MAPPING THE POLICIES OF THE U.S. SUPREME COURT: DATA, OPINIONS, AND CONSTITUTIONAL LAW

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Abstract

Scholars of the U.S. Supreme Court read and analyze the opinions of the justices. Based on those readings, these observers attempt to offer a variety of characterizations regarding the meaning of the Court=s policies, the relationship of a ruling to prior opinions, and the general state of the law. To what degree might political methodology offer more systematic leverage on these issues? Employing a recent innovation in content analysis, we examine a sample of the Court=s decisions on several different constitutional issues. Specifically, we treat the words within the Court=s opinions as data to be quantified, and we attempt to extract their relative policy positions. Our evidence suggests that the ideological placements of those policies can, in some cases, be readily estimated. We speculate about the possible applications and limits of this form of content analysis as it relates to judicial opinions.

Introduction

Judicial opinions are one of the most important resources for scholars of law and courts. Traditionally, these written rulings have constituted the foundation for critical assessments of legal policy. They provide the evidentiary basis for most qualitative appraisals of judicial decision making. Essays that evaluate the meaning and consistency of various rulings within particular areas of the law are a staple of legal scholarship. For many students of the courts, however, the written opinions of judges provide little more than the basis for deriving case outcomes, voting alignments, and other variables of interest. By this means, quantitative information is generated by reference to the relevant attributes of individual opinions.

The empirical accounts of judicial behavior possess a high degree of systematic rigor and offer a great deal of insight into how judges make decisions. Among other things, this brand of research sorts out the relative impact of personal preferences, legal factors, institutional constraints, and external political pressures on the decisions judges makes. Whatever their virtues, however,

these statistical models typically do not concern themselves with the substantive content of written opinions. For good or ill, these analyses discard most of the policy information provided by judges. In effect, the empirical research ignores what is regarded by more traditional legal scholars as crucial to an adequate understanding of judges and the law.

Can the content of judges= written opinions be regarded as data for empirical analysis? We believe that it can. In this paper, we offer an illustration by applying a method of content analysis to the opinions of the justices of the U.S. Supreme Court. By relying upon the Wordscore procedure (Laver, Benoit, and Garry 2003), we are able to extract valid policy positions from the text of written opinions for a series of decisions in the areas of religion and search and seizure. Although we are circumspect about our results, we believe that our findings suggest that the written opinions of the justices are a potentially significant source of data, which can be mined not only to buttress existing quantitative models but also to offer new perspectives on judicial policy.

Supreme Court Opinions and the Problems of Content Analysis

One of the fundamental aims of any political account of the U.S. Supreme Court is to characterize the ideological tenor of its decisions. It has long been recognized that the policy preferences of the justices play a substantial role in their decisions, and the most comprehensive account provides abundant evidence that the ideological dispositions of the justices are the principal determinant of the Court=s policies (Segal and Spaeth 2002). The theory that guides this work is straightforward enough; liberal justices produce liberal decisions, and conservative justices make conservative choices.

Demonstrating that preferences explain votes, however, does not necessarily provide a sufficient understanding of the relative differences between policies. More specifically, the link

between attitudes and votes does not tell us anything --- at least not directly --- about the substantive content of the opinions adopted by the Court. To be sure, the earliest scaling work showed that the stimuli that confronted the justices varied across cases; the vote divisions on the Court were appropriately interpreted as a product of those stimuli being located at different points along an ideological continuum (see, e.g., Rohde and Spaeth 1976; Schubert 1965). But this research still did not reveal anything about the policy positions adopted by the Court in their opinions.

Political scientists have naturally shown an interest in the determinants of the contents of written opinions. Typically this work assumes a strategic orientation toward the Court and places a heavy reliance upon the necessary give-and-take among the justices as they seek to maximize their policy preferences (Epstein and Knight 1997; Murphy 1964). The impact of such strategic considerations varies across issues and competes with a number of institutional constraints that together govern who writes an opinion as well as how and why that opinion-writer reacts to his or her colleagues (Maltzman, Spriggs, and Wahlbeck 2000).

Interestingly enough, though, political scientists have not brought quantitative methods to bear upon the one question that is routinely asked whenever the Court issues an opinion: How liberal or conservative is this decision? Here, traditional legal analysis offers much more promise. Regardless of whether they adopt an attitudinal perspective of the Court or a more classic view regarding the influence of legal considerations, scholars who labor in this vineyard seem to have a more firm grasp on the critical distinctions between cases, how they fit within the competing subtleties of precedents, and what the legal ramifications of a ruling are likely to be. Thus, sophisticated analyses of the Court's doctrines and the forces that guide them have a good deal to say about the substantive variance that exists both within and across policy domains. A small

sample of recent studies, for example, readily reveals how traditional methods of legal analysis can probe with considerable analytic precision into the Court's rulings in such areas as abortion, *Bush v. Gore*, the death penalty, federalism, freedom of the press, privacy, and religious establishments (Gillman 2003; Greenhouse 2005; Tushnet 2005; Yarbrough 2000). These accounts of constitutional law provide a rich appreciation of the relative differences between the substantive policies adopted by the Court.

It is in this important area where quantitative studies have yet to demonstrate any consistent capacity to unravel the complexities of the Court's doctrines. So, even while empirical analysis has been very effective at quantifying the relative liberalism of the Supreme Court's members and their votes, it has had less success in quantifying the relative liberalism of the Court=s actual policies.

Those policies, of course, are conditioned by the relevant facts presented by different cases, and for some time, political scientists have been quite cognizant of the potential importance of these factual scenarios and their relevance to the doctrines adopted by the justices. Taking their cues from the initial fact-pattern analysis of the Court's search and seizure cases (Segal 1984), scholars have crafted a variety of statistical models that take into account a number of different case characteristics in such areas as capital punishment, involuntary confession, and obscenity, (Benesh 2002; George and Epstein 1992; Hagle 1992).

The connection between fact-patterns and doctrine is obvious enough. If rulings represent the interpretation of federal law as it applies to a particular set of circumstances, then the characteristics of a case can be interpreted as indicators of where the Court places its doctrine in ideological space. Stated somewhat differently, if case characteristics can be used to derive a statistical estimate of where a particular case falls along a scale of liberalism, it suggests that the

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Court's precedents and their progeny can be describe in terms of their relative ideological differences.

The most sophisticated of this work actually seeks to quantify the Court's rulings by employing a kind of pre- and post-test study of changes in doctrine (Richards and Kritzer 2002). By demonstrating that justices' responses to the same fact patterns change as a result of a significant alteration in precedent, this research reveals the importance of doctrinal revision for judicial behavior.

Despite the usefulness of this research, it still largely ignores the broad context in which case facts are considered. That is, the full contents of the Court's written opinions are, for the purposes of statistical analysis, ignored. Virtually without exception, the text of the Court's written opinions is not regarded as data useful for quantification and analysis. To the extent that scholars are interested in providing a methodologically sophisticated account of the Court's policy outputs, why do they discard so much information?

