices and appeals court judges are primarily motivated by the belief that each case has a single "right" answer, independent of judicial ideology. If ideological preferences factor into certiorari decisions, however, a DDR should generally attract Court attention only if the Court's preferences lie closer to those of the DDR author than those of the panel decision's author. Otherwise, a DDR's claim that the panel's decision was misguided should fall on deaf ears.

In this chapter I test the effects of judicial ideology in cases involving DDRs at two points in the litigation process: on litigants' decisions whether to seek certiorari, and on the Supreme Court's decision whether to grant it. To this end I use an original dataset of every circuit court DDR from the beginning of the Burger Court through the end of 2012.⁵ The breadth and scope of the data permit an assessment of the dynamics of DDR usage across circuits and over time. The results show that litigants interpret DDRs as a strong signal of cert-worthiness and do not seem concerned with the ideology of the DDR's author. In the Supreme Court, however, DDRs are not universally interpreted as a signal that a case merits Supreme Court review. Instead,

⁵ I exclude the relatively small numbers of DDRs preceding the Burger Court from the study because they skew overwhelmingly in favor of Democratic-affiliate authors, thus providing insufficient variation. In addition, DDRs were much more of a novelty prior to the Burger Court. Following the first DDR in 1943, the federal courts of appeals averaged three DDRs per year before 1970 and fifteen per year between 1970 and 1979. This number climbed to 25 per year in the 1980s and 1990s, and to 41 per year starting in 2000.

the Supreme Court's response to certiorari petitions in cases involving DDRs is strongly linked to the ideology of the DDR's author.

I begin with a more complete description of DDRs, in which I explain why they provide clearer evidence of judicial preferences at the circuit court level than panel votes alone. I then describe how I arrive at my hypotheses regarding the link between ideology and certiorari success in the Supreme Court. After setting out my data and methods, I describe and assess the results. The chapter concludes with potential additional directions for DDR research.

II. DDRs: The Clearest Expression of Judicial Preferences

DDRs are an anomaly, jurisprudentially speaking. Federal circuit court judges are expected to decide only those cases that come before them -- indeed, this is the very point of the Constitution's "case or controversy" requirement, under which only parties affected by a court's decision may bring a case in federal court and the courts may only hear cases in which a controversy has already arisen and has not yet been resolved (Chemerinsky 2012). Federal appellate judges may comment on other disputes in speeches or law review articles, but they are expected to refrain from doing so in a judicial opinion. In a DDR, however, a judge who was often not on the underlying panel⁶ nevertheless sets forth the reasons why he believes the panel erred and the case should have been resolved differently. This is true even though a judge who writes a DDR has usually not had the benefit of the parties' oral arguments (and

⁶ Only eighteen percent of DDRs (222 of 1250) were written by a judge who sat on the initial panel hearing the case.

may not have even read their briefs). DDRs thus allow judges to set out their feelings about the merits of a case even if, from an institutional perspective, no one asked for their opinion.

A DDR is a pure expression of judicial preference -- one so strong it creates an incentive to voluntarily inject oneself into a dispute and publicize a disagreement that usually occurs behind closed doors.⁷ The perceived importance of making one's voice heard in this context outweighs the additional work and potential antagonism of one's colleagues that a DDR entails. Because they represent the expression of unconstrained preferences in the judicial context, DDRs provide a particularly useful source of information about judicial ideology, one that differs dramatically from the data available from regular judicial votes. Panel votes, which are overwhelmingly unanimous due to the mandatory jurisdiction of the appellate courts,⁸ suffer from a relative dearth of variation that often makes it difficult to draw definitive conclusions. DDRs, in contrast, allow judges (including DDR authors, those that concur in DDRs, those that write responsive concurrences in denial of rehearing en banc ("CDRs"), and those concurring in CDRs) to make their preferences heard, relatively unconstrained by institutional restrictions.

⁷ Individual votes on whether to take a case en banc have traditionally been kept secret, though the Fourth Circuit has announced the individual votes since 1984. In recent years the Fifth, Seventh and Tenth Circuits have begun publicizing individual votes as well. The issue remains highly contentious (Horowitz 2013).

⁸ Epstein, Landes and Posner (2011) estimate that over 97% of all panel decisions are unanimous. Even restricting the data to published opinions, they find unanimity in 92% of all panels.

III. Ideology and the DDR-Certiorari Link

The strong influence of judicial preferences on the decision whether to write or concur in a DDR implies that the signal a DDR provides cannot be assessed independently of ideology. In other words, the authoring judge's preferences must be taken into account when interpreting whether a DDR sends an effective signal of cert-worthiness to the Supreme Court. If a litigant is behaving strategically, she would not willingly incur the expense of an appeal to the Supreme Court -- even if a DDR fully vindicated her position -- unless she believed the Supreme Court was likely to take the case and ultimately reverse the panel decision. Such an outcome is only likely if the Supreme Court is more inclined to agree with the DDR author than the panel author on the merits of the case. If the DDR author is more liberal (conservative) than the panel while the Supreme Court is more conservative (liberal), one would not expect the presence of a DDR to affect a strategic litigant's decision whether to petition for certiorari. This leads to the first testable hypothesis:

Hypothesis 1 (Strategic Litigant Hypothesis): Following a DDR, litigants will be more likely to seek certiorari from a Supreme Court dominated by Republican affiliates⁹ when the DDR author is likewise a Republican affiliate, particularly when the panel opinion author is a Democratic affiliate.

If the Supreme Court is acting ideologically, it will not treat all DDRs as uniform signals of cert-worthiness. Instead, an ideologically motivated Court would be more inclined to grant certiorari in DDR cases when it shares ideological

⁹ As used in this chapter, a judge's "party affiliation" is the party of the president who nominated the judge to the court of appeals. I discuss the term "affiliate" and the use of party affiliation as a proxy for ideology more fully on page 22 below.

sympathies with the DDR author, and particularly when it does not share such sympathies with the panel author. This leads to the second hypothesis:

Hypothesis 2 (Ideological Supreme Court Hypothesis): A Supreme Court dominated by Republican affiliates will grant certiorari more often in cases with DDRs when the DDR author is likewise a Republican affiliate, and less often when the DDR author is a Democratic affiliate. The difference will be particularly pronounced when the DDR author and panel author differ ideologically.

IV. Measures and Data

To test these hypotheses, I use an original dataset of all DDRs drafted in the circuit courts of appeals between 1969 and 2012.¹⁰ For each DDR I recorded a number of details, including the year and circuit, the author of the DDR, the judges concurring in the DDR, the author of any responsive CDR, the names of the judges concurring in the CDR, and the subject matter(s) of the case. I also identified the judges who sat on the underlying panel, the author of the panel's majority decision, and the judges who wrote any concurrences or dissents from the panel opinion. Finally, I recorded whether a petition for certiorari was filed, how the Supreme Court ruled on that petition, and how the Court ultimately ruled on the case if it granted certiorari. Using the Federal Judicial Center's database of biographical information on federal judges I then obtained the party affiliation for the authors of each DDR and

¹⁰ I identified these cases searching the Westlaw database for each circuit using the following search term: DISSEN! /10 (DEN! REFUS! DECLIN! FAIL! /S ("EN BANC" "IN BANC")). I then reviewed the results for actual DDRs (as opposed to, e.g., non-DDR opinions referencing a DDR in another case). I supplemented this set of DDRs with opinions referenced in Solimine (1988) and Kozinski and Burnham (2012).

underlying panel opinion. As used in this chapter, “party affiliation” refers to the party of the president who nominated the judge in question to the circuit court.¹¹

Before continuing, a brief comment on the use of nominating president’s party as a proxy for judicial ideology is in order. Numerous studies have found that the nominating president’s party is a consistently significant predictor of vote outcomes, particularly in the courts of appeals (Pinello 1999; Fischman and Law 2009). In addition, although party affiliation is far from a perfect proxy for ideology in every circumstance (Fischman and Law 2009; Cross 2007; Berzon 2012), it may nevertheless be especially useful in the context presented in this chapter: as a measure of the signal provided to litigants and the Supreme Court about a judge’s ideological leanings (rather than as a measure of actual ideological beliefs). This is particularly true given the large dataset involved -- one involving hundreds of judges and nearly a thousand cases. I nevertheless use the more nuanced Giles, Hettinger and Peppers ideology score (“GHP score”)¹² (Giles et al. 2001) for additional analysis.

A. Litigant Behavior

As noted above, if litigants are reacting to DDRs strategically, they will seek certiorari more often when the DDR author and the Supreme Court majority have similar ideological leanings. This relationship should be particularly pronounced when the author of the panel decision does not share these preferences.

¹¹ I use the party of the president who nominated the judge to the circuit court even if a president of the other party previously nominated the judge to the district court.

¹² I describe the derivation of the GHP scores in more detail on pages 31-32 below.

To test the relationship between DDR author ideology and litigant behavior, I examine whether litigants filed petitions for certiorari in each of the 977 cases in the data.¹³ The results are summarized in Tables 1-1a and 1-1b. As a first cut, the results indicate that the party of the DDR author does not affect the decision whether to seek certiorari review. Indeed, the rates at which litigants file certiorari petitions in DDR cases is strikingly uniform over time and across circuits.

Table 1-1a: Certiorari petition rates by party of DDR author, by Supreme Court era

	Overall			Burger		
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	967	638	530	283	188	135
Cert petition filed:	696	459	395	200	128	101
% with cert petition filed:	72.0%	71.9%	74.5%	70.7%	68.1%	74.8%

	Rehnquist			Roberts		
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	433	278	244	251	172	151
Cert petition filed:	313	199	180	183	132	114
% with cert petition filed:	72.3%	71.6%	73.8%	72.9%	76.7%	75.5%

¹³ Ten of the cases were published so late in 2012 that the deadline to file a petition for certiorari had not yet expired by the end of the year. I therefore exclude these from the analysis.

Table 1-1b: Certiorari petition rates by party of DDR author, by circuit

	<u>1st</u>		<u>2d</u>		<u>3d</u>	
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	23	12	19	57	70	61
Cert petition filed:	15	9	12	41	44	39
% with cert petition filed:	65.2%	75.0%	63.2%	71.9%	62.9%	63.9%
						13
						8
						61.5%
	<u>4th</u>		<u>5th</u>		<u>6th</u>	
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	70	42	41	120	61	19
Cert petition filed:	50	29	30	89	49	14
% with cert petition filed:	71.4%	69.0%	73.2%	74.2%	80.3%	73.7%
						52
						44
						84.6%
	<u>7th</u>		<u>8th</u>		<u>9th</u>	
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	81	68	25	82	241	176
Cert petition filed:	68	58	21	59	165	121
% with cert petition filed:	84.0%	85.3%	84.0%	72.0%	68.5%	68.8%
						133
						93
						69.9%
	<u>10th</u>		<u>11th</u>		<u>D.C.</u>	
	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>	<u>All cases with DDRs:</u>	<u>Repub. authors</u>	<u>Dem. authors</u>
Cases:	11	10	5	53	98	52
Cert petition filed:	10	10	4	42	64	33
% with cert petition filed:	90.9%	100.0%	80.0%	79.2%	65.3%	63.5%
						64
						43
						67.2%

Notes: Accurate as of 12/31/2012. The table does not include the 10 cases in which the deadline to file certiorari had not expired by 12/31/2012. Numbers for the "All cases with DDRs" cells use the case as the unit of analysis, while numbers broken down by author party use the individual DDR as the unit of analysis (accounting for the discrepancies in the totals). The table does not include the 12 DDRs written by multiple authors of different parties.

Viewing all cases involving DDRs collectively, litigants have filed certiorari petitions in 72.0% of such cases. When examined by individual DDR rather than by case, 74.5% of DDRs by Democrat-affiliated authors have resulted in a certiorari petition, compared with 71.9% of DDRs by Republican-affiliated authors. The difference is not statistically significant ($t=-0.99$, $p=.32$).

Every Supreme Court era in the study has seen the same lack of a statistically significant relationship between the party affiliation of the DDR author and the decision to seek certiorari. Litigants appealed DDR cases to the Supreme Court at a 70.7% rate under Chief Justice Burger, increasing slightly to 72.3% under Chief Justice Rehnquist and 72.9% under Chief Justice Roberts.¹⁴ T-tests show that under each Chief Justice, the party of the DDR author is not significantly correlated with the decision whether to file a certiorari petition.

Nor does the lack of significance appear to be driven by outliers in any particular circuit. Table 1-1b shows the circuit-by-circuit breakdown, illustrating two points. First, the circuits are quite similar in the percentage of DDR cases leading to certiorari petitions. Although there is some degree of variance, even the circuits with litigants least likely to appeal a DDR case to the Supreme Court (the First, Third and D.C. Circuits) see litigants seeking certiorari in nearly two-thirds of cases with DDRs. Only the Seventh and Tenth Circuits have a rate above 80%, and the Tenth Circuit's results are difficult to interpret given the small number of DDRs that circuit's judges have produced.

¹⁴ Similarly, litigants filed certiorari petitions in 67.6% of DDR cases under Chief Justice Warren.

Second, the DDR author's party affiliation does not appear to affect whether a litigant files a certiorari petition. Petition rates within circuits are relatively constant, regardless of the DDR author's party. T-tests show that the effect of the DDR author's party only reaches conventional significance in the 5th Circuit ($t=-2.12$, $p=.036$).

In short, I do not find support for the strategic litigant hypothesis with respect to DDRs. Litigants appeal cases involving DDRs to the Supreme Court at a consistently high rate -- a result that holds true over time and across all circuits. Litigants in DDR cases do not appear to be swayed by the party of the DDR author in interpreting its existence as a strong signal of cert worthiness. I now turn to whether this failure to take the author's party into account is justified by the Supreme Court's response to certiorari petitions in DDR cases.

B. Supreme Court Interpretation of DDRs

As explained above, it may well be rational for the Supreme Court -- inundated as it is with thousands of certiorari petitions every year -- to interpret a DDR as a signal that a case merits review. However, one would expect a strategic Court to take the DDR's source into account in making this interpretation. To the extent a Court majority¹⁵ sympathizes with the ideology of the DDR author, it will be more likely to grant certiorari; if it does not, it would be more likely to disregard the DDR's signal, or perhaps even treat it as a negative signal.

¹⁵ I refer to a "Court majority," even though only four justices need to agree that certiorari is warranted under the Court's "Rule of Four," based on the assumption that four justices will not want certiorari granted in a case in which they are likely to come out on the losing end (Denniston 2009).

Looking again at the initial numbers, the Court appears to differentiate between Republican- and Democrat-affiliate DDR authors in determining whether to grant certiorari. As shown in Table 1-2, the Court has consistently granted certiorari at relatively high rates in DDR cases; overall, the Court has granted certiorari in more than 26% of DDR cases in which it reaches a certiorari decision.¹⁶ Compared with the overall success rate of paid certiorari petitions, which was around 10% but has shrunk to less than 6% in recent years (Baum 2010), this is an impressive figure.¹⁷ Not all DDRs are treated equally, however. Cases with DDRs by Republican-affiliated authors have traditionally fared more than twice as well as those with DDRs by Democrat affiliates. T-tests show that these differences are significant at the .05 level in the Rehnquist Court and at the .001 level in the Burger and Roberts Courts.

¹⁶ This figure is based on only those cases in which the Court either granted or denied the writ for certiorari explicitly. It does not include those cases in which the parties voluntarily dismissed the appeal prior to a decision on certiorari; those in which the Court granted certiorari, vacated the panel court ruling and remanded in light of an intervening decision (“GVR”); or those cases the Court dismissed as improvidently granted, because such cases turn on factors that are irrelevant to the hypotheses being tested (George and Solimine 2001).

¹⁷ Indeed, it is impressive even when compared with certiorari petitions in cases decided en banc. One study found that the Court granted certiorari in 18.4% of such cases between 1986 and 1998 (George and Solimine 2001: 185).

Table 1-2: Rate of certiorari grant by party of DDR author

	<u>Overall:</u>	<u>All Eras***</u>		<u>Overall:</u>	<u>Burger Court***</u>	
		<u>Repub. authors:</u>	<u>Dem. authors:</u>		<u>Repub. authors:</u>	<u>Dem. authors:</u>
Cases w/ cert decision:	621	397	365	180	110	97
Cert granted:	162	137	62	52	43	17
% of cert grants:	26%	35%	17%	29%	39%	18%
		<u>Rehnquist Court*</u>		<u>Overall:</u>	<u>Roberts Court***</u>	
		<u>Repub. authors:</u>	<u>Dem. authors:</u>		<u>Repub. authors:</u>	<u>Dem. authors:</u>
Cases w/ cert decision:	285	177	165	156	110	103
Cert granted:	70	50	31	40	44	14
% of cert grants:	25%	28%	19%	26%	40%	14%

*** p<0.001, ** p<0.01, * p<0.05

Cases are not all fungible, of course. Particular case elements may amplify or dampen the strength of a signal of cert-worthiness that a DDR conveys, and it is possible that the party of the DDR author is correlated with some other case element that is actually driving the results. To test whether this is true, I estimate a series of logistic regression models to determine whether the DDR author's party is significantly related to the likelihood that the Court will grant a petition for certiorari when accounting for various groups of institutional and case-specific characteristics.

In the first model I estimate the equation with the DDR author's party as the sole independent variable, coded as 0 for Republican affiliates and 1 for Democrat affiliates. In the second model I use dummy variables to account for several institutional elements: the circuit in which the case arose, the year, and the Supreme Court era (as determined by Chief Justice).

In the third model, I add information about the specific decision at issue. First, I account for the subject matter of the underlying dispute (*subject matter*). I assigned subject matter codes for each case based on the protocol used in the Songer Court of Appeals Database (Songer 1999). The Songer coding system divides cases into the following categories: criminal, civil rights, First Amendment, due process, privacy, labor relations, economic activity and regulation, and miscellaneous. Where cases involved multiple subject areas I made a subjective judgment about the area that predominated. This occurred in 101 of the 977 cases in the data.

The third model also takes into account specific information about the initial panel decision. First, the model incorporates the ideological makeup of the panel.

This is appropriate because one might reasonably suspect that the ideology of a panel's members impacts the outcomes it reaches (Sunstein et al. 2006). To the extent the justices are swayed by this information, it could influence their decision whether to grant certiorari. As a proxy for panel ideology the model incorporates a measure of the number of judges on the panel appointed by Democrats (*panel Ds*).¹⁸ Similarly, the model accounts for the party affiliation of the panel decision's author, both alone (*panel author party*) and interacted with the DDR author's party affiliation (*DDR author party*panel author party*). Again, party is coded as 1 for Democrat affiliates and 0 for Republican affiliates. This information could provide the Supreme Court relevant information about perceived cert-worthiness. For example, a DDR from a Republican affiliate in reaction to a panel decision by a judge affiliated with the Democrats could provide a particularly strong signal to a conservative-leaning Court. In contrast, a Republican affiliate's DDR that responds to a fellow Republican affiliate's panel decision might constitute a weaker signal to the same conservative Court, and a Democratic affiliate's DDR in response to a Republican affiliate's panel decision might represent, if anything, a negative signal.

In addition, I account for the presence of multiple judges concurring in each DDR, both alone (*multiple concurrens*) and interacted with the party affiliation of the DDR author (*multiple concurrens*DDR author party*). I coded the *multiple*

¹⁸ In this model I omit the 15 cases in the database in which the circuit court heard the case en banc, the judges rejected the suggestion that they hear the case en banc again, and one or more judges wrote a DDR objecting to the circuit's denial of such a re-rehearing en banc. Adding the number of Democratic affiliates in these cases (which could exceed three and which in any event carries a different meaning when the overall panel consists of anywhere from six to thirteen judges) could potentially skew the results.

concurrers variable 1 if two or more judges concurred in the DDR and 0 otherwise.¹⁹

To the extent a DDR represents the beliefs of numerous judges that a case should be reviewed, it may provide a stronger signal of cert-worthiness than the views of a single judge writing for himself alone. This signal may operate independently of party affiliation, or it may be positive for Republican-affiliate authors and negative for Democrat-affiliates.

Panel dissents and, to a lesser extent, concurrences potentially provide an additional signal of cert-worthiness to the Court, either because they emphasize the existence of a genuine controversy or because they indicate the potential for a deviation from Supreme Court precedent (Cross and Tiller 1998; Mak et al. 2013). I therefore include two additional dummy variables, *panel dissent* and *panel concurrence*, coded as 1 if the panel decision contained a dissent or concurrence, respectively, and 0 otherwise.

Finally, the fourth model replaces the fairly blunt proxy of DDR author's and panel author's party affiliation (as well as their interaction) with a more nuanced assessment of the difference between the DDR author's ideology and the panel author's ideology. For this variable, *ideology differential*, I rely on each judge's GHP score, which is in turn based on Poole and Rosenthal's DW-NOMINATE scores for

¹⁹ I use this method, rather than simply using the absolute number of concurring judges, because I did not want to allow circuits with more active judges (and thus more potential DDR concurrers), like the Fifth and the Ninth, to skew the results. To illustrate the potential skew, consider the following: six or more judges concurred in 93 DDRs. Of these 93, 74 came from the Ninth Circuit and 18 arose in the Fifth Circuit. (The remaining one came from the Sixth Circuit.)

the significant players in the judge's nomination (Giles et al. 2001).²⁰ The variable represents the difference between the DDR author's score and the panel author's score. It should be noted that, because the GHP scores theoretically range from +1 (for the most conservative judges) to -1 (for the most liberal ones),²¹ positive values of this variable indicate a more conservative DDR author and a more liberal panel author.²² Thus, the coefficient for this variable should be the opposite of the party proxy (for which Democratic affiliates are assigned a 1 and Republicans are assigned a 0). In other words, both a negative coefficient for the party proxy and a positive coefficient for the ideology differential indicate the same thing: that the Court is more likely to grant certiorari in a case with a conservative DDR author than in a case with a liberal one.

²⁰ Specifically, if senatorial courtesy does not apply in a judge's nomination, the judge is assigned the nominating president's DW-NOMINATE score. If senatorial courtesy applies to one home-state senator, the judge receives that senator's DW-NOMINATE score. If both home state senators are of the nominating president's party, the judge's score is an average of the two senators' DW-NOMINATE scores (Giles et al. 2001).

²¹ In practice, however, the scores range from 0.608 (Ninth Circuit Judge Richard Chambers) to -0.699 (Third Circuit Judges Herbert Goodrich, Charles Jones and Albert Maris).

²² As an example, suppose that then-Judge Scalia, while on the D.C. Circuit, drafted a DDR in response to a panel decision by then-Judge Ruth Bader Ginsburg. The ideology differential would be Scalia's GHP score (0.559) minus Ginsburg's GHP score (-0.532), or 1.091. If the positions were reversed, with Judge Ginsburg writing a DDR responding to Judge Scalia's panel decision, the differential would be (-0.532 - 0.559), or -1.091.

Table 1-3: Logistic regression model of factors affecting certiorari decision --
DDR cases

VARIABLES	(1) Certiorari grant	(2) Certiorari grant	(3) Certiorari grant	(4) Certiorari grant
DDR author party	-0.946*** (0.175)	-0.929*** (.210)	-0.726 (.400)	
Ideology differential				0.657* (0.261)
Panel author party			0.372 (0.318)	
DDR author party*panel author party			0.011 (0.448)	
Multiple DDR concurrers			0.828** (0.290)	0.934*** (0.263)
Multiple DDR concurrers* DDR author party			0.224 (0.444)	-0.088 (0.355)
Panel Ds			0.260 (0.167)	0.222 (0.152)
Panel dissent			0.218 (0.215)	0.229 (0.218)
Panel concurrence			-0.118 (0.324)	-0.184 (0.323)
Constant	-0.641*** (0.106)	0.055 (1.26)	-1.642 (1.430)	-1.572 (1.386)
Observations	762	675	656	631
Log Likelihood	-422.127	-348.103	-316.224	-309.326
% correctly predicted	73.9	74.8	78.2	76.9
Pseudo-R ²	0.035	0.134	0.190	0.184

Standard errors in parentheses.

*** p<0.001, ** p<0.01, * p<0.05.

Notes: Results for individual circuits, years, Supreme Court eras and subject codes omitted for space but available upon request.

As shown in Table 1-3, the results provide significant support for the hypothesis that the Supreme Court has been substantially more inclined to grant certiorari in cases involving DDRs written by more conservative judges. In the first three models, author ideology is represented by the DDR author's party. The variable is significant at conventional levels in the first two models.²³ When accounting in

²³ Because "Republican affiliate" was coded as 0 and "Democrat affiliate" was coded as 1, the negative coefficient on the DDR author party variable indicates that cases with DDRs written by Democratic-affiliate authors are substantially less likely to obtain certiorari review.

Model 3 for the party of the panel decision's author and the interaction between the parties of the DDR author and the panel decision author, the coefficient remains negative and substantively similar, though the estimate is not quite as precise ($p=.07$). Model 4 attempts to account in a more nuanced way for the difference between the ideology of the DDR author and panel author. The results of this model indicate, at a conventionally significant level ($p=.01$), that the signal provided by a DDR is highly contingent on the ideology of its author.

Converting these results to odds ratios provides context for the magnitude of the effects. Model 1 and Model 2 indicate that cases with DDRs written by Democrat affiliates are roughly 40% as likely as those of Republican affiliates to obtain certiorari review. Even when accounting for all of the individual case factors as well, cases with DDRs from Democratic affiliates are still only 48% as likely as cases with Republican affiliate DDRs to obtain Supreme Court review. In Model 4, moving from no ideological difference between the author of the DDR and the author of the panel opinion to a difference of +1 increases the chances the Supreme Court will grant certiorari by more than 90%.

