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Claire B. Wofford

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The Road (Not) Taken: Selection of Legal Rules on the U.S. Supreme Court

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An abstract of
A dissertation submitted to the Faculty of the James T. Laney School of Graduate Studies of Emory University
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Abstract

The Road (Not) Taken: Selection of Legal Rules on the U.S. Supreme Court

By

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When the U.S. Supreme Court issues an opinion, it must decide not only who wins or loses, but what legal rule justifies the result. As political scientists now recognize, the legal rule, which defines legal and illegal conduct and provides guidelines for the subsequent behavior of other political actors, is at the heart of judicial policy-making. What has been overlooked is that the justices are presented with a menu of legal rules by case participants from which they make their selections. My dissertation examines how the justices choose among these options. I posit that the justices will select the rule that comports best with their ideological preferences, the amount of discretion they wish to provide to lower courts, and the quality of the rule. To test my theory, I rely upon a new dataset of all the rules suggested to and adopted by the justices in 500 cases from 1954-2002. I find first that the justices almost always favor a rule suggested by a litigant, rarely adopting rules offered by interest groups or developing rules on their own initiative. When they select between litigant rules, the justices do seem to favor those rules that are in closer proximity to their own ideological preferences, are of higher legal quality, and provide lower courts with more flexibility in implementation. I also examine those cases in which the justices did not favor the rule of a litigant or raise a rule on their own accord. The rule choices in the former cases appear to be motivated by the same factors that influence most rule selections, but the latter may be the result of the type of case at issue, rather than any insufficiency of the proffered rules. As the first study of the actual legal rules presented to and adopted by the justices, the project highlights that the rule options suggested to the justices are key to the policy the high Court eventually promulgates.

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This dissertation is dedicated to the residents of 1244 Blueberry Trail, the two-legged and the four. I love you.

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CHAPTER 1:

INTRODUCTION: RULE SELECTION ON THE U.S. SUPREME COURT

In December, 1992, LaShonda Davis, a fifth-grader from Monroe County, Georgia, began to experience sexual harassment from one of her classmates, a boy known as "G.F." The harassment continued for six months, included suggestive comments and touching of a sexual nature, and ended only when the boy pled guilty to a charge of sexual battery. Throughout the winter and spring, LaShonda and her mother had repeatedly complained of G.F's behavior to teachers and the school principal, but the only action taken was to move LaShonda to a new seat in her classroom, further away from G.F.

In 1994, LaShonda's mother filed suit on her behalf against the Monroe County School Board, alleging that their failure to stop the harassment of her daughter constituted a violation of Title IX, the statute which prohibits sex discrimination in all educational institutions receiving federal funds. The case wound its way through the federal court system, and nearly seven years after the harassment began, the U.S. Supreme Court overturned the decision of the 11th Circuit Court of Appeals, holding that, in certain circumstances, a school board could be liable for student-on-student sexual harassment (*Davis v. Monroe County*, 526 U.S. 629) (1999).

To LaShonda and her mother, this ruling was presumably welcome news, as they were now finally free to seek monetary and injunctive relief from the school board. To court watchers, legal professionals, and lower court judges, however, that LaShonda emerged victorious was of minimal consequence. Instead, what was critical about *Davis* was the legal standard a plaintiff such as LaShonda would have to meet before school officials could be deemed legally responsible for peer sexual harassment. Writing for a divided Court, Justice

O'Connor found that to establish liability under Title IX, the plaintiff must demonstrate that "a [school] official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf has actual knowledge of" the harassment and "responds with deliberate indifference." It was that language, not the decision that LaShonda could continue her suit against the school board, that constituted the most critical aspect of the Court's opinion and to which other political actors, including lower courts, Congress, and litigants, would turn to guide their own behavior.

Thus understood, *Davis* highlights a fundamental fact about the U.S. Supreme Court: when the Court confronts a case, it must determine not only who wins and loses, but what legal rule justifies that result (Carrubba et. al. 2009; Kornhauser 1992). In fact, it is the legal rule - the language in the opinion that defines legal and illegal conduct and provides guidelines for the subsequent behavior of other political actors - that constitutes the Court's policy output (Lax 2011; Hansford and Spriggs 2006; Richards and Kritzer 2002; Bueno de Mesquita and Stephenson 2002; Canon and Johnson 1999; Songer et. al. 1994; Epstein and Koblyka 1992). The case outcome - which I define as the determination of the victorious party - is much less important for legal policy purposes. Indeed, given that scholars now recognize that the legal rule, not the outcome, constitutes the "heart of judicial policy" (Lax 2007: 592), many in the disciplines of both law and political science have explored the source, content, and impact of legal rules (Lax 2011; Clark and Carrubba 2011; Cross and Tiller 2007; Friedman 2006; Sunstein 1995; Radin 1991).

What most scholarship has generally failed to recognize, however, is that when they hear a case, the justices of the U.S. Supreme Court are offered a menu of legal rules suggested by parties and organized interests (Lax 2011; Clark and Carrubba 2011; Cross and

Tiller 2007). For each case, in fact, the justices can receive anywhere from two to more than seventy-five briefs (as in *Webster v. Reproductive Health*, 492 U.S. 490, 1989), most of which contain a particular legal standard the case participant is urging the Court to adopt. Although nothing prevents the justices from rejecting all these proffered rules and developing one of their own making, whether the justices of the U.S. Supreme Court do this, or whether they make their selections from among the rules presented to them, has never been subject to empirical scrutiny.

If the justices do in fact select from among suggested options, this raises the key question to which this dissertation is directed. How do the justices of the U.S. Supreme Court make choices from among proffered legal rules? A scholar convinced of the primacy of ideology (and the irrelevance of other concerns) for explaining judicial behavior might suggest, for instance, that liberal justices would vote for the rule that would ensure victory for LaShonda, while conservative justices would vote for the rule that would ensure victory for the school board. In this view, rule choice is simply the afterthought of an ideologically-driven decision about the case outcome.

In *Davis*, however, case participants advocated a total of five different legal rules, two of which would have produced a victory for LaShonda and three of which would have produced a victory for the school board. Why did the majority favor the "deliberate indifference" standard instead of LaShonda's primary suggestion, which would hold a school board liable for failing to take "immediate and appropriate corrective action" in the face of complaints? Why did the dissent opt for a rule than banned all such litigation, rather than one that rested on whether the school board's lack of action was motivated by gender bias? Given that several rules could have produced either outcome, preferences over who should win the

case could not have been the sole explanation for the rule choices of the justices. Other factors must have been shaping their decisions.

My dissertation is designed to explore what those other factors might be. More precisely, I suggest that the selection of legal rules can be understood as a process in which multiple factors – about the justice, the case, and the rule itself – operate simultaneously to determine the rule the justice ultimately selects. Though I attend to the legal and political environment in which the justices operate, I focus primarily on the rules themselves and claim that certain aspects of those rules influence the probability that they are selected by a particular justice. Drawing on extant literature, I argue that three aspects of a legal rule - its ideological tenor, the level of discretion it imparts to subsequent decision-makers, and its legal quality - all affect the likelihood a justice will favor that rule. I then test my argument on a newly constructed dataset of 500 U.S. Supreme Court cases involving inter-circuit conflict, spanning nearly five decades (1954-2000).

A Note on Rule Proposal and Rule Choice

Although this dissertation is centered on explanations of rule choices made by the justices of the U.S. Supreme Court, I recognize that these decisions occur at the final stage of a rule generation and selection process that has likely been ongoing for years. Understanding exactly how, when, and why rule options have evolved in the lower courts is well beyond the scope of this project. Yet it is important to describe how I conceptualize the process, as it ultimately leads to a choice among rule options by the justices. I accomplish this by describing a hypothetical dispute between two parties in which several legal rules are developed and advocated by case participants, as the litigation moves through the federal judiciary. Since the cases analyzed in this dissertation involve inter-circuit conflict, this

hypothetical case is structured as presenting a legal question over which the lower courts have not arrived at consensus.

Imagine that Company A and Company B install attic insulation.[1] The president of Company A finds out that Company B recently began installing bright pink insulation material, just as Company A has done for many years. Company A registers its use of bright pink insulation as a trademark and then sues Company B for trademark violation. After a lengthy period of failed negotiations, the case finally reaches the trial stage in the federal district court. There, the judge instructs the jury that it should find in favor of Company A if Company B has been using insulation material of the same color as Company A's material. The jury finds in favor of Company A and orders Company B to stop using the insulation and to pay Company A a substantial sum.

Frustrated at its loss, Company B files an appeal in the circuit court of appeals, a court that has yet to impose a binding rule governing such cases. Given that Company B can only appeal legal, not factual issues, it does not deny it has been using bright pink insulation material. Rather, Company B claims that the district court judge erred in his instruction to the jury. In presenting its case, Company B offers a proposed legal rule it hopes the circuit court will adopt. It argues that under federal law, Company A cannot trademark the use of a color "unless it is proven by compelling evidence that a reasonable consumer would associate the color" with Company A. Knowing that appellate judges in this circuit have a record of favoring rules supportive of marketplace competition, Company B believes that its suggested legal standard will appeal to the judges and generate a victory.

[1] These facts are very loosely based on *Qualitex Company v. Jacobsen Company Products*, 514 U.S. 159 (1995).

Company A, fearing that the rule proposed by Company B will be to its disadvantage, finds support for its cause in decisions handed down by two other circuit courts. These circuits have arrived at a different interpretation of federal trademark law and have endorsed a rule inconsistent with the standard suggested by Company B. They have held that a company can trademark a color if it can demonstrate by a "preponderance of the evidence that a reasonable consumer would associate the color" with its company. The "preponderance of evidence" rule is a less stringent standard than the "compelling evidence" rule offered by Company B and therefore would provide a better opportunity for Company A to trademark its bright pink color.

In deciding the appeal, the circuit court judges consult several sources, including any directly applicable precedent established by the U.S. Supreme Court. Most cases that result in inter-circuit conflict, however, occur when the Supreme Court has not yet handed down a binding precedent for the lower courts to follow. In such cases, the circuit court judges have substantial latitude in fashioning a rule of law for their circuit. They give consideration to the arguments presented by the litigants, and if relevant, consult their own prior decisions and the decisions of other circuits. In addition, of course, the judges rely on their independent research of relevant statutes and their own ideological and jurisprudential values. They want a rule that will be workable in the judicial districts of their region and one that will likely be upheld if challenged on appeal.

Assume in our hypothetical case that, after due consideration, the panel judges hearing Company B's appeal reject the rule endorsed by their sister circuits. Instead, the judges believe that the rule offered by Company B better comports with their own

interpretations of trademark law. They reverse the district court's decision and remand to case to the trial court for further proceedings consistent with the rule they have endorsed.

Before the remand can proceed, Company A files a writ of *certiorari* with the U.S. Supreme Court. Although it knows the chances of the Court hearing its case are extremely low, at around 1%, it hopes that the circuit split the case has created will motivate the justices to grant *certiorari* nonetheless. Six months later, the Court agrees to hear the case, and six years after the original lawsuit was filed, Company A and B argue their case before the nine justices.

Several organized interests, including the Attic Insulation Manufacturers of America and the D.C. Bar Association file briefs as *amicus curiae*. Concerned that the ability to trademark a color will diminish the number of companies installing insulation, the Attic Insulation Manufacturers argue that "color can never be the subject of trademark." Knowing that fewer trademarks mean less litigation, the D.C. Bar Association suggests that a color can be trademarked "as long as the trademark does not produce a substantial burden on marketplace competition." The justices are thus given four legal rules which they may use to resolve the dispute. How might we expect them to make their rule choices?

If a justice were to have a strong predisposition for either Company A or Company B, the question of which rule to favor would be largely irrelevant, as the justice could simply vote to affirm or reverse the lower court depending upon which party the justice wanted to win the case, caring little about which legal rule was used to justify that result. Considerable research, however, supports the conclusion that, independent of the particular party who wins the instant case, the justices care about legal rules.[2] Given that a justice is probably not especially concerned with these particular companies, but likely is quite concerned with

[2] Moreover, as in *Davis*, the justices may actually face multiple rules for each outcome.

trademark law in general and how future similar cases might be decided, the case's outcome should be much less important than the legal rule which produces it. As such, it should be the case's outcome that is irrelevant, and the legal rules that draw the justice's attention.

