

**The Intersection of Judicial Attitudes and Litigant Selection Theories:
Explaining U.S. Supreme Court Decision Making**

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

I. Introduction

Few scholars of the United States Supreme Court seriously doubt that the personal ideological proclivities of justices play a role in the case decisions that they make. Indeed, the Attitudinal Model of judicial decision making has enjoyed considerable success and respect in the fields of political science and law, and its application has been extended beyond the U.S. Supreme Court to other levels of the judiciary. The premise that a government actor's personal policy preferences shape their decisions on important governance decisions is not singular to the courts. Indeed, ideological preferences have been advanced as a driving force in the decision making of other institutional actors such as members of congress and executives. However, the Attitudinal Model has perhaps been most fruitfully applied to decision making on the U.S. Supreme Court where scholars have argued that the institutional structure of the High Court is particularly well-suited for justices' ideological preferences to play a critical role. Lack of oversight or higher professional aspirations, lifetime appointments, and a highly discretionary docket all work to facilitate the translation of justices' policy preferences into binding case opinions.¹

Emanating from the criticisms of the classic legal model of the 1920s, the behavioral school of political science of the 1950s developed a model of decision making that shifted the conventional assumptions about the High Court. Challenging the notion that Supreme Court decisions hinge solely on precedent, plain meaning of the Constitution, and the original intent of the Framers, Attitudinal theorists instead looked to the ideological leanings of the members of the Court itself to explain case and vote outcomes. Simply put, the Attitudinal Model posits that “justices base their decisions on the merits on the facts of the case

¹ *See, e.g.*, JEFFREY SEGAL AND HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

juxtaposed against their personal policy preferences.”² That is, attitudinal adherents recognize that while precedent and original intent may inform the justices, these factors do not fully explain the decisions of the court - it is the justices' ideological inclinations that essentially drive case decision making.³

Missing from most Attitudinal Model accounts of Supreme Court decision making, however, is an accounting of the role of the case selection choices of litigants in the Court's litigation process - an important consideration in assessing any type of court outcomes according to scholars advocating Litigant Selection Models. Thus, under this theoretical approach, the Attitudinal Model mistakenly ignores the fact that courts are essentially reactive institutions. That is, courts do not formally initiate policy making. Instead, they rely on litigants to bring issues before them for legal resolution. As Frank Cross points out, “[t]hose cases that reach a judicial decision are the cases that the parties have chosen not to settle and thus represent a subset of disputes chosen by the parties, not by the judges.”⁴

In their seminal 1984 article promoting the “Selection Hypothesis” model, law and economics scholars George Priest and Benjamin Klein suggest that this fact has important implications for the inferences that we draw from examining cases that are actually litigated (rather than settled). They explain that:

The most important assumption of the model is that potential litigants form rational estimates of the likely decision, whether it is based on applicable legal precedent or judicial or jury bias. From this proposition, the model shows that

² *Id.* at 312.

³ *Id.*

⁴ Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIFORNIA LAW REVIEW 1491 (2003).

the disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of disputes.⁵

Priest and Klein go on to argue that this selection or sorting of disputes by utility maximizing parties creates a strong tendency toward a rate of litigation success for a given set of plaintiffs at trial or appellants at appeal of 50 percent regardless of the relevant legal standard or “whether judges or juries are hostile or sympathetic.”⁶ In other words, parties sort out and settle disputes in which potential outcomes are clear and the parties’ expectations converge, and the remaining “uncertain” cases that go forward to adjudication result in outcomes that approximate the flip of a fair coin, or 50-50.⁷

With regard to Supreme Court outcomes, even though the justices choose the cases that they hear from a large pool of petitions, litigants must ultimately choose to appeal their cases for the Court to have the opportunity to select them. Under a Selection Theory approach, this phenomenon plays an important role in the decision making process of the high Court because it frames the nature and quality of the cases heard by the Court. This point serves as the basic premise of the Litigant Selection Model - the litigants have likely considered the attitudes and ideological inclinations of the justices in their decision to appeal (or not appeal) their cases to the Court. Given that litigants and their attorneys are undoubtedly aware of the well-known ideological proclivities of the High Court's justices, they likely sort out or settle cases that have relatively clear or predictable outcomes and, hence, the Court does not hear them. In this regard, the cases that are appealed to the Court are those that are not readily classified as winners or losers by the litigants and their attorneys.

⁵ George L. Priest and Benjamin Klein *The Selection of Disputes for Litigation* 13 THE JOURNAL OF LEGAL STUDIES 1, 4 (1984).

⁶ *Id.* at 5.

⁷ *Id.* at 36.

Thus, the direct influence of judicial ideology on the outcomes of these remaining “uncertain” cases is likely inconsequential since litigants have predetermined that such potential ideological biases are not at play. In the words of Priest and Klein, “the parties will act themselves to neutralize judicial bias.”⁸

Of course, a number of factors can make cases difficult for litigants to classify in this manner. First, many cases hinge on issues that are not subject to an obvious left-right ideological quality or dimension. Second, some cases turn on legal questions that are largely indeterminate – for instance, they may concern novel legal issues; other cases may be plagued by factual complexity or ambiguity. As we might reasonably anticipate, these cases do not lend themselves to ready prediction on the basis of judicial attitudes or ideology (or legal standard for that matter); unlike those more easily forecasted cases in which judicial preferences are easily discerned and outcomes more predictable. It is the cases that are close or uncertain, or in which the parties have widely divergent expectations as to potential outcomes that do not settle and end up going to trial (or appeal).

Of course, the seemingly complex dynamics described above are essentially not too different from the calculated litigation reasoning process that well seasoned trial lawyers have come to develop through handling many disputes and cases over the years. For example, in the criminal plea bargaining context, cases with clear cut outcomes often have associated “going rates,” or shared views of how judges might decide with regard to the appropriate sentence for a given offense.⁹ Similarly, in civil cases, lawyers and their clients carefully size up their cases and attendant circumstances (e.g. judge or jury ideology) and settle those where the parties' outcome expectations are clear and convergent and take to trial those that

⁸ *Id.* at 37.

⁹ GEORGE F. COLE AND CHRISTOPHER E. SMITH, CRIMINAL JUSTICE IN AMERICA 224 (2008).

are not. Once in court, experienced litigators might tell you, the outcomes of these latter, indeterminate, cases are often a toss up, or even odds for each side. Indeed, a trial lawyer's financial success may in fact turn on the old axiom of knowing "when to hold them and when to fold them" in sorting out cases for settlement or adjudication.

The two theories of legal decision making outlined above present us with what might be reasonably considered to be competing explanations of legal outcomes. Each theory is very well known and highly influential. It seems unusual that these two paradigmatic yet ostensibly contradictory accounts of legal decision making would not yield a river of scholarship attempting to resolve or reconcile such an important theoretical conflict. Perhaps this state of affairs may be partly attributable to generalized interdisciplinary disengagement or unawareness. In this vein, Lawrence Baum suggests that integration of varying approaches to explaining Supreme Court decision making is needed, although he concedes that "the assumption that justices act solely on the basis of their policy goals has advanced our understanding of the Court a good deal."¹⁰ Barry Friedman seems to agree with the former point, noting that "now might be the time for interdisciplinary collaboration between legal scholars and positive political scientists. Decades of differing approaches have left a lingering antagonism between the projects."¹¹ Perhaps because they have long been considered at odds with each other, these two theories have seen little academic interplay.¹² To some degree, this may be attributable to the fact that the two theories emanate from different academic fields. Litigant Selection Model theories are commonly forwarded by law

¹⁰ Lawrence Baum *What Judges Want: Judges' Goals and Judicial Behavior* 47 POLITICAL RESEARCH QUARTERLY 749, 761 (1994).

¹¹ Barry Friedman *Taking Law Seriously* 4 PERSPECTIVES ON POLITICS 261, 272 (2006).

¹² *But cf.* Frank Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals* 91 CALIFORNIA LAW REVIEW 1457 (2003)(comparing legal, political, strategic, and litigant-driven models of Circuit Court judge decision making) and John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation* 21 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 501 (2005)(examining the effect of judicial ideology on the selection and outcome of telecommunications regulatory cases).

and economics scholars, while the Attitudinal Model is usually posited by scholars in political science. But, as Friedman reminds us, there is much to learn from well-executed combinations of two academic fields. Indeed, many scholars have lamented the lack of interplay between the legal and political science domains. Lee Epstein and Gary King echo these sentiments, claiming that scholars should take into account the lessons to be learned from past studies.¹³ In particular, they warn that “[f]ailure to do so is more than wasteful; it also decreases the odds that the ‘new’ research will be as successful as the original because the researcher is, in effect, ignoring the collective wisdom gained from the first piece.” Perhaps the best explanation for this particular theoretical disconnect in the literature is that law and economics approaches have focused primarily on the effect of litigant selecting, or sorting, strategies in trial courts while the Attitudinal Model is most often employed to explain variation in Supreme Court decisions or justices' voting choices. However, it is evident that our understanding of both trial and appellate court decision making would be enhanced through the incorporation of each of these important theoretical approaches.

