Analyzing Justices and Their Policy Positions Over Time

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Undoubtedly, decisions by the US Supreme Court often have significant

political consequences. Not surprisingly, social scientists have expended

considerable energy to develop reliable measures of the political content of the

Court's decisions. One of the most prominent and widely used such measure is the

"direction" of the court's ruling, coded as either "liberal" or "conservative."

Although some may disagree about the construction and interpretation of this

measure, it is the standard employed in the most widely used data on the Court

(Spaeth et al. 2011). In a previous paper (McGuire et al. 2009), we demonstrated

that this particular measure --- when applied to an aggregation of the Court's

decisions (say, over a term) --- suffers from significant bias. As a result of the

strategic interactions between litigants (who try to win and therefore adjust the

arguments they present to the Court in light of the Court's ideological composition)

and lower court judges (who want to avoid being overturned by the Court and

therefore hew in varying degrees to the Court's doctrines), the direction of a

decision is only an accurate indicator of the content of the Court's decisions when it

reverses a lower court. When the Court affirms a lower court decision, by contrast,

the direction of the decision will typically run counter to its ideological content. As a

corrective, we suggested that aggregate measures of the Court's policy output that

are derived from the binary direction of rulings should be calculated only from decisions to reverse.

Although our previous work focused on measures of the aggregate output of the Court, we suggested in the paper that similar dynamics may affect measurement of the ideological "output" produced by *individual* justices in their votes to affirm and to reverse.   We are scarcely the first to contemplate the longitudinal variation in the justices' voting behavior (see, e.g., Baum 1989; Epstein et al. 1998; Ulmer 1981), and we do not seek to revisit or challenge earlier findings. Rather, we are simply interested in exploring the individual-level implications of our earlier aggregate-based argument. We begin with a brief review of the main theoretical orientations and their implications for the voting behavior of individual justices. We then draw out some testable implications and present some preliminary analysis.

A Theoretical Sketch

Consider a simple "case-space" model of judicial decision-making. The justices are arrayed from left to right in a single dimension that represents the legally relevant "facts" of a case, e.g., the intrusiveness of a search. Judicial decisions embody "legal rules" that are cut-points on this dimension that separate permissible from impermissible actions. For their part, justices are characterized by their preferences over legal rules, and they are assumed to prefer rules that are close to their "ideal" rule to rules that are further away. Without loss of generality, we assume that more "conservative" justices favor legal rules that are further to the right.

In any individual case, the Supreme Court faces the following task: It is reviewing a lower court decision that is represented by a legal rule, which in turn implies a disposition of the case. The petitioner who has brought the case to the Court is asking the Supreme Court to reverse the lower court and to replace that decision with one that is more to the petitioner's liking. Thus, in bringing the case, the petitioner outlines an alternative legal rule that leads to the opposite disposition. Thus, in deciding whether to vote to "reverse" or "affirm" the lower court decision, each justice consults her preferred legal rule and votes to affirm if she agrees with the lower court's disposition and votes to reverse if she does not. If a majority of the justices votes to reverse, the lower court decision is overturned.

To illustrate, consider Figure 1. A lower court has issued a decision that establishes a legal rule at D_{LC}. Given the fact pattern c in the case, this rule (and therefore the lower court decision) results in judgment in favor of one of the parties (say Party A). Suppose the losing party B appeals to the Supreme Court, and the legal rule favored by the median justice of the Supreme Court is at X_{SC}. If the Supreme Court grants certiorari, it will move the legal rule at least to X_{SC}.[1] Moreover, because the case facts fall below X_{SC}, the Court concludes that Party B,

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[1] There is, of course, a tremendous literature on the "location" of Supreme Court opinions. The two prevailing schools of thought privilege either the median justice of the Court as a whole (e.g., Hammond et al. 2005), or the median member of the majority coalition (e.g., Clark and Lauderdale 2007; Carrubba et al. n.d.). In either case, for purposes of our illustration, the legal rule adopted in the Court's decision will be at or to the right of X_{SC} (since the Carrubba et al. [n.d.] model implies that the winning coalition forms on the right, given the median's preferences over case disposition.

not Party A, should have prevailed. Accordingly, it issues a reversal of the lower

court decision.

Figure 1: An Illustration
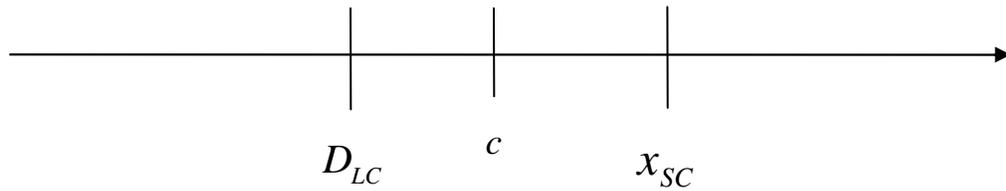
In contrast, imagine that X_{SC} had been located to the *left* of c. In that case, the

Supreme Court majority agrees with the disposition reached by the lower court, and

accordingly affirms the lower court decision.

Consider the implications of this reasoning for the decision of potential

petitioners --- those who have lost in the lower courts --- to bring cases. For the

moment, let us focus on petitioners who are motivated by the desire to win, i.e., they

weigh the costs of appeal against the likelihood of prevailing in the Supreme Court

and only file if they believe that they have a sufficient chance of winning. The

critical question for such petitioners is whether they believe that the median justice

of the Supreme Court prefers a legal rule that reaches a different outcome than the

lower court. So, in Figure 1, the critical question is whether the median's preferred

legal rule (X_{SC}) is to the right of c. If the (potential) petitioner believes that it is, she

will file the appeal. But if she believes that it is not, she will not do so.

In general, it seems reasonable that petitioners will have some information about the likelihood that the median justice will take a favorable or unfavorable view of the disposition reached by a lower court. A conservative Supreme Court, for example, is likely to take a skeptical look at lower court decisions located to its left (the situation depicted in Figure 1). Conversely, a liberal Supreme Court may be more interested in overturning conservative lower court decisions. There are two immediate consequences of this straightforward observation:

1) When the Supreme Court is conservative *relative to* (most) lower courts, litigants will perceive that the Court prefers a more conservative legal rule. Consequently, petitions will primarily come from those seeking a more conservative legal rule. When these petitioners win, the Court reverses the lower court. Because the Court chooses the conservative alternative relative to the lower court disposition, the direction of this decision, according to conventional coding, is "conservative."

2) When the Supreme Court is liberal *relative to* (most) lower courts, litigants will perceive that the Court prefers a more liberal legal rule. Consequently, petitions will primarily come from those seeking a more liberal legal rule. When these petitioners win, the Court reverses the lower court. Because the Court chooses the liberal alternative relative to the lower court disposition, the direction of this decision is typically coded as "liberal."

However --- and this is critical to the argument --- petitioners are unlikely to be able to predict *perfectly* what the preferences of the median justice are likely to be with respect to a particular case. In some instance (especially those in which the lower

court decision gets "close" to what the median justice regards as desirable), petitioners can "guess wrong" and ask the Court to reverse a lower court ruling when the Court does, in fact, agree with the disposition reached by the lower court. In terms of Figure 1, this occurs when the Supreme Court's ideal legal rule, X_{SC}, is located to the left of c. Such mistaken guesses result in affirmances: the Court rejects the position taken by the petitioner and affirms the disposition reached by the lower court.