I argue in this dissertation that the justice will select the rule which gives that justice greater utility, a utility that depends upon how well the rule comports with the justice's ideological predispositions, concerns about lower court compliance, and attention to legal quality. In *Company A v. Company B*, for instance, a justice might like strong market competition and prefer a rule that would give companies as much leeway to compete as possible; as a result, the rule that banned all trademarks of colors might be ideal for this justice. If, however, that justice also prefers that lower courts have sufficient discretion to apply existing law to new factual situations, then the justice might reject that rule for the one suggested by the D.C Bar, which would still account for market competition, but permit lower courts to determine if the burden on that competition is "substantial" enough to ban trademarking in each particular case.

On the other hand, another justice may have those same preferences regarding trademarks and lower court discretion, but be resistant to selecting a rule that was suggested to the Court by an amici, believing instead that the justices should attend only to the dispute as presented by the actual litigants. In that case, the justice might determine that because Company B's rule has been adopted by at least a few of the lower courts, it is a less risky alternative. And still a third justice might be so opposed to any restrictions on intellectual property that the "bright line rule" of the Attic Insulation Association is preferable, regardless

of whether it has been tried in the lower courts or is suggested by a non-litigant. And so it would proceed until each justice had selected a favored rule.[3]

Clearly, this description is tentative and leaves many unanswered questions. Under what conditions will a justice's concerns for lower court compliance outweigh policy preferences? How exactly do concerns for legal quality affect concerns over lower court discretion? And when, if ever, might a justice be so ideologically predisposed in a case that other aspects of the legal rule are rendered irrelevant? These and other questions must be left to future research, as this dissertation is only an initial exploration into the process of rule selection on the high Court. Nonetheless, by analyzing how several factors identified by political scientists as relevant to judicial decision-making might operate on rule choice in particular, the project makes an important contribution to our understanding of legal rules and the Supreme Court. That it generates so many avenues for future research is perhaps a testament to the richness of this area of study and of the many complexities which scholars might find worthy of exploration.

Implications of the Dissertation

One of the perennial questions in the study of American politics is how policy is generated. Whether in reference to Congress, the Executive, the bureaucracy, or the courts, scholars continue to explore which actors control the policy-making process and what influences shape institutional outputs. In regards to the Supreme Court in particular, much work has been devoted to studying exactly how and why the Court issues the rulings it does, rulings that all concede often have important, nation-wide policy effects.

[3] This description does not include any bargaining among the justices over which legal rule to favor, a concern I set aside for this dissertation.

Among elected officials and the general public, an overriding concern about the Court has been its seemingly unchecked ability to enact this legal policy, a concern that may have been further fueled by the findings of political scientists that much of the justices' behavior is in fact driven by their own ideological preferences. Though many scholars have documented how considerations of inter-branch politics, intra-court relationships, and legal factors operate to constrain these preferences, few have challenged the notion that the Court's policymaking power rests primarily in hands of the justices themselves.

In this dissertation, I suggest that, at least when the Court resolves cases of inter-circuit conflict, its policymaking process is more complicated than heretofore recognized. Rather than being one in which the justices simply vote for the party they want to emerge victorious, articulating whatever legal rule they wish to justify that disposition, I envision the process as being fundamentally shaped by the rule options that case participants present to the justices. When deciding among those options, the familiar considerations of ideology, hierarchical control, and legal persuasiveness still come into play, but the central aspect of the Court's promulgation - the legal rule - may arise not from the justices themselves, but from those who litigate before them. Envisioned this way, policymaking by the U.S. Supreme Court is shaped not only by those who sit on the Court, but also by those political actors who seek remedies before it. Though full explication of the relationship between the justices, case participants, and legal doctrine remains far beyond the scope of this project, I hope that at least the initial evidence gathered here encourages others to think more broadly about how and why the Court develops the legal policy it does.

Organization of the Dissertation

This dissertation is comprised of seven chapters. I begin in Chapter 2 with an extensive review of the scholarship on judicial behavior that traces the ideological, strategic, and jurisprudential factors scholars have identified as most relevant to judicial decision-making. I highlight how the literature has moved from studying the justices' votes on case outcomes to attending to court opinions and legal rules. How rules generate more or less discretion for lower court judges has drawn the most attention here, and I review how scholars have used a "case space model" in particular to determine whether a jurist is likely to promulgate a "bright-line" rule or a more amorphous legal "standard." I emphasize the theoretical advances of this scholarship as well as its failure to empirically evaluate many of the implications of these models.

Chapter 3 develops a theory of rule selection on the U.S. Supreme Court. I suggest that justices will select the rule that gives them the greatest utility, utility which is derived from their preferences about the ideological content of the rule, the amount of discretion it provides to lower court judges, and its legal quality. As a justice's preferences over each of these elements shifts, so too will the extent to which each factor influences their choice of rule. I also hypothesize that the salience of the case and the ideological distance between the justice and the lower courts will interact with these three rule attributes to shape judicial preferences.

Chapter 4 provides a detailed description of the dataset used in this project, including the data collection and coding procedures. The chapter also includes descriptive statistics about the number and types of rules the justices confront, the role of *amicus curiae* (organized interests who act as "friends of the court"), and the (in)frequency with which

justices generate their own legal rules. The data also suggest that due to the nature of the rules the justices actually confront and from which they almost always make their selections, whether rules are "bright line rules" or "standards" may not be the most relevant question to which scholars could attend.

In Chapter 5, I first establish that even though justices most often face only two competing legal rules, they still, at least in certain types of cases, can maintain an ideological preference for a rule apart from the outcome it will generate. I then conduct a statistical analysis of the eight hypotheses articulated in Chapter 3, including both primary independent variables and several additional controls. The results are mixed, demonstrating that ideology and concerns over rule quality do seem to affect rule choice, but how much discretion a rule imparts to lower court judges is not particularly relevant.

Finally, in Chapter 6, I conduct an exploratory analysis of two categories of cases: those in which, like *Davis*, a justice faces multiple rules, and those in which the justices rejects all suggested rules for one of their own design. For each category, I explore whether aspects of the cases, the justices who make these non-typical rule choices, or the rules themselves might be explanatory factors. For those cases in which the justices were presented with more than two rules, the ideology, flexibility, and quality of the rules did seem to influence their decisions, but the nature of the cases and the justices did not differ markedly from those cases studied in Chapter 5. The analysis was less productive in explaining why the justices might generate their own legal rules, though the type of cases and the number of rules suggested to the Court did differ in these cases. The chapter posits that while these types of rule selections are uncommon, they still warrant further study.

Chapter 7 concludes with a summary of the study and its implications for extant work on judicial behavior and legal rules. I also detail the limitations of my project, emphasizing how the cases I have selected for analysis impose certain constraints on my conclusions about rule choice on the U.S. Supreme Court. Finally, I note the many important questions that must be left to future research.

CHAPTER 2:

EXPLAINING JUDICIAL CHOICES: LITERATURE REVIEW

This project asks "When confronted with a choice over competing legal rules, how do the justices of the U.S. Supreme Court make their selections?" The literature on judicial behavior is replete with work on many types of judicial decision-making and has provided substantive insights into the justices' choices about the granting of *certiorari*, the writing of opinions, and voting on the merits. The newest works have focused upon legal rules in particular, and several scholars have developed sophisticated models of how ideological, institutional, and jurisprudential concerns might affect the rule a high court promulgates. While the Supreme Court is of course free to articulate any legal rule it wishes, I suggest that the assumption of these works - that it actually does so - warrants more empirical scrutiny. It may be, in fact, that the justices select their rule from among the options presented to them. If true, then scholars should evaluate whether or not the proffered options are in any way constraining how the justices determine which legal rules to favor, a constraint which extant work does not now consider.

I see the choice of rule, however, as motivated by many of the same factors identified in the larger literature on judicial behavior. By explicitly examining how concerns about policy outcome, lower court compliance, and legal quality influence which proffered rule a justice adopts, this project thus fits into the broader literature on judicial behavior, and focuses on what is now generally seen as the crux of the Court's policymaking ability – the legal rule. Since my theory of rule choice incorporates ideological predispositions, strategic considerations about lower courts, and legal factors, the following chapter discusses how the

existing literature has articulated and employed these elements to understand the decisions of the justices of the United States Supreme Court.

Explaining Judicial Choices

Extant work has not systematically confronted why and how justices choose between competing legal rules presented to them by the participants in the litigation. These participants included both the parties to the case and *amicus curiae*, outside entities, usually organized interests, that act as "friends of the court" and supply additional legal or policy information for the justices (Collins 2008). Though some political scientists have studied the development of legal rules in a few doctrinal subjects, (Epstein and Knight 1998; Epstein and Koblkya 1992) and others have developed formal models of rule creation, (Carrubba and Clark 2010; Lax and Landa 2008; Lax 2008; Staton and Vanberg 2006; Kornhouser 1992), an extensive empirical analysis of whether and how the rules offered to the justices influence their decisions has been lacking.

Nonetheless, this literature does suggest several factors that likely operate on the justices' selection of legal rules, factors which I employ to form and test a theory of rule selection. In the following section, I outline generally how scholars of the U.S. Supreme Court have explained the choices of the justices across many types of decisions. I focus on both the theoretical and methodological advances of the literature, highlighting what is known and what remains unclear. I pay particular attention to the literature - from both the political science and legal disciplines - that focuses on legal rules. The section concludes with an explication of what is problematic in extant scholarship and how this project attempts to resolve some of these concerns.

The Role of Ideology in Judicial Behavior

Political scientists generally agree that a primary influence on judicial decision-making is ideological preference. Across virtually all decisions the justices make, including agreeing to hear a case, assigning and drafting opinions, writing concurrences or dissents, and voting on the final outcome of the case, scholarship has persuasively demonstrated that policy preferences are a key factor in explaining why the justices do what they do (Segal and Spaeth 2002; Maltzman et. al. 2000; Epstein and Knight 1998). Though attention sometimes is paid to inter-branch politics, internal bargaining on the Court, concerns for lower court compliance, and the influence of precedent and other legal factors, the literature has shown repeatedly that ideology motivates, at least in part, all judicial behavior. As a result, it is difficult to find a serious empirical study of judicial decision-making that fails to consider the ideological preferences of the justices (Friedman 2006).

To be more specific, under this approach, scholars presume that judges have pre-existing ideological dispositions that are triggered by the facts of the case. Those dispositions then become a principle reason that a justice decides a certain way. Other factors may condition the effect of ideology, but it is almost always heralded as the strongest predictor of a justice's decision. At the case level, then, the ruling of the Court is simply the cumulative results of the ideological preferences of each individual justice: when there are five (or four in the case of the granting of *certiorari*) or more justices with a particularly ideological bent, the Court's decisions will reflect those leanings.

Most initial applications of this "attitudinal" perspective focused on the final votes on the merits of the case - who wins or loses - or what is often called the "outcome" or "judgment" (Clark and Lauderdale 2010). In fact, across a relatively large range of legal

areas, multiple works substantiated the well-known claim that "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal," and that case outcomes are the result of whether these conservatives or liberals constitute the Court's majority (Segal and Spaeth 2002: 86; Ruger et. al. 2004; Martin and Quinn 2002).

Importantly, the strongest advocates of this perspective emphasize that the justices face few constraints on their behavior. Unlike legislators or executives, the justices need not overcome any electoral barriers to achieve or retain their positions, and they are therefore generally free to act as they wish without significant fear of sanction or reprisal. Moreover, although legal scholars and the justices themselves might claim that unique aspects of the judicial system – the requirement that cases be brought to the Court, for instance, or the importance of legal arguments and precedent – distinguish their decision-making from that of other political actors, proponents of this model claim that such institutions do little to prevent the justices from achieving their desired results. Any suggestions that justices cannot follow their policy preferences are generally regarded as a chimera (Segal and Spaeth 2002; Whittington 2000; Cross 1997; Rhode and Spaeth 1976).

The newest works, however, have suggested that though the influence of ideology may be profound, it is not unconditional. For instance, scholars have shown that certain case factors such as salience, the grounds of Court jurisdiction, and the presence of inter-circuit conflict can mitigate the effect of ideology (Bartels 2010; Unah and Hancock 2006). Others have pointed to larger institutional dynamics and have demonstrated how the need for public support and institutional legitimacy serve as important limitations on the policy-driven behavior of the justices (Clark 2011). Still other works have found certain legal doctrines

more susceptible to ideologically-driven manipulation than others, and some justices more driven by ideology than others (Bartels 2009; Bailey and Maltzman 2008). Nonetheless, the major role ascribed to ideology remains largely undisputed, even among those who have moved beyond final votes to other aspects of the justices' behavior[4] (Carrubba et. al. 2009; Maltzman et. al. 2000).

