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## Context of Ideology: Law, Politics, and Empirical Legal Scholarship, The

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# The Context of Ideology: Law, Politics, and Empirical Legal Scholarship

Carolyn Shapiro<sup>1</sup>

*In their confirmation hearings, Chief Justice Roberts and Justice Sotomayor both articulated a vision of the neutral judge who decides cases without resort to personal perspectives or opinions, in short, without ideology. At the other extreme, the dominant model of judicial decisionmaking in political science has long been the attitudinal model, which posits that the Justices' votes can be explained primarily as expressions of their personal policy preferences, with little or no role for law, legal reasoning, or legal doctrine.*

*Many traditional legal scholars have criticized such scholarship for its insistence on the primacy of ideology in judicial decisionmaking, even as empirical legal scholarship has grown in significance and influence in the legal academy. Recently, however, empirical scholars and traditional legal academics have begun to engage in serious discussions with each other about how to think about and evaluate the balance between law and ideology and about how to harness the powerful tools of quantitative analysis to study such questions. In this Article, I offer several contributions to this discussion.*

*First, the Article evaluates current efforts by empirical scholars to identify the ideological character of cases. These efforts generally assume that the ideological character of a case can be determined by reference to a single liberal-conservative spectrum, and they generally presume that all or most cases present only a single issue. Through a recoding and quantitative analysis of a random sample of recent Rehnquist Court cases, as well as through a qualitative analysis of many of the cases, I establish concretely some of the limitations of these efforts. Specifically, I demonstrate that these approaches are indeterminate and oversimplified, and often prevent scholars from identifying cases in which the Justices face issues that pull them in different ideological directions. At the same time, however, I identify their strengths, particularly the strengths of approaches that leverage information derived from the Justices' actual voting patterns.*

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1. Assistant Professor of Law, Chicago-Kent College of Law; Affiliated Scholar, American Bar Foundation. For comments and discussion at various stages of this project, thanks are due to Joshua Fischman, Joshua Karsh, David Klein, Robin Lenhardt, Gregory Mitchell, Mark Rosen, Matthew Sag, Christopher Schmidt, and David Schwartz. I am also very grateful to Paul Edelman, David Klein, and Stefanie Lindquist for sharing their data with me, and to Matthew Sag, Andrew Martin, and Joshua Fischman for answering my questions about their work. Exceptional research assistance was provided by Jerry Thomas. Thanks also to Tom Gaylord for his superb library assistance.

*Finally, I propose a new approach for empirical scholars interested in studying the role of ideology in Supreme Court cases. Rather than starting with the assumption that ideology is the most important factor in Supreme Court decisionmaking, my approach focuses on just how important ideology was to the Justices in a particular case. Measuring ideological salience, I argue, would allow empirical scholars to study the empirical question of when and how ideology – and other factors – affects decisionmaking. Doing so would also open the door to a wide variety of important and interesting research questions. Most importantly, this approach would allow empirical scholars to engage with more traditional legal academics in the important normative debates about when and how ideology should play a role in the work of the Supreme Court.*

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## I. INTRODUCTION

Does ideology have a role to play in the work of the Supreme Court? Chief Justice Roberts suggested that it does not when, during his confirmation hearings, he described the judicial role as one of a neutral umpire “call[ing] balls and strikes.”<sup>2</sup> In Justice Sotomayor’s more recent confirmation hearings, she partially accepted this metaphor (although she said it is an “imperfect” analogy) and consistently rejected the notion that, as a Supreme Court Justice, her personal experiences or perspectives would have a legitimate – or even an inevitable – role to play in her work.<sup>3</sup> These statements reflect a view – widely expressed in public debates over judicial confirmations – that law and legal reasoning can and will provide an objectively correct answer to even the most difficult cases if only the judge is willing to put aside his or her personal preferences and opinions – his or her ideology.

At the other extreme, the dominant model of Supreme Court decision-making in political science has long been the attitudinal model, which posits that the Justices’ votes can be explained primarily as expressions of their personal policy preferences, with little or no role for law, legal reasoning, or legal doctrine.<sup>4</sup> More recent and nuanced attempts to describe judicial ideology – attempts that focus not on case outcomes (as the attitudinal model does) but rather on which Justices are in the majority and dissent in each case – likewise fail to identify an explicit role for legal reasoning, precedent, or case facts. For these scholars, judging on the Supreme Court is presumptively about politics or ideology.<sup>5</sup>

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2. *Nomination of Judge John G. Roberts, Jr. to Be Chief Justice of the Supreme Court: Panel One of a Hearing of the S. Judiciary Comm.*, 104th Cong. (2005) (statement of Judge John Roberts).

3. *Nomination of Judge Sonia Sotomayor to Be Associate Justice of the Supreme Court: Panel One of a Hearing of the S. Judiciary Comm.*, 106th Cong. (2009) (statement of Judge Sonia Sotomayor).

4. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

5. The attitudinal model’s chief competitor in political science, the strategic model, does not dispute that the Justices seek to implement their policy preferences but theorizes that, for strategic reasons, Justices may not vote (or write) in perfect accord with those preferences. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998). Rather, they behave strategically to try to get a result as close as possible to their preferred outcome but within the constraints imposed by needing agreement among colleagues and (sometimes) by concerns about the response of other governmental actors. *Id.* at 1. While somewhat more nuanced than the attitudinal model, the strategic model likewise assumes that the Justices are primarily motivated by ideological considerations, not law. See generally *id.* Of course, these models are not the only ways that political scientists think about judicial decisionmaking. See, e.g., Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 15-41 (Cornell W. Clayton & Howard

Despite their limitations, these approaches to studying the ideology of Supreme Court cases and Justices are prominent in the burgeoning field of empirical legal scholarship in part because they are conducive to large-scale quantitative analysis. They also are good examples of two significant limitations of much empirical legal scholarship. First, as already mentioned, they at best ignore and at worst reject any role for law in Supreme Court judging. And second, they presume that the ideological nature of each case can be characterized along a single liberal-conservative dimension. As a result, these approaches generally offer no way to evaluate the possibility that a particular case might involve multiple issues or concerns that pull the Justices in different directions and that require them to balance competing interests and priorities.

As a result of these and other deficiencies, some might dismiss the project of quantitative analysis as, at best, too reductive to be useful, and indeed some legal academics have criticized empirical legal scholarship for such flaws.<sup>6</sup> This Article, however, proceeds from the premise that the tools of quantitative analysis can enrich the longstanding public and academic debates about ideology and judging by offering important information about what the Justices actually do. For example, quantitative analysis might allow us to evaluate the ways in which Justices vote in cases that turn on issues of procedure. Do the votes vary systematically depending on the underlying issues in the cases, and, if so, how? Quantitative analysis of such questions can help scholars avoid basing broad conclusions about the respective roles of ideology and law on a handful of high-profile but unrepresentative cases – a danger to which both traditional legal scholarship and public debate are particularly susceptible. In order to answer such questions, however, we must refine the way empirical scholars identify the ideological nature of cases,

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Gillman eds., 1999); Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decision-making: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827 (2003); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135 (2006).

6. See, e.g., FRANK B. CROSS, *LAW IS POLITICS* (forthcoming 2009) (manuscript at 9-10) (prepared for presentation at the "What's Law Got to Do With It?" Conference, Indiana University, 2009); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685 (2009); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873 (2008).

making possible acknowledgment and empirical assessment of the cases' legal content.

Fortunately, traditional legal academics, who generally engage in qualitative analysis of cases and doctrines, and empirical legal scholars, who use large-scale quantitative techniques, have recently begun to engage in serious discussions with each other about how to think about and evaluate the balance between law and ideology.<sup>7</sup> What is missing in many of these discussions, however, is an effort to use the tools of quantitative analysis to engage with actual cases at a level of detail that allows for more nuanced understandings of the interactions between law and politics (or policy, or ideology) and of the interactions among different areas of law and between law and other considerations. There are notable and creative exceptions to this trend, but those works generally focus on particular questions or areas of the law, such as workplace law, tax law, or intellectual property.<sup>8</sup> In this Article, in contrast, I engage with a cross-section of cases in order to struggle with and evaluate methods of identifying or describing ideology and the role it plays in the cases. And I conclude that quantitative scholars must think about how to identify the ideological valence of Supreme Court cases in entirely new ways. Specifically, I argue that rather than assuming that the ideological character of cases is the cases' most important aspect, we should evaluate *whether and to what extent* ideology plays a role.

The Article proceeds in four substantive parts. Part II provides the basic context of the inquiry into attempts to identify the ideological character of Supreme Court cases. In this Part, I explain some of the reasons scholars want to characterize the ideological nature of cases, and I describe and critique in general terms the two most common approaches: Outcome Coding, which assigns a liberal or conservative label to each case depending on its outcome, and Behavioral Coding, which focuses on the voting patterns of the Justices. Part III carries the critique of Outcome Coding a step further. In this Part, I discuss the widely used U.S. Supreme Court Database, which as-

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7. Two recent conferences illustrate this development. In March 2009, Indiana University at Bloomington hosted an interdisciplinary conference entitled "What's Law Got to Do With It?" The proceedings of that conference will be published in a volume forthcoming from the Indiana University Press. In February 2009, the *Duke Law Journal* hosted a symposium entitled *Measuring Judges and Justice*, 58 DUKE L.J. 1173 (2009).

8. An outstanding recent example is James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009). In this fascinating article, following up on their previous work focusing on workplace law, the authors examine the ways in which the Justices' use of legislative history and canons of statutory construction compare in workplace law and tax law. *See id.*; *see also, e.g.*, Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801 (2009); Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797 (2006).

signs either a liberal or a conservative ideology code to every Supreme Court case since 1953 and which is the primary source of evidence for the attitudinal model. Part III also presents an in-depth recoding, discussion, and analysis of a random sample of 95 cases decided by the last Rehnquist natural court.<sup>9</sup> This recoding vividly demonstrates how a presumption that each case involves only one issue, coupled with binary liberal/conservative outcome codes, masks important information about the cases' ideological and legal content and context. As a result, the Database's ideology coding involves subjective and unarticulated decisions, leading to great indeterminacy. In fact, for more than a third of the recoded cases, under the Database's basic protocols, the ideological nature of the cases could have been coded as *either* liberal *or* conservative, depending on what issue the coder assigned to the case. Through a qualitative analysis of these cases, Part III also identifies particular types of cases in which the Justices must reconcile competing priorities and issues – ripe areas for future research.

Part IV details current efforts to use Behavioral Coding to identify the ideological nature of particular cases. Behavioral Coding infers the ideological character of cases from the voting patterns of the Justices. In this Part, through a qualitative analysis of some of the recoded cases, I examine some of the strengths and weaknesses of these approaches. For example, I demonstrate some of the limitations of relying on a methodology that promises more precision than it can actually provide and that elides the reality that the Justices often face cases that present multiple and competing issues. I also discuss, however, some of the benefits of leveraging information provided by the Justices' actual voting patterns.

Finally, in Part V of the Article, I propose a new way for quantitative scholars to think about the role ideology plays in Supreme Court cases. Specifically, I suggest that rather than focusing – as most empirical scholars do – on the ideological position of a case (liberal or conservative), we should look at the extent to which the case in fact had ideological salience to the Justices themselves. This proposal capitalizes on the insight – often pointed out by traditional legal scholars and acknowledged by some quantitative scholars – that many cases, even at the Supreme Court level, do not have a particularly strong ideological component. If we can separate cases that the Justices treated as largely non-ideological from those cases that were ideologically salient, we can begin to analyze what influences the Justices' decisionmaking

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9. The term natural court refers to the Supreme Court during a period in which there are no personnel changes. Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649, 653 (1979). The last Rehnquist natural court lasted from the beginning of October Term (OT) 1994 through OT 2004 – a total of 11 years. It is sometimes referred to as the Rehnquist 7 natural court, as it is the seventh natural court of Chief Justice Rehnquist's tenure. HAROLD J. SPAETH, *THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953-1997 TERMS* 30 (2008), available at [http://www.cas.sc.edu/poli/juri/allcourt\\_codebook.pdf](http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf) [hereinafter *Codebook*].

in different circumstances. We can address such questions as when and how law dominates, when and how ideology does, and whether other factors might explain the Justices' votes and opinions. In this Part, I identify and discuss a number of factors likely to be useful in identifying ideological salience.

In Part V, I also describe some of the important benefits that a focus on ideological salience would bring to empirical legal scholarship. For example, it would allow quantitative scholars to investigate whether, how, and why judicial behavior varies depending on the ideological salience of a case. A focus on ideological salience would also allow quantitative scholars to consider *why* some cases have higher ideological salience than others and to identify and study changes over time in the types of cases that are ideologically salient. Perhaps most importantly, a focus on ideological salience would open the door to more meaningful normative discussions between traditional legal academics and empirical scholars about the appropriate role of ideology in Supreme Court judging.

The truth about the roles of ideology and law in the work of the Supreme Court undoubtedly lies somewhere between the two extremes of the neutral umpire and the lawless ideologue, both as an empirical and normative matter. As Judge Posner explains, all judges, but especially appellate judges and even more especially Supreme Court Justices, can and must sometimes decide cases with reference to their perspectives, politics, experiences, and intuition.<sup>10</sup> This is because the law itself leaves areas of uncertainty – what Posner calls “open areas” – in which judges must exercise discretion, weigh competing interests, and make policy judgments.<sup>11</sup> If we want to talk about whether we think the Justices get the balance between law and ideology right, then we have to know what balance they are in fact striking, when they allow ideology to dominate, and how other factors influence their decisions.

## II. CODING CASE IDEOLOGY

The role of ideology in the work of the Supreme Court, as well as of lower courts, has long been of interest to scholars. However, “judicial ideology” is not a self-defining term, nor is there consensus about what, precisely, it means.<sup>12</sup> “Ideology” could refer to a desire for

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10. RICHARD A. POSNER, *HOW JUDGES THINK* 81-87, 269 (2008).

11. *Id.* at 81-121. See also Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 138-41 (2009) (making the same point and noting that, in many contexts, use of judicial discretion is *mandated* by the law).

12. See generally CROSS, *supra* note 6; LAWRENCE BAUM, *LAW AND POLICY: MORE AND LESS THAN A DICHOTOMY* (forthcoming 2009) (prepared for presentation at the “What’s Law Got To Do With It?” Conference, Indiana University, 2009); Fischman & Law, *supra* note 11, at 137-38.



a particular policy outcome – a world characterized by less environmental degradation, or of less regulation, or of greater or lesser levels of immigration. Alternatively, the term “ideological” could describe a tendency to favor or disfavor certain types of parties – criminal defendants, police officers, corporations, members of ethnic or religious minorities, the disabled, and so forth. Indeed, the breadth of the concept of “ideology” even makes it possible to speak of both *political* ideology and *legal* ideology. To say that a certain type of judicial behavior is “ideological” need not mean that it is ideological in a *political* sense . . . [A]djudication driven by ideas about the role of law and the responsibilities of judges might by contrast be characterized as both “legal” and “ideological” in character.<sup>13</sup>

Due to this range of possible meanings, some scholars have defined ideology in functional terms. “Ideology” could, for example, refer to “an overarching framework of beliefs, with sufficient consistency among constituent belief elements that knowledge of an individual’s ideology allows for prediction of his or her views on related topics.”<sup>14</sup> Still other scholars think of ideology in more purely political terms, distinct from legal or jurisprudential philosophy: some judges are liberal, others conservative.<sup>15</sup> For the purposes of this Article, a working understanding of what is meant by judicial ideology falls somewhere between these latter two ideas. Judicial ideology here refers to judges’ extralegal “beliefs and intuitions,”<sup>16</sup> which can and often do form a general framework or orientation influencing decisionmaking, frequently but not always correlating to more general understandings of political ideology.

To understand the significance of this working definition as a practical matter, it is helpful to consider some of the kinds of questions that scholars interested in judicial ideology have asked. Some have focused on the relationship between judges’ or Justices’ political orientations when appointed and the way that they vote once on the bench. For example, if certain Justices were described by newspaper editorials as very liberal (or conservative) before they were confirmed,<sup>17</sup> or if those Justices were appointed by a Demo-

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13. Fischman & Law, *supra* note 11, at 138.

14. Sag et al., *supra* note 8, at 804.

15. SEGAL & SPAETH, *supra* note 4, at 86 (“Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”).

16. POSNER, *supra* note 10, at 79.

17. This measure is known as the Segal-Cover scores and has been widely used because it is a measure of a Justice’s ideology that is completely independent of any votes the Justice makes on the Court. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559-61 (1989). Of course, it also is unable to capture any changes or evolution in the Justice’s views once confirmed. Fischman & Law, *supra* note 11, at 173. Judicial

cratic (or Republican) President, can we then predict how they will vote?<sup>18</sup> In some cases? In cases involving certain legal issues only? In all cases? Other scholars have attempted to answer questions about judicial ideology by looking at the Justices' behavior on the bench. If we know that Justice *X* rarely votes in favor of criminal defendants, what (if anything) does that tell us about how Justice *X* is likely to vote in intellectual property cases, for example, or First Amendment cases?<sup>19</sup> Or if two particular Justices generally vote together and often are the only two in dissent in certain types of cases, can we make predictions about how they might vote in other categories of cases?

All of these questions require researchers to have not only some information about the Justices' ideological orientations – whether gleaned from newspaper editorials, party of appointing President, or voting patterns – but also information about the ideological nature of the Justices' votes, opinions, or holdings. Put concretely, if we want to know if Justices appointed by Democratic Presidents generally vote more liberally than Justices appointed by Republican Presidents, then we need to be able to evaluate whether particular votes or opinions are more liberal or more conservative than others. It is this question – how we should identify (or, in the language of empirical legal studies, “code”) the ideological nature of cases (“case ideology”) – on which this Article focuses.

The two primary approaches to coding case ideology focus on the votes and/or outcomes in cases and not on the content of the opinions. Some scholars assign an ideology code to the case outcome (or the outcome for which a Justice voted). Outcome can be defined by a variety of factors, such as which party wins, whether a statute is upheld or struck down, or the type of claim at issue, but, crucially, it is (in theory) independent of information about which Justices vote which way. So, for example, the U.S. Supreme Court Database assigns a liberal code to case outcomes (or votes) in favor of criminal defendants. I refer to this kind of coding as “Outcome Coding.”