From this point, our study of the intersection of Selection Models and Attitudinal Models of judicial decision making unfolds as follows: In the next section we discuss in greater detail the Attitudinal Model, including its background, development, and current status. We then do the same for the Litigant Selection Model. In the section that follows, we outline how Attitudinal Theory and Selection Theory may be effectively wed to produce an integrated explanation for Supreme Court decisions which simultaneously accounts for litigants' (and justices') strategic case sorting and the influence of judicial attitudes or ideology. We then develop and test our integrated theory of how attitudes and case selection interact in legal decision making. Finally, we conclude by reflecting on the utility of applying

¹³ Lee Epstein and Gary King *The Rules of Inference* 69 THE UNIVERSITY OF CHICAGO LAW REVIEW (2002).

such an integrated approach to explaining Supreme Court decision making and address how future research might incorporate such approaches.

II. Competing Models

The Attitudinal Model

The Attitudinal Model emerged during a period dominated by legal realism. Judicial decision making, according to classical legal scholars, was guided solely by a system of logically consistent principles, concepts and rules.¹⁴ Personal preferences and ideologies were simply not considered to be an important component of decision making. Indeed, “judging was more like finding than making, a matter of necessity rather than choice.”¹⁵ By the 1920s, however, scholars had begun to question the validity of this assumption. By the 1940s, political science had moved toward behavioralism, which endeavored to make political science a discipline of prediction and explanation. In 1948, Herman Pritchett authored *The Roosevelt Court*, a book that was among the first of its kind in its systematic evaluation of court decisions.¹⁶ Pritchett centered his study on questions like “If judges were merely ‘declaring’ the law rather than making it, why did they so often disagree?”¹⁷ However, perhaps the first working definition of a model that considered the preferences of judges was offered by Glendon Schubert,¹⁸ commonly considered the father of the Attitudinal Model. One of Schubert's primary contributions is his use of “ideal points,” or the positions of

¹⁴ Yosai Rogat “Legal Realism,” in Paul Edwards, ed., *THE ENCYCLOPEDIA OF PHILOSOPHY* 420 (1972).

¹⁵ *Id.* at 420.

¹⁶ HERMAN C. PRITCHETT, *THE ROOSEVELT COURT* (1948).

¹⁷ WALTER F. MURPHY, C. HERMAN PRITCHETT, LEE EPSTEIN, JACK KNIGHT, *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 18 (2006) .

¹⁸ GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES* (1965).

justices on an ideological continuum determined by their judicial beliefs.¹⁹ In *Supreme Court Decision Making*, David Rohde and Harold Spaeth greatly advanced the Attitudinal Model, giving meticulous definitions to otherwise fairly ambiguous terms. In particular, they define an “attitude” as:

A (1) relatively enduring, (2) organization of interrelated beliefs that describe, evaluate and advocate action with respect to an object or situation, (3) with each belief having cognitive, affective, and behavioral components. (4) Each one of these beliefs is a predisposition that, when suitably activated, results in some preferential response for the attitude object or situation, or toward the maintenance of preservation of the attitude itself. (5) Since an attitude object must always be encountered with some situation about which we also have an attitude, a minimum condition for social behavior is the activation of at least two interacting attitudes, one concerning the attitude object and the other concerning the situation.²⁰

At its core, the argument is that these attitudes of the justices “should cause a behaviorally predisposed justice to support certain legal claims and to oppose others.”²¹ There are structural characteristics of the Supreme Court that make it particularly well suited to justices' attitudinal decision making and merit at least brief mention. First, the Supreme Court justices control their own docket, and while such control does not necessarily dictate that the justices will vote according to their own policy preferences, it does provide them with considerable discretion to hear only cases they deem important and worth adjudicating.

¹⁹ *Id.*

²⁰ DAVID W. ROHDE AND HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 2 (1976).

²¹ JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 69 (1993).

Additionally, Supreme Court justices are not electorally accountable.²² That is, they do not face reelection concerns and, hence, are not held accountable to the electorate for their actions on the bench. Justices are also generally considered to be immune to political ambition.²³ Although judges at other levels may desire a higher judicial post, no such opportunity exists for Supreme Court justices. Lastly, the decisions made by Supreme Court justices cannot be overturned by another higher court – it is the pinnacle of both the federal and state judicial systems and does not consider overhead monitoring concerns from other judicial actors.²⁴ For all of these reasons, justices are largely free to apply their policy preferences, just as the Attitudinal Model predicts.

The intuitive logic of the Attitudinal Model does not necessarily translate easily into sensible concept operationalization or hypothesis testing. Indeed, the impalpable nature of personal attitudes and ideology makes this a difficult task. Because the Attitudinal Model claims that justices base their decisions “on the facts of the case juxtaposed against their personal policy preferences,”²⁵ the personal attitudes or ideologies of justices must be estimated and measured in order to test the model. However, techniques for estimating the preferences of political actors commonly suffer from circularity issues. Consider, as an example, the congressman who is deemed to be ideologically liberal because his voting record lines up on the liberal end of the ideological spectrum. His personal ideology or set of attitudes is categorized as liberal because his votes have been liberal. However, his policy choice on a given vote could emanate from influences other than his personal ideological

²² Jeffrey A. Segal *Separation of Powers Games in the Positive Theory of Law and Courts* 91 AMERICAN POLITICAL SCIENCE REVIEW (1997).

²³ Segal, *supra* note 22.

²⁴ However, arguments have been made that justices consider the potential reactions of other branches and the public to their decisions. *See e.g.* LEE EPSTEIN AND JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

²⁵ Segal and Spaeth, *supra* note 1 at 312.

preferences (e.g. the ideology of his constituents, or strategic voting behavior) - there exists no independent verification of his personal policy preferences outside of his voting record.

In hopes of correcting for this circularity problem, Jeffrey Segal and Albert Cover endeavored to develop ideological scores for Supreme Court justices that were independent of justices' prior judicial decision-making.²⁶ They employed content analysis of post-nomination/pre-confirmation op-ed stories from the nation's leading newspapers²⁷ to assemble exogenous accounts of justices' ideological inclinations at about the time they ascended the High Court. This method, they claim, provides comparable information on each justice.²⁸ The editorials were coded paragraph by paragraph for assertions concerning the justice's perceived ideology.²⁹ Using the perceptions of newspaper writers as to justices' attitudes to approximate actual justice attitudes is an imperfect method for operationalizing justices' ideology, but acquiring this information from the justices themselves through surveys or interviews is unfortunately not a viable option³⁰ and might be fraught with other concerns even if it was possible.

Segal and Cover use their scores to explain justices' lifetime voting records (percentage of votes liberal) in civil liberties cases from the 1953 to 1987 terms. They found

²⁶ Jeffrey A. Segal and Albert D. Cover *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 AMERICAN POLITICAL SCIENCE REVIEW 558 (1989). According to Segal and Cover, "one cannot demonstrate that attitudes affect votes when the attitudes are operationalized from those same votes." See Rohde and Spaeth, *supra*, note 20, and Schubert, *supra*, note 18, for studies that describe attitudes of the judges based on votes cast by those judges. Of course, studies on judicial behavior have long used judges' partisanship or, when relevant, the party of the judges' appointing president to provide insight as to judges' ideological preferences. A particularly noteworthy study considered personal and professional background variables of Supreme Court justices to help explain their voting behavior. See Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Cases* 75 AMERICAN POLITICAL SCIENCE REVIEW 355 (1981).

²⁷ The authors selected four newspapers, two with a seemingly liberal slant and two more conservative options. On the liberal side, the *New York Times* and the *Washington Post* were used. On the conservative side, the *Chicago Tribune* and the *Los Angeles Times* were used.

²⁸ Segal and Cover, *supra* note 1, at 559.

²⁹ Segal and Cover do not include editorials written post-confirmation because they would "undoubtedly be influenced by votes a justice casts and thus not independent of those votes" (559).

