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Examining the Success of the U.S. Solicitor General

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Abstract

In political science the well-known “Attitudinal Model” of legal decision making dictates that judges’ sincere policy preferences drive legal outcomes. In contrast, the celebrated “Selection Hypothesis” from the law and economics literature suggests that litigants carefully consider factors affecting potential case success (including judicial ideology) and accordingly choose to settle cases in which legal outcomes can be readily predicted in the name of efficiency. Thus, judges end up adjudicating a non-random set of cases which, in the typical situation, should not lend themselves to ideological decision making. From this perspective, the influence of Supreme Court justices’ ideological preferences on outcomes should be obviated by the forward thinking decisions of mindful litigants. We are left with two dominant theories on jurisprudential outcomes that appear to be at odds with each other. We endeavor to address this situation by incorporating litigant selection effect considerations into a basic attitudinal account of Supreme Court justice decision making. Our primary thesis that the influence of judicial ideology on legal outcomes is conditioned on case sorting decisions by litigants that precede the justices’ case decisions on merits. We also extend our assessment of this thesis by evaluating our basic model on a subset of cases involving the Court’s most formidable litigator – the federal government.
Political scientists have long considered the role of litigants and their attorneys in understanding and explaining legal outcomes. Such studies have considered the impact of these actors in state courts (Brace and Hall 2001), federal trial courts (Epstein and Rowland 1991), federal courts of appeals (Songer, Sheehan, and Haire 1999) and, finally, the U.S. Supreme Court (Sheehan, Mishler, and Songer 1992). However, with regard to the U.S. Supreme Court, the dominant model for explaining legal outcomes has been the Attitudinal Model (Segal and Spaeth 1993, 2002), whose proponents steadfastly maintain that it is the ideological preferences of the justices – and not the actions or decisions of litigants or their attorneys - that drive legal outcomes on the High Court. In short, justices’ votes are a product of their ideological predilections and Court outcomes are dictated by the justices’ cumulative ideologies.

However, is it possible that the actions of litigants and their attorneys may shape the manner in which justices’ attitudes influence Supreme Court legal outcomes? In fact, one of the most prominent theories from the field of law and economics suggests that this may very well be the case. Priest and Klein’s (1984) celebrated, and often controversial, “Selection Hypothesis” asserts that because litigants carefully consider factors affecting potential case success (including judicial ideology) and accordingly choose to settle cases in which legal outcomes can be readily predicted in the name of efficiency -- judges end up adjudicating a non-random set of cases. As a result, those cases that are not settled, in the typical situation, should not lend themselves to ideological decision making.\footnote{In their seminal article Priest and Klein did not focus on the effect of judicial ideology, but instead considered it among a number of potential predictors of legal outcomes. Their main argument was that a given litigant’s (e.g., plaintiff) victories would hover around fifty percent regardless of the relevant legal standard or judicial ideology – due to the sorting mechanism that preceded trial. Their argument was supported by the analysis they conducted in a number of trial level venues where legal outcomes were found to be near the hypothesized fifty percent mark.} Thus, from Priest and Klein’s perspective, the influence of justices’ ideological preferences on outcomes should be obviated by the forward thinking
decisions of mindful litigants on whether to settle or litigate. Presumably, strategic litigants would settle before Supreme Court adjudication in those cases in which outcomes can be reasonably prognosticated so as to avoid further extending the outlay of financial and other costs typically associated with bringing cases in the High Court. Indeed, Friedman (2006) warns that accounts of Supreme Court outcomes which fail to account for such litigation selection processes run the risk of providing incomplete or inaccurate conclusions. How can a prominent theory on litigation dynamics such as that posited by Priest and Klein, which seems to contradict the dominant political science account of Supreme Court decision making, come to receive only scant attention in the political science literature? To be sure, it is most likely the case that this anomaly simply constitutes an honest and understandable interdisciplinary oversight - an all too frequent occurrence in a time in which discreet disciplinary literatures often pass each other blithely like ships in the night. Still, as Epstein and King warn, our failure to learn from prior studies “decreases the odds that the ‘new’ research will be as successful as the original because the research is, in effect, ignoring the collective wisdom.” (2002, 58)

In this paper we endeavor to address this situation by incorporating litigant selection effect considerations into a basic attitudinal account of Supreme Court justice decision making. We begin in the next section of this paper by providing a more detailed explanation of the “Selection Hypothesis” and how it relates to attitudinal approaches of Supreme Court decision making. In the section that follows we outline our approach to integrating litigant selection processes and attitudinal judicial decision making and test our primary thesis that the influence of judicial ideology on legal outcomes is conditioned on the case sorting decisions that precede