When the Court is conservative relative to the lower courts, most litigants that come to the Court are asking for more conservative legal rules; after all, it is these litigants that expect to win, given the Supreme Court's preferences. Litigants favoring more liberal legal rules by and large do not file cases, because they realize that they are unlikely to win. Because the Court's docket is dominated by cases brought by conservative litigants, these litigants are responsible not only for most of the "correct guesses" (that is, reversals of liberal lower courts) but also for the lion's share of "wrong guesses" (that is, affirmances of liberal lower court that result simply from overestimating *how* conservative the Court is). Moreover, because the Court affirms the lower court in the face of a conservative challenge, the "direction" of these decisions is coded as "liberal." Hence, for the Court as a whole, the ideological direction of affirmances runs directly counter to the *actual* preferences of the Court's centrist justices: As the Court moves rightward along the ideological continuum, its affirmances look increasingly liberal, even as its reversals appear increasingly conservative.

Moving to the Individual Justice Level

Now consider the implications of this argument for the votes of individual justices to reverse or affirm. In teasing out these implications it is useful to separate two cases, distinguished by the relative position of the Supreme Court's preferences vis-à-vis the lower courts. One possibility is that the Supreme Court is conservative compared to most lower courts. This implies that most of the decisions that make it on to the Supreme Court's plenary docket are *liberal* lower court decisions; this is the case because (a) there simply are more liberal (relative to the Supreme Court) lower courts making decisions, and (b) the majority of justices on the Supreme Court (being conservative) are more likely to be concerned with granting certiorari in order to rein in the policymaking of liberal lower courts. In contrast, when the Supreme Court is liberal (relative to most lower courts), most of the lower court decisions it reviews are conservative. Figure 2 provides data consistent with this expectation, plotting the preferences of the Supreme Court relative to the lower courts (measured as the percentage of Democratic appointees on the Supreme Court minus the percentage of Democratic appointees on the federal courts of appeals) alongside the percentage of conservative lower court decisions on the Supreme Court's docket. (To facilitate comparison, these variables have been standardized to a mean of 0 and standard deviation of 1.) What these data reveal is a close correspondence between the two time series. When the Court is liberal relative to lower courts (i.e., higher on the y-axis), the decisions it reviews are mostly conservative (i.e., again, higher on the y-axis). As the Court takes a more

Figure 2. Relative Supreme Court Preferences and Ideology of Court's Docket
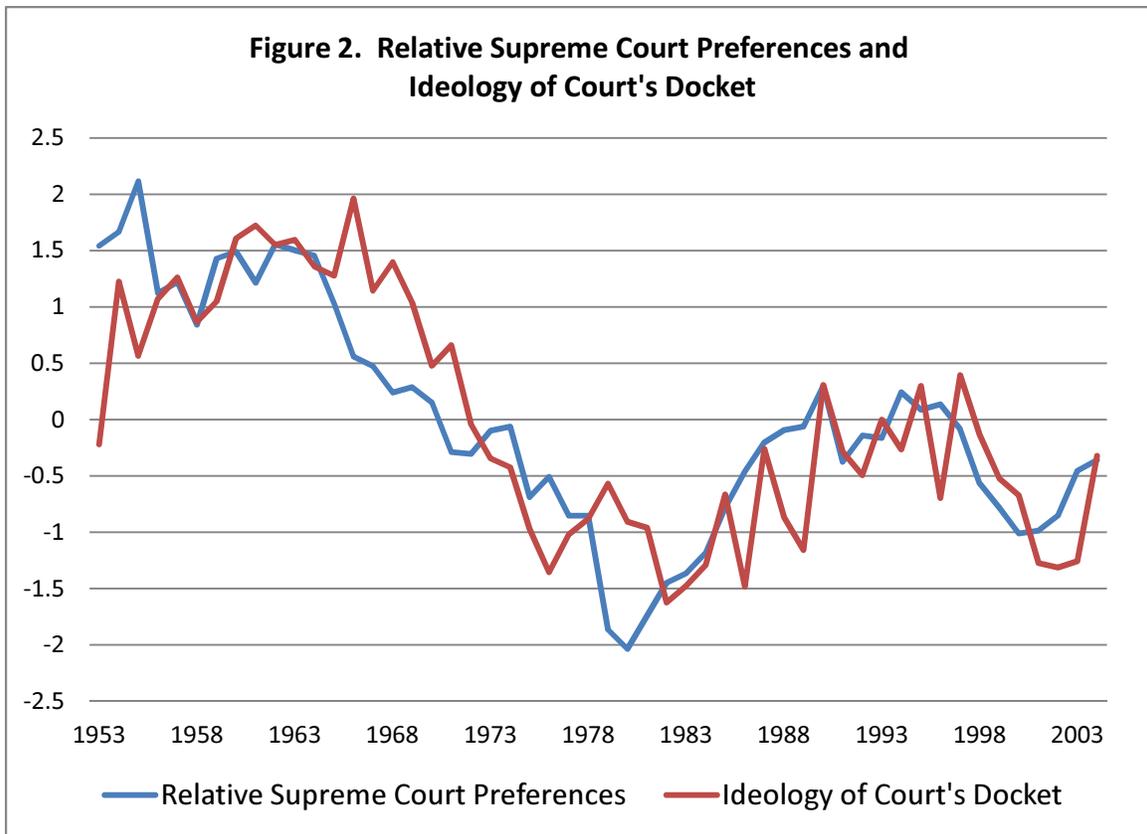
conservative turn in the early 1970s, it shows a propensity for reviewing a greater number of liberal lower court decisions.

To understand the implications for the voting behavior of individual justices, consider the case in which the Supreme Court is conservative relative to the lower courts. As a result, the Court is primarily engaged in review of *liberal* lower court decisions. Given that the Court is conservative, most of these liberal lower court decisions are being challenged by petitioners who are seeking a more conservative policy from the Supreme Court. Liberal petitioners largely "stay away," knowing that they are likely to lose.

Now consider an individual justice who is on the *right* side of the Supreme Court in Figure 1, i.e., a justice who is *more conservative* than the median justice,

who thus prefers a legal rule to the right of X_{SC}. Given that --- in most cases --- conservative petitioners are challenging a liberal lower court ruling, such a justice is highly likely to vote to reverse and for obvious reasons: she will typically agree with the petitioner, and such a vote will be a vote cast in a *conservative* direction.

Of course, there is imprecision in the estimates of winning made by petitioners, and hence they make "mistakes." Although this should happen with less frequency, it is possible that a petitioner who is even more liberal than the lower court challenges the lower court ruling. (In Figure 1, this is a petitioner who prefers a rule to the left of D_{LC}). In such a case, our "rightward" justice votes to affirm, and this vote is cast in a conservative direction. More likely is a second type of "mistake": A conservative petitioner, believing that the Court is sympathetic to its interests, may "overshoot" even the justices on the right side of the Supreme Court and ask for a policy that is "too conservative" even from their point of view. In such a case, our justice will vote to affirm the lower court, and such a vote is cast in a "liberal" direction.