³⁰ *Id.* at 560.

a .80 correlation between justices' ideology scores and their voting behavior. The results were remarkably robust and not dependent on the scores of any particular justice.³¹ In later work, Segal and Spaeth assess the usefulness of the scores in explaining the votes of an expanded set of Supreme Court justices on civil liberties cases.³² They find that the scores explain the justices' voting quite well in a bivariate regression model with an adjusted R^2 of .55. They conclude that "the results supply exceptional support for the attitudinal model."³³ Compared to other models used to explain court decisions, Segal and Spaeth argue, the Attitudinal Model is the only one that "has been successfully used to predict the Court's decisions [giving it] its status as the best explanation of the Court's decisions."³⁴

Of course, one weakness in the Segal-Cover scores is that they do not allow for potential justice variance or "drift" in ideology over time. In other words, the ideology scores are time-invariant and do not allow for the fact that justices' ideological outlook or contextual changes in their work environment might lead them to approach cases differently over time. In recent work, Andrew Martin and Kevin Quinn have used a Bayesian modeling strategy to develop term-by-term ideal point scores for justices based on their case voting; this allows them to provide evolving estimates of justices' ideological preferences over time as well as more nuanced estimates as to the (ideologically) median justice for a given term.³⁵

³¹ In a follow up study, Segal and his associates update the scores and analysis to the 1992 term and backdate it to the 1946 term. They also extended their analysis to include economic cases. They found that the scores remained a good explanation for justice voting in this extended time frame, but that correlations were higher for civil liberties cases (.69) than for economic cases (.56). See Jeffrey Segal, Lee Epstein, Charles Cameron, and Harold Spaeth *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited* 57 JOURNAL OF POLITICS 812 (1995).

³² Segal and Spaeth note that they examine civil liberties cases because the newspaper op-ed articles used to assemble the Segal/Cover scores deal almost entirely with civil rights and civil liberties concerns. *Supra*, note 1, at 322.

³³ Segal and Spaeth, *supra* note 1 at 323.

³⁴ *Id.* at 351.

³⁵ See Andrew Martin and Kevin Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999* 10 POLITICAL ANALYSIS 134 (2002)(introducing and explaining the approach an scores); Andrew Martin, et al. "The Median Justice on the U.S. Supreme Court" 83 NORTH

While the Attitudinal Model has been a dominant approach to assessing judicial behavior in recent decades and methods of measuring judicial attitudes continue to improve, not all scholars of judicial behavior are wholly enamored with the approach. At a basic level, most critics of the Model simply argue that it fails to reasonably consider the possibility of alternative constraints and joint influence, arguing that justices simply can not always freely impose their policy preferences. As Greg Caldeira comments, "Justices, like other political actors, are not free to translate their preferences directly into policy in any and all situations. Instead, the justices maximize their policy preference under the constraints of law, policy, and custom."³⁶ Critics also suggest that Attitudinal theorists do not fairly assess legal considerations, arguing that tests of the legal model are unduly narrow and simplistic.³⁷ Finally, some question whether purely attitudinal accounts of judicial decision making adequately account for external and internal dynamics that might lead justices to vote in strategic ways that are not always consistent with their sincere ideological preferences.³⁸

Notwithstanding the plentiful critiques of the Attitudinal Model, it has become a cornerstone of judicial behavior scholarship and it likely constitutes the foremost rejoinder to classical legal accounts of court decision making. As Howard Gillman points out it is "considered the common sense of the discipline that Supreme Court justices should be

CAROLINA LAW REVIEW 1275 (2005)(using the scores to discern the ideological center of the Court); Andrew Martin and Kevin Quinn "Assessing Preference Change on the U.S. Supreme Court" 23 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 303 (2007)(comparing the scores with time invariant approaches); and Andrew Martin, et al. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" 101 NORTHWESTERN LAW REVIEW 1483 (2007)(discussing implications of justice ideological drift for presidential appointment impact).

³⁶ See Greg Caldeira *Review: The Supreme Court and the Attitudinal Model* 88 AMERICAN POLITICAL SCIENCE REVIEW 485 (1994).

³⁷ See Melinda Gann Hall *Review: The Supreme Court and the Attitudinal Model* 57 JOURNAL OF POLITICS 254 (1995).

³⁸ See LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997).

viewed as promoters of their personal policy preferences rather than interpreters of law.”³⁹

Although critics may argue over its dominance, few argue its importance. While Hammond, Bonneau and Sheehan have criticisms of the Attitudinal Model, they do recognize that: “[t]he Attitudinal Model has become the most widely recognized and influential representation of decision-making on the Supreme Court, and little can be published without citing at least some of the arguments by Spaeth and associates.”⁴⁰ This being said, we argue below that Selection Theory considerations may have important implications for how we view and utilize the Attitudinal Model in explaining legal decision making in the future.

Selection Hypothesis

Selection Theory has enjoyed a long history in the law and economics literature.⁴¹ For the most part, the law and economics field has overlooked the judicial politics dynamics that can affect case outcomes, focusing instead on the influence of case selection by litigants.⁴² The basic premise is that litigants estimate probable outcomes of their cases before deciding to bring them to trial or appeal. In disputes with clearly predictable outcomes, the parties typically settle since doing so is generally more efficient. It is those cases in which outcomes are not readily discernable for one side or the other that make it to the courts or appeal. This theory is central to the seminal "Selection Hypothesis" article of Priest and Klein, who reason that courts do not hear a random sample of cases and that this fact has important implications

³⁹ Howard Gillman *Review: What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making* 26 LAW AND SOCIAL INQUIRY 466 (2001).

⁴⁰ THOMAS HAMMOND, CHRISTOPHER BONNEAU, AND REGINAL SHEEHAN, STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005) at 39. In similar vein, Lawrence Baum concludes, “[t]he Attitudinal Model in its various versions has been the most influential conception of judicial behavior in political science.” LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997) at 25.

⁴¹ See Robert Cooter and Daniel Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution* 17 JOURNAL OF ECONOMIC LITERATURE 1067 (1989) for a good review of the history of this literature.

⁴² de Figueiredo, *supra* note 12 at 502.

for the inferences that we draw from studying formally adjudicated disputes.⁴³ More specifically, the argument dictates “that plaintiff win rates at trial approach 50 percent as the fraction of cases going to trial approaches zero.”⁴⁴ In other words, as parties are able to prognosticate outcomes more accurately and settle disputes more often, those cases that do make it to adjudication have win rates that fall about evenly for the parties. Those cases that see their day in court are cases that do not have qualities that facilitate readily discernable outcomes. For instance, some cases or issues do not lend themselves to a clear ideological set of potential outcomes. Other cases may involve a novel question of law or complex combinations of facts and legal issues, so juror or judicial reaction to such a situation may be difficult to predict. Priest and Klein tested this theory in a number of courts and found that “plaintiff victories will tend toward 50 percent whether the legal standard is negligence of strict liability, whether judges or juries are hostile or sympathetic.”⁴⁵ This basic proposition was confirmed in their analysis of trial court cases decided by both juries and judges.⁴⁶

The Selection Hypothesis theory has enjoyed wide application in the law and economics field; indeed it has been noted that “few results in the law and economics of litigation have sparked as much interest as the hypothesis, associated with an article by Priest and Klein, that states that plaintiff win rates at trial approach 50 percent as the fraction of cases going to trial approaches zero.”⁴⁷ Priest and Klein were understandably concerned with how well appellate cases epitomized the entirety of litigation and legal disputes. That is,

⁴³ Priest and Klein, *supra* note 5.

⁴⁴ Daniel Kessler, Thomas Meites, and Geoffrey Miller *Explaining Deviations From the Fifty-Percent Rule: A Multimodel Approach to the Selection of Cases for Litigation* XXV JOURNAL OF LEGAL STUDIES 233 (1996).

⁴⁵ Priest and Klein, *supra* note 5 at 5.

⁴⁶ They find evidence to support the 50 percent rule in a number of judicial venues, including a number of jury decisions in Cook County, IL local, state, and federal courts. They find further evidence to support their theory in judge decisions made in a variety of U.S. District Court locations and justice of the peace decisions rendered in Hamilton County, OH. *Id.* at 32-49.

⁴⁷ Kessler, et al., *supra* note 44 at 233.

those cases that actually make it to the courtroom are a minute sample of original cases, and appellate cases are even a smaller fraction of that number. As they note, “[m]ost legal scholars...either ignore the problem of the representativeness of appellate decisions or presume representativeness.”⁴⁸ In an effort to correct for this oversight, Priest and Klein worked to develop a model that clarifies the relationship between disputes settled and disputes litigated. Their model is one of pure economics; in other words, one that is determined by litigants' perceived utility of litigation and settlement, including “the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement.”⁴⁹ Assuming that litigants develop rational estimates of judicial decisions, their model predicts that those cases chosen for litigation will be neither random nor representative.

Strategic litigants will carefully weigh their potential case outcomes, and make strategic case sorting decisions accordingly, based on a number of relevant factors with the ideology of the relevant adjudicator(s) likely being a fundamental consideration. Hence, ideology does not directly influence judicial decision making, according to Selection Theory proponents, because its impact has already been accounted for by the litigants in their decision to take the case to court (or appeal a case). While the effect of strategic case sorting on the influence of ideology in judicial decision making may not have been the primary focus of Priest and Klein's study - they were more broadly interested in selection phenomena and litigation outcomes - it was integral to their Selection Hypothesis theory. With ideology accounted for on the front end, it should not affect those cases that actually make it to the courtroom. Similarly, litigants also consider other trends and norms of courts. If parties can

⁴⁸ Priest and Klein, *supra* note 5 at 3.