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2 For important exceptions see de Figurido (2005), Cross (2003), and Yates and Coggins (2009).
3 To be sure, the fact that Priest and Klein’s theory was originally designed to explain trial court dynamics as opposed to Supreme Court litigation outcomes accounts for some of the interdisciplinary oversight. However, given the aforementioned extensions of their theory to appellate courts (e.g. de Figurido 2005), it is indeed curious that the two theories remain underexplored in studies of the nation’s High Court.
the justices’ case decisions on merits. We also extend our assessment of this thesis by evaluating our basic model on a subset of cases involving the Court’s most formidable litigator – the federal government. In the final section we reflect on the results of our study and discuss the implications of our findings for future research involving attitudinal approaches to explaining court outcomes.

Judicial Attitudes and the Selection of Disputes for Supreme Court Adjudication

The dominant theory of judicial behavior in the field of political science, the Attitudinal Model, developed as a merger of theories combined from legal realism, political science, psychology, and economics (Maltzman, Spriggs, and Wahlbeck 2000). As such, the ideological proclivities of judges play an important role in deciding disputes relative to the facts of a case. Emerging from criticisms of the classic legal model, which holds that judges make decisions based on the facts of a case in relation to relevant rules and doctrinal precedent, the Attitudinal Model challenges the notion that Court decisions hinge entirely on precedent and a legalistic interpretation of statutes or the U.S. Constitution. Segal and Spaeth (1993, 2002) articulate that litigants from both sides of dispute provide arguments that help shape case facts, precedent, and the interpretation of statutory and constitutional provisions to support their positions – justices can easily choose from a given side to support their decision. In sum, the Attitudinal Model recognizes that while legal considerations such as precedent, statutory language, and original intent may inform judges when making decisions, those factors do not fully explain the decisions of the Court. Rather, “justices base their decisions on the merits of the facts of the case juxtaposed against their personal policy preferences” (Segal and Spaeth 2002, 312). By discerning the preferred outcomes of cases and “ideal points” for judges, explanations were
developed for understanding how judges vote for specific outcomes. Investigations of attitudinal influences (Pritchett 1948, Rohde and Spaeth 1976; Schubert 1965, 1974; Segal and Spaeth 1984, 2002; Martin and Quinn 2007) have led to empirical findings confirming the role of attitudes across a variety of policy contexts. The Attitudinal Model recognizes that decision outcomes depend on the goals of judges, the situation, and the decision making environment. It has been in the context of the U.S. Supreme Court that the attitudinal theory has been most successfully applied. Lack of oversight, appointive selection to lifetime terms, and a highly discretionary agenda provide an environment in which U.S. Supreme Court justices are perhaps more able than any other American judicial actors to freely pursue their policy goals.

By focusing primarily on decisions on the merits, however, the Attitudinal Model overlooks the fullness of the extended litigation process that leads to legal outcomes. Viewed as a decision making equation, all courts, to varying degrees (including the U.S. Supreme Court), function as reactive institutions. As an institution designed to interpret law, the Court cannot formally initiate legislation or policymaking. Rather the Court must respond to “the cases that the parties have chosen not to settle” (Cross 2003, 1491). While the Court has the discretion to grant review to only those cases it prefers to consider (Perry 1991), litigants must appeal a lower court decision for the Court to play a role. Disputes presented to the Court for potential adjudication represent only a sample of lower court cases that are appropriate for review -- and those being a non-random sample chosen by the parties rather than the justices.

In contrast to attitudinal approaches, law and economics perspectives on legal outcome dynamics typically focus on the strategic decisions of litigants to bring cases to court or to avoid formal adjudication (settle). The general characteristics of the litigant decision making equation can found in Priest and Klein’s (1984) Selection Hypothesis. In this view, litigants avoid the
financial and personal costs associated with extended litigation where possible, selecting only
those cases for adjudication where the balancing of relative costs and risks do not justify settling,
which is generally considered the more efficient path. Essentially, litigants make a prospective
decision about which cases they can win and which cases they will lose. Where cases are fairly
straightforward and more predictable, litigants typically settle out of court, thereby avoiding
protracted litigation costs. Cases that proceed to courts, on the other hand, tend to be complex
matters where neither party is able to predict an outcome. Where cases have no obvious winner
or loser, plaintiffs and defendants both perceive the case as presenting uncertainty and risk.
Alternatively, such non-straightforward cases may foster very disparate perceptions regarding
the potential outcome for the respective litigants – again, this leads to not settling. The effect of
these difficulties in predicting outcomes is to produce overall adjudication win-rates (either at
trial or on appeal) that are about equal for the original plaintiffs and defendants – commonly
referred to as the “fifty percent rule” – much like the heads or tails call on a flip of a fair coin.