Some other facets of the data warrant highlighting. First, the Supreme Court seems to respond to the number of other judges concurring in the DDR. If the DDR represents the views of a substantial faction of circuit judges, rather than just one or two, this has the effect of more than doubling the likelihood the Court will grant certiorari. This effect apparently operates independently of the DDR author's party, as the interaction between author party and multiple concurring judges is not

significant.²⁴ Thus, if a circuit appears particularly divided over a case, with numerous judges on the losing end of a battle to rehear the case en banc willing to sign a DDR to publicize their disagreement with the outcome, the Supreme Court is more likely to step in to provide an authoritative resolution. This result implies that the Court takes its institutional position at the top of the judicial hierarchy seriously, separate and apart from ideological concerns.

Also worth noting is that the existence of a panel dissent does not seem to affect the certiorari decision in DDR cases. A panel dissent might provide a strong signal that certiorari is warranted in an ordinary petition to the Supreme Court, but once a case has a DDR, the presence of a panel dissent does not appear to provide a strong additional signal.

As a means of comparison I use Solberg's (2010) Shepardized Courts of Appeals Database to estimate the likelihood that the Supreme Court would grant certiorari in a non-DDR case, examining the relative effect of many of the same variables -- panel author ideology, circuit, year, Chief Justice regime, case issue, number of democratic appointees on the panel, and existence of a panel dissent or concurrence.²⁵ I estimate two models, the first using party of appointing president as a proxy for the panel author's ideology and the second using the panel author's GHP score. As shown in Table 1-4, the presence of a panel dissent strongly correlates with the likelihood that the Court will grant certiorari; the odds of the Court granting

²⁴ Substituting an interaction between the author's GHP score and multiple concurring judges produces similar results. This regression is not shown but is available upon request.

²⁵ There is almost no overlap between the Solberg database and the DDR database, with only two cases appearing in both.

certiorari nearly double in cases with a panel dissent. None of the other variables, including either measure of panel author ideology, correlates with the certiorari decision in a statistically meaningful way.

Table 1-4: Logistic regression model of factors affecting certiorari decision -- non-DDR cases

VARIABLES	(1) Certiorari grant	(2) Certiorari grant
Panel author party	-0.091 (0.125)	
Panel author GHP score		0.127 (0.217)
Panel Ds	-0.031 (0.073)	-0.059 (0.081)
Panel dissent	0.641*** (0.131)	0.627*** (0.148)
Panel concurrence	0.307 (0.215)	0.226 (0.243)
Constant	-0.726 (0.757)	0.068 (1.825)
Observations	4584	3525
Log Likelihood	-1486.096	-1081.318
Pseudo-R ²	0.080	.085

Standard errors in parentheses.

*** p<0.001, ** p<0.01, * p<0.05.

Notes: Results for individual circuits, years and subject codes omitted for space but available upon request. The two cases appearing in the Solberg database and the DDR database are omitted from this analysis.

Finally, although the information was excluded from Table 1-3 to conserve space, it bears mentioning that the different circuits, years, Supreme Court eras and subject matters largely do not appear to be significant determinants of the likelihood that the Supreme Court will grant certiorari in DDR cases. This indicates that the

same dynamic tends to operate regardless of the case's specific era, origin or fact pattern. As to the individual circuits, only the Sixth appears to differ significantly from the D.C. Circuit (used as a baseline) across specifications -- the Supreme Court is consistently less likely to grant certiorari to Sixth Circuit DDR cases than to D.C. Circuit cases.²⁶ This difference is perhaps attributable at least in part to the large proportion of Sixth Circuit DDRs written by Democratic-affiliate judges: Democratic affiliates wrote 52 of the 71 Sixth Circuit DDRs, or 73%. This is the largest DDR author party differential of any circuit.

With respect to the subject matter of the cases, only cases coded "miscellaneous" were statistically significantly more likely to have certiorari granted. This is true in both Model 3 ($\beta=1.08$; $p=.007$) and Model 4 ($\beta=1.04$; $p=.009$). Given the large variety of cases included in the "miscellaneous" designation, however, it is difficult to draw any general conclusions about this result.

C. Supreme Court Outcomes in DDR Cases

The ability of DDR cases to generate attention in the certiorari process is not the end of the story. Also relevant is the ultimate outcome in such cases. Does the Supreme Court tend to affirm the lower court's judgment in cases involving DDRs? Or does it tend to vacate or reverse the judgment, indicating a perceived error in the panel's disposition (thereby implicitly or explicitly validating the concerns expressed

²⁶ The Third Circuit also has a negative, statistically significant coefficient in Model 2, but its coefficient is not statistically significant in Models 3 and 4, which account for other case-specific factors. Because the Supreme Court has not granted certiorari in any of the First Circuit's 26 DDR cases, that circuit was excluded from the analysis. Results of these regressions are available upon request.

in the DDR)? If the Supreme Court tends to affirm these decisions, perhaps the effort expended in DDR authorship is misplaced.

To assess the effectiveness of DDRs in generating Supreme Court reversal, I begin with a baseline assessment of the outcome of non-DDR cases in the Supreme Court. Between the Court's 1969 and 2011 terms, inclusive (covering the Burger and Rehnquist Courts and the first seven years of the Roberts Court), the Court disposed of 4,926 such cases (Spaeth 2012). It reversed or vacated the lower court's decision in 3,359 of them (68.2%).²⁷ Thus, once the Court has granted certiorari, there is a high likelihood it will vacate or reverse the decision below.

Looking at the set of DDR cases during the same time period, the Court vacated or reversed in 119 of 157, a rate of 75.8%. Comparing the reversal rate in DDR cases with the rate in non-DDR cases, the difference is significant at conventional levels ($z=2.02$, $p=.04$). Accordingly, DDR cases are not only more likely to obtain Supreme Court review than other cases, they are significantly more likely to be vacated or reversed once certiorari has been granted. This is true even given the already high baseline success rate for petitioners in the Supreme Court.

The party of the DDR author also correlates with success in the Supreme Court, but not as overwhelmingly. Overall, the Court vacated or reversed in 103 of 128 cases with Republican DDRs (80.5%), compared with 41 of 59 cases with Democratic DDRs (69.5%). This difference is not significant at conventional levels ($t=1.66$, $p=.098$). Examining the data by Supreme Court era gives a clearer picture of

²⁷ I include in this count those cases in which the Court vacated or reversed in part or in whole.

the dynamics. Under Chief Justice Burger, Republican DDRs led to reversals in 30 of 43 cases (69.8%), while Democratic DDRs actually fared even better: 12 of 17 such cases were vacated or reversed (70.6%). The difference is negligible ($t=-0.06$, $p=.95$). Under Chief Justice Rehnquist, however, a party-based difference is more apparent. Republican DDRs led to the Court vacating or reversing in 41 of 50 cases (82%), while Democratic DDRs led the Court to modify the lower court decision in 21 of 31 cases (67.7%). These results are suggestive but not significant at conventional levels ($t=1.47$, $p=.145$), owing in part to the relatively small number of cases involved. The Roberts Court results are similar: the Court reversed or vacated 32 of 35 cases with Republican DDRs (91.4%) and 8 of 11 cases with Democratic DDRs (72.7%). Again, a t-test of the difference shows these numbers are merely suggestive ($t=1.62$, $p=.113$), but this may change as the Roberts Court decides more DDR cases. In short, Republican DDRs appear to be more successful at obtaining reversal in the Supreme Court than those by Democrats, especially under Chief Justices Rehnquist and Roberts,²⁸ but the evidence is not conclusive. These results are summarized in Table 1-5.

²⁸ Combining the data for the Rehnquist and Roberts terms does indicate a significant difference ($t=2.27$, $p=.02$).

Table 1-5: Rate of reversal/vacation by party of DDR author

	All Eras		Burger Court			
	<u>Overall:</u>	<u>Repub. authors:</u>	<u>Dem. authors:</u>	<u>Overall:</u>	<u>Repub. authors:</u>	<u>Dem. authors:</u>
Merits decisions:	154	128	59	52	43	17
Case reversed/vacated:	116	103	41	38	30	12
% reversed/vacated:	75.3%	80.5%	69.5%	73.1%	69.8%	70.6%
	Rehnquist Court		Roberts Court			
	<u>Overall:</u>	<u>Repub. authors:</u>	<u>Dem. authors:</u>	<u>Overall:</u>	<u>Repub. authors:</u>	<u>Dem. authors:</u>
Merits decisions:	70	50	31	35	35	11
Case reversed/vacated:	51	41	21	30	32	8
% reversed/vacated:	72.9%	82.0%	67.7%	85.7%	91.4%	72.7%

Notes: Accurate as of 12/31/2012. The table does not include the 5 DDR cases on which the Supreme Court granted cert but had not ruled as of 12/31/2012. Numbers for the "Overall" cells use the case as the unit of analysis, while numbers broken down by author party use the individual DDR as the unit of analysis (accounting for the discrepancies in the totals).

V. Discussion

The numbers certainly do not reduce to a simplistic formulation that Republicans always manage to have their pet cases heard while Democrats never have such a channel available to them. Many factors may underlie a certiorari decision that are entirely unrelated to ideology: how well the case presents the issue, whether the Court believes a particular area requires jurisprudential clarification, whether it believes a particular issue has sufficiently “percolated” in the lower courts, and so forth. Nevertheless, DDRs clearly perform at least a partial screening function for the Court in determining whether certiorari is warranted in a given case. To this end, the success differential between affiliates of the two parties indicates that ideology does play a significant role in how the Court interprets a DDR’s signal.

One reason for the strong ideological effect may be the unconstrained nature of a DDR. DDRs do not depend on the happenstance of a judge who feels particularly passionate about an issue being assigned to a panel hearing a case that presents that very issue. Instead, if a case arises before *any panel in the circuit*, a DDR gives a judge the opportunity to set out his views of the merits of the case, in a public, legally sanctioned (though non-precedential) forum.²⁹ In addition, elements that can affect the outcome of a panel decision -- for example, how well the facts frame the underlying legal issues, how well the lawyers prepared and argued the case, and how the judges on a panel interact with each other while working together to decide the set of cases presented to them -- need not apply to the author of a DDR. Thus, DDRs are

²⁹ It is precisely this leveraging of a judge’s position to make a public statement on an issue that has generated strong criticism of DDRs on jurisprudential grounds (McGowan 2001).

in a very real sense a pure expression of judicial preference, largely unfettered by institutional constraints.³⁰ The Supreme Court has shown that it takes these expressions of preference seriously.

This signaling effect has real-world consequences. Judges are drafting DDRs with increasing frequency: the judiciary as a whole averaged around three DDRs per year before 1970, 15 DDRs per year in the 1970s, 25 per year in the 1980s and 1990s, and more than 41 per year since 2000. Given the shrinking number of cases the Supreme Court has been hearing, the increasing number of DDR cases, and the fact that the rates at which certiorari petitions are filed and granted in DDR cases has remained relatively constant, this means that DDR cases constitute a rapidly growing portion of the Supreme Court's oral argument docket. Since 2001, DDR cases have accounted for around 7% of cases argued in the Supreme Court, with a high of 12% in the 2006 term. In this way, DDR author ideology is having a relevant impact on Supreme Court outcomes.

The results sketched out above indicate that there is a disconnect between the way litigants interpret cases with DDRs and the way the Supreme Court views those same cases. Litigants seem to construe DDRs as clear signals that a case merits Supreme Court review. Thus, they appeal DDR cases to the Supreme Court more than 70% of the time. In making the decision to file a petition for certiorari, litigants do not appear to distinguish between DDRs written by Democratic affiliates and those written

³⁰ The only true constraint comes from the requirement that a particular case be filed within a judge's circuit. Judges do not write DDRs in response to the judicial output of other circuits, district courts, or potential cases that have not yet been filed.

by Republican affiliates. The existence of a DDR, apart from the ideology of its author, seems sufficient to convince these litigants that their case has a sufficiently good chance of being taken up by and reversed in the Supreme Court to warrant the expense of a certiorari petition.

The Court, however, appears to treat DDRs very differently depending on the affiliation of the author. Those written by Republican appointees are more than twice as likely to obtain Supreme Court review. This difference holds true even when accounting for a variety of institutional and case-specific factors. And as the ideological difference increases between a DDR author and a panel decision author, this preference for DDRs written by conservative authors increases. In addition, the Supreme Court appears somewhat more likely to vacate or reverse in cases with DDRs from Republican judges than in those with DDRs from Democrats.

These differences suggest that litigants are not behaving entirely rationally when deciding whether to file a petition for certiorari. It is true that all DDR cases, regardless of the party affiliation of the DDR author, fare better in obtaining certiorari review than non-DDR cases. Historically, roughly 10% of paid petitions to the Supreme Court were successful. More recently, one study found that 5.6% of paid petitions (and 0.1% of *in forma pauperis* petitions) resulted in Supreme Court review (Baum 2010). Compared to these numbers, all DDR cases fare quite well. DDRs in general may well be a proxy for the presence of case issues of “exceptional importance,” which could account for the disproportionately high rate at which even cases with DDRs by Democratic affiliates have obtained certiorari review. This

generalized proxy effect may also be why the presence of multiple judges concurring in a DDR has a significant positive effect on the likelihood of the Court granting certiorari, independent of the author's party affiliation. However, the fact that cases involving Democratic-affiliate DDR authors fare so much worse, comparatively, than those involving Republican-affiliate DDRs should lead to a correspondingly smaller percentage of such appeals -- even if that percentage is still larger than the overall percentage of cases appealed to the Supreme Court. That has not been the case in any Supreme Court era since appeals court judges began publishing their DDRs.

VI. Conclusion

The results show that a DDR author's ideology impacts how much credence the Court gives the DDR when making its certiorari decision. Judges likely understand this. Why, then, would liberal judges bother to write DDRs?³¹ Perhaps they wish to signal potential arguments to judges in other circuits or to district court judges. DDRs may also constitute an attempt to influence public opinion (Kozinski and Burnham 2012). Both rationales may be part of an effort to establish the judge as an ideological leader, possibly for its own sake and possibly to position the judge for consideration in the event of a future Supreme Court vacancy. A large number may

³¹ Consider Ninth Circuit Judges Diarmuid O'Scannlain and Stephen Reinhardt. Judge O'Scannlain is an outspoken conservative who has drafted DDRs in 39 cases, in which litigants filed certiorari petitions in 26 (67%). The Court granted certiorari in 13 such cases. Not including those that were GVR'ed, dismissed or still await resolution, this constitutes a success rate of 59%. Judge Reinhardt, an outspoken liberal, has published 38 DDRs. Twenty-four of these (63%) led to certiorari petitions, but the Court granted the petition in only two cases: a 9% success rate.

arise simply because it feels good to say one's piece, particularly given the convention that a panel decision speaks for the circuit as a whole.

To assess these possible rationales, future studies could determine how often particular DDR authors (or particular DDRs themselves) are cited in other cases, media reports, blog postings and elsewhere. One might also determine how the judges themselves explain the practice. (Some have written articles or opinions publicly defending or criticizing DDR publication, but without a broader sample it is difficult to determine how representative these authors are of the federal appellate judiciary as a whole.) Regardless, given the increasing prevalence of DDRs in the pages of the *Federal Reporter*, they constitute a judicial tool warranting increased academic scrutiny.

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CHAPTER 2

Split Circuits: Analyzing Polarization on the U.S. Courts of Appeals

Using Dissent from Denial of Rehearing En Banc Coalition Data

Abstract: Are the federal courts of appeals polarizing along with the rest of the government and American society more generally? This chapter explores that question by exploiting a novel source of data: dissents from denial of rehearing en banc (DDR). A DDR is a published opinion, often attracting concurrences from other judges, in which a judge criticizes her court for choosing not to rehear a case -- one the initial circuit panel ostensibly decided wrongly. DDRs have no precedential effect but offer a judge the opportunity to publicize her disagreement with the court's result. As such, they are a pure expression of judicial preference. Using an original dataset of information collected from nearly 1,300 DDRs published between 1943 and 2012, I evaluate the ideological nature of DDR usage focusing specifically on two aspects of DDRs: the colleagues a judge joins *with*, and the panel authors she mobilizes *against*. I use these measures to examine the different patterns among the circuits, among different presidential cohorts, and in different decades to show trends in circuit court polarization and to explore the connection between polarization in the judiciary and in the elected branches. The chapter finds that although the circuits vary widely in the way they use DDRs, a substantial number of them do so in a polarized fashion. Evaluating judicial cohort behavior over time indicates that the nominating presidents -- more than the increasingly polarized environment in the Senate and the general

public's own tendency toward ideological division -- are the primary force driving judicial polarization.

I. Introduction

Over the last forty years, the forces of polarization have led to a nearly complete bifurcation of the legislative branch, with members of both the House and the Senate separated almost entirely into two distinct camps (Jacobson 2000; Barber and McCarty 2013; Poole and Rosenthal 1997; McCarty et al. 2006: 30-32). Is this trend restricted to the elected branches, or has it seeped into the judiciary as well?

Outside of the Supreme Court context, research in this area has been largely speculative, anecdotal or inconclusive. Studies comparing the voting behavior of each president's district court and circuit court appointees to determine how often they vote in favor of the party representing "conservative" or "liberal" interests find that in the aggregate, the votes of a president's judicial nominees reflect the ideology of the president (implicitly indicating that more polarized presidents appoint more polarized judges), but they note a wide variance within each group (Carp et al. 2007: 160-65, 300-01; Epstein and Segal 2005: 133). Wittes (2006) posits that the increasingly difficult confirmation process itself -- one resulting in ever greater delays with each new presidential administration -- "probably imprints upon [judges] a stronger partisan identity than they had prior to nomination" (9), and this process, he argues, "risks creating Democratic and Republican caucuses on the courts" (89-90). Goldman (1975: 505-06) similarly speculates about a possible connection between legislative polarization, judicial selection and the ultimate rulings of judges once on the bench, and Judge Harry Edwards confirms his sense that such a link existed on the D.C.

Circuit early in his tenure (Edwards 2003: 1677-78), but neither article presents generalizable conclusions.

Because little empirical work has addressed the issue, it remains an open question whether members of the federal bench have become more polarized along with the elected branches and the American public as a whole. Such a question is difficult to answer in part because polarization is an inherently difficult concept to quantify in the judicial context. Polarization on the courts is “necessarily ... subtle and nearly impossible to measure” (Wittes 2006: 90), particularly given the vast majority of unanimous decisions¹ and the number of external institutional factors -- random assignment of panels to cases, court workloads, case facts, the quality of counsel, and so forth -- that may influence a judge’s behavior in nonpartisan ways. In addition, to the extent such polarization occurs, the mechanism has not been fully explored. Judicial polarization may result from the increasingly partisan Senate environment in which judges are confirmed, greater partisanship in the electorate generally (of which judges may be a representative subsection), or an increasingly partisan vetting effort within the executive branch to ensure the ideological fealty of potential judicial nominees.

In this chapter I attempt to quantify the scope of polarization among federal appeals court judges, identify trends in circuit court polarization and explore the connection between polarization in the judiciary and in the elected branches. To

¹ Epstein et al. (2011) estimate that over 97% of all panel decisions, and 92% of all published panel decisions, are unanimous, likely owing in large part to the circuit courts’ mandatory jurisdiction over appeals from the district courts. The mandatory right to appeal means that a large number of cases with clear outcomes nevertheless reach the courts of appeals.

accomplish these goals I focus on a novel source of data from the federal circuit courts of appeals: dissents from denial of rehearing en banc (DDRs).

A DDR is a voluntary, non-precedential opinion a judge publishes after a majority of the circuit's active, non-recused judges votes not to convene the full court to rehear a decision from a three-judge panel.² The DDR sets out why the author believes the panel erred in deciding the case and the circuit compounded this error by allowing the panel decision to remain good law. Other circuit judges have the option of concurring in a colleague's DDR, publicly aligning themselves with its position. Because of its fundamentally discretionary nature, a DDR gives a more direct sense of a judge's preferences than other forms of judicial activity, and therefore provides a valuable window into polarized activity on the circuit courts.

The chapter proceeds as follows. I first discuss why judicial polarization might be linked to other forms of polarization and outline three potential competing theories of its rise, attributing causal primacy to, alternatively, the Senate, the general public and the president. I then turn to a technical and jurisprudential explanation of DDRs and describe why they are a valuable means of identifying and quantifying judicial polarization. Next, I discuss the construction and use of DDR coalition data -- both in terms of the ideology of the coalitions formed and the ideology of the judge who wrote the panel decision the DDR criticizes -- to measure polarization activity. Based on

² As used here, "full court" means all active circuit judges as well as any senior judge on the original panel. The Ninth Circuit is alone among the circuits in convening an eleven-judge subset of the circuit, rather than all active judges on the court, for en banc hearings (Ninth Circuit Rule 35-3), pursuant to 28 U.S.C. § 46(c).

these measures, I assess the extent to which DDRs have been used in a polarized fashion in the circuit courts. I then examine DDR usage among presidential cohorts, both overall and by decade, again looking at DDR coalition ideology and the ideology of the panel author whose opinion is challenged. Finally, I apply these cohort-based results to the competing theories of judicial polarization to determine which has the greatest support. I ultimately find that political polarization does indeed exist in the courts of appeals, and that it is primarily attributable to the appointees of the most recent Republican presidents: Reagan and both Bushes. I conclude with general thoughts about the effect of polarized judicial activity on judicial legitimacy.

II. Competing Theories of the Rise of Judicial Polarization

Judicial independence is based on the notion that the courts will function best if they remain free of partisan concerns when deciding cases. Such lack of partisanship ostensibly minimizes the dangers of transient partisan passions and the attendant threat they pose to minority rights. As Alexander Hamilton explained in Federalist No. 78, an independent judiciary is necessary “to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community” (Hamilton et al. 1961). When judges are too closely

tied to the ideological agenda of one party in the performance of their duties, they abnegate this crucial systemic function.

Nevertheless, the behavior of judges has become a perennial issue in electoral campaigns. Beginning with Richard Nixon's 1968 presidential campaign, during which he pledged to appoint "strict constructionists" respecting "law and order" to the bench (Scherer 2005: 6), a promise to populate the judicial ranks with co-partisans has become a staple of each party's quadrennial platform. The use of lower court judicial nominations as a campaign issue became pronounced starting in 1980, when the Republicans criticized President Carter's "particularly disappointing" judicial appointments and pledged to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life" (Republican Party Platform 1980). Since then, nearly without fail, each party has used its platform to attack the appointments of the other and to make promises about the types of judges its nominee would appoint if elected.

The 1980s also saw confirmation votes on federal appeals court nominees become a flashpoint issue in Senate races (Scherer 2005: 108-16, 166-71, 174-80; Geyh 2006: 214). Depending on the party in power, candidates now routinely criticize their opponents' support for delay tactics preventing the confirmation of qualified jurists or their support for the appointment of "judicial activists" (a generally content-free but nevertheless potent charge). Challengers level such attacks whether or not the incumbent sits on the Senate Judiciary Committee, and whether or not the nomination in question arises from the candidate's state (Silverstein 1994: 94-95). The increased

politicization of judicial nominations may be seen in the changing nature of confirmation votes. For decades, voice votes were held on over 95% of appeals court nominations, and even in the 1990s only one out of six came up for a roll call vote. Since 2000, however, the Senate has held roll call votes on more than 80% of circuit court nominations, providing a clear voting record for use in subsequent campaigns.

Given the salience of judicial performance as an electoral issue, it is reasonable to link polarization in the elected branches (as well as in the electorate itself) with the rise of a polarized judiciary. The literature identifies three potential paths through which such a link might occur. First, the Senate -- specifically, the bruising, highly partisan confirmation process to which that body subjects judicial nominees -- might generate heightened partisan feelings in nominees that judges carry with them after their confirmation (Wittes 2006; Cross 2009).³ If this were true, we would expect all judges appointed in the more highly partisan environment (starting in the mid-1970s) to act in a more polarized fashion, while those appointed before that time would, as a group, exhibit less polarized behavior. As the Senate grows increasingly polarized, each successive group of confirmed judges should act in a more polarized manner than their predecessors.

Alternatively, judicial polarization may be attributable to polarization in society as a whole. As Justice Cardozo famously declared, “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the

³ It is worth noting that the opposite might be the case. Given the increasingly partisan nature of the confirmation process, the only individuals who survive the process may be those least likely to use their judicial office for ideological purposes (Posner 2008: 91).

judge by” (Cardozo 1921: 168; see also Epstein and Martin 2010; Carp et al. 2007: 311). With Republicans and Democrats taking an increasingly dim view of each other (Gelman et al. 2008: 112-13; Barber and McCarty 2013: 24; Iyengar et al. 2012), we might expect to see judges similarly showing heightened antipathy toward their ideological opponents on the bench. If this hypothesis is correct, we would expect all judges, regardless of appointing president or time of appointment, to behave in an increasingly polarized manner in each successive decade, mirroring the polarization in the electorate (Jacobson 2000; Barber and McCarty 2013; Abramowitz and Saunders 2008; but see Fiorina et al. 2005).

Finally, polarization may instead be attributable to the appointing presidents, some of whom explicitly select judicial nominees for their strongly partisan ideological beliefs in order to produce a judicial branch that will promote their domestic agenda. Under this theory, demonstrated partisanship would be relatively fixed within each cohort of judges nominated by a particular president, with little intra-cohort change in polarized activity over time, but would vary substantially among judicial cohorts.