⁴⁹ *Id.* at 4.

ascertain adherence to other norms (such as those preferred by the legalistic, strategic, or other theories of judicial decision making), then they can take such factors into account in the decision to settle or try a case. Therefore, any potential influences of these factors should be nullified.

Notwithstanding the intuitive appeal of Priest and Klein's premise, ample criticism of their theory, specifically their "50 percent rule" proposition, soon followed publication of their study.⁵⁰ Early empirical applications were not generally supportive as any variations from a strict 50 percent win rate were considered to be strong evidence against Priest and Klein's theory.⁵¹ Critics also charged that there were important theoretical reasons to believe that the strategic dispute sorting process proposed by Priest and Klein might be inaccurate; for instance, the parties might possess asymmetric information on case outcome probabilities or parties might have differential stakes or possibly even different goals in the dispute.⁵² Although win rates for any subset of litigants almost always vary from 50 percent, Joel Waldfogel notes that "because this theory predicts 50 percent only as a limiting implication, plaintiff win rates deviating from 50 percent do not by themselves provide evidence against [Priest and Klein's theory]."⁵³ More recent studies, using more sophisticated analyses that incorporate some of the aforementioned theoretical considerations, have tended to confirm the viability of the 50 percent rule. Indeed, in his 1998 study Joel Waldfogel finds that:

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

⁵⁰ See e.g. Donald Wittman, *Is the Selection of Cases for Trial Biased?* 19 JOURNAL OF LEGAL STUDIES 185 (1985).

⁵¹ See generally Daniel Kessler, Thomas Meites, and Geoffrey Miller *Explaining Deviations From the Fifty-Percent Rule: A Multimodel Approach to the Selection of Cases for Litigation* 25 JOURNAL OF LEGAL STUDIES (1996)(providing review of cases finding deviation from strict 50 percent rule).

⁵² See generally Frank Cross, *supra* note 4 at 1491-93 (discussing theoretical critiques of the 50 percent rule).

⁵³ Joel Waldfogel *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation* 61 JOURNAL OF LAW AND ECONOMICS 453 (1998).

Consequently, the selection of cases for trial results in plaintiff win rates at trial approaching 50 percent. [C]ases both above and below the decision standard are settled or adjudicated out of the filed pool, leading to a tendency toward central, not extreme, plaintiff win rates at trial.⁵⁴

Other theoretically sophisticated studies have similarly supported the Selection Hypothesis. Peter Siegelman and John Donohue investigate the outcomes of employment discrimination cases to test the validity of the Priest-Klein theory.⁵⁵ They find that “higher unemployment rates induce a significant rise in the number of cases, but these incremental cases are substantially weaker than the average cases filed when unemployment rates are lower.”⁵⁶ Their model confirms the predictions of the Priest-Klein theory in that weaker cases should be weeded out, and more likely to settle. This, in turn, leads to less predictable cases going to trial, and a 50 percent win rate for the plaintiff in their study. In similar vein, Kessler, Meites, and Miller's empirical application of the 50 percent rule is also supportive.⁵⁷ Using data from more than 3,000 cases arising in the Seventh Circuit Court of Appeals between 1982 and 1987, they use a multimodal approach to understanding the selection of cases for litigation. Simply put, their approach focuses on how assumptions implicit in the Selection Hypothesis model (e.g. symmetrical information) might be violated and how these conditions may cause win rates to vary from 50 percent. They account for the existence of such conditions, and after controlling for multimodal case characteristics, find evidence confirming a tendency toward 50 percent win rates.⁵⁸

⁵⁴ *Id.* at 475.

⁵⁵ Peter Siegelman and John J. Donohue III *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis* 24 THE JOURNAL OF LEGAL STUDIES (1995).

⁵⁶ *Id.* at 451.

⁵⁷ Kessler, et al., *supra* note 44 at 248-56.

⁵⁸ Extensive reviews of literature relevant to Priest and Klein's theory can be found in Kessler, et al., *supra*, note 44 and more recently in Cross, *supra*, note 4.

Much like the Attitudinal Model, the Selection Hypothesis will no doubt continue to have both champions and critics. However, its influence on the literature is undeniable and it has become a staple of law and economics teaching and textbooks.⁵⁹ In the next section we endeavor to explain how this theory can be effectively melded with political science based Attitudinal approaches to help provide a more nuanced explanation of U.S. Supreme Court decision making.

III. The Intersection of Judicial Attitudes and Litigant Selection Theory

Political science approaches to explaining legal outcomes have not given much attention to the Selection Hypothesis or the general notion that strategic pre-adjudication decisions may affect judicial decision making at the outcome stage. Yet, failure to consider such selection effects may have implications for our findings and how we understand judicial decision making. As Friedman cautions, "[p]ositive scholars need to demonstrate an awareness of whether a settlement effect might be biasing their conclusions."⁶⁰ The aforementioned disciplinary theoretical gap notwithstanding, a handful of studies in political science have endeavored to venture into the intersection of litigant selection and judicial ideology. In 1995, Donald Songer and his associates demonstrated that criminal defendants were strategic in their decisions to appeal their Circuit Court of Appeals losses in search and seizure cases to the U.S. Supreme Court.⁶¹ They found that the likelihood that a criminal defendant would appeal their loss to the Court was influenced by a number of factors,

⁵⁹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1992); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1989); ROBERT COOTER AND THOMAS ULEN, *LAW AND ECONOMICS* (1988).

⁶⁰ Friedman, *supra* note 11 at 271.

⁶¹ Donald Songer, Charles Cameron, and Jeffrey Segal, *An Empirical Test of the Rational-Actor Theory of Litigation*, 57 *JOURNAL OF POLITICS* 1119 (1995).

including the probability that they would prevail on the merits, which, in turn, was partly a function of the ideology of the justices.⁶² While they did not examine the effect of litigant selection on judicial behavior or the influence of attitudes on Supreme Court outcomes, their research did provide us with some important initial evidence - litigants are strategic in sorting cases for potential adjudication in the U.S. Supreme Court.

Two more recent studies on litigation in the U.S. Courts of Appeals have also explored the intersection of Selection Theory and the Attitudinal Model. Frank Cross's 2003 study on the Courts of Appeals provides an excellent summary of leading theories of judicial decision making, including: legal theory, political (attitudinal) theory, strategic theory, and litigant-driven theory (selection theory). In addition to providing surveys of each theory's relevant literature and judges' self assessment of these theories, he also tests each theory using Courts of Appeals data. He finds that legal and political factors (attitudes) are the most important determinants of Courts of Appeals decision making and that strategic and litigant-driven factors have little to no influence. He tests the litigant-driven model by considering the differential success of presumably more sophisticated and strategic "repeat players," namely the federal government. He finds that when controls from the other theories are introduced, the presence of the federal government as a party is inconsequential to judicial outcomes.⁶³ In 2005, John M. de Figueiredo set forth a more direct test of the intersection of

⁶² *Id.* at 1126.

⁶³ While this effort to test Selection Theory is commendable, it is not evident that these findings entirely discredit the Selection Hypothesis as the study may have some limitations. The first limitation of Cross's study is that it is a rather attenuated test of Priest and Klein's theory which suggests that outcomes for *any set of litigants* (including the federal government) should be about 50-50, due to strategic litigant sorting (i.e. decisions to appeal or not). Admittedly, the federal government's involvement probably provides an example of a situation in which the strict 50 percent assumption should perhaps be relaxed - the federal government is a repeat player and its win rates should probably deviate upward from 50 percent, possibly due to, among other reasons, superior information access and experience. However, Cross's findings are also limited in scope (i.e. only criminal cases) and might benefit from considering alternative model specifications to ensure robustness of findings. More fundamentally, these findings stand against a strong literature which suggests that repeat players,

Selection Theory and the Attitudinal Model. He recognized that a vast literature attributes legal decisions to judicial ideology and sought to reconcile this general understanding with what has been posited by Selection Theory scholars.⁶⁴ He reasoned that “while law and economics models (which do consider selection) do not generally consider judge ideology at the time of case outcomes, judicial politics models (which do consider judge ideology) generally do not consider case selection.”⁶⁵ To assess these considerations jointly, he examines telecommunications regulatory cases in the D.C. Circuit Court of Appeals. He focuses on the effect of judicial ideology in two regards: the selection of cases by litigants for appeal and the outcomes of the cases. Specifically, he analyzes the decisions of firms to challenge Federal Communications Commission (FCC) regulations and the decisions of the D.C. Circuit Court of Appeals in these cases.⁶⁶ Using a two stage estimation procedure to assess firms' decisions to appeal agency losses and case outcomes in the D.C. Circuit Court of Appeals, he finds evidence for the influence of judicial ideology at both junctures. Firms' estimates of the ideology of the judges that would hear their appeals influence their decisions to appeal. In those cases that are appealed, the ideology of the judicial panel hearing the case is a significant determinate of case outcomes. So, this provides only partial confirmation of the Selection Hypothesis: while litigants do appear to reference judicial ideology in strategically sorting their cases for appeal, the influence of judicial ideology still persists, at

and the federal government in particular, do in fact enjoy a higher rate of success on the Court of Appeals than other litigants. See e.g. Donald Songer and Reginald Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals* 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 235 (1992); Donald Songer, et al. *Do the 'Haves' Come Out Ahead Over Time? Applying Galanter's Framework to the Decisions of the U.S. Courts of Appeals, 1925-1988* 33 LAW & SOCIETY REVIEW 811 (1999).