The reasons are not terribly hard to discern. Systematizing any written work requires one to undertake some form of content analysis. Aside from the obvious problems of devising a coding scheme that is facially valid and readily replicable, content analysis is an enormously time-intensive method of data collection, relying on human coders of texts. The long-running Comparative Manifestos Project, for example, employs this method as a means of estimating the ideological location of political parties in Europe both cross-sectionally and longitudinally (Budge, Roberston, and Hearl 1987). The effort required for this project has been substantial, increasing directly with the number of texts to be scored. Thus, human coding poses serious practical limitations for the analysis of a large number of texts.

Such obstacles notwithstanding, content analysis remains a widely used method in the

social sciences (Krippendorff 2003; Weber 1990), and it continues to play a prominent role in the research of political scientists (see, for recent illustrations, Althaus, Edy, and Phalen 2001; Damore 2002; Peterson, Grossback, Stimson, and Gangl 2002; Schwartz-Shea and Yanow 2002).

Scholars of the Supreme Court, by contrast, have made only limited use of content analysis. Where it has been employed, though, the effort has borne substantial fruit. It has been used, for example, to compare the arguments contained in amicus briefs with the policies adopted by the Court (Spriggs and Wahlbeck 1997). In addition, the most widely adopted measure of the justices' preferences is based upon a content analysis of newspaper editorials (Segal and Cover 1989). Perhaps the leading example of content analysis of the justices' written opinions can be found in the work of Gates and Phelps (1991, 1996), who coded the type of legal argument contained in hundreds of written opinions, using the individual paragraph as the unit of analysis. Their work revealed that there was a substantial divergence between the interpretive orientations claimed by the justices and the methods that they actually employed.

As exhaustive and impressive an effort at data collection as theirs was, it still was restricted to the constitutional opinions of only two justices. These limitations, however, belie the significance of their findings, which illuminated an important aspect of judicial decision making in a way that previous work had not. Such findings suggest that the opinions of the justices have the potential to be mined more deeply to enhance our understanding of the Supreme Court. But how, given the enormity of task, might such information be gathered and analyzed?

Extracting Policy Placements from Opinions

One of the most important innovations for scholars interested in content analysis is the mechanical storage of text. The translation of the printed word into machine-readable form has

made it extremely easy to collect, sort, and search vast amount of information, facilitating highly sophisticated content analyses that would have been previously impractical (Krippendorff 2003). Indeed, some political scientists have begun to develop new analytic techniques to exploit fully this advantage. Most notable is the Wordscore procedure, a computer application that generates dimensional information about the ideological content of machine-readable texts (Laver, Benoit, and Garry 2003; see also Laver and Garry 2000). This method circumvents many of the common obstacles of content analysis. Moreover, the procedure is relatively easy to implement, even by a lone scholar, without the need to devote much time or research assistance to data collection. Thus, it holds out the possibility of analyzing a large number of texts quickly and efficiently. If this procedure can be applied successfully to court decisions, it would enable researchers to analyze the ideological content of a large number of judicial opinions with relatively little effort. Assessing the usefulness of this method is thus a worthwhile enterprise.

The Wordscore procedure

Before assessing how promising this method is as a tool for judicial scholars, it is useful to explain in some detail the underlying assumptions and mechanics of the procedure. The innovative feature of the Wordscore procedure is to move away from trying to code the *meaning* of words or phrases. Instead, the application estimates the ideological position expressed in a text by simply treating words as data points to be counted in assessing the similarity and differences across texts while remaining (in a sense to be made precise) "agnostic" about the meaning of those words (Laver, Benoit, and Garry 2003, 312). Because the procedure "only" counts words, it removes the need to look for "meaning" and thus reduces the problem of content analysis to a computational

problem that can be quickly and easily handled.[1] The researcher need not even understand the language in which the documents she is analyzing are written!

The intuition underlying the procedure can be illustrated by considering an extreme example. Suppose someone who does not speak English is presented with two written opinions of the U.S. Supreme Court. One is authored by a justice who is ideologically conservative, while the other is the written by a more liberal justice. Upon closer inspection, such a person might discover that the two texts --- which the reader cannot understand --- make use of systematically different language. The words "rational," "legitimate," and "intent," for example, appear frequently in the opinion of the conservative justice, but only once in a while in the other opinion. The words "strict," "discrimination," and "equality," on the other hand, are more frequent in the liberal justice's opinion but hardly appear in the other opinion.

Our observer is then handed a new set of documents and is told that they are the written opinions of the other seven members of the Supreme Court but about whose ideological positions nothing is known. What would the observer conclude about the likely location of the justices on the right-left continuum? The thrust of the Wordscore procedure is the claim that one can make use of the frequencies with which different words appear in the different texts to draw some conclusions. For example, if one were to observe that one of the opinions made heavy use of words primarily found in the conservative justice's opinion and infrequent use of words that are typical for the opinion of the liberal justice, one would draw the conclusion that that new opinion probably expresses a position that is closer to the position of the right-leaning justice than the left-leaning justice. In other words, even in the absence of understanding the meaning of any of the words in the documents, one could make use of the similarity in word use in documents whose positions one

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[1] The procedure is currently available as an add-on to STATA, which the authors have made available.

does know (referred to as "reference texts") to draw inferences about the likely position of

represented by the texts whose position one *does not know* (referred to as "virgin texts") (Laver,

Benoit, and Garry 2003, 313).

How exactly does this process of using reference texts to estimate the position of virgin

texts work? While we point the interested reader to the original article for a complete account, a

quick overview of the details is necessary to understand both the promise and the limitations of the

procedure.[2]   Consider again our example. Suppose we supplied our non-English speaker with

additional information about the ideology of the original two justices by indicating that the

ideology of the conservative justice on a 10-point left-right continuum is at 8, while the position of

the liberal justice is 3.[3]   One can use this knowledge to assign the opinions associated with these

two justices a "score" on the left-right dimension. Specifically, let A_{rd} denote the score assigned to

reference text *r* for dimension *d*. Thus, in our example, $A_{rd} = 8$ for the conservative justice and

$A_{rd} = 3$ for the liberal. Moreover, for each reference text, one can count all words contained in

that text and determine the *relative frequency* of each distinct word in that reference text. Let

F_{wr} denote the relative frequency of word *w* in reference text *r*.

Once the relative frequency of each word for each reference text is determined, those

frequencies can be used to calculate a new frequency, namely the share of a word's *overall* usage

that occurs in a *particular* reference text. Laver, Benoit, and Garry illustrate this new frequency with

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[2] We follow the notation employed by Laver, Benoit, and Garry (2003, 315-317).

[3] As Laver, Benoit, and Garry (2003, 314) stress, obtaining policy location estimates for the reference texts is a key issue. Such estimates could come from independent sources (e.g., expert placements of parties on a scale) or, if such sources are unavailable, can be "imposed" by the researcher using substantive knowledge of the relative ordering of the reference texts (e.g., we could assign a "conservative" text a score of 1 and a "liberal" text a score of -1 and then score the virgin texts relative to these scores). In fact, we employ this method below.

a thought experiment. For ease of exposition, imagine that you are looking at several texts of equal length. You are told that a particular text you have in front of you contains the word *w*. In light of that fact, what is the probability that the text you are reading is reference text *r*? This probability is given by the relative frequency just described:

$$P_{wr} = \frac{F_{wr}}{\sum_r F_{wr}}$$

That is, loosely speaking, P_{wr} denotes the probability that we are reading text *r* given that we have observed word *w*.[4] For example, suppose the relative frequency of the word "rational" is 0.02 for the opinion written by the conservative justices and 0.01 for the liberal justice's opinion. Then based only on observing the word "rational," the likelihood that you are reading the more conservative opinion is given by $\dfrac{0.02}{0.02 + 0.01} = \dfrac{2}{3}$.