Other scholars look at the voting patterns of the Justices over time with reference to each other and derive ways of describing case ideology from those voting patterns. Although these approaches often use highly sophisticated statistical methods, we can begin our discussion of them with a conceptual description. Knowing nothing about a case other than that Justices Scalia, Thomas, and Rehnquist were in the majority and that Justices Souter and Stevens were in dissent, most observers likely assume that the outcome of the

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common space scores, another widely used measure of judicial ideology, have some of the same strengths and weaknesses. These scores rely on ideology measures of the appointing President as well as of a judge's home state senators at the time of appointment where those senators are of the same party as the President. Michael W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

18. Fischman & Law, *supra* note 11, at 166-72.

19. See, e.g., Sag et al., *supra* note 8 (evaluating whether judicial ideology predicts votes in intellectual property cases); Nancy Staudt et al., *supra* note 8.

case is conservative. This assumption arises from information we have about the Justices' behavior on the bench rather than from any identification of the case outcome itself, from any other characteristics of the case, or, for that matter, from information about how the Justices were expected to vote by editorialists or their appointing Presidents.<sup>20</sup> I will refer to this kind of coding as "Behavioral Coding."<sup>21</sup>

These approaches share several important limitations.<sup>22</sup> First, they both focus on the votes and/or outcomes in cases and not on the content of the opinions. As a result, factors such as legal reasoning, precedent, and case facts play no explicit role in describing the ideological character of the case, nor is there an attempt to account for law, jurisprudential approaches, or institutional concerns as constraining, channeling, or motivating forces.<sup>23</sup> Second, implicit in these approaches is an assumption that the Justices generally vote *sincerely*, not *strategically*, or that we can legitimately treat those votes as sincere even if the Justices do vote strategically.<sup>24</sup> And third, these approaches all assume that there is a single dimension – liberal to conservative – along which all cases' ideological character can be measured. In fact, for the Outcome Coding used in the U.S. Supreme Court Database, not only is the ideology coding unidimensional, but it is also binary – either liberal or conservative.<sup>25</sup>

The recent Voting Rights Act case, *NAMUDNO v. Holder*,<sup>26</sup> provides a useful example of the complications inherent in trying to identify a case's ideological character while operating within these limitations. In *NAMUDNO*, a small Texas municipal district wanted to avoid the restrictions of Section 5 of the Voting Rights Act.<sup>27</sup> Section 5 requires voting districts in certain parts of the country, including Texas, to obtain "preclearance" from the U.S. Department of Justice before making any changes that affect vot-

20. In fact, a measure like party of appointing President would not help here, as all five Justices mentioned were appointed by Republican Presidents.

21. Fischman & Law, *supra* note 11, at 176-83 (describing "behavioral measures" of judicial ideology). When describing the coding of cases, Fischman and Law refer to this kind of coding as "agnostic coding" because it "does not require the researcher to make a subjective assessment of the direction of each outcome." *Id.* at 162.

22. I discuss here three significant structural limitations. These and other limitations are discussed in more detail *infra*, Parts II & III.

23. *See id.*

24. Political scientists often distinguish between sincere and strategic voting. Sincere voting means that judges vote their ideological preferences regardless of the effect that it will have on the final result. Strategic voting occurs when judges alter their votes or other actions in some way to achieve a result closer to their preferences than would occur if they voted sincerely. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 5.

25. *Codebook*, *supra* note 9.

26. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

27. *Id.* at 2505 (the particular statute can be found at 42 U.S.C. § 1973c).

ing.<sup>28</sup> Some otherwise covered states and political subdivisions are able to “bail out” of Section 5’s requirements by making certain showings in a special three-judge district court.<sup>29</sup> That court held in *NAMUDNO*, however, that, under the statutory definition of “political subdivision,” the municipal district was not eligible to bail out.<sup>30</sup>

In the Supreme Court, the voting district argued that it should be allowed to bail out of Section 5’s requirements (or, rather, that it should be allowed an opportunity to show that it could meet the requirements to bail out).<sup>31</sup> In the alternative, it argued that Section 5 was unconstitutional.<sup>32</sup> The Supreme Court had upheld identical and near-identical language in earlier incarnations of the Voting Rights Act as legitimate exercises of Congress’s power to enforce the Fifteenth Amendment.<sup>33</sup> In *NAMUDNO*, however, the voting district argued that, under the factual circumstances when the law was reenacted in 2006, Congress exceeded its Fifteenth Amendment power.<sup>34</sup>

After oral argument, it seemed overwhelmingly likely that there were at least four votes (Chief Justice Roberts and Justices Alito, Scalia, and Thomas) for holding Section 5 unconstitutional, with a likely fifth vote from Justice Kennedy.<sup>35</sup> But when the opinion was announced on June 22, 2009, to much surprise,<sup>36</sup> the vote was eight to one in favor of a reading of the statutory text that declared that *all* covered voting districts, including *NAMUDNO* itself, are eligible for bail-out.<sup>37</sup> Because it held for the voting district on the statutory claim, the Court said that it need not and should not decide the constitutional question.<sup>38</sup> Only Justice Thomas, concurring in the judgment in part and dissenting in part, reached the constitutional issue and would have struck down the statute.<sup>39</sup> Not only did Justices Alito and Scalia join the majority, but the opinion itself was written by Chief Justice Roberts.<sup>40</sup> Perhaps

28. 42 U.S.C. § 1973c (2006).

29. *Id.*

30. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 221, 232 (2008).

31. *NAMUDNO*, 129 S. Ct. at 2510.

32. *Id.*

33. *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

34. *See NAMUDNO*, 129 S. Ct. at 2510.

35. *See, e.g., Dahlia Lithwick, The Supreme Court Breakfast Table: Roberts, Then and Now*, SLATE, June 22, 2009, <http://www.slate.com/id/2220927/entry/2221052/>.

36. *Id.*

37. *See NAMUDNO*, 129 S. Ct. 2504.

38. *Id.* at 2513.

39. *Id.* at 2517 (Thomas, J., dissenting) (arguing that the doctrine of constitutional avoidance is inapplicable in the circumstances of this case).

40. *See generally id.*

just as surprising, the four most liberal members of the Court – Justices Breyer, Ginsburg, Souter, and Stevens – all joined Chief Justice Roberts’s majority opinion in full, despite the opinion’s skeptical language about the constitutionality of the law,<sup>41</sup> and none of them wrote separately.

Speculation has run rampant about what happened after the oral argument. Many people presume that there was some kind of compromise.<sup>42</sup> For the conservatives, the opinion allowed the plaintiff voting district to avoid the requirements of Section 5 and raised explicit concerns about the law’s constitutionality. For the liberals, the statute remains intact, and Congress has the opportunity to resolve the constitutional concerns itself by amending the law, thereby avoiding a constitutional precedent restricting congressional power with respect to civil rights.

There is little question that *NAMUDNO* raised politically and ideologically salient questions of government treatment of race and of federal authority over functions, like running elections, that are traditionally within the purview of the states. The post-oral-argument predictions presumed, based in large part on their questions and demeanor at oral argument, that the four most conservative Justices would vote to strike down Section 5.<sup>43</sup> If we focus only on outcome, then would we say that the majority opinion is liberal because it did not do so or conservative because it did not *uphold* Section 5? Would we say that it is conservative because it allowed for the possibility that the voting district could bail out of Section 5’s requirements or liberal because to do so the district must establish a track record of undertaking measures designed to ensure minority voters equal access to the polls? If we take a more behavioral approach, we might assume that, because the liberal Justices joined the majority opinion, the opinion should be characterized as relatively liberal – but the behavioral approach does not allow us to take into account the opinion’s language voicing serious doubts about Section 5’s constitutionality. Nor does it allow us to account for the possibility of strategic voting and opinion writing. And finally, we miss, through these approaches, any analysis of the legal reasoning, such as the majority’s use of the constitutional avoidance doctrine, or any way to consider what (if anything) the quality or nature of that reasoning tells us about the ideological and/or strategic nature of the Justices’ votes. Neither Outcome Coding nor Behavioral Cod-

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41. See, e.g., *id.* at 2512 (discussing “federalism concerns” inherent in federal control over state-run elections, differentiation between states “despite our historic tradition that all the States enjoy equal sovereignty,” and race-consciousness required to comply with Section 5) (internal quotation marks and citations omitted); *id.* at 2513 (noting that the “Act’s preclearance requirements and its coverage formula raise serious constitutional questions”).

42. See, e.g., Linda Greenhouse, *The Supreme Court Breakfast Table: There’s Always Another Day*, SLATE, June 22, 2009, <http://www.slate.com/id/2220927/entry/2221036/>; Lithwick, *supra* note 35.

43. Lithwick, *supra* note 35.

ing adequately describes the ideological valence of the case and the interaction between ideology and other considerations.

### III. OUTCOME CODING

#### A. *How It Works and How It Doesn't*

##### 1. The Supreme Court Database

The most famous and widely used source of Outcome Coding for Supreme Court cases is found in Harold Spaeth's U.S. Supreme Court Database (the "Database").<sup>44</sup> The Database is the primary source of evidence for the attitudinal model, but it is ubiquitous in all kinds of empirical legal scholarship on the Supreme Court. As one scholar puts it, "There is little doubt that today [the] U.S. Supreme Court Judicial Data Base is the greatest single resource of data on the Court; there are virtually no social-scientific projects on the Court that fail to draw on it."<sup>45</sup> The Database's own new website proclaims itself "the definitive source for researchers, students, journalists and citizens interested in the U.S. Supreme Court."<sup>46</sup> Unfortunately, however, scholars often use the Database without careful consideration of its significant limitations and its appropriateness for their purposes.<sup>47</sup>

To identify the ideological character of cases, the Database codes virtually every case as having either a liberal or a conservative outcome.<sup>48</sup> Some of the limitations of this approach are obvious and fairly well recognized. A binary, liberal-versus-conservative coding system masks all kinds of subtleties: some cases are more liberal (or more conservative) than others;<sup>49</sup> some

44. The Database is available for free public download at <http://scdb.wustl.edu/index.php> [hereinafter Database]. See also [www.cas.sc.edu/poli/juri/sctdata.htm](http://www.cas.sc.edu/poli/juri/sctdata.htm).

45. Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 848 (2002) (quoting Lee Epstein, *Social Science, the Courts, and the Law*, 83 JUDICATURE 225, 225 (2000)).

46. See Database, *supra* note 44.

47. See generally Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009).

48. *Codebook*, *supra* note 9. Likewise, it codes every vote as having a conservative or liberal orientation. *Id.* I will refer primarily to case outcomes in the text, but the same analysis and critiques apply to the Database's coding of individual votes.

49. See, e.g., Shapiro, *supra* note 47, at 486-87 & n.43 (citing Frank B. Cross et al., *Warren Court Precedents in the Rehnquist Court*, 24 CONST. COMMENT. 3, 4 (2007)) ("[T]he binary outcome coding cannot measure whether a particular opinion is moderately liberal (or conservative) or more extremely ideological."); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003) (reviewing objections to the attitudinal model and Spaeth and Segal's responses).

issue areas (such as civil rights) may be more suitable to being characterized as liberal or conservative than others (such as patent law),<sup>50</sup> and some cases involve more than one issue to which an ideology code could be attached.<sup>51</sup>

It is this last point – the possibility of more than one issue actually being present in a case – that the Database’s design and coding protocols render particularly problematic. Each case receives a code reflecting the case’s “issue,” and the coding protocols for the Database *explicitly* presume that most cases can and should be coded with a single issue.<sup>52</sup> Once a case’s issue is identified, an issue area code is assigned. Assigning issue area codes is mechanical: each issue code is assigned to one of thirteen issue areas.<sup>53</sup> Those issue area codes are crucial for determining the ideology of the case. The ideology coding protocols are different for different issue areas and focus either on which party prevails or on what type of ruling was issued on a particular claim.<sup>54</sup> In the criminal procedure issue area, for example, when the prevailing party in a case is a criminal defendant, the case is coded as liberal;

50. See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (August 28, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126403) (changing ideology codes within certain issue areas to “indeterminate” due to dissatisfaction with the liberal versus conservative options in those issue areas). For examples of efforts to address inadequate ideology coding in particular issue areas, see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006) (explaining that the Database does not adequately assess the ideological orientation of cases involving federal preemption of state law); Nancy Staudt et al., *supra* note 8 (developing a separate ideology coding regime for tax cases in part due to dissatisfaction with the Database in this area of law); Sag et al., *supra* note 8 (developing a different approach to identifying the ideological nature of intellectual property cases).

51. See, e.g., Greve & Klick, *supra* note 50, at 79; Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 1-3; Shapiro, *supra* note 47, at 521; Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database 3* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1393613](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393613). See *infra* text and notes 64-69 for an in-depth discussion of Anna Harvey and Michael Woodruff’s analysis of the scope of this problem.

52. Shapiro, *supra* note 47, at 491-92. The coding protocols do allow for cases to have multiple issues assigned to a single case. *Id.* at 492. Only about 8.6% of the orally argued cases in the Database (1953-2005) have more than one issue code. *Id.* at 491-92 & n.74. In addition, a case’s issue is defined not as its legal issue but as the public policy context of the case. *Id.* at 488-91.

53. The issue areas are Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Attorneys, Unions, Economic Activity, Judicial Power, Federalism, Interstate Relations, Federal Taxation, and Miscellaneous. SPAETH, *Codebook*, *supra* note 9, at 42-52. The coding protocols require the coder to identify the issue code for the case. *Id.* at 42-43. The issue *area* is then automatically assigned by the computer. *Id.* at 82.

54. *Id.* at 53-55.

when the criminal defendant loses, the case is coded as conservative.<sup>55</sup> In the economic activity area, if economic regulation is invalidated, the case is coded as conservative; if it is upheld, the case is coded as liberal.<sup>56</sup> Individual Justices' votes are also classified using the same protocols but with a focus on the party or claim for which the Justices voted.<sup>57</sup>

Because the Database's ideology protocols vary with issue area, in some cases, the choice of issue area determines the ideology code. *Schenck v. Pro-Choice Network of Western New York*<sup>58</sup> is such a case.<sup>59</sup> In *Schenck*, abortion protesters brought a First Amendment challenge to an injunction restricting their activities.<sup>60</sup> Votes for the abortion protesters and their First Amendment rights were coded as conservative – because the issue identified was abortion.<sup>61</sup> But if the issue identified had been the First Amendment, the votes for the protesters, as claimants of First Amendment rights, would have been classified as liberal.<sup>62</sup>

Spelling out these protocols forces us to recognize that what looks on the surface like a completely objective system – look at the issue area and figure out which party prevailed – in fact masks subjective decisions about how to characterize a case. This does not mean that those decisions are necessarily “wrong.” Consider *Schenck*: most observers would agree, I think,

55. *Id.* at 53-54.

56. *Id.* at 54.

57. *Id.* at 61-67.

58. 519 U.S. 357 (1997).

59. Another prominent example is *Gonzalez v. Raich*, 545 U.S. 1 (2005), in which a liberal vote for the supremacy of federal law was also a conservative vote against legalizing medical marijuana. See also Shapiro, *supra* note 47, at 492; Fishman & Law, *supra* note 11, at 161-63; Young, *supra* note 51, at 11.

60. *Schenck*, 519 U.S. at 361-62.

61. See Shapiro, *supra* note 47, at 480.

62. A disclaimer about terminology is appropriate here. As others have complained, see, for example, Ernest Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1189-90 (2002), the Database's identification of which case outcomes are conservative (versus liberal) is, in some contexts, contestable, out-of-date, or even offensive. Most contemporary conservatives would bristle at the notion that a decision in favor of a cross-burner should be seen as conservative because the decision is in favor of a racist. Likewise, many conservatives today would be quite reluctant to accept automatic descriptions of all pro-First Amendment decisions as “liberal.” See *infra* note 78. A similar critique of the Database's protocols can be made from the left. Many liberals would not accept the notion, for example, that a vote against a criminal defendant should automatically be seen as a conservative vote. Nonetheless, throughout my discussion of the Database and its coding protocols in both Part II and Part III, I will, by necessity, refer to case outcomes or votes in the Database's terms. This use of terminology should not be taken to mean that I am attributing particular views to all (or any) conservatives or liberals. The same of course is true when I refer to liberal or conservative views even outside the context of the Database.



that in our current political context the votes for the abortion protesters were votes for the more conservative outcome, while the votes against the protesters were for the more liberal outcome. (This is true even though the votes for the protesters were also votes for more expansive First Amendment rights, a position traditionally deemed liberal.)<sup>63</sup> But making such an assessment requires the coder to, sub silentio, locate the case in a broader political and social context, which is not always easy to do.

## 2. Challenging the Database's Issue and Ideology Codes

Recent scholarship has begun to explore the extent to which the Database systematically selects one type of issue code over another – and therefore one type of ideology code over another. This scholarship is useful both for noting the indeterminacy of the Database's coding protocols and for understanding the nature of the unarticulated criteria that go into the coding decisions. In a recent working paper, for example, Professors Anna Harvey and Michael Woodruff convincingly demonstrate that the way the Database identifies issues – and hence ideology – varies over time and correlates to the ideological reputation of the Court that decided each case.<sup>64</sup> Harvey and Woodruff focus on cases that involved constitutional challenges to federal statutes and that were decided between 1953 and 2002.<sup>65</sup> Under the Database's coding protocols, they note, most such cases can be given either an issue code that focuses on the constitutional question (for example, the First Amendment or due process) or one that focuses on the substantive area that the statute regulates (for example, economic activity).<sup>66</sup> Moreover, some of these issue areas are oriented so that within those areas decisions to strike down statutes are coded as “liberal” – vindicating a person's constitutional rights, for example – while other issue areas would code the same decision as “conservative” – anti-regulation. As a result, the issue coding decisions with respect to constitutional challenges have systematic implications for the ideology coding in such cases.

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63. Cf. Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment*, 21 WASH. U. J.L. & POL'Y 81, 91 (2006) (arguing that, over time, liberal Justices have become increasingly willing to allow other interests to predominate over First Amendment interests). *But see* Shapiro, *supra* note 47, at 507-08 (pointing out the ways in which Epstein and Segal's analysis is faulty due to its reliance on the Database's coding).

64. Harvey & Woodruff, *supra* note 51, at 14; *see also* Anna Harvey, *What Makes a Judgment “Liberal?” Coding Bias in the United States Supreme Court Judicial Database* 8 (2008), available at <http://ssrn.com/abstract=1120970> (arguing that decisions about issue and ideology coding may be affected by the coder's knowledge of which Justices are in the majority and which are in dissent).

65. *See generally* Harvey & Woodruff, *supra* note 51.

66. *See id.* at 6-10.