An essential characteristic of the Selection Hypothesis is the absence of a direct effect (on
legal outcomes) for the ideological attitudes of judges. Litigants decide whether to pursue cases
in courts with the preferences of judges in mind (Priest and Klein 1984; Wittman 1988,
Waldfogel 1995). Cases that remain on the docket (i.e., cases not settled) are often complex and
cannot be easily mapped to the ideological inclinations of judges. In such instances, litigants
experience increased uncertainty about the outcome of a case, either because a dispute cannot be
placed on the traditional left-right ideological spectrum or possibly because a case is legally or
factually ambiguous (e.g., a case of first impression). With the strategic sorting (i.e.,
settling/litigating) of cases by litigants prior to cases being considered by courts, judicial
attitudes may become less useful for explaining or predicting court outcomes (e.g., de Figueiredo
2005). If the decisions of judges are driven by their attitudes, then litigants are correct to carefully assess their prospects within a judge’s court and sort out their cases accordingly. As a result, if litigants and their attorneys act rationally and make accurate decisions, then attitudinal proclivities by judges toward policy outcomes should not affect cases actually going forward to trial or appeal.

In the field of law and economics, the fifty percent rule developed in Priest and Klein’s (1984) study remains a particularly influential perspective (Cooter and Ulen 1988; Donohue 1988; Kessler, Meites, and Miller 1996; Posner 1998). Kessler, Meites, and Miller note “[f]ew results in the law and economics of litigation have sparked as much interest as the hypothesis, associated with a seminal article by Priest and Klein, that states that plaintiff win-rates at trial approach 50 percent as the fraction of cases going to trial approaches zero” (1996, 233). Of course, explaining the role of judicial ideology was not central to Priest and Klein’s Selection Hypothesis; rather, they were primarily interested in the dynamics of dispute and settlement. Regardless, their theory has important implications for understanding the role of judicial ideology in legal decision making. With this intersection between the Attitudinal Model and the Selection Hypothesis in mind, we suggest that if decisions of judges are motivated by their desire to shape policy, then litigants play an important role in allowing them an opportunity to do so.

While the Selection Hypothesis developed by Priest and Klein has been enormously influential, there remains significant theoretical debate. Critics of the fifty percent rule within law and economics focus on characteristics of litigation that shape uncertainty, including differing legal environments, asymmetrical levels of litigant information, and varying litigant stakes that motivate litigation where ideally it should be avoided (e.g., Watts 1994). In its strictest form, the Selection Hypothesis predicts that plaintiffs will win fifty percent of the time
when trial rates approach zero – in all cases. Challenging the rule, predictions from game theoretic models point toward a norm of resource disparity among litigants and win-rates that are systematically different from fifty percent (Bebchuk 1984; Watts 1994). However, more finely nuanced analyses of the fifty percent rule, including those that account for asymmetrical information and differential stakes among litigants (among other factors), reason that the prediction of the hypothesis is not a strict assumption, but rather a conception that can be relaxed to accommodate these considerations. Those analyses provide strong empirical support in a number of legal environments that confirm the conceptual viability (if not the literal application) of the fifty percent hypothesis (de Figueiredo 2005; Kessler et al. 1996; Siegelman and Donahue 1995; Waldfogel 1998).

The Selection Hypothesis has been traditionally applied by scholars to decision making in trial courts, rather than the higher levels of the judiciary including the U.S. Supreme Court. With nearly complete discretion over its agenda since the enactment of the Certiorari Act of 1925, the Supreme Court has had a tremendous ability to select cases for review. As a result, the institutional and environmental features of the Court differ from most other federal and state courts. While the power of agenda-setting resides with the justices of the Court, the role of litigants is not insignificant. Litigants decide not only the cases the Court can hear, creating a non-random pool of cases, they also determine the character and quality of the cases available for review. Building upon the Selection Hypothesis, there is sufficient reason to believe litigants are strategic in their decisions to appeal (or not appeal) to the U.S. Supreme Court. When parties lose in lower court settings, they endure significant costs when appealing their case to the U.S. Supreme Court (Songer, Cameron and Segal, 1995; Zorn 2002). At both the certiorari and substantive appeal stages, parties are apt to avoid extending cost outlays where litigation offers a
low probability of success for them. Where decisions are costly (e.g., at the Supreme Court level), parties are expected to pursue settlement or plea alternatives (or internalize losses), especially where the Court (as a whole) is ideologically less sympathetic to a petitioner’s appeal or where a respondent predicts the Court will overturn their lower court victory. To be sure, Supreme Court justices ultimately have a very important hand in determining the cases that come before the Court. Indeed, it is the push-pull dynamic of litigant case sorting versus justice case selection that may promote the deviations from fifty percent outcome rates that we discuss later in the paper.4