Measuring the ideology of the justices and of the Court's judgment, however, has posed an ongoing challenge. Unlike elected officials, whose politically-driven behavior is expected (and sometimes demanded), conventional wisdom and legal tradition suggest that justices are supposed to remain above the political fray, rendering decisions free from the passion and political leanings that drive other political actors. Justices' rulings are simply supposed to articulate "what the law is," and they are to resolve the legal dispute using only previous opinions, constitutional and statutory texts, and the intent of the Framers or lawmakers, paying no attention to constituent desires or personal preferences.

Though most political scientists have abandoned this rarified concept of judging, and generally concede to the role of political preferences, they still confront the problem that no justice openly admits to the influence of ideological predispositions. In fact, several judges have publically and vehemently rejected that claim, at least as it applies to their own decision-making (Alito 2011; Edwards 1985; Newman 1984). Without such direct evidence, finding a valid measure of these preferences has posed significant difficulties, difficulties

[4] This is not to imply that the legal community has embraced the primacy of ideology. In fact, many remain vehemently outspoken (and seemingly offended) about the picture attitudinalists paint of judges as "knee-jerk ideologues" (Edwards 1998; see also Friedman 2006; Fishman and Law 2009). Of course, for their part, many political scientists have seemed just as scornful about any suggestion that law "matters" to judicial behavior in any real sense (Segal and Spaeth 2002).

which have subjected these works to criticisms from scholars schooled in the legal discipline (Friedman and Law 2009; Friedman 2006; Cross 1997).

To capture the preferences of the justices, scholars initially employed scaling approaches, using latent dimensions of, for example, economic liberalism and "New Dealism" to generate ideal points that represented the justice's most preferred position on a case's outcome (Schubert 1965; Rhode and Spaeth 1976). These points were assigned numerical values that could then be used to compare the justices and, in more advanced work, added to regression equations as predictors of voting behavior. Subsequently, Segal and Cover's (1989) use of newspaper editorials written at the time of a justice's nomination to the Court became the most popular measure, though other scholars continued to use a straightforward percentage of liberal votes cast by the justices in certain types of cases (Epstein et. al. 1989; Baum 1988).

Most studies now use the well-regarded Martin and Quinn scores (2002) in which a justice's ideal point is calculated using a sophisticated Bayesian methodology and an item-response model. Importantly, this approach allows the justices' ideologies to change over time, which extant measures had failed to do (Epstein et. al. 1998). The Martin-Quinn scores have been faulted as tautological (Bartels 2009), as they, in effect, use judicial votes to predict judicial votes (Segal and Cover 1998: 558), but the authors argue their measure is quite appropriate, at least when one is studying a single legal area (Martin et. al. 2005). Use of these scores is now standard practice in political science.

The newest measure, employed in this project, is based on so-called "bridging observations," that, while also producing measures that change with time, allows the scholar to place the justices, presidents, and members of Congress in the same ideological space

(Bailey 2007). The scores are derived using certain cases as "cut points" and then measuring, based on public statements or votes, where various political actors stand relative to that point. This then allows one to assess the ideology of justices, members of Congress, and the President relative to each other, an important addition to existing measures. This measure also offers one solution to the "agenda-setting problem" - or the inability to tell if it is the justices' ideology or the cases which they decide that has changed (Fischman and Law 2009) - because it uses fixed reference points against which changing preferences can be assessed. The Bailey measure has yet to be widely adopted, but does seem to be gaining attention (Carrubba et. al. 2009; Fishman and Law 2009; Black and Owens 2009). I employ it in anticipation of future work that may incorporate other political institutions - Congress and the Executive in particular - into hypotheses about rule choice on the Supreme Court.

Scholars also have developed several ways to measure the ideology of the Court's judgment (Fischman and Law 2009). The mainstay has been the measure developed by Spaeth (2002). Here the case outcome is coded as simply a dichotomous variable, where (1) = conservative and (2) = liberal. The code depends upon who benefits from the ruling: liberal decisions are those that favor, for example, criminals, civil rights or civil liberties claimants, indigents, affirmative action programs, or unions; conservative decisions are those that favor the opposite party. Though challenged by some as crude (Shapiro 2009) and others as simply erroneous (Landes and Posner 2009), the Spaeth codes are used in the vast majority of those studies that predict the ideological direction of the Court's rulings (see e.g., Collins 2008; Baum 2004; Segal and Spaeth 2002). The codes have also been used to capture the content of the court's opinion (Hansford and Spriggs 2006).

Others have tried to develop a more nuanced measure of the ideology of the Court's output, primarily by employing the opinion itself, rather than the final vote. These works have correctly noted that the Spaeth approach is limited in several ways: one, it focuses on the Court's ruling, not on the policy contained in the opinion, the latter of which is of growing interests to scholars; two, it seems less able to capture the ideology of cases that are themselves not highly ideological, such as certain issues of intellectual property or corporate contract disputes; and, three, because it employs the winning party as the measure, can mistakenly code cases as liberal or conservative when the policy of the ruling is actually the opposite (Clark and Lauderdale 2010; Harvey 2007; Friedman 2006; Cross 1997).

Consequently, scholars are developing alternative measures. McGuire et. al. (2010) use the Wordscore program to capture the ideological content of the majority opinion, primarily by comparing the words in the opinions with the words in the briefs submitted by the parties. In another, more sophisticated approach, Clark and Lauderdale (2010) use the citations to cases in an opinion to develop a scaling model that places that opinion in ideological space. These authors generate their measure from freedom of religion and search and seizure cases and then employ it to test various theories of intra-court bargaining. Finally, though not the primary focus of their work, Black and Owens (2009) use the ideology score of lower court judges as a measure of the status quo legal policy in their study of *certiorari* voting.

As explained in the following chapter, I measure the ideological content of the legal rule chosen by the justices, rather than the judgment or the opinion. This project highlights the distinction between a legal rule, opinion, and judgment, so it is preferable to measure the ideology of the rule itself, rather than the opinion which explains it or the judgment

produced by it. Doing this raises some challenges of its own, but my measure – which relies upon the ideology of lower court judges who have adopted the rule – is arguably a more direct way to capture what extant measures are seeking: the ideological content of the Supreme Court's policy output.

Other Influences on Judicial Behavior: The Institutional Environment

Along with its methodological shortcomings, many scholars have faulted this literature for excessively focusing on ideology to the detriment of other relevant predictors of judicial decision-making. The alleged flaw of these works is not the claim that ideology matters, but rather the implicit suggestion that the institutional environment in which judges operate does not somehow constrain those policy preferences. These scholars instead propose that formal rules (such as Congress' ability to overturn certain Court rulings), informal norms (such as the "Rule of Four" for granting *certiorari*), or interpersonal interactions among justices condition their ability to enact their preferences and may generate "sophisticated" behaviors which run counter to ideological preferences (Caldiera et. al. 1999). In particular, scholars have studied how the inter-institutional interplay among the Court, Congress, and the Executive (Rogers 2001; Vanberg 2001), the interactions among Court members (Maltzman et. al. 2000; Epstein and Knight 1998), the need to preserve institutional legitimacy (Clark 2001), and the relationship between higher and lower courts (Benesh and Reddick 2002; Songer et. al. 1994) all condition judicial behavior.

The role of the judicial hierarchy in shaping court decision-making is of particular relevance to my dissertation.[5] Though many works examine whether or not lower courts attend to the preferences of the Supreme Court when they make decisions (Carrubba and

[5] I focus upon the judicial hierarchy in particular because of my own interests and because most extant works on rule creation (several of which contain predictions I test directly) envision that hierarchy as fundamental.

Clark 2011; Carrubba and Clark 2010; Westerland et. al. 2010; Cross 2005; Klein 2002; Benesh and Reddick 2002; Songer and Sheehan 1990), several have focused on the reverse of that relationship, exploring how the presence of lower courts affects the choices of the higher court justices (Cross et. al. 2012; Lindquist et. al. 2007; Bueno de Mesquita and Stephenson 2000; Cameron et. al. 2000).

Most work here has adopted a principal-agent framework: the Supreme Court is the principal that must rely on the lower courts as agents to implement its (the principal's) wishes. As a result, the high court faces the challenge of compliance - how to ensure that the lower courts faithfully apply the preferences of the Court rather than "shirk" and enact their own preferred policy. Yet the Court also faces restraints of time and resources and must try to ensure compliance while not expending more effort than necessary (Cameron et. al. 2000).

The problem is complicated because the Court has very few mechanisms at its disposal with which it can try to ensure compliance. Most works have posited that the Court can use its *certiorari* power as a "check" on lower courts, auditing their rulings when the Court has reason to suspect shirking and reversing cases that depart from the high court's preferences (Lindquist et. al. 2007; Cameron et. al. 2000). Others have pointed to the role that litigants can have in bringing resistant lower courts to the Court's attention via appeals, acting as "fire alarms" that warn the principle of defiant behavior by its agent (Songer et. al. 2000). Finally, at least one work has argued that the Court writes opinions to enhance compliance – the more that opinion rests on previously decided cases, the more the lower court is able to grasp, and presumably enact, the wishes of the higher court (Bueno de Mesquita and Stephenson 2002). In short, scholars are still struggling to understand how the

Supreme Court, unable to implement its own rulings directly (Canon and Johnson 1999), can see its policy goals realized (Staton and Vanberg 2006). This need for implementation and the challenges posed by the hierarchical structure of the judicial system are key components of my theory of rule choice. Whether a justice favors a particular rule depends, in part, on whether that rule is likely to promote or inhibit lower court compliance, a claim I detail in the next chapter.

Some scholars have suggested that the justices' concerns about lower court responses to a Court ruling can exist for non-ideological reasons as well. In this view, the Court is not determined to bend the lower courts to its (the higher court) wishes, but rather to ensure that the lower court has sufficient guidance with which to fulfill its role in the judicial bureaucracy (Stumpf 1998). The attention to the nature of the opinion and rules, therefore, is fueled by a desire to assist lower courts and help their process of judging be easier and more consistent.

This perspective incorporates notions of the proper role of the justices in the larger legal system (Howard 1981; Grossman 1968) and the duty they owe to other legal actors (Cross 1997).[6] More particularly, although the justices of course are bound to resolve disputes and set national policy, they also operate in a hierarchical setting in which they are charged with issuing rulings that those below them can easily follow – not only so that their decisions are implemented, but so the judicial system functions smoothly and efficiently (Baum 1994; Dworkin 1985). The clarity and precision with which the Court issues its directives to lower courts is seen as key to ensuring that the rule of law is upheld (Owens and Weddeking 2011; but see Staton and Vanberg 2006).

[6] It also assumes that lower courts have a sense of their role in the legal system, which involves, to the extent possible, faithful attention to higher court promulgations (Baum 1994; Canon 1991).

Though most studies on the judicial hierarchy have not adopted this perspective,[7] the justices themselves have indicated that these considerations are a factor in their decision-making. Justice Scalia, for instance, has argued in favor of clear legal guidelines because it is not his court, but the "thirteen courts of appeals….and [depending on the legal issue] the fifty state courts" that will be resolving most disputes. Only with good directions can these lower courts promote "uniformity ….. [and] predictability" in the law (1989: 1179). Similarly, in the Court's ruling on cross-burning in *R.A.V. v. St. Paul* (505 U.S. 377: 415), Justice White objected to the majority's new test for hate speech as one that would only "confuse the lower courts." More recently, in *Arizona v. Gant* (129 S.Ct. 1710: 1720-2), the majority rejected its own prior ruling precisely because it, while seeming to offer the clarity of a "bright line rule," had actually generated "a great deal of uncertainty" and confusion among lower courts.[8] In short then, it may be that justices care about the quality of their communications to lower courts not for ideological reasons, but simply because good communication is part of their job: the promulgation of a national legal policy that lower court judges must implement.

A Role for Law

Though not calling for a return to long-discarded notions of "mechanical jurisprudence," many continue to argue for at least some influence of legal factors on judicial

[7] An exception to this is some of the work on separate opinions on the high Court. When five justices cannot agree on one opinion, the ruling is a plurality that many have suggested leaves the lower courts confused about the state of the law and unable to perform their own duties (Corley 2010; Thurmon 1992; Davis and Reynolds 1974).