Note an important implication of this reasoning. Consider affirmances first. Because votes to affirm by our conservative justice are more likely to be the result of a petitioner who has overestimated how conservative the Supreme Court is, then when our justice votes to affirm the lower court, it is likely to be the result of conservative petitioners challenging liberal lower court rulings. Hence, when our justice votes to affirm a lower court ruling, she is casting predominantly votes to that are coded as *liberal.* In contrast, because most petitioners are conservative and

perceive the Court to be interested in undoing liberal lower court policy, when our

justice votes to reverse, those votes will be predominantly coded as *conservative.*

This leads to two implications: First, for this justice who is on the right side

of a conservative Court, votes to reverse will be "in tune" with his preferences, while

the direction of votes to affirm will be "out of tune" with his preferences. Second, if

we take the difference in the (presumably small) percentage of liberal votes in votes

to reverse to the (presumably large) percentage of liberal votes in votes to affirm,

this difference is *negative.*

Now, consider a justice on the opposite side of a conservative Supreme Court,

that is, a justice who is more liberal than the median justice. Given that --- in most

cases --- conservative petitioners are challenging a liberal lower court ruling, such a

justice is highly likely to vote to affirm, and again for obvious reasons: she will

typically disagree with the petitioner seeking to move policy to the right, and her

votes will largely reflect a desire to affirm those *liberal* lower court policies. But as

before, petitioners will be mistaken in their perceptions of what the Court is likely to

do. In a few instances, a *liberal* petitioner will err and challenge a lower court

ruling. Even though this petitioner is unlikely to win the support of the conservative

Court, our (liberal) justice will nevertheless support the petitioner's position,

casting a vote to reverse, which will be coded in a *liberal* direction.   Of course, the

more likely scenario will be cases in which a lower court has issued a very liberal

decision which is challenged by a petitioner who wishes to move policy in a

conservative direction. In such cases, a conservative petitioner "undershoots" the

median justice by asking for a policy that, while to the right of the lower court, is still

liberal enough for to win the support of our left-leaning justice. Stated differently,

when very liberal policies are challenged in the Court, even our liberal justice finds

herself in agreement with the (more conservative) petitioner challenging the lower

court's ruling. In such cases, our justice votes to reverse, and this vote is coded in a

conservative direction.

What are the implications of this reasoning? First, for the justice on the left-

side of the Supreme Court, most votes are votes to affirm, and these votes are coded

in a liberal direction. Fewer votes are votes to reverse, but among votes to reverse,

the bulk of these votes are cast in a *conservative* direction. Unlike for our justice on

the right, the ideology of the liberal justice is thus better reflected in votes to affirm,

while votes to reverse are "out of tune" with the justice's ideology.   When we

consider the difference between the (presumably small) percentage of liberal votes

in votes to reverse and the (presumably large) percentage of liberal votes in votes to

affirm, however, this difference is *negative.*

We can, of course, apply similar reasoning to the case of a Supreme Court

that is more liberal than most lower courts and which therefore reviews

predominantly conservative lower court decisions. This exercise would result in

symmetrical conclusions. Summarizing, then, we thus have the following

expectations:

1) For justices who are on the "same side" of the lower courts as the median

    justice --- that is, conservative justices on a conservative Supreme Court and

    liberal justices on a liberal Supreme Court --- the ideology of the justices is

accurately reflected in votes to reverse, while votes to affirm run *counter* to the ideology of the justices.

2) For justices who are on the "wrong side" of the lower courts as the median justice --- that is, liberal justices on a conservative Supreme Court and conservative justices on a liberal Supreme Court --- the ideology of the justices is accurately reflected in votes to affirm, while votes to reverse run *counter* to the ideology of the justices.

Note that, on a conservative Court, conservative justices will *correctly appear conservative* when voting to reverse and *incorrectly appear liberal* when voting to affirm. So, the difference between (lower) liberalism when voting to reverse and (higher) liberalism when voting to affirm will be negative. At the same time, on a similarly conservative Court, liberal justices will *incorrectly appear conservative* when voting to reverse and *correctly appear liberal* when voting to affirm. Again, the difference between these two rates of support for liberalism will be negative; lower liberalism when voting to reverse and higher liberalism when voting to affirm.

This logic works in precisely the same way when the Court is liberal relative to lower courts. The only distinction is that these differences will become positive. A liberal justice on a liberal court will appear correctly liberal when voting to reverse, incorrectly conservative when voting to affirm. A conservative justice will seemingly --- but again incorrectly --- be perceived as liberal when voting to reverse, while her votes will to affirm will be a more accurate barometer of her greater

conservatism. For all justices, subtracting greater liberalism when voting to reverse from lesser liberalism when voting to affirm produces a positive difference.

Suggestive Empirics and Questions

We begin our analysis visually, examining whether the empirical implications of our theoretical argument manifest themselves overtime. Ultimately, our purpose is to search for confirmatory evidence of our theory at the level of the individual justice. As a preliminary exercise, however, it is useful to illustrate our argument through aggregation.   Does the behavior of the justices generally reflect the tendencies that we anticipate?
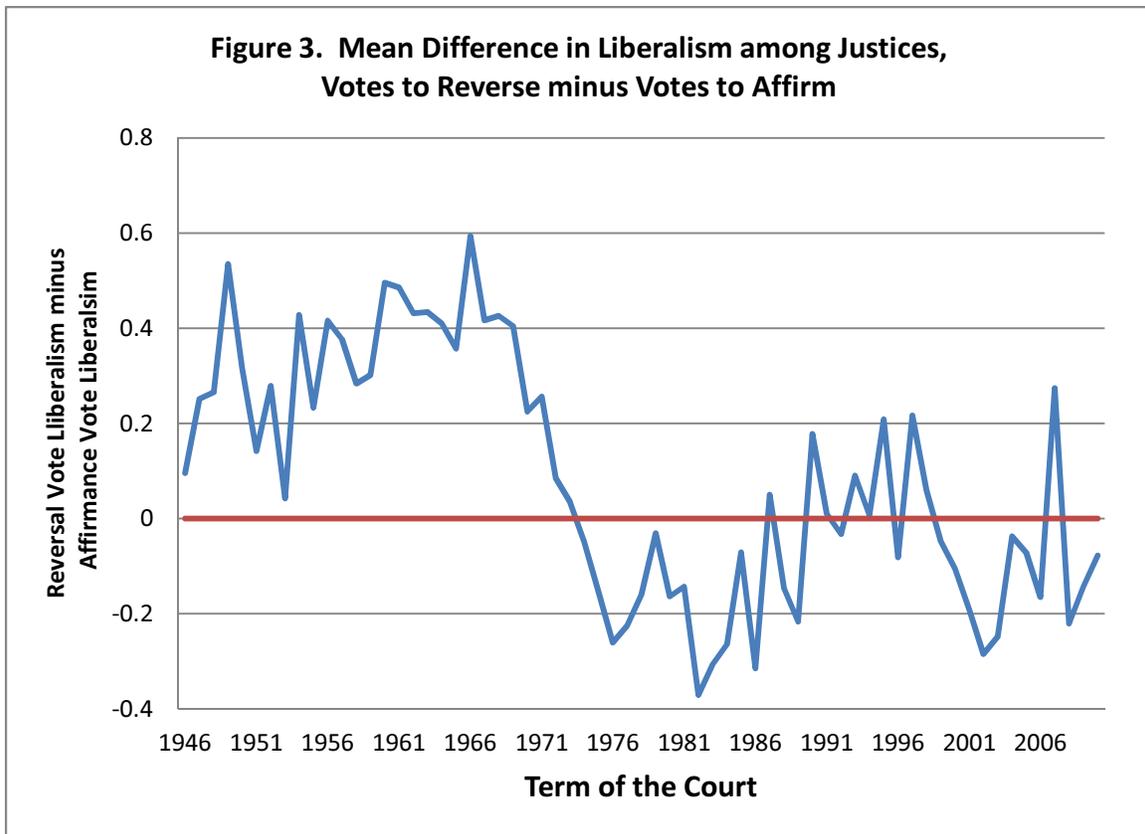
If we are correct in supposing that, when the Court is relatively liberal, liberalism in the justices' votes to reverse will outpace liberalism in their votes to affirm, the mean difference between these two percentages will be positive. That is:

$$\frac{1}{n} \sum_{i=1}^{n} (\% \, Liberal_{Votes \, to \, reverse} \, - \, \% \, Liberal_{Votes \, to \, affirm}) \, i \; > \; 0$$

Similarly, when the Court is relatively conservative, the Court mean of the difference in liberalism between votes to reverse and votes to affirm should be negative:

$$\frac{1}{n} \sum_{i=1}^{n} (\% \, Liberal_{Votes \, to \, reverse} \, - \, \% \, Liberal_{Votes \, to \, affirm}) \, i \; < \; 0$$

The data in Figure 3 clearly confirm our expectations.   During the Warren era, the Court reached its zenith of liberalism, followed by a steep decline, marked by the successive Nixon appointments of Chief Justice Warren Burger and Associate Justices Blackmun, Powell, and Rehnquist. Interestingly enough, by this accounting,

**Figure 3. Mean Difference in Liberalism among Justices,
Votes to Reverse minus Votes to Affirm**

Reversal Vote Liberalism minus Affirmance Vote Liberalsim

Term of the Court

the Court was still "liberal" until 1974, when the average difference in liberalism between these two types of votes turned negative. Since then, the Court has remained largely conservative, with occasional forays into more liberal territory in the 1990s.[2]

At first glance, one might be tempted to observe that this figure is simply a representation of the Court's liberalism over time. It bears emphasizing, however, that this time series marks only, in any given year, the average *difference* in liberalism between votes cast to reverse a lower court and those cast to affirm a lower court. Votes to reverse and votes to affirm have no ideological valence; they

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[2] These data are derived from votes in all orally-argued cases involving civil liberties and rights and economic regulation, with docket number as the unit of analysis.

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merely represent an institutional mechanism for reacting to the lower court decisions on the Court's plenary agenda.   If one makes the standard assumption of the attitudinal model --- that liberal justices cast liberal votes and conservative justices cast conservative ones --- then it should matter little, if at all, that some of those votes aim to reverse, while others affirm, a lower court decision. Absent some theory (such as ours) that posits systematic differences, there is no reason to expect that the difference between these two types of votes would be anything other than zero. In the aggregate, we see precisely the behavior that we expect with respect to positive and negative differences.

At the individual level, however, the votes to reverse and affirm should not be consistently indicative of a justice's true policy position. Recall that our expectations are that liberalism in votes to reverse will, in some instances, be a valid indicator of a justice's preference, with votes to affirm running in precisely the opposite direction. In other instances, liberalism in affirmances votes will be the more valid measure, with reversal liberalism running in the opposite direction. Which set of votes to rely upon depends upon (1) whether the Supreme Court is liberal or conservative, and (2) whether the justice is located to the left or the right of the median justice. We can summarize our expectations in Table 1. This table indicates that when a justice shares the ideological orientations of the Court as a whole --- that is, when a liberal justice sits on a left-leaning Court or when a conservative justice sits on a right-leaning Court --- votes to reverse will accurately reflect that justice's policy position. When a justice does not share the Court's policy proclivities --- a liberal justice on a conservative Court or a conservative justice on a

Table 1. Which votes are valid indicators of a justice's policy position?

	If the justice is left of the median:	*If the justice is right of the median:*
If the Court is liberal:	**Reversal votes are valid** (and Affirmance votes are invalid)	**Affirmance votes are valid** (and Reversal votes are invalid)
If the Court is conservative:	**Affirmance votes are valid** (and Reversal votes are invalid)	**Reversal votes are valid** (and Affirmance votes are invalid)

liberal court --- liberalism in votes to affirm will better serve to indicate a member of the Court's policy positions.

We can test these expectations against the voting behavior of individual justices. To do so, however, we must have some objective assessment of whether the Court is, in the main, liberal or conservative. We might allow the data in Figure 3 to serve as our guideline and assume that any term in which the mean "reverse minus affirm" liberalism was positive would indicate a liberal Court, while a negative mean for any term would serve to signify a conservative Court. Although this is a highly plausible measure, it is one that is derived from the justices' votes. Our theory would be more rigorously tested by an indicator that was not governed by the justices' votes on the merits. Thus, we rely instead on the data in Figure 2, the ideological composition of the Court's docket. Acting on the widely-held assumption that the justices grant certiorari principally because they wish to reverse lower court policies with which they disagree, we code the Court as "liberal" in any term in which it reviews more conservative than liberal lower court decisions and "conservative" in any term in which the larger share of its plenary docket consists of liberal lower court outcomes.