Table 2-1, below, summarizes the three competing hypotheses and the facts that would support each. It explains the effect each potential polarization mechanism would have on older judges (those confirmed before polarization started to become rampant in the Senate, in the mid-1970s) and newer judges (those confirmed after polarization took hold). I next turn to a fuller description of DDRs and explain how

DDR evidence can provide purchase on questions about the existence and cause of polarization in the courts of appeals.

Table 2-1: Possible explanations for judicial polarization

<u>Driver</u>	<u>Mechanism</u>	<u>Effect on older judges</u>	<u>Effect on newer judges</u>
Senate	Senate environment (particularly confirmation) polarizes new judges (starting in 1970s)	Remain relatively unpolarized	All are polarized
Public	Judges are polarized along with rest of society	All become more polarized	All are polarized
President	Presidential appointment determines polarization -- presidents vary in use of polarized criteria	Cohorts vary in terms of polarization, but are internally consistent over decades	Cohorts vary in terms of polarization, but are internally consistent over decades

III. DDRs: An Increasingly Common Means of Expressing Judicial Preference

As explained above, a DDR is a voluntary, published, non-precedential opinion accompanying an order denying a request for an en banc hearing in which a judge sets out her reasons for finding a panel decision impermissibly erroneous and important enough to warrant correction through the circuit's en banc machinery. Its existence implies that a judge finds the panel's purported error so egregious she feels compelled to write an opinion spelling out the gravity of the mistake, even when her official duties do not require that she offer such an opinion, she gets no workload reduction for her efforts, and she risks alienating colleagues by making the internecine dispute public. Because of its fundamentally discretionary nature, a DDR gives a more direct sense of the judge's preferences than other forms of judicial activity.

Importantly, DDRs do not depend on the assignment of judges and cases to particular panels. Instead, any active judge of the circuit may write one in response to

any decision within the circuit.⁴ Thus, unlike a normal dissenting opinion, the option of writing a DDR does not depend on the fortuity of a judge being assigned to hear a case about which he cares passionately. Participating in a DDR is therefore a clear gauge of a judge's ideological predilections, unconstrained by the randomness of case assignment.

Some DDRs are written on behalf of the author alone; most obtain a concurrence from at least one other circuit judge, and many represent the views of a sizable faction of the circuit.⁵ Judges concurring in DDRs make a weaker ideological statement than judges who write DDRs (given that they do not willingly take on the additional work required to write one), but concurring in a DDR nevertheless makes a judge publicly accountable for her stance and therefore carries its share of costs in terms of collegiality and, potentially, public condemnation (Ginsburg 1990).⁶ The fact that judges frequently vote in favor of an en banc rehearing but opt not to concur in a DDR indicates that the costs of concurring are tangible, and that a decision to concur is therefore meaningful.

In the early years of DDRs, they overwhelmingly tended to represent the thoughts of the author alone or in combination with only one other judge; groups of

⁴ Occasionally senior judges write DDRs as well. Of the 1,276 DDRs in the dataset compiled for this chapter, twelve were written by judges who had already taken senior status.

⁵ More than 63% of DDRs were written on behalf of at least one other judge, 47% attracted at least two concurers, and 11% drew concurrences from at least five others. The largest DDR coalition occurred in the Ninth Circuit case of *Nunes v. Ashcroft*, 375 F.3d 810 (9th Cir. 2004), in which eleven other judges concurred in Judge A. Wallace Tashima's DDR.

⁶ Of course, the reverse is also true. Judges refusing to sign onto a DDR may risk alienating the judges who wrote and concurred in the DDR, and judges who refuse to align themselves with a particular position communicated in a DDR may face public disapproval on that ground as well. Presumably both sets of risks are stronger in the case of voluntary action than in the case of inaction, but inaction is not necessarily costless.

judges concurring in a DDR were relatively rare. Beginning in the 1980s, however, a much larger proportion of DDRs attracted multiple concurrences. Since 1981, nearly half of all DDRs have attracted at least two concurrers, and 13% have drawn concurrences from five or more others. Indeed, the use of DDRs (and responsive concurrences in denial of rehearing (CDRs)) as a means of speaking on behalf of circuit coalitions has become so common that in one instance a judge specifically refused to allow other judges to sign onto her CDR in an attempt to de-escalate the practice (*Defenders of Wildlife* 2006).⁷ Table 2-2 summarizes the existence and size of DDR coalitions over time.

Table 2-2: Distribution of concurrences in DDRs

Concurrers:	Pre-1970	1970-79	1980-89	1990-99	2000-	Total:
0-1 concurrers	70	102	123	127	258	680
2+ concurrers	18	52	127	119	280	596
Total	88	154	250	246	538	1276
% of 2+ concurrers	20%	34%	51%	48%	52%	47%

DDR are controversial in legal circles because they express a judge's views about the outcome of a case when, often, she did not sit on the initial panel,⁸ did not hear the parties' oral arguments, and may not have read the parties' briefs (Horowitz 2013; Sur 2006). Despite these criticisms, DDRs are nevertheless becoming an increasingly prevalent judicial tool. The first DDRs appeared in the 1940s, but were exceedingly rare. Beginning in 1971, however, judges began to indulge in them

⁷ That CDR, by Ninth Circuit Judge Marsha Berzon, begins, "So as to avoid establishing a new tradition of group concurrences in denial of en banc to match the group dissents, I intentionally write for myself alone, without the concurrence of any of my colleagues" (*Defenders of Wildlife* 2006: 402).

⁸ More than 81% of DDRs were written by a judge who was not on the original panel.

significantly more often. Their frequency again increased sharply starting in 2003 (Horowitz 2013). They are now quite common, with 77% of circuit judges in active service since the start of 2001 having written or concurred in at least one. Since 2001, the courts have averaged 42 DDRs per year, with a high of 60 in 2009.

DDR coalitions provide a valuable window into polarized activity on the circuit courts. Because DDRs are inherently voluntary, because they are a pure statement of preference divorced from legal consequence,⁹ and because they involve taking the relatively extreme step of publicizing a dispute circuit judges generally prefer to keep private (Horowitz 2013), the act of authoring or concurring in a DDR is one of the clearest expressions of unalloyed judicial preference at the circuit court level. DDRs present a wealth of wholly discretionary opportunities for judges to act on their preferences and align themselves with one intracircuit coalition and against another. Each DDR within the circuit offers such a chance to every active judge on the circuit; the resultant coalitional activity does not depend on the vagaries of panel assignment. Indeed, *every* case litigated in the circuit potentially provides an

⁹ In this sense DDRs resemble more conventional dissents. Dissents, like DDRs, by definition do not state what the law is, but instead what the author believes the law should be; they have no legal relevance “unless some quality of thought or of expression commends them to later generations” (Scalia 1994). Nevertheless, they have become a mainstay of judicial activity because they offer the opportunity to express one’s beliefs about an issue in precisely the terms the author chooses. For this reason, Justice Antonin Scalia called dissent writing “an unparalleled pleasure” (Scalia 1994), and D.C. Circuit Judge Patricia Wald characterized dissents as “liberating,” because they allow one to voice “profound disagreement, frustration, even outrage” with the majority’s result (Wald 1995: 1412-13). Justice William O. Douglas went further, saying, “The right to dissent is the only thing that makes life tolerable for a judge of an appellate court” (Douglas 1960). DDRs differ from ordinary dissents, however, because they constitute an opinion on a case the judge *has not been asked to decide*. While judges often dissent in cases they have heard to ensure that no one may associate them with an outcome they consider anathema (Scalia 1994), judges participating in DDRs face no comparable danger from silence.

opportunity for the formation of one or more DDR coalitions.¹⁰ Thus, determining which coalition partners each judge chooses to align herself with gives a strong indication of preference-based divisions on the circuit. To the extent these coalitions tend to form along ideological lines, they illustrate polarization playing out in the circuit courts.

IV. Constructing Measures of DDR Ideology

As explained above, given the increased use of DDRs, both in general and as a means of speaking for a sizable circuit coalition, the nature of DDR coalitions warrants closer scrutiny. Do they consist of co-partisans banding together to argue political controversies in a new forum? Or do they not fall so neatly along partisan lines, instead indicating that ideological cross-cleavages exist among circuit judges, and that DDRs represent more than “politics carried on by other means” (Ferejohn 2002)? In short, do DDR coalitions demonstrate the existence of polarization in the circuit courts?

Answering this question is more difficult than appears at first blush. While it might seem reasonable to determine how often the coalitions fall along party lines, a few outliers can significantly skew such figures. For example, Ninth Circuit Judge Richard Tallman was nominated by President Clinton as part of a compromise deal

¹⁰ Even cases actually decided en banc occasionally give rise to DDRs when the circuit opts not to rehear the case en banc a second time. The dataset of DDRs assembled for this chapter contains 16 cases (accounting for 21 separate DDRs) that were already decided en banc. Four of these were Ninth Circuit cases in which the court opted not to convene all active judges (rather than a subset) to rehear the case. Although Ninth Circuit General Order 5.8 allows for a full-court rehearing, the Ninth Circuit has never used this procedure.

with Senate Republicans to get Judge William Fletcher confirmed to the same court (Wilson 2003).¹¹ Since Tallman's confirmation in 2003, he has been extremely active in DDRs, participating in 76 as an author or concurrer through the end of 2012. The vast majority of DDRs in which Tallman concurred came from the court's conservative stalwarts; indeed, only six of the 71 were from other judges nominated by a Democrat. He is, for all relevant purposes, a Republican -- and a particularly conservative one at that -- but looking only at the party of coalition members would erroneously lead to coding all 65 DDRs from Republican appointees with a Tallman concurrence as bipartisan efforts.

Thus, a more nuanced measure of coalitional behavior is in order. To construct such a measure with DDR data I look at the behavior of each judge individually, focusing on three variables: (1) the mean ideology of the judge's DDR coalition partners, (2) the mean ideology of the authors of opinions targeted in the judge's DDRs, and (3) the difference between the two. Evaluating a judge's coalition partners reveals which judges tend to align themselves with co-partisans and which ones routinely cross party lines in their DDR participation. This allows for a better sense of the dynamics behind DDR usage in the individual judge, circuit and presidential cohort contexts -- a necessary precondition to assess polarization at the circuit court level. Similarly, looking at the ideology of the judge who wrote the panel opinion the

¹¹ Senate Republicans held up Fletcher's confirmation for three and a half years, finally acceding only when Clinton agreed to nominate the choice of Senator Slade Gorton (R-WA) as well. Gorton initially put forth Washington State Supreme Court Chief Justice Barbara Durham for the position, then suggested Tallman after Durham withdrew for health reasons (Wilson 2003: 43-47). Although most presidents have made a small number of cross-party appointments, the Fletcher-Tallman compromise "represented the first and only exchange of a Republican for a Democratic judge on a single court of appeals" (Wilson 2003: 46).

DDR criticizes (who I refer to as the “target” author) gives a sense of the purpose for which a judge uses DDRs.¹² To the extent judges use them ideologically, we would expect to see liberal (conservative) judges using DDRs to criticize conservative (liberal) opinions.¹³ Alternatively, if ideology does not play a large role in deciding when a panel opinion warrants a responsive DDR, we would not see a pattern of DDR coalitions and DDR targets falling on opposite sides of the ideological spectrum. Finally, comparing the average difference between these two figures -- what I refer to as the “coalition/panel author ideology gap” -- gives the clearest picture of DDR participation, with larger gaps indicating more ideologically driven behavior. Viewing the gaps for all judges in a given circuit shows the degree of polarization within that circuit.

To evaluate these aspects of DDR activity I use an original dataset of all DDRs drafted in the circuit courts of appeals from the first one in 1943 through the end of 2012. The database contains information about 1,276 DDRs in 1,050 separate cases. For each DDR I recorded the author, all judges concurring in the DDR, the circuit, the date of publication, the judges on the panel hearing the case initially, the panel

¹² I focus on the ideology of the panel opinion’s author, rather than that of the panel majority as a whole, in keeping with research indicating that an opinion’s author exercises disproportionate control over its content (Lax and Cameron 2007; Maltzman et al. 2000). This research implies that the author gives a better measure of a panel opinion’s substantive content and the strength of the signal it sends than the panel majority as a whole. For all panel decisions giving rise to a DDR, the average ideology of the panel’s author and its majority are correlated at 0.80.

¹³ This was the implicit dynamic at play when, following the confirmation of a number of conservative Reagan nominees to the D.C. Circuit Court of Appeals in the 1980s, several commentators accused the judges of improperly using the en banc process to further their ideological ends (Karpay 1988; Smith 1990).

opinion's author, the author of any panel concurrence or dissent, and the subject matter of the case.

Each of the relevant variables used to assess polarization described above -- coalition partner ideology, target author ideology and the gap between the two -- relies on the Giles-Hettinger-Peppers (GHP) scores (Giles et al. 2001) of judicial ideology. GHP scores are based on Poole and Rosenthal's DW-NOMINATE scores for the significant players in the judge's nomination. If senatorial courtesy applies to a home-state senator, the judge is assigned the senator's DW-NOMINATE score (or an average of the scores if senatorial courtesy applies to both home-state senators). Otherwise, the judge is assigned the nominating president's DW-NOMINATE score (Giles et al. 2001). GHP scores theoretically range from -1 (most liberal) to 1 (most conservative), but in practice range from -0.699 (for Third Circuit Judges Herbert Goodrich, Charles Jones and Albert Maris) to 0.608 (for Ninth Circuit Judge Richard Chambers). The measure has been demonstrated to improve upon the party of the appointing president and has become standard in analyses of circuit court judicial behavior (Sisk and Heise 2005; Epstein and King 2002). In addition, its assignment of scores along a continuum, rather than a dichotomous assignment of party affiliation, allows for a fuller analysis of coalition composition and the distance of those coalitions from the author of the panel decision the DDR critiques.

Creating a judge-level variable measuring the average ideology of the judge's DDR coalition partners is a three-step process. First, for each judge who authored a DDR, I calculate the mean GHP of the coalition signing onto each one of her DDRs,

then take the mean of these means over all DDRs the judge has written that attracted at least one concurrence.¹⁴ The second step is the reverse of the first: for each judge who has concurred in at least one DDR I average the GHP of the authors of the DDRs in which the judge concurred.¹⁵ I then combine both averages, weighting them based on the number of DDRs involved.

An example illustrates the process. Eighth Circuit Judge Donald Lay wrote 15 DDRs attracting concurrences. Taking the mean GHP of concurers in each of those DDRs, then averaging those scores across all 15 DDRs, yields an average GHP of -0.283 for judges concurring in Judge Lay's DDRs. Judge Lay also concurred in 13 DDRs from other judges. The mean author GHP of those 13 opinions is -0.300. I weight each figure and combine them as follows: $((-0.283*15) + (-0.300*13)) / (15+13)$, which yields an ultimate DDR coalition GHP score of -0.291.

To determine the ideology of the opinions targeted when a judge participates in a DDR I use a similar approach, averaging the panel author GHP scores for all DDRs a judge wrote or concurred in. It should be noted that, unlike the coalitional measure, the data here include *every* DDR a judge authored, whether or not it attracted a

¹⁴ This is a more accurate measure than merely averaging the GHP scores of all other judges who have concurred in a particular judge's DDRs. For example, if a judge drafts ten DDRs, nine of which attract a concurrence from a single conservative judge and one of which attracts a concurrence from nine liberal judges, the judge's DDRs are likely fairly conservative on the whole. This is the result that an average of concurers' GHP scores over all of the judge's DDRs would yield. Averaging over all concurers, on the other hand, would misleadingly place the judge near the middle of the political spectrum.

¹⁵ Here, again, I use the author's ideology as a touchstone rather than that of the DDR coalition as a whole because of the author's outsized importance in determining opinion content (Lax and Cameron 2007; Maltzman et al. 2000). This is particularly true in the DDR context, given that the choice to write a DDR is entirely voluntary and the concurrence of other judges is unnecessary -- if another judge is unsatisfied with the substance of a particular proposed DDR, she is free to write her own. Indeed, 187 cases have given rise to multiple DDRs.

concurrence. Examining the average ideology of the targeted panel authors permits additional conclusions about the way a judge uses DDR participation -- either as a means of ideological conflict, as shown when the average panel GHP tends toward an extreme on the left or right, or for other purposes, as shown when the figure is closer to 0.

Finally, for each judge I take the difference of these two means, subtracting the panel author ideology figure from the coalition ideology score. High positive scores indicate that a judge tends to have conservative coalition partners and liberal targets, while larger negative scores indicate the reverse.

Using GHP scores in this manner does not require that every GHP score be an accurate reflection of the judge's ideology, so long as they are generally accurate overall and not erroneous in any systematic way. As noted above, GHP scores may be somewhat misleading as indicators of ideology in the case of individual judges appointed for reasons of compromise or patronage rather than ideological fealty. Despite these occasional inaccuracies, however, studies show that GHP scores are a good approximation of judicial ideology in the aggregate (Sisk and Heise 2005; Epstein and King 2002).¹⁶

An examination of the differences between a judge's GHP score (indicating a judge's expected behavior) and his DDR coalition/target author ideology gap (indicating actual behavior) shows that the measure has face validity. Table 2-3

¹⁶ The scores may nevertheless be inaccurate when based on only a few data points. It is for this reason I restrict the analysis below to judges who have participated as authors or concurers in at least five DDRs. Even with this limitation, the analysis still accounts for 174 judges, including individuals from every circuit. Indeed, every circuit other than the First, Sixth and Tenth has at least ten judges who meet the five-or-more-DDR restriction criterion.

identifies the judges with the largest such gap among those who have participated in at least five DDR coalitions. The list contains a number of judges who are generally considered to be “misclassified” by appointing president or GHP score.¹⁷ D.C. Circuit Judge Edward Tamm, a Truman appointee, had been the deputy director of the FBI under J. Edgar Hoover and was described in one study of voting behavior as the “leader of the conservatives” on the D.C. Circuit (Goldman 1973: 651). Judge Tallman’s presence on the list is wholly expected, as explained above. Similarly, although Judge Roger Gregory was initially a Clinton recess appointee to the Fourth Circuit, George W. Bush reappointed him in 2001 as a means of appeasing Senate Democrats early in his presidency (Wittes 2006). The Bush appointment accounts for Judge Gregory’s relatively conservative GHP score, but a score reflecting his initial nomination -- which would have been -0.200 if he had been confirmed when first nominated during Clinton’s presidency¹⁸ -- would more accurately represent Judge Gregory’s rulings on the bench. Second Circuit Judge Jose Cabranes, a Clinton appointee, has been described as “on the conservative side” (AFJ 2012: 2-13) and “among the more conservative-leaning Democratic appointees on crime and security issues” (Savage 2013). Eighth Circuit Judge Floyd Gibson, a Johnson appointee, was “a moderate conservative who was more conservative than moderate in criminal

¹⁷ Two judges on the list, Judges Juan Torruella and Kermit Lipez, serve together on the tiny First Circuit and have participated jointly in all five DDR coalitions on which their respective scores are based. Thus, the number for each is strongly dependent on the other, accounting for the large gap between each judge’s GHP and his coalition GHP score. Despite the judges’ disparate GHP scores, lawyers’ evaluations of each in the Almanac of the Federal Judiciary (AFJ) describe them in similar terms, noting Lipez’s “moderate” tendencies and concluding that Torruella is ideologically “down the middle” (AFJ 2012: 1-9, 1-12).

¹⁸ This conclusion is based on Senator Chuck Robb’s First Dimension DW-NOMINATE score, available at http://voteview.com/SENATE_SORT106.HTM.

cases” (Morris 2007: 149). Fourth Circuit Judge K.K. Hall, a Ford appointee, showed “a lifelong concern for the rights of the individual, which often left him siding with the underdog” -- traditionally a position associated with Democratic appointees (Dale 1999). In short, looking at the difference between a judge’s GHP score and his DDR coalition/target author ideology gap score identifies a subset of judges who may be routinely misclassified according to the traditional party-of-appointing-president or GHP methods. Any study of judicial decisionmaking whose empirics rely heavily on the participation of these identified judges should be viewed skeptically.

Table 2-3: Largest differences between judge’s GHP and DDR coalition/panel author GHP gap (minimum: 5 DDR coalitions)

Judge name:	Circuit:	# of DDR coalitions:	GHP:	DDR coalition / panel author GHP gap:	Absolute value of difference:
Tamm	D.C.	6	-0.367	0.569	0.936
Wiener	5	16	0.502	-0.372	0.874
Gregory	4	5	0.281	-0.589	0.870
Tallman	9	76	-0.327	0.529	0.856
Sloviter	3	9	-0.532	0.262	0.794
Rovner	7	34	0.502	-0.289	0.791
Cabranes	2	18	-0.267	0.509	0.776
Lipez	1	5	-0.422	0.348	0.770
Torruella	1	5	0.559	-0.200	0.759
F. Gibson	8	5	-0.292	0.437	0.728
K.K. Hall	4	5	0.409	-0.318	0.727

V. Polarization in the Circuits?

Looking at the DDR coalition/target author ideology gap for each judge gives a useful picture of polarization at the circuit level. To the extent the judges in a circuit are clustered, with a large space between the clusters, circuit court polarization is

evident. Figure 2-1 places each judge who has participated in five or more DDR coalitions on a -1 to 1 scale, broken down by individual circuit. Democratic appointees' names are represented by circles, Republican appointees' names are represented by triangles, and the scale indicates greater liberalism on the left and greater conservatism on the right, with a value of 0 in the center (indicated with a dotted line).

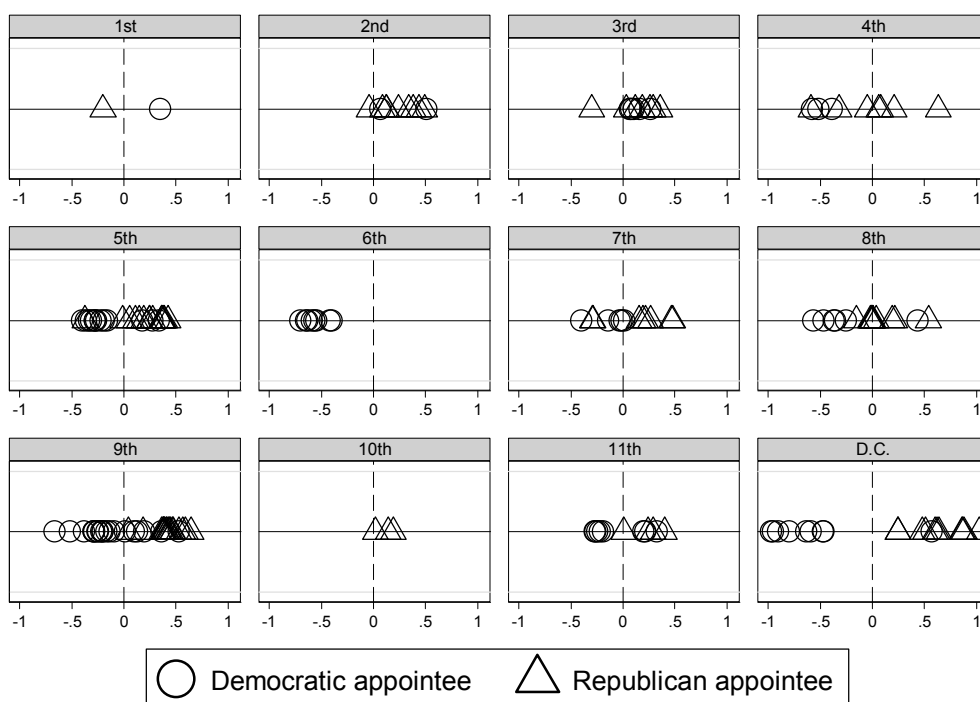


Figure 2-1: Mean DDR coalition/panel author GHP differential when judge participates in DDR, by circuit (minimum: 5 DDR coalitions)

The figure shows that political polarization is indeed widespread in the federal courts of appeals, but it is not universal. In a purely polarized environment, one would expect a cluster of circles on the left, triangles on the right and a gap in between. This general pattern is visible in the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh

and D.C. Circuits.¹⁹ The Ninth Circuit is particularly interesting in this respect: it shows essentially three distinct camps, with liberal judges on one end, conservatives bunched closely on the other, and a number of relative moderates in the middle. The Second and Third Circuits, in contrast, show no discernable polarization patterns, and there are too few DDR participants in the First and Tenth Circuits to draw any definitive conclusions.

Regression analysis further confirms the implications of Figure 2-1. Table 2-4 estimates the absolute values of the mean coalition partner ideology, the target panel author ideology, and the DDR coalition/panel author ideology gap for the set of judges who participated in at least five DDR coalitions. I choose absolute value for each of these measures in order to isolate the magnitude of extremism; looking instead at the values alone would simply indicate whether liberalism or conservatism predominates among the judges. The regression estimates account for each judge's ideology, circuit, presidential cohort and level of Senate polarization at confirmation.²⁰ These results -- particularly those regarding the DDR coalition/target author gap -- provide further support for the conclusion that DDRs have been used in an especially polarized way in the Fourth, Sixth, Ninth and D.C. Circuits. The results also imply that the polarized

¹⁹ Many of these circuits have one or two outliers positioned with appointees of the other party, but because the general expectation under polarization holds, this says more about the individual judges than about any weaknesses of the variable as a polarization measure.