The two perspectives described above present two ostensibly competing theories of legal decision outcomes on the Supreme Court. Both theories are well-known and highly influential within their respective fields with both perspectives producing contradictory accounts of legal decision-making. As problematic as both theories might be in relation to the other, even more perplexing is the lack of scholarship seeking to reconcile these perspectives.

**Approach and Research Design: An Integrated Model of Supreme Court Outcomes**

By attempting to reconcile these two seemingly inconsistent views of Supreme Court adjudication, we consider the possibility that both may operate to influence Court outcomes in important, but related ways. As noted previously, there exist a multitude of reasons why litigant win-rates may deviate from Priest and Klein’s famed fifty percent rule, including differential stakes, risk acceptability, asymmetrical information between litigants, and litigant resource

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4 A wealth of judicial politics literature suggests that justices have an interest in taking on cases that are salient, resolve important legal conflicts, and, in fact, do map onto distinct ideological preferences. As we discuss infra, the degree to which justices cull cases from the ‘litigant case-sorted’ pool that have not been ‘cleansed’ of distinct ideological issue dimension may in fact be an important pathway toward bringing ideology back to the High Court decision making process. Of course, justices – like litigants – are also strategic in selecting cases for adjudication. It is entirely possible that a justice may, on occasion, make decisions relating to writs of certiorari that are designed to keep certain ideologically salient cases off the Court’s docket. The result would be to avoid an outcome on the merits with which they do not agree (see Yates and Coggins 2009).
capabilities, to name a few. With regard to litigants’ decisions on whether to appeal to the Supreme Court we can imagine a number of situations under which litigants’ decisions to appeal (rather than settle) may facilitate deviation from the fifty percent rule. In other words, these would be scenarios under which litigants who rationally seek victory on the merits would ordinarily be inclined to not go forward to Supreme Court adjudication. These might include situations in which litigants are more interested in agenda setting and the acclaim that might attach to their cause simply by litigating in the High Court rather than necessarily winning on the merits. It might also include situations in which a litigant is simply stubborn and non-rationally advances their claim to the Supreme Court in the face of near-certain defeat. Of course, the other reasons noted above (asymmetrical information, resources, stakes, etc.) may also lead litigants to appeal decisions (or respond to appeals) which, cumulatively, may lead to institutional departures from the fifty percent mark. While such deviations from Priest and Klein’s rule have been the bread and butter of their critics’ arguments, we see such departures from the rule as providing extremely valuable information regarding litigation and adjudication dynamics that can prove quite useful in understanding Supreme Court legal outcomes.

In situations or environments in which forward thinking litigants strategically (and skillfully) sort cases for adjudication – settling those in which outcomes are predictable and appealing those that are not – we expect that judicial ideology should be ‘cleansed’ from justices’ legal decisions because the remaining cases do not readily map onto existing ideological preferences. Accordingly, where win-rates approach or are exactly fifty percent we reasonably anticipate that this phenomenon works best and that ideological influence should matter least. Similarly, when win-rates deviate substantially from fifty percent in either direction (e.g., litigants have erred in sorting) we would expect that this phenomenon works worst – and that the
ideological preferences of justices should matter more. By considering the broader context of the litigation process and litigant case sorting, we can understand better how and when justices’ attitudes influence Supreme Court outcomes.

Of course, the challenge lies in empirically assessing this proposition. Our approach requires that we gather information on the relative pervasiveness of case sorting and consider it in tandem with justices’ ideological preferences. We address the first concern by using win-rate deviations (from fifty percent) as a proxy for the pervasiveness of litigant case sorting. This is developed by first determining the win-rate percentage of liberal litigants before the Court in a given term and in a specific issue area. We then subtract this rate from fifty percent and use the absolute value of this number to indicate the term/issue deviation from fifty percent for the Court.\(^5\) To represent the justices’ ideological preferences we employ the well known ideology scores developed by Segal and his associates (e.g., Segal and Cover 1989). These scores are assembled through content analysis of leading newspapers’ op-ed assessments of the justices between the date of their nomination and the time of their confirmation. The scores are scaled to range from -1 to 1 with higher scores representing more liberal ideological preferences. We regress the justices’ case vote decisions on these two variables along with an interactive term based on these two component variables.