Laver and his colleagues make use of these probabilities --- and the ideological scores assigned to the reference texts --- to assign an average ideological position to each word that appears in the reference texts. This average ideological position is the weighted average of the ideological scores assigned to the reference texts:

$$S_{wd} = \sum_r (P_{wr} * A_{rd})$$

Stated simply, the ideological score assigned to a word will gravitate towards the ideological position assigned to a reference text that makes heavier use of that word. In the example considered above, the ideological score of the word "rational" would be given by

$$\frac{2}{3}(8) + \frac{1}{3}(3) = 6.33 .$$

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[4] For texts of different length, calculating the same probability requires an intermediate step. See Martin and Vanberg 2005.

Armed with the ideological score of each individual word in the reference texts, one can easily "score" the ideological position of an unknown "virgin" text. Once again, we can count the words in virgin text *v* to obtain a relative frequency of each word *w* in the virgin text. Denote this frequency by F_{wv}. The ideological position that Laver and company assign to the entire virgin text is simply the weighted average of the ideological position of the words used in that text:

$$S_{vd} = \sum_r (F_{wv} * S_{wd})$$

In other words, the ideological score assigned to an unknown virgin text is simply the weighted average ideological score of the words that are contained in that text. The ideological score of each word is derived from the different frequencies with it is used in the reference texts (whose ideological positions we know). The closer the word usage in a particular virgin text is to the word usage in a reference text, the closer the ideological position assigned to the virgin text will be to that of the reference text.

Interpretation of these "virgin text scores" poses one specific challenge that requires an additional "fix." The comparison of virgin texts works by taking advantage of the fact that the reference texts (a) make use of *different words* or (b) make use of the *same word with different frequency*. Many texts include the same words in roughly the same frequency, however. Laver, Benoit, and Garry call such words (e.g., "the," "and," etc.) "nondiscriminating" words (2003:316). Because the procedure assigns such words a score roughly equal to the average position of the reference texts, the virgin text scores will typically be much more tightly distributed around their mean than the reference texts. Comparison of the scored texts to the reference texts therefore requires a transformation that places the scored texts on a metric with the same dispersion as the reference

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texts.[5] Importantly, this transformation depends on the variance of (a) the reference texts and (b) the variance of the virgin texts. This has an important implication to which we return below.

What are the strengths of the Wordscore procedure, and what are the caveats to keep in mind? The obvious strength of the procedure – which should be exciting for judicial scholars – is that it makes it extremely easy and efficient to score a large number of documents, as long as a researcher has access to reference and virgin texts in electronic format.[6] Once the texts are placed into the appropriate directory, a few keystrokes will generate scoring of virgin texts, along with transformed scores, and an assessment of the uncertainty surrounding those estimates.[7] Since most judicial opinions --- from the Supreme Court to Federal Courts of Appeals to state supreme courts --- are readily available in electronic format, the procedure has the potential to allow scholars to estimate ideological positions for a large number of opinions. Such data, in turn, facilitate projects that rely on estimating the ideological position of judicial opinions (either as dependent or as independent variables).

At the same time, there are a number of important caveats to keep in mind, some of which are directly tied to the advantages of the Wordscore procedure. Two are particularly important; indeed, we will encounter their relevance in our empirical results. The first is that the *sine qua non* of the Wordscore procedure is the underlying assumption that (a) texts expressing different ideological positions make use of systematically different language, and (b) texts that are similar in

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[5] See Laver, Benoit, and Garry (2003, 316) for the precise transformation.

[6] The STATA code and documentation to implement their procedure are available at http://www.wordscores.com.

[7] In the interest of brevity, we do not discuss the uncertainty estimates that the Wordscore procedure provides for each virgin text score. It is important to note, however, that this is a key aspect of the procedure: unlike other content analysis procedures, the Wordscore application not only provides point estimates for each text, but also the degree of confidence we should have in those estimates. See Laver, Benoit, and Garry (2003, 317) for details.

the language they use do, in fact, represent similar ideological positions. Part (a) of the assumption can be investigated, at least partially, by inspecting the descriptive statistics for the reference texts: Do the texts make use of different vocabulary?

Part (b) of the assumption is much harder to assess. In what follows below, we try to do so by considering the extent to which employing the procedure orders different opinions in a "sensible" manner that corresponds to our intuitive judgment about the appropriate ideological ordering of those opinions. As we will see, in some contexts the assumption seems to be satisfied, in others, it does not seem to hold. The difficulty, of course, is that the real utility of the procedure lies in estimating positions for documents for which we do not possess prior intuitions about ideological positions. And in those cases, we must rely on the *a priori* assumption that similar word usage does, in fact, indicate a similar ideological position. The extent to which this assumption is reasonable depends very much on the context: For, say, election manifestos, which are typically constructed around a common set of salient issues for all parties in a given election, this assumption may be reasonable. In other contexts, the assumption may appear less plausible.

Having reviewed the Wordscore procedure, we are now in a position to apply it to the U.S. Supreme Court's opinions and to assess its suitability for estimating the ideological positions expressed in those opinions.

Analysis

We begin our analysis by identifying potentially useful areas of the law, ones that are likely to satisfy the conditions necessary for effective application of the Wordscore procedure. As a preliminary step, we limit our opinions to the broad category of civil liberties and rights. This is not because we believe that the justices' opinions in other areas, such as federalism or economic

regulation, are devoid of ideological valence. Rather, questions of individual liberties have dominated the agenda of the modern Court, thus providing a larger number of cases for potential study. Moreover, this broad category contains a variety of salient issues that sharply divide not only the members of the Supreme Court but the American polity more generally.

This broad subset of cases must be refined, however, since this issues defined by individual liberties and rights contain language that differs dramatically across issues. Since the selection of the reference texts is one of the crucial elements of the Wordscore procedure, we need to take special care to ensure that the opinions reflect differences in policy rather than simply differences in issues. Comparing, say, written opinions in free speech cases to the Court's reapportionment rulings would indeed demonstrate systematic differences across opinions, but those differences are more likely to be the product of the idiosyncratic concerns that are distinctive to each field of the law. So, to further narrow our investigation, we elected to concentrate on the written opinions that involve interpretation of three different provisions of the Constitution: the free exercise of religion and establishment of religion clauses of the First Amendment, and the search and seizure guarantees of the Fourth Amendment.[8] Our choice of these areas was guided by practicality (i.e., each offers a sizable number of decisions with written opinions) and our need to satisfy the assumptions of the Wordscore application (i.e., within each area, the justices use different language to stake out distinctive ideological positions). We do not believe that the results that we report below are a function of the particularities of these issue domains. We are confident that similar

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[8] We identified possible cases by issue codes within the U.S. Supreme Court Judicial Database, and we gathered the text of the written opinions from the electronic databases made available through Findlaw.com and Lexis-Nexis. Within these specific areas, we discarded some cases for various reasons, such as the extreme brevity of some opinions. Within those remaining viable cases, we selected samples that contained a disproportionate number that were salient, as evidenced by their appearance in one more textbooks on constitutional law. There is nothing invidious to this procedure; more than anything else, we simply wanted cases on which we had some prior dispositions so that we could evaluate our findings in light of our prior beliefs about the relative differences between the Court's policies.

results would obtain in analyzing the opinions relating to other questions or indeed other courts.