²⁰ I use the Eleventh Circuit and President Eisenhower's appointees as baselines because of their relative centrality. Measured by DW-NOMINATE score, Eisenhower has the ideology closest to the center of any president for whom the scores are available. Among all judges participating in five or more DDRs, the Eleventh Circuit judges have a mean ideology score closest to the center.

use of DDRs began with President Johnson's appointees,²¹ a subject the next section explores in detail. Interestingly, this DDR/panel author ideology gap is not restricted to DDRs with substantial coalitions. When looking at the same ideology differential for all DDRs (i.e. including those written alone or with only one concurrer), the results are largely the same as those for larger coalitions: a mean difference of 0.443 for DDRs with two or more concurrers (n=560, SD=0.263), compared to a mean difference of 0.432 for DDRs with zero or one concurrer (n=630, SD=0.309).²²

²¹ The implication is confirmed when estimating the regression using a dummy variable to distinguish between appointees preceding Johnson and those confirmed during and after Johnson's term. The coefficient is substantively large and significant ($\beta=0.168$, $p=.03$).

²² A t-test confirms this difference is not significant ($t=-0.66$).

Table 2-4: Regression results for coalition partners, targets and partner/target gap, by judge

VARIABLES	(1) Avg. GHP of coalition partners, abs. value	(2) Avg. GHP of target panel authors, abs. value	(3) Avg. diff. btwn. coalition partners and target panel authors, abs. value
GHP	0.015 (0.063)	-0.005 (0.069)	0.160+ (0.096)
<i>Circuit:</i>			
1st	0.183* (0.085)	0.002 (0.092)	0.124 (0.129)
2nd	0.015 (0.051)	-0.000 (0.056)	0.077 (0.078)
3rd	0.058 (0.056)	0.135* (0.061)	0.091 (0.086)
4th	0.074 (0.048)	0.092+ (0.052)	0.153* (0.073)
5th	0.115** (0.040)	0.054 (0.043)	0.080 (0.061)
6th	0.229*** (0.052)	0.098+ (0.057)	0.389*** (0.079)
7th	0.039 (0.049)	0.047 (0.054)	0.101 (0.075)
8th	0.045 (0.045)	0.036 (0.049)	0.021 (0.068)
9th	0.085* (0.040)	0.020 (0.043)	0.164** (0.060)
10th	0.181* (0.075)	0.103 (0.081)	-0.036 (0.114)
D.C.	0.247*** (0.043)	0.190*** (0.046)	0.490*** (0.065)

Table 2-4 (cont.): Regression results for coalition partners, targets and partner/target gap, by judge

VARIABLES	(1) Avg. GHP of coalition partners, abs. value	(2) Avg. GHP of target panel authors, abs. value	(3) Avg. diff. btwn. coalition partners and target panel authors, abs. value
<i>Presidential cohort:</i>			
FDR	0.462** (0.151)	0.175 (0.164)	-0.083 (0.230)
Truman	0.314* (0.121)	-0.072 (0.131)	-0.049 (0.184)
JFK	0.152 (0.149)	0.118 (0.162)	0.302 (0.227)
LBJ	0.200+ (0.107)	0.264* (0.116)	0.512** (0.163)
Nixon	0.154+ (0.091)	0.211* (0.099)	0.263+ (0.139)
Ford	0.241* (0.103)	0.277* (0.112)	0.320* (0.157)
Carter	0.119 (0.099)	0.225* (0.107)	0.360* (0.150)
Reagan	0.202* (0.101)	0.222* (0.110)	0.277+ (0.154)
GHW Bush	0.214+ (0.119)	0.358** (0.129)	0.352+ (0.181)
Clinton	0.153 (0.153)	0.509** (0.166)	0.554* (0.232)
GW Bush	0.228 (0.160)	0.588*** (0.173)	0.532* (0.243)
Obama	0.119 (0.214)	0.477* (0.232)	0.381 (0.325)
Polarization at confirmation	-0.113 (0.461)	-1.465** (0.500)	-1.189+ (0.701)
Constant	0.012 (0.219)	0.706** -0.237	0.506 (0.333)
Observations	173	173	173
R ²	0.432	0.329	0.517
Adjusted R ²	0.336	0.215	0.435
Notes: Standard errors in parentheses, 11th Circuit and Eisenhower cohort used *** p<0.001, ** p<0.01, * p<0.05, + p<0.1.			

In sum, evidence of political polarization appears in most of the circuits, and appears to a statistically significant degree in nearly half. Coalitions of judges often coalesce along fairly rigidly polarized lines, using DDRs to further their political ends, but in a subset of circuits judges turn to DDRs in a less predictable fashion, routinely forming cross-party coalitions. These circuit differences tell only part of the story, however, because the analysis thus far does not account for changes in judicial behavior over time, and therefore does not help isolate the factors driving judicial polarization. The next section attempts to address such changes in DDR usage and identify how they relate to competing theories explaining the rise of polarization within the judiciary.

VI. Assessing Polarization Causes via Presidential Cohort-Based Analysis

Based on the foregoing, it appears that circuit courts do show evidence of polarization, with judge-level data showing a mostly bimodal distribution of DDR coalition/panel author ideology gaps falling largely along party lines in most of the circuit courts. The next question is the source of that polarized behavior. As explained above, the literature implies three primary potential drivers: an increasingly polarized Senate, an increasingly polarized general public, and presidents performing their nominating duties in a polarized fashion. Comparing the explanatory power of each account requires assessing the behavior of judicial cohorts over time. This section first describes the dynamics revealed in cohort-based analysis of DDR usage,

then applies this evidence to determine which polarization explanation is most plausible.

A. Marshalling and Assessing Presidential Cohort Evidence

Attempting to assess DDR time trends on an individual judge level is not possible because there are not enough data points for most individual judges to make such an assessment meaningful -- very few judges have engaged in substantial DDR activity over multiple decades. I therefore group the judges by presidential cohort and examine cohort behavior on a decade-by-decade basis to get better traction on the scope and nature of judicial polarization as expressed through DDRs.

Before beginning the evaluation of cohort-based time trends, it is worth examining the rate of DDR participation by presidential cohort generally to determine how cohort-specific such participation seems to be. As shown below in Table 2-5, participation in *some* DDR activity is fairly widespread across cohorts, with every judicial cohort since Kennedy's (other than Obama's, which has not been on the bench long enough yet to offer a true comparison) exceeding 60%.²³ Looking at those who have participated in DDRs more frequently reveals some differences among cohorts in the extent to which judges use DDRs on a relatively regular basis. More than 60% of Ford, Carter and Clinton appointees have participated in at least five DDRs. Of the rest, only Reagan's exceed 50% (though we may assume that the percentages for George W. Bush's and Obama's appointees will increase, as most members of those

²³ To date, Obama's appointees have participated at roughly the same rate as other cohorts during a president's first term. Including both authored DDRs and concurrences, Obama appointees have participated at a rate of roughly 0.52 DDRs per judge-year during this time, which puts them behind George W. Bush's (0.65) and Reagan's (0.63) appointees during their respective first terms but ahead of every other judicial cohort. These results are not shown but are available upon request.

cohorts will continue in active service for years -- and possibly decades -- to come, and will therefore have many more opportunities for DDR participation). Particularly surprising is the low participation result for George H.W. Bush's appointees, who were confirmed at a time of increasing partisanship in the Senate, and who mostly remained active during the DDR increase in the early 2000s.²⁴ From these results, it seems fair to conclude that, as a group, the George H.W. Bush appointees are less interested in pursuing their goals by way of DDRs than their immediate predecessors and successors. As shown below, however, those that make use of the DDR mechanism do so in a markedly partisan way.

Table 2-5: Frequency of DDR participation by presidential cohort

	Total appointees	# participating in 1+ DDRs	% of DDR participation	# participating in 5+ DDRs	% of 5+ DDR participation
Eisenhower	45	21	47%	3	7%
JFK	21	13	62%	2	10%
LBJ	40	26	65%	16	40%
Nixon	46	33	72%	18	39%
Ford	11	11	100%	8	73%
Carter	56	50	89%	34	61%
Reagan	78	68	87%	41	53%
GHW Bush	37	30	81%	15	41%
Clinton	62	56	90%	38	61%
GW Bush	59	42	71%	14	24%
Obama	27	14	52%	2	7%

Breaking down DDR participation behavior by presidential cohort and decade illuminates several trends in DDR participation. Table 2-6 summarizes this data. To generate the numbers in the table I add up all DDR participation (both via authored DDRs and concurrences) by judges in each presidential cohort for each decade, then divide that sum by the total number of active judge-years for the cohort during that

²⁴ Indeed, at the beginning of George W. Bush's second term, more than two-thirds of George H.W. Bush's 37 appointees were still active.

decade.²⁵ This quotient provides the cohort-based DDR activity per judge-year figure presented in the table.

Table 2-6: DDR participation per judge-year, by presidential cohort and decade

	1960-69	1970-79	1980-89	1990-99	2000-	Total
FDR	0.43	0*	.	.	.	0.07
Truman	0.24	0.72	0*	.	.	0.14
Eisenhower	0.07	0.41	0.50	0.19*	.	0.14
JFK	0.07	0.24	0.11	0.10*	0*	0.14
LBJ	0.14	0.36	0.36	0.27	0.53*	0.31
Nixon	0*	0.33	0.56	0.18	1.06*	0.41
Ford	.	0.24	0.47	0.22	1.08*	0.41
Carter	.	0.06	0.43	0.66	1.24	0.58
Reagan	.	.	0.55	0.40	1.04	0.60
GHW Bush	.	.	0*	0.33	0.76	0.53
Clinton	.	.	.	0.60	0.91	0.85
GW Bush	.	.	.	.	0.92	0.92
Obama	.	.	.	.	0.52	0.52
All D judges	0.17	0.32	0.40	0.60	0.93	0.43
All R judges	0.07	0.34	0.54	0.36	0.92	0.51
All judges	0.13	0.33	0.47	0.45	0.92	0.47

*Decade's figure based on fewer than 15 judge-years.

The table contains several revealing elements. First, it shows that the jumps in DDR activity in the early 1970s and the early 2000s, described in Horowitz (2013), were not restricted to a single presidential cohort. Instead, every participating cohort underwent a substantial increase in DDR activity during those periods.²⁶

²⁵ A cohort's "judge-years" in a decade is the total number of years in the decade that members of the cohort served as active judges. I calculate the total number of active judge-years per decade for each judicial cohort using the start date, end of active service date and nominating president information from the Federal Judicial Center's Biographical Directory of Federal Judges, located at www.fjc.gov.

²⁶ The two exceptions are President Roosevelt's appointees in the 1970s and President Kennedy's appointees in the 2000s. In both cases, the cohort accounted for some DDR activity in the preceding decade but had only a single member still active as of January 1 of the new decade: Roosevelt appointee Alfred Murrah, of the Tenth Circuit, who assumed senior status on May 1, 1970; and Kennedy appointee James Browning, of the Ninth Circuit, who assumed senior status on September 1, 2000.

In other respects the judicial cohorts appear to differ substantially from one another. Johnson appointees maintained roughly the same level of activity throughout. Appointees of Nixon and Ford, in contrast, nearly doubled their DDR participation in the 1980s, perhaps in response to the thirty-five new appeals court judgeships created in 1978 and populated with Carter appointees, which left the appeals courts 61% Democratic when Carter left office.²⁷ Carter appointees have consistently increased their rates of DDR participation in every succeeding decade, while Reagan appointees seem far more sensitive to the political composition of the courts: they started off active in the 1980s, reduced their activity in the 1990s, then redoubled their DDR efforts in the 2000s. Clinton and George W. Bush appointees have been active in the DDR process from the outset, while Obama's appear relatively less inclined to do so -- at least so far.

These figures provide a good overview of the scope of DDR participation among the various presidential cohorts, but they do not tell the full story regarding polarization. To get a broader sense of the ideological dynamics at play, I look again at the three key variables measuring the ideological component of DDR participation: the ideology of DDR participants' coalition partners, the ideology of the panel authors of the opinions targeted in the DDRs, and the interplay between the two. I break both variables down by presidential cohort and decade.

²⁷ The subsequent reduction in DDR activity of these cohorts in the 1990s may be due to the influx of Reagan and George H.W. Bush appointees in the courts. Alternatively, the decrease might simply reflect the effects of aging.

I turn first to the coalitional behavior of each presidential cohort. As described above, the coalitional behavior measure provides a weighted average of (a) the average GHP score of DDR concurrers when a judge from the cohort is the DDR author and (b) the average author GHP score when a cohort member concurs in a DDR. Table 2-7 summarizes the results for each cohort overall and by individual decade. The data indicate that most cohorts tend to observe traditional ideological divisions in their choice of coalitional partners. Among cohorts participating in significant numbers since 1970, the exceptions are the Eisenhower and Clinton appointees, who as a group tend to form coalitions not strongly identified with a particular ideology.

Table 2-7: Average DDR coalition GHP score, by presidential cohort and decade

	Pre-1970	1970-79	1980-89	1990-99	2000-	Total
FDR	-0.362	.	.	.	.	-0.362
n	24	.	.	.	.	24
Truman	-0.332	-0.465	.	.	.	-0.353
n	22	4	.	.	.	26
Eisenhower	-0.036	-0.051	0.156	-0.120	.	-0.018
n	15	35	9	1	.	60
JFK	-0.291	-0.127	-0.469	-0.409	.	-0.205
n	10	24	3	1	.	38
LBJ	0.059	-0.036	-0.258	-0.170	.	-0.097
n	12	102	47	8	.	169
Nixon	.	0.086	0.118	0.272	0.156	0.109
n	.	85	95	6	2	188
Ford	.	0.024	0.241	-0.018	-0.019	0.144
n	.	11	37	5	9	62
Carter	.	-0.367	-0.193	-0.188	-0.176	-0.187
n	.	1	191	173	120	485
Reagan	.	.	0.295	0.175	0.217	0.224
n	.	.	179	217	298	694
GHW Bush	.	.	.	0.168	0.222	0.204
n	.	.	.	95	192	287
Clinton	.	.	.	-0.099	-0.030	-0.039
n	.	.	.	96	577	673
GW Bush	.	.	.	.	0.198	0.198
n	.	.	.	.	382	382
Obama	.	.	.	.	-0.122	-0.122
n	.	.	.	.	22	22
Total, D presidents	-0.276	-0.073	-0.210	-0.158	-0.057	-0.115
n	71	135	251	280	719	1456
Total, R presidents	-0.036	0.047	0.236	0.173	0.207	0.191
n	15	132	318	322	883	1670

The table also indicates that most cohorts have maintained relative ideological consistency over time regarding their DDR coalition partners. Cohorts that form liberal, moderate or conservative coalitions in one decade tend to do so in other decades as well. The major exceptions to this trend are the Johnson and Ford

appointees in the 1980s, with the Johnson judges becoming substantially more liberal in their DDR coalitional behavior and the Ford judges becoming more conservative.²⁸

Looking cumulatively at the judges of each party, it is evident that DDR coalitions were relatively ideologically balanced in the 1970s, but became extremely polarized in the 1980s, with Democrats joining other Democrats and Republicans joining other Republicans. The scope of this polarization abated somewhat in the 1990s. Since 2000, it appears that Democratic appointees have been much more amenable to forming coalitions across the ideological divide, while Republicans still tend to observe ideological divisions. This difference is almost entirely attributable to the behavior of the more moderate Clinton appointees.

Assessing the ideology of the panel judges whose opinions are challenged in DDRs, more of the polarization picture comes into view. Some cohorts became more extreme in their ideological targeting over time. Thus, for example, Johnson appointees pursued judges who were, on average, in the middle of the ideological spectrum in the 1970s, but the panel authors they targeted in the 1980s were much more conservative. Nixon appointees, similarly, had a moderately liberal panel author target in the 1970s but a substantially more liberal one in the 1980s. Other cohorts go in the opposite direction: both Reagan and Clinton appointees initially tended to take on opinions from more extreme ideological authors, but had a more moderate mean target ideology in later decades. Carter appointees follow both trends, with the

²⁸ One-tailed t-tests show that the difference in coalitional GHP in the 1980s is statistically significant for the Johnson judges ($t=2.79$, $p=0.008$), and approaches conventional statistical significance for the Ford appointees ($t=-2.01$, $p=0.06$).

average target becoming more extreme in the 1990s and more moderate again in the 2000s. Ford appointees, interestingly, went from a liberal average target to a moderate average and then, ultimately, to a conservative one in the years since 1990. Table 2-8 summarizes this material.

Table 2-8: Mean panel author GHP, by DDR participant presidential cohort and decade

	<u>Pre-1970</u>	<u>1970-79</u>	<u>1980-89</u>	<u>1990-99</u>	<u>2000-</u>	<u>Overall</u>
FDR	-0.411	.	.	.	.	-0.411
n	45	.	.	.	.	45
Truman	-0.220	0.083	.	.	.	-0.130
n	31	13	.	.	.	44
Eisenhower	-0.204	-0.065	-0.146	-0.043	.	-0.117
n	23	43	14	2	.	82
JFK	-0.156	-0.112	0.138	0.183	.	-0.089
n	9	26	4	1	.	40
LBJ	-0.241	0.014	0.148	0.079	0.218	0.032
n	18	110	54	9	1	192
Nixon	.	-0.132	-0.231	-0.172	0.153	-0.174
n	.	100	114	6	7	227
Ford	.	-0.159	-0.098	0.283	0.143	-0.030
n	.	11	42	7	12	72
Carter	.	0.329	0.150	0.225	0.109	0.168
n	.	2	222	201	130	555
Reagan	.	.	-0.189	0.014	-0.059	-0.069
n	.	.	192	239	324	755
GHW Bush	.	.	.	-0.030	-0.025	-0.027
n	.	.	.	99	207	306
Clinton	.	.	.	0.240	0.081	0.105
n	.	.	.	106	612	718
GW Bush	.	.	.	.	-0.123	-0.123
n	.	.	.	.	394	394
Obama	.	.	.	.	0.107	0.107
n	.	.	.	.	27	27
Total, D presidents	-0.310	0.008	0.153	0.225	0.090	0.094
n	106	155	288	320	781	1650
Total, R presidents	-0.204	-0.113	-0.193	0.005	-0.078	-0.090
n	23	156	361	350	933	1823

Overall, Democratic appointees seemed to follow a polarized trend from the 1970s through 2000, homing in on more conservative targets in each successive decade, but their average target since 2000 has been closer to the center. Republican appointees also took a very polarized approach to DDR targets in the 1980s but have a more moderate average target in the 1990s and 2000s.

Combining both elements -- coalition partners and panel author targets -- demonstrates the extent to which the various judicial cohorts have used DDRs in a polarized manner. Again, for each presidential cohort and decade this measure shows the ideological distance between a judge's cohort partners and the author of the opinion the DDR targets. Higher positive scores indicate that cohort members tend to join with conservatives and target liberals, while high negative scores indicate the reverse. Results are below in Table 2-9.

Several patterns emerge, generally confirming what the assessments of the coalition partners and targets showed previously. Overall the cohorts follow an expected pattern, with Republican appointees demonstrating positive scores and Democratic appointees showing negative ones. This pattern began in earnest with the Nixon appointees and has continued with every succeeding cohort other than the Clinton judges, who are relatively moderate on this scale. Looking at the data on a decade-by-decade basis, polarization grew tremendously in the 1980s and lessened to some extent since then, as Republican appointees drew closer to the center in the 1990s before again turning rightward in the 2000s and Democratic judges became more moderate in the 2000s. Cohorts have varied somewhat over time: Johnson

appointees grew substantially more liberal in the 1980s, while Clinton appointees became substantially more moderate in the 2000s and Reagan appointees became more moderate in the 1990s before again shifting right in the 2000s.

Table 2-9: Mean coalition partner/panel author ideology gap, by DDR participant's presidential cohort and decade

	<u>Pre-1970</u>	<u>1970-79</u>	<u>1980-89</u>	<u>1990-99</u>	<u>2000-</u>	<u>Overall</u>
FDR	0.083	.	.	.	.	0.083
n	24	.	.	.	.	24
Truman	-0.035	-0.880	.	.	.	-0.182
n	19	4	.	.	.	23
Eisenhower	0.232	0.008	0.267	-0.338	.	0.093
n	13	35	9	1	.	58
JFK	-0.139	0.017	-0.718	-0.592	.	-0.107
n	9	21	3	1	.	34
LBJ	0.232	-0.051	-0.434	-0.293	.	-0.153
n	11	99	47	8	.	165
Nixon	.	0.214	0.349	0.444	0.193	0.291
n	.	77	91	6	2	176
Ford	.	0.184	0.397	-0.214	-0.103	0.244
n	.	11	35	5	7	58
Carter	.	-0.843	-0.360	-0.411	-0.281	-0.360
n	.	1	187	173	116	477
Reagan	.	.	0.488	0.165	0.276	0.295
n	.	.	174	216	288	678
GHW Bush	.	.	.	0.193	0.259	0.237
n	.	.	.	95	189	284
Clinton	.	.	.	-0.352	-0.094	-0.132
n	.	.	.	95	553	648
GW Bush	.	.	.	.	0.339	0.339
n	.	.	.	.	368	368
Obama	.	.	.	.	-0.293	-0.293
n	.	.	.	.	22	22
Total, D presidents	0.046	-0.083	-0.384	-0.389	-0.132	-0.214
n	66	129	245	279	691	1410
Total, R presidents	0.232	0.152	0.437	0.173	0.296	0.287
n	13	124	308	321	854	1620

Regression analysis clarifies these trends. To isolate the differences in polarization among presidential cohorts I use individual judge participation in a DDR

(as an author or concurren) as the unit of analysis and estimate three models, using the absolute values of relevant DDR coalition partner ideology,²⁹ target author ideology, and the difference in ideology between relevant coalition partners and target panel opinion authors as the key dependent variables. I use absolute value for each of these variables to measure the scope of extremism rather than average ideological direction. Each estimation accounts for the DDR participant's ideology, the president who appointed her, the decade of the DDR, the circuit and the DDR's primary subject matter.³⁰ In all, the data contain 3,609 instances of DDR coalition participation.³¹ As before, I use Eisenhower appointees and the Eleventh Circuit as baselines due to their ideological centrality. Criminal cases are used as the subject matter baseline. Standard errors are clustered by individual judge. Table 2-10 summarizes the results.

²⁹ "Relevant coalition partner ideology" is the mean ideology of the concurren when a judge authors a DDR and the ideology of the author when a judge concurs in a DDR.

³⁰ I assigned each case one of the eight subject matter codes (for criminal, civil rights, First Amendment, due process, privacy, labor, economic activity and regulation, and miscellaneous cases) used in the Songer Courts of Appeals Database (Songer 1999).

³¹ The estimations for coalition partners and coalition partner/target author difference are based on DDRs involving coalition partners (i.e., those DDRs attracting at least one concurrence), accounting for the smaller numbers of observations.

Table 2-10: Presidential cohort, circuit and decade effects on DDR participation polarization

VARIABLES	(1) Relevant DDR coalition partner GHP, abs. value	(2) Target panel author GHP, abs. value	(3) DDR coalition / panel author GHP differential, abs. value
Judge's GHP	-0.046 (0.034)	-0.020 (0.026)	-0.071 (0.057)
<i>Presidents:</i>			
FDR	0.253*** (0.075)	0.202* (0.091)	0.090 (0.068)
Truman	0.112* (0.054)	-0.019 (0.068)	0.053 (0.060)
Kennedy	0.041 (0.042)	0.060 (0.041)	0.019 (0.056)
LBJ	0.046 (0.027)	0.047 (0.029)	0.138*** (0.040)
Nixon	0.053* (0.024)	0.051 (0.026)	0.059 (0.035)
Ford	0.104*** (0.031)	0.076* (0.035)	0.095* (0.041)
Carter	0.046 (0.027)	0.033 (0.027)	0.035 (0.041)
Reagan	0.098*** (0.024)	0.068** (0.026)	0.105** (0.036)
GHW Bush	0.091** (0.032)	0.089** (0.028)	0.119** (0.042)
Clinton	0.055* (0.025)	0.05 (0.028)	0.048 (0.047)
GW Bush	0.066* (0.032)	0.084** (0.029)	0.123** (0.046)
Obama	0.051 (0.035)	0.031 (0.039)	0.008 (0.058)
<i>Decades:</i>			
1970s	0.044 (0.025)	-0.002 (0.034)	0.131** (0.049)
1980s	0.080** (0.028)	0.002 (0.036)	0.266*** (0.049)
1990s	0.098*** (0.029)	0.038 (0.038)	0.179*** (0.052)
2000s	0.108*** (0.031)	0.063 (0.038)	0.199*** (0.054)

Table 2-10 (cont.): Presidential cohort, circuit and decade effects on DDR participation polarization

VARIABLES	(1) Relevant DDR coalition partner GHP, abs. value	(2) Target panel author GHP, abs. value	(3) DDR coalition / panel author GHP differential, abs. value
<i>Circuits:</i>			
1st Cir.	0.094* (0.038)	-0.030 (0.029)	0.119 (0.070)
2nd Cir.	-0.017 (0.032)	-0.015 (0.020)	0.053 (0.043)
3rd Cir.	0.022 (0.034)	0.068* (0.033)	-0.022 (0.043)
4th Cir.	0.039 (0.026)	0.052** (0.017)	0.130*** (0.034)
5th Cir.	0.057* (0.026)	0.035 (0.019)	0.009 (0.028)
6th Cir.	0.058* (0.024)	0.123*** (0.017)	0.295*** (0.033)
7th Cir.	0.018 (0.027)	0.034 (0.018)	0.109** (0.037)
8th Cir.	0.048 (0.028)	0.064** (0.022)	0.081* (0.040)
9th Cir.	0.036 (0.023)	0.023 (0.016)	0.136*** (0.031)
10th Cir.	0.098*** (0.029)	0.093*** (0.024)	-0.017 (0.045)
D.C. Cir.	0.216*** (0.025)	0.230*** (0.017)	0.418*** (0.043)
<i>Subject matter:</i>			
Civil rights	0.003 (0.006)	0.036*** (0.008)	0.043** (0.014)
1st Amendment	-0.022 (0.011)	0.047*** (0.010)	-0.03 (0.016)
Due process	-0.010 (0.016)	0.079*** (0.019)	0.134*** (0.033)
Privacy	0.035* (0.015)	-0.014 (0.018)	0.159*** (0.022)
Labor	0.016 (0.020)	0.058*** (0.017)	0.036 (0.026)
Econ. Activity	0.004 (0.008)	0.023* (0.010)	-0.014 (0.018)
Miscellaneous	-0.004 (0.014)	0.013 (0.012)	0.042 (0.023)
Constant	0.104** (0.034)	0.146*** (0.033)	0.061 (0.057)
Observations	3,109	3,452	3,014
R-squared	0.136	0.170	0.192
Standard errors, clustered on individual judges, in parentheses.			
*** p<0.001, ** p<0.01, * p<0.05			
Note: 11th Circuit and Eisenhower appointees and criminal cases used as comparison points.			