Through statistical analysis of the cases involving constitutional challenges, Harvey and Woodruff establish that the Database systematically identifies issue codes leading to liberal outcomes for cases decided by the relatively liberal Warren and Burger Courts and vice versa for the conservative Rehnquist Court.<sup>67</sup> Harvey and Woodruff attribute their findings to confirmation bias: the coder knows, for example, that the Rehnquist Court is conservative, and so the coder is more likely to select an issue code resulting in a conservative outcome.<sup>68</sup> As a result, they argue, conclusions drawn about, for example, the ideological nature of cases decided by these different Courts may be circular and unreliable.<sup>69</sup>

There are, however, other explanations for Harvey and Woodruff's striking and fascinating findings, and those explanations require thinking about ideology in more contextual ways. Take one of their prominent examples, *Lopez v. United States*.<sup>70</sup> In *Lopez*, a convicted criminal challenged the constitutionality of a statute criminalizing possession of a gun within a certain distance of a school.<sup>71</sup> Lopez's argument – which likely looked like a long shot when it was first made – was that the statute in question exceeded Congress's regulatory authority under the Commerce Clause.<sup>72</sup> In a 5-4 decision, the Supreme Court agreed with him.<sup>73</sup> As Harvey and Woodruff point out, if coded as a criminal procedure case – which is possible under the Database's protocols – the case would result in a liberal ideology code because it was decided in favor of a criminal defendant.<sup>74</sup> But since it was coded as a federalism case, it received a conservative ideology code because it limits the regulatory power of Congress.<sup>75</sup>

Harvey and Woodruff suggest that the decision to code *Lopez* so that it received a conservative ideology code is the result of confirmation bias.<sup>76</sup> But this line of argument assumes that we should assess ideology by reference to the same aspects of a case in 1995 as in 1965, regardless of what other legal or political issues are present in the case and regardless of broader historical and political contexts. In other words, at some historical moments,

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67. In fact, they find that *every single* case in which the Warren Court struck down a statute is coded for liberal ideology. *Id.* at 11.

68. *Id.* at 10-14.

69. I use the term "unreliable" in its ordinary, descriptive sense, not in the technical statistical sense of repeatedly reaching different results or observations. *Cf.* Shapiro, *supra* note 47, at 481 n.16.

70. 514 U.S. 549 (1995).

71. *Id.* at 551-52.

72. *Id.* at 552.

73. *Id.*

74. *See* Harvey & Woodruff, *supra* note 51, at 16-17.

75. *Id.* at 16. *Lopez* also was coded as a case involving economic activity. *Id.* Because the case struck down a regulatory statute, under the Database's decision rules, it is coded as a conservative outcome. *Id.* at 16-17.

76. *See id.* at 17-18.

the Justices' focus may be more clearly on congressional power issues, for example, while at other times they may be paying more attention to criminal law and procedure. More generally, underlying Harvey and Woodruff's analysis is an assumption that ideology is *always* relevantly identified by reference to the same aspects of an opinion – either the nature of the statute struck down or the nature of the constitutional challenge, but not both. Different areas of the law (or, for that matter, of policy) are not deemed to interact, influence, or trump each other.

But does anyone really doubt that *Lopez* was a conservative decision? True, it vacated a criminal conviction, but that was unquestionably the least salient aspect of the case to the Justices and to the opinion-reading public. It was the *implications* of both the holding and the Court's reasoning for congressional power in all kinds of contexts – criminal and otherwise – that alarmed liberals and pleased conservatives.<sup>77</sup> The criminal context of the case was largely irrelevant to these concerns. In fact, the conservative majority's willingness to vacate a criminal conviction and overturn a criminal statute (albeit one relating to guns) could be seen as an indication of just *how* salient the conservative aspect of the opinion was to the Justices in the majority. More importantly, seen in the context of the many other Rehnquist Court cases restricting congressional power, *Lopez* was part of a larger conservative project, just as expansive readings that vindicated constitutional rights were part of a larger project of the Warren Court. Part of the challenge empirical legal scholars face in gaining respect within the legal academy is rooted in such realities – realities that are elided by the Database, unnoted by most people who rely on its coding, and ignored by the kinds of “objective” coding regimes with which Harvey and Woodruff experiment. Put bluntly, coding regimes that might identify *Lopez* as a liberal case will not and should not be taken seriously by legal scholars.<sup>78</sup>

Ultimately, what Harvey and Woodruff's work may establish is that – at least sometimes – the Database's issue and ideology coding is driven not so much by confirmation bias, as they hypothesize, but by an assessment of the most politically salient aspects of the case in the context of the time and the particular Court's overall agenda. To the extent that the Database gets those

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77. Cf. Baum, *supra* note 12, at 5 (citing Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778 (1997) (noting that “judges actually might have limited interest in who wins and loses a specific case and much greater interest in the broader policy implications of court decisions than are captured in doctrine”).

78. I do not mean to suggest that miscoding the occasional case – even an important case like *Lopez* – necessarily renders the Database and work relying on it unreliable. To the extent that such miscodings are randomly distributed and are not too ubiquitous, the problems they present will not affect conclusions drawn from large-N statistical studies. Moreover, in fairness to Harvey and Woodruff, I do not believe that they are claiming that *Lopez* is a liberal case. They use it as an example of the systematic differences in coding among different eras of the Supreme Court.

assessments “right,” it is because of unarticulated decisions and criteria, such as the decision not to code *Lopez* as a liberal criminal procedure case or to code *Schenck* as an abortion case. The unarticulated nature of these assessments means that, at best, scholars are deprived of the opportunity to analyze the way the Justices’ votes and opinions are affected by the interaction of different legal and political issues arising in a single case.<sup>79</sup> The appropriate response, it seems to me, is to find ways to explicitly account for both the context of the cases and the content of the opinions. Doing so requires moving away from binary, liberal-versus-conservative coding and from assumptions that most cases can be described by reference to a single issue or issue area.

### B. The Recoding Project

Part of any assessment of the limitations of the Database’s coding must concretely examine ways in which the coding is incomplete or inaccurate. To do so here, I build on my prior efforts to evaluate the limitations of the Database. In a previous article, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, I recoded a random sample of 95 cases – 10% of the cases decided by the last Rehnquist natural court (“Rehnquist 7”)<sup>80</sup> – in an effort to establish the extent to which the Database accurately provides information about law. Through this Recoding Project, I concluded that a significant amount of information about law goes unreported in the Database, in large part due to the presumption that most cases can and should be coded with a single issue.<sup>81</sup> Notably, out of the 95 cases in my sample, the Database coded 94 of them as involving only a single issue area and coded only one case as having two issue areas.<sup>82</sup> In contrast, once recoded, the mean number of issue areas per case was 2.4, and only six cases had a single issue area.<sup>83</sup> In other words, the Database failed to identify more than half of the issue areas identified by the Recoding Project.

*Coding Complexity* focused on the Database’s limitations only with respect to information about law, and my primary goal in that article was to evaluate how and whether empirical scholars interested in law could use the

79. At worst, of course, the Database systematically gets these assessments wrong, leading to misleading data and conclusions based on that data. *Cf.* Harvey & Woodruff, *supra* note 51, at 20 (arguing that the Database’s ideology coding biases have led to inaccurate assessments of the extent to which the Court is constrained by Congress).

80. The sample was computer generated. *See* Shapiro, *supra* note 47, at 511 n.175.

81. *See id.* at 528-29.

82. *Id.* at 514-15.

83. *Id.* Only about 5.12% of Rehnquist 7 cases are coded in the Database as having more than one issue (and some of those cases have only one issue area). *Id.* at 516 & n.187.

Database.<sup>84</sup> Therefore, although I noted that the Database's coding of outcome ideology relies on the issue areas coded, I did not evaluate the extent to which the issue areas that the Database fails to identify in fact affected its ideology coding. Here, I address that question: since the Database's ideology coding is directly related to the issue area codes, how would ideology coding vary for the many cases that, once recoded, have additional issue area codes?<sup>85</sup> In other words, using the Database's basic ideology protocols but my more complete issue coding, do we see any significant differences or inconsistencies in the ideology coding?

To investigate this question, I returned to the recoded cases from *Coding Complexity*. I used the ideology coding protocols set out in the Database's codebook, applying them to each issue that I had coded<sup>86</sup> rather than to the case as a whole. Several caveats are worth mentioning. First, because the Database's issue coding is designed to identify the public policy context of a case, not the case's legal issues, comparing my legal-issue based ideology coding to the Database's public-policy based coding is, arguably, comparing apples to oranges. I accounted for this problem by reviewing the cases to ensure that the public policy context was captured by the issue coding, and I concluded that only three cases in the sample involved public policy contexts not accounted for by their recoded legal issues.<sup>87</sup> As a result, the Database's ideology coding protocols were generally applicable to the legal issues that I identified.

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84. *Id.* at 488.

85. I am indebted to Gregory Mitchell for suggesting this line of inquiry.

86. I did the ideology coding more than a year and a half after I did the issue coding.

87. Those three cases are *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997), *Clinton v. Jones*, 520 U.S. 681 (1997), and *Virginia v. Black*, 538 U.S. 343 (2003). *Schenck* is the First Amendment challenge brought by abortion protesters. 519 U.S. 357. There is no legal issue related to abortion in the case. *See id.* *Virginia v. Black* is also a First Amendment case in which the nature of the "speech" – cross burning – has a significant public policy context in its own right. 538 U.S. 343. Finally, in *Clinton v. Jones*, Paula Jones's lawsuit against President Clinton, see 520 U.S. 681, the partisan political context is not encompassed by the issue codes. For these cases, I did not add any issues to my issue coding, but I did account for the larger public policy context in the ideology coding. Because *Schenck* and *Black* were already coded as having mixed ideology, nothing changed in their coding. For *Clinton v. Jones*, however, I changed the liberal ideology code to a mixed code. See note 94 and accompanying text for an explanation of mixed ideology codes. My conclusion that public policy context was almost always accounted for in the issue coding is consistent with my findings in *Coding Complexity* that, in general, at least one of my issue area codes matched the Database's. Shapiro, *supra* note 47, at 517. Interestingly, despite the protocol requiring coding of the public policy context and not legal issue, *Schenck* is the only one of the three cases for which the Database actually identifies the public policy context as the case's issue.

Nonetheless, in a few situations, the protocols did not speak directly to the types of issues presented. For example, the coding protocols provided that cases decided in favor of voting rights plaintiffs should be coded as liberal, making no distinction between minority plaintiffs alleging that their voting rights had been violated and white plaintiffs alleging racial gerrymandering. When appropriate, I updated the protocols accordingly.<sup>88</sup>

In addition, in the Recoding Project for *Coding Complexity*, I created some issue areas that did not exist in the original Database in order to more accurately describe the cases' legal issues.<sup>89</sup> As a result, I had to make some changes and additions to the ideology coding protocols to accommodate these new issue areas. I tried, however, to hew as closely as I could to the Database's protocols. For example, in my issue area "employment," which encompasses the Database's "unions" issue area but is much broader, I continued the Database's practice of coding a case conservative if it was pro-employer and vice versa.<sup>90</sup>

Finally, unlike the Database, which codes outcome on the basis of which party or claim prevailed in the entire case,<sup>91</sup> I coded the outcome of the cases on an issue-by-issue basis. For example, if a habeas petitioner were to win on a procedural claim but lose on the merits of his ineffective assistance of counsel claim, the Database would likely assign that case a conservative code – the final outcome is in favor of the government and against the criminal defendant. Coding by issue, however, required me to evaluate how each issue was decided, even if the resolution of that issue did not affect the case's final outcome. So my hypothetical habeas case would get a liberal code for the procedural issue and a conservative code on the merits.

Before describing the results of this recoding and comparing them to the Database's original coding, however, it is worth reiterating *why* I undertook the project. My purpose is not simply to show that the Database's ideology coding protocols are indeterminate and dependent upon subjective issue coding – although there is strong evidence for that proposition in my recoding and in the work of Harvey and Woodruff, among others.<sup>92</sup> The purpose here is to use an intensive look at the 95 cases in my sample to begin a discussion of how and whether we can better evaluate a case's ideological character, what we mean when we talk about a case's ideology, and what we are missing under current measures of case ideology. I do not claim that my approach

88. In fact, I discovered that, in some instances, including the racial gerrymandering cases, Spaeth himself had, sub silentio, updated the protocols, coding conservative votes in favor of the plaintiffs in those cases and vice versa.

89. See Shapiro, *supra* note 47, at 511-12.

90. This approach is also consistent with the Database's overall economic activity protocols, which also overlap with my employment issue area.

91. *Codebook*, *supra* note 9, at 58-59.

92. Harvey & Woodruff, *supra* note 51; Young, *supra* note 51, at 9-10; Shapiro, *supra* note 47, at 493; Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides into the Sunset*, 24 CONST. COMMENT. 199, 207 (2007).

to coding legal issues, coupled with the Database's ideology protocols, is the best way to identify the ideological nature of cases.<sup>93</sup> Rather, this approach gives us an initial purchase on the nuanced and textured nature of ideological and legal decisionmaking in a cross-section of cases and a way to evaluate at least some of the substantive limitations of binary, liberal-versus-conservative coding.

### 1. Quantitative Analysis

Once I completed the outcome recoding of my 95-case random sample, I compared my ideology codes to the Database's. Out of the 95 cases in the dataset, the Database assigns 47 of them a conservative ideology code and 45 of them a liberal ideology code. Three cases received *both* liberal and conservative ideology codes; that is, the Database itself gave three cases what I call "mixed ideology codes."<sup>94</sup> Where the Database's ideology codes were in complete agreement with mine, I designated the case a match. Sixty cases, including the Database's three mixed ideology cases, were matches.

Under my recoding, there were an *additional* 35 cases that had mixed ideology codes – both liberal *and* conservative codes – for a total of 38 or 40.0%.<sup>95</sup> Were all the cases from the last Rehnquist natural court ("Rehnquist 7") to be recoded, there is a 95% chance that between 30.0% and 50.0% of them would have mixed coding.<sup>96</sup> In other words, from about one-third to one-half of Rehnquist 7 cases would be coded as having both liberal and conservative ideology. The Database, however, identifies a grand total of only

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93. I doubt very much that it is. See *infra* Part V.

94. Those cases were *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997), which received a mixed ideology code because the Court upheld part of the injunction against the abortion protesters and struck down part of it; *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), in which the Court unanimously allowed punitive damages under Title VII but, in a 5-4 vote, restricted the circumstances under which they could be awarded; and *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), in which the Court decided two entirely distinct questions, each of which received its own issue and ideology code. For further discussion of these cases, see *infra* Part III.B.2.

95. There were no cases in which I coded only the opposite ideology code from the Database. All of the cases either matched the Database's coding or resulted in mixed ideology coding.

96. Unanimous cases are often omitted from analyses that focus on the ideological orientation of the cases and votes on the theory that these cases are legally easy and that ideology plays little or no role in them. I think that this approach is very problematic, but I did think it was likely that unanimous cases might reflect greater multidimensionality – hence more mixed ideology codes – because different Justices might find different aspects of the same case more salient than other Justices. However, there was barely any change when I removed unanimous cases from the sample. Among the non-unanimous cases in the sample, 37.7% have mixed ideology coding, with a 95% confidence interval of 25.2% to 50.2%.

10 such cases for the 11 years of that natural court – about 0.01% of the cases in the Database. These findings alone raise significant questions about any study that rests too much weight on the binary, liberal-versus-conservative coding of the Database, and they suggest that in many cases even the most ideologically driven Justice must prioritize some aspects of a case over others.

Table 1: Ideology Coding for 95-Case Sample in U.S. Supreme Court Database and Recoding Project

	Conservative Only: Number of Cases	Liberal Only: Number of Cases	Mixed Ideology: Number of Cases
U.S. Supreme Court Database	47	45	3
Recoding Project	27	30	38

In addition to compiling these descriptive statistics, I performed a (logit) regression analysis to investigate factors that made it more likely for a case, once recoded, to have mixed ideology codes. I hypothesized that *recoded* cases with issue areas that are not generally seen as particularly ideologically fraught – areas like economic activity, judicial power, and matters of government structure and operations<sup>97</sup> – would be more likely to have mixed ideology. My reasoning was that it is likely – or even, as Harvey and Woodruff demonstrate, highly probable – that the economic, governmental, or judicial issues often point in different ideological directions from constitutional or civil rights issues that might appear in the same cases.<sup>98</sup> Under the same reasoning, I also tested whether cases identified in the Database as involving civil liberties<sup>99</sup> were particularly likely to have mixed ideology once recoded.

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97. Here, I included cases with issue areas of federalism, federal government, and state and local government. Federalism, of course, was a much contested area during the Rehnquist Court. See, e.g., Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 799 (2006) (noting that “the Rehnquist Court dramatically revived the structural principles of federalism as grounds for judicial invalidation of statutes”); *id.* at 800 (noting that these decisions “sharply divided the Court, typically eliciting 5-4 divisions among the Justices and vigorous dissents”).

98. My previous work indicated that issues involving judicial power and the structure and functioning of government are particularly likely to go uncoded in the Database, in contrast with, for example, the sexier issues of civil rights or criminal procedure. Shapiro, *supra* note 47, at 518-21. For this reason, I focused on the *recoded* issue areas here.

99. I grouped together cases that the Database codes as involving criminal procedure, civil rights, due process, First Amendment, or privacy. Cf. Lee Epstein et al., *The Supreme Court During Crisis: How War Effects Only Non-War Cases*, 80 *N.Y.U.*



Here, I thought we might see more mixed ideology codes because the civil liberties aspect of the case would likely have dominated the coding in the Database, leaving out other, less “sexy,” issue and ideology codes.

I suspected that vote margins would be related to whether a case had mixed ideology. Cases with broad agreement among Justices who are often at odds ideologically might involve multiple issues, some perhaps more salient to liberal Justices and others more salient to conservative Justices. If that were so, then we might expect to see that unanimous cases or cases with wide vote margins (e.g., 8-1) are more likely to have mixed ideology. On the other hand, I thought we might see the opposite effect. To the extent that unanimous or lopsided cases are the legally “easy” cases in which ideology is not salient, the Justices might join cases that, superficially, appear to point in the opposite direction of their usual predilections. I similarly identified cases in which the lower courts were in disagreement, thinking that such disagreement might signal multidimensionality in issues that would make it more likely that we would see mixed ideology. Finally, I included a variable to indicate how far to the right or left the median Justice in the majority is<sup>100</sup> as a way of controlling, to some degree, for the overall ideological orientation of the opinion independent of any outcome-related coding.

Interpreting the results of this quantitative analysis must be done with caution. The sample size is quite small,<sup>101</sup> and, although there are many potential explanatory variables, I was not able to include them all in the regression.<sup>102</sup> My results, which are discussed below and summarized in Table 2, are best understood, therefore, as providing some guidance for future investigation, not as definitively explaining the mixed ideology codes.

As expected, recoded cases that included a government, judicial power, or economic activity code were more likely to have mixed ideology than those that did not, but there was no statistically significant effect for cases that the Database coded as involving civil liberties. There was also no statistically significant effect for unanimous cases or for the size of the vote margin. On the other hand and to my surprise, I found that a split of authority in the lower courts made mixed ideology coding *less* likely. I am unsure how to explain this last result. My measure for how far to the right or left the court majority was, based on the median Justice in the majority, was borderline

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L. REV. 1, 43-44 (2005) (defining civil liberties cases as including the same five issue areas as well as the “attorneys” issue area).

100. For this variable, I used the Martin-Quinn score of whichever Justice was the median of the majority. See Part IV, *infra*, for an explanation of Martin-Quinn scores and the significance of the score of the median Justice of the majority.

101. It is at the very low end of the appropriate sample size for a logistic regression. See J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 77 (2d ed. 2006).