Free Exercise of Religion

We build our analysis from simplicity to complexity. Accordingly, we begin with the free exercise cases, inasmuch as they offer the smallest number of opinions for analysis. Our first step is to identify reference texts, that is, written opinions that we believe represent ideologically distinct positions on the same issue. Our intuitions suggest two clear candidates, *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) and *Employment Division v. Smith* (1990). In the first case, the Supreme Court struck down a municipal ordinance designed to limit the religious rites of a group that practiced animal sacrifice. In the second case, the justices ruled that neutral laws of general application --- such as drug laws that interfered with the use of illegal narcotics by members of the Native American church --- posed no free exercise problems.

Since we lack *a priori* information about the degree of liberalism represented by the written opinion in each case, we rely instead upon their relative difference. One case (*Lukumi*) was clearly a liberal decision, while the other case (*Smith*) was just as obviously a conservative legal policy. Thus, as described above, we assign these reference texts scores of -1 and 1, respectively. In turn, we conducted a Wordscore analysis that examined the majority and (if they existed) minority opinions in a sample of liberal and conservative opinions that dealt with the free exercise of religion. Our expectations were that, regardless of whether the opinions were written as opinions of the Court or as dissenting opinions, the policy positions extracted by the application would align liberal opinions (i.e., those that favored free exercise) with the *Lukumi* opinion, while conservative opinions (i.e., those that opposed the free exercise claim) would be closer to the text of the *Smith* decision.

By this initial test, our efforts to extract the policy positions contained within the opinions were unsuccessful. Although, for the sake of brevity, we do not present these preliminary results here, we discovered that this analysis generated seemingly random estimates of the justices' policy positions. Some liberal opinions were placed on the extreme right, while some conservative opinions were scored as liberal texts. In addition, clearly contrary policy positions were situated in close proximity, while complimentary opinions were relatively distant from one another.

What explains this seeming failure to identify the ideological content of the justices' opinions? Recall that the essential assumption of the procedure is that similarity (or dissimilarity) between the language used in political texts represents ideologically similar (or dissimilar) positions. But, of course, the language used in written opinions is often very much the same, even between contending opinions in the same case; they reference the same precedents, cite the same statutes, and debate the same legal standards. Based on this preliminary analysis, therefore, we conclude that, at least insofar as judicial opinions are concerned, ideologically divergent texts lack sufficient variation in either the type or frequency of words to generate a meaningful representation of the policy positions they represent.[9] The data fail to satisfy the assumptions of the statistical model, so the results perforce are not as expected.

That we are unable to differentiate *between* groups of texts does not mean, however, that we cannot distinguish texts *within* groups. Accordingly, we conducted our analysis on a set of free exercise cases that were decided in the same ideological direction, in order to search for meaningful variation within those texts. Each of these cases was decided in a conservative direction (that is, against the free exercise claim), and to differentiate between them we utilized the opinions in

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[9] As a reliability check, we conducted comparable Wordscore analyses on the opinions in the other two issues we examined, as well as one that we did not, specifically, abortion. The results were consistent.

O'Lone v. Shabazz (1987) and *Employment Division v. Smith* (1990). The former case was one in which the justices upheld a prison regulation that made it impractical for Muslim inmates to hold certain prayer services. As conservative policies go, this is not too extreme, inasmuch as the Court has historically been deferential to the government in cases involving the administration of prison. As the less conservative case, we assign this opinion a reference score of -1. The latter case, by contrast, articulated the view that the state's pursuit of a legitimate governmental interest could restrict religious liberty, as long as the law did not target religious exercise. As the more conservative position, we assigned this opinion a value of 1. (The holdings in these and the other cases whose opinions we content analyze are described briefly in the appendix.)[10] The Wordscore results for this exercise are presented in Table 1.

**Table 1. Estimated Policy Positions of Supreme Court Opinions,
Free Exercise Cases**

Case	Standardized wordscores	Standard errors
U.S. v. Lee (1982)	1.82	.32
Heffron v. ISKON (1981)	− 0.32	.26
Goldman v. Weinberger (1986)	− 0.85	.37

Note: Reference texts are the opinions in *O'Lone v. Shabazz* (1987), scored as -1, and *Employment Division v. Smith* (1990), scored as 1.

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[10] In order to eliminate potentially stochastic language, we "stripped" the written opinions of the details that delineate and the factual circumstance of each case and the history of the litigation. Although we had no hard and fast coding rule for this procedure, as a practical matter, we typically discarded everything between Roman numeral "I" and the sentence "We granted certiorari."

The standardized scores represent point estimates for the policy positions of the opinions, and their standard errors permit an assessment of the uncertainty associated with each estimate. An additional virtue of the Wordscore application is that it also computes standard errors for each estimate, which facilitates formal statistical tests. For our purpose here, we simply note that the confidence intervals constructed around these estimate would involve virtually no overlap, so one can be confident of the relative ordering of these cases.

Not less important, we want to know just where these policies are located in dimensional space, especially with respect to our reference texts. To illustrate their respective locations, we graph these point estimates alongside the values of the reference texts and present these data in
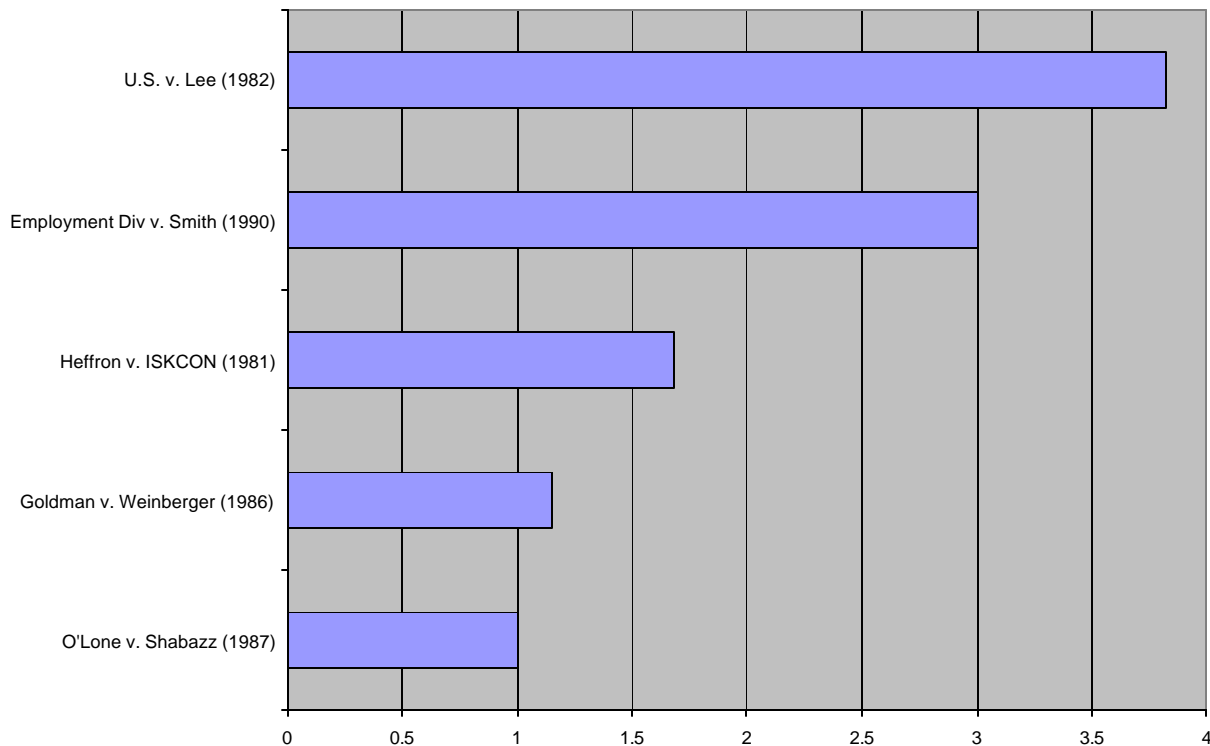
Figure 1. Wordscores for Free Exercise Cases