Looking at the results in column 3 for the ideology differential between relevant coalition partners and target authors, several interesting details emerge. First, Republican cohorts tend to exhibit higher differentials than their Democratic counterparts (though there is no statistically significant link between a judge's ideology score and the size of the relevant coalition/target author gap). Appointees of Nixon, Ford, Reagan, and both Bushes are linked to larger ideology gaps to a statistically significant degree. On the Democratic side, only Johnson's appointees are similarly connected to polarization in DDR usage. Second, the polarized use of DDRs demonstrates a significant increase in every decade over the pre-1970 baseline. This increase is considerable in each decade, but particularly pronounced in the 1980s. Third, as indicated earlier, there is some evidence of the polarized use of DDRs in a majority of the circuits. DDR polarization is particularly extreme in the Fourth, Sixth, Ninth and D.C. Circuits, though also apparent in the First, Seventh and Eighth Circuits. In each of these circuits other than the First, the estimate is at conventional significance levels.

In an alternative specification I interact each judge's presidential cohort with the decade of the DDR to determine whether the relevant DDR coalition partner/target author ideology gap within any cohort changed over time. Only three such interactions are statistically significant: Ford appointees were less polarized in the

1980s ($p < .05$) and Reagan and GHW Bush appointees were less polarized in the 1990s ($p < .001$ for Reagan judges; $p < .05$ for GHW Bush judges).³²

B. Applying the Cohort-Based Results to the Polarization Hypotheses

The foregoing analysis indicates the presence of ideology gaps between DDR coalitions and the authors of the targeted panel opinions falling largely along party lines. When viewed over time, it appears that these gaps grew substantially in the 1980s, when the legislature and the public also became more polarized, and that the trend has continued (though abated slightly) since then. These cohort-based polarization results allow us to evaluate the competing hypotheses summarized above that ascribe judicial polarization to polarization in the Senate, the general public and among appointing presidents.

As described above, if the fractious Senate environment directly caused judicial polarization, each successive cohort of judges would engage in more polarized behavior. Using the coalition/panel author ideology gap to measure polarization, the regression estimates provide only limited support for this hypothesis. Among cohort effects sizes, the largest coefficient applies to President Johnson's nominees, who were confirmed before party-based polarization took hold in the Senate. Every Republican cohort beginning with Nixon has a larger coefficient than its predecessor, indicating increasing levels of polarization. The Democratic cohorts do not show a similar trend, however; the coefficients for these cohorts are small and statistically

³² Several other cohort/decade interactions achieve statistical significance, but these are based on the behavior of only two judges. Results of the models with these cohort/decade interactions are not shown but are available upon request.

insignificant. This indicates that increasing Senate polarization alone does not account for the levels of judicial polarization evident in the DDR data.

Under the theory of public opinion as the primary driver of judicial polarization, when the electorate collectively becomes more polarized, judges -- a highly knowledgeable subgroup of the electorate -- undergo this shift themselves and act in an increasingly polarized way. If this were true, we would find that all judges, regardless of appointing president or time of appointment, behave in an increasingly polarized manner in each successive decade. The data tend not to support this theory. Table 2-9, which breaks down cohort behavior by decade, does not show evidence of uniformly increasing polarization. Some cohorts become more polarized over time while others become more moderate. Similarly, the decade coefficients in Table 2-10 show that polarization in every decade has been higher than it was before 1970, but it peaked in the 1980s and has tapered off in the decades since. In addition, the models that include interaction effects between judicial cohorts and decades show that, with only a few exceptions, the cohorts have not become increasingly liberal or conservative over time, but have instead stayed relatively stable.³³

Finally, to the extent presidents determine judicial polarization through their selection of candidates, and some presidents seek more ideologically driven nominees (who are more prone to polarized behavior), we would expect to see some judicial cohorts consistently behaving in a more polarized fashion than others. These

³³ In each of the exceptions to this trend -- the Ford judges in the 1980s and the Reagan and GHW Bush judges in the 1990s -- the interaction term is negative, indicating more moderation than would otherwise be expected. For the Ford judges this moderation comes at the end of their tenure. For the Reagan judges the moderation comes in the middle, and for the GHW Bush judges it falls at the beginning.

differences should remain fairly constant over time. More specifically, the literature on judicial nominations would predict that Republican appointees (other than Ford's and, to a lesser extent, Nixon's) would be identifiably polarized, while Democratic nominees would tend to be more centrist. Reagan, who campaigned on a promise to appoint only judges "who believe in state and local authority" and who "respect traditional family values and sanctity of innocent human life" (Republican Party Platform 1980),³⁴ broke new ground in the use of judicial appointments to further policy goals by explicitly including ideological considerations in his nominating decisions. His administration delegated initial screening of potential judicial nominees to the newly formed Office of Legal Policy and formalized the selection procedure to ensure the nomination of ideologically compatible individuals -- those committed to "judicial restraint," which Reagan defined as "support[ing] the limited policymaking role for the Federal courts envisioned by the Constitution" (Goldman 1997: 291-98; Reagan 1983).³⁵ George H.W. Bush and George W. Bush essentially continued this practice of ideology-based selection (Carter 1994; Miner 1992; Goldman et al. 2003; Solberg 2005).

The relevant studies indicate that Ford and the Democratic presidents, whether due to political exigencies or personal preference, pursued less ideological goals through their judicial appointments. Ford contended that appointing judges on

³⁴ This explicit linkage between judicial appointments and "traditional family values" policies (including abortion prohibition) has become a staple of every subsequent Republican Party platform.

³⁵ According to an analysis of Reagan's presidential papers, at least three-quarters of Reagan's appointments to the courts of appeals were based on furthering the president's policy agenda (Goldman 1997: 307).

ideological grounds was “improper” because it “denigrates the nominee and the Court”; he instead favored highly qualified and easily confirmable nominees (O’Brien 1989: 28). Kennedy and Johnson used judicial selection to further personal and partisan goals more than policy ones (Goldman 1997: 172). Carter’s primary aim through nominations was expansion of female and minority representation on the bench rather than promotion of his domestic policy agenda (Goldman 1997: 250), and Clinton preferred a more limited role for the judiciary in general (Wittes 2006; Scherer 2005; Haire et al. 2001). Based on the presidential appointments literature, then, one would expect to see more ideological behavior from the later Republican judges and less from judges nominated by Democrats.

The regression results provide strong support for this theory of presidential influence as the primary driver of polarization. As the theory predicts, Nixon and Ford appointees do indeed hew more closely to the center than the judges confirmed during later Republican administrations, who are generally more ideological. Carter, Clinton and Obama appointees are similarly relatively centrist in their DDR usage (though in the latter case this may be an artifact of their limited time on the bench). The main exception to this theory is the cohort of Johnson appointees, who are the most prone to use DDRs in a polarized fashion. This result contradicts the implications of the appointments literature, which would predict less polarized behavior from the Johnson judges because “the policy agenda played a relatively minor role in [Johnson’s] judicial selection” (Goldman 1997: 172).

VII. Conclusion

In assessing the existence and possible causes of judicial polarization, this chapter looked at DDRs -- voluntary, non-precedential, highly public opinions from circuit court judges claiming error on the part of their colleagues. To evaluate the ideological nature of DDR usage, it focused specifically on two aspects of DDRs: who a judge joins *with*, and who he mobilizes *against*. I used these measures to examine the different patterns among the circuits, among different presidential cohorts, and in different decades.

The chapter concludes that, although the circuits vary widely in the way they use DDRs, a substantial number of them use DDRs in a polarized fashion. This trend is particularly pronounced in the Fourth, Sixth, Ninth and D.C. Circuits, and largely absent only in the Second and Third Circuits (with too few judges participating in the First and Tenth Circuits to draw any firm conclusions). Looking at the cumulative trends in DDR coalitions over time, DDR usage was relatively nonideological in the 1970s but became exceedingly polarized in the 1980s. Democrats engaged in more polarized behavior in the 1980s and 1990s but have moderated since then, while Republicans have fluctuated substantially, displaying heightened polarization in the 1980s and 2000s and relatively less in the 1990s. The patterns in DDR coalitional behavior over time indicate that the president is more of a driving force in judicial polarization than the Senate or the general public's own tendency toward polarization, and that polarized activity is most reliably traced to the Reagan, George H.W. Bush and George W. Bush appointees.

To the extent judges are ideologically polarized, and choose to highlight that polarization via DDR participation, it is worth considering the potential effect of such actions on the public's perception of the courts. As political scientist Keith Bybee warns, "Judicial legitimacy has long been understood to derive from what judges do *and* from how they look doing it. Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle" (Bybee 2010: 5). If judges go beyond their required duties in order to publicly chastise their colleagues, and if they appear to be doing so based on ideological preference rather than legal requirement, they threaten to erode the public's sense of the court's legitimacy (Berzon 2012; Edwards 1998). This may lead some to question the propriety of lifetime tenure for individuals seemingly pursuing a political agenda in the courtroom. It could also limit the public's trust in the legal system, irreparably damaging the effectiveness of the courts as a neutral arbiter of disputes. As Judge Harry Edwards notes, if people "believe that the judicial function is nothing more than a political enterprise ... the judiciary will be sharply devalued and incompetent to fulfill its role as mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold" (Edwards 1991: 838-39). In short, to the extent DDR behavior is premised on furthering ideological goals, such activity could have profoundly negative consequences for the judiciary. This damage to judicial legitimacy would be entirely self-inflicted.

DDR research could be extended in a number of directions. First, one could analyze whether judges in a circuit's ideological minority employ a different strategy with respect to DDR participation than judges in the majority. Does the degree of ideological imbalance on the circuit have an effect? Second, the time trends described in this chapter raise several interesting issues. It appears that judges have become less polarized in the 2000s while the public has continued to grow more divided during this time. What accounts for this deviation from public sentiment? Why did the Reagan appointees begin targeting judges closer to the middle of the ideological spectrum in the 1990s? Is this a sign of nonideological activity, or does it instead reflect an attempt by the courts' more extreme conservatives to challenge liberals, centrists and moderate conservatives alike? Third, one could tease out the relationship between a judge's age and her willingness to engage in DDR activity. It is possible that older judges do not have the same fervor that leads to DDR participation, but one could just as easily imagine that judges who stay active after reaching retirement eligibility are a self-selected group who are more committed to pursuing ideological goals. Finally, the political dynamics of coalitions signing onto CDRs -- opinions responding to DDR critiques -- may themselves warrant further investigation.

In addition, DDR activity provides a useful new measure of "judicial activism," one whose interpretation is not susceptible to political bias. As originally used, the term was a value-neutral means of describing justices on the Supreme Court who were "more concerned with the employment of the judicial power for their own conception of the social good," and "regard[ed] the Court as an instrument to achieve

desired social results” (Schlesinger 1947: 201). Since then, however, the term has become almost exclusively pejorative and largely empty, amounting to “little more than a rhetorically charged shorthand for decisions the speaker disagrees with” (Roosevelt 2006; see also Sedensky 2010). Many judicial scholars, frustrated with the term’s amorphousness, have abandoned it altogether as a useful concept. Using DDR participation to measure judicial activism would mark a return to Schlesinger’s original concept: DDR participation is a voluntary activity going beyond the required duties of judging that leverages a judge’s position and allows her to publish a statement about her conception of the social good, rather than staying silent in the face of an outcome she dislikes. As a measure of activism it does not rely on interpretation and is therefore ideologically neutral.

Regardless of the specific form such future research takes, DDRs represent a unique window into unmediated preference dynamics exhibited on the courts of appeals. They warrant greater scrutiny and analysis.

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CHAPTER 3

Legitimacy, Ideology and the Use of Precedent on the U.S. Supreme Court

Abstract: Numerous articles have looked at the connection between the Supreme Court's actions and public perception of the Court's legitimacy, but most of these studies focus solely on justice votes; relatively few studies have assessed other ways in which the justices might enhance the Court's legitimacy through the performance of their judicial duties. In particular, little scholarly attention has been paid to the justices' use of precedent as a legitimizing tool. In this chapter, I empirically investigate whether the Court systematically cites precedent in its decisions to enhance its institutional legitimacy. I employ a recent measure of precedent centrality developed by Fowler et al. (2007) to test the hypothesis that the Court cites more authoritative precedent in cases that might cause the public to question its legitimacy. The data indicate that in these situations -- when the Court departs from governing case law, when its actions are particularly salient to the public, and when it directly challenges the actions of the coordinate branches -- its decisions cite more authoritative case law to support its holdings. Thus, the justices appear to respond to the institutional constraint requiring them to explain the rationales underlying their decisions. This dynamic implies the existence of a degree of concern for legitimacy, running contrary to the commonly expressed fears of an unchecked judiciary.

The Court's power lies ... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.
(*Planned Parenthood* 1992: 865)

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.
(Hamilton 1961: 471)

The Supreme Court has traditionally enjoyed higher public esteem than the elected branches of government (Caldeira and Gibson 1992). At first blush this is somewhat surprising given the justices' lifetime tenure and lack of direct accountability to voters, institutional qualities that run counter to the democratic ideal. Some have attributed the Supreme Court's relative popularity to its position above the political fray, insulated from the vicissitudes of political life, coupled with the ceremonial flourishes with which the justices carry out their duties (Gibson et al. 2003; Scheb and Lyons 2000). In this view, the public supports the Court, and accords it legitimacy, precisely because the Court appears to be the branch of government least concerned with obtaining that support.

But is this view of the Court's behavior accurate? One line of political science research has examined whether the justices, far from being apolitical actors, instead cast their votes either consciously or subconsciously to curry favor with the public. Many of these studies have determined that the justices preserve the Court's legitimacy by voting, collectively, in accordance with public sentiment (McCloskey 1960; Dahl 1957; McGuire and Stimson 2004; Giles et al. 2008; Casillas et al. 2010). Relatively few studies, however, have assessed other ways in which the justices might

enhance the Court's legitimacy through the performance of their judicial duties.¹ In particular, little scholarly attention has been paid to the justices' use of precedent as a legitimizing tool. This is a significant gap: the way justices cite prior cases to justify their holdings is a key instrument allowing them to demonstrate that the Court is operating rationally, legitimately and within constitutionally prescribed bounds (Schauer 1995; Knight and Epstein 1996).

In this chapter, I attempt to fill this gap by determining whether Supreme Court justices systematically draft their opinions with an eye toward enhancing the Court's legitimacy. Specifically, I examine the justices' use of precedent under Chief Justices Warren, Burger and Rehnquist to assess whether the Court cites more authoritative precedent in cases that might cause its legitimacy to be questioned. I find that the Court does, indeed, cite more authoritative precedent under such circumstances -- when it departs from governing case law, when its actions are particularly salient to the public, and when it directly challenges the actions of the coordinate branches. To this extent, the justices appear to be responding to the institutional constraint requiring them to explain the rationales underlying their decisions. Such a requirement implies the existence of a degree of accountability to the public and the other branches, running contrary to the commonly expressed fears of an unchecked judiciary.

The chapter proceeds as follows. Part I defines the concept of legitimacy, applies it to the judiciary and explains how the Court's use of precedent relates to its

¹ Those articles that go beyond looking at judicial votes to assess the content of Supreme Court opinions, moreover, focus on a single case or group of cases (e.g. Sullivan 1992; Caldeira 1987; Finkelman 2005). While some of these analyses make theoretically persuasive arguments about the justices' concern with institutional legitimacy in particular decisions, their specificity of focus limits the extent to which they advance understanding of judicial behavior in the aggregate.

legitimacy in the eyes of the public. Part II sets out in greater detail my hypotheses regarding the Court's use of precedent as a means of maintaining its legitimacy. Part III explains the key variables involved in testing the hypotheses -- the *hub score* measure of precedent centrality used to evaluate the authority of precedent cited in a case;² the measures of ideology, ideological shift of the Court, case salience and challenges to the coordinate branches used as the primary means of explaining Court behavior; and other case-specific factors that may affect the centrality of precedent used in an opinion. Part IV describes the results, which indicate that the justices do in fact appeal to more authoritative precedent when their actions might lead the public to question their legitimacy. Part V assesses what these results say about the behavior of the justices and the extent to which the need for legitimacy serves as a genuine check on judicial action.

I. Court Legitimacy and the Importance of Precedent

Political scientist David Easton (1965: 268) defines legitimacy as a belief that “it is right and proper ... to accept and obey the authorities and to abide by the requirements of the regime.” According to his view, legitimacy, once established, can create “diffuse support” for an institution, defined as “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants” (273). The

² For reasons that will be made clear in the discussion of the *hub score* variable in Part III, this chapter uses the terms “embeddedness,” “authority” and “centrality” interchangeably, following the convention established in other articles making use of the measure.

widespread public acceptance to which Easton refers is particularly important for courts, given that their pronouncements ultimately require voluntary acceptance to have any effect. Because the Court relies on the support of the public to enforce its judgments, a loss of legitimacy would pose a severe threat to its continued ability to function. As Justice Frankfurter famously observed, “The Court’s authority -- possessed of neither the purse nor the sword -- ultimately rests on sustained public confidence in its moral sanction” (*Baker* 1962: 267).

Gibson and Caldeira (2011) investigate the contours of the Supreme Court’s ability to obtain this sustained public confidence. It is not, they conclude, based on people’s perceptions that the Court mechanically and impartially applies fixed legal principles to arrive at the “correct” result. Instead, they find that the vast majority of Americans “believe[s] that judges have discretion and that judges make discretionary decisions on the basis of ideology and values” (207). What determines whether the Court enjoys legitimacy, in their formulation, is how the public perceives the Court’s exercise of this discretion. To the extent the public believes this exercise is principled, the Court retains its legitimacy. Alternatively, if the justices seem to be acting in a “self-serving or strategic fashion,” their actions will appear illegitimate.³

The use of precedent is a primary area in which the justices may appear principled, rather than simply results-oriented. Reliance on precedent has become a

³ Gibson and Caldeira (2011) describe a belief that justices act in a principled way as the “Judiciousness Model” and a belief that they act in a self-interested or strategic manner as the “Typical Politician Model.” Such an approach, of course, begs the question how the public distinguishes between principled and results-oriented actions when both are fundamentally political. Interestingly, the public does not appear to make this distinction on partisan grounds. Gibson (2007) finds that political ideology and party identification do not appear to correlate strongly with loyalty to the Supreme Court as an institution.

distinctive element of American jurisprudence, particularly since the early twentieth century.⁴ Ruling based on precedent is important for a number of reasons. The existence of binding precedent ensures that the law is uniform -- applying the same way to all parties -- and predictable -- applying the same way in every case.

Uniformity is necessary to ensure the judicial system is (and is perceived to be) fair, not fundamentally privileging any one party over another. Predictability is essential to ensure legal clarity and social stability, which in turn promote economic growth (Barro 1997; La Porta et al. 1997). Allowing some issues to be “settled” also prevents constant relitigation of the same subjects, conserving scarce judicial resources. As Justice Cardozo (1921: 149) observed, “[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

More relevant to the present chapter, citation to prior authorities indicates a principled attempt to fit resolution of the current controversy within the universe of the Court’s prior holdings, giving the impression that a case’s outcome is based on

⁴ Prior to the eighteenth century, courts operated under the assumption that the law was a “Platonic ideal” to be discovered, rather than a set of judge-made decisions, and they reasoned that prior decisions inconsistent with such an ideal (when properly understood) could be replaced without formal overruling. Such an approach to the law “presupposes a relatively weak (if not non-existent) doctrine of stare decisis,” and “left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it” (Lee 1999: 660). This conception of the role of courts started to change in the early years of the Republic, as courts in England and America began to observe a duty to explain their reasoning when departing from prior interpretations of the law. This change may have resulted in large part from the influence of William Blackstone’s *Commentaries*, which referred to an obligation to rule consistently with precedent. Statistical evidence of citation practices in Supreme Court opinions in Fowler et al. (2007) and Cross et al. (2010) bears out this trend of increasing attention paid to precedent, a trend that became particularly pronounced in the late nineteenth and early twentieth century.

timeless legal rules rather than the whims of an individual judge. This dynamic implies limits on the availability of judicial discretion -- a vital concern, given that federal judges are largely unaccountable following their confirmation. In Federalist 78, Alexander Hamilton (1961: 471) made this connection between respect for precedent and judicial constraint explicit: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” The Court itself has observed the link between respect for precedent and an absence of arbitrariness. In *Patterson* (1989: 172), it declared, “[*S*]tare *decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”

Unexplained disregard of relevant precedent, alternatively, may lead the public to view the judiciary as illegitimate, interested solely in policy outcomes and unconcerned with any fixed principles governing decisionmaking. As Justice Breyer (2010: 151) notes, “[A] Court that overturns too many earlier decisions encourages the public to believe that personalities or politics, not law, determine the outcome of Court cases. And that belief undermines the public’s confidence in the Court.”⁵ Thus, a judge who drafted an opinion following the French model, with no citation to similar prior cases, would receive harsh criticism from members of the legal, academic and

⁵ The justices have an additional reason to obey precedent, or at least to refrain from cavalierly disregarding it, apart from an interest in retaining legitimacy. A court that gives little weight to precedent reduces the scope of its own influence on future courts. If today’s court ignores yesterday’s legal pronouncements, tomorrow’s jurists will have little reason to respect the results arrived at today.

judicial communities alike (and ultimately from the general public) for appearing too results-driven and insufficiently “judicial.”

Supreme Court justices are fully cognizant of this dynamic. The Court has described respect for precedent as “by definition ... indispensable” to “the very concept of the rule of law” (*Planned Parenthood* 1992: 854), and has explained that the principle of *stare decisis* “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact” (*Vasquez* 1986: 265-66). Observing the connection between *stare decisis* and legitimacy, the Court observed that its legitimacy “depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation,” and noted that excessive willingness to deviate from its prior decisions “would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term” (*Planned Parenthood* 1992: 866).

For judges to appear principled, they need not show a slavish adherence to the dictates of precedent. Indeed, the Supreme Court arguably has an affirmative duty to repudiate bad or outdated precedents, lest they expand in dangerous directions. Contexts change from one case to another, and a rule that seemed eminently logical when first announced may prove to have unforeseen negative consequences. Instead, to be seen as guided by principle rather than partisan leanings, judges merely need to behave in accordance with the popular conception of the proper judicial role. In

keeping with this role, members of the judiciary “act like judges” when they rule based on the facts and laws before them (rather than misrepresenting facts or intentionally misreading statutes), rule consistently with past decisions (i.e., rule from precedent) and justify their rulings in written opinions (Cross and Lindquist 2007; Cross 2003).⁶ The Court may deviate from its holdings in past cases, but at a minimum the public expects the courts to address relevant precedents -- even inconvenient ones -- when it does so. If the Court chooses to diverge from prior holdings, or overrule them altogether, it must explain its rationale in detail and show it has principled reasons for its actions in order to maintain the public’s confidence. As Justice Breyer (2010: 156) observes, this engagement with disfavored precedents “helps to maintain the Court’s institutional strength and a system of Court decision making that works well in practice,” which in turn “help[s] to maintain public acceptance of the Court’s decisions.” Its absence, in contrast, may raise suspicions of unchecked judicial overreaching, which in turn decreases legitimacy and, as noted above, fundamentally threatens the continued relevance of the courts.

Supreme Court justices clearly recognize the connection between precedent citation and legitimacy. But do they act on it? Are members of the Court particularly apt to cite authoritative precedent when the Court’s legitimacy may be questioned, either because it is showing an excessive eagerness to revisit past decisions, because it

⁶ One argument for justifying outcomes via written opinions holds that the public needs the ability to assess the Court’s rulings (Friedman 2005). This unidirectional view of the public policing the Court’s behavior may be overly reductionist, however. Judicial opinions may actually allow the courts to engage in a dialogue with the public, in some cases actually changing public opinion (Mishler and Sheehan 1993), though its power to do so is debatable (Fallon 2005: 1829-30).

is invalidating legislative actions of the coordinate branches, or simply because its actions are squarely in the public eye? It is to these questions this chapter now turns.

II. Using Precedent to Maintain Legitimacy

In light of the connection between respect for *stare decisis* and Court legitimacy, as well as the importance of legitimacy to the Court's operation, one might suspect that the justices actively employ precedent in a way that will increase the Court's legitimacy. Based on this theory, a number of testable hypotheses emerge.

I begin with a simple model of an author's decisions about which precedents to cite when drafting an opinion. In this model, the justices hear the parties' arguments in a case, then discuss the case in conference and vote on its outcome. The senior justice in the majority assigns writing duties to a member of the majority coalition. The authoring justice must then decide which precedents to include in the opinion, based on her own preferences and her negotiations with other justices.