102. I could not include some variables because those variables did not have enough variation in the sample. In addition, due to the small sample size, I had to restrict the number of explanatory variables in the regression. See *id.* at 131.

statistically significant ( $p > .052$ )<sup>103</sup> and suggested that, the further to the left the majority was, the less likely the case was to have mixed ideology coding. Again, I am unsure how to explain this result, but it suggests that Justices on the right and left may treat multidimensional cases differently. This finding obviously warrants future research and investigation.

Table 2: Factors Tested for Effect on Likelihood of Mixed Ideology in Recoded Cases

Factors Tested	Effect Found	Statistical Significance
Economic Activity Issue Area in Recoded Cases	Mixed ideology is more likely.	$p > .01$
Judicial Power Issue Area in Recoded Cases	Mixed ideology is more likely.	$p > .01$
Government Issue Area in Recoded Cases	Mixed ideology is more likely.	$p > .01$
Civil Liberties Code in Original Database	No effect found.	None
Vote Margin	No effect found.	None
Position of Median Justice in Majority	Mixed ideology may be more likely the further to the left the median Justice in the majority.	$p > .052$
Split of Authority in Lower Courts	Mixed ideology is less likely.	$p > .05$

I also wanted to investigate whether cases that the Database coded as liberal were more or less likely to have mixed ideology once recoded than were cases that it had coded as conservative.<sup>104</sup> The evidence here is not conclusive, but it is concerning. When I added the Database's issue coding to the model, it approached statistical significance ( $p > .088$ ). In other words, the analysis suggested but did not establish that, all else equal, cases identified as liberal in the Database are more likely to have mixed ideology coding once recoded than are cases originally identified as conservative.<sup>105</sup> Further research – with larger datasets – is needed to determine if such a skew is in fact

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103. The traditional cut-off for statistical significance is  $p > .05$ . The p-value tells us the likelihood that a particular variable *actually* has the effect identified by the statistical analysis. At  $p > .01$ , we can say that there is a 99% likelihood that the variable has the identified effect. At  $p > .05$ , we can say there is a 95% likelihood.

104. For this regression, I dropped from the sample the three cases that the Database identifies as mixed.

105. The results also suggested – again without statistical significance – that the tendency was less pronounced in cases to which the Database assigns a civil liberties issue area than in other cases.

present in the Database and, if so, to investigate its implications, which could be extraordinary.

## 2. Qualitative Analysis

The qualitative analysis of the mixed ideology cases begins with the three cases that the Database itself codes as having mixed ideology: *Schenck v. Pro-Choice Network of Western New York*,<sup>106</sup> *Kolstad v. American Dental Ass'n*,<sup>107</sup> and *Green Tree Financial Corp. v. Randolph*.<sup>108</sup> The Database characterizes two of those cases, *Schenck* and *Kolstad*, as “split decisions,” meaning that each party prevailed in part. In *Schenck*, the Court upheld part of the injunction restricting abortion protesters’ activities (coded as liberal) and struck down part of it (coded as conservative).<sup>109</sup> In *Kolstad*, the Court held unanimously that Title VII plaintiffs can receive punitive damages (coded liberal), but, over a partial dissent by four Justices, it imposed a fairly restrictive test for determining when such damages are warranted (coded conservative).<sup>110</sup>

*Green Tree Financial*, the third case that the Database codes as both liberal and conservative, is the only case in my sample to which the Database assigns two issues areas: economic activity and judicial power. In *Green Tree Financial*, the Court answered two distinct questions.<sup>111</sup> The first question was whether a district court’s “order compelling arbitration and dismissing a party’s underlying claims is a ‘final decision with respect to arbitration’ within the meaning of . . . the Federal Arbitration Act . . . and is thus immediately appealable pursuant to that Act.”<sup>112</sup> Presumably because of the centrality of this jurisdictional question to the case, the Database gives the case a judicial power issue area code. And since the Court concluded (unanimously) that the answer was yes – it was a final order, and so there was appellate jurisdiction<sup>113</sup> – the case received a liberal code with respect to judicial power.<sup>114</sup>

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106. 519 U.S. 357 (1997).

107. 527 U.S. 526 (1999).

108. 531 U.S. 79 (2000).

109. *Schenck*, 519 U.S. at 361.

110. *Kolstad*, 527 U.S. at 527.

111. *Green Tree Fin.*, 531 U.S. at 82.

112. *Id.* (citing 9 U.S.C. § 16(a)(3)).

113. *Id.* at 89.

114. Under the coding protocols, cases decided in favor of federal court jurisdiction should be coded as liberal. *Codebook*, *supra* note 9, at 54-55. Jurisdictional or procedural issues that must be decided before the Court can consider the merits are sometimes called threshold issues, and some scholars systematically identify them separately from the underlying merits issues. Although the Database does identify the issue separately in *Green Tree Financial*, the protocols do not require that it systematically does so, and in many other cases it does not. *See, e.g.*, *Yamaha Motor Corp.*,

The Court then went on to consider the second question: the enforceability of the arbitration agreement. The agreement at issue in the case did “not mention arbitration costs and fees,” and the plaintiff argued that it was therefore “unenforceable because it fail[ed] to affirmatively protect [her] . . . from potentially steep arbitration costs.”<sup>115</sup> Here, the Court held that the agreement was not automatically unenforceable for that reason and, in a 5-4 vote, ruled against the plaintiff because she had failed to provide any evidence of the arbitration’s actual cost burdens.<sup>116</sup> Presumably because the case involved a dispute between a mortgage holder and borrower, the Database assigns it an economic activity issue area. And for a holding like this one, in favor of the large company and against an individual (or potential class of individuals), the coding protocols dictate a conservative ideology code.<sup>117</sup>

Each of the three original mixed-ideology cases has a different kind of structure with respect to its issue and ideology coding. *Schenck* involved application of the same body of law – the First Amendment and precedent construing it – to a multi-faceted factual situation – the injunction against the abortion protesters.<sup>118</sup> The Court reached different conclusions with respect to different aspects of the factual situation (the injunction), but it did not purport to announce any new legal rules.<sup>119</sup> In *Kolstad*, on the other hand, the Court decided a pure legal question in favor of the plaintiff – and by extension in favor of all Title VII plaintiffs – but it did not go as far in favor of the plaintiff as it could have.<sup>120</sup> Both of these cases, to the extent that they can be explained ideologically, suggest that the Justices do not vote in purely binary, liberal-versus-conservative terms. Rather, these cases might be described as falling somewhere on a spectrum.

I call cases like *Schenck* “Tug-of-War Cases” because they involve two clearly defined interests (abortion rights and the First Amendment) that, in the factual context of the case, point in opposite ideological directions under the Database’s protocols.<sup>121</sup> In Tug-of-War Cases, the decision as to which issue area to identify will determine the ideology code. These are the kinds of cas-

U.S.A. v. Calhoun, 516 U.S. 199 (1996) (coded by the Database as an economic activity case with no reference to the jurisdictional issue that the Court also decided).

115. *Green Tree Fin.*, 531 U.S. at 82.

116. *Id.* at 91-92. This portion of the opinion was 5-4. *See id.* Although the dissenters agreed that the arbitration agreement was not automatically unenforceable, they would have remanded to the lower court “for closer consideration of the arbitral forum’s accessibility.” *Id.* at 93 (Ginsburg, J., concurring in part and dissenting in part).

117. *Codebook*, *supra* note 9, at 54. My description of the reasons that the Database codes *Green Tree Financial* as it does is educated speculation.

118. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

119. *See generally id.*

120. *See generally Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

121. *See supra* note 62 for a disclaimer and discussion about liberal and conservative labels.

es that Harvey and Woodruff identify as problematic for the Database. In contrast, *Kolstad* is what I call a “Spectrum Case.” Spectrum Cases are those in which, while there may well be more than one issue or issue area, they run ideologically in the same direction; a vote for the plaintiff is considered a liberal vote in *Kolstad* under both civil rights coding and economic activity coding.<sup>122</sup>

*Green Tree Financial*, on the other hand, is a Tug-of-War Case, but, unlike *Schenck*, it involves two distinct legal questions, each coded in the Database and decided (according to the Database’s protocols) in different ideological directions. *Green Tree Financial*’s two distinct legal issues challenge not only the widespread assumption of unidimensionality but also the underlying presumption that the Justices simply vote their policy preferences without regard for law.<sup>123</sup> In *Green Tree Financial*, the Justices who voted against the plaintiff on the merits could have reached the same result – a loss for the plaintiff – if they had held that there was no jurisdiction. Moreover, if they were trying to reach a conservative bottom line, such a holding would have had much more impact, as it would have prevented lower appellate courts from ever reviewing dismissals of plaintiffs’ claims pursuant to the Federal Arbitration Act. Nonetheless, they joined their liberal colleagues in finding such dismissals reviewable in the federal appellate courts.<sup>124</sup>

The Justices’ behavior in *Green Tree Financial* therefore suggests that, assuming they *were* simply voting their policy preferences, they had different ideological preferences with respect to different issue areas. If so, there is no unidimensionality with respect to judicial ideology, at least in this case. On the other hand, if their ultimate policy preference was to promote arbitration (as indeed they suggest in the opinion),<sup>125</sup> then their failure to vote against the plaintiff on jurisdictional grounds suggests that they were constrained in some way, perhaps by their reading of the law, or that they were concerned about the consequences of the case as a legal precedent.<sup>126</sup> If so, it is not just ideology that motivated their votes. Likewise, the Justices who dissented in *Green*

122. The difference between Spectrum Cases and Tug-of-War Cases is largely an artifact of the issue and ideology coding protocols both in the Original Database and in the Recoding Project. In both kinds of cases, the Justices are balancing competing interests. Spectrum Cases, however, are often identifiable only when there are separate opinions urging the Court to go further in one direction or another. Moreover, in any case, there may be additional dimensions – jurisprudential, strategic, or institutional, to name a few – that might compete with ideology as the Justices make their decisions.

123. See generally SEGAL & SPAETH, *supra* note 4.

124. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

125. The majority does not assert that this is its personal policy preference. See *id.* Rather, it refers to the need to support the “liberal federal policy favoring arbitration agreements.” *Id.* at 91 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

126. Cf. BAUM, *supra* note 12, at 5.

*Tree Financial* could have argued that all arbitration agreements that are silent as to costs are necessarily unenforceable, as the plaintiff claimed and the Eleventh Circuit held, but they did not do that either. Instead, the dissenters agreed with the majority that such agreements can, at least sometimes, be enforced.<sup>127</sup> The *Green Tree Financial* opinions, like those in *Schenck* and *Kolstad*, evidence some calibration of judicial preferences that – whether ideological or not – are certainly not binary and that appear to operate along several dimensions.

A review of all 38 of the mixed ideology cases in my dataset revealed that – as with *Schenck*, *Kolstad*, and *Green Tree Financial* – in almost every case, the mixed ideology codes revealed something substantive about the case instead of being an artifact of the coding protocols. Sometimes, of course, the mixed ideology codes identified something for which the case was not well known.<sup>128</sup> Nor did the different ideological considerations always carry anything close to the same weight within the case.<sup>129</sup> Nonetheless, of the 38 mixed ideology cases, I identified only two cases in which the mixed ideology code seemed a function purely of a mechanical application of the coding protocols and added no information about the ideological character of the case.<sup>130</sup> In other words, my mixed ideology codes helped to identify cases in which the Justices in fact had to reconcile competing interests.

127. See *Green Tree Fin.*, 531 U.S. 79.

128. For example, *Printz v. United States*, 521 U.S. 898 (1997), is known for striking down part of the Brady Bill. But in a lower-profile holding, the Court also held that the plaintiff had no standing to challenge other aspects of the law.

129. In *Garner v. Jones*, 529 U.S. 244 (2000), for example, the Court held that a change in Georgia's parole board operations did not violate the Ex Post Facto Clause. However, Justice Scalia, concurring in part and concurring in the judgment, would have denied the prisoner even the possibility that on remand the lower courts might allow him to take additional discovery. See *id.* at 257-59 (Scalia, J., concurring in part of the judgment). The majority, while it issued a conservative decision, did not go as far as Justice Scalia. See *id.* at 246-57 (majority opinion).

130. In fact, those two cases demonstrate some additional weaknesses and over-generalizations in the Database's coding protocols. In *Heintz v. Jenkins*, 514 U.S. 291 (1995), the Court held that an attorney who regularly engaged in debt collection was subject to the Fair Debt Collection Practices Act. As an economic activity case (and as coded in the Database), this is a pro-consumer, liberal decision. But if coded as a decision within the attorneys issue area (or in the legal profession issue area in my recoding) as an anti-lawyer decision, it would get a conservative ideology code. The notion that pro-lawyer decisions are necessarily liberal is absurd, and I presume that this protocol arose with respect to issues related to attorneys' fees and access to lawyers in other contexts. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the Court held that maritime jurisdiction governed litigation over the Chicago flood; as a result, the available damages were dramatically reduced. As an economic activity decision, it should be coded as a conservative, anti-tort liability decision. As a judicial power case, however, the protocols dictate that pro-federal

Of the remaining 36 cases, five, including *Kolstad*, were Spectrum Cases that essentially split the baby – not going as far in one direction as the Court could have gone and issuing a holding that was, in some sense, moderated.<sup>131</sup> In *Wilson v. Layne*, for example, the Court held that officers violated the Fourth Amendment by bringing reporters along for execution of a warrant, but the Court also held that the officers were entitled to qualified immunity from suit.<sup>132</sup>

The remaining 31 cases were Tug-of-War Cases. These cases involved some recurrent themes,<sup>133</sup> some of which have been studied and others of which are ripe for more investigation:

(a) ***Federalism and Preemption.*** Five cases were about whether federal regulatory structures preempted state law.<sup>134</sup> Professors Jonathan Klick and Michael Greve have already recognized this category of cases as problematic for the Database.<sup>135</sup> As they explain, if understood as a matter of federalism, pro-state-law, anti-federal-law votes should be coded as conservative, which is in fact how they are usually coded in the Database. But if understood as economic activity cases, the pro-regulation votes – which are also the pro-state-law votes because they are votes to uphold state regulation – should be coded as *liberal* and vice versa. Greve and Klick's findings suggest that it is this second dimension – economic regulation – that is often

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jurisdiction holdings be identified as liberal. Ironically, this is how the Database codes the case, although I would argue that it is simply wrong and overly mechanical.

131. *Garner v. Jones*, 529 U.S. 244 (2000); *Slack v. McDaniel*, 529 U.S. 473 (2000) (resolving some procedural matters in favor of habeas petitioner and resolving others against him); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999); *Martin v. Hadix*, 527 U.S. 343 (1999) (holding that the Prison Litigation Reform Act's limitations on attorneys' fees applies to postjudgment monitoring performed after the PLRA's enactment but not to such monitoring performed before its enactment even if payment was sought only post-enactment); *Wilson v. Layne*, 526 U.S. 603 (1999). *Virginia v. Black*, 538 U.S. 343 (2003), the cross-burning case, could also be considered to fall into this category. In all of these cases, that there is a spectrum is made obvious by the presence of separate opinions, see, for example, *Slack*, 529 U.S. 473 (separate opinion by Justice Stevens agreeing with only part of the majority's holding and separate opinion by Scalia agreeing with a different part), and/or by the Court's resolution of at least two related questions, as in *Wilson*, 526 U.S. 603 (resolving merits of Fourth Amendment question as well as the related issue of qualified immunity).

132. 526 U.S. 603 (1999).

133. There is of course some overlap between the categories of cases set forth below, and many cases could be classified in more than one category. Some (but not all) of those overlaps are noted in the footnotes.

134. *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998); *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005); *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440 (2005); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (1996); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 619 (1996).

135. Greve & Klick, *supra* note 50, at 79-80.

more salient to the Justices in these cases. Of my five preemption cases, only two of them were coded as economic activity cases. The other three received federalism codes.

(b) **Constitutional Challenges to Laws.** Four cases involved constitutional challenges to state or federal regulation,<sup>136</sup> much like the cases that Harvey and Woodruff examine.<sup>137</sup>

(c) **Jurisdictional Issues.** Eleven cases, including *Green Tree Financial*, decided whether to grant standing or jurisdiction to plaintiffs where the ideological character of the jurisdictional decision pointed in the opposite direction of the underlying claims.<sup>138</sup> In *Bennett v. Spear*,<sup>139</sup> for example, the Court held that prudential zone-of-interests standing requirements did not apply to citizen suits authorized by the Endangered Species Act, and it found that the plaintiffs in the case – ranchers and irrigation districts concerned about the economic harm they would suffer from certain actions taken by the Department of the Interior under the ESA – had sufficient injury-in-fact to satisfy Article III.<sup>140</sup> Pro-jurisdiction, pro-standing holdings are generally seen as liberal, and indeed that is how the case is coded in the Database. But the claims that the Court allowed to go forward alleged that the Secretary of the Interior had failed to adequately consider the economic impact of his action – an anti-environmental, anti-regulation outcome. Such outcomes are generally seen as conservative. So although the Database assigns *Bennett* a judicial power issue area with a liberal ideology code, the case could have received an economic activity issue area with a conservative ideology code.

(d) **Federal Government Structure and Power.** Four cases involved questions of federal government structure or power – cases that have implications for the balance of power between Congress, the courts, and the executive. Such cases can sometimes pit supposedly liberal or conservative prefer-

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136. Ill. *ex rel.* *Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Virginia v. Black*, 538 U.S. 343 (2003).

137. Harvey & Woodruff, *supra* note 51, at 6-8. Harvey and Woodruff examine only challenges to federal law. *See generally id.*

138. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Green Tree Fin. Corp. v. Randolph*, 513 U.S. 79 (2000); *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lords Landing Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 715 (1997) (takings plaintiff); *Comm'r v. Lundy*, 516 U.S. 235 (1996); *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *Austin v. United States*, 513 U.S. 5 (1994); *Reich v. Collins*, 513 U.S. 106 (1994).

139. 520 U.S. 154 (1997).

140. *Id.* at 166-68.



ences about deference to the different branches against preferences with respect to the underlying substantive issues.<sup>141</sup>

(e) **Public Policy Contexts.** There were three cases, including *Schenck*, in which the public policy context could be seen as more salient than the legal issues – and where the ideological orientation of the public policy context was inconsistent with the ideological orientation of the legal issues.<sup>142</sup> These are cases in which the attitudinal model may have the most explanatory power.