Figure 1.[11]

According to the data in this figure, *O'Lone* is the least conservative of these several

decisions, but quite close to it is the Court's policy in *Goldman v. Weinbergwer* (1986). Their pairing

seems natural, since *Goldman* involves another case of traditional deference by the Court, in this

case, deference to the military, which refused permission to a Jewish officer to wear a yarmulke

while in uniform.

The decision in *Heffron v. ISKCON* (1981) represents a more conservative policy. In this

case, there were no overriding interests such as military uniformity or prison order to consider.

Instead, the justices upheld a state regulation confining the distribution of literature at a state fair to

designated booths --- even though it interfered with the religious obligation of the Krishna religion

to proselytize --- as a means of maintain order on the fairgrounds.

As expected, the *Smith* doctrine upholding neutral laws of general application is the most

conservative holding, save for the decision in *U.S. v. Lee* (1982). The Court's refusal to exempt

Amish employers from paying social security taxes seems not dramatically different from the

Court's holding in *Smith*. So it is not clear why, as a substantive matter, *Lee* would be more

conservative than *Smith*. Still, given that the Court had earlier exempted the Amish from mandatory

attendance of public schools in *Wisconsin v. Yoder* (1972), a departure from that principle might be

seen as somewhat more extreme.

These results are sensible and fit, we think, with how most traditional legal accounts might

piece together these cases. Our next step is to test the resiliency of the Wordscore procedure by

analyzing opinions in an issue area in which we can expand the number of texts to be analyzed.

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[11] In this and in subsequent figures, we add a uniform value (in this histogram, we add 2) so that each estimate takes on a positive value. We do this simply to facilitate the graphical representation of the data.

Establishment of Religion

Our content analysis of cases involving claims of government establishment of religion offers us a somewhat wider range of cases from which to choose. As before, we restrict our attention to cases of the same ideological valence, but in this subject area we select liberal as opposed to conservative constitutional doctrine. To that end, we chose two cases to serve as analytic referents. The first was the decision in *Abington School District v. Schempp* (1962), coded as the less liberal at -1. After all, as far as religious establishments are concerned, requiring daily readings from the New Testament in public schools would scarcely be a close call, even for the Court's most conservative members, then or now. In contrast, since it invalidated a process by which student speakers could elect to offer an invocation at the beginning of football games, the majority opinion in *Santa Fe v. Doe* (2000) was our more liberal policy text.

**Table 2. Estimated Policy Positions of Supreme Court Opinions, Establishment Cases**

Case	Standardized wordscores	Standard errors
Lee v. Weisman (1992)	2.09	.21
Allegheny Count v. ACLU (1989)	1.21	.18
Edwards v. Aguillard (1986)	.48	.29
Kiryas Joel v. Grumet (1994)	.43	.22
Wallace v. Jaffree (1985)	− .02	.31
Larkin v. Grendel's Den (1982)	− .61	.36
Engel v. Vitale (1962)	− 1.73	.28
Epperson v. Arkansas (1968)	− 2.10	.31

Note: Reference texts are the opinions in *Abington School District v. Schempp* (1963), scored as -1, and *Santa Fe v. Doe* (2000), scored as 1.

Our Wordscore results for the sample of establishment clause cases are presented in Table 2. As before, the procedure locates the opinions along the ideological scale, in most cases confidently so. The Wordscores in this table are typically several times the size of their standard errors, and the Wordscore for only one case, *Wallace v. Jaffree*, is smaller than its standard error. Again, to make a substantive evaluation of how these estimates fit with our sensibilities of the Court's rulings in these cases, these values are charted alongside the reference texts in Figure 2.

Viewing these cases along the ideological continuum, we find that a decision striking down a ban on teaching evolution and another invalidating a state-composed prayer in public schools --- *Epperson v. Arkansas* (1968) and *Engel v. Vitale* (1962), respectively --- register as less liberal than our reference policy contained in *Schempp.* To be sure, these are all liberal policy positions, but they

Figure 2. Wordscores for Establishment Clause Cases
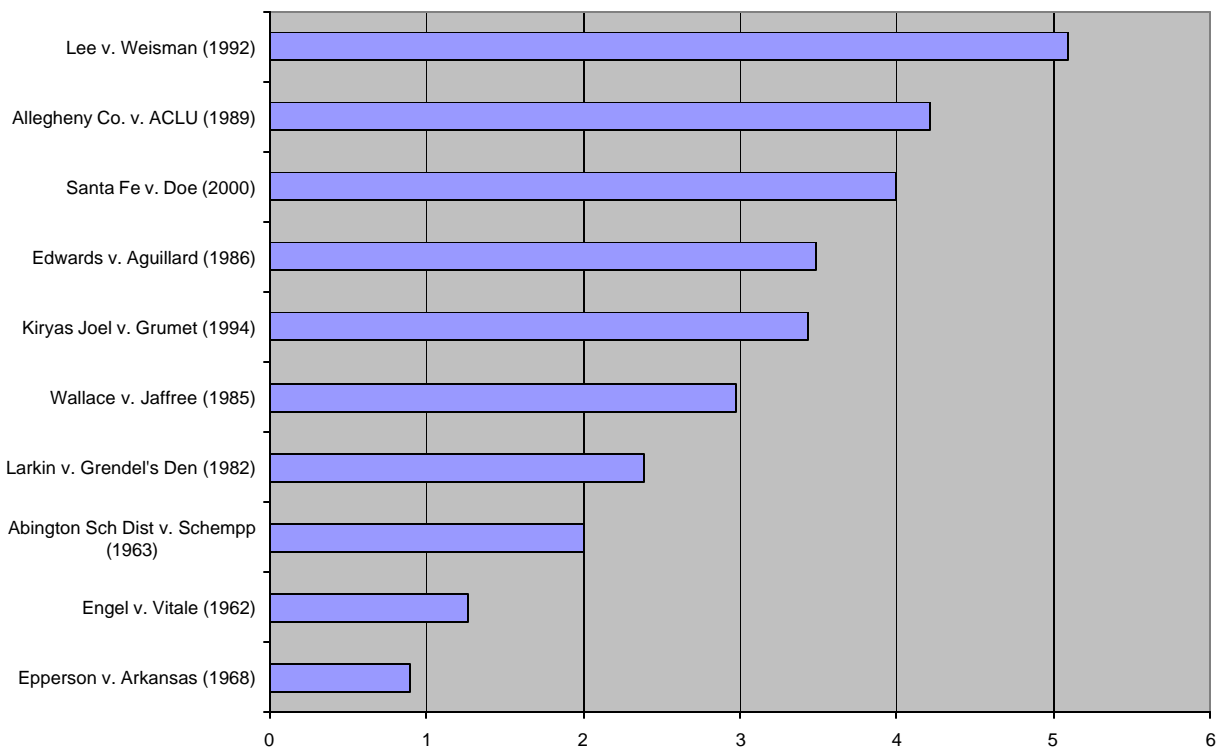
would scarcely be numbered among the most significant obstacles to religion playing a more prominent role in public life.