⁶⁴ John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation*, 21 THE JOURNAL OF LAW, ECONOMICS, & ORGANIZATION (2005).

⁶⁵ *Id.* at 502.

⁶⁶ *Id.* at 503. This particular area was chosen because of the profound impact of FCC regulatory decisions following the dissolution of AT&T in 1984 when the FCC took over a number of communication domains, including “issuance of wireless licenses; the expansion of satellite technology; the deregulation of long distance and local networks; the fusion of cable television, wireless, and telephone technology; and the increasing importance of spectrum in radio, broadcast television, and other forms of communication.”

least to some degree, in case decisions despite such litigant sorting efforts.⁶⁷ While both of these latter studies are intriguing and make important inroads toward developing integrated accounts that incorporate Selection Theory, neither study entirely undercuts either major theory or provides a precise estimate of the specific effect of strategic case sorting on the influence of ideology on judicial decision making. Perhaps more importantly, none of the studies outlined above endeavor to provide information on our central question - what drives decision making on the U.S. Supreme Court?

The Selection of Cases for Appeal by Litigants

We believe that the Attitudinal Model and the Selection Hypothesis can be effectively combined to offer an integrated theory of judicial decision making that considers the entire judicial process. In this regard, Selection Theory may help define the parameters of the Attitudinal Model. Ultimately, our goal is the development of a more finely nuanced approach to judicial decision making - a theory that considers the broader context in which judges make decisions. As previously noted, Litigant Selection Theory studies have typically focused on trial court, rather than Supreme Court, decision making. Applying the Selection Model to the U.S. Supreme Court requires us to carefully consider the relevant institutional and environmental features that are special to the nation's High Court. Unlike U.S. District Courts or Courts of Appeals, the Supreme Court has enjoyed a primarily discretionary docket

⁶⁷ As with Cross's study this one also has limitations. First, it is very narrow in scope, encompassing an extremely small fraction of the cases handled by the Circuit Courts of Appeals. Interestingly, the identities of the judges hearing the cases are actually unknown to the litigants before the filing of the appeal because the panel of judges is chosen from a large bloc or banc of possible judges from the Circuit. Additionally, the defendant in these cases is always the federal agency and de Figueirido actually makes a compelling case that the FCC is not acting strategically in these cases; his reasons include lack of FCC motivation and heavy FCC case loads. Thus, there may be no reason to believe that the effects of judicial ideology should be nullified in case outcomes. See de Figueirido at 520, where he adds: "If there was strategic behavior on the part of the FCC, we should see statistically insignificant coefficients on the ideological variables with values close to zero, as the ideological effects would be cleansed by the FCC's strategic decision making."

since the Certiorari Act of 1925. Consequently, the Court does not have to hear all of the cases appealed to it, but rather, chooses almost all of the cases it hears via the certiorari process. Accordingly, litigants can not completely dictate the Court's on-the-merits docket (as they largely can in trial and intermediate appellate courts); they only have the power to prescribe the pool of cases from which the justices can choose to grant certiorari. This power, however, is not inconsequential. By determining the case pool, litigants define not only the parameters of what type of issues the Court can address, but also the quality and character of the available cases raising those issues. For example, from 1997 to 2004, the average (mean) number of criminal cases disposed of (terminated) by the U.S. Courts of Appeals was 7532.5; hypothetically, almost all of these cases could have resulted in a petition for certiorari to the U.S. Supreme Court. During that same time frame (1997-2004), the average (mean) number of petitions of criminal cases from the U.S. Courts of Appeals to the Supreme Court was only about 28% of that amount, or 2110.75. This winnowing process clearly narrows the set of cases from which the Court can select for review. The winnowing that occurs in the Court's certiorari selection process is even more pronounced. From 1997-2004 the average number of these (2110.75) criminal cases accepted for review by the Court was 27.75, or less than 2%.⁶⁸

There is good reason to believe that litigants are strategic in their decisions to appeal to the Supreme Court.⁶⁹ A party losing at the lower level incurs significant costs in appealing cases to the Supreme Court, both in appealing for certiorari and, if successful, the additional

⁶⁸ See Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts: Annual Report of the Director* (Various Years). <http://www.uscourts.gov/judbus2005/appendices/b2.pdf>. The Administrative Office of the U.S. Courts breaks down such information by civil and criminal cases. The patterns set forth above are similar to those found in the civil context. Of course, the U.S. Courts of Appeals are not the only source of petitions for certiorari to the Court. However, it is likely that appeals to the Supreme Court from other courts (e.g. state supreme courts) would follow a similar winnowing pattern.

⁶⁹ See e.g. Songer, et al., *supra* note 61 (providing evidence of litigants' strategic behavior in appeals to the Supreme Court).

substantive appeal on the merits.⁷⁰ Parties who win at the lower levels may also wish to avoid the costs of appeal as well as risk costs by settling their cases, especially if they perceive that the Court might overturn their lower court victory. While parties typically do not settle their cases between a grant of certiorari and the merits appeal, such settlements are allowed (under Supreme Court Rule 46) and the Court usually sees a small number of such settlements every term.⁷¹ Thus, strategic settlement and case sorting may occur even after the grant of certiorari.

Litigants' strategic sorting produces a pool of cases for possible Court review that are not randomly distributed. Rather, this process produces a selection of cases that are generally not amenable to settlement, likely because they do not provide conspicuous outcome cues, or because the litigants are otherwise constrained from resolving their dispute through negotiated agreement. Litigants are also apt to make some "errors" in their selection of which disputes to appeal to the Court. We use the term "errors" to denote decisions by litigants to appeal (or not appeal) that do not comport with rational estimates of their ability to win the appeal on the merits. This may equate with an inaccurate estimation of the strength of their case (relative to their opponent's case) which would be closer to traditional notions of an erroneous decision, or it might be emanate from an informed and rational deliberative process, but constitutes a decision that simply does not seek to gain an appellate victory on the merits. We might imagine a number of factors that could lead litigants to fail to settle cases that may, in fact, be reasonably appropriate for negotiated resolution.

⁷⁰ For instance, Greg Caldeira and John Wright obtained estimates of the external financial costs of filing an amicus brief in 1988. They generally found that prices of a single brief from a reputable law firm consistently fell in the range of \$15,000 to \$20,000, although one respondent reported paying as much as \$60,000. See Greg Caldeira and John Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court* 82 AMERICAN POLITICAL SCIENCE REVIEW 1109, 1112 (1988). We assume that these prices have increased since that time.

⁷¹ See generally ROBERT STERN, EUGENE GRESSMAN, AND STEPHEN SHAPIRO, SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES (1986)(outlining rules and norms of Supreme Court practice).

First, as noted above, a litigant may simply misperceive the relative strength of their case due to information asymmetry between litigants, or, alternatively, the case at issue may simply not lend itself well to outcome prediction for either party, due to factual complexity or legal ambiguity (e.g. case of first impression). Second, litigants may engage in non-merit based strategies in which they primarily seek to highlight or promote their cause through Supreme Court review and its attendant publicity, with winning being perhaps only an auxiliary potential benefit. Similarly, litigants pursuing a long term historical cause or social movement may stubbornly and irrationally refuse to settle cases where loss is imminent; focusing instead on how history (or their relevant peer groups) will ultimately judge their valiant, yet futile struggle. Finally, while litigants may perceive the grounds on which their cases might be adjudicated, their cases may ultimately transform or "morph" upon review by the Court. For instance, although litigants help frame the relevant legal issues for the Court by stating them in their appellate briefs, it is not uncommon that the ultimate set of legal issues that lead to a case's disposition are created (or the originally claimed issues suppressed) by the Court during deliberations and opinion formation.⁷² Thus, while litigants' strategic sorting of disputes may work to undercut the influence of judicial ideology in adjudicated cases (as suggested by the 50 percent rule), litigants do not always sort their cases accurately or effectively and this may lead to a number of cases being appealed to the Court which do, in fact, reasonably avail themselves to ideological decision making by the Court.