[8] Concerns of lower court confusion also seem to bleed into the justice's decisions about granting *certiorari* and into questions asked during oral arguments. Justice O'Connor and Thomas, two justices not known to be ideological allies, both dissented from a denial of *certiorari* in one case precisely because they wanted to resolve the misunderstandings and conflicts in lower courts ((*Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.,* 515 U.S. 1116)(1995)). In the recently argued *Turner v. Rogers* (No. 10-10), Justice Kennedy appeared frustrated with the lack of precision in one legal argument because it would not "give much help to the system." (available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-10.pdf)

decision-making (Lax 2011; Lax 2008; Friedman 2006). These scholars maintain that while ideological and/or strategic dynamics may indeed operate on certain judges in certain situations, the claim of many political scientists that law is a "fig leaf" which disguises judges' true motivations is at best overstated, at worst insulting (Freidman 2006; Feeley and Rubin 2000). Instead, they suggest that judicial decision-making is a specialized process in which certain jurisprudential concerns can constitute a meaningful restriction on the enactment of policy preferences and can shape a justice's behavior in ways not captured by current models (Bailey and Maltzman 2008; Hansford and Spriggs 2006; Friedman 2006; Lindquist and Klein 2006; Cross and Tiller 2006; Richards and Kritzer 2002; Cross 1997; Koblkya 1995).

For many scholars in this area, the focus is on the principle of *stare decisis* (literally, "let the prior decision stand"), and they work to demonstrate how precedent constrains (or not) the choice over case outcomes (Hansford and Spriggs 2006; Segal and Spaeth 1999; Wahlbeck 1997). Others examine legal doctrine defined more broadly and its impact upon subsequent judges or litigants (Kritzer and Richards 2003; Richards and Kritzer 2002; Epstein and Koblyka 1992; Koblyka 1995). Richard and Kritzer's work on "legal regimes," for example, provides some evidence that Supreme Court justices voted differently in free speech cases before and after a critical precedent was issued. While recent scholarship has challenged the methodology of this work (Lax and Rader 2010), good evidence exists that legal precedent does have at least some influence on how a justice votes (Lim 2000; Gerhart 2008; Hansford and Spriggs 2006).

However, even among those who support a role for law, these works have been criticized for their restrictive conception of "law" as (only) precedent that operates as a

constraint on ideological preferences and strategic considerations (Martin and Friedman 2009; Cross 1997). These scholars maintain that "law" should be understood as much more than a "constraint" which prevents judges from doing what they would otherwise wish to do (Bartels 2009: 474). Instead, law should be seen as something which "channels" the jurist in certain ways, structuring what considerations are relevant to the decision-making process (Martin and Friedman 2009: 5-6).

More precisely, some scholars have argued that "law" actually is a method or practice of decision-making (Friedman 2006; Hammond et. al. 2005; Gillman 2001; Cross 1997) in which the final outcome of a case is not determined by any legal principle *per se*, but in which the process of judging is guided by norms of logic and rigorous analysis, attention to concepts of "original intent" or textualism (Bailey and Maltzman 2008), and other "good faith efforts" to make legally sound decisions (Lindquist and Klein 2006: 136). Again, while ideological preferences and strategic considerations are acknowledged as relevant, so too are various other factors to which a judge attempting to "do a 'good job' by following the norms of his or her profession" should attend (Posner 2008:12; Gibson 1978).

In assessing this process of legal decision-making, a few works have begun to attend to the role that "legal persuasiveness" can have on voting behavior. These scholars argue that as legal professionals, judges are socialized into the norms of legal decision-making, and "genuinely want" to reach the correct legal conclusion (Martin and Friedman 2009: 6). Because the correct legal conclusion results from adopting the more valid legal argument, judges should be attentive, at least in part, to whether the positions advocated by case participants are more or less legally sound and should view more favorably those arguments which are more legally persuasive (Collins 2008).

Empirically capturing "legal persuasiveness" is quite challenging, however, and attempts to measure it have been indirect. Lindquist and Klein (2006), for example, use the number of circuits favoring a particular litigant, the amount of dissensus in the lower courts, and the prestige of lower court judges to indicate which party has the more "legally convincing" position (143). Finding each of these variables statistically significant, the authors conclude that concerns for legal quality do in fact affect justices' final votes. Collins (2008) argues that amicus briefs can function similarly, adding to the persuasiveness of a litigant's position as they grow in number.

In the same vein, a few scholars have looked to attorney experience and found that more qualified attorneys, who presumably articulate more convincing legal arguments, have an impact on justice's voting and on the final opinions of the Court (Corley 2008; McAttee and McGuire 2007; Johnson et. al. 2006). Some have focused on the Solicitor General in particular, and have attributed at least part of his success before the Court to his perceived experience and legal expertise (Bailey et. al. 2005; but see McGuire 1998). Johnson's (2004) work on oral arguments also confirms that the quality of argumentation can affect a litigant's success on the merits. My theory of rule selection also attends to legal persuasiveness, as I argue that justices should favor the rule that is of higher legal quality. As explained in the following chapter, I measure rule persuasiveness by the response of lower court judges, lower courts, and litigants to the rule. This comports with some extant work (Lindquist and Klein 2006) but measures the legal quality of a rule with those who are arguably most attune to legal persuasion – judges and attorneys. My approach is novel, but because it relies upon those likely skilled in persuasion, offers an arguably more direct way to capture legal quality than existing measures.

From Final Votes to Court Opinions

While all of this scholarship is growing in both size and sophistication, criticism of a different cast still persists. In particular, some scholars are troubled by an allegedly myopic focus upon the final votes cast in the Court (Carrubba et. al. 2009; Friedman 2006; Maltzman et. al. 2005). Though the justices' choices about the outcome of a case are of course important, scholars are now positing that those interested in the Court as policy-maker must study more closely the part of the Court's decision that actually contains the policy – the opinion. Several scholars have heeded this call and examined both the content of opinions the Court produces and the process through which it produces them. Arguing that opinions are the "the main tool of Supreme Court justices as policy makers" (Lax and Rader 2009) and contain the "most important" products of Supreme Court decision-making (Hammond et al. 2005: 17), political scientists have begun to pay renewed attention to the Court's written output (Owens and Weddeking 2011; Carrubba and Clark 2010; Carrubba et. al. 2009; Maltzman et. al. 2002).[9]

Most of the works here can be considered as part of the strategic literature on judicial behavior. Again, while attending to the role of ideology and/or legal factors, scholars have explored how inter- and intra-branch dynamics in particular affect all aspects of the opinion-writing process. Epstein and Knight's (1998) work reinvigorated an approach begun decades earlier (Murphy 1964), and became the foundation of the more recent strand of this scholarship (Lax 2011). Drawing primarily on qualitative evidence, Epstein and Knight's claim that justices' decisions are based, in part, on the "choices they expect others to make,

[9] Of course, legal scholars have studied legal opinions for years, but their work has been primarily qualitative or normative and arguably replete with methodological problems (Hammond et. al. 2005; Epstein and King 2002). Similarly, prior to the "behavioral revolution," the political science study of law was largely confined to content-based work on court opinions (Murphy and Tanenhouse 1974; Sheldon 1974).

and the institutional context in which they act" (10) has been adopted and substantiated by numerous other scholars.

In terms of the opinion-writing process, several works provide compelling evidence that the assignment of the opinion, the writing of the first opinion draft, the response of other justices to that draft, and the reply of the opinion author to those responses are all structured by the "strategic game" that the formal and informal rules of the Court generate (Brenner and Whitmeyer 2009; Maltzman et. al. 2000: 14-15; Wahlbeck et. al. 1998; Epstein and Kobylka 1992). Justices are still viewed primarily as policy-seekers, but scholars suggests that the process of translating those preferences into legal opinions can be greatly affected by the preferences and predicted behaviors of their colleagues and other political actors.

Other scholars have attended to the role of strategy by developing formal models of the opinion writing process. Among the most complex have been those that try to determine which justice exerts most control over a Court opinion and whether and how those opinions can be mapped onto policy spaces. Here, debate centers around whether the opinion ultimately rests at the ideal point of the median justice (Hammond et. al. 2005), the majority-median justice (Carrubba et. al 2009; Clark and Lauderdale 2009) or somewhere in between (Lax and Rader 2009) and, consequently, how much control rests with the majority opinion's author and assigner (Carrubba et. al. 2009; Lax and Rader 2009; Bonneau et. al. 2007; Lax and Cameron 2007).

Still others have focused upon the separate opinions written by the justices, both concurrences and dissents. Particularly given claims about the primacy of policy preferences, separate opinions - which cannot constitute Court policy - raise interesting questions about why and when a justice would chose to author an opinion that cannot actually become law

(Corley 2009; Wahlbeck et. al. 1999). Wahlbeck et. al. (1999) found, for example, that a justice is less likely to concur when the justice is ideologically close to the author, when the term is near its end, and when the justice and author have cooperated previously. Way and Turner (2006) also find that ideology predicts concurrences, as does workload and disagreement over doctrine. As for dissenting opinions, their writing has been attributed to ideological divergence among the justices (Segal and Spaeth 2002), a failure of strategic bargaining (Maltzman et. al. 2000), and as a mechanism for communications to future judges who might direct the law differently (Smelcer 2008).

Most recently, it is the legal quality rather than the existence or content of Court opinions which has drawn focus. Just as those interested in case outcomes have argued that "law matters" to voting behavior (Richards and Kritzer 2002: 305), several scholars have suggested, at least implicitly, that the jurisprudential quality of the opinion itself is important, particularly to how subsequent judges respond to it. These works suggest that the legal quality and persuasiveness of the Court's written output can be important considerations for the justices, even as they remain policy-oriented.

Lax and Cameron (2006), for instance, employ legal quality to develop their bargaining model of opinion-writing. They define legal quality as the "persuasiveness, clarity, and craftsmanship" of the opinion and argue that the higher the quality of the opinion, the more likely the resulting policy is close to the ideal point of the authoring justice (279). Quality is thus a bargaining chip a justice can exploit to ensure the final opinion reflects his or her ideal points as much as possible. Unfortunately, the authors do not offer a more explicit definition or empirical measure of persuasiveness, clarity, or craftsmanship.

Other scholars have focused on the implementation of higher court opinions and have theorized how the quality of that opinion can enhance implementation in lower courts and, therefore, the extent to which appellate judges are able to achieve their preferred legal policy. Staton and Vanberg (2006), discussed more fully below, explore how the clarity of an opinion can affect the chance of non-compliance and suggest reasons why judges might want to articulate opinions that leave their true policy preferences somewhat in doubt. In the same vein, Bueno de Mesquita and Stephenson (2002) posit how opinions can be more or less effective depending upon how well-grounded they are in precedent: the more an opinion pays heed to prior cases, the better the higher court is able to communicate, and the lower court to understand, the policy preferences of the appellate judges (see also Hansford and Spriggs 2006).

Importantly, none of these authors makes the normative claim that judicial opinions that are clearer, more convincing, or better grounded in law are necessarily "better," as lawyers or legal scholars might understand it. In fact, the impetus for these works seems to have been to explain why judges, presumably driven primarily by ideological preferences, would ever invest the resources necessary to write a well-reasoned, logical, and legally supported opinion; in other words, the goal has been to explain jurisprudential concerns with non-jurisprudential factors. Still, by even implying that certain types of court opinions can better effectuate the purposes that judges, lawyers, and legal scholars attribute to them – namely, stability, clarity, and predictability in the law – these works on legal quality have at least a foot in the camp of those who suggest that legal concerns must be factored into political science models of judicial behavior (Cross et. al. 2012; Owens and Weddeking 2011; Hansford and Spriggs 2006).

Not satisfied with these largely theoretical predictions, others have turned to various forms of content analysis to assess how well justices are crafting their opinions and what effect this has on those who implement court rulings. Several have focused upon the "clarity" of opinions in particular, suggesting that clearer court opinions can ensure better compliance and that higher quality opinions also promote judicial values such as legal consistency and institutional legitimacy. They also have moved beyond extant work to measure their concepts (Owens and Weddeking 2011; Spriggs 1997; Baum 1981; Wasby 1970).

Spriggs (1997), for example, has demonstrated that the clarity of a Supreme Court opinion is directly related to the extent to which administrative agencies comply with the ruling: the more explicit the Court's mandate, the more likely bureaucrats will follow. He develops a 4-point scale to measure court opinions, classifying them as "not explicit, somewhat explicit, explicit, and very explicit" and generates high measures of inter-coder reliability. More recently, Owens and Weddeking (2011) also argue that clearer opinions promote legal stability, Court legitimacy and policy implementation, and they use computer software to measure the "cognitive complexity" of opinions. Though they attribute the level of complexity in an opinion in part to non-legal factors such as the size of the majority coalition and the coalition position of the justice, their suggestion that legal clarity is worthy of attention and can be captured scientifically is persuasive.