(f) **Deference to State Decisionmakers.** In four cases, the Court had to decide whether to defer to state policymakers or state courts that were asserting a relatively liberal position. In other words, as with the preemption cases, the traditionally conservative solicitude for state policymaking and sovereignty conflicted with the substantive legal issues at stake – and vice versa.<sup>143</sup>

This qualitative analysis of the mixed ideology cases illustrates why and how unidimensionality and binary ideology coding inadequately describe content of Supreme Court cases and the nature of Supreme Court decision-making. The Justices are not simply giving the thumbs up (or thumbs down) to favored (or disfavored) parties or claims. Instead, they are balancing sometimes powerful competing interests. What we cannot conclude from this analysis, however, is the extent to which those competing interests are perceived by the Justices in purely ideological terms – protecting women’s access to abortion versus protecting free speech, for example – or the extent to which they are perceived and resolved along other dimensions – most notably law, but also including strategic, institutional, and jurisprudential considerations. With respect to the interaction of ideology and law, Tug-of-War Cases involving questions of standing and jurisdiction and the state solicitude cases offer particularly fruitful avenues for future research. Are the Justices

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141. *Hamdi v. Rumsfeld*, 542 U.S. 578 (2004) (holding that the government could not indefinitely detain an American citizen designated an enemy combatant without providing him a chance to contest the factual basis for the detention); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004) (applying *Chevron* deference to regulation promulgated by the Federal Reserve Bank and upholding regulation); *Fischer v. United States*, 529 U.S. 667 (2000) (holding that the federal bribery statute covered a health care provider participating in Medicare, thereby expanding the reach of federal regulation of criminal activity traditionally governed by the states); *Loving v. United States*, 517 U.S. 748 (1996) (holding that Congress could delegate to the President the authority to identify aggravating circumstances for the imposition of the death penalty and upholding the factors so identified). *Clinton v. Jones*, 520 U.S. 681 (1997), could also be placed in this category.

142. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Clinton*, 520 U.S. 681; *City of Chicago v. Morales*, 527 U.S. 41 (1999). *Virginia v. Black*, 538 U.S. 343 (2003), could also be considered in this category.

143. *Easley v. Cromartie*, 532 U.S. 234 (2001); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Ohio v. Robinette*, 519 U.S. 33 (1996). The federal preemption cases can be seen as a subset of this category.

voting on judicial power issues in ways that are inconsistent with their apparent preferences on the underlying merits, especially in ideologically charged areas like race and capital punishment? Do they rule in the same way on similar judicial power questions in different factual or legal contexts? How does deference to state lawmakers vary depending on the legal or factual context? These questions might help us determine how (or whether) legal doctrine interacts with ideology.

#### IV. BEHAVIORAL CODING

##### A. A First Approach

While scholars like Spaeth, Harvey, and Woodruff attempt to identify the ideological nature of cases by reference to case outcomes, independently of the Court's composition and how particular Justices vote, other scholars have taken precisely the opposite path. For these scholars, the ideology of a case is a function of which Justices joined the majority opinion.

In a landmark article, Professors Andrew Martin and Kevin Quinn use an elegant and sophisticated methodology to assign each Justice a numeric score for each Term.<sup>144</sup> Martin and Quinn's model calculates the frequency with which Justices vote together, incorporating historical voting patterns as well as such information as the frequency with which a given Justice is a lone dissenter or one of two dissenters, etc.<sup>145</sup> Based on this information, the Justices are arrayed along a single line, with new scores determined for each Term. The scores represent the Justices' "ideal points" relative to each other,<sup>146</sup> and Martin and Quinn, as well as other scholars, interpret them as reflecting the ideological predilections of the Justices.<sup>147</sup> Indeed, most observers would likely agree that the scores are consistent with where the Justices fall ideologically, at least relative to each other. For October Term (OT) 2004, for example, the last Term of the Rehnquist 7 natural court, Justice Thomas was at the far right, with a score of 4.5. Justice Stevens was at the

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144. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

145. *See id.*

146. Martin and Quinn claim that the scale is consistent over time and so can be used to compare Justices who never served together – like Thomas and Douglas – through the information provided by looking at the votes of the Justices who served with both. Martin & Quinn, *supra* note 144, at 145. See *infra* Part IV.A for discussion of this claim.

147. *See, e.g.,* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 3-4 (2009).

other extreme, with a score of -2.41. The median Justice for that Term was, unsurprisingly, Justice O'Connor, with a score of .08.

The Martin-Quinn scores (which are publicly and freely available)<sup>148</sup> are widely used for a variety of purposes. While they cannot be used as an independent variable to explain the universe of votes (because they are derived from the universe of votes), they can (arguably) be used to explain or predict votes in certain areas or on certain subjects.<sup>149</sup> Among the advantages of the Martin-Quinn scores is that they are not binary. Instead of identifying a Justice as either liberal or conservative, the Martin-Quinn scores define a spectrum and locate Justices at various points along that spectrum.

Scholars are now beginning to try to use Martin-Quinn scores to describe the ideological character of *cases* as well as of the Justices. In a recent article, for example, Professors Tonja Jacobi and Matthew Sag present several models of how the Martin-Quinn scores might be used to identify the ideological character of a case, taking advantage of this spectrum.<sup>150</sup> Jacobi and Sag's work explores a variety of theoretical models that might explain the way ideological and strategic considerations influence Justices' voting. One possibility, which they call the Ideological Model, simply assigns every case the Martin-Quinn score of the median Justice of those who participated in the case, which, for most cases, is the median Justice on the Court for that Term.<sup>151</sup> Yet it is obvious that not every case in a given Term has the same ideological character, and, in part for this reason, the Ideological Model is not compelling.

148. See Martin-Quinn Scores, The National Center for Empirical Research in the Law and the Institute for Quantitative Social Science, <http://mqscores.wustl.edu/> (last visited on Nov. 3, 2009).

149. Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimate Be Used as Explanatory Variables?*, (Oct. 8, 2005) (unpublished working paper), available at <http://mqscores.wustl.edu/media/resnote.pdf>.

150. Jacobi & Sag, *supra* note 147, at 11-18; see also Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009) (laying out in detail the theoretical justifications for the models). Jacobi and Sag's work is a particularly well-developed attempt to use the Martin-Quinn scores to identify case ideology. As such, it offers the opportunity to analyze how the strengths and weaknesses of the widely used Martin-Quinn scores affect such an effort.

151. Jacobi & Sag, *supra* note 147, at 15-16. This model relies on the Median Justice Theorem, which suggests that the median Justice essentially controls the outcome of all cases. See *id.* (citing Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948), and Keith Krehbiel, *Supreme Court Appointments As a Move-the-Median Game*, 51 AM. J. OF POL. SCI. 231 (2007)). There are occasional cases in which one or more Justices do not participate. In such cases, the score for the median Justice may or may not be the score for the median Justice for the Court.

The approach that Sag and Jacobi prefer, after assessing its descriptive power, is what they call the Strategic Model.<sup>152</sup> In this model, the ideological nature of the case is defined as the median or, alternatively, the mean of the Martin-Quinn scores of all of the Justices in the majority.<sup>153</sup> I will refer to the Strategic Model's scores as Jacobi-Sag scores of case ideology, and, in the text, I will report the median score of the Justices in the majority, with the mean score identified in the footnotes.<sup>154</sup>

As an alternative to the binary, liberal-versus-conservative coding of the Database, measures (like the Jacobi-Sag approach) that rely on the Martin-Quinn scores offer a number of distinct advantages. Notably, they allow for a spectrum – some cases might be more conservative (or more liberal) than others. And they do not rest on subjective assessments (unarticulated or explicit) about the most salient aspects of a case. In fact, assigning the Jacobi-Sag score to a case requires knowing nothing at all about the case's legal issues, case facts, or political context.

Moreover, the Jacobi-Sag approach in particular can be both descriptive and informative. It arguably identifies the correct ideological direction with respect to closely decided cases in which the Court's swing Justice sides with the liberal Justices and those in which the swing Justice sides with the conservatives. Compare, for example, the Jacobi-Sag scores for two 5-4 voting rights cases.<sup>155</sup> In *Bush v. Vera*, Justice O'Connor sided with the conservative Justices to strike down the boundaries of three congressional districts on equal protection grounds.<sup>156</sup> The Jacobi-Sag score for the case is 1.544.<sup>157</sup> In

152. Jacobi & Sag, *supra* note 147, at 17-18. The theoretical framework for this model rests on the idea that Justices care both about case outcome and about the size of the majority coalition and will make strategic trade-offs between them. *Id.* at 17-18. Jacobi and Sag also consider and reject a "Collegial Model," which assigns each case the Martin-Quinn score of the "marginal" Justice. *Id.* at 16, 24, 65. In a 6-3 decision that the Database codes as conservative, for example, the case will receive the Martin-Quinn score of the most liberal Justice who joined the majority. *See id.* at 16. They explain the theory behind the Collegial Model but then convincingly demonstrate that it does a terrible job of describing the ideological character of decided cases. *Id.* at 16, 34-65.

153. *Id.* at 17-18. Jacobi and Sag assess whether the median or mean is a better measure and conclude that each has practical and theoretical advantages and disadvantages. *Id.* at 82; *see also* Cliff Carrubba et al., *Does the Median Justice Control the Content of Supreme Court Opinions?* (November 2007) (unpublished working paper), available at <http://adm.wustl.edu/media/working/mjt1-5.pdf> (concluding that the median Justice of the majority is a better measure of case ideology than the median Justice of the Court).

154. I figured the Jacobi-Sag scores myself based on the protocols set forth in their article.

155. Except where noted, all of the cases discussed in this Part are in my 95-case dataset.

156. 517 U.S. 952, 956-57 (1996).

157. Using the mean instead of the median, the score is 1.996.

*Easley*, on the other hand, Justice O'Connor sided with the liberal block to uphold a district against a similar challenge.<sup>158</sup> The Jacobi-Sag score is -1.518.<sup>159</sup> The shift in these scores from the right of the Court's median Justice (O'Connor) in *Bush v. Vera* to her left in *Easley* comports with some of what we know about the cases. *Bush v. Vera* has a conservative outcome, while *Easley* is a liberal case, as indeed they are coded in the Database. But the spectrum created by the Jacobi-Sag scores provides more information about the ideological nature of a case than does the Database. In the Database, a unanimous (or lopsided) case with a "liberal" outcome has the same ideology code as *Easley*, and a unanimous case with a "conservative" outcome has the same ideology code as *Bush v. Vera*. Yet such a unanimous case would have the Jacobi-Sag score of the median Justice on the Court. Jacobi and Sag's use of the Martin-Quinn scores, on the other hand, allows us to distinguish meaningfully between the ideological character of cases in which the outcome closely divided the Court (like the voting rights cases) and those in which the outcome was relatively centrist, an improvement over binary, liberal-versus-conservative codes.

Moreover, the Jacobi-Sag scores might help us identify when and how ideological predilections change, again without reference to subjective assessments. Specifically, the scores might demonstrate how the meaning of "conservative" and "liberal" can change over time. Take, for example, *Republican Party of Minnesota v. White*, a 5-4 decision striking down, on First Amendment grounds, state law restrictions on judicial candidates' speech.<sup>160</sup> *White* is coded in the Database as a liberal First Amendment decision. But because the four most liberal Justices dissented in *White*, the Jacobi-Sag score is comparable to the score in *Bush v. Vera*, the conservative voting rights case. That information can serve as a signal that, at least sometimes, what has traditionally been considered liberal (or conservative) with respect to the First Amendment may have changed or that issues other than the First Amendment have become more salient to at least some of the Justices.<sup>161</sup>

There are several specific problems with the Jacobi-Sag scores, however. First, Jacobi and Sag's use of the Martin-Quinn scores may sometimes substantially overstate the difference between the ideological positions of cases. The focus on the median Justice in the majority may, in some kinds of cases, shift the focus away from the Justices whose votes were actually contested and therefore whose ideology is most likely to be reflected in the case. For example, in *Bush v. Vera* and *Easley*, the voting rights cases discussed earlier, the shift in one vote – Justice O'Connor's decision to side with the liberals or the conservatives – caused a dramatic change in the Jacobi-Sag

158. 532 U.S. 234, 236-37 (2001).

159. Using the mean instead of the median, the score is -1.27.

160. *Republican Party of Minn. v. White*, 536 U.S. 765, 766, 788 (2002) (coded as liberal in the Database). *White* is not in my dataset.

161. Cf. Epstein & Segal, *supra* note 63, at 91.

score for those cases (1.544 for the conservatively decided *Bush v. Vera* and -1.518 for the liberal decision in *Easley*). While the Jacobi-Sag measure accurately identifies the ideological direction of each case, it seems unlikely that Justice O'Connor perceived either case as being anywhere close to that ideological extreme. As in the Michigan affirmative action cases, where Justice O'Connor alone voted to uphold the law school's affirmative action admissions program but voted to strike down the program used for undergraduate admissions,<sup>162</sup> it is likely that she understood both cases to be close cases in which the specific facts made all the difference. Sag and Jacobi's singular focus on the median Justice in the majority in these cases, then, obscures important information about the ideological character of the cases and may overstate the ideological distance between them.<sup>163</sup> This criticism, put more theoretically, suggests that Jacobi and Sag's Ideological Model may be a more accurate approach to identifying the ideological position of *some* kinds of cases than is their Strategic Model.

The remaining three problems I will discuss all arise from Sag and Jacobi's reliance on the Martin-Quinn scores. The first problem is that the scores provide an extraordinary degree of apparent precision – several digits beyond the decimal point. This precision arises from the sophisticated (and, for most legal scholars, incomprehensible) methodology Martin and Quinn use. Moreover, the Martin-Quinn scores are *estimates*, and they have their own confidence intervals around them – ranges within which Martin and Quinn calculate the *actual* ideal points are overwhelmingly likely to fall.

The apparent precision of the scores, then, is an artifact of statistical techniques and reporting conventions. This precision, however, is not necessarily *qualitatively* meaningful. That is, knowing nothing else about the cases, is it meaningful to say that a case (or a Justice) with a score of 1.518 is more conservative than one with a score of 1.516? And, if not, why make the distinction? The approaches do not tell us at what point the distance between scores becomes important or useful information. While this concern may not matter when the Martin-Quinn or Jacobi-Sag scores are used for large-N empirical studies,<sup>164</sup> it becomes more problematic, as I will explain below, if we assume that the scores are telling us something substantive about the ideological nature of particular cases relative to each other.

A second problem with the Martin-Quinn scores is that while they improve on the binary, liberal-versus-conservative coding of the Database in some respects, they nonetheless assume unidimensionality.<sup>165</sup> More concrete-

162. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down undergraduate admissions program); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (upholding law school's admissions program).

163. I am indebted to David Klein for this insight.

164. "N" refers to the number of observations in a study. "Large-N" means that there are many observations.

165. Fischman & Law, *supra* note 11, at 32 (noting that unidimensional ideology coding may create "distortions" that we cannot identify).

ly, the Martin-Quinn scores do not allow us to take into account the possibility that the Justices' actual ideal points on the spectrum may vary relative to each other depending on the legal issues, facts, or context of the cases. One consequence of this unidimensionality is that, while Martin-Quinn scores for each Justice vary from Term to Term, it is impossible to tell what those changes mean other than that Justices vote with each other at somewhat different rates from Term to Term. In other words, the Martin-Quinn scores reflect observed voting behavior. Ascribing that behavior *solely* to ideological ideal points requires a significant inferential leap, but that leap is necessary if we interpret changes in Martin-Quinn scores as changes in the Justices' ideology.<sup>166</sup> These criticisms of the Martin-Quinn scores lead to a criticism of the Jacobi-Sag approach. Changes in the Martin-Quinn scores of the Justices from Term to Term lead to changes in the Jacobi-Sag scores for particular cases – changes that may not in fact be at all meaningful in understanding the relative ideological nature of those cases.

A third and related problem with Martin-Quinn scores – and hence with the Jacobi-Sag approach – I mention with some hesitancy, as its existence and significance is disputed in the literature.<sup>167</sup> Nonetheless, it is potentially serious. It is the dual problem of selection effects and changes in the nature of law over time. The Court, of course, has control over most of its docket, and it may well choose to hear different mixes of cases in different Terms. As a result, if the Justices' ideal points vary with different types of cases, we might see different voting coalitions depending on the mix of cases being heard each Term, thereby causing the Justices' Martin-Quinn scores to shift regardless of whether their ideological views have changed.<sup>168</sup>

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166. This problem is sometimes called the problem of observational or behavioral equivalence. See Fischman & Law, *supra* note 11. See also Ward Farnsworth, *The Uses and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, With Special Attention to the Problem of Ideological Drift*, 101 NW. L. REV. 1891 (2007) (explaining that the agreement and disagreement reflected in the Martin-Quinn scores might have nothing to do with political ideology but might instead demonstrate agreement or disagreement about law or legal reasoning).

167. See *infra* note 168.

168. Whether such shifts are artifacts of the mix of cases being heard or accurately reflect changes in the Justices' actual ideal points is disputed. Compare Epstein et al., *supra* note 147, at 1503-04 (claiming that the Martin-Quinn scale is consistent over time and that the scores can therefore measure whether Justices' ideal points shift or "drift"), and Jacobi & Sag, *supra* note 147, at 2-3 (suggesting that reliance on the Martin-Quinn scores produces "a valid and reliable mechanism of . . . comparing cases via a *consistent*, objective standard") (emphasis added), with Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433 (2007), Fischman & Law, *supra* note 11, at 153-55 (asserting that selection effects prevent the Martin-Quinn scale from accurately assessing drift), and Farnsworth, *supra* note 166 (same). I find very powerful the intuition behind the claim that the scores may be affected by selection effects. I am not in a position, however, to resolve the question here. On selection

Moreover, changes in voting coalitions could be affected by developments in the law. Imagine a group of Justices who constitute a majority on the Court and who consistently vote in favor of criminal defendants, expanding defendants' constitutional rights and reading criminal and sentencing statutes as leniently as possible. Suppose that, over time, due in part to this group of Justices, criminal law in the United States shifts. Eventually, presumably, the law overall might coincide with these Justices' ideal point(s). In fact, the law, as developed in the lower courts (or by Congress), could even trend *beyond* those ideal points. Then, these same Justices might begin to vote *against* criminal defendants in some cases. If this shift were to occur, some of our group of Justices might now find themselves voting with their colleagues who used to dissent. Because the Martin-Quinn scores arise from actual voting coalitions, the scores of our Justices would then shift in the direction of their formerly dissenting colleagues (and vice versa) – even though their actual, internal ideal points have not shifted.

To understand how these concerns might affect the usefulness of the Jacobi-Sag scores in identifying case ideology, I returned to my sample of cases and identified sets of cases that dealt with similar subject matter. I conclude that the Jacobi-Sag scores may, at least sometimes, be missing the forest for the trees by, like the Database, emphasizing ideology at the expense of other significant factors in the Justices' decisionmaking. Compare, for example, *Jerome B. Grubart, Inc. v. Chicago*<sup>169</sup> and *Yamaha Motor Corp. v. Calhoun*.<sup>170</sup> Both cases involve maritime law and remedies, and both were decided unanimously, although in *Grubart* neither Justice Stevens nor Justice Breyer took part in the decision and Justices Thomas and Scalia concurred only in the judgment.<sup>171</sup> In *Grubart*, the Court held that there was federal maritime jurisdiction over tort actions against the barge company that allegedly negligently caused the Chicago flood.<sup>172</sup> As a result of the case being litigated under federal maritime law instead of state tort law, the barge company's liability was limited to the value of the barges and tug involved, orders of magnitude less than the actual damages suffered as a result of the flood.<sup>173</sup>

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effects more generally, see Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407 (2008). Others have attempted to assess drift more directly. Professor Michael Bailey has developed measures of changes in the Court's and the Justices' ideology over time by analyzing what he calls "bridge observations" – cases presenting the same issue but decided at different times. Bailey, *supra*.