The Selection of Appeals for Review by the Court

The pool of cases available for potential review by the Court is determined by litigants. This collection of appealed cases are essentially those that remain from a strategic

⁷² See generally Kevin McGuire and Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court* 89 AMERICAN POLITICAL SCIENCE REVIEW 691 (finding that legal issue transformation occurs in about one-half of the Court's cases).

sorting process which is driven by litigants' perceptions of potential Court outcomes, plus a number of additional appealed cases in which sorting strategy errors have been made. While litigants shape the pool of cases appealed to the Court, the justices then get to decide which of these appealed disputes are worthy of their time and attention for review on the merits. It is likely that the default position of the justices would be to select cases that would map onto their policy preferences. If the Court is to remain a viable policy making institution, it can not systematically avoid the highly salient legal policy issues of the day which often fall upon a left-right ideological spectrum. It stands to reason that justices interested in keeping the Court a relevant policy making entity are normally inclined to select for review cases that do lend themselves to ideological voting.

However, there are countervailing reasons to believe that this default process may not always prevail. At first blush it would seem that a Court interested in advancing its sincere policy preferences (an Attitudinal Court) would simply "cherry pick" those cases that do readily map onto its ideological preferences in a straightforward fashion - likely those cases in which strategic litigant sorting has failed (error cases). Under this scenario, litigants' strategic sorting of cases for appeal would essentially have little effect on Court ideological decision making because out of the thousands of cases appealed to the High Court annually, the Court could easily find one-hundred or so cases, its typical docket load, to hear that would effectively facilitate Attitudinal decision making (i.e. cases falling upon a readily discernable left-right ideological dimension). However, this scenario does not accurately or fully depict the reality of Supreme Court certiorari outcomes. While this scenario might be an accurate depiction if the Court's certiorari decisions were made in a unilateral manner, (for instance if the Chief Justice single handedly chose cases for review), the Court's selection of

cases for merits review is actually a collective decision process of the individual justices' choices.

The Court's case selection process begins with the review of petitions for certiorari by the justices' clerks. The clerks make recommendations on certiorari for their respective justices and the justices can accept or reject the recommendations, or ask for further case information.⁷³ The Chief Justice assembles an initial list of cases for discussion at periodic certiorari review conferences (the "Discuss List") and the associate justices can then add cases to the list that they wish to have considered for certiorari discussion. All cases not added to the Discuss List are in effect denied certiorari by default and constitute the "Dead List." Indeed, this is the primary process whereby members of the Court "sort out" most petitions for certiorari from consideration on the merits. Of the thousands of cases appealed to the Court annually, the justices only place about 20 to 30 percent on the Discuss List.⁷⁴ In defending this selection process against criticisms that Court members actually deliberate over a relatively small number of certiorari petitions at conference, Chief Justice William Rehnquist explained:

For the sixty years since the enactment of the Certiorari Act of 1925, there have been significant ideological divisions on the Court, such that one group of justices might be inclined to review one kind of case, and another group of justices inclined to review another kind of case. When one realizes that any one of nine justices, differing among themselves as they usually do about which cases are important and how cases should be decided, may ask that a

⁷³ See generally H.W. PERRY, *DECIDING TO DECIDE* (1991)(describing the general process of certiorari granting).

⁷⁴ See Greg Caldeira and John Wright, *The Discuss List: Agenda Building on the Supreme Court* 24 *LAW & SOCIETY REVIEW* 807, 808 (1990).

petition for certiorari be discussed, the fate of a case that is “dead listed” (“dead listing” a case is the converse of putting a case on the “discuss list”) is a fate well deserved. It simply means that no one of the nine justices thought the case was worth discussing at conference with a view of trying to persuade four members of the Court to grant certiorari.⁷⁵

Thus, significant case sorting has been performed by the justices, individually, well before they ever meet to discuss certiorari decisions. Furthermore, Ryan Schoen and Paul Wahlbeck's 2006 study provides strong evidence that justices place petitions for certiorari on the Discuss List with a strategic eye toward how they will be decided on the merits.⁷⁶ Thus, it is evident that consequential strategic sorting is at play in the development of the Court's merits docket before the justices even meet to deliberate on petitions for certiorari. At the periodic certiorari conference meetings, justices must find at least three of their colleagues to agree that the case is worth hearing to satisfy the well known Rule of Four requirement for review on the merits. A river of literature has addressed the prospect that justices act strategically in their conference votes to grant or deny petitions for certiorari in conference. A strategic justice might vote to grant a petition for certiorari where they want to address a lower court's decision and believe that enough other justices would agree with them to prevail on the merits. Alternatively, a strategic justice might vote to deny certiorari where they have concerns that their preferences would not be supported by a majority of the Court on the merits. Most studies agree that justices engage in strategic certiorari voting to help effectuate their policy preferences on the merits, to a certain degree, but there is disagreement

⁷⁵ WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS HOW IT IS* (1987) at 266-67.

⁷⁶ Ryan Schoen and Paul Wahlbeck *The Discuss List and Agenda-Setting on the Supreme Court*, paper presented at the annual meeting of the Southern Political Science Association in Atlanta, GA, January 6, 2006.

as to the extent of such strategic behavior by justices or whether it is ultimately effective for advancing their policy preferences.⁷⁷

Thus, in considering this process we might conceive of the justices as acting not unlike individual litigants who are strategically sorting cases for settlement or trial. Each justice has his or her own policy agenda and they seek to effectuate these policy preferences through the strategic selection of cases for merit resolution. In short, justices choose cases for review (both in framing the Discuss List and in certiorari conference voting) with an eye toward their ultimate "winnability" on the merits (i.e. whether the case's decision outcome will comport with their ideological preferences). Of course, none of the justices can individually settle cases or control whether cases ultimately make it to the Court's docket; their decisions are necessarily collective in nature. Consequently, the process at play in Supreme Court case selection is certainly not strictly analogous to the litigant trial selection process posited by Priest and Klein. Still, the justices' strategic selection of cases, at both the Discuss List and certiorari conference vote stages, suggests that there may be another layer of strategic case sorting (in addition to the prior tactical sorting by litigants) that further promotes a Court docket that is not randomly distributed.

Both litigants and justices are apt to sort cases onto the Court's docket based in large part on the perceived winnability of cases - and this should lead to case decision outcomes that gravitate toward 50 percent win rates. If potential Supreme Court litigants consider Court ideology in gauging case winnability, and justices similarly contemplate the relative ideology of their brethren in making case selection decisions, then we might reasonably expect that this double case sorting process should yield Court outcomes that hover around 50 percent

⁷⁷ See e.g. Robert Boucher and Jeffrey Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court* 57 JOURNAL OF POLITICS 824 (1995)(reviewing literature on strategic certiorari voting by justices).

liberal and 50 percent conservative. However, there is also reason to believe that strategic case sorting is hardly perfect and that there are important factors and considerations that may undercut strategic case sorting and thus, cause deviation from 50 percent outcomes. We previously outlined reasons why litigants might err in their strategic case sorting process - potentially causing outcomes to deviate from 50 percent. Justices may also err in their strategic case sorting process for analogous, yet contextually distinct, reasons.

Hence, a justice may make decisions which help place a case on the Court's docket even though these actions go against what we might reasonably assume would be their rational choices toward promoting their policy preferences. But why would this occur? First, while the Court's docket is almost entirely discretionary, cases may arise in which the justices are effectively constrained in their selection decisions. Segal and Spaeth explain:

For all practical purposes, the justices are free to accept or reject cases brought to their attention as they see fit. That is to say, the Court has full control over its docket. But that is not to say that the Court has no obligation to decide certain sorts of cases. The justices would not likely refuse to review a decision by a lower federal court that voided a major act of Congress, nor would it decline to consider a state court's decision that substantially redefined the scope of the First Amendment, absent extenuating circumstances.⁷⁸

In such situations, strategic sorting is essentially foiled (at least at the certiorari granting level) and these cases may very well lend themselves to justices' ideological voting.

But this is not the only reason why justices come to take on cases that do not necessarily promote their ideological agenda. The reasons are almost as plentiful as the reasons litigants fail to strategically sort out cases through settlement. Perhaps foremost of

⁷⁸ Segal and Spaeth, *supra*, note 1, at 240-41

these reasons is the fact that justices simply sometimes err in predicting how other justices will vote and how cases will ultimately turn out. Another reason is that cases, and the grounds on which they are decided, may change or "morph" after certiorari is granted. As noted previously, this morphing may come about due to the evolution of the dispositive issues along the continuum of the Court's decision making process, including compromises reached during the opinion writing and redrafting phases.⁷⁹ Finally, justices sometimes have differential salience points for given issues and cases. Hence, while some justices may have very strong ideological preferences on a case and favor certiorari on a case to promote those preferences, other justices may well not agree on the policy merits, but do not have very strong preferences on the case or interest in the issue at hand. This situation may lead justices without strong preferences to accommodate justices with stronger preferences in the case selection process by joining them in a certiorari grant toward gaining the critical four votes. But even if they are not especially interested in or have strong convictions on a case or issue, why would they do this? It may well be that justices engage in such accommodating behavior on in cases on which they are otherwise indifferent in hopes that this collegial behavior will be reciprocated in the future in cases in which they do have greater personal stakes, or alternatively, they wish to be seen by their colleagues as being cooperative "team players."⁸⁰ Thus, there are a number of reasons why strategic case sorting by justices (and litigants) may not always be pervasive or effective and, accordingly, cases that lend themselves well to Attitudinal voting may consequently find their way onto the Court's docket.