Clearly, additional work on legal quality is needed. Scholars should define their concepts better and continue to develop rigorous mechanisms for empirical analysis. Still, the attention of political scientists to not only what is in Court opinions, but how that content can affect the policy-making power of the Court is certainly a welcome development. Indeed, as

seen in subsequent chapters, the concept of "legal quality" becomes an important predictor as I articulate my own theory of the judicial selection of legal rules.

Judicial Choices and Legal Rules

The most nascent development in the scholarship on judicial behavior has been the shift from the study of legal opinions to the study of the legal rules contained within those opinions, a trend into which this project directly fits. Though admitting to the importance of the Court opinion as a whole, political scientists have in fact just recently recognized that the legal rule is the most important aspect of that opinion. Legal rules are "the heart of judicial policy" (Lax 2007: 592), and the literature has begun to place legal rules at the center of analysis (Lax 2011). Theories about legal rules are still under development, the conception of exactly what constitutes a legal rule needs clarification, and empirical evidence should draw more focus, but scholars have made important advances on which this project directly builds.

Rules Versus Standards

For their part, legal scholars have devoted a comparatively large amount of attention to legal rules (Heytens 2008). This literature has primarily focused upon defining and comparing "rules" and "standards" (Shapiro 2006; Fallon 2001; Posner 1997; Kaplow 1992; Kornhauser 1992; Schauer 1991), and though the terminology is occasionally more confusing than enlightening (Lax 2008), a consensus has emerged: "rules" and "standards" both explicate the law, providing guidance for lower courts and other political actors, but they differ in the rigidity of that guidance. "Rules" are precise and specific, leaving little room for subsequent interpretation while "standards" are more amorphous and place greater discretion in the hands of the subsequent adjudicator (Cross et. al. 2009; Lax 2008; Cross and Tiller 2006; Rowland and Carp 1980). In other words, "rules" contain explicit categories or factors

against which particular facts are measured; "standards" require nuanced balancing of various elements by the jurist charged with implementation (Jacobi and Tiller 2007; Sullivan 1992; Ehrlich and Posner 1974).

Other legal scholars argue this distinction has little merit beyond its analytical utility. They have suggested that rules and standards are not dichotomous concepts, but rather exist on a continuum in which each form may share traits of the other (Korobkin 2000; Sunstein 1995; Sullivan 1992; Radin 1991). Many areas of legal doctrine also are said to be comprised of a "mix of rules and standards" where the guidelines promulgated by courts can, for example, require a balancing of precisely defined factors (Cross et. al. 2012: 18; Baird and Weisberg 1982). The vagaries of the English language often necessitate this overlap, as the structure of the guideline might be quite rule-like (requiring the judge to attend to a single element), but the content of it is quite standard-like (the element to which the judge must attend is "reasonableness" or "totality of the circumstances").[10] Finally, a guideline can begin as a standard, useful for novel areas of legal development, but be transformed into a set of rules as new information is gained and new decisions which clarify the standard are promulgated (Schlag 1985).[11]

Even among those scholars who critique any rigid distinction between rules and standards, virtually all have nonetheless offered evaluations of which form of legal guideline is preferable. Claiming that "that rules and standards can be differentiated enough for the investigation into the normative choice between the two," (Korobkin 2000: 25), scholars

[10] Consider the *Miranda* warnings: on the one hand, the Court in *Miranda v. Arizona* ((384 U.S. 436)(1966)) set out very specific language law enforcement officers must relay to suspects, suggesting a rule; on the other hand, the Court indicated these warnings were required whenever the suspect was "in custody," language which has spawned decades of litigation over what that vague terminology actually means. (My thanks to Georg Vanberg for this example).

[11] Schlag also suggests this transformation can operate in the reverse: a set of rules eventually becomes a vague standard (1985:425).

continue to explore the pros and cons of these two legal forms. The approach is almost always descriptive and/or normative, but legal scholars in particular have engaged in what has become known as the "rules versus standards debate," arguing vehemently about which type of legal guideline a court should promulgate and why.

Sometimes, the claim has been that one structure is inherently inferior to the other: rules are faulted for being overly restrictive and difficult to apply to new factual situations; standards are said to place too much discretion in those charged with implementation of the rule and criticized for failing to provide sufficient guidance for citizens to resolve their own conflicts (Nance 2006; Korobkin 2000; Schauer 1991; see also Schlag 1985). For others, the tradeoff is more complex, with each form generating its own costs and benefits that vary with legal and political context (Cross et al. 2012; Korobkin 2000; Schlag 1985). Most frequently, many have found their preference for rules or standards to depend upon the legal area under study, and works analyzing the dichotomy across a vast range of doctrinal arenas continue to appear in the legal literature (Philips 2010; Crane 2007; Overton 2002; Lee 2002; Diver 1983).

Political Scientists and Legal Rules

Political scientists who study rules generally have adopted legal scholars' distinction between rules and standards. Their work, however, has been more empirically rigorous and less normatively driven, as they try to determine not which type of rule a court should produce, but which type of rule it likely will produce (Carrubba and Clark 2011; Lax 2008; Kaplow 1995; Johnson 1995; Kornhauser 1992; Kaplow 1992). Some of the works are highly theoretical, others more data-driven, but in each, scholars have recognized that the nature of the legal guideline issued by a court is key to understanding how both law and courts operate.

Since appellate courts are policy-making institutions that use legal rules as their primary policy-making tool (Lax 2011), political scientists are now suggesting that analyzing precisely why and how the justices promulgate certain types of legal guidelines provides insight into exactly how and to what effect the Supreme Court uses its policy-making power.

In terms of predicting which type of guideline a court might adopt, Kaplow (1992) was among the first to articulate the various "costs and benefits" that attach to rules and standards. Distinguishing between rules and standards based upon whether content was given to the legal guideline before (in the case of rules) or after (in the case of standards) individuals act, Kaplow argued that the critical factor in determining whether a rule or standard would be adopted was the frequency with which that law would be applied in the future. If relevant conduct could be expected to arise frequently, then the costs involved in articulating a precise rule would be outweighed by the benefits to individuals who could conform their conduct to the rule. In contrast, if adjudicators would only have to apply the guideline infrequently, then the time-saving benefits derived from crafting a vague standard would outweigh the costs of litigating the guideline every time new, potentially illegal conduct arose. In short, Kaplow envisioned the choice between rules and standards as one driven by "basic considerations of [the] economic production…of an information product" (622-23).

Schauer (1991a) took the literature in a slightly different direction, one which several subsequent works, including this project, adopt. More precisely, Schauer rejected the traditional rules versus standards dichotomy, and differentiated between rules based on their "degree of ruleness." Here, Schaur specifically referenced not when a guideline was promulgated (as with Kaplow), but the level of detail contained in those guidelines - in his

words, rules could be “precise and constraining” or “looser and less constraining” (665). While his primary focus was on countering the claim that rules served little purpose, he emphasized that rules are articulated by one person and then implemented by another person, the latter of whom may not always be aware of or understand a rule’s (or rulemaker’s) purpose. Given this, rules can be articulated in such a way as to limit the discretion which the rule-implementer can enjoy (1991b).

Despite the rich theoretical foundation offered by these works, only a few political scientists have entered discussions about what types of guidelines a court will promulgate (Cross et. al. 2012; Carrubba and Clark 2011; Lax 2011a; Lax 2008; Tiller and Cross 2006). Among all, however, the judicial hierarchy has been identified as a critical structural mechanism that drives a court’s choice between a rule and a standard, a mechanism on which I focus as well. While of course attending to the role that judicial ideology can play, scholars have suggested that the higher court’s need to control lower courts can have a significant impact on how and why a judge would favor a certain type of legal prescription (Lax 2011; Lax 2011a; Heytens 2008).

In an early study on partisanship in the district courts, Rowland and Carp (1980) highlighted how rulings with more ambiguity create more discretion for lower courts, whereas more constrained, less ambiguous rulings constrain discretion. Scholars subsequently adopted this argument in their more extensive work on the relationship between the precision of legal language and control of lower courts. Jacobi and Tiller (2007), for example, theorize specifically how the need to control lower courts can give higher courts incentives to craft specific types of legal guidelines, positing that courts will select “determinate rules” or “indeterminate standards” depending primarily upon the ideological

alignment between higher and lower courts. If the higher court faces a lower court likely to diverge from its own ideological preference, it should issue a restrictive rule that limits this possibility; conversely, if the lower court is likely to adhere to higher court preferences, the guideline can be vaguer.[12]

Staton and Vanberg (2006) agree that concerns about implementation can influence the specificity of a judicial opinion (though not the legal rule *per se*), but ask why a judge would ever issue a vague guideline that could generate non-compliance by a lower court or legislature. Their answer is more complex than the relatively straightforward principal/agent model of Jacobi and Tiller (2007), as they argue that judges face a tradeoff between controlling policy outcomes and maintaining the prestige of their court. Focusing on a legislature, the authors posit that while judges may use vagueness as the policy preferences of the legislature diverge from their own, they may also purposefully issue vague rulings in order to disguise non-compliance and avoid any subsequent loss of their own institutional legitimacy. In addition, because judges, at least relative to other policymakers, may lack technical expertise, they may prefer vague opinions to "hedge" against their inaptitude and to leave the technical challenges of policymaking to others (506). In the Staton and Vanberg model, then, the selection of vague or specific guidelines is shaped by dynamics stemming from both the judicial hierarchy and the separation of powers, dynamics likely to generate results not predicted by the standard principal/agent account.

[12] In a more recent articulation, Cross et. al. (2012), echo this argument but add (ala Kaplow) the distribution of cases likely to arise to their model. They argue that along with the distribution of lower court preferences, the higher court knows the likely distribution of future cases as well. The exact source of this knowledge remains unclear.

The Case-Space Model

Currently, the most prominent method for understanding the rules promulgated by a high court is the so-called "case-space model." Based upon the works of Kornhauser (1992, 1992a) and Cameron (1993), this formal model departs from the traditional policy-space approach which employed a one-dimensional line and points to signify the ideological location of policies. In contrast, the case-space model is a two-dimensional space in which the cases are the points and the policy – the legal rule – is a line or plane that divides the space. Cases that fall on one side of the line are "winners," while those on the other side are "losers." In a search and seizure case, for instance, the rule involves various factors such as the location and intrusiveness of the search; cases in which the search was particularly intrusive or conducted in a highly personal area such as a home, would fall on the "wrong" side of the rule and the search declared unreasonable; in contrast, searches which involved minimal intrusion or were conducted in a less personal location (such as a car), would fall on the "right" side and be held reasonable. (Lax 2011a; Lax and Landa 2009). Importantly, unlike how most lawyers or judges might think about them, these rules are not "right answers," but instead a reflection of the competing preferences of those jurists charged with their creation (Lax 2011: 137).

The case-space model does not reject either the attitudinalist claim that ideology matters or the legal formalism claim that it does not, but rather seeks to explain how ideological preferences might interact with the structure and nature of legal adjudication to produce both case outcomes and legal rules. Though judges are required to make strategic tradeoffs to ensure the resulting policy matches their preferences as closely as possible, they are generally free, within those confines, to articulate whatever legal rule they deem

appropriate. In short, the case-space model offers an innovative way study how and why judges create legal rules (Lax 2011a; Kornhauser 1992).

One scholar's work with the case-space model is particularly prominent. In a recent article (2011a), Lax uses a case-space model to predict when a higher court will favor "bright line rules" or more nuanced legal "standards." Like Jacobi and Tiller (2007), Lax also focuses on the "strategic tradeoffs" created by the judicial hierarchy, arguing that the choice of rule will be affected by ideological divergence between higher and lower courts, along with judges' expertise, issue complexity, and case salience (3). Using the model, which "places judge-created case sorting rules at the heart of judicial policy-making," Lax thus specifies the conditions under which appellate judges will favor rules or standards, such as the likelihood of non-compliance, the complexity of the doctrine at issue, and the expertise of the creator of the rule (28).[13]

For reasons detailed below, this project does not employ a case-space model. Nonetheless, I envision the dissertation as fitting within the new "doctrinal politics" that those who work in the case-space approach have advocated (Lax 2011). These scholars are in fact correct that the ongoing debate over whether judges are driven by ideological or legal considerations has prohibited cross-fertilization between disciplines and stunted the study of judicial behavior in both fields (Lax 2011; Friedman 2006; Cross 1997). By drawing upon theories of political scientists to attend to the Supreme Court's most important legal product, my goal for this project is to incorporate the concerns of legal scholars and political scientists and to produce findings that might be of interest to those in both fields of study.