Our method of constructing a dependent variable and analyzing justices’ votes requires some additional explanation. In an effort to avoid having variables with ideological dimensions on both the right and left sides of the regression equation, we employ a dependent variable “vote for petitioner” that indicates whether a justice votes in favor of the party petitioning the case to the Court (1 = vote for petitioner, 0 = against petitioner). Our model is then split into two separate analyses – first, those in which the petitioning party is bringing a conservative argument

\(^5\) Deviation = absolute(liberal win % – 50%)
to the Court and, in a second analysis, those in which the petitioning party is bringing a liberal argument to the Court. Thus, in the first analysis of conservative petitioners we expect that justices with more liberal ideological scores should be negatively related to votes for the petitioner and, in the latter analysis of liberal petitioners, we expect that more liberal scores will be positively related to votes for the petitioner. Of course consistent with our thesis, in each situation we expect that the influence of justices’ ideological preferences on their voting should be conditioned on the pervasiveness of litigant sorting, which again we measure as deviations from the fifty percent win-rate norm. Again, in the situation in which there is little to no deviation from fifty percent, we anticipate that the influence of judicial ideology will be diminished. Likewise, in the situation in which there is substantial deviation in win-rates from fifty percent, we expect that judicial attitudes will cast a stronger influence on voting outcomes.

Data and Estimation

Our empirical data is derived using Harold Spaeth’s Supreme Court Database. As such, our data set consists of judge vote observations from 1953 until 2000. We use these observations to determine the proclivities of justices to support litigants pursuing liberal or conservative claims. The types of cases analyzed herein include disputes involving criminal procedure and economic policy, as well as later cases where the United States government is a party in a case. In using the Supreme Court Database, we analyze whether US Supreme Court justices support the conservative or liberal party under specified conditions, which include the case sorting ability of litigants and the context of a justice’s ideology. Each vote is analyzed using logistic regression analysis given the binary attribute of each dependent variable (for the

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6 We choose these two case types because they represent reasonably discrete areas of the law that involve enough cases each term to assemble satisfactory and reliable win rates percentages. Other case types (e.g. civil rights) provide adequate observations in some terms but not in others.
criminal procedure and economic models, 1 = justice vote for petitioner, 0 = vote against petitioner; for US government models, 1 = justice vote for US government, 0 = vote against US government). To account for observations that are non-independent, we cluster the standard errors on the individual case. The clustering controls for correlation among judges participating in individual case decisions.

Evidence of Case Sorting in the US Supreme Court Context

As described above, we suspect that the pervasiveness of case sorting in a given year may vary on the basis of issue area. As such, we test our hypotheses in two distinct issue areas: criminal procedure cases and economic cases. We thus run four models (liberal and conservative petitioners in criminal and economic cases). The results of our analyses appear in Table 1.

[Table 1 about here]

[Figures 1 & 2 about here]

Ai and Norton (2003) note that in nonlinear models (like the logit models used here) a standard z-test on the coefficient of an interaction term does not comprehensively assess the significance of the interaction effect. Indeed, the size, sign, and significance of the interaction may vary across the range of the constituent terms that comprise the interactive effect. As such we use a graphical representation of the conditional effects, recommended by Brambor, Clark, and Golder (2006), with standard errors based on a simple simulation technique. Figures 1 and 2 show the discrete change in the probability of ruling in favor of the petitioner associated with a 1 unit change in judge ideology. We find that the effect of ideology is conditional on the prevalence of case sorting.
In both criminal cases (Figure 1) and economic cases (Figure 2), we find support for our hypothesis regarding the conditional effects of ideology. When case sorting is pervasive (absolute deviation from .5 liberal win-rate = 0), a 1 unit change in ideology has only a modest effect (about a .15 increase/decrease in the probability of a liberal decision where petitioners are either liberal or conservative in criminal cases; the effects are about .08 in economic cases). However, as the absolute deviation from a .5 liberal win-rate increases, signifying less effective case sorting, the effect of ideology becomes more pronounced. The rate at which ideology becomes more pronounced is strongest in criminal procedure cases, but is clearly present in economic cases as well. Thus, across these two important issue areas, we find that by integrating both the case sorting hypothesis and the attitudinal model, we can render a more complete portrait the judicial decision making process.