⁷⁹ McGuire and Palmer, *supra*, note 71.

⁸⁰ *See generally* Hammond et al., *supra*, note 40; and LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

In Priest and Klein's pure selection hypothesis scenario all cases that have predictable outcomes are selected out of adjudication through settlement, and so litigation outcomes are a 50-50 proposition. However, in reality both litigants and justices make mistakes in case outcome predictions and even engage in purposive behavior that is not merits outcome motivated. This leads to departures from the strict selection hypothesis and, accordingly, deviations from 50 percent win rates for any subset of litigants (e.g. liberal or conservative outcome seeking parties). The Attitudinal Model suggests that Supreme Court justices make decisions based upon their sincere ideological preferences and the ideological preferences of the justices of the Supreme Court are likely more well-known than any other judicial actors in the nation.

So, we are faced with a conundrum - if justices base their decisions on their ideological preferences, and their preferences are well-known, then litigants (and perhaps justices) should nullify the effect of such preferences through strategic case selection. We believe that this is in fact what does happen - but not in all instances. Recall from the above discussion that the double case sorting process of litigants and justices is fraught with error and non-outcome motivated behavior. Consequently, strategic case sorting likely does obviate attitudinal decision making, but only where it is pervasive and effective. Where we find evidence of effective and pervasive strategic case sorting (by litigants and/or justices) we might well expect to find the influence of justices' attitudes on Court outcomes to be less strong or even absent. Where strategic case sorting is not as effective or pervasive, justices' attitudes should have a stronger influence on Court outcomes.

IV. Testing an Integrated Model of Judicial Attitudes and Selection Theory

Our approach to assessing the relative influence of judicial attitudes and case selection on Supreme Court decision making is straightforward. Our research environment is the Supreme Court's criminal procedure cases from the 1953 term to the 2004 term, encompassing the Warren, Burger, and Rehnquist Courts.⁸¹ Criminal procedure cases are typically considered high profile decisions and constitute a frequently addressed topic area on the Court's docket, relative to other issues, averaging over 25 cases per Court term. They also fit within the broader set of legal concerns that are generally considered in the realm of "civil liberties" and, hence, are especially appropriate for Attitudinal Model explanation. We employ as our dependent variable the Court's proportion of liberal decisions on these cases per term.⁸² This time series of the Court's relative liberalism in criminal procedure decisions ("Liberal Win Rate") constitutes a stationary series⁸³ and is displayed in Figure One.

Our set of explanatory variables is also straightforward. We consider separately two measures of justices' attitudes: those produced by Segal and Cover which are drawn from pre-confirmation op-ed stories, and those suggested by Martin and Quinn which are based on justices' relative ideal points. With each measure, we use the value associated with the Court's median justice to denote the Court's ideological orientation for a given term. Of course, we anticipate that these measures will be related to Supreme Court decision outcomes: the Segal-Cover scores are scaled to denote Court liberalism and therefore should be

⁸¹ We employ the U.S. Supreme Court Judicial Database (compiled by Harold Spaeth) for our analysis. Our case analyzed are chosen from `analu = 0 or 1; dec_type = 1, 6, or 7`. The database can be found on the S. Sidney Ulmer Project website: <http://web.as.uky.edu/polisci/ulmerproject/databases.htm>

⁸² We employ Ordinary Least Squares estimation for our analysis of this proportion oriented dependent variable. Given that our proportion data do not have values approaching either boundary (the minimum value is .14 and the maximum is .74) this is a reasonable approach. See Phillip Paolino *Maximum Likelihood Estimation of Models With Beta-Distributed Dependent Variables* 9 POLITICAL ANALYSIS 325, 345-46 (2001).

⁸³ A Dickey-Fuller test for unit root suggests that the series is stationary. The MacKinnon approximate p value for the test statistic (-3.42) is 0.0103.

positively related to the liberal proportion of the Court's decisions and the Martin-Quinn scores are scaled such that they should be negatively related to Court decision liberalism.

Of course, this is but a small part of our story. We are primarily interested in the degree to which, if any, the effect of judicial ideology on Court decision outcomes is conditioned on Litigant Selection phenomena. As noted above, we believe that judicial ideology should matter least in situations in which litigant case sorting is pervasive and effective and should matter most where such litigant case sorting is less pervasive or successful. Again, we note that this sorting process also encompasses case sorting by the Court's justices during the case selection stage - a double case sorting process. Thus, our primary hypothesis is: *The influence of judicial ideology on Court outcomes should be greater where strategic case sorting is less pervasive or effective.*

Recall that under Priest and Klein's basic hypothesis strategic sorting behavior should lead to litigant win rates that approach 50 percent. Of course, we also outlined a number of factors that might work to undermine strategic case sorting and hence, win rates might deviate from 50 percent. Thus, where win rates approach 50 percent, case sorting should be effective and ideology should be largely nullified. When win rates deviate from 50 percent, ideology should matter more. Accordingly, we endeavor to provide an estimate of deviations from Priest and Klein's 50 percent rate. Recall that in Figure One, liberal win rates typically do deviate from 50 percent in a given term, just in different degrees. We use this information to provide an estimate of the pervasiveness and effectiveness of the case sorting of litigants and justices in a given term for criminal procedure cases. In essence, if the case sorting was effective, then win rates should be .5; to the degree that they deviate from .5, case sorting is less effective. We use the absolute deviation from .5 to provide a gauge of the extent of

effective case sorting.⁸⁴ This variable (“Deviation”) is then interacted with our ideology variable (either Segal-Cover scores or Martin-Quinn scores) so that we can assess the conditional influence of ideology as levels of case sorting effectiveness (i.e. deviation from 50 percent) change.⁸⁵

Table One provides the results for the basic models of judicial ideological influence on Court decisions as well as the results for the integrated (interactive) models. The "S/C Basic" and "M/Q Basic" columns show that these ideology measures (the Segal-Cover median justice score and the Martin-Quinn median justice score, respectively) are statistically significant explanations for Supreme Court liberalism in criminal procedure cases. The "S/C Integrated" and "M/Q Integrated" columns display the results for the interactive models which account for the conditioning effect of case sorting and selection. In these models we find that the interaction term (Ideology \times Deviation) is statistically significant in each model. Further, the integrated models have significantly stronger explanatory ability as indicated by their much higher adjusted R^2 values and have lower root mean squared error scores. Since some of the component terms of the interactions are statistically significant and some are not it is important to expand upon the highly conditional nature of these results. Robert Freidrich's classic work on interpreting interactions explains that the coefficients and standard errors for an interaction's component terms denote the respective values for the component term at issue when the other related component term is at a specific value.

⁸⁴ Thus, the variable is constructed as follows: Absolute (.5 - Liberal Win Rate).

⁸⁵ We recognize that some readers may have concerns with the fact that our Deviation variable contains a component of the dependent variable in its construction. While we acknowledge such concerns, we note that use of forms of, or components of, a dependent variable on the right hand side of a regression equation are not necessarily inappropriate when theory or methodological reasons suggest their use (e.g. including a lagged dependent variable in a time series or time series cross-sectional model). In our research design, the Deviation variable presents the best method of representing the effectiveness and pervasiveness of strategic case sorting. Further, the Deviation variable and the dependent variable (Liberal Win Rate) are not highly correlated (-.39 correlation).

Consequently, the coefficients and standard errors for our component terms are highly conditional. This situation can make the statistical results for interactions somewhat non-intuitive and difficult to interpret substantively. Thomas Brambor and associates provide helpful insights for analyzing the conditional nature of such relationships by clarifying the conditional nature of the variables.⁸⁶ Basically, the relationship between the dependent variable (Y) and the component term of interest (X), is conditioned by the level of the other component term of the interaction (Z), which is considered the modifying variable. Accordingly, the coefficient and standard error associated with the relationship between Y and X may vary, depending upon the levels of the modifying variable, Z. In Figures Two and Three we present these conditional relationships graphically. Figure Two shows the marginal effect of Court Ideology (measured by Segal-Cover scores) as the modifying variable, Deviation, varies. The solid line denotes the marginal effects of Ideology as Deviation (from 50%) increases. The 95% confidence interval lines around the solid sloping line indicate the conditions in which Ideology has a statistically significant effect on Court liberalism. Figure Three provides the same information for the Martin-Quinn measure of ideology, but recall that the scaling of this measure suggests a negative relationship between it and Court liberalism. In both figures we see that neither measure of ideology is statistically significant when Deviation is at or very near zero - in other words when case sorting leads to approximately 50% outcomes. Thus, when case sorting is especially effective and pervasive, the attitudes or ideology of the justices is nullified. However, as case sorting becomes less effective (i.e. deviations from 50% go up), justice ideology emerges an increasingly influential explanation for Court liberalism. In fact, the figures indicate that variations in the

⁸⁶ Thomas Brambor, William Clark, and Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses* 13 POLITICAL ANALYSIS 1 (2005).