**Figure 4a. Justice Brennan's Liberalism,
Votes to Reverse and Votes to Affirm**
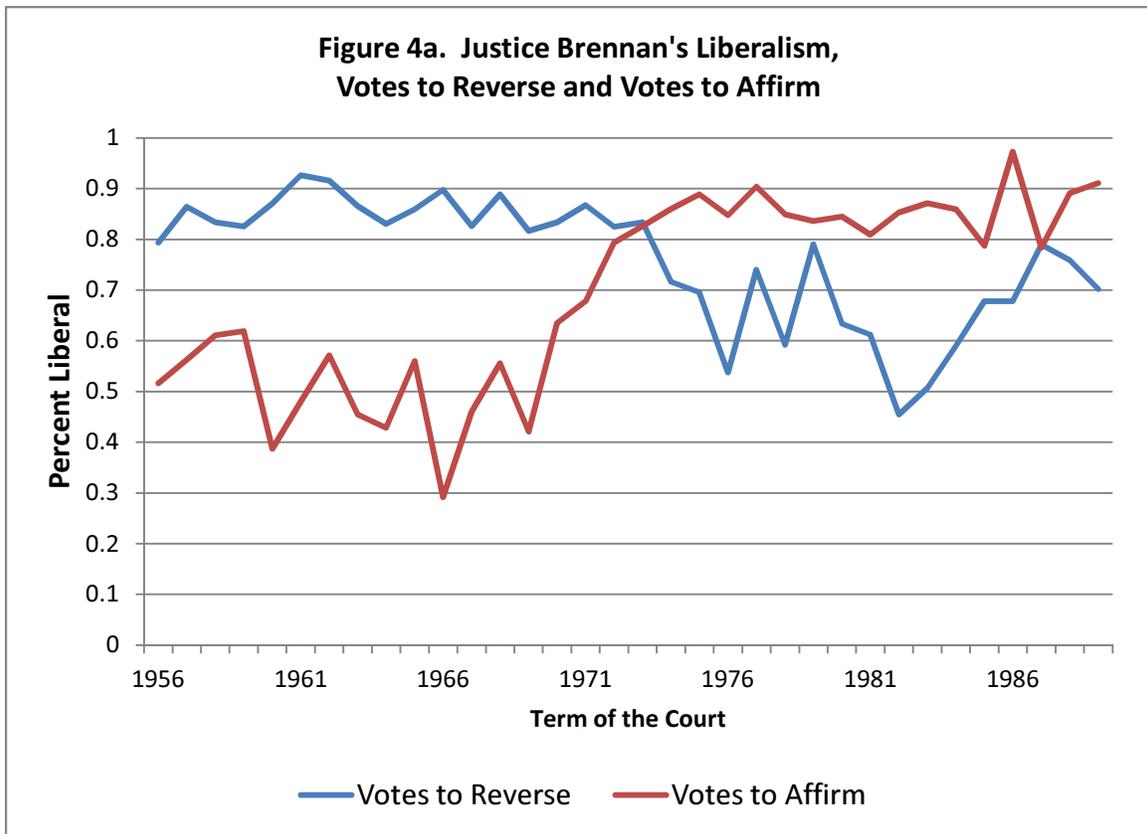
Ideally, the best justice to serve as an illustration would be one who has

served over a time period sufficiently long to detect regular vote patterns and who,

during that time period, occupied positions both to the left and right of the Court's

median justice.[3] On the modern Court, Justice William Brennan is ideal. Over his

lengthy career, he was a consistent member of the liberal majorities that

characterized the Warren Court. He likewise was a frequent liberal dissenter during

the more conservative regimes led by Chief Justices Burger and Rehnquist.

We begin with a comparison of his liberalism in votes to reverse and votes to

affirm, tracking each behavior over time in Figure 4a. The behaviors that he evinces

align precisely with our theory. From his earliest year on the Court until the Court

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[3] We judge a justice's location relative to the median by the Martin-Quinn
scores.

accumulated a sufficient number of conservative appointees to turn the direction of its policies, Brennan shared the liberal orientations of the Court, and his votes to reverse during this period clearly reflect his disposition; from 1956 through 1973, he regularly voted in a liberal direction --- at least when voting to reverse --- in excess of 80% of the time. By contrast, his votes to affirm reflect a markedly different tendency; liberalism in this category of cases hovers at an annual rate of only 50%, and in at least one instance dips as low 30%. Clearly, when Brennan served on a liberal Court, his votes to reverse are valid indicators of his orientations, while votes to affirm are not.

No less important, as the Court begins to take a more conservative turn in the early 1970s, Brennan's liberalism in votes to reverse begins to wane, just as his liberalism in votes to affirms begins to tick upward. By 1974 --- precisely the year in which, according to Figure 2, the Court switched fully to a conservative mode --- his liberalism in affirmance votes (now his more valid indicator, since he is on the left of a right-leaning Court) overtakes his liberalism in reversal votes, reflecting the same pattern of liberalism reflected in his pre-Burger votes. Liberalism in (the now invalid) votes to reverse continues to decline in subsequent years, reaching a nadir of 45% in 1982.

It seems quite plain that, when Brennan was on a liberal Court, his votes to reverse better capture his policy positions. When serving with a more decidedly right-leaning set of colleagues, by contrast, his votes to affirm are the superior indicator. In light of the evidence of this bias, one might well ask what the empirical

**Figure 4b. Justice Brennan's Liberalism,
All Cases and "Corrected Rate"**
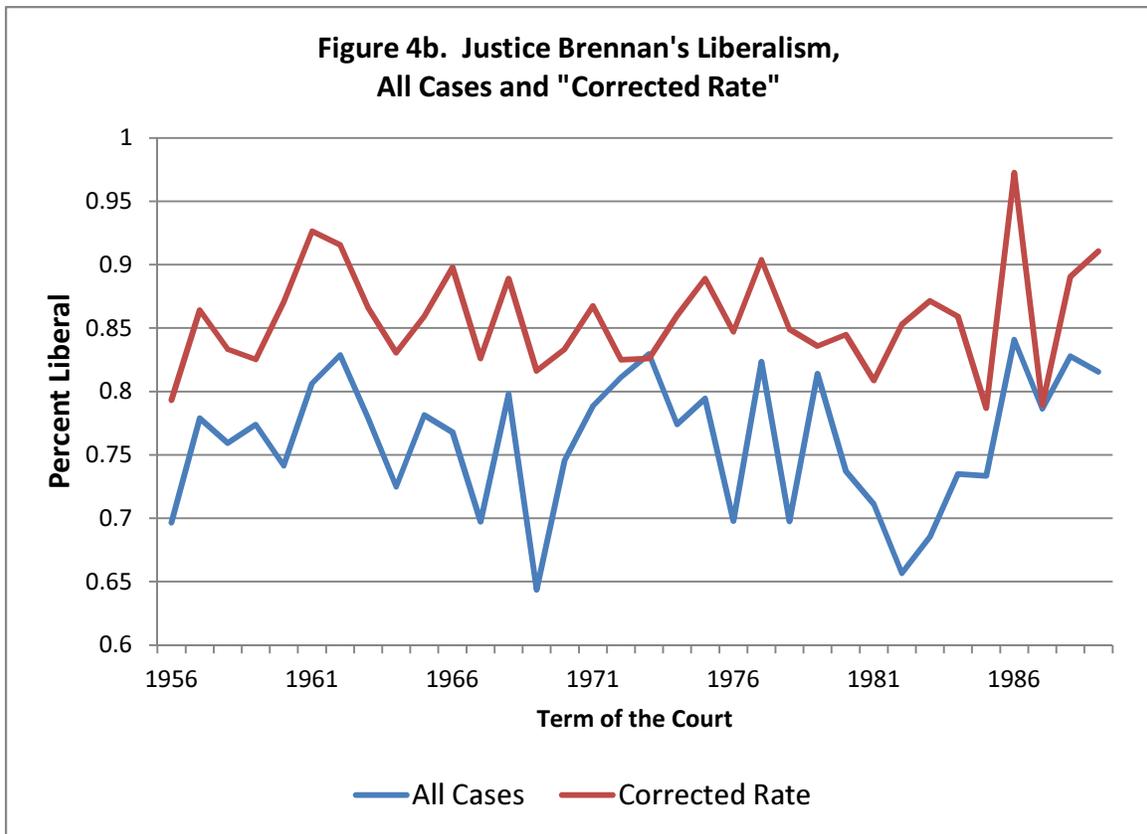
consequences are of relying upon the traditional annual aggregation of liberalism in
all cases. Those consequences are illustrated in Figure 4b.