Extending the Model: The Federal Government as Strategic Litigator

The findings of our model outlined in Table 1 provide strong evidence that litigant case sorting behavior can have a strong conditioning effect on the influence of justice ideology on Supreme Court voting. In this section we seek to explore our basic thesis in a specific litigation environment involving what most consider the Court’s most formidable litigator – the federal government. In doing so, we investigate how our model fares when assessing the success of a single litigant who is generally considered as being highly strategic and competent in case selection and having superior litigation expertise and experience before the High Court (Zorn 2002).

As the chief litigator for the United States, the Solicitor General is recognized for a remarkably successful record as a litigant before the U.S. Supreme Court (Caldeira and Wright
1988; Caplan 1987; Sheehan, Mishler, and Songer 1992). While the office of the Solicitor General serves a number of functions, we are primarily interested in its role in representing the federal government as a direct litigant before the Court. A river of studies suggest that, as a general matter, the Court is highly responsive to the “tenth justice” (Caplan 1987; Bailey, Kamoie, and Maltzman 2005; Caldeira and Wright 1988; Deen, Ignagni, and Meernik 2005; Lindquist and Spill Solberg 2007; McGuire 1995; McGuire and Caldeira 1993; Nicholson and Collins 2008; Segal 1988, 1990; Segal and Reedy 1988; Sheehan, Mishler, and Songer 1992).

In terms of the success of the Solicitor General’s Office in representing the federal government in Supreme Court litigation, the Office essentially knows no equal. The federal government wins the majority of its cases against all other forms of litigants, including state and local governments, individuals, businesses, and corporations (Sheehan, Mishler and Songer 1992).

As the legal hand of the incumbent president, support for the position of the Solicitor General has come to symbolize a special deference paid the executive branch by the Court. Yet despite numerous studies documenting the success of the Solicitor General before the Court and the claimed special relationship between the two, relatively few investigations have evaluated one of the primary functions of the Solicitor General -- its choices as to which cases it brings to the Court and the implications of its litigation strategies for success at the decision on the merits stage (for exceptions see Zorn 2002; Yates 2002).

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7 As Segal (1988) notes, the first of these functions is to evaluate cases where the United States has lost a lower court decision. Among those decisions, the Solicitor General petitions cases for review before the Court. The second function is to argue for or against litigation review where the United States is not a party with standing. The third responsibility is to represent the executive branch where the United States is a direct litigant. The final role of the Solicitor General is to submit amicus briefs either in support or opposition to a petitioner when the United States has no direct role.

8 For more critical treatments of the Solicitor General’s influence, McGuire (1998) and Wohlfarth (2009) suggest alternative explanations. McGuire (1998) reasons that litigation experience, rather than a special status assigned to the Solicitor General, explains litigation success. As experienced litigants, the Solicitor General successfully applies that knowledge and familiarity when making arguments before the Court. Furthermore, Wohlfarth (2009) suggests the office of the Solicitor General has become increasingly politicized in the post-Reagan era. As a result, the Court has become less responsive to the Solicitor General’s arguments.
In his study of decisions by the Solicitor General to appeal adverse circuit court rulings, Zorn (2002) concludes that factors related to cost of litigation, the potential for review by the Supreme Court, and the likelihood of victory on the merits, influence decisions of the Office to seek reversal of lower court decisions. Where the Solicitor General expects the Court will be sympathetic to its claim, decisions to appeal are more likely. Thus, much like expectations from the field of law and economics in relation to trial litigation, litigants working within the highest tier of the appellate court system weigh the costs and benefits of litigation before advancing.