Deviation variable lead to substantial increases in the relative influence of the ideology measures (i.e. a one unit increase in either the S/C or M/Q median justice variables) on Court decision liberalism. In sum, these figures suggest exactly the type of conditional relationship between judicial ideology and strategic case sorting that we anticipated.

V. Conclusion

In assessing judicial behavior it is imperative that we consider the choices that justices make in the broader context of the litigation process as a whole. As Priest and Klein cautioned, the adjudicated cases that are typically studied are the end result of a much longer and involved process and are not necessarily representative of the set of underlying disputes leading to those cases. In the context of the Supreme Court, we outlined a double sorting process in which both potential litigants and the Supreme Court justices engaged in strategic selection of the disputes that would ultimately be adjudicated by the High Court.

But, what does this mean for Attitudinal Theories of Supreme Court decision making? The limited literature on the intersection of litigant selection and judicial ideology and our own results suggest that, first, litigants are strategic in their choices to appeal cases to the Supreme Court. The attitudinal preferences of Supreme Court justices are likely better known than any other set of judicial actors and, accordingly, parties reference this information in their decision whether to seek review by the Court. This means that the justices' attitudes have an important role in framing the set of disputes that make up their pool of appeals for certiorari consideration. Further, this strategic process of appeal selection (by both parties and the justices) has important implications for how and when justices' ideological preferences affect Supreme Court outcomes. More specifically, our results indicate that when

case sorting is effective (i.e. on the merits outcomes approach a 50% win rate), judicial ideology is largely nullified. But, case sorting is effective in varying degrees and when it is less effective and outcomes deviate from 50% we see judicial attitudes wielding a powerful influence on legal outcomes in the Court. In sum, we have two primary observations regarding the Attitudinal Model: 1) its direct influence is conditioned on the effectiveness of dispute sorting; and 2) attitudes have *both* direct effects and indirect effects on legal outcomes in the Court, since justices' attitudes likely influence the set of disputes that are decided on the merits.

Of course, our approach to assessing the intersection of Litigant Selection and the Attitudinal model constitutes just one path, and certainly not the only method, for incorporating dispute selection phenomena in our analyses of legal decision making. There are likely multiple and varied ways in which scholars can incorporate these important considerations in studying Supreme Court decision making. However, we believe that regardless of the approach scholars use to address this issue, such selection considerations are relevant and have important implications for the way we think about legal decision making, whether at the Supreme Court level or otherwise.

Table One: Prais-Winston Regression Results for Court Criminal Procedure Liberalism

Variable	S/C Basic		S/C Integrated		M/Q Basic		M/Q Integrated	
	Coefficient	T	Coefficient	t	Coefficient	t	Coefficient	t
Ideology	.2103	4.16	-.0330	-.52	-.1844	-4.46	-.0226	-.34
Deviation			-.4943	-3.55			-.2845	-1.35
Ideology × Deviation			1.4482	4.51			-.8604	-2.57
Constant	.4279	16.99	.5048	17.92	.4908	18.37	.5171	13.23
	Adj. R ² = .26	N=52	Adj. R ² = .56	N=52	Adj. R ² = .28	N=52	Adj. R ² = .50	N=52
	RMSE=.0995	DW=1.95	RMSE=.0757	DW=2.16	RMSE=.1000	DW=2.04	RMSE=.0819	DW=1.98

Figure One: Liberal Win Rates in U.S. Supreme Court Criminal Procedure Cases

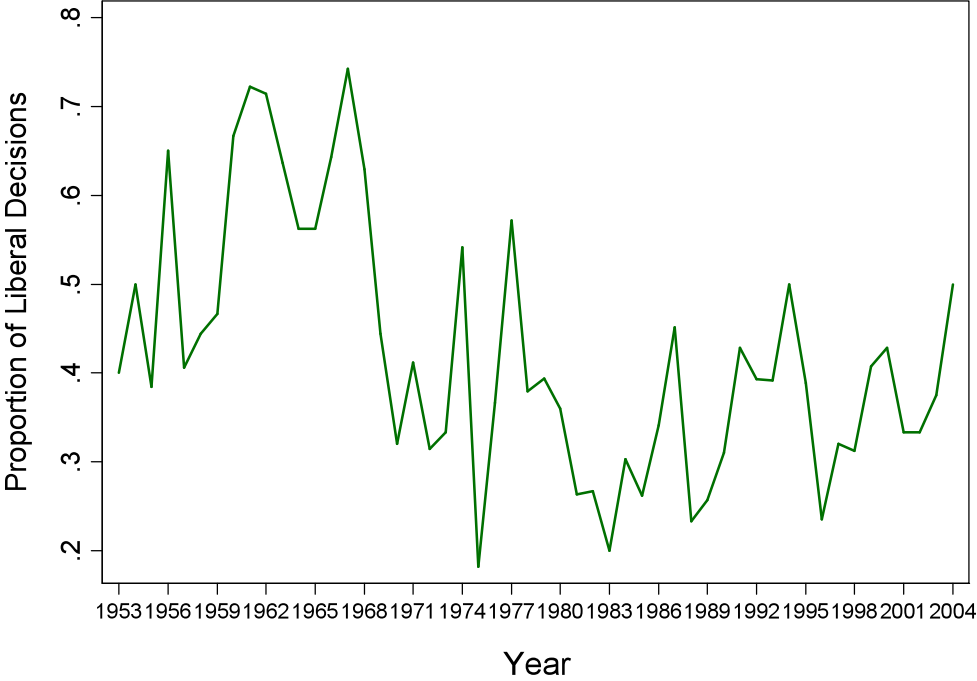


Figure Two: Interactive Effects - Segal/Cover Measure of Ideology

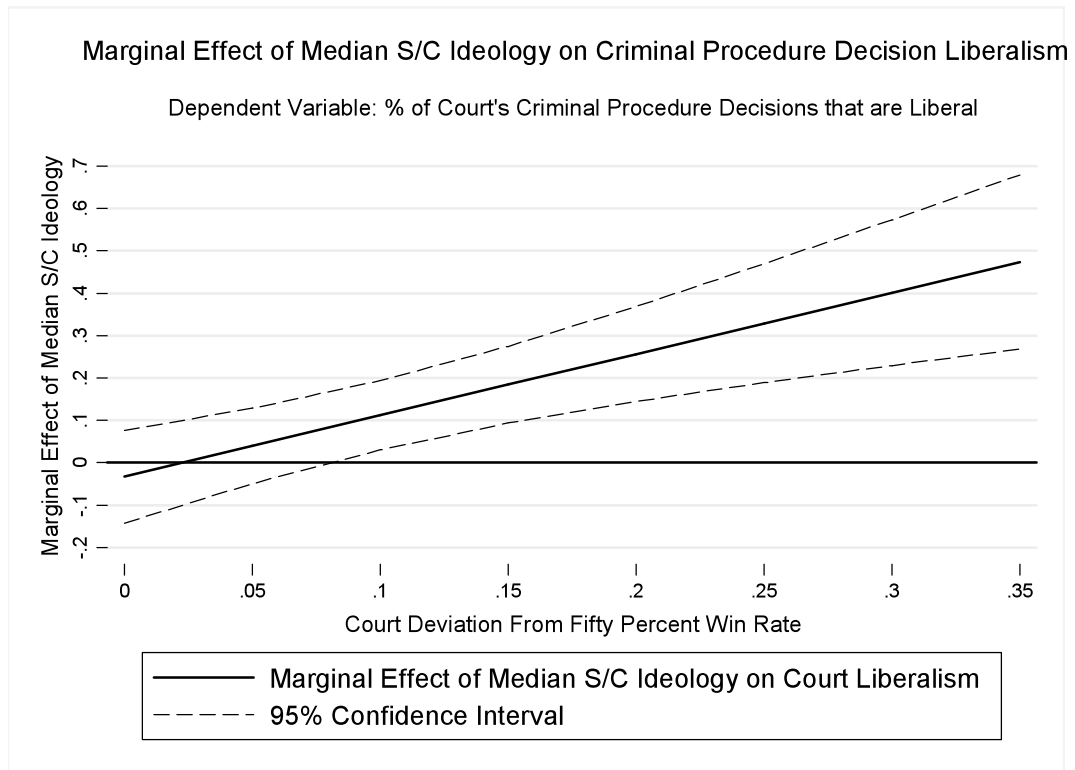


Figure Three: Interactive Effects - Martin/Quinn Measure of Ideology