Next in the line-up are two cases that pose questions of religious entanglements, and they are sensibly ordered, as well. The Court's opinion in *Larkin v. Grendel's Den* (1982), which stands for the proposition that government may not place legislative power into the hands of a religious institution, is a liberal policy but not quite as liberal as the Court's decision to strike down the more diffuse entanglement of creating a special school district for Hassidic Jews, presented in *Kiryas Joel v. Grumet* (1994).

Between these two cases lies the Court's decision to invalidate a daily moment of silence in the public schoolroom in *Wallace v. Jaffree* (1985). The justices, of course, have long been skeptical of religious exercises in the schools, but a moment of silence is not nearly as troublesome as a state-composed prayer. For that reason, we would expect to see the policy extracted from the *Wallace* opinion to be judged as a good deal more liberal than the decision in *Engel v. Vitale.* At the same time, the *Wallace* opinion banning a daily moment of silence is surely not as liberal as eliminating the invocations that are given only rarely at events where attendance is not required. The decisions striking down those devotional activities --- *Lee v. Weisman* (1992) and *Santa Fe v. Doe* (2000) --- are scaled as much more liberal policy positions.

It is interesting to note that, even though two of the cases involve attempts to limit the teaching of evolution, they are scaled at nearly opposite ends of the dimension. The legislative decision to make the teaching of evolution optional (and contingent upon a willingness to teach Creation Science as an alternative account of the nature of human life) is scarcely on par with an outright ban on the subject. Thus, the Wordscore procedure extracts a far more liberal position for the policy contained in *Edwards v. Aguillard* (1986) than the majority position in *Epperson*.

The remaining case, *Allegheny County v. ACLU* (1989), presented what most would reasonably construe as a state-endorsement of Christianity --- the courthouse crèche depicting the birth of Christ beneath a banner proclaiming "Glory to God in the Highest." The religious connotations notwithstanding, the state's recognition of the importance of Christianity to many of its citizens is seemingly universal in the United States. A decision restricting a tradition regarded as innocuous by large numbers of the population would naturally be seen as quite liberal. Indeed, the Wordscore procedure bears this out, ranking it as the most liberal policy, just after the decision striking down another commonplace, the invocations and benedictions offered at public high school graduations.

Search and Seizure

To this point, the policy positions derived from the content analysis are facially valid, corresponding, more or less, to relevant differences that exist across cases. One potentially trouble-spot highlighted by the Establishment Clause cases is their possible temporal dependence. In Figure 2, for example, the opinions evaluated as least liberal are also the ones decided first. The opinions scaled as more liberal, by comparison, tend to be of more recent vintage. This type of policy movement can and does occur systematically (Baum 1988). From the standpoint of the Wordscore application, however, our concern is that the similarity in language between cases might be a simple function of each case building from a base established from prior cases and capped by its most recent previous decision. Thus, each new liberal policy would, in effect, be equal to the Court's liberalism at Time $_{t-1}$ plus 1 additional unit of liberalism.

To examine this possibility, we conduct an additional wordscore analysis of a larger sample of search and seizure cases. As before, each majority opinion has the same valence; in this case,

they are all conservative policies. Because the various doctrines of search and seizure have not historically proceeded in a linear fashion (see, e.g., Segal 1984), we believe that they will be useful for sorting out any problems of time-boundedness. If the Wordscore procedure scales policies in a way that is ideologically plausible but without reference to time, then that would suggest that the extraction of policy positions by this method is not inhibited by the temporal sequence of those positions.

Using *Terry v. Ohio*'s (1968) stop-and-frisk exception to the warrant requirement as a less conservative reference text and *National Treasury Employees Union v. Von Raab*'s (1989) support for drug tests for promotion within the Customs Service as a more conservative reference, we generate a third estimation of the policy positions of the Court's precedents. These results appear in Table 3.

As in our previous content analyses, these results come with a fair degree of confidence. In almost every instance, the Wordscore estimate is substantially larger than its standard error. Thus, we believe that the relative positions extracted through the application represent genuine and meaningful differences that exist in these various judicial policies. More important, there seems to be no temporal sequence to the ideological scale. Cases from throughout the 1980s and 1990s, for example, are dotted all across the scale in no apparent pattern. True, the least conservative cases are a trio from the late-1960s and early 1970s, but we believe that this is a function of their genuine ideological location.

We compare these estimates graphically in Figures 3. According to these data, two cases were regarded as somewhat less conservative than our reference position. Specifically, the Court's support for warrantless searches conducted at the time of a suspect's arrest (*U.S. v. Robinson* 1973) and because of the likely destruction of physical evidence by suspect (*Cupp v. Murphy* 1973). We

believe that, by most accounts, these searches are substantially more "reasonable" than many others that have been upheld.

Table 3. Estimated Policy Positions of Supreme Court Opinions, Search and Seizure Cases

Case	Standardized wordscores	Standard errors
Board of Education v. Earls (2002)	2.73	.17
Skinner v. Railway Labor Executives' Association (1989)	2.45	.11
Vernonia School District v. Acton (1995)	1.69	.15
Michigan v. Sitz (1990)	1.27	.18
U.S. v. Montoya de Hernandez (1985)	.99	.20
U.S. v. Jacobsen (1984)	.05	.18
New Jersey v. T.L.O. (1984)	– .10	.14
U.S. v. Leon (1984)	– .44	.13
U.S. v. Knotts (1983)	– .48	.25
Bond v. U.S. (2000)	– .69	.35
Ciraolo v. California (1986)	– .77	.26
California v. Acevedo (1991)	– .76	.13
Arizona v. Hicks (1987)	– .93	.19
Florida v. Bostick (1991)	– .96	.19
Schmerber v. California (1966)	– .96	.20
Cupp v. Murphy (1973)	– 1.94	.27
U.S. v. Robinson (1973)	– 2.15	.16

Note: Reference texts are the opinions in *Terry v. Ohio* (1968), scored as -1, and *National Treasury Employees Union v. Von Raab* (1989), scored as 1

Only moderately more conservative is the decision in *Schmerber v. California* (1966). Like *Cupp*, it too involves the potential loss of evidence, but this opinion upheld the invasive procedure of drawing blood in order to establish a driver's intoxication. By these lights, the policy position in this case was equivalent to the position in our reference opinion, *Terry.*