Cases argued by the Solicitor General make a particularly interesting venue to test our integrated model of Supreme Court outcomes because of the confluence of two unique characteristics of cases involving the U.S. government. First, cases in which the U.S. is a party tend to be particularly salient, often involving controversial issues and/or staggering dollar amounts. On highly salient cases, Unah and Hancock (2006) show that judicial ideology is particularly influential, which might lead one to conclude that ideology would simply be more important in cases argued by the Solicitor General. Tempering this expectation, however, is a second unique characteristic of U.S. cases: the Solicitor General’s unique status as an experienced, repeat-player enables him to effectively gauge how the justices’ ideological values will affect their voting in a case (Zorn 2002). Further, the Solicitor General’s repeat-player status incentivizes case sorting because he may lose credibility with the Court if he continues to bring weak cases before the justices. Thus, when case sorting is taking place on cases involving the U.S. government, we expect it to be particularly well-done, leading to little influence of ideology. In contrast, when U.S. cases are not well-sorted, we expect the salience and importance of these cases to result in very pronounced effects of ideology (perhaps even more so than in the general criminal procedure and economic cases we examined above).
For this secondary analysis, we look exclusively at cases in which the U.S. is a party to the case. We divide these cases into two sets: those where the U.S. is the conservative party and those where the U.S. is the liberal party. The dependent variable is coded as 1 for a justice who votes in favor of the U.S. and 0 for votes against the U.S. We again use a pair of logit models (one for cases where the U.S. is the liberal party and another for cases where the U.S. is the conservative party) with standard errors clustered on the case. We include three independent variables following the pattern established in our prior model. First, we include a variable measuring the Segal-Cover ideology score of each of the justices. Secondly, we include a variable indicating the pervasiveness of case sorting on U.S. cases (the absolute deviation from a .5 liberal win-rate in that year). Finally, we include an interaction of the two. For cases where the U.S. is the liberal party, we expect ideology to have no effect when the absolute deviation from a .5 win-rate is 0 and a strong positive effect for ideology as the absolute deviation from .5 increases. In cases where the U.S. is the conservative party, we still expect no significant effect for ideology when case sorting is ubiquitous, but as the absolute deviation from a .5 win-rate increases, we expect a significant negative effect on the probability of a vote in favor of the U.S.

[Table 2 about here]

[Figure 3 about here]

Results of the model where the Solicitor General is a party within a case appear in Table 2, while Figure 3 presents graphical depictions of these results. The results of our integrated model of Supreme Court decision making are only stronger when applied to cases featuring the United States government as a litigant. Figure 3 presents the marginal effect of a one unit increase in absolute deviations from the fifty percent win-rate norm. In cases involving the Solicitor General, panel A reveals there is a positive marginal effect of judge ideology on the
probability that the Court will side with the Solicitor General. However, similar to the general criminal procedure and economic cases described above, we find that ideology has no significant effect until the absolute deviation from the .5 win-rate exceeds about .07, where the confidence intervals eventually shift beyond the x-axis. Where case sorting is most effective and closest to the .5 win rate, there is a remarkably weak relationship between judge ideology and victory by the US Solicitor General. In contrast, where deviations from the .5 win rate increase beyond .07, the positive marginal effect of judge ideology is substantial and operates conditionally as expected.

Panel B shows the case sorting effect on the probability that the United States will win where the Solicitor General is the conservative party. Like the panel above, panel B reveals that judge ideology does contribute toward success by the Solicitor General, however, only after the win-rate moves beyond .05. When the win-rate deviation from .5 is at its theoretical maximum where the United States government is either the liberal or conservative petitioner, the model predicts very strong effects for ideology. These effects are similar in magnitude to the effects we observed with general litigants in criminal procedure and economic cases.

Discussion

The premise that justices’ attitudes drive U.S. Supreme Court voting is largely accepted in political science. While some might argue about whether it is an exhaustive explanation for Supreme Court voting or on the magnitude of the impact of justices’ ideological preferences on their voting, most would concede that we can explain and predict justices’ voting effectively by knowing their ideological beliefs. However, we argue that the influence of justices’ attitudes on their voting may vary, rather considerably, by the context of the decision making environment.
In other words, when litigants have effectively sorted cases for Supreme Court litigation, then attitudes provide a relatively weak explanation for justices’ votes. Conversely, attitudes provide a much more useful insight into Supreme Court voting behavior when litigant sorting has been less ubiquitous and win-rates deviate substantially from Priest and Klein’s fabled mark. Especially intriguing is the fact that this conditional relationship holds even after we restrict our analysis to the Supreme Court functions of a single litigant – the federal government. The government’s fortunes before the Court may be influenced by the attitudinal preferences of the justices, but the degree to which such attitudes have impact varies by the sorting process that originally brought the cases to the Court in the first place.