This determination regarding precedent inclusion is based on several components. First, the justice will consider the subset of relevant precedents that support the majority's position.⁷ For example, a justice drafting an opinion holding that a warrantless search was constitutional would be well served by citing prior cases

⁷ Following Segal and Spaeth (2002), Epstein and Knight (1998), Hansford and Spriggs (2006), Maltzman et al. (2000), and numerous others, the model assumes that justices' ideologies influence their votes -- that they cast votes to move the law as close as possible to their preferred ideological position. If justices instead base their votes primarily on the existing state of precedent, voting for the party whose position has stronger precedential support, we would not tend to see ideological shifts on the Court (given that the ideology measure is a function of justice votes, as described in greater detail below).

in which the Court held that other warrantless searches, presenting arguably analogous factual circumstances, were constitutional.

Second, in keeping with the principle of *stare decisis*, the authoring justice must consider the most authoritative precedents relevant to the issue being decided. To continue the example from above, a justice drafting an opinion about the constitutionality of a warrantless search would need to consider the most central precedents within the universe of cases involving warrantless searches. Failure to acknowledge the most important prior pronouncements on a given issue may make the Court appear to be overtly political and results-oriented, rather than a neutral arbiter guided by consistent legal doctrines.

A third set of factors based on the individual case should also affect the selection of precedents to cite. Particularly complex cases will presumably involve more legal issues, each of which will merit discussion (and the citation of the relevant precedents) in the ultimate opinion. Justice-specific idiosyncrasies may also affect the selection of precedents for citation, as some opinion authors may have writing styles that are more or less reliant on extensive citation to precedent. Both of these factors -- case complexity and the author's writing style -- should affect the centrality of precedent used in a given opinion under the model.

Implicit in this framework is a potential tension between the most authoritative precedents and those reaching the majority's preferred result. The set of precedents supporting a particular outcome may differ substantially from the set of precedents most often and most recently cited in connection with the issue under consideration,

particularly if the Court has recently undergone an ideological shift. More recent cases tend to constitute stronger precedent: Landes and Posner (1976), Cross and Spriggs (2010) and Fowler and Jeon (2008) all show that the citation frequency of an average Supreme Court decision is highest in the years immediately following its announcement, then quickly tapers off. Thus, if the Court has recently experienced a significant ideological change, the justices' individual ideological preferences may run counter to the set of strongest precedents available for citation. Older (and therefore relatively peripheral) precedents will tend to support their desired outcomes, while newer (more central) decisions will not.

Following an ideological shift, then, the Court may wish to depart from governing case law to "correct" the perceived mistakes of its immediate predecessors by limiting the scope of earlier rulings, changing the focus of the relevant legal analysis or overruling prior decisions altogether. The extent to which the justices do or do not justify their reasons for doing so (by explaining why the earlier pronouncements were erroneous, created bad policy, no longer apply in the current social context, and so forth) determines whether an opinion uses more or less authoritative precedent. If the justices are concerned with judicial legitimacy and the perception that they are faithfully adhering to the principle of *stare decisis*, they will cite more authoritative precedent following an ideological shift. This dynamic should be especially pronounced when the Court is overruling an earlier decision -- an act that

may be viewed as particularly political and unprincipled.⁸ This leads to two initial hypotheses:

Hypothesis 1: Following an ideological shift on the Court, justices will tend to use more authoritative precedent in their opinions. The greater the ideological shift, the more authoritative the cited precedent will be.

Hypothesis 2: When the Court overrules itself, it will take care to use particularly authoritative precedent to justify its decision.

To the extent we instead see an inverse relationship between ideological change and precedent centrality, with ideological change correlating with the use of *less* authoritative precedent, such evidence would tend to indicate that the justices are instead behaving in a more results-oriented fashion, primarily citing those precedents that support their ultimate position while disregarding the more recent and authoritative cases that lead to an outcome the majority disfavors.

Similarly, an interest in legitimacy would lead the justices to cite more authoritative precedent in closer cases. The authoring justice in a close case will need to forge and retain a narrow coalition to gain majority support, likely requiring the author to incorporate a larger set of arguments, each with its own set of citations, to pull the crucial fifth justice into the fold (Maltzman et al. 2000: 121). In addition,

⁸ An example that highlights the potential force of such an argument comes from *Payne v. Tennessee* (1991). In *Payne*, the Court upheld the use of victim impact statements during the sentencing phase of capital murder trials, overruling two recent cases forbidding the practice, *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989). In a powerful dissent, Justice Marshall excoriated the majority, thundering, “Power, not reason, is the new currency of this Court’s decisionmaking. . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did. . . . The implications of this radical new exception to the doctrine of *stare decisis* are staggering.” (*Payne* 1991: 844-45). Marshall’s warning that “an even more extensive upheaval of this Court’s precedents may be in store” (844) took on even greater force in light of his retirement the day *Payne* was announced and President Bush’s nomination of Clarence Thomas to replace him four days later (Williams 1998: 391; Dowd 1991).

close cases may result in a particularly strong dissent that the majority opinion will need to refute. When such refutation distinguishes the cases favored by the dissent, it necessarily cites these cases and increases the overall centrality of the precedent it contains. The third hypothesis may therefore be stated as follows:

Hypothesis 3: Opinions in cases with a smaller winning margin will tend to cite more authoritative precedent.

To the extent the justices are concerned with public perception of the Court's output, they will be particularly likely to cite more authoritative precedent in opinions the public is more likely to scrutinize. Thus, if the justices structure their opinions to increase the Court's legitimacy, cases that are more salient -- either to the public as a whole or to interest groups that are particularly interested in the outcome -- should use more authoritative precedent. This leads to the fourth hypothesis:

Hypothesis 4: Opinions in cases with greater public salience will tend to cite more authoritative precedent.

Finally, the Court potentially calls its legitimacy into question when it challenges the prerogatives of the coordinate branches. Such a challenge may be explicit, as when the Court strikes down congressionally enacted legislation the President has signed into law. Alternatively, the challenge may be merely implicit, as when the Court lies outside the ideological boundaries established by the other branches. During these periods, the justices' lack of accountability to the public is in sharpest relief. Members of the other branches, concerned with protecting their power from judicial encroachment, may respond negatively to the Court by stripping its jurisdiction, cutting funds for the judiciary, and (in extreme cases) impeaching one or

more justices (Baum 2006; Peretti 2003). Despite the life tenure of Court members, such threats are genuine,⁹ and may lead the justices to focus more carefully on justifying their results with reference to authoritative precedent. This leads to the final two hypotheses:

Hypothesis 5a: When the Court invalidates a federal statute, it will tend to use more authoritative precedent.

Hypothesis 5b: When the Court is ideologically out of step with the other branches, it will tend to use more authoritative precedent.

With the relevant hypotheses set out, I now turn to the measurement of these concepts and the methods used to test them.

III. Measuring Precedent Centrality, Justice Ideology and Other Relevant Concepts

To test the hypotheses I examine the relationship between the centrality of precedent cited in an opinion -- its “embeddedness” -- and other aspects of the opinion, including the ideological shift of the Court prior to the decision, the case’s salience, its contentiousness and potential separation of powers concerns it presents. I also account for other case-specific factors that could systematically affect the

⁹ Prior studies have found support for the idea that the Court is sometimes constrained by congressional preferences (Fischman and Law 2009: 159 n.65). One famous (though admittedly extreme) example illustrates this point nicely. Congress impeached Supreme Court Justice Samuel Chase in 1804 at the urging of President Jefferson. While the outcome of the impeachment trial was still in doubt, Chief Justice John Marshall -- the man whose decision in *Marbury v. Madison* (1803) had established the doctrine of judicial review -- suggested the possibility of giving the legislature appellate jurisdiction over Supreme Court rulings as an alternative to future impeachments: “A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowing of his fault” (Elsmere 1980: 177).

centrality of precedent cited. This section describes the variables used to measure each concept.

A. Measuring Precedent Centrality: The Hub Score

The focus of this chapter is a network analysis measure of the centrality of the Supreme Court precedent cited in each Supreme Court opinion -- the degree to which each new opinion is “embedded” in the prior opinions of the Court. This embeddedness measure, developed in Fowler and Jeon (2007) and Fowler et al. (2008),¹⁰ treats all Supreme Court decisions as part of an interdependent network, and takes account not only of the *number* of precedents each opinion cites, but also of the *relative importance* of those precedents to the case law network as a whole. In this way, the measure, known as the *hub score* (or *embeddedness score*), distinguishes those cases that rely on precedents that are central to the body of Supreme Court law from those that cite more tangential decisions (or few decisions at all) to support their conclusions. It therefore allows for an objective measure of legal authority, something that until now has only been evaluated subjectively.

Hub score calculation treats the entire corpus of Supreme Court decisions as a network in which opinions, the “nodes” of the network, are connected to one another through citations. These connections are both direct (such as the connection between case *A* and case *B* when case *A* cites case *B*) and indirect (such as the connection between case *A* and case *C* when case *A* cites case *B*, which in turn cites case *C*). Both the direct and the indirect connections provide information about how central each

¹⁰ The data for both papers are available at <http://jhfowler.ucsd.edu/judicial.htm>.

case is in the overall network; indeed, it is the additional information from the indirect connections that make network measures so valuable. Using this information, a case's hub score measures the number of cases it cites and the relative centrality of those cited cases (which is in turn based on which other cases have cited them, which cases they cite, and so on throughout the network).¹¹

The hub score captures the relative importance of each case to the network as a whole. In this way, the measure is superior to a simple count of total citations included in a given opinion.¹² It distinguishes not only cases relying on many prior Supreme Court cases from those relying on few cases, but also cases relying on widely used precedents from those that dredge up support from tangential decisions -- what Posner (2008: 45) describes as cases "that ha[ve] died but ha[ve] not been given a decent burial" -- to support their points. This is a key distinction. The body of case law is vast enough (and computerized legal search engines are fast enough) that at least *some* support can be found for virtually any principle, particularly by jurists skilled in drawing analogies between various lines of cases. The hub score allows for a differentiation between cases citing *some* authority and cases citing *good* authority.

¹¹ Hub scores are calculated using the method Kleinberg (1999) employed for simultaneously calculating the hub and authority scores for web pages. Authority scores are the counterparts to hub scores. A case is a good hub when it cites many good authorities. Likewise, a case is a good authority when it is cited by many good hubs. Kleinberg's method is described more fully in the Appendix to this chapter.

¹² For example, *McGowan v. Maryland* (1961) and *Maryland v. Louisiana* (1980) both cite 70 cases. *McGowan* is nevertheless far more central than *Maryland v. Louisiana*, with a substantially larger embeddedness score (3.43 to 2.13) that places it in the ninety-seventh percentile of all cases to *Maryland v. Louisiana's* seventy-ninth percentile. Thus, *McGowan* is much more central to the network, even though both cases cite the same number of precedents.

The hub score of a case is a dynamic measure that changes as new cases, with their own sets of citations, are added to the body of Supreme Court case law. For the analysis in this study, however, I am interested in the extent to which authoring justices ground their decisions in central precedent at the time of drafting. I therefore use the *initial* hub score of a case -- its hub score at the time of its announcement -- as a measure of its embeddedness. To illustrate the importance of this distinction, consider the following example: Suppose a justice is eager to draft an opinion adopting a new constitutional theory. To this end, he relies on case precedents that are not, at the time of drafting, central to the Supreme Court network. The resultant opinion would have a relatively low initial hub score. Now suppose that he is successful in his endeavor, and the interpretation sketched out in the opinion becomes widely embraced by future decisions. A dynamic score would increase, showing that the opinion (and the cases on which it relied) have become stronger over time, reflecting this widespread adoption. But such a dynamic measure would not capture the issue with which this study is chiefly concerned -- whether, *at the time of drafting*, the opinion relies on widely accepted precedent.

Hub scores are based on the rank order of each case as a means of determining its relative importance to the network as a whole; the scale of the scores is arbitrary. To make the results easier to evaluate, and to minimize the influence of outliers, I have transformed the variable by multiplying it by 1000, adding 1, and taking the natural logarithm. This transformation does not change the fundamental rank information that

the scores communicate (Gelman and Hill 2007), and it is the cases' relative ranks that I use as the basis for the analysis below.

Fowler and his coauthors show, through a variety of tests, that the hub score measure of precedent embeddedness measures what it purports to measure -- a case's relative importance within the network of all Supreme Court cases. They demonstrate that a case's hub score is a better predictor of its likelihood of being cited by future Supreme Court cases than a simple count of its citations, the case's appearance on the front page of the *New York Times* the day after its announcement, or inclusion of the case in a list of the year's most important cases as determined by experts. They also show that a case's hub score correlates significantly with its inclusion on expert lists of landmark Supreme Court decisions. These results suggest that the hub score captures significant latent attributes of a case's importance better than alternate subjective measures or a simple count of citations.

An evaluation of the relative rankings of the individual justices with respect to the average hub score of their opinions further bolsters the score's validity as a measure of the strength of precedent cited in an opinion. Table 3-1 presents the average embeddedness score of the opinions written by each justice. The table also provides the justices' relative ranking, from largest to smallest average embeddedness score, both in absolute terms and adjusted to account for an opinion's subject matter and the year it was written. The subject matter adjustment is helpful because justices may disproportionately obtain writing assignments in different issue areas which, as

explained in greater detail below, may distort their average embeddedness scores.¹³

The time adjustment is necessary because embeddedness scores decrease as more cases are added to the network, meaning that justices in later years will have lower average hub scores, all else equal.

¹³ This effect is seen, for example, when looking at the statistics for Chief Justice Burger, who was widely criticized for withholding his vote during conference and assigning writing duties on many of the most controversial cases to himself or his allies (Stevens 2011: 236; Epstein and Knight 1998: 125-26; Johnson et al. 2005: 351). When including the controls, Burger's ranking drops from two to four.

Table 3-1: Mean hub score by justice, 1953-2004

Justice:	# of opinions authored:	Mean hub score:	Max hub score:	Rank:	Adjusted rank:
Powell	242	1.65	4.64	1	1
Burger	247	1.63	4.64	2	4
Rehnquist	437	1.63	4.23	3	2
Stewart	304	1.53	4.27	4	5
White	457	1.48	4.90	5	3
Brennan	429	1.43	4.26	6	6
Stevens	342	1.40	4.62	7	8
Kennedy	168	1.33	3.71	8	11
O'Connor	286	1.32	3.94	9	9
Blackmun	304	1.32	4.39	10	7
Fortas	38	1.28	3.52	11	12
Goldberg	36	1.21	3.65	12	17
Scalia	187	1.21	4.00	13	10
Warren	165	1.13	3.94	14	15
Marshall	317	1.11	4.38	15	13
Harlan	165	1.09	4.68	16	16
Black	194	1.07	3.67	17	14
Frankfurter	78	1.01	4.20	18	23
Souter	126	0.99	3.96	19	19
Douglas	258	0.98	4.44	20	18
Ginsburg	102	0.92	3.39	21	21
Reed	27	0.92	3.66	22	20
Burton	36	0.89	3.06	23	22
Clark	171	0.85	3.99	24	25
Thomas	108	0.85	3.33	25	26
Breyer	90	0.84	2.80	26	27
Whittaker	42	0.84	3.31	27	24
Minton	22	0.48	2.10	28	28

Note: Does not include Jackson, who authored five opinions during the period under study.

The adjusted rankings conform to expectations generated from the justices' stated beliefs about the importance of following precedent. Justice Powell, for example, had a jurisprudence characterized by the great weight he placed on the concept of *stare decisis*. Indeed, Segal and Spaeth (1996) conclude that he showed the greatest respect for precedent among all modern justices. Though not an absolutist, Powell contended that "the general rule of adherence to prior decisions is a proper one," in both statutory and constitutional cases (Powell 1990: 286). Fealty to this principle was essential, he argued, to maintain the legitimacy of the courts:

The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the *judicial power* prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions (286-87).

The embeddedness scores reflect the importance Powell placed on *stare decisis*: his opinions have the highest average embeddedness scores of all the justices studied.

Justice Frankfurter, in contrast, placed less emphasis on the importance of *stare decisis*, particularly in constitutional cases. He acknowledged the importance of precedent in creating expectations and imparting a sense of legal continuity, but nevertheless declared, "*stare decisis* is a principle of policy, and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" (*Helvering* 1940: 119). Elsewhere, he made the same point more bluntly: "The ultimate touchstone of constitutionality is

the Constitution itself and not what we have said about it” (*Graves* 1939: 491-92). This is not to say that Frankfurter disregarded precedent; merely that he placed less emphasis on following precedent, or on justifying breaks from it, than many of his colleagues on the Court. Again, the embeddedness scores reflect this approach. When adjusted for time and subject matter, Frankfurter ranks twenty-third of the twenty-eight justices studied.

The measure even illuminates jurisprudential differences among otherwise similar jurists. Justices Scalia and Thomas have related ideological approaches and voting patterns that tend to correlate closely. Between the Supreme Court’s 1994 and 2003 Terms, for example, Justices Scalia and Thomas voted with each other 86.7% of the time, the highest correlation of any two justices during that period (*Harvard Law Review* 2004). Despite their shared originalist approaches to statutory and constitutional interpretation, however, Scalia has shown a greater respect for precedent at the margin (*Merida and Fletcher* 2007: 333). He will sometimes concede that the interests of continuity and predictability that *stare decisis* serves may outweigh the importance of correcting what he views as an erroneous holding. Thomas is less prone to value finality in legal interpretation, particularly of constitutional provisions. He has argued, “When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning” (*Kelo* 2005: 523). Scalia summarizes this difference as follows: “He does not believe in *stare decisis*, period. If a constitutional line of authority is

wrong, he would say let's get it right. I wouldn't do that" (Foskett 2004: 281-82). Again, the embeddedness score picks up on this difference in emphasis on the importance of precedent. Justice Scalia ranks tenth overall, while Justice Thomas, despite his similar interpretive approach, ranks twenty-sixth of the twenty-eight justices.

Despite the utility of the hub score as a measure of a case's embeddedness in precedent, several caveats apply. First, the measure does not distinguish between cases that are cited as part of an opinion's argument and those that are cited in order to explain why they are not controlling for the current dispute (in other words, between those cited positively and those cited negatively). There are several reasons why this fact does not weaken embeddedness as a useful metric. The line between positive and negative citations is exceedingly blurry. Cases often cite a predecessor as authoritative law for a particular proposition but explain that applying it to the case under consideration would extend its reach too far. Such a discussion both bolsters and limits the prior case as a precedent, showing simultaneously that although the case is important enough to discuss, its holding does not extend to the dispute at issue. It is not clear how a positive/negative weighting should work in such a case.¹⁴ More broadly, I am interested in the extent to which Supreme Court justices structure their opinions with reference to precedent to show respect for the principle of *stare decisis*. As noted above, incorporation of precedent explains an opinion's content in neutral

¹⁴ Legal practitioners who use KeyCite or Shepard's citation services are intimately familiar with this problem. Although these services usefully indicate positive citations (with one to four stars given for the extent of the positive treatment) and cases that have been vacated or overruled (denoted with a red flag), the services' use of yellow flags to indicate that an authority has been "questioned" is so widespread as to be effectively useless as a signal of a precedent's continuing legitimacy.

terms, potentially increasing the legitimacy of the opinion and the Court more generally. To the extent an opinion acknowledges but attempts to distinguish contrary precedents, rather than ignoring them altogether, it should (and under the embeddedness measure, does) merit a higher score. As Fowler and Jeon (2007) explain, “[R]egardless of content, each citation is a latent judgment by the justice who authors it about which cases are most important for resolving questions that face the Court. Since legal rules are cited to provide convincing legal justifications, the fact that the opinion writer ch[ose] to cite a case in an opinion rather than leave it out suggests that the citation, even if it is not a reliance on authority, provides applicable information about the role of various precedents in the legal network” (18). In this sense, the embeddedness score measures not just the centrality of the decisions relied on to craft an argument but the degree of respect the opinion shows to *stare decisis* as an ideal. Precedents under this conception need not always be followed, but any deviation must at least be acknowledged and explained. As Shapiro (1987) observes, “A requirement that judges give reasons for their decisions -- grounds of decision that can be debated, attacked, and defended -- serves a vital function in constraining the judiciary’s exercise of power” (737).

Second, the measure takes into account only single-author majority opinions, rather than per curiam opinions and administrative orders. This is by design. The types of opinions that lend themselves to per curiam disposition tend to differ from most other decisions in subject matter, procedural posture and importance (Wasby et

al. 1992; Mishler and Sheehan 1993).¹⁵ Accordingly, omitting per curiam decisions should not negatively affect the analysis. Similarly, administrative orders do not reveal (at least to the same extent as substantive opinions) the justices' approach to decisionmaking, interest in precedent or concern with legal outcomes. The effect of legitimacy concerns, if any, will be oblique in such cases. In addition, one explanatory variable used in the analysis below is the ideology of the opinion's author. Per curiam opinions, by definition, do not allow for analysis of individual authorship. Often they are the result of collaboration among multiple justices, dampening the influence exercised by any one of them. For all of these reasons, restricting this study to single-author majority opinions helps to highlight the relationships being tested.

B. Measuring Justice Ideology and Court Ideological Movement

Assessing the Court's behavior in the face of an ideological shift requires measuring the justices' ideologies, a notoriously difficult concept to quantify (Fischman and Law 2009; Edwards and Livermore 2009).¹⁶ To measure judicial ideology Martin and Quinn (2002) generated a dynamic set of "ideal point" scores based on voting alignments.¹⁷ The authors begin by identifying conservative and

¹⁵ This is only a general rule, however. There are well-known examples of per curiam opinions of great legal and political significance, including *New York Times Co. v. United States* (1971); *Furman v. Georgia* (1972); *Buckley v. Valeo* (1976); and *Bush v. Gore* (2000).

¹⁶ The problem is particularly thorny in studies aiming to explain or predict judicial votes given the issue of endogeneity -- if a measure uses a justice's rulings to determine his ideology, then uses that ideology score to explain those very rulings, it is fundamentally circular. Because the dependent variable here is a measure of opinion embeddedness rather than vote direction, however, the analysis avoids this circularity problem.

¹⁷ Some (e.g. Fischman and Law 2009; Shapiro 2010) have criticized the Martin-Quinn scores for reducing ideology to a unidimensional scale, potentially creating an oversimplified picture of the effect of judicial ideology. However, Martin and Quinn (2002) and Grofman and Brazill (2002) both find that the vast majority of voting behavior may be explained by a single dimension.

liberal “anchor” justices, then calculate the frequency of particular voting alliances. Based on this information, they locate the ideal point of each justice relative to the others along a single line. The scores, which are updated every term to incorporate new information about each justice’s preferences, provide a basis to compare justices who never sat on the Court at the same time.

Judicial Common Space (“JCS”) scores, developed by Epstein et al. (2007), transform the Martin-Quinn scores to a -1 to 1 scale, with -1 representing most liberal and 1 representing most conservative.¹⁸ With this rescaling, JCS scores are linear¹⁹ and comparable to NOMINATE Common Space scores (Poole and Rosenthal 1997; Poole 1998), allowing for an ideological comparison between the justices and political actors in the legislative and executive branches.²⁰ The JCS scores (and the Martin-Quinn scores on which they are based) have become fairly standard in the literature.²¹ I use them here as the basis for the various ideology measures.

¹⁸ The -1 to 1 bounding is theoretical. In practice, the most liberal score is -0.8083 (for Justice Douglas during the 1974 term), and the most conservative score is 0.6996 (for Justice Thomas during the 2004 term). The median score, 0.0204, belongs to Justice Stewart during the 1974 term.

¹⁹ The untransformed Martin-Quinn scores’ lack of linearity generates larger reported differences at the extremes, a quality that leads to several somewhat anomalous results. For example, during the 2006 term, Justice Alito was nearly as far away from Justice Thomas (a difference of 2.845) as he was from Justice Souter (a difference of 2.871), even though he voted with Thomas 73.6% of the time and with Souter only 54.8% of the time (Fischman and Law 2009: 188-89; Harvard Law Review 2007: 438 tbl.I(BI)).

²⁰ Indeed, the desire to conduct such interbranch comparisons was a primary factor motivating the development of the JCS scores (Epstein et al. 2007: 309).

²¹ Their use is not uncontroversial, however. The Martin-Quinn scores assume the Supreme Court agenda has remained ideologically consistent over time -- an assumption that may not be safe given the Supreme Court’s discretionary docket (Bailey 2007: 436-38). This failure to account for agenda change leads to some irregularities in the Martin-Quinn scores, particularly in the early 1970s. To account for the Court’s changing agenda, Bailey (2007) and Bailey and Maltzman (2011) introduce an alternative ideology measure using “bridge observations” of cases decided at different times in the Court’s history addressing the same legal issue. Because my measures of Supreme Court ideological change take into account ideology scores from as far back as the 1943 term, and the Bailey scores are available only as

To measure the Court's ideological movement, I begin by determining the mean ideology score for every Court term between 1943 and 2004. I then compare the mean score for each term in the Warren, Burger and Rehnquist Courts -- all terms from 1953 through 2004 -- with the average ideology of the Court during the preceding ten terms. These measures indicate the difference between the ideology of the Court during a particular term and the time period immediately preceding it. Thus, the measure permits analysis of the way a conservative (liberal) Court reacts to precedent when the Court during the preceding era was dominated by liberals (conservatives) who presumably generated precedents unfavorable to a majority of Court members during the term. Although somewhat arbitrary, I chose a ten-year time frame, following Cross (2003), because it is long enough to capture relatively significant ideological changes but short enough to ensure substantial variation between periods. In addition, Black and Spriggs (2009) have shown that a majority of Supreme Court decisions are no longer cited by the Court once eleven years have elapsed since initial publication. To make sure the results are not overly sensitive to the ten-year specification I also experimented with measures of ideological change over five, fifteen and twenty years. The same general results hold regardless of the particular timeframe.²²

of the 1950 term, the analysis below relies on the JCS scores. Regressions using the Bailey scores (for the terms those scores cover) yield largely the same results with respect to the relationship between ideological change on the Court and greater precedent embeddedness, though they show a somewhat larger effect of opinion author ideology. These results are available upon request.