[13] In another work (2007), Lax addresses how collegiality might affect the structure of doctrine, a concern he explicitly sets aside here.

Challenges in the Literature

Perhaps because it is so new, the literature on legal rules is not without its shortcomings, some of which this project seeks to remedy. In particular, scholars have yet to reach agreement on either the meaning or origin of legal rules. Though these disagreements themselves have yet to draw attention, the lack of conceptual and empirical consensus arguably has inhibited more rigorous study of legal rules. In this section, I discuss these challenges further and explicate one potential solution.

Conceptualizing a Legal Rule

Of primary importance to both my work and that of others is the concept and meaning of a legal rule itself. Particularly in the political science literature, the term "rule" appears frequently, but what the concept entails and if and how a rule differs from other products of the Court's adjudication is sometimes left unclear. Because many scholars have not differentiated between a rule, a judgment, an opinion, and a precedent, they have risked making claims about Court policy-making without studying the element – the legal rule – that actually constitutes that policy.

The confusion between a rule and other products generated by courts occurs all too frequently in the literature. Scholars have used the term "rule" to reference the opinion, the outcome or judgment, doctrine, precedent, and legal rationales, each of which is quite distinct from the actual rule (Carrubba et. al. 2009; Lax and Landa 2009; Bailey and Maltzman 2008; Jacobi and Tiller 2007; Bonneau et. al. 2007; Hansford and Spriggs 2006; Cameron, Segal and Songer 2000; Richards and Kritzer 2002; Spriggs et. al. 1999; Spiller and Spitzer 1992; Spriggs 1997; Posner and Landes 1976). The opinion, for instance, contains much more than the rule, including discussions of facts, procedural history, and prior case law. Opinions also

contain rationales, or the reasons why a particular rule is appropriate or desirable.[14] And, as a few scholars have begun to recognize (Carrubba et. al. 2009), the rule is distinctly different from the outcome: the outcome is which party wins or loses while the rule is the legal principle that produces this result.

The implication of these misperceptions varies based upon the aspect of judicial behavior under study. For those who focus on broader phenomena such as bargaining on the Court or the constraints of legal factors on judicial voting, this lack of clarity about rules may not be particularly problematic. But for those interested primarily in exactly how and to what effect the Supreme Court makes legal policy, claims that do not correctly identify or incorporate the "heart" of that policy-making power (Lax 2007: 592) may be less well-substantiated than they first appear.

To avoid such problems, I articulated a definition and explanation of what exactly constitutes (and does not constitute) a legal rule. For this research, I define a legal rule as *the language in an opinion that defines legal and illegal conduct and provides guidelines for the subsequent behavior of governmental or private actors.* Extending the argument that rules and standards exist on a continuum (Radin 1991), I argue that "rules," "standards," and even "tests" (Fallon 2001) are in fact manifestations of the same underlying concept – what I term the "legal rule."

Several characteristics of this concept warrant discussion. First, legal rules serve different functions, depending upon the actor who attends to them. For actors outside the judicial system, including legislators, private persons, and corporations, the legal rule defines the boundaries of permissible behavior: the legislator must make his or her intent "clear;" the

[14] Rationales include, for instance, claims about the intent of Congress, the proper method of statutory interpretation, and the policy implications that attach to a particular rule. Rationales can also include discussion of extant case law.

private person must exercise "due care;" the corporation is subject to liability as the "*respondeat superior*." Each rule informs the actor – in advance of the behavior – what courts will consider appropriate.

For lower courts, the legal rule functions somewhat differently, as it informs not how judges should generally behave in their professional roles, but rather provides the guidelines that they should employ to resolve the case before them. In other words, when faced with disputes about whether other actors have or have not violated the law, it is the legal rule promulgated by the higher court that the lower court uses to adjudicate the proceeding. Legal rules thus tell lower court judges – in advance of the dispute resolution – the appropriate test to apply.

Second, unlike current scholarship, this concept of a rule does not rest upon a particular level of specificity. The literature, particularly in political science, has generally conceived of rules in only their dichotomous form – "bright line rules" or "vague standards" (Lax 2011a) These may be theoretically useful constructs, but they do not fully capture the nature of rules actually confronted and employed by the court, which can be difficult to classify as bright line or standard-like. In fact, all legal rules, even those that might be deemed "bright line," are general in some sense, intended to apply to the case currently being adjudicated as well as future events (Lax 2008; Schauer 1991). By necessity, every legal rule must therefore contain some level of generality. As discussed below, although I address the precision of a legal rule, I do not differentiate among types of rules based on that characteristic. Rules may be quite specific (e.g., the statute of limitations is triggered on the "date of the bankruptcy filing") or quite vague (e.g., searches and seizures must be "reasonable").

Third, the definition is not limited to directives aimed at certain behaviors or certain entities. Rules can cover the criminal or civil acts of private persons (a person is liable for a tort involving "willful negligence"), businesses (a ship holder is responsible for all injuries "regardless of the contributory negligence of the worker"), institutions (schools may only be liable for sexual harassment if they exhibit "deliberate indifference" to the behavior), the political branches (Congress may not be said to abrogate the Eleventh Amendment immunity of the state without "clear intent"), or the lower courts (jurisdiction may only be exercised when administrative remedies have been "fully exhausted"). Rules, then, may relate to constitutional, regulatory, or statutory law; unlike previous scholarship, therefore, my study is not limited to particular areas of law (Bailey and Maltzman 2008) or to rules conceived of only theoretically (Lax 2007).

Finally, because my definition does not attach legal rules to a particular case, it draws an important, but heretofore unaddressed distinction between a rule and a precedent. Rules may in fact be established in - and be known by - one specific ruling (e.g., the "*Roth* test" of obscenity) or flow from numerous rulings across decades (e.g., the "exceedingly persuasive justification" needed for sex discrimination cases), but rules are not the same as precedent. Precedent is what results from the application of the rule; the rule is the guideline that is applied. In other words, the rule indicates how the law is to be interpreted, the precedent is the product of that interpretation and the vehicle through which the rule is transmitted.

When scholars have studied precedent (Bailey and Maltzman 2008; Hansford and Spriggs 2006; Segal and Spaeth 2001; Segal and Spaeth 1999), they have neither drawn this distinction nor recognized that prior cases can be cited for numerous reasons, not all of which indicate reference to a legal rule or even a legal "principle" (Hansford and Spriggs 2006: 5).

A jurist may very well cite a prior case for its rule, but may just as easily cite it for its judgment, reasoning, fact pattern, or even *dicta*, language in the opinion not generally considered part of the Court's statements of law. Because the literature often has failed to recognize the difference between a rule and precedent or the different uses for which precedent can be employed, studies of precedent that rely upon case citations are not in fact always capturing the "role of law." Law, I suggest, is not the precedent, but the rule contained within it.

It is also important to clarify what, under my definition, does not constitute a legal rule. Along with language that explains why the rule has been selected (the rationale) and how it applies in the instant dispute (the holding, judgment, or outcome), opinions sometimes contain guidelines the Court uses to inform its own adjudication. Although these are indeed directives, they are directives for the Court itself, rather than external actors, and hence do not constitute a legal rule.

Statutory interpretation cases illustrate the point. When the Court resolves conflicts over the meaning of legislation, it often cites principles of statutory construction as a guide for its inquiry. These principles include, for example, the "rule . . . [that the Court should] first discern congressional intent from the existing statutory text" or that the Court should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."[15] While the opinion may even term these as "rules," such guidelines for the Court's own analyses are not considered as such here.

Similarly, the Court sometimes faces cases that evoke legal "presumptions," which generally focus the Court in a particular way. For instance, the Court may cite the

[15] *Gomez v. United States*, 490 U.S. 858 (1989).

presumption that Congress, "when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency,"[16] or the so-called "rule of lenity," which indicates that when a criminal statute is ambiguous, it should be resolved in favor of the criminal defendant. Again, while these phrases provide guidelines, even directives, for the Supreme Court justices themselves, they are not aimed at the subsequent behavior of other actors - only directives which have an externally and future-directed quality fall under my concept. Language which articulates a mode of analysis or a general decision-making principle for the Court to follow is excluded.

My concept of a legal rule thus has both theoretical and empirical advantages. From a theoretical perspective, it removes much of the confusion between a rule and an opinion. More precisely, it shows that while the rule will be embedded in the opinion, it alone does not itself constitute the opinion. Again, the opinion is comprised of many more elements, including the facts of the case, the state of law at the time of adjudication, a discussion of relevant precedents, application of the rule to the facts at hand, and, if needed, directives to lower courts to respond accordingly. By isolating the legal rule from the rest of the Court's output, my approach permits a sharper focus upon what many have at least implicitly agreed is the most relevant and important product of the Supreme Court (Carrubba et. al. 2009).

Unlike other work (Richards and Kritzer 2003), this concept of a legal rule also has more empirical value, for it is not limited to particular legal areas. Indeed, it is portable enough for a study of corporate and tax law, criminal procedure, civil liberties, civil rights, federalism, environmental regulations, torts, and a host of other areas the Supreme Court is called upon to address. As detailed below, my sample of cases is restricted only to those that involve competing rules, rather than to particular issue areas.

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[16] *United States v. Mead Corporation*, 533 U.S. 218 (2001, Scalia, J., dissenting).

The Origin of Rules

The literature has also lacked both clarity about - and evidence for - the origin of the legal rules articulated in the Court's opinions. Although several scholars have traced how the arguments or rationales contained in the briefs of litigants and amici are incorporated in the Court rulings (Corley 2008; Collins 2008), no one has yet done so for legal rules themselves. In fact, the general consensus in the literature is that appellate judges are able to develop and articulate whatever legal rule they deem appropriate (Carrubba and Clark 2011; Lax 2011; Lax 2007; but see Epstein et. al. 1996). Even works in the legal literature, whose authors are presumably familiar with how the legal process operates, generally have not questioned the scholarship's assumption that justices construct their own legal rules (Cross et. al. 2012).

The formal literature is particularly troubling here, as it asserts that the content of the Court's output is "endogenously determined by the justices themselves" (Hammond et. al. 2005: 17; see also Jacobi and Tiller 2007) and that Court doctrine in particular, including its "content, structure and legal quality ….[rests] in the hands of the justices themselves" (Lax 20011a: 3). Though agreeing that justices have control over opinion content, often interacting over and about it, I argue it is at least an untested proposition whether or not the justices actually do develop their own legal rules. Of course, given their institutional position, they certainly could articulate whatever legal rule they chose (subject to any internal bargaining or other constraints that might operate on these preferences), but scholarship has yet to demonstrate this phenomenon in operation. It may be, that to save time and resources or to fulfill any professional obligation they feel to resolve the instant dispute, the justices rely upon the case participants to suggest the rules from which they ultimately select. The judicial adoption of legal rules in fact may not be the unfettered process of rule creation

much of the literature currently envisions (Lax 2011a); consequently, any model (such as the case-space) built around that assumption is not appropriate for this project. Instead, I propose that because the proffered rules likely constitute the set of available choices, the nature of those rules could be an important factor in when and why they are favored. The following chapter explicates precisely what those traits are and how they influence the judicial selection of legal rules.

A False Choice: Rules vs. Standards

As noted, the relevant literature also has repeatedly and consistently framed the discussion of judicial selection of legal rules as a choice between a precise "rule" and a vague "standard." However, I suggest that the Supreme Court almost never faces this dichotomous choice. Instead, what they usually must choose between are versions of the same type – rules that are more or less "rule-like," standards that are more or less "standard like" – or, perhaps even more often, competing legal guidelines which do not vary in their level of precision at all. While the considerations that drive the resulting choice may be the same ones that drive the (theoretical) choice between a rule and a standard, the literature has not recognized fully that its notion of a "rule versus a standard" could be a rather extreme simplification. Because this frame may not capture the true state of the world regarding judicial selection of legal rules, we cannot be sure that it is even prompting us to ask the most relevant questions. In fact, my results indicate that the concerns over the rigidity and precision of a legal rule cannot be driving the justices' choice of rule in a large majority of cases: this suggests that the literature's focus on "rules versus standards" is in fact overly restrictive and that new theories of rule choice must be developed.