These data confirm that relying upon all cases to capture Brennan's policy
positions plainly undercuts his true liberalism. The series that contains all cases in
which he participated suggests that his annual rate of liberal voting was roughly
75%. In an absolute sense, this is certainly strong support for liberal interests, but
yet we know that this series is contaminated by votes that actually run counter to
his orientations. This bias can be siphoned off by a simple procedure; the "corrected
rate" series is nothing more than his annual rate of liberalism in votes to reverse ---
or to affirm --- depending upon whether Brennan sat on a liberal or a conservative

Figure 5a. Justice Blackmun's Liberalism, Votes to Reverse and Votes to Affirm
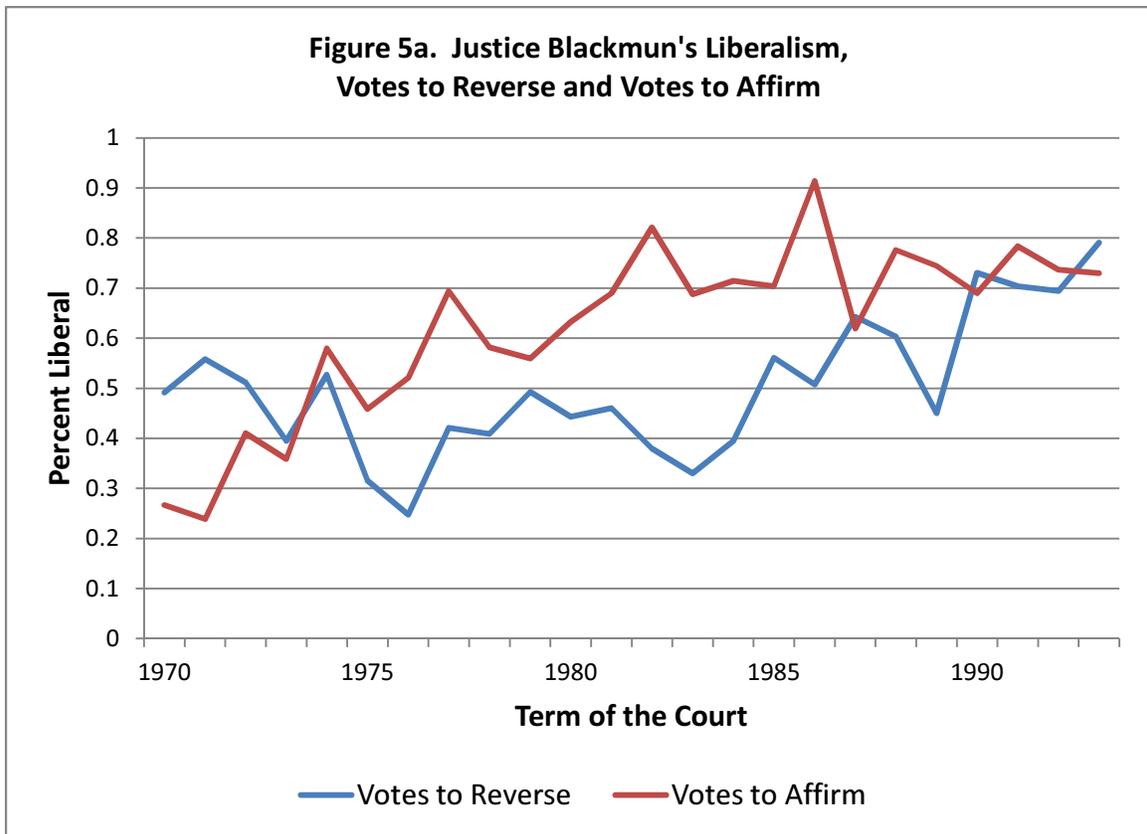
Court. Once this corrective is employed, we see that Brennan's liberalism is, on average, fully 10% greater, holding steady at roughly 85% across the time series.

Justice Harry Blackmun offers a somewhat different portrait of voting behavior. Figure 5a differentiates his votes to reverse and votes to affirm, and both show steady increases in liberalism over time, with liberalism in affirmance votes generally outpacing his liberalism in reversal votes. His location relative to the Court, however, is somewhat more complex than Justice Brennan's. By our lights, Blackmun spent his first few terms on the bench on the right side of a still liberal Court, which makes his initial lower level of liberalism in affirmance votes our preferred indicator. By the mid-1970s, though, he was located to the right of the median of a decidedly conservative bench; hence, his reversals votes are the

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Figure 5b. Justice Blackmun's Liberalism, All Cases and "Corrected Rate"
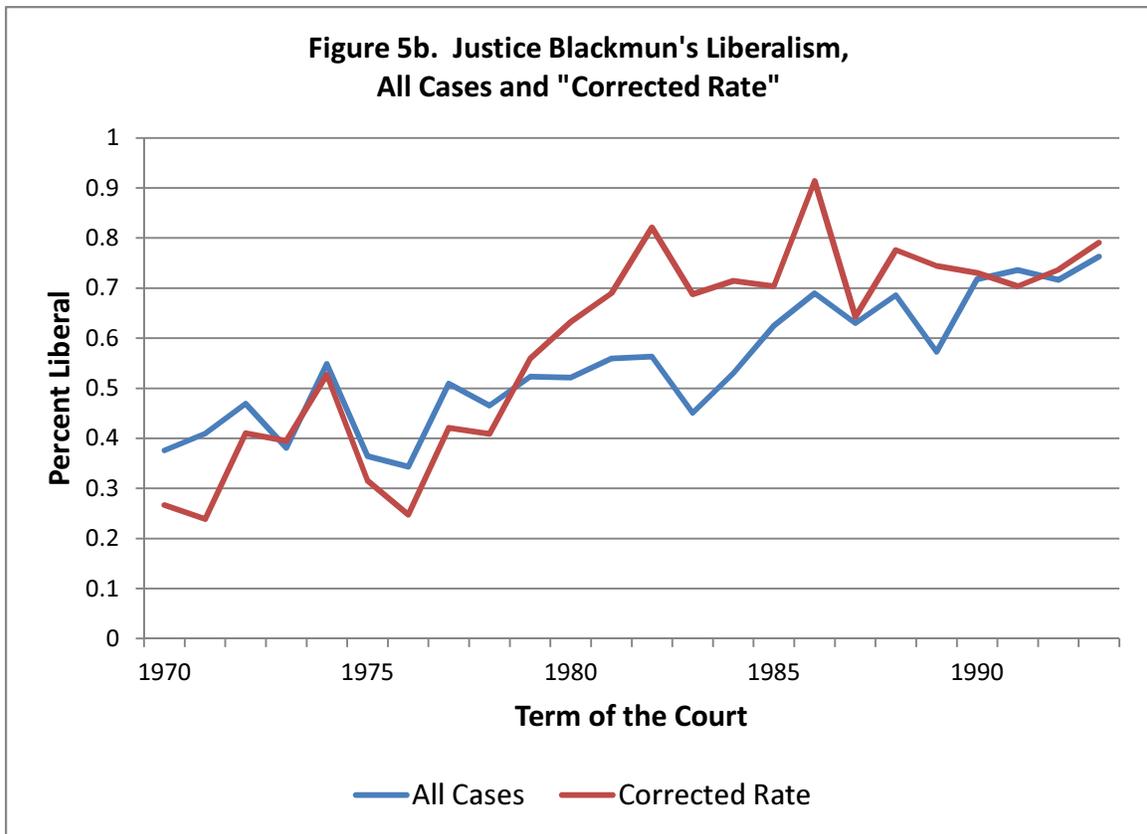
preferable measure. Of course, the subsequent appointments of justices such as O'Connor, Scalia, and Kennedy nudged the Court further to the right, so much so that, by the mid-1980s, Blackmun was located to the *left* of the Court's median. In this situation, our theory dictates that his affirmance votes better characterize his policy positions.