²² I also calculated ideological change based on the Court's ideological median, rather than its mean, for the preceding five, ten and fifteen years. The results for each specification follow the same pattern, and are available upon request.

C. *Measuring Salience, Contentiousness and Separation-of-Powers Implications*

Measuring the other factors needed to test the remaining hypotheses -- a case's public salience, its contentiousness and whether it implicitly or explicitly implicates separation-of-powers concerns -- is fairly straightforward. This section briefly describes each measure in turn.

As noted above, the theory of precedent usage predicts that the Court will cite more authoritative precedent in more salient cases, because those cases receive higher scrutiny. To measure the general public's interest in a case, I follow the protocol of Epstein and Segal (2000), who define salience as whether the case disposition is mentioned on the front page of the *New York Times* the day after its announcement. Thus, I include a dummy variable, *NYT*, coded as 1 if the case met Epstein and Segal's salience definition and 0 otherwise.²³ This salience variable, *NYT*, indicates the relationship between public attention paid to a case and the authoritativeness of the precedent it cites. Because the model predicts more attention to precedent in more salient cases, the coefficient for this variable should be positively signed, showing that cases appearing on the front page of the *New York Times* generally have higher centrality scores.

To determine how salient a case is to particular interest communities, I use as a proxy a measure of the number of amicus briefs filed, *amici*, standardized by term.²⁴ I

²³ I obtained this information for cases through the 2001 term from Professor Paul Collins's website, <http://www.psci.unt.edu/~pmcollins/data.htm>, and supplemented it with my own search of *New York Times* archives for the 2002, 2003 and 2004 terms.

²⁴ The standardized *amici* score is based on the following formula: (# of amicus briefs filed in the case - average # of amicus briefs filed during the term the case was decided) / standard deviation of amicus briefs filed during the term the case was decided (Fowler 2008; Hansford and Spriggs 2006).

use this standardized measure rather than the raw number of amicus briefs filed both because the raw number might provide a diminishing signal of salience after a certain point and because a strict numerical count would allow outlier cases drawing especially large numbers of amicus filings to skew the results. It is well documented, moreover, that the number of amicus filings per case has increased considerably over the last several decades (Collins 2004; Songer and Sheehan 1993). As with the *NYT* variable, the model predicts that the coefficient for *amici* will be positively signed, as cases generating more interest should have higher authority scores. It is worth noting, however, that additional amicus filings might in theory have the opposite effect, alerting the Court to additional helpful cases on the periphery of the case citation network which, if included in the ultimate opinion, could lower its embeddedness score.

The public might arguably show more interest in a case that overrules existing precedent and scrutinize its reasoning more closely, looking for evidence of results-oriented behavior rather than principled decisionmaking. As Justice Breyer has observed, “[A] Court that overturns too many earlier decisions encourages the public to believe that personalities or politics, not law, determine the outcome of Court cases. And that belief undermines the public’s confidence in the Court” (Breyer 2010: 151). To account for the possibility that the justices draft their opinions differently in such situations I include a dummy variable, *overrule*, coded 1 if the case overrules a

To generate this variable I used Fowler’s online data for cases through 2001. To calculate the standardized scores for the 2002, 2003 and 2004 terms I used the Westlaw Supreme Court database and counsel lists from the Supreme Court website, [http:// www.supremecourt.gov/opinions/counsellist.aspx](http://www.supremecourt.gov/opinions/counsellist.aspx), to determine the raw number of amicus briefs filed.

Supreme Court precedent and 0 otherwise.²⁵ At a minimum, such a case will cite the precedent it overrules, and it may well also include the precedents underlying the overruled decision or subsequent cases relying on the overruled precedent to negative effect, showing the potential dangers of the precedent in the absence of explicit overruling. Again, Hypothesis 2 predicts a positive relationship between this variable and a case's authority score, indicating that cases overruling prior decisions will cite more authoritative precedent, all else equal.

As noted above, the theory predicts that closer, more contentious cases will result in opinions showing greater reliance on more authoritative precedent. To test for this dynamic I include a variable, *margin*, measuring the difference between the number of justices in the majority and the number in dissent.²⁶ Hypothesis 3 predicts the variable will be negatively signed: when cases are more contentious, the margin of victory will be smaller and the measure of precedent centrality will be larger, reflecting inclusion of more authoritative precedent. Majority opinions in cases with larger victory margins, in contrast, will not need to bolster their contentions as carefully with quality precedent and will not need to focus as much on a meticulous refutation of the competing arguments offered in the dissent(s).

I use several measures to assess the relationship between separation-of-powers issues and precedent centrality. First, to determine whether the Court takes special care to embed its decisions in central precedent when its actions directly raise

²⁵ Information for the variable is derived from Harold Spaeth's United States Supreme Court Judicial Database ("Supreme Court Database"), which is available for public download at <http://scdb.wustl.edu/index.php>.

²⁶ Again, I obtained this information from the Supreme Court Database.

separation-of-powers concerns, I add a dummy variable, *statute invalidation*, to measure how an opinion's centrality score differs when it invalidates a federal statute. The variable is coded as 1 when the Court strikes down a federal statute and 0 otherwise.²⁷ A positive relationship between this variable and centrality score will tend to support Hypothesis 5a, showing that the Court uses more authoritative precedent when it strikes down the actions of a coordinate branch, possibly indicating that the Court feels compelled to justify such actions more forcefully through the use of more accepted precedent.

Separation-of-powers concerns may also arise when the Court is more conservative or more liberal than Congress and the President -- what Spriggs and Hansford (2001) refer to as falling outside the "zone of acquiescence" established by the other branches. Hypothesis 5b predicts that, in such an unfavorable political environment, the Court will embed its decisions more fully in precedent to indicate that its rulings are based on timeless principles rather than its current ideological leanings to avoid a backlash from the other branches. To test this hypothesis, I begin by finding the "zone of acquiescence" for each term from 1953 to 2004, based on the largest range when looking at the ideology scores of the President and the median member of the Senate and House for the following year.²⁸ I then create two variables. The first, *environment--majority*, is a dummy variable coded as 1 if the median

²⁷ Information used in this coding comes from the Supreme Court Database.

²⁸ For this ideology score I use the relevant DW-NOMINATE scores, available at <http://www.voteview.com/pmediant.htm> (Poole 2011). I compare each Supreme Court term to the relevant DW-NOMINATE scores for the subsequent year because the vast majority of decisions during a Supreme Court term are handed down during the following calendar year. For example, of the 73 opinions in the database from the Court's 2004 term, 65 were issued after January 1, 2005.

member of the majority coalition in a particular case falls outside the ideological range established by the other branches and 0 otherwise.²⁹ The second, *environment--Court*, is a dummy variable coded the same way for the Court as a whole. Under Hypothesis 5b, both variables should be positively correlated with precedent authority, showing that the Court uses more authoritative precedent to justify its actions when its members fall outside the ideological range established by the other branches.

D. Other Case-Specific Elements

I also attempt to account for other case-specific factors that could systematically affect the centrality of precedent an opinion contains. First, as shown in Table 3-2, embeddedness scores vary tremendously by subject area, with some subject areas being more central to the case network. This result stems directly from the way the scores are calculated. A case's embeddedness score reflects the centrality of the precedents on which it relies within the network of Supreme Court case law as a whole. More cases in a particular subject area create more opportunities to cite relevant cases, which in turn increases these cases' embeddedness scores. To take one example, the Supreme Court hears many more First Amendment cases than antitrust cases, and these cases are more central to the Court's overall jurisprudence.³⁰ The universe of potentially relevant Supreme Court antitrust cases is therefore simply smaller than the analogous set of First Amendment cases. Any new antitrust case --

²⁹ As noted above, the JCS scores used for the Supreme Court are comparable to the similarly scaled DW-NOMINATE scores for the coordinate branches.

³⁰ For First Amendment cases (n=435), the mean hub score is 2.56. For antitrust cases (n=217), the mean hub score is .96 -- nearly three times smaller. Indeed, even the antitrust case with the highest hub score, *Lafayette v. Louisiana Power & Light Co.* (1977), has a hub score (2.63) that is smaller than the median hub score for First Amendment cases (2.70).

even one carefully citing all of the Court’s major antitrust decisions -- will have a lower score than the average First Amendment case, because the cases relevant to any discussion of First Amendment principles will inevitably be more numerically “central” in Supreme Court jurisprudence. To account for this phenomenon, I include a dummy variable for each of the issue areas identified in the Supreme Court database (other than privacy, which was omitted to provide a basis for comparison).

Table 3-2: Embeddedness scores by issue area

Issue:	# of cases:	Hub mean:	Hub SD:	Hub median:	Max hub:
First Amendment	435	2.56	1.05	2.70	4.90
Miscellaneous	15	1.96	0.87	2.11	3.34
Privacy	77	1.76	1.45	1.44	4.44
Due process	233	1.59	0.82	1.63	4.03
Crim. procedure	1176	1.51	0.88	1.46	4.68
Civil rights	894	1.42	0.96	1.31	4.21
Federalism	270	1.22	0.89	1.05	3.98
Judicial power	564	1.05	0.82	0.83	3.75
Attorneys	65	0.96	1.02	0.52	3.76
Econ. activity	1125	0.89	0.80	0.68	4.78
Unions	269	0.75	0.71	0.56	4.06
Interstate Relations	32	0.50	0.44	0.29	1.59
Federal Taxation	225	0.34	0.47	0.16	2.46

Similarly, justices themselves have idiosyncratic writing styles, with their own individual approaches to the use of precedent. Even justices who rely on clerks to produce first drafts of their opinions can be expected to exercise a great deal of control

over the substance of the final product. Illustrating the magnitude of these individual differences, Table 3-1, above, shows the mean hub score for each justice who authored an opinion between 1953 and 2004, as well as the total number of opinions the justice authored during that period and the justices' relative and adjusted ranks. To control for the individual differences among opinion authors I include a dummy variable for 28 of the 29 justices who wrote one of the opinions in the sample, omitting Justice Clark as a baseline.³¹

Case complexity might also arguably affect the centrality of precedent used in an opinion. If a case involves the interpretation of more laws or addresses more issues of public policy, the majority opinion will likely incorporate more extensive precedent. Discussing more legal issues also presumably means citing more relevant precedents. To account for these factors, I generate two additional variables, *total laws* and *total issues*.³² The *total laws* variable captures the number of constitutional provisions, federal statutes and court rules at issue in a decision, as determined with reference to the case's summary in the Lawyers' Edition case reporter (Spaeth et al. 2011: 54). The *total issues* variable counts the number of subjects addressed in the decision as determined from a public policy (rather than legal) standpoint (Spaeth et al. 2011: 42; Shapiro 2009).³³ Both variables should be positively signed, as an

³¹ I use Justice Clark as the basis for comparison because his mean ideology, -0.013, is closest to 0 of all justices in the dataset.

³² Information for both variables comes from the Supreme Court Database.

³³ The *total laws* and *total issues* variables are related: as the Supreme Court Database's codebook explains, "[E]ach legal provision should not generally have more than a single issue applied to it. A second issue should apply only when a preference for one rather than the other cannot readily be made" (Spaeth et al. 2011: 42). The *total laws* variable has a minimum of one and a maximum of six laws, but the database lists the vast majority of cases (4156/5384, or 77.2%) as having only one law at issue.

increase in case complexity should correspond to a case's greater embeddedness in the network of Supreme Court law.

Some researchers have found particular characteristics attributable to justices while they undergo an acclimatization process during their first few years on the Court. One could imagine a newer justice citing relatively more precedents to ensure her opinions fit comfortably within the body of law produced by her predecessors, leading to higher embeddedness scores. A newer justice might also accede more readily to the citation suggestions of her new colleagues as a means of establishing cordial relations with them. Alternatively, a newer justice who was not directly involved with Court decisions during the preceding decades might be less intimately familiar with the body of law from which to draw precedents, leading to relatively lower scores. To determine whether any such tendencies systematically affect the data, the regressions include a dummy variable, *freshman*, coded 1 if the majority opinion author had not yet completed two full terms on the Court at the time the opinion was announced and 0 otherwise. The two-term period for measuring the acclimatization effect follows Hagle (1993). Because arguments could be made for freshman justices using either stronger or weaker precedent before acquiring more experience on the Court, I am agnostic as to the anticipated sign for this coefficient.

As explained above, the embeddedness score for each case is based in part on the size of the network at the time of the decision, meaning that a larger number of

Similarly, the *total issues* variable has a minimum of one and a maximum of five issues, with an even higher percentage (4942/5384, or 91.8%) coded as involving only one issue. Despite its prevalent use in the literature, the Supreme Court Database's coding as to these variables is somewhat controversial (Shapiro 2009: 488-501).

cases in the network will decrease the score of the average constituent case. Thus, a 2004 case citing exactly the same precedents as a 1974 case will have a lower embeddedness score, *ceteris paribus*. To account for this trend, I include a count variable, *time*, set at 0 for 1953 and adding one for each additional term, up to 51 in 2004. As implied above, this coefficient should be negatively signed.

IV. Assessing Legitimacy and Precedent Centrality: Testing the Hypotheses

A. *The Effects of an Ideological Shift*

Using the variables summarized above, I now test the hypotheses. As a first test I predict a case's centrality using the variables of interest -- the degree of ideological shift on the Court, case salience and case contentiousness -- as well as the variables accounting for specific subject areas, authoring justices, case complexity and time. The unit of analysis is a single-authored majority Supreme Court opinion, and the dataset consists of every such opinion drafted between 1953 and 2004 (n=5,384), or the entirety of the Warren, Burger and Rehnquist Courts. The results, summarized in the first column of Table 3-3, show that the justices respond to ideological shifts by using more central, authoritative precedent. This result, which is highly statistically significant ($p < .001$), is consistent with the theory that, as the Court changes ideological direction, the justices attempt to support their decisions with better case authority to bolster the Court's legitimacy. This could reflect an attempt to counter charges of results-oriented judging by taking greater pains to harmonize cases with the Court's prior decisions.

Table 3-3: Ideological shift and precedent strength

	(1)	(2)	(3)	(4)	(5)
	basic model	model with liberalism control	model with extremism control	model with both controls	model with liberalism, extremism and author controls
VARIABLES	hub score	hub score	hub score	hub score	hub score
mean ideology Δ from avg. of prior 10 years	1.399*** (0.288)	1.173** (0.377)	1.914*** (0.458)	1.728** (0.522)	2.520*** (0.486)
liberal		-0.0435 (0.0733)		-0.0346 (0.0702)	0.0426 (0.0982)
extreme			0.0500 (0.0707)	0.0568 (0.0733)	0.0461 (0.0770)
liberal*mean ideology Δ		0.477 (0.473)		0.384 (0.518)	-0.514 (0.496)
extreme*mean ideology Δ			-1.332* (0.646)	-1.326 (0.649)	-1.490* (0.707)
author ideology					0.0848 (0.110)
NYT	0.399*** (0.0409)	0.399*** (0.0406)	0.399*** (0.0406)	0.399*** (0.0403)	0.389*** (0.0390)
amici	0.107*** (0.0111)	0.107*** (0.0111)	0.106*** (0.0111)	0.106*** (0.0111)	0.113*** (0.0119)
total laws	0.255*** (0.0218)	0.255*** (0.0217)	0.257*** (0.0221)	0.256*** (0.0218)	0.261*** (0.0227)
total issues	0.0492 (0.0389)	0.0484 (0.0394)	0.0478 (0.0388)	0.0474 (0.0390)	0.0502 (0.0369)
overrule	0.602*** (0.0605)	0.601*** (0.0599)	0.605*** (0.0627)	0.604*** (0.0621)	0.633*** (0.0636)
margin	-0.0604*** (0.00539)	-0.0605*** (0.00541)	-0.0603*** (0.00545)	-0.0604*** (0.00544)	-0.0605*** (0.00501)
freshman	-0.0854 (0.0478)	-0.0848 (0.0475)	-0.0726 (0.0465)	-0.0719 (0.0466)	-0.0852 (0.0550)
time	0.00202 (0.00346)	0.00186 (0.00348)	0.00225 (0.00379)	0.00205 (0.00377)	0.00545* (0.00265)
Constant	0.420** (0.143)	0.441** (0.154)	0.378* (0.156)	0.396* (0.164)	0.629*** (0.165)
Observations	5,378	5,378	5,378	5,378	5,378
R-squared	0.405	0.405	0.406	0.406	0.381
Notes: The dependent variable is the case embeddedness score. Standard errors, clustered by majority opinion author, are in parentheses. The results of dummy variables for individual justices (columns 1-4) and issue areas (all columns) are omitted.					
*** p<0.001, ** p<0.01, * p<0.05					

To provide context for the magnitude of ideology change, consider first a Court that differs ideologically from the previous ten terms by the average amount, roughly .06 points on the -1 to 1 scale. When all other variables are set at their means, this leads to a hub score of approximately 1.295, putting the case at the fifty-sixth percentile of all cases in the dataset. Increasing the ideological difference variable by one standard deviation (roughly .05 points) while leaving all other variables at their means results in a hub score of approximately 1.369 -- a rank increase of two percentiles.³⁴ Moving from the lowest ideological differential (0.001) to the highest ideological differential (0.221) creates a hub score rank increase of nearly ten percentiles when all other variables are set at their means. The effect of these changes, as well as the effect of changes to other key variables (described below), are summarized in Table 3-5. The results, indicating that the Court uses more central precedent following an ideological shift, support Hypothesis 1.

The data also show that cases explicitly overruling past decisions cite substantially more authoritative precedent: holding all other variables at their means, a case overruling precedent has a centrality score rank that is seventeen percentiles higher than one that does not. This result is highly statistically significant ($p < .001$). Thus, the data strongly support Hypothesis 2.

To see whether liberals differ from conservatives in their response to an ideological shift of the Court, I estimate the same regression taking into account whether the majority opinion author was liberal or conservative. To do this I include a

³⁴ Decreasing the degree of ideological change by a standard deviation similarly results in a hub score two percentiles lower.

dummy variable indicating the presence of a liberal author (*liberal*, defined as one with an ideology score below zero) and a variable interacting that dummy with the differential change in ideology (*liberal*mean ideology Δ*). These results, in column 2 of Table 3-3, show that reaction to an ideological change on the Court still appears to be the key variable, while the ideological direction of that change appears not to impact a case's centrality score in a statistically meaningful way. The ideology differential coefficient remains large and quite significant ($p=.004$), while the coefficients for the liberalism dummy and the interaction term are comparatively small and statistically insignificant. Thus, the Court appears to use more authoritative precedent following an ideological shift, regardless of the direction of that shift. Increasing the centrality of precedents cited does not appear to be the exclusive province of either conservatives or liberals.

Similarly, to test whether extremist authors differ from moderates in their response to changing ideology, I estimate the regression equation accounting for the relative extremity of the majority opinion author. To do this I included a new dummy variable, *extreme* (coded as 1 if the author's ideology is one standard deviation above or below the average for all justices and 0 otherwise), and a variable interacting that dummy with the differential change in ideology (*extreme*mean ideology Δ*). Column 3 of Table 3-3 shows the results of that regression, and column 4 shows the results of a regression accounting for both liberalism and extremism. In each case, ideological change on the Court has a similar, highly significant impact. Extremism by itself does not seem to affect precedent centrality, but extremism coupled with

ideological change correlates with the use of less central precedent. This result indicates that authors respond to ideological shifts in the Court by grounding their opinions in more central precedent, but ideological extremist authors may do so somewhat less than moderates. Perhaps extremists of both ideological stripes are less concerned with public perception of the Court's changing ideology than their more moderate counterparts, and are relatively more focused on "correcting" the perceived excesses of their predecessors.

B. What Role Does Ideology Play?

Given the increasingly polarized nature of the public, some may wonder whether conservative and liberal justices simply tend to differ in their use of precedent. To test for this possibility I estimate the effect of the author's ideology (on the -1 to 1 JCS scale) -- rather than ideological change -- on precedent centrality. These results are summarized in Table 3-4. They show that what initially seems to be a strong relationship between ideology and precedent centrality becomes substantially weaker when factoring in issue areas. This result indicates that the initial strong correlation between embeddedness score and author ideology is largely a function of the issue areas in which particular justices tend to write; we cannot conclude with any precision that conservatives generally use stronger precedent.

Table 3-4: Opinion author/majority coalition ideology effect on precedent strength

	(1)	(2)	(3)
	author ideology, no issue control	author ideology, issue control	coalition ideology, justice and issue controls
VARIABLES	hub score	hub score	hub score
ideology	0.171*** (0.0297)	0.0750 (0.0671)	
mean majority ideology			0.233 (0.122)
NYT	0.618*** (0.0357)	0.394*** (0.0399)	0.409*** (0.0422)
amici	0.104*** (0.0130)	0.111*** (0.0123)	0.106*** (0.0114)
total laws	0.322*** (0.0216)	0.260*** (0.0239)	0.255*** (0.0232)
total issues	0.0634 (0.0407)	0.0603 (0.0378)	0.0595 (0.0385)
overrule	0.605*** (0.0810)	0.636*** (0.0662)	0.615*** (0.0636)
margin	-0.0735*** (0.00407)	-0.0605*** (0.00507)	-0.0589*** (0.00523)
freshman	-0.0659 (0.0454)	-0.0632 (0.0639)	-0.0802 (0.0565)
time	0.00522*** (0.000903)	0.00309 (0.00255)	-0.000696 (0.00323)
Constant	0.994*** (0.0602)	0.869*** (0.119)	0.569*** (0.122)
Observations	5,382	5,378	5,378
R-squared	0.224	0.372	0.402
Standard errors, clustered by majority opinion author, in parentheses.			
*** p<0.001, ** p<0.01, * p<0.05.			
Note: Results of dummy variables for individual justices (column 3) and issue areas (columns 2 and 3) omitted.			

When I include author ideology in the ideological change regressions in Table 3-3, the results are even more imprecise. In column 5 of Table 3-3 I include the results of one such regression, which also accounts for liberalism, extremism, and the interaction of both with the ideological change of the Court as a whole.³⁵ The estimated effect of author ideology in column 5 is not statistically significant ($p=.446$). As may be seen when comparing columns 4 and 5, including the author ideology variable accentuates the effect of ideological change but otherwise does not appreciably change the results for the variables of interest.

Similarly, to determine whether the ideology of the majority coalition as a whole (rather than the ideology of the opinion's author alone) correlates with the centrality of precedent used in an opinion, I estimate the connection between precedent centrality and the majority coalition's average ideology, while continuing to account for specific issue areas and controlling for the authoring justice. The results are summarized in column 3 of Table 3-4. The average ideology of the coalition appears to be positively correlated with embeddedness score, indicating that more conservative coalitions may tend to embed their opinions in more central precedent. The result is near the conventional standard of statistical significance ($p=.067$).

C. The Effect of Contentiousness and Salience

Regardless of the specific variables included, every test summarized in Tables 3-4 and 3-5 supports Hypothesis 3 (that cases with smaller winning margins will use more central precedent) and Hypothesis 4 (that more salient cases will use

³⁵ This model does not include justice fixed effects because inclusion of author ideology accounts for justice differences.

more central precedent). Precedent centrality consistently increases as voting margins become closer, and the results are consistently highly significant ($p < .001$). Holding all other variables at their means, an 8-1 decision ranks four percentiles higher than a 9-0 decision, and a 5-4 decision ranks fifteen percentiles higher. These results, along with the effects of changes in the other variables of interest on resultant hub scores, are summarized in Table 3-5.

Table 3-5: Effect of variable changes on hub score percentile ranks

Variable:	Experimental change:	Hub score percentile rank change:
Court ideological change	1 std. deviation shift	2
Court ideological change	Lowest to highest	10
Overrule	Case explicitly overrules precedent	17
Case salience	Case mentioned in <i>New York Times</i>	12
Case salience	1 std. deviation shift in amici z-score	3
Margin	From 9-0 to 5-4 decision	15
Separation of powers	Strikes down federal statute	18
<p>Note: Calculations based on results when regressing embeddedness score on ideology, ideological change, salience, complexity and contentiousness variables, and controlling for time, freshman author status, and justice and issue area fixed effects. The results are based on the indicated change when keeping all other variables at their means.</p>		

The results also show that opinions in more salient cases rely on substantially more central case law. Both the *NYT* and *amici* variables are strongly correlated with the use of more authoritative precedent, and the results are highly significant ($p < .001$) for each specification tested. The magnitude of these effects is considerable. When all other variables are kept at their means, a case mentioned in the *New York Times* the day after it is announced has a precedent centrality score ranking it twelve percentiles higher than one that does not receive such a mention. Similarly, an increase of one standard deviation in the standardized number of amicus briefs filed translates to an opinion ranking three percentiles higher. Thus, it seems clear that the Court uses more

authoritative precedent in cases the public is likely to notice. When the public is watching, the justices draft more fully supported opinions.