Figure 3. Worscores for Search and Seizure Caess
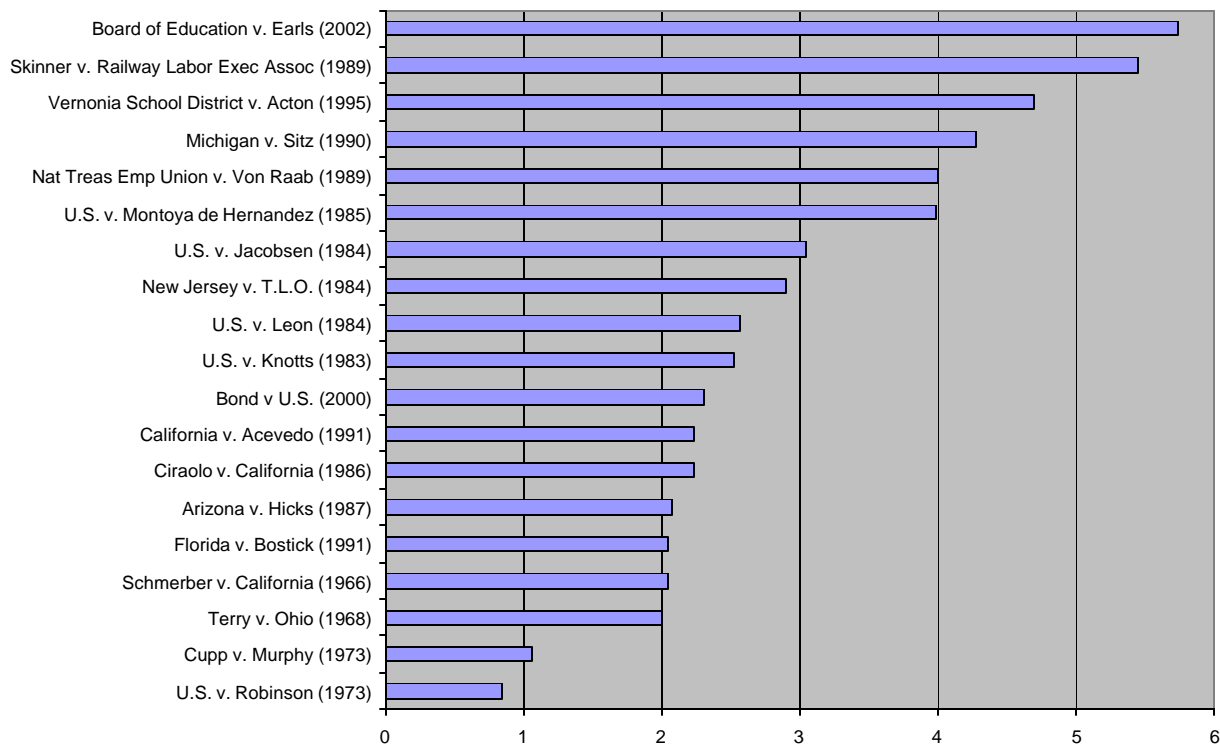
The need for a valid warrant is further obviated by a number of circumstances: when one consents to be searched (*Florida v. Bostick* 1991), when the police are acting in good faith (*U.S. v. Leon* 1984), and when the evidence is in plain sight (*Arizona v. Hicks* 1987) or otherwise viewable by different segments of the public (*Ciraolo v. California* 1986; *U.S. v. Knotts* 1983; *U.S. v. Jacobsen* 1984). Likewise, the justices have consistently suggested that searches are valid as long as they do

not invade an expectation of privacy. Automobiles consequently enjoy less protection (*California v. Acevedo* 1991). Similarly, law enforcement's touching of luggage in an overhead compartment in a bus is not substantially different from the incidental handling that luggage undergoes by other members of the traveling public (*Bond v. U.S.* 2000). We would expect therefore, that these types of policies would not rank on a scale of conservatism, and this is exactly what the results show.

By the Wordscore estimates, the indefinite detention of a suspected drug smuggler at the international border, represented by the decision in *U.S. v. Montoya de Hernandez* (1985), is substantially more conservative than the search of a student by a public school principal, upheld in *New Jersey v. T.L.O.* (1984). Students, as a group, have never fared well in constitutional litigation, so moderately conservative estimate for this opinion certainly makes sense.

Perhaps of greatest concern for the justices has been searches undertaken without individualized suspicion. To be sure, the justices have upheld several of these searches, but their opinions typically reveal either a considerable worry about the potential loss of privacy or the imperative governmental goals that must be weighed against the threatened privacy interest --- or both. Although their factual scenarios differ a good deal, the policy positions extracted from the opinions in these cases are estimated to be the most conservative in our sample. In fact, the scaling procedure estimates that each of the policies in this category issued by the Court are more conservative than our reference text, the *Von Rabb* decision, which is another opinion upholding searches without individualized suspicion.

The sobriety checkpoints upheld in *Michigan v. Sitz* (1990) are rendered here as a highly conservative policy. And the Court's support in *Vernonia School District v. Acton* (1995) for drug tests for high school football players --- even when motivated by a desire to stem a school's drug problem or to protect the health of athletes --- represents one of the Court's most stringent cases within the

search and seizure doctrine. At the extreme right of the policy dimension are *Skinner v. Railway Labor Executives' Association* (1989) and *Board of Education v. Earls* (2002), both opinions upholding searches without individualized suspicion. In *Skinner*, the justices found the interest of safety on the nation's rail lines to be significant enough to justify drug and alcohol tests of rail personnel immediately after a train accident. *Earls*, like *Vernonia*, presents a case of drug testing as a condition for participation in extracurriculars, but unlike *Vernonia*, the majority opinion upheld suspicionless tests for students seeking to participate in virtually any school-sponsored activity, even those such as the choir or the honor society that are least likely to attract the students using illegal drugs. Whatever the virtues of these searches, they are undoubtedly quite conservative, and the scaling method recognizes them as such.

Conclusions

We began by noting that political scientists who undertake quantification of the Supreme Court for statistical purpose largely ignore its policy outputs. Are we discarding valuable information? The use of the Wordscore application suggests that it may be quite easy to summarize a great deal of information contained within those opinions and to extract estimates of the policy positions that they represent.

By our lights, these estimates are indeed valid indicators of the content of the justices' opinions. Although one may certainly quibble with the relative placement of any individual case, it is hard to deny that the Wordscore procedure --- which we must emphasize neither speaks nor understands the English language --- is capable of identifying important similarities and differences that exist within a body of law.

By no means do we intend our exercise here to be interpreted as a substitute for the

significant work that continues to be done those scholars who labor to comprehend and explain the forces that drive the form and function of judge-made law. Rather, our is an attempt to determine if a large amount of information that virtually everyone agrees is important can be assimilated systematically and used to better inform our perspective on law and courts.