As with Justice Brennan, we compare Justice Blackmun's voting record over time in all cases with his voting record calculated according to our correction. Figure 5b suggests that Blackmun was more conservative during his early years than portrayed by the standard voting record. Likewise, it suggests that relying upon all cases for much of Blackmun's tenure understates the growth in his liberalism. Indeed, in some terms of the Court, he voted liberally as much as 80% or

Figure 6a. Justice O'Connor's Liberalism, Votes to Reverse and Votest to Affirm
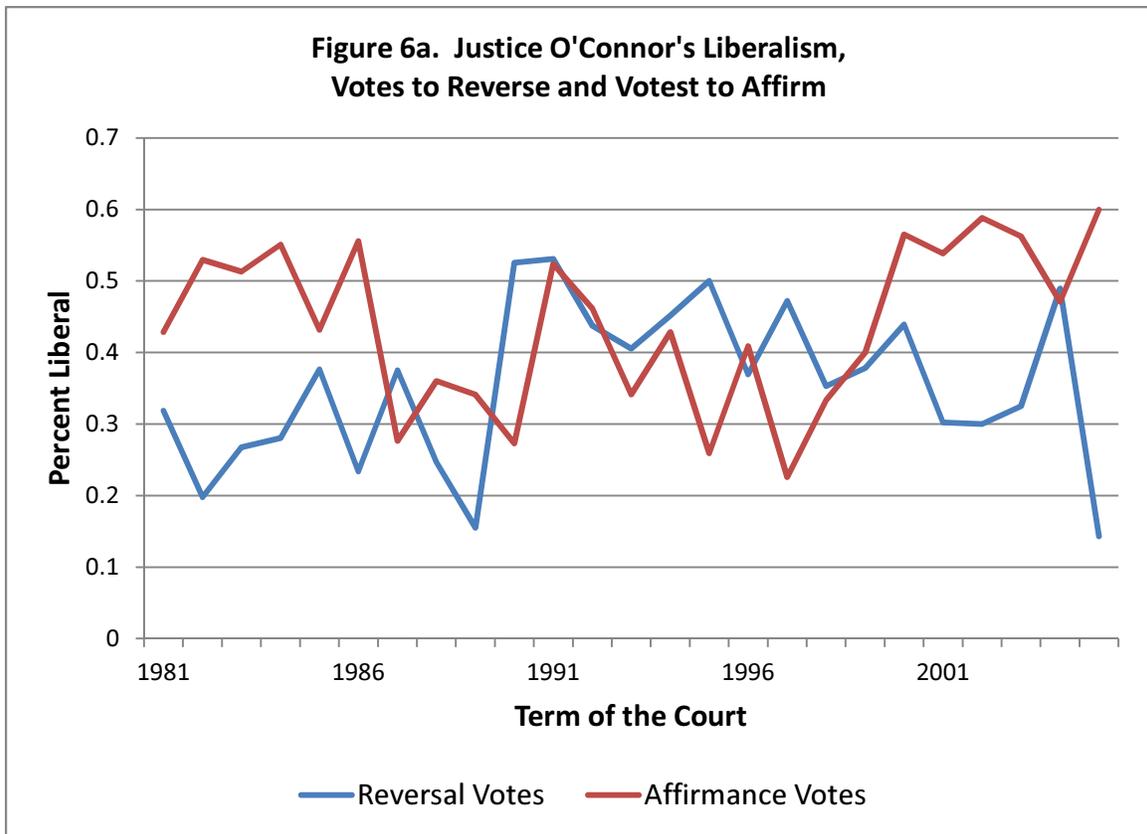
90% of the time by our estimates, while judging by his complete (and undifferentiated) record, his liberalism was as much as 20 percentage points lower.

Finally, we illustrate the consequences of this vote bias by examining a justice who more closely approximates the median of the Court. For most of her career on the Supreme Court, Justice Sandra Day O'Connor was at or near the Court's ideological center. In Figure 6a, both votes to reverse and votes to affirm show about the same average level of liberalism, but clearly the two series are, as expected, negatively correlated (r = -.41, p=.04).

During her tenure, the Court's docket was so often closely split between reviewing liberal and conservative lower court decisions, that, even while she remained on the right-side of the Court, the Court itself (at least according to our

**Figure 6b. Justice O'Connor's Liberalism,
All Cases and "Corrected Rate"**
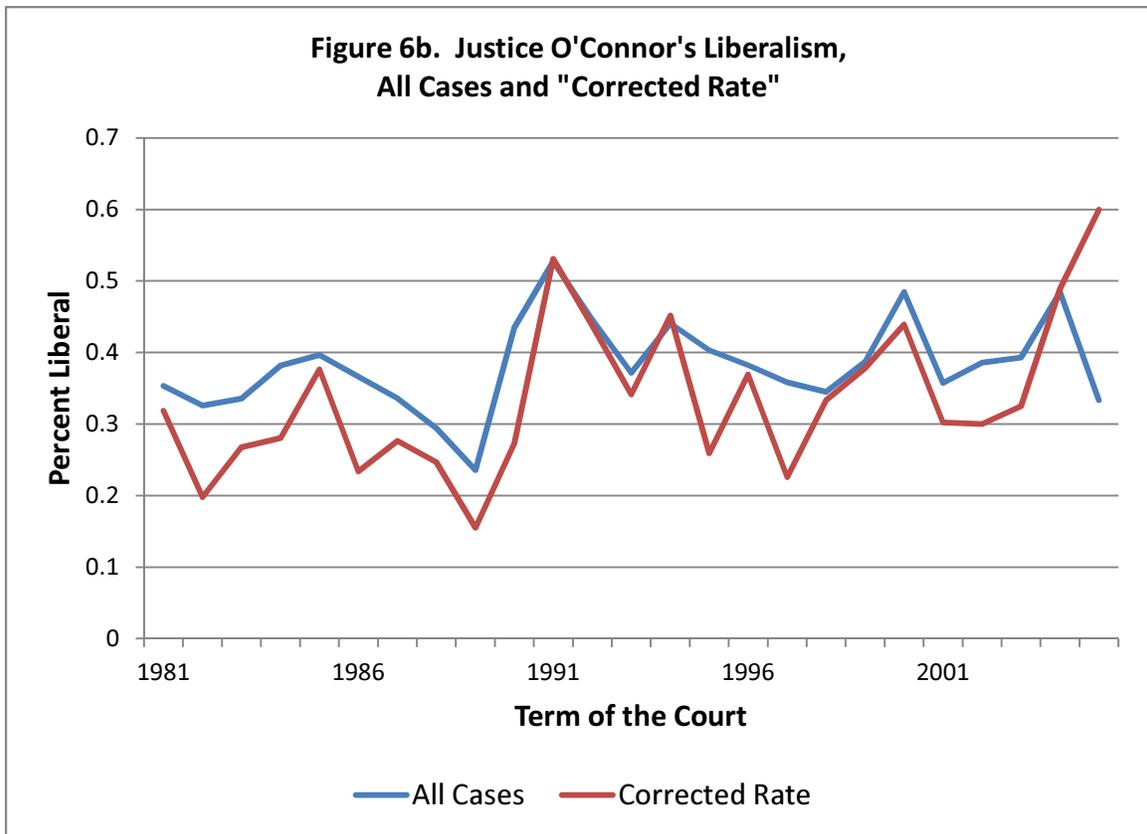
coding rules) sometimes reverted from being conservative to liberal and back again.