Testing Theories of Rule Selection

Finally, there has been general failure in the literature to test rigorously models of rule choice. Where testing has been done, it unfortunately has been restricted to one or two legal areas, limiting the external validity of the work and preventing the kind of generalizations about rule selection on the Court that we might wish to make (Cross et. al. 2010; Spriggs 1997; Epstein and Kobylka 1992). More often, scholars have developed sophisticated theoretical models about rule creation, but have not subjected their theories to much empirical analysis (Cross et. al. 2012; Carrubba and Clark 2011; Lax 2011; Jacobi and Tiller 2007).[17] Given the challenges of data collection, this failure to test is perhaps understandable, but it does prevent validation of predictions, no matter how sophisticated the model which produced them. By undertaking this data collection process, I hope this dissertation offers the opportunity to evaluate better at least some of these expectations.

Conclusion

The literature on judicial behavior has offered a rich foundation upon which to build a theory of judicial selection of legal rules. Indeed, despite some limitations, all of the works referenced here are impressive, and I build upon them in important ways. First, as outlined above, I articulate a more comprehensive definition of a legal rule so that my examination of high court policy-making is aimed at the policy itself. Second, I study the actual rules offered to the Court by participants in the cases, litigants, and amici to determine if and how these rules are selected by the justice. Third, I measure aspects of legal rules that have been deemed important but not empirically evaluated: work has been done predicting when a court will select a vague standard or rigid rule, but the only measure has been a dichotomous (and

[17] This is not to say there has not been extensive empirical analysis of other aspects of the Court's work, including opinion-writing and the role of bargaining in the justices' decision-making. (Clark and Lauderdale 2010; Carrubba et. al. 2009; Hansford and Spriggs 2006; Maltzman et. al. 2000).

largely theoretical) distinction between the two types, a shortcoming my dissertation attempts to remedy. Moreover, I also look to other attributes of a rule - who offers and who supports it - that have been ignored by scholars but that might affect rule choice.

Thus, while my work fits well within recent trends, it represents a meeting of legal and political science disciplines in one of the most direct ways to date. Because I examine the rules that litigants and amici suggest to the Court, I draw from the same source – legal briefs – and focus upon the same element – legal rules – to which the justices at least claim to attend, around which their opinions are in fact written, and to which political actors later turn (Cross et. al. 2010; Kastellec 2010; Lax 2007). At the same time, because I theorize that the selection of a legal rule can be influenced by a range of ideological, strategic, and jurisprudential concerns, I directly situate the justices' choices in the larger political context. The following chapter details this theoretical explanation of the selection of legal rules on the U.S. Supreme Court.

CHAPTER 3

PREDICTING RULE SELECTION: THEORY, HYPOTHESES, AND RESEARCH DESIGN

The previous chapter discussed how scholars of judicial behavior generally have understood the process of judicial decision-making. I drew particular attention to several factors identified as relevant for most of the decisions Supreme Court justices make: ideological preferences, the hierarchical judicial system, and legal considerations. I then documented how the scholarship has moved from a focus on final votes to legal opinions and highlighted how one particular aspect of the Court's opinion - the legal rule - has begun to draw the attention of political scientists. Agreeing with those who argue that the legal rule is the most important product of the Court's policy-making process, I offered my own conception of a legal rule and explained how it differed from other concepts such as precedent, legal rationale, and case outcome. In this section, I employ the theories of judicial decision-making to develop hypotheses about how and why the justices chose among the competing rules presented to them by case participants. The chapter also explains the research design with which I test these predictions.

The Nature of Rule Selection on the Supreme Court

As discussed in the previous chapter, the literature on rules and the high Court has generally assumed that justices generate whatever legal rule they prefer. Though I agree that the justices are free in fact to do this, it is, at the very least, unclear whether or not they actually do so. Instead, it could be that they select their favored rule from among the options presented to them by case participants.

If that is true, then, the number of rules from which a justice can select becomes fundamental to how I envision, and how I can test, rule choice. As documented in Chapter 4,

when the justices confront cases involving competing rules, those cases are generally of two types: those where case participants have presented only a pair of competing rules and those where they have presented more than two options. Cases in the latter category may provoke a different type of decision-making process because the number of rule choices can affect why a justice favors a particular rule. The distribution of rule options thus has implications for developing and testing any theory of rule choice. In this section, I explicate these implications and discuss how my project attempts to manage the ensuing challenges.

To preview the following chapter, my data show that the justices generally confront between two and six rules per case. When the justices are presented with only two rules - one rule from the Petitioner (the party(ies) appealing the lower court decision) and one rule from the Respondent (the party(ies) supporting the lower court decision), their selection of a rule has at least the potential to be relatively straightforward. As each litigant has offered one rule, the choice of rule is correlated with the case outcome – whichever rule a justice adopts automatically produces a victory for that particular party. As I discuss below, it is a least possible that, in this situation, a justice pays little attention to the rule itself, instead voting for the outcome that the justice finds more ideologically appealing.[18]

This claim seems to underlie the way that the literature often has measured the Court's output. Most scholars determine the ideological direction of the ruling based on the identity of the party who won the case (Spaeth 2002). Cases in which certain parties, such as individual claimants in civil liberties cases, criminal defendants, and indigents win are coded as liberal; conservative outcomes are the reverse. When choosing between two rules, therefore, a justice need only determine which of these types of parties the justice wants to

[18] Of course, a pure legalist would assert the reverse: the justice chooses the rule first and the victory for one party or the other is produced by the rule choice.

emerge victorious; the nature of the rule associated with that party might be largely irrelevant. In fact, when confronted with only two rule options, the attitudinalist assertion that the choice of rule is simply the afterthought of an ideologically-driven decision about the case outcome seems more plausible.

In other instances, however, case participants present more than two rules to the Court: litigants can offer alternatives to their primary rule or amici can add rules not also suggested by either party. In these cases, the dynamics of rule choice inevitably shift. More precisely, if the justice has three or more rule options, two of those rules must be attached to the same party and hence, the same outcome.[19] In a case with four rules, for instance, one rule will favor the Petitioner, one rule will favor the Respondent, and the remaining two rules may favor either the same litigant, or be distributed evenly between them. Regardless of whether the justices wishes to favor the Petitioner or the Respondent, several rules may exist which generate that result.[20] In these circumstances, the choice of rule cannot be driven solely by attending to which outcome the rule favors and the justices must look to other factors to determine their preferred rule. Particularly when compared to cases involving only two rules, rule selection in these multiple-rule cases has at least the potential to be much more complex and involve additional factors.

As explored further below, I suggest that the rule itself becomes one of those factors and that a justice will evaluate competing rules for their content and implications. Of course, that evaluation may also be driven solely by ideology – a very liberal justice chooses the

[19] It is possible that amici in particular could suggest a rule but not argue for victory for one party or the other. In my data, however, this occurred in only one instance.

[20] In case with three rule options, the "extra" rule will favor either the Petitioner or the Respondent, but not both. In cases with more than three options, the "extra" rules may also all favor one party. In any of these cases, a justice wishing to favor the party with only one associated rule may thus ignore the rule altogether, voting on only the party. A justice wishing the favor the other party, however, has the more complicated choice.

most liberal rule, a moderately liberal justice chooses the more moderately liberal rule. But, particularly when compared to two-rule cases, if other, non-ideological aspects of the rule – aspects which I develop in my theory – are operative, they should be more apparent in a multiple-rule case.

Thus, the number of rules suggested may have important effects upon how and why the justices of the Supreme Court favor the rules they do. In cases with two rule choices, the choice of rule and the choice of outcome may be conflated and, if the choice over outcome is determined ideologically, the influence of other traits of the rule is likely to be attenuated. In contrast, cases with multiple rule choices are more likely to reveal concerns beyond case outcome, including characteristics of the rule itself. Under ideal conditions, a study of rule choice would address both situations; unfortunately, practical limitations render a full empirical assessment of both in this dissertation impossible.

Several of these limitations arise from the nature of the data itself. First, as detailed in the following chapter, in a large majority of cases, the Court is confronted with only the two rule options; in fact, in less than 15% (seventy) of the 500 cases in the dataset did case participants offer three or more rules to the justices. Second, the justices very rarely actually select any of these alternative rules, either from litigants or amici.[21] More specifically, in only eighteen of the seventy multiple-rule cases did any justice favor a rule that was not a litigant's primary rule suggestion. Consequently, the attempt to use quantitative analysis to predict why and under what conditions a justice chooses such an alternative rule has few such outcomes to study.

Variation in the number of rule options creates additional complexity for statistical analysis. Several standard models (such as multinomial logit or probit) can be used to study

[21] The rarity of the selection of rules offered only by amici is explored more fully in Chapter 4.

the choice among more than two options, but they cannot model such choices unless the number of options remains the same across all observations. Here, of course, that number does not remain the same but shifts from three to four to five to six. I could separate the eighteen cases into categories where the number of rules was constant (i.e., cases with three rules, cases with four rules etc.) and analyze each group separately, but each group of cases would have too few observations for rigorous statistical analysis. In short, the challenges posed to quantitative analysis of cases where the justices confront more than two rules seem prohibitive, at least for this project.[22]

Therefore, with the exception of Chapter 6, for the remainder of this dissertation, I suggest that the choice of rules is a choice between the rule of the Petitioner and the rule of the Respondent, and I examine only those cases in which the majority of justices favored a rule suggested by a litigant. Although this approach cannot fully explain every rule choice, it still explains the vast majority of rule selections made by the justices. Again, the justices almost always select the primary rule of a litigant; as a result, rule selection on the high court can be conceived of – and modeled as – a choice between the two competing rules that the parties present to the justices.

This approach also provides a harder test of my theory of rule choice. More precisely, extant literature suggests that votes on case outcomes are particularly likely to be driven by ideological preferences. In cases with only two rule options, the justice is expected to decide simply based upon the ideological direction of the case outcome, adopting the rule of the preferred party as a rationalization. I argue, however, that non-ideological aspects of the rule may also influence the rule selection process. Testing this theory on cases where these factors

[22] That they cannot be explained quantitatively does not mean that these cases cannot be studied at all, however. Instead, I adopt an exploratory, qualitative approach in Chapter 6 to study the eighteen multi-rule cases in greater depth.

are least likely to operate ensures that any positive findings are all the more credible. Thus, though future work should continue to explore the dynamics of multiple rule cases, this dissertation still may provide important insights into most of the rule choices made by the justices of the U.S. Supreme Court and offers some tentative claims about the rest.

Explaining Rule Selection: Theory and Hypotheses

While most agree that the rule is the heart of judicial policy-making, the focus of political scientists on legal rules is one of the most nascent trends in the literature, and most have envisioned the process as one in which the justices craft their own preferred legal rules. As such, there has been little theoretical and virtually no empirical work on whether and how the justices chose among the rule options case participants offer to the Court, the question to which this dissertation is directed. Existing literature, however, does offer important clues about what factors might operate on such choices, factors which I adopt and combine into a theory of rule choice. This approach is of course only a first step, but it does suggest at least one way that the justices might make decisions about which legal rule to favor and, consequently, how legal doctrine may develop.

Again, scholars have emphasized how judicial decision-making is likely influenced by the justice's ideology, the hierarchical environment in which the justices operate, and jurisprudential considerations such as adherence to precedent and legal argument. Importantly, I suggest that all three elements operate simultaneously on the justices' choice of rule. Rather than being driven only by political preference, or only by concerns over lower court judges, or only by professionalized norms of judging and legal reasoning, I argue that all these factors influence why the justices select the rules they do. Though the degree to

which these considerations drive rule choice shifts with context, each should play some role in the rule choice of the justices of the U.S. Supreme Court.

The Role of Ideology in Rule Selection

Whether studying rule choice, votes, or opinion-writing, any work on judicial behavior must attend to the political preferences of the justices. Indeed, across virtually every choice the justices make, their ideological disposition has been identified as probably the most critical influence on their decision-making. I envision a justice's choice of rule as no different – that is, a justice's ideology should strongly influence that justice's selection of rule. Simply stated, a rule that comports with a justice's political leanings is more likely to be favored than one that does not.

Again, the justices generally face a choice between two competing rules – one from each of the litigants. Though these rules do not necessarily have to be polar opposites on the ideological spectrum, they are suggested by two parties who presumably are at odds over the proper resolution of the case and likely have some divergent ideological tenor or implications. Accordingly, particularly when compared to a case where the justices are confronted with a large range of legal rules that may differ slightly or not at all in their ideology, it is safe to assume that the rules from two competing litigants are in some state of ideological disagreement. When choosing between those two rules, therefore, a justice is probably quite attuned to whether that rule comports with the justice's own disposition and should be more likely to favor the rule with which the justice is more ideologically aligned.