Having suggested that scholars can, in fact, do just that, we would like to offer some preliminary notions on the application of this method. Simply as a descriptive matter, we see enormous benefit to being able to describe a large number of opinions in dimensional terms. After all, seeing how various pieces of the law fit together and whether they represent similar or divergent policies is the business of anyone who seeks a firm grasp of the Court's policy outputs. Perhaps more important, the Wordscore procedure is, like any form of dimensional analysis, a method of data-reduction, and the results of that reduction can then be employed in other types of analysis. Having interval-level information about the policies adopted by the Court opens a great many avenues for further exploration. Indeed, the policy position scores could serve as either independent or dependent variables in various statistical models of, for example, Supreme Court decisionmaking, the response of lower courts to precedent, and the circumstances under which Congress might seek to over the Court's policies. We easily imagine other plausible applications.

Any user of the procedure, however, ought to consider with some care whether the data and the results fit with their independent observations of the Court. As we discovered, for example, the Wordscore technique seemed ill-suited to distinguishing majority and minority opinions --- at least for those opinions that we sampled.[12]

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[12] We add another, slightly more complicated caveat, which concerns the interpretation of the standardized scores that place the virgin texts on the same metric as the reference texts. The drawback to the standardized estimates is that they depend critically on the variance of the virgin texts that have been scored. As a consequence, if we use the same set of reference texts to score a given set of virgin texts, the position assigned to a virgin text will depend on the *other* virgin texts that are scored along with it: if, for example, we have three reference texts, and

Understanding the ideological nature of the Supreme Court's decisions is a basic enterprise for a great many students of the Court. Unfortunately, existing research often assumes away the substance of those decisions. We have tried to illustrate a novel way of investigating that ideological content, one that follows in the long tradition of content analysis. Although we have hardly settled the matter, we think the results presented here suggest a way of better informing our understanding of not only the Court's policies but the Court itself and its role in the political system.

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virgin texts 1 through 7, we will get different estimates for the position of virgin text 1 if we score it along with all other virgin texts than if we scored it with only a subset of the other texts. As is common to virtually all statistical procedures, such sensitivity is particularly pronounced the smaller sample size. In general, researchers should thus prefer a larger set of virgin texts and they need to be sensitive to the implications of using a particular set of virgin texts for the scores that result.

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Appendix. Cases Used in the Wordscore Analysis

Case	*Summary of holding*
Free Exercise of Religion	
Employment Division v. Smith (1990)	Oregon's prohibition of use of peyote in religious ceremony held not to violate free exercise of religion.
Goldman v. Weinberger (1986)	Free exercise of religion held not violated by applying Air Force regulation, prohibiting wearing of headgear while indoors, to Orthodox Jew's wearing of yarmulke.
Heffron v. ISKCON (1981)	State fair rule requiring religious organization to sell literature and solicit donations at assigned location, held not to violate free exercise of religion.
O'Lone v. Shabazz (1987)	State prison regulations effectively preventing Muslim inmates from attending weekly congregational service held not to violate free exercise of religion clause.
U.S. v. Lee (1982)	Imposition of social security taxes on persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support such benefits, held constitutional.
Establishment of Religion	
Abington School District v. Schempp (1963)	Required reading at the opening of each school day of verses from the Bible and the recitation of the Lord's Prayer by the students violates establishment clause.
Allegheny County v. ACLU (1989)	Creche in county courthouse, but not menorah displayed with Christmas tree outside city-county office building, held to violate establishment of religion.
Edwards v. Aguillard (1986)	Statute requiring public schools that teach evolution to teach "creation science" as well, held to violate establishment of religion clause.
Engel v. Vitale (1962)	Classroom prayer in daily program for public schools violates establishment clause, even though the prayer is denominationally neutral and its observance on the part of the students is voluntary.
Epperson v. Arkansas (1968)	Antievolution statute prohibiting explanation of the theory of evolution in public schools violates establishment clause.
Kiryas Joel v. Grumet (1994)	Statute creating public school district for Hasidic Jewish village held to violate establishment of religion.
Larkin v. Grendel=s Den (1982)	Statute vesting power in governing bodies of churches to effectively veto applications for liquor licenses within 500 foot radius of a church violates establishment clause.
Lee v. Weisman (1992)	Inclusion of invocation and benediction by member of clergy at high school graduation held forbidden by

	establishment of religion clause.
Santa Fe v. Doe (2000)	School district's policy authorizing high school student's delivery of "invocation and/or message" before home varsity football games held to violate establishment of religion clause.
Wallace v. Jaffree (1985)	Statute authorizing a moment of silence in public schools for "meditation or voluntary prayer" held to violate the establishment clause of the First Amendment.
Search and Seizure	
Arizona v. Hicks (1987)	Warrantless searches are permissible when evidence is in "plain view."
Board of Education v. Earls (2002)	Public school subjection of all students participating in competitive extracurricular activities to urinalysis drug testing held not to violate Fourth Amendment.
Bond v. U.S. (2000)	Law enforcement officer's physical manipulation of bus passenger's carry-on luggage held to prohibition against unreasonable searches.
California v. Acevedo (1991)	Warrantless search of paper bag found in automobile trunk, based on probable cause to believe bag contained marijuana, held permissible under Fourth Amendment.
Ciraolo v. California (1986)	Warrantless aerial observation of individual's fenced-in backyard held not to violate Fourth Amendment.
Cupp v. Murphy (1973)	Taking a sample of scrapings from the fingernails of a strangulation-murder suspect, over his protest and without a warrant, does not violate the Fourth Amendment.
Florida v. Bostick (1991)	Police officers' request that bus passenger consent to search of luggage held not necessarily to constitute "seizure" for purposes of Fourth Amendment.
Michigan v. Sitz (1990)	Initial stop of motorists at highway sobriety checkpoints conducted by state police held not to violate Fourth Amendment.
National Treasury Employees' Union v. Von Raab (1989)	Tests of urine samples for illegal drug use by customs employees who apply for promotion held not to violate Fourth Amendment.
New Jersey v. T.L.O. (1984)	Public school principal search of student's purse, without probable cause, does not violate Fourth Amendment.
Schmerber v. California (1966)	Withdrawal of blood sample to test for intoxication does not violate Fourth Amendment.
Skinner v. Railway Labor Executives= Association (1989)	Federal Railroad Administration safety regulations authorizing alcohol and drug tests of employees without

	warrants or individualized suspicion held not to violate Fourth Amendment.
Terry v. Ohio (1968)	The police "stop and frisk" practice --- necessarily swift action predicated upon the on-the-spot observations of the officer on the beat --- cannot be subjected to the warrant procedure.
U.S. v. Jacobsen (1984)	Warrantless removal and test by federal agent of powder discovered in damaged package by employees of freight company held not to violate Fourth Amendment.
U.S. v. Knotts (1983)	Monitoring beeper signals from radio transmitter that was placed in container of chloroform, held not to constitute search or seizure under Fourth Amendment.
U.S. v. Leon (1984)	Evidence obtained in reasonable reliance on defective search warrant held admissible.
U.S. v. Montoya de Hernandez (1985)	Detention at international border held justified at its inception if customs agents reasonably suspect that traveler is smuggling contraband in her alimentary canal.
U.S. v. Robinson (1973)	General search of a suspect when taken into custody does not require a warrant.
Vernonia School District v. Acton (1995)	School district's policy authorizing urinalysis drug testing of students who participated in athletics programs held not to violate Fourth Amendment.

Note: Holdings are adapted from listings in Lexis-Nexis.