169. 513 U.S. 527 (1995).

170. 516 U.S. 199 (1996).

171. They disagreed with the test that the Court used to determine whether maritime jurisdiction applied but agreed with the result.

172. *Grubart*, 513 U.S. at 529.

173. *Id.* at 530-31.



*Yamaha* was a wrongful death action brought by the parents of a girl who was killed in an accident involving a jet ski.<sup>174</sup> The issue in the case was whether, despite uncontested maritime jurisdiction, state law remedies were available because the victim was a nonseaman.<sup>175</sup> As in *Grubart*, the answer to this apparently technical question was of great substantive importance: if only maritime remedies applied, there was a possibility (albeit disputed) that the plaintiffs could recover only funeral expenses.<sup>176</sup> The Court held, 9-0 with no separate opinions, that state law remedies were not displaced and that the plaintiffs, if successful, could recover the full range of state remedies, such as damages for loss of society, support and services, and future earnings, as well as punitive damages.<sup>177</sup>

So, is one of these opinions more conservative or more liberal than the other? One might think that the answer is clearly yes – *Yamaha* is significantly more liberal than *Grubart* because it allows for broad tort liability, while *Grubart* does not.<sup>178</sup> Yet *Grubart*'s Jacobi-Sag score is only slightly to the right of *Yamaha*'s (.691 versus .577).<sup>179</sup> Here, then, the apparent precision of the scores does not reveal anything useful about the substantive differences between the cases. In fact, the difference in the scores is largely a function of the recusal of two Justices in *Grubart* and the slight changes in each Justice's Martin-Quinn scores with each Term.

174. *Yamaha*, 516 U.S. at 201-02.

175. *Id.* at 205.

176. *Id.* at 203.

177. *Id.* at 202, 216. The Court left open the question of which state law would govern. *Id.* at 216 n.14. The plaintiffs were residents of Pennsylvania, but the accident took place in Puerto Rico. *Id.* at 202-03 & n.1.

178. The Database codes *Yamaha* as a liberal economic activity decision and *Grubart* as a liberal judicial power decision, presumably because it finds federal jurisdiction. See *infra* note 179 for a discussion of why that coding of *Grubart* is meaningless. In the Recoding Project, both cases received mixed ideology codes.

179. Calculating the Jacobi-Sag score for *Grubart* is somewhat complicated and presents its own set of problems. Normally, the Jacobi-Sag median score for a unanimous case is simply set at the score of the median Justice of the Court. Because Stevens and Breyer did not participate, however, the median Justice on the *Grubart* Court is one spot to the right of the median Justice for that Term and so moves from O'Connor (.666) to Kennedy (.691) for OT 1994. On the other hand, if Thomas and Scalia are excluded from the majority since they concurred only in the judgment, the *Grubart* Court's median Justice shifts back to Justice O'Connor. Another difficulty with scoring *Grubart* is that using the mean Martin-Quinn score causes wild fluctuations depending on whether we include Thomas and Scalia. It also is shifted substantially to the right given the lack of participation of Stevens and Breyer. If Thomas and Scalia are included, the Jacobi-Sag score is 1.169, significantly to the right of *Yamaha* and perhaps, in this case, the most descriptively accurate score. But if they are excluded, the score is .389 – which is actually to *Yamaha*'s left. Such large fluctuation in the scores is a reason to use the median rather than the mean.

More significantly, the comparison of the cases calls into question the extent to which either or both cases were decided on the basis of ideology at all. Issued not even a year apart, their holdings are – if understood ideologically – difficult to reconcile, particularly as both were decided unanimously with Jacobi-Sag scores that are quite close to each other. There must be other dimensions to these cases that are captured neither by Sag and Jacobi's ingenious but unidimensional approach nor by the Database's ideology coding.

Another pair of unanimous cases likewise raises questions about how meaningful movement along the spectrum might be and highlights again the problem of unidimensionality. In *Rubin v. Coors Brewing Co.*, the Court unanimously struck down a federal statute prohibiting beer labels from displaying alcohol content as violating the First Amendment.<sup>180</sup> *Rubin's* Jacobi-Sag score is .666.<sup>181</sup> In contrast, in *Illinois ex rel. Madigan v. Telemarketing Ass'n*, the Court, again unanimously, rejected a First Amendment challenge to a fraud claim brought by the State of Illinois against professional fundraisers.<sup>182</sup> The suit alleged that the fundraisers had defrauded donors "by falsely representing that 'a significant amount of each dollar donated would be paid over to'" the charity for which they were soliciting donations, when in fact the fundraisers retained 85% of all the money they raised.<sup>183</sup> *Madigan's* Jacobi-Sag score is .227,<sup>184</sup> suggesting that it should be considered more liberal than *Rubin*. Perhaps so. If understood as economic activity cases, *Rubin* would be seen as conservative (anti-regulation, pro-business), and *Madigan* would be seen as liberal. Of course the opposite is true if they are seen as First Amendment cases.<sup>185</sup> But the *only* reason for the difference in their scores here is that the cases were decided in different Terms. The median Justice – O'Connor – is the same in both cases; the difference in the Jacobi-Sag score is due to the difference in *her* Martin-Quinn score between OT 1994 and OT 2002. It is hard to see how this difference tells us anything meaningful about the relative ideological character of these two unanimous cases.

A third First Amendment case makes the point even more starkly. In *Buckley v. American Constitutional Law Foundation, Inc.*, the Court struck down a series of regulations that Colorado had imposed on circulators of petitions for popular initiatives.<sup>186</sup> Colorado required that the petition circulators themselves be registered voters, that each circulator wear a badge with his or

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180. 514 U.S. 476, 478 (1995).

181. Using the mean, it is .531.

182. 538 U.S. 600, 605-06 (2003).

183. *Id.* at 605.

184. Using the mean, it is .255.

185. The Database codes both as First Amendment cases, with the accompanying ideology codes. In other words, the Database codes the relative ideology of these cases as the opposite of the Jacobi-Sag scores. Recoded, both receive mixed ideology codes.

186. 525 U.S. 182, 186-87 (1999).

her name on it, and that the proponents of an initiative report the names and addresses of paid circulators and the amount paid to them.<sup>187</sup> The Court struck down all of these requirements as violating the First Amendment.<sup>188</sup> As to the identification badge, the vote was 8-1, with only Chief Justice Rehnquist in dissent.<sup>189</sup> As to the other requirements, Justices O'Connor and Breyer also dissented.<sup>190</sup>

A mixed vote like this one might make assigning a Jacobi-Sag score a bit messy, but because of the way the votes are distributed, the median Justice of the majority – and therefore the Jacobi-Sag score – is the same for both the full majority (8-1) and the partial majority (6-3).<sup>191</sup> It is -0.75. But what does it mean that the scores for both parts of the case are the same?<sup>192</sup> Certainly, Justices Breyer and O'Connor saw important differences in the balance of interests as between the different regulations – although they may well not have seen those differences in ideological terms. Moreover, in this case, the Justices at the far ends of the Martin-Quinn spectrum agreed with each other – Justices Thomas, Scalia, Stevens, and Ginsburg all were in the majority.<sup>193</sup> The distribution of votes in this case suggests that an attempt to explain the case along a single dimension obscures relevant information about what led the Justices to their decisions.

### *B. A Refinement: Identifying When There Are More Dimensions*

The Martin-Quinn scores are unique among attempts to measure ideology in that they are dynamic. That dynamic nature is their strength – they derive from the actual behavior of the actual Justices – but it can, as described above, create weaknesses. On the other hand, that dynamism can perhaps be exploited for even more information about the Justices' voting behavior. Recent work identifying and measuring “disordered voting” does just that.

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187. *Id.* at 188-89.

188. *Id.* at 186-87.

189. *See generally id.*

190. *See generally id.*

191. For both, the score is the mean of the OT 1998 Martin-Quinn scores of Justice Souter (-0.899) and Justice Kennedy (0.75).

192. Using the mean of the majorities here, which does cause a shift, does not seem particularly illuminating. For the 8-1 part of the decision, the mean is .284, while, for the 6-3 part, it is .424. So the decision to strike down the registered voter and ID badge provisions is scored as more liberal than the decision to strike down the disclosure requirements. Nothing in the content of the case compels or justifies this result. *See generally Buckley*, 525 U.S. 182.

193. Justice Thomas did not actually join the majority opinion. *See generally id.* at 206-15 (Thomas, J., concurring in the judgment). He concurred in the judgment, arguing for a stricter test of constitutionality than the majority used. *Id.* at 206 (advocating for use of strict scrutiny).

In their 2008 article, Professors Paul Edelman, David Klein, and Stefanie Lindquist (“EKL”) capitalize on the Martin-Quinn scores to explore the phenomenon of unexpected voting coalitions, or what they call “disordered voting.”<sup>194</sup> They define a case as disordered when the Justices’ votes are not consistent with their relative positions on the Martin-Quinn spectrum.<sup>195</sup> *Buckley*, with Justices Breyer, O’Connor, and Rehnquist in dissent,<sup>196</sup> is disordered. So is, for example, a 7-2 decision where the dissenters are Justices Thomas and Stevens<sup>197</sup> or Justices Breyer and Rehnquist<sup>198</sup> because there are other Justices whose ideal points fall between the two dissenters in each of those cases. In contrast, a 7-2 decision with Justices Scalia and Thomas in dissent is ordered because Scalia’s and Thomas’s ideal points are next to each other at one extreme of the spectrum.

EKL’s formula not only identifies *when* such voting occurs but also measures the extent of a majority coalition’s disorder.<sup>199</sup> So, if Justice O’Connor is the median Justice, a 5-4 decision with Justice O’Connor in the majority along with Justices Breyer, Ginsburg, Souter, and Stevens is an *ordered* case, with a disorder score of 0. The same is true for a 5-4 decision with Justice O’Connor in the majority along with Justices Scalia, Thomas, Kennedy, and Rehnquist. A 5-4 liberal majority, however, where Justice *Kennedy* (who is the next most conservative Justice after O’Connor) votes with the liberals and O’Connor votes with the conservatives, is *disordered* – but only modestly so, as only Kennedy and O’Connor have switched places. It will have a fairly low disorder score. In contrast, a 5-4 decision with a majority of Scalia, Rehnquist, O’Connor, Souter, and Stevens is much more disordered and will have a much higher disorder score.

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194. Paul H. Edelman, David Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEG. STUD. 819 (2008).

195. *Id.* at 829. The authors calculate the Justices’ ideal points by natural court, not by Term. *Id.* at 829-30. For the Rehnquist 7 court, the order of Justices, from lowest ideal point (generally interpreted as most liberal) to highest ideal point (interpreted as most conservative), is Stevens, Ginsburg, Souter, Breyer, O’Connor, Kennedy, Rehnquist, Scalia, Thomas. *Id.* at 830 tbl.1. So a case in which Stevens, Ginsburg, and Breyer dissent, but Souter does not, will count as disordered because Souter has a lower ideal point than does Breyer. Likewise, a case in which Kennedy sides with the liberal bloc in a 5-4 vote, with O’Connor in dissent, will count as disordered. For some Terms, of course, Souter’s ideal point is higher than Breyer’s, and O’Connor’s is higher than Kennedy’s. Whether such cases should really be considered disordered is debatable. They do, however, have quite low disorder scores. See *infra* for a discussion of the relative magnitude of disorder scores.

196. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

197. See, e.g., *Comm’r v. Lundy*, 516 U.S. 235 (1996).

198. See, e.g., *Lords Landing Village of Condo. Council of Unit Owners v. Cont’l Ins. Co.*, 520 U.S. 893 (1997).

199. Edelman, Klein & Lindquist, *supra* note 194, at 825-27.

EKL computed disorder scores for every nonunanimous orally argued case decided by each natural court that lasted at least three terms.<sup>200</sup> For Rehnquist 7, the natural court on which I focus, the scores ranged from 0 (perfectly ordered) to a high of 1.356.<sup>201</sup> Specifically, EKL found that 55.56% of nonunanimous cases were ordered but that 61.52% of civil liberties cases (broadly defined) were ordered.<sup>202</sup> EKL suggest that civil liberties cases may have a lower rate of disorder than other cases “perhaps [because the] Justices feel more strongly about civil liberties issues and are less able to put aside ideology in deciding them . . . .”<sup>203</sup> Even in civil liberties cases, however, nearly 40% of the nonunanimous cases were disordered.<sup>204</sup>

One important benefit of EKL’s approach is that it accepts the possibility of multidimensional preferences or factors in judicial decisionmaking and begins to offer a way to identify when and how those preferences manifest themselves. If the Justices do not simply vote liberal or conservative, or move from left to right on a single line, their votes may vary with the case’s subject matter, the law, or case facts, and these changes in voting behavior may be reflected in the disorder scores. In this respect, EKL’s approach has the potential to add a richness to our understanding of judicial decisionmaking that was not previously available.<sup>205</sup> Specifically, the disorder scores reveal some significant differences between cases that, under other approaches, are identified as having the same ideological character. Cases with the same median Justice in the majority but different voting coalitions would receive the same Jacobi-Sag score, yet they can be distinguished by disorder score. Likewise, the disorder scores can add nuance to our understanding of the ideological valence of cases identified as simply liberal or conservative in the Supreme Court Database.

The disorder scores have their limitations, of course. EKL are conservative in their methodology and therefore likely to fail to identify all the cases that are indeed multidimensional. By starting with the Martin-Quinn scores, for example, EKL seem to accept the notion that, for most cases, there is a single dimension that explains the Justices’ actions, and they likewise seem to operate on the assumption that this dimension is ideology.<sup>206</sup> But if the Justices are operating along many dimensions and are regularly weighing com-

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200. *Id.* at 830. Unanimous cases are omitted because there can be no disorder (or order) when all of the Justices vote the same way. *Id.*

201. *Id.* at 831. My dataset contained the same range.

202. *Id.* at 830.

203. *Id.* at 843.

204. *Id.* at 830.

205. It is worth noting that the same logic might apply to unanimous cases as well as to any case in which typical voting partners are separated, even when the case is ordered.

206. *See id.* at 843.

peting interests, there may in fact be more “disorder” than EKL account for.<sup>207</sup>

Nonetheless, EKL’s disorder scores may give us a window into the question of what kinds of issues, facts, or contexts are more salient to some Justices than to others. As EKL hypothesize, “We feel justified in concluding that . . . unexpected voting patterns are frequently caused by other considerations outweighing ideology in the thinking of at least some Justices.”<sup>208</sup>

So what might those other considerations be? By way of example, I focus here on Justice Breyer and his well-known pragmatism.<sup>209</sup> I theorized that Breyer is more likely to be “out of place” (leading to a “disordered” case) when he is voting to defer to the judgments of an agency or other entity that is either expert or closer to the facts on the ground, when he is concerned about the administrability of a particular holding, or when he wants to allow government actors room to experiment. In fact, a review of the six cases in my dataset in which Justice Breyer is out of place reveals that five of them meet this description. In other words, one of the “other considerations,” as EKL put it, or one additional dimension might, for Justice Breyer, be his pragmatism.<sup>210</sup>

In *Schenck*, for example, Justice Breyer was the only Justice who voted to uphold the district court’s entire injunction.<sup>211</sup> All of the other Justices voted to strike down the portion of the injunction that they construed to pro-

207. The term “disorder” itself implies a deviation from the normal unidimensional order.

208. Edelman, Klein & Lindquist, *supra* note 194, at 843. EKL do not find that multiple issue coding in the Database is more likely to lead to disordered voting. *Id.* at 843. They express surprise at this result because multidimensionality is the attitudinalist’s explanation for surprising votes – the Justices simply have different preferences along different dimensions. *Id.* Of course, the Database systematically omits an enormous amount of information about the legal issues in the cases, so reliance on its multiple issue coding to identify multidimensionality is problematic. Shapiro, *supra* note 47, at 503-04, 515-16.

209. Justice Breyer is explicitly and deliberately concerned about the real-world consequences of the Court’s decisions. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 115-32 (2005). His pragmatism has not escaped the notice of commentators. A search in Westlaw’s JLR database for Breyer /s pragmati! produced 264 results (search conducted on January 1, 2010). See, e.g., Paul Gewirtz, *The Pragmatic Passion of Justice Breyer*, 115 YALE L. J. 1675 (2006); Cass Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L.J. 1719 (2006); Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 924 (2009) (noting that “Justice Breyer advocates a method of statutory interpretation aimed at determining the purpose of the legislation, which is fundamentally a pragmatic approach”).

210. At other times in the country’s history, Breyer’s willingness to defer to administrative agencies and other government entities might have itself been a hot-button issue seen in more ideological terms.

211. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

hibit abortion protesters to approach within fifteen feet of people entering and leaving the clinic.<sup>212</sup> Justice Breyer, on the other hand, argued not only that the injunction did not have to be so construed but also that it should be “left [] to the District Court to resolve in the first instance any linguistic ambiguity that might create a constitutional problem.”<sup>213</sup> He explained,

The District Court understands the history, and thus the meaning, of the language in context better than do we. If the petitioners [abortion protesters] show a need for interpretation or modification of the language, the District Court, *which is directly familiar with the facts underlying the injunction, can respond quickly and flexibly.*<sup>214</sup>

Similar concerns arise in other cases in which he is out of place, even when he did not write the opinion himself. In *Buckley*, for example, Justice Breyer joined Justice O’Connor’s partial dissent.<sup>215</sup> Both Justices would have upheld Colorado’s requirement that petition circulators be registered voters against a First Amendment challenge, in part for a very practical reason:

In the past, Colorado has had difficulty enforcing its prohibition on circulation fraud, in particular its law against forging petition signatures, because violators fled the State . . . . Colorado has shown that the registration requirement is an easy and a verifiable way to

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212. *See id.*

213. *Id.* at 399 (Breyer, J., concurring in part and dissenting in part).

214. *Id.* (emphasis added); *see also* Nat’l Park Hospitality Ass’n v. Dep’t of the Interior, 538 U.S. 803, 817-21 (2003) (Breyer, J., dissenting) (disagreeing with the Court’s holding that plaintiffs, who wished to challenge the validity of a regulation, did not have standing and indicating that he would uphold regulation; joined by the only other dissenter, Justice O’Connor); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding in majority opinion that statute authorizing additional prison time for certain illegal immigrants was a sentence enhancement and not a separate offense, so no mention in indictment was required; joined in majority by Justices Thomas, Kennedy, O’Connor, and the Chief Justice). *But see* *Verizon Commc’ns, Inc. v. F.C.C.*, 535 U.S. 467, 539 (2002) (Breyer, J., concurring in part and dissenting in part) (arguing that challenged regulations were not authorized by the relevant statute; joined in part by Justice Scalia). Outside of my dataset, there are many other examples of disordered cases in which Justice Breyer is out of place that are consistent with my theory that he is motivated in part by administrative pragmatism. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417 (1998) (voting, in dissent and joined by Justices Scalia and O’Connor, to uphold line-item veto); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (joining majority of Justices Scalia, Thomas, Kennedy, and the Chief Justice to hold that schools can constitutionally require athletes to submit to random drug tests).

215. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

ensure that petition circulators fall under the State's subpoena power.<sup>216</sup>

Likewise, in *Lords Landing*, Justice Breyer joined the Chief Justice's dissent from a per curiam order to grant, vacate, and remand (GVR).<sup>217</sup> The Court sent the case back to the Fourth Circuit for consideration of a recently decided state supreme court case, even though that case had already been presented to the Fourth Circuit on a motion to recall the mandate.<sup>218</sup> The dissent argued not that the Fourth Circuit had reached the right result in the first place but rather that the GVR mechanism was inappropriate and confusing. The Court, the dissent said,

should either set the case for argument or summarily reverse. True, this would require the investment of still more time and effort in a case that is in the federal courts only reason of diversity of citizenship . . . but *it would have the virtue of explicitly telling the Court of Appeals how to dispose of the case.* The Court's decision to grant, vacate, and remand . . . on the contrary, is muddled and cryptic. *Surely the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given.*<sup>219</sup>

A theory of judging that focuses only on a single dimension of ideology might conclude that Justice Breyer's views on abortion are more liberal than any of his colleagues or that his views of the First Amendment are more conservative. But this is only one possible explanation for his votes, and it is not the most likely one. Instead, by looking at his opinions (or the opinions he joins) in the cases in which he is out of place, we can identify themes that may, at least in some cases, be more salient to him than ideological considerations<sup>220</sup> or whatever other considerations that normally align him with particular members of the Court. The disorder scores offer a way to capital-

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216. *Id.* at 220 (O'Connor, J., concurring in part and dissenting in part, joined by Breyer, J.).

217. *See* *Lords Landing Village of Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893 (1997).

218. *See id.* at 894. Normally, the Supreme Court does not GVR in light of a new legal development when the lower court has already had an opportunity to consider it. ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, KENNETH S. GELLER, *SUPREME COURT PRACTICE* 318 (8th ed. 2002).

219. *Lords Landing*, 520 U.S. at 898 (Rehnquist, C.J., dissenting, joined by Breyer, J.) (emphasis added).

220. In some cases, of course, his ideological preferences may point in the same direction as his desire to defer to the expert or more knowledgeable government entity. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).



ize on the dynamic nature of the Martin-Quinn scores, one that holds the potential to begin studying the multidimensional nature of judicial decisionmaking.

## V. IDEOLOGICAL SALIENCE AND IDEOLOGICAL LEGITIMACY: A WAY FORWARD?

### A. *Defining Terms*

Although this Article critiques many empirical scholars' attempts to identify the ideological character of Supreme Court opinions, I do not wish to deny the significant role of ideology in judging, particularly in Supreme Court judging. To the contrary, ideology (or, to use a gentler term, policy or political judgments) inevitably plays a role in much of the Supreme Court's work. The Supreme Court often addresses difficult and contested political questions – questions to which there is simply no objectively correct answer. Instead, there are judgments to be made. The question of whether a sitting President has immunity from suit is one such question.<sup>221</sup> Whether or when the Constitution permits public displays of the Ten Commandments is another.<sup>222</sup> That these cases involve political judgments does not mean that legal arguments and sources are irrelevant, of course, but it does mean both that the law in such cases is indeterminate and that the indeterminacy must be resolved by largely political judgments.<sup>223</sup>

Such political resolutions are not intrinsically illegitimate, notwithstanding Chief Justice Roberts's and Justice Sotomayor's claims about neutrality.<sup>224</sup> In some cases, the Justices would not be doing their jobs if they did not make political judgments. In other words, in some cases, judging based on ideology is *legitimate*.<sup>225</sup> *Parents Involved*, the recent case adjudicating a

221. See *Clinton v. Jones*, 520 U.S. 681 (1997).

222. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

223. Some readers might complain that I have fallen into the trap of distinguishing between ideology on the one hand and law on the other, as if they are analytically distinct. See, e.g., BAUM, *supra* note 12, at 10; Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility*, at 20, available at <http://papers.ssrn.com/abstract=1393362>, Posner, *supra* note 10, at 43. These complaints are both true and inevitable. In fact, however, my goal here – consistent with these authors – is to acknowledge that ideology, especially on the Supreme Court, is a factor in the Justices' decisions, while rejecting attempts to describe Supreme Court cases *only* in ideological terms.

224. See *Nomination of Judge John G. Roberts, Jr.*, *supra* note 1; *Nomination of Judge Sonia Sotomayor*, *supra* note 2; see also discussion *supra*, Part I.

225. Some might contest this assertion, claiming, for example, that originalism and textualism can provide objective and non-ideological answers. See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Original-*

challenge to the Louisville and Seattle schools' voluntary desegregation efforts is a good example.<sup>226</sup> Although there were legal arguments to be made, the key textual sources – both *Brown v. Board of Education* and the Constitution itself – failed to explicitly dictate a result.<sup>227</sup> Ultimately, therefore, the outcome was determined by the Justices' political judgments, informed by their value-laden understanding of the meaning of *Brown*.<sup>228</sup> The case could not have been decided in the absence of these judgments.

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*ism*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN G. BREYER, *ACTIVE LIBERTY* (2005)) (arguing that textualism-originalism “is not an ideological position, but one that safeguards the distinction between law and politics” and that “in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance”). Such an approach, however, suffers from the same hidden subjectivity as does the Supreme Court Database’s coding systems. Value judgments must still be made, but they will be masked by a veneer of neutrality. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

226. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007).

227. See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008).

228. Chief Justice Roberts’s plurality opinion attempted to present its conclusion that race-based decisionmaking by school districts is virtually always unconstitutional as if it were required by value-neutral legal reasoning and reliance on *Brown*. This aspect of the opinion has been widely criticized, for example, as “disingenuous,” Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts’s Reinterpretation of Brown*, 691 OHIO ST. L.J. 791, 793 (2008), for “pretend[ing] . . . that invalidation of the . . . programs was compelled by . . . *Brown*,” POSNER, *supra* note 10, at 313, and for failing to discuss the factual context of *Brown*, “an omission [that] is historically and intellectually misleading, if not dishonest.” Vikram David Amar, *The Supreme Court’s Problematic Use of Precedent Over the Past Term: Why Overruling or Refashioning May, In Some Cases, Be Better than Selective Interpretation*, FindLaw, July 20, 2007, <http://writ.news.findlaw.com/amar/20070720.html>. Such criticism of the opinion was not limited to those who disagreed with its conclusions. In a *Harvard Law Review* article, Fourth Circuit Judge J. Harvie Wilkinson, in full agreement with Chief Justice Roberts’s plurality opinion, expresses a wish that the opinion had engaged in a discussion of *Brown*’s meaning in historical context. J. Harvie Wilkinson III, *The Seattle and Louisville Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007). He concludes,

The whole sad saga of the early African American experience teaches that racial decisions by the state remain unique in their capacity to demean. To squeeze human beings of varying talents, interests, and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least. To seize upon this one proven odious criterion of judgment as the basis for preferment of some and disfavor for others, and as a potential determinant of the destiny of all, is to commit this country to the perpetuation of means employed in the

Arguing for the legitimacy of ideological or political considerations in judging in certain types of cases does not mean that one must accept any result in such a case as *right*.<sup>229</sup> What it does mean, however, is that the most powerful arguments about the case must explicitly incorporate policy and political judgments. One can argue, for example, as Judge Posner does, that *Parents Involved* was wrongly decided because it prevents school districts from experimenting with the “vexing issue of race”<sup>230</sup> or, as Justice Breyer did, that the school districts had compelling interests in considering race in school assignments, including the need to “help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds . . . .”<sup>231</sup> One can argue, as Justice Kennedy did, that we must take account of race now in order to keep it from mattering later but that the specific race-based school assignments at issue were not justified.<sup>232</sup> Or one can argue for the colorblind Constitution, as Justice Thomas did, pointing out that “if our history has taught us anything, it has taught us to beware of elites bearing racial theories.”<sup>233</sup> No one person can agree with all of these arguments, but we *can* agree that they are the kinds of arguments that are appropriate for the Justices to make in a case like *Parents Involved*.<sup>234</sup>

But not every case is like *Parents Involved*. Even in the Supreme Court, there are many cases that do not appear to have been considered by the Justices primarily in ideological terms. So this discussion returns us to the normative questions raised in this Article’s introduction: when is it legitimate for the Justices to make decisions motivated in whole or in part by ideology, and do we think that they strike the right balance between ideology and other considerations? A focus on these questions suggests that, rather than trying to identify a decision’s liberalness or conservativeness, empirical scholars might instead focus on the relative importance or salience of ideology – to the Justices themselves – in different cases.<sup>235</sup> In so doing, empirical scholars

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darkest hours of its history. From this, the Fourteenth Amendment was supposed to be the instrument of deliverance.

*Id.* at 163-64.

229. Like many other commentators, I strongly reject the plurality opinion and agree with Justice Breyer’s dissent. But a discussion of the merits of the case is beyond the scope of this Article.

230. POSNER, *supra* note 10, at 313.

231. *Parents Involved*, 551 U.S. at 843 (Breyer, J., dissenting).

232. *Id.* at 782-98 (Kennedy, J., concurring in part and concurring in the judgment).

233. *Id.* at 780-81 (Thomas, J., concurring).

234. See *supra* note 228 for a discussion of Judge Wilkinson’s political argument in support of the *Parents Involved* plurality opinion.

235. Cf. Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility*, at 13, available at <http://papers.ssrn.com/abstract=>

can move beyond the basic assumption that ideology is almost always the dominant factor in judicial decisionmaking or that it is the most important aspect of a case. Analyzing the role of ideology in such a nuanced and functional way would begin to acknowledge the complexity of judicial decision-making in ways that legal scholars have long called for.<sup>236</sup>

### B. *Is Measuring Ideological Salience Possible?*

However valuable the concept of ideological salience might be, it is not likely to be embraced by empirical scholars unless there are relatively objective ways to identify and measure it. In this subpart, I explore some of the factors that may help scholars do just that. The specifics here are more conceptual than functional, and I do not offer a measure that other scholars can begin to use. Nonetheless, I identify a number of objectively measurable factors that can together provide at least a partial picture of the salience of ideology in different Supreme Court cases.<sup>237</sup>

#### 1. Possible Indicators of Ideological Salience

##### a. Distance from the Court's Median

One lesson of Sag and Jacobi's efforts is that the relative location of the median Justice in the majority can be a useful indicator of the ideological orientation of a case, as the comparison of the two voting rights cases showed.<sup>238</sup> As discussed in Part IV, however, the specific Martin-Quinn scores of these median Justices, attached to each case as its Jacobi-Sag score of ideology, do not add substance to this understanding. In fact, those scores probably overstate the ideological distance between the two cases.<sup>239</sup> But

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1393362 (asserting that it is a mistake to "assume that the relationship between 'judicial politics' and 'law' is or should be the same . . . even for judges on the same court in every type of case").

236. See, e.g., *id.*; Shapiro, *supra* note 47; Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261 (2006); Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 522-25 (2005).

237. I do not focus here on ideological salience for each Justice. But obviously, in any given case, different Justices may rely on ideology to greater or lesser extents.

238. See Jacobi & Sag, *supra* note 147; see also *supra* Part IV.A. In those two 5-4 decisions, Justice O'Connor was the swing vote, and all other Justices voted with their customary blocs. So in *Bush v. Vera*, with a conservative majority, the median Justice is Justice Rehnquist. In *Easley*, on the other hand, in which the liberal bloc is in the majority, the median Justice is Justice Ginsburg. Knowing nothing else about these cases other than who the majorities' median Justices are, we have some reasonably good information about their relative ideological orientation. See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996).

239. See *supra* Part IV.A.

there is valuable information in the number of places the median Justice in the majority is from the median Justice on the Court. That information is *not* how liberal or conservative the case is, but instead is suggestive of the extent to which the Justices relied on ideology in their resolution of the case. In a unanimous case, the median Justice is the median Justice on the Court. In *Bush v. Vera*, in contrast, the median Justice in the majority is the third most conservative Justice, while in *Easley* the majority's median is the third most liberal member of the Court. Knowing that the median Justice is as far away from the Court's median as possible on a nine-member Court can help to orient us to the ideological *intensity* of the case.

#### b. Disordered Voting

As the discussion of disordered cases demonstrates, information about the relative position of the majority's median Justice is not enough, by itself, to tell us how central ideology might have been to the decision in the case.<sup>240</sup> A majority made up of Chief Justice Rehnquist and Justices Scalia, Thomas, Ginsburg, and Stevens has the same median Justice – Chief Justice Rehnquist – as a majority consisting of Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy (the majority in *Bush v. Vera*). The insight that EKL capitalize on in their concept of disordered voting is that these two majorities do not strike us as having the same ideological valence – even if we know nothing else about the cases. To identify ideological salience, then, in addition to knowing how far from the Court's median Justice the majority's median is, we might want to know if a case is disordered and whether it is very disordered or only slightly so – information provided by EKL's disorder scores. The scores can help identify cases that divided the Court along predictable ideological lines and cases that did not.<sup>241</sup> Specifically, the more disordered a case is, the less likely it is to be ideologically salient.

#### c. Vote Margin

Not all ordered cases are necessarily ideologically salient, however. A case with only one or two dissenters, for example, may be a perfectly ordered case. Where Justice Stevens alone dissents, for example, there is no disorder.

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240. See *supra* Part IV.B.

241. Disorder may not be the only way to identify the less ideologically salient cases. An ordered case is one in which Justice Thomas dissents alone. But one might wonder why Justice Scalia, his frequent coalition partner, did not join him. An ordered case is likewise one in which Justices Stevens, Ginsburg, and Souter are all in dissent, with Breyer in the majority. The same question arises – since Breyer's ideal point is so close to Souter's and Ginsburg's that from Term to Term they switch places on the spectrum, does ideology explain the voting? So we might want to look at deviations not only from order but also from traditional coalitions to help us identify cases that lack ideological salience.

But if all eight of the other Justices agree on the outcome, it seems unlikely that all eight perceived the case largely ideologically. At least on the Rehnquist 7 court, generally speaking, an ordered 5-4 decision is likely much more ideologically salient than is an ordered 7-2 decision. And as others have observed, unanimous cases are particularly unlikely to have been ideological salient. In addition to a case's disorder score, then, we might also want to look at the vote margin.

#### d. Other Possible Variables

There are other possible indicators of ideological salience. The widely used measure of salience in a more public sense – appearance on the front page of *The New York Times* the day after announcement – often denotes ideologically fraught decisions.<sup>242</sup> Likewise, a Justice's decision to read his or her dissent from the bench, especially in a close case, often signals a pitched ideological battle on the Court.<sup>243</sup> And, of course, scholars may be able to identify other factors that should be considered.

## 2. Challenges in Using the Indicators

There are, of course, challenges to be overcome in developing a functional measure of ideological salience. Among other things, some of the variables discussed above need to be refined. For example, EKL's measure of disordered voting, which is based on the Martin-Quinn scores, undoubtedly suffers from the problem of artificial precision.<sup>244</sup> Instead of relying on the specific disorder scores, then, we might want to divide the scores into categories – highly disordered, somewhat disordered, slightly disordered, etc.<sup>245</sup> Likewise, there are important decisions to be made about how and whether to account for separate opinions like concurrences only in the judgment, which might signal ideological disagreement.<sup>246</sup> We might also want to consider

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242. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72-73 (2000).

243. Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court* (forthcoming) (working title).

244. See *supra* Part IV.A for a discussion of the problem of too much precision in the Martin-Quinn scores.

245. An additional consideration in using the disorder scores is that EKL calculated the scores by natural court, not by Term, and calculated them only for natural courts that existed for at least three Terms. Edelman, Klein & Lindquist, *supra* note 194.

246. In this Article, I have followed the convention of counting all votes for a particular outcome together. So, for example, I have counted *Clinton v. Jones* as a unanimous case, even though Justice Breyer concurred only in the judgment and was quite critical of the majority opinion. But this convention may not be appropriate when identifying ideological salience.

whether and how factors indicating ideological salience might vary in different eras of the Court. Although ideologically contentious cases have recently been decided with a 5-4 vote, for example, for some earlier eras of the Court, different vote margins might be more indicative of ideological salience.

Identifying (some of) the objective indicators of ideological salience of course leaves open the question of how to use those indicators. There is no scientific way to aggregate them into a single measure of ideological salience. Nonetheless, to get a sense of whether, together, the factors described above identify cases that seem intuitively to be more ideologically driven than others, I put them together into a “salience score.” The specifics of the aggregation can be found in Appendix B. The primary guiding principle, however, was that no single variable should completely dominate. To emphasize, this method is entirely experimental, designed to evaluate qualitatively whether my general approach to identifying ideological salience is on the right track. I am not proposing a measure that scholars can begin to use.

For each of the 95 cases in my dataset, I calculated a “salience score” based on the factors I identified. A list of the cases, ordered by salience score, is in Appendix B. The highest (most salient) score was 2.875, and the lowest (least salient) was -2.525. Looking at the cases with the highest scores on this measure and working down to the lowest scores, the list generally comported with my sense of which cases were the most ideologically salient. The three cases with the highest scores were *Bush v. Vera* and *Easley*, the two hotly contested voting rights cases discussed earlier, and *Printz*, the controversial Brady Bill case.<sup>247</sup> All of these cases were 5-4 decisions, and all involved some of the Rehnquist 7 court’s most contested issues – issues of race and voting rights for *Bush* and *Easley* and federalism for *Printz*. And, as expected, unanimous cases were, for the most part, clustered at the bottom of the list, with a few high profile ones, such as *Clinton v. Jones*, higher up.

The differences in salience scores between cases with similar subject matter were also generally consistent with what one might predict. *Grubart* and *Yamaha*, the two maritime law cases, both had very low salience scores (-2.275 and -2.525 respectively), as did *Rubin* and *Madigan*, the two unanimous First Amendment cases (both -2.525). On the other hand, *Buckley*, the First Amendment case challenging Colorado’s requirements for petitions on voter initiatives and in which the Court split into unusual coalitions, received a higher score (-0.465), indicating somewhat more ideological salience, but not such a high score as to suggest that ideology dominated the decision.

A comparison of the scores of two high-profile War on Terror cases is likewise instructive. In both *Rasul v. Bush* and *Hamdi v. Rumsfeld*, the Court held that War on Terror detainees had the right to contest their detention.<sup>248</sup>

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247. See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Printz v. United States*, 521 U.S. 898 (1997); *Bush v. Vera*, 517 U.S. 952 (1996).