Stated differently, O'Connor was on the conservative side of what could probably

best be characterized as a moderate Court. Taking these changes into account, we

present her "all cases" liberalism against her "corrected" liberalism in Figure 6b. [4]

The story told by these data is that, while the bias is not as severe as illustrated by,

say, Justice Brennan, her liberalism derived from all of her votes nevertheless serves

to overstate her support for liberal interests before the Court. In virtually every

year, she is more conservative, according to her "corrected vote," than she is when

judged against her overall voting record.

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[4] For those terms in which she was herself the Court's median justice, we
employ her votes to reverse as the more valid indicator, consistent with our
argument presented in McGuire et al. (2009).

To this point, the data suggest confirmation of our hypothesis about the

likely biases that can be traced to a failure to consider whether a justice votes to

reverse or affirm a lower court decision. In the aggregate, we see evidence that

supports our theory, and our examination of individual level behavior corroborates

our expectations. In light of these findings, we would expect that a standard

measure of the justices' preferences would be a better predictor of our corrected

scores than the standard measure that aggregates all votes. In Table 2, we test this

intuition in two separate models, regressing the annual total liberalism for each

justice, as well as the corrected liberalism for each justice, on their ideology, as

measured by the Segal/Cover scores. This exercise yields a surprising finding.

Notwithstanding the evidence presented to this point, the models indicate

that the corrected score offers no improvement over the use of all scores; the

coefficients are almost identical. This is especially puzzling, given the fairly strong

preliminary evidence that seemingly supports our theoretical orientations. After all,

by a variety of (admittedly less rigorous) tests, there was every reason to believe

Table 2. Impact of Justice Preferences on All Votes and Corrected Score

Variable	All Votes	Corrected Score
Justice Ideology	.37 *	.42 *
	(.07)	(.11)
Constant	.35	.32
	(.04)	(.07)
R^2	.38	.24

N = 581. Dependent variable in "All Votes" model is the annual percentage of liberal votes cast by a justice in all cases; dependent variable in "Corrected Score" model is the annual percentage of liberal votes cast after correcting for bias. Justice ideology is measured as the relevant Segal/Cover score; robust standard errors, clustered on individual justices, are in parentheses; * p<.05 or better.

that our corrected score would offer a substantial improvement over the typical

aggregate measure. Although we are not prepared to jettison our theory, we

obviously need to think with some care about what might account for this empirical

result. One possibility is that, while our theory may work well for some justices, it

may be less useful for others and that those differences, taken together, wash out

any individual effects. Although we do not present these results here, we have

examined the longitudinal voting patterns of all available justices, and we see no

reason to rethink our theory; virtually every justice evinces behavior consistent

with our expectations --- at least judging by our visual inspection of the data.

Conclusions

We have offered a simple theory about how the justices of the Supreme Court

are likely to behave, taking into account both the ideological orientations of the

Court as a whole and each justice's ideological location relative to the Court's

median member. In our view, there is good reason to believe that a significant bias

exists in how most scholars typically assess the ideological positions of the justices.

Simple aggregates of liberal and conservative votes no doubt capture the general

tenor of the Court's policies as a whole, as well as the ebb and flow of liberal voting

among the Court's individual members. Still, these measures are not calculated

directly from the mechanical votes of the justices; the justices do not formally vote

"liberal" or "conservative." Instead, they are derived from an interpretation of those

votes in light of whether a justice votes to reverse or affirm a lower court decision.

Our purpose here, therefore, has not been to question the coding rules for what constitutes support for the liberal or conservative side in a case. Rather, we have inquired as to the empirical consequences of ignoring that justices formally vote to reverse or affirm a lower court ruling and that they do so in light of the kinds of cases selected for review on the merits.

Much of the evidence points very clearly in the direction outlined by our theory. There are real and obvious differences in how the justices behave, depending upon whether they share or oppose the policy ambitions of the Court's dominant coalition, and those differences manifest themselves in quite systematic ways in votes to reverse and votes to affirm lower court rulings.

The consequences of ignoring these different patterns of behavior have the potential, we think, to be severe. Ironically, the strongest test of our theory suggests that these concerns may be more apparent than real. Leaving aside the inconclusiveness of our results, we do believe that scholars of the Court should continue to consider how valid inferences may be complicated by relying upon ideological votes that are derived from institutional procedures that are not themselves designed to elicit ideological information.

References

Baum, Lawrence. 1989. "Comparing the Policy Positions of Supreme Court Justices from Different Periods." *Western Political Quarterly* 42(4):509-521.

Carrubba, Cliff, Barry Friedman, Andrew D. Martin, Georg Vanberg. N.d. "Who Controls the Content of Supreme Court Opinions?" *American Journal of Political Science.* Forthcoming.

Epstein, Lee, Valerie Hoekstra, Jeffrey A. Segal and Harold J. Spaeth. 1998. "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices." *Journal of Politics* 60(3):801-818.

Hammond, Thomas H., Chris W. Bonneau, and Reginald S. Sheehan. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court.* Stanford, CA: Stanford University Press.

McGuire, Kevin T., Georg Vanberg, Charles E. Smith, Jr., and Gregory A. Caldeira. 2009. "Measuring Policy Content on the U.S. Supreme Court." *Journal of Politics* 71:1305-1321.

Spaeth, Harold J., Lee Esptein, Ted Ruger, Keith Whittington, Jeffrey Segal, Andrew D. Martin. 2011. "Supreme Court Database Codebook." http://scdb.wustl.edu.

Ulmer, S. Sidney. 1979. "Parabolic Support of Civil Liberty Claims: The Case of William O. Douglas." *Journal of Politics* 41:634-639.