With respect to the other control variables, the *total laws* variable correlates strongly with the use of more central precedent. This correlation supports the validity of the embeddedness score measure: more laws under consideration usually require reference to a larger number of precedents interpreting those laws, which is precisely what the results show. Interestingly, the *total issues* variable is not significant. This may be because the *total laws* variable accounts for most of the variation in case complexity. Freshman authoring justices apparently use somewhat less central precedent, but the relationship is fairly weak and does not meet conventional levels of statistical significance.

D. Separation-of-Powers Concerns

Next, I examine whether the Court uses precedent differently when it poses a threat to the power of the other branches either directly (by invalidating a federal statute) or indirectly (when its ideology is outside the bounds delineated by the other branches). Looking only at the subset of cases involving federal statutes, it is clear that the Court does, in fact, cite more central precedent when it invalidates the enactment of a coordinate branch. Indeed, a case that strikes down a federal statute ranks *eighteen percentiles higher* than an otherwise identical case upholding the statute. This indicates that when the Court's actions potentially implicate separation-of-powers concerns, the justices take special care to address fears of judicial overreaching by justifying the outcome with particularly authoritative precedent. This

effect applies regardless of ideological change. These results, which support Hypothesis 5a, are summarized in the first column of Table 3-6.

Table 3-6: Coordinate branches and precedent strength

VARIABLES	(1) hub score	(2) hub score	(3) hub score
mean ideology Δ from avg. of prior 10 years	0.687 (0.439)	1.761** (0.538)	1.733** (0.530)
liberal	-0.00229 (0.0632)	-0.0459 (0.0666)	-0.0361 (0.0681)
extreme	0.0955 (0.0823)	0.0560 (0.0723)	0.0568 (0.0731)
liberal*mean ideology Δ	0.873 (0.681)	0.403 (0.520)	0.387 (0.510)
extreme*mean ideology Δ	-1.537 (0.777)	-1.331 (0.652)	-1.326 (0.649)
statute invalidation	0.553*** (0.127)		
environment--majority		0.0345 (0.0267)	
environment--Court			0.00428 (0.0279)
NYT	0.265*** (0.0503)	0.400*** (0.0404)	0.399*** (0.0404)
amici	0.0955*** (0.0137)	0.106*** (0.0111)	0.106*** (0.0111)
total laws	0.347*** (0.0257)	0.256*** (0.0219)	0.256*** (0.0218)
total issues	0.104* (0.0415)	0.0491 (0.0391)	0.0476 (0.0389)
overrule	0.630*** (0.130)	0.604*** (0.0617)	0.604*** (0.0620)
margin	-0.0502*** (0.00552)	-0.0604*** (0.00545)	-0.0604*** (0.00544)
freshman	-0.0115 (0.0551)	-0.0697 (0.0460)	-0.0719 (0.0465)
time	0.000538 (0.00330)	0.00211 (0.00377)	0.00207 (0.00378)
Constant	1.822*** (0.164)	0.394* (0.165)	0.396* (0.165)
Observations	2,835	5,378	5,378
R-squared	0.350	0.406	0.406
Standard errors, clustered by majority opinion author, in parentheses.			
*** p<0.001, ** p<0.01, * p<0.05.			
Note: Results of dummy variables for individual justices and issue areas omitted.			

When the threat posed to other branches is attenuated, with the Court's ideology falling outside the boundaries established by the other branches and thereby posing only an implicit, potential risk to the realization of their policy preferences, such an effect is not apparent. Column 2 of Table 3-6 shows the effect when the ideology of the median member of the majority coalition lies outside the "zone of acquiescence," and column 3 shows the effect when the median member of the Court as a whole falls outside that zone. As is evident from the table, ideological distance from the coordinate branches in general does not appear to influence the Court's decisions regarding precedent citation. Neither variable is remotely significant, and the coefficients are quite small in any event. This result does not support Hypothesis 5b.

V. The Quest for Legitimacy: A Constraining Force?

The analysis above confirms that the Supreme Court uses more central, authoritative precedent when its legitimacy might be called into question. Embeddedness scores of cases are systematically higher following an ideological shift of the Court (and particularly when the Court overrules its prior decisions), when cases have smaller winning margins, when cases are more salient to the public and when the Court invalidates the actions of the coordinate branches. In other words, the justices seem to write their opinions "with an eye not only to legal right and wrong, but with an eye to what popular opinion w[ill] tolerate" (McCloskey 1960: 15). When they deviate from the holdings of prior Courts (raising the specter of decisionmaking

based on preference rather than principle), when they threaten to usurp power from the other branches, and when they take actions the public is particularly likely to notice, the justices do in fact strive to explain their rationales instead of merely asserting their conclusions by fiat, and seek to show that their decisions are appropriate with reference to more authoritative precedent. This impulse to justify their holdings applies to justices across the ideological spectrum.

These results dovetail nicely with Gibson and Caldeira's (2011) finding that the Court continues to enjoy legitimacy so long as the public perceives it to be guided by principle rather than politics. The findings similarly complement those of Baird and Gangl (2006) and Scheb and Lyons (2001), who conclude that the public shows more support for the Supreme Court when it believes the Court's decisions are motivated at least in part by legal considerations. Whether consciously or not, the justices seem to appreciate that the public expects them to situate their holdings in the language of authoritative precedent, and they respond to that expectation.

Some might argue that justices cite precedent simply because it is part of the "rules of the game," adherence to which brings its own value separate and apart from notions of legitimacy (Posner 1993). If this were the primary explanation for precedent citation, however, and if public perception of the Court's behavior were irrelevant, we would not expect to see the marked difference in precedent centrality between opinions that strike down a federal statute and those that uphold such statutes. To the contrary, however, the difference between such cases is pronounced: As noted above, among cases assessing the constitutionality of a federal statute, an opinion

striking down a federal statute has a hub score placing it eighteen percentiles higher than an otherwise identical case upholding the statute.

The question remains, however, whether this inclination toward justifying an opinion's conclusions serves as a genuine check on judicial behavior. Some scholars (e.g. Shapiro 1987) argue that the norm of providing reasons in written opinions serves a "vital function" in cabining the Court's potential action. Anecdotal evidence of justices changing their votes when a particular opinion "won't write" -- an experience numerous judges have described (Posner 1995; Wald 1995; Ginsburg 2003; McCree 1981) -- further supports the view that some constraint does in fact exist. One famous example of the phenomenon, described in Cross (1997), occurred in the case of *Owen v. Owen* (1991). In that case, the Court initially voted unanimously to affirm, with Justice Scalia assigned to write the opinion. After determining that he was unable to craft an argument justifying the result, Scalia circulated a draft reversing the lower court. Chief Justice Rehnquist then attempted to draft an affirmance, but he, too, was unable to write an opinion he found compelling. The Court ultimately voted 8-1 to reverse.

Taking a contrary position, attitudinalists, most notably Professors Jeffrey Segal and Harold Spaeth, contend that justices are unconstrained preference maximizers for whom precedent citation is nothing more than "a matter of good form, rather than a limit on the operation of judicial policy preferences" (Segal and Spaeth 2002: 81). A justice's vote, under this view, is far more important than the post hoc rationalization of it provided in the pages of the *U.S. Reports*. In this account, the

justices may feel constrained to offer some explanation for their decisions, but this is at most an easily surmountable hurdle, rather than a substantive check on judicial action.

Under the attitudinalist formulation, justices wishing to pursue their preferences while complying with the norm of precedent citation have two primary options. First, they can find and cite those cases leading to their preferred outcomes and simply ignore those that come to a contrary conclusion. The results of this study indicate that this is not, in fact, what Supreme Court justices do. If the justices were simply cherry-picking helpful precedents, an ideological shift would lead to lower network centrality scores, as opinions would ignore the more recent (and more central) cases in favor of older, more tangential opinions for support. Instead, the data show that an ideological change leads to the use of *more* embedded precedent, indicating the justices are in fact engaging with the more recent and more authoritative decisions from which they seek to depart.

This leads to the second option available to preference-maximizing justices who nevertheless wish to retain legitimacy. They can address these contrary precedents but explain why their preferred outcome is easily reconciled with them, through a process of distinguishing or, in the extreme case, outright misrepresentation. Such behavior is not detectable through use of the network centrality scores alone; the scores do not distinguish between principled and spurious argumentation.

This is not a risk-free strategy for the justices, however. By purporting to address and explain away inconsistencies with relevant precedent, the justices open

themselves and their reasoning up to scrutiny. A justice who arguably misrepresents precedential holdings in an opinion may become the target of an attack from his judicial colleagues, the coordinate branches, the legal academy and the media. An interesting recent example of this phenomenon occurred in *Federal Election Commission v. Wisconsin Right to Life* (2007). In that case, Chief Justice Roberts's majority opinion held that the portion of the McCain-Feingold Act prohibiting the broadcast of issue advocacy advertisements in the weeks preceding an election was unconstitutional. *Wisconsin Right to Life* arguably overruled *McConnell v. Federal Election Commission* (2003), which had upheld many provisions of the Act against a constitutional challenge four years earlier. The majority opinion nevertheless claimed that the case presented "no occasion to revisit" *McConnell*. In his concurrence, Justice Scalia argued that the majority opinion clearly overruled *McConnell*, called the majority's claim to the contrary "indefensible," and concluded, "This faux judicial restraint is judicial obfuscation" (*Wisc. Right to Life* 2007: 498 n.7). Such criticisms, particularly those that are well publicized, may result in professional and personal embarrassment for the authoring justice. This can have a strong deterrent effect (Kozinski 1993; Baum 2006).

In addition, even if justices may sometimes rely on weak distinctions to distinguish contrary precedents without suffering a loss of standing in the public eye, they threaten to sacrifice the Court's legitimacy if they go to this well too often. Support for the Supreme Court is fairly diffuse and survives short-term dissatisfaction with Court decisions (Caldeira and Gibson 1992), but such support erodes in the face

of extended unhappiness with its output (Gibson et al. 1998; Gibson and Caldeira 1992). If the Court consistently appears to be providing weak justifications for fundamentally political decisions, public support is likely to taper off (Feldman 2005: 115). The Court acknowledged as much in *Planned Parenthood* (1992) when it stated, “A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve” (864).

On balance, then, this chapter’s conclusion that the justices structure their opinions to maintain the Court’s legitimacy is somewhat encouraging for those who believe transparency in judicial decisionmaking is important. So long as the justices are committed to justifying themselves through their opinions (which the results show they appear to be), it is possible to evaluate the strength of their reasoning. To the extent the justices give lip service to the importance of *stare decisis* while behaving in a results-oriented fashion, they risk alienating the public and sacrificing support for the Court. This threat may not prevent the Court from prioritizing results over principle in particular cases, but it provides some reason to believe they will not do so as a matter of course, so long as the public is made aware of these deviations when they occur. While this dynamic holds open hope for those who believe the opinion-writing process serves as a check on judicial power, it amplifies the responsibility of the dissent, the legal academy and the media to highlight contradictions between the Court’s actions and its explanations whenever they arise.

Appendix: Calculation of the Hub Scores

Formally, suppose that \mathbf{x} is a vector of authority scores and \mathbf{y} is a vector of hub scores, and that these vectors are normalized such that their squares sum to 1. If we let each opinion i 's authority score, x_i , be proportional to the sum of the hub scores of the cases that cite it and each opinion's hub score, y_i , be proportional to the sum of the authority scores of the cases that it cites, we obtain the following two equations:

$$x_i \propto a_{i1}y_1 + a_{i2}y_2 + \dots + a_{in}y_n$$

$$y_i \propto a_{i1}x_1 + a_{i2}x_2 + \dots + a_{in}x_n$$

This yields 2 equations for each case, which can be represented in matrix format by the following two equations:

$$\lambda \mathbf{x} = \mathbf{A}^T \mathbf{y}$$

$$\lambda \mathbf{y} = \mathbf{A} \mathbf{x}$$

As Kleinberg (1999) shows, these equations converge to $\lambda \mathbf{x}^* = \mathbf{A}^T \mathbf{A} \mathbf{x}^*$ and $\lambda \mathbf{y}^* = \mathbf{A} \mathbf{A}^T \mathbf{y}^*$, where λ is the principal eigenvalue and \mathbf{x}^* is the principal eigenvector of $\mathbf{A}^T \mathbf{A}$, and \mathbf{y}^* is the principal eigenvector of $\mathbf{A} \mathbf{A}^T$. Hub and authority scores can thus be simultaneously calculated by knowing which cases cite which other cases.

Sources: Fowler et al. (2007: 330-31); Fowler and Jeon (2008: 20); Lupu and Fowler (2010: 20 n.5).

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CONCLUSION

In these essays I have attempted to move beyond an accounting of votes to look at the substance of judicial actions. By focusing on the specific ways judges and justices go about the performance of their duties, I aimed to illuminate and expand on the dynamics underlying appellate behavior in the federal judicial system. To assess circuit court behavior, this entailed evaluating an increasingly common (and arguably extra-judicial) means of appealing directly to the Supreme Court and marshalling political coalitions to wage ideological battle. For Supreme Court justices, it involved an analysis of the use of justificatory citation practice within opinions to appeal to the public and retain legitimacy when such legitimacy might be most imperiled. In each I used an analytical approach accounting for the realities of the range of judicial behavior, one that expanded beyond the narrow choice of a vote in favor of the plaintiff or the defendant.

The first essay examines the use of dissents from denial of rehearing en banc (DDRs) in the certiorari process and concludes that the Supreme Court interprets the existence of DDRs in strongly political terms: if a Republican appointee has written a DDR, the Court treats it as a meaningful signal that the case merits review and, often, reversal. The signal is far weaker when coming from a Democratic appointee. Interestingly, litigants appear not to acknowledge the political dimensions of DDR activity, as they seek review in cases with a DDR at the same rate, regardless of the political affiliation of the author.

The second essay considers whether DDRs are used as weapons in ideological clashes within the federal judiciary. Focusing on the fundamental nature of DDRs as unconstrained statements of judicial preference, it evaluates the coalitions formed in support of a DDR and the author of the panel opinion the DDR targets to determine whether DDR activity tends to play out along ideological lines. The essay ultimately concludes that DDR activity does have an ideological dimension to it in many (but not all) circuits, that this polarization within the circuit courts increased markedly in the 1980s, and that the polarization can be largely attributed to the cohorts appointed by Reagan and both Bushes.

In the final essay I look to see whether Supreme Court justices cite stronger, more “central” precedent when the public might most have a reason to question the legitimacy of its actions: when the Court’s ideological composition has recently changed, when a decision invalidates federal statutes, and when the case is most visible to the general public. The data show that opinions do indeed cite stronger precedent in these situations, implying a judicial concern with public perception of its actions that manifests itself in the content of judicial opinions, not merely the justices’ ultimate votes.

Each essay endeavors to use knowledge of specific judicial practices to learn how judges work within a given institutional structure to pursue their policy objectives. This is in keeping with a larger goal within the discipline of moving beyond the formalist/attitudinalist debate which, though prominent during much of the twentieth century, has now largely run its course.

Broadly speaking, formalists contend that judges make decisions based on principles of “plain meaning, intent of the framers, precedent, and balancing of societal interests,” all applied to the facts presented in a specific case (Segal and Spaeth 1993: 64). Under this model, “judges almost scientifically apply analogical reasoning to the Constitution, prior precedents, or statutes to find the proper resolution of a case” (Cross 1997: 254). Proponents of this approach include traditionalist legal academics and many judges themselves, and it remains the dominant mode of legal instruction.

For decades, however, this approach has been under attack from legal scholars and political scientists alike. Beginning in the 1920s, realists within the legal academy assailed formalism with their argument that judges decide cases based on their sense of the correct outcome rather than the deduction of ineluctable conclusions from legal precedent. A later generation of critical legal studies scholars claimed that the law’s inherent indeterminism allows judges to justify virtually any desired result (Cross 1997). Starting in the 1950s, political scientists began marshalling empirical evidence to support their claims that judicial preferences with respect to the parties matter far more than legal texts in determining the outcome of cases. These groups of legal scholars and political scientists both contend that legal formalism is naïve and excessively mechanistic at best, and intentionally obfuscates actual judicial activity at worst. The rhetoric with which such critics repudiate the importance of legal constraint can be quite heated, with one recent book dismissing legal formalism as “the phony world of precedent and history” (Segal and Spaeth 2002: 85). These

critiques have successfully discredited formalism in the eyes of many, so much so that it has become a pejorative term. Indeed, by the late 1980s, one scholar observed, “[F]ormalist’ is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees” (Schauer 1988: 510).

Attitudinalism, the theory that judges decide cases based on their personal preferences, emerged as a key challenger to formalism as a means of understanding judicial behavior. The approach conceives of courts “decid[ing] disputes in light of the facts of the case vis-à-vis the ideological attitudes and values” of the judges (Segal and Spaeth 2002: 86). It focuses on judicial votes as they relate to pre-existing judicial ideologies, dismissing opinion substance as post-hoc rationalization for decisions based on the judge’s personal preferences. The approach was particularly valuable in an era when scholars desired to apply scientific rigor to the study of judicial politics but votes were the only objectively interpretable data easily acquired.

Although attitudinalism has an intuitive appeal and considerable empirical support, the simplicity of its extreme form has sparked pointed criticism. Detractors argue that attitudinalism’s exclusive focus on judicial votes is overly reductionist, with models purporting to find evidence supporting the theory often accounting insufficiently for legal factors that may in fact be determinative of case outcomes. Critics also complain that the reductionist nature of the attitudinalist approach fails to consider relevant differences among cases types, when not all legal disputes are fungible. Different case types may allow for disparate degrees of influence from

individual preferences, with some outcomes more directly dictated by the interplay of facts and legal requirements and others more subject to interpretation. This is particularly problematic given the inordinate focus of much empirical attitudinalist research on Supreme Court cases -- by definition, a set of exceptional cases -- rather than the district court and appeals court opinions that make up the vast majority of federal judicial activity (Cross 1997: 285-309).

Some cases may also have complex results that are not easily reducible to interpretation as a clear victory for either party. As one common example, an appeals court might affirm a lower court's finding of liability but reverse on the total amount of damages (e.g. *Williams v. Trader Publishing Co.*). Such a result may require a subjective interpretation to determine the winner. In addition, the issues involved in a case do not always reduce to a single set of competing values falling along traditional liberal/conservative dimensions. For example, *McCullen v. Coakley*, which required the Court to assess the propriety of a statute restricting the protest rights of anti-abortion activists, raised free speech and abortion rights concerns pulling in competing directions. A simple vote count of that case would record it as a unanimous decision, while a closer reading of the majority opinion and two concurrences shows that the justices followed very different rationales in concluding that the statute was unconstitutional.

Even taking the attitudinalist approach at face value, some detractors complain that its models are overly simplistic. Judges may well be motivated by their personal preferences, the argument goes, but this assertion is tautological and untestable unless

researchers are able to model judicial utility functions convincingly. Many attitudinalists model judicial preferences exclusively as *policy* preferences,¹ but this decision removes from consideration many other equally plausible preference sources (Cross 1997: 294-303; Posner 2008: 38, 60; Posner 1993: 16-30), including the innate satisfaction that comes from complying with legal norms (Posner 1993: 28), the concern for prestige and reputation (Cross 1997: 297; Epstein 1990: 838; Posner 1993: 13-14), and a desire to increase leisure time (Posner 1993: 11), as well as a number of factors specific to the individuals involved in the litigation and disposition of a particular case. To the extent attitudinalists focus on policy preferences to the exclusion of other bases for judicial motivations, their account of the judicial process bears little relation to judging in the real world (Cross 1997: 298).

In addition, the attitudinalist approach's focus on parsimony shields from analysis much of the nuance of judicial activity, disregarding elements that make judicial behavior unique and, in the process, losing a valuable source of information. Opinions have a number of functions, but they are at heart efforts at persuasion, directed at the parties, colleagues, other courts, lawyers and history. *How* judges try to accomplish this task through their opinions -- the way they structure their decisions; how they state their ideas; what bases of support they choose from precedent, the case record, legislative history, foreign law, literature, popular culture and other sources; and how they employ syntax and tone -- all reveal something about the way judges try to achieve their goals. Looking exclusively at ultimate votes and dismissing the rest as

¹ A notable exception is Baum 2006, in which the author takes into account judges' attempts to appeal to their selected audiences through their opinions.

mere window dressing is cynically reductionist and ignores a tremendous wealth of potentially valuable information. This approach may well have made sense a generation ago, when judicial votes were the only objective data readily available, but modern advances in data analysis methods and computing power mean that researchers seeking quantifiable data and replicable modes of analysis are no longer so restricted in their source material.

Moving forward, the study of judicial politics must strive to reconcile the legal formalist and attitudinal views of the judiciary, recognizing that a judge may have ideological, role-based and pragmatic motivations simultaneously. These motivations may all manifest themselves in judicial opinions in ways that are sometimes complementary and sometimes conflictual. Scholars must try to quantify and assess how judges work within existing judicial institutions to promote and reconcile these interests, and need to explain the circumstances under which each will predominate. Accomplishing this goal requires sensitivity both to the inner workings of the court under evaluation and the substantive nuances of judicial opinions. To this end a focus on specific institutional practices, and a familiarity with the institutional context within which judges operate, is invaluable.

New and continually improving computing methods offer considerable promise for the future operationalization of these concepts. Foremost among these are novel techniques in automated content analysis, including methods of document classification and sorting as well as ideological scaling. Grimmer and Stewart (2013)

provide an extensive taxonomy of the different forms of automated content analysis as applied to political texts and the benefits and drawbacks of each.

Such methods hold great promise for future work on specific aspects of judicial behavior. For example, analysts interesting in identifying individual judges' judicial styles may want to employ software that analyzes the emotional content and positive or negative orientation of opinion texts. More precise information about judicial writing styles could provide considerable insight about dynamics at the circuit and Supreme Court levels, better illuminating the nature of judicial behavior on a collegial court. For example, are those with a less aggressive orientation in their opinions better able to form majorities? Does nastiness beget nastiness -- do those with a harsher writing style become the target of harsher attacks in return? Are judges socialized over time to use a different, more collegial approach toward their colleagues? Or do they instead display increasing frustration with their colleagues over time? If so, how much of this is rooted in being in an ideological minority on the court, and how much stems from interpersonal dynamics?

Computer tools may provide other avenues for fruitful research as well. Recent work using automated text analysis methods has advanced our understanding of opinion clarity as it relates to authorship and various institutional factors (Owens and Wedeking 2011), has uncovered the degree to which Supreme Court clerks contribute to opinion substance (Rosenthal and Yoon 2011), and has examined how much parties' briefs influence opinion content (Corley 2008). Further research in this vein will help to illuminate the opinion-writing process, something currently shrouded

in considerable mystery. These advances should situate opinion writing more fully within the adjudicatory context, explaining how litigants, colleagues and the general institutional structure of the courts all contribute to opinion content.

A more nuanced focus on judicial opinions will also provide additional insights about the connection between judicial behavior and public perception of the judiciary. This is a vitally important avenue for research, particularly in light of new data showing that the public holds a far less favorable view of the Supreme Court than it did even a decade ago (Jones 2014). One such avenue could determine the relationship between opinion tone and public respect for the judiciary. While scholars have written much about the importance of unanimity, particularly with respect to issues of great societal import, little has been done regarding the effect of the words used to communicate conflicting views. The public expects a certain level of decorum from its judges, even when they disagree (Friedman 2001: 195-96; Bybee 2010: 5). Thus, opinions contemptuously accusing one's colleagues of simple-mindedness, sophistry, underhandedness and similar judicial failings may damage perceptions of court legitimacy far more than dissents laying out disagreements in more respectful terms. This connection between opinion content and public perception warrants more in-depth exploration.

In addition, more work can be done to connect opinion readability and judicial legitimacy. As noted above, Owens and Wedeking (2011) used a content analysis program, Linguistic Inquiry and Word Count (LIWC), to assess the complexity of Supreme Court opinions. They found, *inter alia*, that justices write clearer opinions

when they write for smaller coalitions and when they write in dissent. Their project suggests additional research in this area connecting readability levels and popular support. It may be that the public trusts the courts more when they have a better understanding of judicial opinions owing to the opinions' greater clarity (Owens and Wedeking 2011: 1030). Also plausible, however, is the opposite hypothesis: perhaps people idealize their courts more when judicial opinions are harder to understand, appearing more like Delphic pronouncements than examples of clearly supported reasoning. Posner (2008) observes that judges engage in "professional mystification" by using "esoteric materials and techniques" to emphasize their skills and disinterest in a case's outcome (3), and Hansford and Coe (2014) find evidence that people are more accepting of decisions that use legalistic language. Through textual analysis and experimentation the next generation of scholars would be well-advised to continue exploring the link between judicial clarity and public perception of the judiciary.

The next decade promises a significant increase in data sources available to judicial scholars. This information, properly deployed, should help uncover aspects of the judicial process long hidden from view and considered unknowable. In the process, it may allow scholars to move permanently beyond the constrictive legal formalist and attitudinalist camps characterizing earlier work in the field, and instead to describe the judicial process in more accurate terms that better account for its fascinating nuances. This combination of new data and novel analytical techniques has the potential to reinvigorate the study of judicial politics, bringing this relatively neglected area back into the mainstream of American political science research. In the

process, the subfield may finally be able to overcome the “perpetual identity crisis” that has dogged it since its earliest days: that of trying to use the analytical methods of political science to conduct a legally sophisticated study of the courts but, in the process, “somehow remain[ing] peripheral to both political science and legal scholarship” (Maveety 2003: 1, 3). Armed with these enhancements, the study of judicial politics may begin to reveal something truly unique about the judiciary as a fundamental, co-equal branch of government -- not merely an afterthought among governmental institutions, but a subject fully worthy of dedicated study in its own right.

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