What does this mean for the viability and utility of the Attitudinal Model? First, it is still viable and provides helpful insight toward understanding legal outcomes on the Supreme Court. However, the dynamics of this explanation may be more complex than previously thought. As a reactive institution, the Court (like all courts) is constrained in its policy making by its dependence on litigants to shape its docket environment – this remains, despite its rather substantial discretion in choosing cases. Second, the justices’ pathways of policy influence are both direct and indirect. Certainly the impact of justices’ policy preferences is less substantively significant when litigant sorting (or other factors) have driven outcomes closer to Priest and Klein’s fifty-fifty rate environment, however litigants are undoubtedly weighing justices’ ideological propensities when making decisions on whether to press their cases forward or settle. Thus, justices exert an indirect influence on the broader litigation equation by influencing those who determine their pool of cases for consideration. This study hopefully provides a springboard from which we can begin thinking more broadly about how litigant behavior and actions may affect Supreme Court legal outcomes. It could be the case that understanding the dynamics of the
longer litigation process could help inform our understanding of a host of Supreme Court phenomena.
Table 1: Logit Models - Probability of Vote Favoring Petitioner in Supreme Court Cases

<table>
<thead>
<tr>
<th></th>
<th>Criminal Procedure Cases</th>
<th>Economic Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Liberal Petitioner</td>
<td>Conservative Petitioner</td>
</tr>
<tr>
<td></td>
<td>Coefficient (Robust Std. Err.)</td>
<td>Coefficient (Robust Std. Err.)</td>
</tr>
<tr>
<td>Ideology</td>
<td>.397* (.074)</td>
<td>-.363* (.095)</td>
</tr>
<tr>
<td>Absolute Deviation from .5</td>
<td>-.383 (.432)</td>
<td>.250 (.515)</td>
</tr>
<tr>
<td>Ideology * Absolute Deviation from .5</td>
<td>1.034* (.451)</td>
<td>-2.371* (.497)</td>
</tr>
<tr>
<td>Constant</td>
<td>.180* (.068)</td>
<td>.287* (.098)</td>
</tr>
<tr>
<td>$\chi^2$</td>
<td>268.91 p &lt; .01</td>
<td>440.11 p &lt; .01</td>
</tr>
<tr>
<td>n</td>
<td>6594</td>
<td>4294</td>
</tr>
</tbody>
</table>

Note: Results obtained from logistic regression.
* p < .05, two-tailed test. Note that a z-test on the interaction term’s coefficient is not a test of the significance of the marginal effect (or discrete effect) of the interaction term (Ai and Norton 2003). See Figures 1-2 for tests of interactive hypotheses.
Table 2: Logit Models - Probability of Vote Favoring U.S. in Supreme Court Cases

<table>
<thead>
<tr>
<th></th>
<th>U.S. as Liberal Party</th>
<th>U.S. as Conservative Party</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coefficient (Robust Std. Err.)</td>
<td>Coefficient (Robust Std. Err.)</td>
</tr>
<tr>
<td>Ideology</td>
<td>.081 (.158)</td>
<td>-.116 (.111)</td>
</tr>
<tr>
<td>Absolute Deviation from .5</td>
<td>-1.379 (1.248)</td>
<td>3.291* (.743)</td>
</tr>
<tr>
<td>Ideology * Absolute Deviation</td>
<td>2.464* (.897)</td>
<td>-1.525* (.533)</td>
</tr>
<tr>
<td>From .5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>.816* (.195)</td>
<td>.050 (.126)</td>
</tr>
<tr>
<td>χ²</td>
<td>30.52</td>
<td>59.44</td>
</tr>
<tr>
<td>p</td>
<td>&lt; .001</td>
<td>&lt; .001</td>
</tr>
<tr>
<td>n</td>
<td>3533</td>
<td>7105</td>
</tr>
</tbody>
</table>

Note: Results obtained from logistic regression.
* p < .05, two-tailed test. Note that a z-test on the interaction term’s coefficient is not a test of the significance of the marginal effect (or discrete effect) of the interaction term (Ai and Norton 2003). See Figure 3 for tests of interactive hypotheses.
Figure 1: The Effect of Ideology on the Probability of Vote Favoring Petitioner

Conditional on Case Sorting—Criminal Procedure Cases

Panel A: Criminal Cases with Liberal Petitioner

Panel B: Criminal Cases with Conservative Petitioner
Figure 2: The Effect of Ideology on the Probability of Vote Favoring Petitioner

Conditional on Case Sorting—Economic Cases

Panel A: Economic Cases with Liberal Petitioner

Panel B: Economic Cases with Conservative Petitioner
Figure 3: The Effect of Ideology on the Probability of Vote Favoring U.S. Conditional on Case Sorting

Panel A. U.S. as the Liberal Party

Panel B. U.S. as the Conservative Party
Bibliography