248. *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 502 (2004).

Although the cases were decided the same day, their voting coalitions were quite different. *Rasul*, which involved a foreign national detained at Guantanamo Bay, was an ordered 6-3 decision, with Chief Justice Rehnquist and Justices Scalia and Thomas in dissent. *Hamdi*, however, which involved an American citizen held in South Carolina, was highly disordered. Justice Thomas alone would have denied Hamdi the right to challenge his detention. Justices Scalia and Stevens dissented together, but they took the opposite position, arguing that the Court did not go far enough in asserting limits on the government's ability to detain U.S. citizens. Based on these voting coalitions, it appears that *Hamdi* had less ideological salience than did *Rasul*. On the other hand, one would expect a case on such a divisive and high-profile subject to carry a fair amount of ideological baggage, regardless of the voting line-up. Consistent with these expectations, both cases have relatively high salience scores, but *Rasul*'s score (2.125) is higher than *Hamdi*'s (1.625).

Again, I do not offer this "salience score" for scholars to begin using. It is undertheorized and unproven. Future research and experimentation is needed to make such an approach functional for researchers. Whatever its limitations, however, the approach offers the possibility of new insights into Supreme Court decisionmaking. Specifically, such an approach may well make it possible to challenge the traditional assumption of empirical scholars that ideology dominates Supreme Court decisionmaking without either abandoning the project of empirical legal scholarship or attempting to identify every non-ideological factor that the Justices might consider (a plainly impossible task).

### C. Learning from Ideological Salience

Distinguishing between cases of high and low ideological salience opens the door to a variety of research questions through which scholars can better investigate the relative role of law, legal indeterminacy, and institutional considerations in different kinds of cases. For example, we could examine whether the Justices use different kinds of arguments in more ideologically salient cases than in less ideologically salient ones. The recent work of Professors Brudney and Ditslear – examining the Court's use of legislative history and canons of statutory construction in the somewhat ideologically charged area of workplace law compared with the more technocratic area of tax law – certainly suggests that such comparisons would be fruitful avenues for more research.<sup>249</sup>

Identifying ideological salience also would allow us to study how the subject matter of high-ideological-salience cases changes over time. After all, one thing we learn from Harvey and Woodruff's work is that historical context matters – and, I argue, it *should* matter – for evaluating the ideologi-

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249. See generally Brudney & Ditslear, *supra* note 8.



cal nature of a case.<sup>250</sup> As Professors Epstein and Segal have argued, for example, the ideological significance of the First Amendment has shifted since the days of the Warren Court.<sup>251</sup> Today, while we continue to see contentious First Amendment cases, there are many First Amendment cases that, even when they are high profile, do not closely divide the Court (or do not divide it at all) and do not seem to fall out along predictable ideological lines. *Buckley*,<sup>252</sup> *Rubin*,<sup>253</sup> *Schenck*,<sup>254</sup> and *Madigan*<sup>255</sup> all illustrate this point. Similarly, charting shifts in ideological salience creates the possibility of studying how particular doctrines move from being controversial to being mainstream or vice versa.

Identifying subject matter or cases likely to be highly ideologically salient on a particular Court might also help us study strategic behavior. Specifically, we may be able, more systematically, to identify cases, like *NAMUDNO* or *Clinton v. Jones*, that initially appear ideologically salient due to their subject matter but that end with unanimous decisions or lopsided majorities. Such cases suggest the possibility of comparing measures or predictions of ideological salience *ex ante* – before the decision – with measures, like the one I have proposed, that seek to identify ideological salience *ex post*.

Perhaps most importantly, however, thinking about cases in terms of ideological salience allows us to make some normative judgments. We can focus on those cases that are ideologically salient, for example, and within that group, we can face the difficult but important question of whether the Justices' reliance on ideology in those cases was appropriate – whether it was ideologically legitimate – and why. When and how should the Justices make political decisions? Should they adopt (or strengthen) norms of deference to the political branches when they confront such cases? How much candor about what they are doing is appropriate when they decide them? These questions are not empirical questions. But by shifting their focus to ideological salience, empirical scholars can meaningfully contribute to these important debates.

## VI. CONCLUSION

In this Article, I have critiqued empirical scholars' efforts to identify and assess ideology in judging. But I have also tried to build on those efforts and to propose a new way for empirical scholars to think about ideology. This new way would not give us objective and consistent measures of how far to the left or right particular cases are. Rather, it would allow us to evaluate the

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250. See generally Harvey & Woodruff, *supra* note 51.

251. See generally Epstein & Segal, *supra* note 63.

252. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

253. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

254. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

255. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003).

likelihood that ideology played a large role in a particular case, a question that has long been ignored or assumed away in empirical legal scholarship.

Distinguishing between cases that are and are not ideologically salient opens the door to a whole new set of empirical questions. With that information, we can, for example, work to identify *other* factors and dimensions that might be of importance to all or some of the Justices. We can also evaluate and compare the roles of law and legal reasoning in ideologically salient and non-salient cases, and we might be better able to identify cases in which there is a strong likelihood of strategic behavior.

Most importantly, however, identifying ideologically salient cases brings the promise of meaningful normative discussions about whether that salience and the Justices' responses to it are appropriate. These discussions would join empirical legal scholars in important conversations with the rest of the legal academy. And perhaps these discussions could even add candor to the public debate about the role of ideology in the work of the Supreme Court. Ideally, such candor could make confirmation possible for a Supreme Court nominee who professes that ideology – or policy judgments – inevitably will play some role in his or her work, allowing the Senate and the public to evaluate the nature of that ideology and *how* the nominee is likely to use it. A public debate and a confirmation process that no longer require disingenuous claims of absolute neutrality would be both more honest and more democratic. Contributing to such developments is a worthy goal for empirical legal scholarship.

## APPENDIX A

*Cases in Recoding Sample (Chronological Order)*

<b>L.Ed.2d cite</b>	<b>Case Name and U.S. Reports Cite</b>
130/0219	Austin v. United States, 513 U.S. 5 (1994).
130/0454	Reich v. Collins, 513 U.S. 106 (1994).
130/1024	Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).
131/0324	Whitaker v. Super. Ct., 514 U.S. 208 (1995).
131/0395	Heintz v. Jenkins, 514 U.S. 291 (1995).
131/0403	Celotex Corp. v. Edwards, 514 U.S. 300 (1995).
131/0532	Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
133/0578	Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996).
133/0611	Comm'r v. Lundy, 516 U.S. 235 (1996).
134/0034	Norfolk & W. Ry. Co. v. Hiles, 516 U.S. 400 (1996).
134/0577	Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).
135/0036	Loving v. United States, 517 U.S. 748 (1996).
135/0248	Bush v. Vera, 517 U.S. 952 (1996).
135/0843	Bd. of County Comm'rs. v. Umbehr, 518 U.S. 668 (1996).
136/0347	Ohio v. Robinette, 519 U.S. 33 (1996).
136/0696	Babbitt v. Youpee, 519 U.S. 234 (1997).
137/0001	Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357 (1997).
137/0041	Maryland v. Wilson, 519 U.S. 408 (1997).
137/0055	Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997).
137/0063	Lynce v. Mathis, 519 U.S. 433 (1997).
137/0093	Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465 (1997).
137/0281	Bennett v. Spear, 520 U.S. 154 (1997).
137/0945	Clinton v. Jones, 520 U.S. 681 (1997).
137/0980	Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).
138/0091	Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893 (1997).
138/0120	Gilbert v. Homar, 520 U.S. 924 (1997).
138/0162	Mazurek v. Armstrong, 520 U.S. 968 (1997).
138/0285	Abrams v. Johnson, 521 U.S. 74 (1997).
138/0914	Printz v. United States, 521 U.S. 898 (1997).
139/0433	Jefferson v. City of Tarrant, 522 U.S. 75 (1997).

- 139/0702 Buchanan v. Angelone, 522 U.S. 269 (1998).  
 140/0350 Almendarez-Torres v. United States, 523 U.S. 224 (1998).  
 140/0542 Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998).  
 140/0759 Crawford-El v. Britton, 523 U.S. 574 (1998).  
 140/0875 Ark. Educ. Television Comm'n. v. Forbes, 523 U.S. 666 (1998).  
 140/0970 Calderon v. Ashmus, 523 U.S. 740 (1998).  
 141/0222 Am. Tel. & Tel. Co. v. Cent. Office, Inc., 524 U.S. 214 (1998).  
 142/0599 Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999).  
 143/0818 Wilson v. Layne, 526 U.S. 603 (1999).  
 144/0067 City of Chicago v. Morales, 527 U.S. 41 (1999).  
 144/0347 Martin v. Hadix, 527 U.S. 343 (1999).  
 144/0494 Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).  
 146/0236 Garner v. Jones, 529 U.S. 244 (2000).  
 146/0374 Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).  
 146/0530 Nelson v. Adams USA, Inc., 529 U.S. 460 (2000).  
 146/0542 Slack v. McDaniel, 529 U.S. 473 (2000).  
 146/0561 Beck v. Prupis, 529 U.S. 494 (2000).  
 146/0707 Fischer v. United States, 529 U.S. 667 (2000).  
 147/0105 Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).  
 147/0374 Arizona v. California, 530 U.S. 392 (2000).  
 148/0373 Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).  
 148/0576 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs., 531 U.S. 159 (2001).  
 149/0164 Traffix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2001).  
 149/0430 Easley v. Cromartie, 532 U.S. 234 (2001).  
 149/0590 Daniels v. United States, 532 U.S. 374 (2001).  
 149/0674 Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).  
 151/0489 Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).  
 151/0659 Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002).  
 151/0820 Lee v. Kemna, 534 U.S. 362 (2002).  
 152/0437 United States v. Craft, 535 U.S. 274 (2002).  
 152/0701 Verizon Commc'ns., Inc. v. F.C.C., 535 U.S. 467 (2002).  
 152/0888 Alabama v. Shelton, 535 U.S. 654 (2002).  
 153/0027 Delvin v. Scardelletti, 536 U.S. 1 (2002).

- 154/0491 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).
- 154/0501 *Abdur'rahman v. Bell*, 537 U.S. 88 (2002).
- 154/0588 *Satazahn v. Pennsylvania*, 537 U.S. 101 (2003).
- 154/0653 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).
- 155/0001 *Moseley v. Secrete Catalogue, Inc.*, 537 U.S. 418 (2003).
- 155/0017 *Boeing Co. v. United States*, 537 U.S. 437 (2003).
- 155/0164 *Smith v. Doe*, 538 U.S. 84 (2003).
- 155/0376 *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).
- 155/0535 *Virginia v. Black*, 538 U.S. 343 (2003).
- 155/0793 *Ill. ex rel. Madigan v. Telemarketing Assocs. Inc.*, 538 U.S. 600 (2003).
- 155/0933 *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701 (2003).
- 155/0946 *City of L.A. v. David*, 538 U.S. 715 (2003).
- 155/1017 *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003).
- 156/0544 *Stogner v. California*, 539 U.S. 607 (2003).
- 157/0112 *Doe v. Chao*, 540 U.S. 614 (2004).
- 158/0291 *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).
- 158/0450 *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004).
- 158/0659 *Dretke v. Haley*, 541 U.S. 386 (2004).
- 158/0764 *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).
- 158/0787 *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).
- 159/0548 *Rasul v. Bush*, 542 U.S. 466 (2004).
- 159/0578 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- 159/0643 *Missouri v. Seibert*, 542 U.S. 600 (2004).
- 160/0611 *Whitfield v. United States*, 543 U.S. 209 (2005).
- 161/0066 *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).
- 161/0563 *Rousey v. Jacoway*, 544 U.S. 320 (2005).
- 161/0651 *Small v. United States*, 544 U.S. 385 (2005).
- 161/0876 *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).
- 161/0953 *Deck v. Missouri*, 544 U.S. 622 (2005).
- 162/0407 *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005).

- 162/0418 Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv.  
Comm'n, 545 U.S. 440 (2005).  
162/0982 Medellin v. Dretke, 544 U.S. 660 (2005).

## APPENDIX B

*Cases in Recoding Sample by Ideological Salience*

**Note on Methodology:** To create these scores, I started by identifying the median Justice of the majority and calculating the number of places he or she was from the median of the Court. Taking the absolute value of that number, I subtracted the disorder score if the case was not unanimous or 1.4 if it was (just .01 higher than the highest disorder score in my sample). I also subtracted the vote margin (divided by eight), added one if the case was reported on the front page of *The New York Times*, and added one if a dissent was read from the bench. The guiding principles were to combine the various factors I identified, giving somewhat more weight to large disorder scores, unanimity, and majorities' median Justices who are far from the median Justice of the Court, but without allowing any single factor to dominate.

Because the disorder scores, derived from the Martin-Quinn scores, extend, in some cases, many places past the decimal, I rounded to three digits after the decimal. In my view, the particular numbers that result here are not intrinsically informative. What is more important is the order in which the cases are listed and, to some extent, the relative magnitude of the distances between them. Please note that I do not offer these salience scores as a new methodology that is ready for widespread use. To the contrary, the approach is, at this stage, experimental and unrefined, but it is a first step towards a new way for empirical scholars to assess the ideology in Supreme Court cases.

<b>Ideological Salience Score</b>	<b>Case Name and U.S. Reports Cite</b>
2.875	Printz v. United States, 521 U.S. 898 (1997).
2.875	Easley v. Cromartie, 532 U.S. 234 (2001).
2.875	Bush v. Vera, 517 U.S. 952 (1996).
2.625	City of Chicago v. Morales, 527 U.S. 41 (1999).
2.125	Rasul v. Bush, 542 U.S. 466 (2004).
1.875	Daniels v. United States, 532 U.S. 374 (2001).
1.875	Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs., 531 U.S. 159 (2001).
1.875	Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).
1.875	Stogner v. California, 539 U.S. 607 (2003).
1.875	Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

- 1.875 Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).  
 1.875 Abrams v. Johnson, 521 U.S. 74 (1997).  
 1.875 Alabama v. Shelton, 535 U.S. 654 (2002).  
 1.825 Crawford-El v. Britton, 523 U.S. 574 (1998).  
 1.825 Missouri v. Seibert, 542 U.S. 600 (2004).  
 1.750 Small v. United States, 544 U.S. 385 (2005).  
 1.625 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).  
 1.608 Buchanan v. Angelone, 522 U.S. 269 (1998).  
 1.445 Medellin v. Dretke, 544 U.S. 660 (2005).  
 1.375 Virginia v. Black, 538 U.S. 343 (2003).  
 1.125 Garner v. Jones, 529 U.S. 244 (2000).  
 1.125 Mazurek v. Armstrong, 520 U.S. 968 (1997).  
 1.125 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).  
 1.108 Doe v. Chao, 540 U.S. 614 (2004).  
 1.108 Smith v. Doe, 538 U.S. 84 (2003).  
 1.077 Till v. SCS Credit Corp., 541 U.S. 465 (2004).  
 0.952 Devlin v. Scardelletti, 536 U.S. 1 (2002).  
 0.952 Lee v. Kemna, 534 U.S. 362 (2002).  
 0.903 Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003).  
 0.557 Arizona v. California, 530 U.S. 392 (2000).  
 0.452 Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997).  
 0.375 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).  
 0.375 Celotex Corp. v. Edwards, 514 U.S. 300 (1995).  
 0.375 Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996).  
 0.375 Fischer v. United States, 529 U.S. 667 (2000).  
 0.375 Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).  
 0.375 Slack v. McDaniel, 529 U.S. 473 (2000).  
 0.375 Boeing Co. v. United States, 537 U.S. 437 (2003).  
 0.375 Martin v. Hadix, 527 U.S. 343 (1999).  
 0.375 Deck v. Missouri, 544 U.S. 622 (2005).  
 0.328 Beck v. Prupis, 529 U.S. 494 (2000).  
 0.104 Dretke v. Haley, 541 U.S. 386 (2004).  
 -0.061 Almendarez-Torres v. United States, 523 U.S. 224 (1998).  
 -0.171 Maryland v. Wilson, 519 U.S. 408 (1997).  
 -0.268 Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 440 (2005).  
 -0.375 Abdur'Rahman v. Bell, 537 U.S. 88 (2002).  
 -0.375 Wilson v. Layne, 526 U.S. 603 (1999).  
 -0.375 Jefferson v. City of Tarrant, 522 U.S. 75 (1997).  
 -0.375 Babbitt v. Youpee, 519 U.S. 234 (1997).  
 -0.375 Whitaker v. Super. Ct., 514 U.S. 208 (1995).

- 0.375 Ohio v. Robinette, 519 U.S. 33 (1996).
- 0.375 Nixon v. Mo. Mun. League, 541 U.S. 125 (2004).
- 0.388 Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803 (2003).
- 0.465 Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999).
- 0.580 Verizon Commc'ns., Inc. v. F.C.C., 535 U.S. 467 (2002).
- 0.625 Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893 (1997).
- 0.705 Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).
- 0.750 Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214 (1998).
- 0.942 United States v. Craft, 535 U.S. 274 (2002).
- 1.125 Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).
- 1.525 Clinton v. Jones, 520 U.S. 681 (1997).
- 1.525 Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).
- 1.900 Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005).
- 1.900 Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002).
- 1.982 Comm'r v. Lundy, 516 U.S. 235 (1996).
- 2.275 Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).
- 2.400 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
- 2.525 Reich v. Collins, 513 U.S. 106 (1994).
- 2.525 Bennett v. Spear, 520 U.S. 154 (1997).
- 2.525 Norfolk & W. Ry. Co. v. Hiles, 516 U.S. 400 (1996).
- 2.525 Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
- 2.525 Ill. *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003).
- 2.525 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).
- 2.525 Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465 (1997).
- 2.525 Nelson v. Adams USA, Inc., 529 U.S. 460 (2000).
- 2.525 Lynce v. Mathis, 519 U.S. 433 (1997).
- 2.525 Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003).
- 2.525 Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).
- 2.525 Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005).



- 2.525 *Atl. Mut. Ins. Co. v. Comm’r*, 523 U.S. 382 (1998).
- 2.525 *Calderon v. Ashmus*, 523 U.S. 740 (1998).
- 2.525 *Household Credit Servs. v. Pfennig*, 541 U.S. 232 (2004).
- 2.525 *Loving v. United States*, 517 U.S. 748 (1996).
- 2.525 *Whitfield v. United States*, 543 U.S. 209 (2005).
- 2.525 *Heintz v. Jenkins*, 514 U.S. 291 (1995).
- 2.525 *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997).
- 2.525 *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).
- 2.525 *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003).
- 2.525 *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997).
- 2.525 *City of L.A. v. David*, 538 U.S. 715 (2003).
- 2.525 *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001).
- 2.525 *Austin v. United States*, 513 U.S. 5 (1994).
- 2.525 *Rousey v. Jacoway*, 544 U.S. 320 (2005).
- 2.525 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).
- 2.525 *Gilbert v. Homar*, 520 U.S. 924 (1997).