Thus, I hypothesize:

> *H1: When selecting between alternative rules, a justice will be more likely to select the legal rule that is in closer ideological proximity to the justice's own ideological preferences.*

The nature of the instant case, however, may condition the influence of ideology (Unah and Hancock 2006). In particular, if the case itself is salient, it may offer a unique opportunity for the justices to impart their policy preferences into law and thus be more likely trigger their ideological dispositions (Bartels 2009). Consequently, the justices should be particularly attuned to the ideological distance between themselves and the rules and be more motivated to select a rule that comports with their ideological preferences in salient cases. Thus, I hypothesize:

> *H1(a): A justice will be more likely to select the rule in closer ideological proximity to the justice's own ideological preferences in salient cases.*

The Role of Other Rule Attributes

If ideology were the sole factor driving judicial choices about rules, then the rule itself could be largely irrelevant. Again, because the justices usually choose from one rule offered by each of the two litigants, the rule options generally are correlated with which party wins the case – i.e., the outcome. The justice need not pay any attention to the rule at all, but only decide, based on ideological preference, which party the justice wants to emerge victorious. In other words, it is at least possible that a justice could ignore the rules altogether, and make a decision based only on the identity of the case participant who suggests the rule (or vice-versa). In the following section, I provide a theoretical argument that justices in fact do care about the rule, independent of the outcome that rule produces. In Chapter 5, I validate this claim with a statistical model.

Why Justices Care About Rules

Even when confronted with only two rule options, there are several reasons why justices should look beyond the identity of individual litigants to the rule itself. First, it seems unlikely that the justices care only about the parties in the instant dispute. Indeed, even in

cases - such as those about school desegregation or the death penalty - where which litigant wins the case is probably quite important, the justices know that what will govern future cases is the rule they use to determine who wins. It is the rule about why schools must desegregate or the why execution can go forward, not the victory of the schoolchildren or the state, to which other political actors will turn when they make their own policy decisions. Consequently, it is improbable that the justices are myopically focused on the party alone, even in high-stakes cases.

Second, in many instances, the justices may not care about the particular parties at all. Although the litigants themselves likely feel the outcome of their case is critical, the justices probably have not taken the case to solve the dispute between a certain set of litigants - they have taken the case to rule on the legal issue the case involves.[23] Especially in instances of inter-circuit conflict, which the justices at least claim to be taking to promote legal consistency, the justices likely are interested much more in resolving the differences among lower courts rather than in resolving the dispute between the litigants. That goal is accomplished primarily through the legal rule, not the ruling on the case outcome.

Of course, even though the justices may be unconcerned with particular parties, they may be quite interested in the group of litigants to which this party belongs. A justice, for example, may not care about *this* criminal defendant, but may want legal doctrines that protect criminal defendants in general; a justice may not care especially about *this* environmental regulation, but may be quite eager to ensure other such regulations remain legally viable. In such instances, a justice still need not reference legal rules at all, but simply

[23] One possible exception to this is *Bush v. Gore*, 531 U.S. 98 (2000), a decision which provoked serious criticism about the Court's intervention into the political process (Ackerman 2002; Dworkin 2002; Dionne and Kristol 2001).

support the party who represents the organization, program, or group of individuals whom the justice generally favors.

While appealing on its face, such a claim is also problematic. Again, the justices know that the legal rule, not the vote on the outcome, is what will govern future cases. For a justice blindly to adopt a rule based only on the party offering it is, in fact, a rather risky strategy. Indeed, that party may have suggested a rule that generates a victory in the instant case, but which might operate very differently in subsequent cases. Particularly when such rules involve terms subject to interpretation, such as "reasonable" or "foreseeable," a justice - even one focused solely on policy outcomes - would need to feel extremely confident that the litigant was concerned enough with the state of law (not just the instant case) to suggest only those rules that ensured legal protection for similarly situated subsequent litigants. For a justice to make decisions in this way may save the time and resources involved in assessing competing legal rules, but it places something much more important - the law itself - at risk. It is difficult to believe the highest jurists in the land are willing to take that chance.

In addition, there is some evidence that the justices feel an obligation to their professional background and training and are aware of their role as a particular type of decision-maker, one who weighs evidence, analyzes arguments, and makes conclusions carefully (Lopeman 1999; Posner 1995; Gibson 1978). The justices have been socialized to a certain method of reasoning since law school, socialization that has continued throughout their careers, both before the Court and after appointment (Lindquist and Klein 2006; Epstein and 1998). Key to that method is the focus on legal rules: from the first semester of law school, lawyers are trained to identify, articulate, and advocate for or against specific legal rules and many, especially the appellate attorneys and lower court judges more likely to

become justices, spend their careers doing just that type of legal work. For a justice to abandon all attention to legal rules in favor of merely evaluating the presenting party runs counter to this entire professional history and to the habits of mind to which they have been conditioned.

Finally, if the justices cared little for legal rules, it would be difficult to explain the existence and frequency of specially concurring opinions. These opinions, in which a justice supports the majority's vote on the case outcome but rejects other aspects of its opinion, are often written precisely to express disagreement with the majority's legal rule (Corley 2010; Black 1991; Ray 1990). Justice O'Connor, for instance, has rejected the Court's approach to cases about the Establishment Clause of the First Amendment, most famously through a concurrence in which she advocated adoption of the now-termed "endorsement test," a test which later informed much of the Court's doctrine (*Lynch v. Donnelly*, 465 U.S. 668 (1984)). Though no majority ever adopted their suggestions, Justices Stewart and Powell used special concurrences to urge rejection of the application of the "strict scrutiny" test to race and sex classifications, advocating instead for *per se* bans on racial discrimination and the "rational basis" test for sex discrimination, respectively (*McLaughlin v. Florida*, 379 U.S. 184 (1964); *Frontiero v. Richardson*, 411 U.S. 677 (1973)). Even those concurring opinions that oppose only the majority's reasoning or use of precedent, rather than its legal rule, suggest that justices are not simply identifying their favored litigant and voting accordingly. Indeed, if the justices were voting based on party alone, then the Court would issue far fewer separate opinions than it currently does.[24]

[24] Corley (2010:8) documents that during the Burger and Rehnquist Courts, almost half of all cases decided by the Court contained a concurrence.

Testing the Importance of the Rule versus the Outcome

Rather than rely solely upon this reasoning, however, I also test directly whether and how much a justice cares about the rule independent of that justice's preference over outcome. By running a standard regression model with a justice's ideological preference over rule and outcome included, I am able to distinguish the independent influence of each on the justice's choice of rule. A formal expression of the model and the results of the empirical analysis are detailed in Chapter 5. Though these results indicate that the justices care about both a case outcome and the rule which produced it, they also indicate that justices care about the ideological nature of the rule, separate from its influence on case outcome, at least in cases of inter-circuit conflict. While subsequent work is needed,[25] the finding supports my claim that a justice's choice of rule in fact is not the ideological afterthought of a vote about case outcomes. In short, the rule matters in judicial decision-making.

The Importance of Non-Ideological Rule Attributes

Given all these considerations, then, it seems that the justices do pay at least some attention to the rule itself, regardless of who offers it. That justices care about the legal rule, however, does not mean that they care about anything other than the rule's ideology – that is, the nature of the decisions that the rule generates in current and future cases. Even though legal rules themselves rarely, if ever, contain blatantly political language, the results that come when a jurist applies those rules can be quite politically charged. Rules, for instance, that protect freedom of speech, uphold the right to abortion, or allow inmates to appeal cases generally produce outcomes, in both the instant and future cases, that are considered liberal; rules that permit corporate mergers, deny benefits to indigents, or limit the rights of criminal

[25] For instance, future research should employ a more direct measure of the ideology of the outcome associated with the Petitioner's rule, rather than just presuming it as the reverse of the outcome associated with the Respondent's rule.

defendants generally produce more conservative outcomes, again in both the instant dispute and subsequent cases. In other words, the words that comprise a rule may not themselves be ideological, but the content and impact of a rule very often is.

Though there are exceptions, most rules can be associated with some point on a liberal/conservative ideological spectrum. A justice, therefore, could attend only to the ideological nature of the rule, paying little attention to any other elements of it. I suggest, however, that the justices do in fact care about other rule attributes, attributes that affect which rule they favor. While ideology should always be an important influence, there are other aspects of rules that also may be relevant to whether or not they are selected by a particular justice.

Some of this claim rests on the nature of the cases the Court confronts. First, there are disputes that are quite difficult to categorize as liberal or conservative. When the Court upholds the free speech rights of politically conservative groups, for instance, the rule (protection of free expression) is seemingly liberal, but the result (the Ku Klux Klan or anti-gay protestors are allowed to protest) protects right-wing organizations.[26] In these instances, a justice motivated solely by ideology might find it difficult to determine whom to support and could turn to the non-ideological aspects of the rule to resolve competing pressures.

Similarly, some types of disputes are difficult to consider as ideological at all. For instance, when the Court resolves a patent dispute between two large companies ((*Qualitex Co. v. Jacobson Products Co*., 514 U.S. 159)(1995)), decides whether a stockholder who no longer holds shares in a company may continue a lawsuit about insider trading ((*Gollust v. Mendell*, 501 U.S. 115)(1991)), or chooses whether the federal government can withhold

[26] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) and *Snyder v. Phelps*, 580 U.S. 206 (2011).

interest due a city for its sewage repairs ((*Train v. City of New York*, 420 U.S. 35)(1975)), it is a challenge to categorize any rule (or ruling) as liberal or conservative. As a result, a justice would be hard pressed to find the ideological tenor of any of the legal rules and, in these instances, there would be no choice for a justice but to look for non-ideological bases on which to decide.

Most importantly, scholars have demonstrated persuasively that the justices are not just rigid ideologues, focused solely on crafting their political preferences into law. Indeed, even the staunchest proponents of the power of ideology admit that their models cannot explain all voting behavior in all cases (Segal and Spaeth 2002). Whether it is because institutional constraints channel political aims, or because the justices themselves are legal actors who genuinely attempt to use legal reasoning and precedent to reach the most legally sound decision, the literature clearly has established that non-ideological factors influence judicial decision-making. Those same factors should also influence decisions about rules.

This then, raises the question of which other rule attributes a justice might find relevant. I am primarily interested in two aspects of the rule: its flexibility and its quality. I focus on rule flexibility because extant literature has made, but not fully tested, claims about the flexibility of the doctrine a high court promulgates (Lax 2011a; Staton and Vanberg 2006). I examine rule quality to contribute some evidence to the ongoing dispute among scholars about whether, and how much, legal considerations affect judicial decision-making (Friedman 2006).

By flexibility, I mean the amount of discretion the rule imparts to lower court judges. Depending on how much the justices are concerned with constraining that discretion, they should be more or less drawn to more flexible rules. By quality, I mean how well-grounded

the rule is in law and whether it can be seen as a reasoned extension of law. The justices likely care about the quality of their work product and should favor rules of higher quality. Though the influence of these two rule attributes may shift with context, a justice should select the rule that better fulfills that justice's preferred level of lower court compliance and opinion quality. I detail these concepts and their associated hypotheses in the following sections.

Rule Flexibility

Drawing on the literature, I conceive of rule flexibility as the extent of discretion the rule imparts to lower courts. By discretion, I mean the amount of leeway lower court judges have to use and implement the rule. I argue that the more discretion a rule offers, the greater the freedom lower court judges have to apply the rule as they see fit, attending to whatever legal or ideological factors they find relevant; the less discretion a rule offers, the more constrained lower court judges are when applying that rule, and the less they are able to rely upon their own predilections or sense of the "right" outcome in the instant case.

Following those scholars engaged in the "rules versus standards debate" (Cross et. al. 2012; Lax 2011a;), I conceive of the amount of rule flexibility as flowing from the language that constitutes the rule. Certain words, such as "reasonable," "equitable," or "substantial," produce rules that offer lower court judges more discretion; conversely, rules with absolute words such as "never," "always," or which set specific guidelines for time or amount (i.e., a reply must be filed within sixty days) do not allow a lower court judge much leeway. Under this conception, then, it is the words of the rules themselves that generate more or less discretion for lower court judges.

In addition to language, the structure of a rule can affect its flexibility.[27] By structure of the rule, I mean its grammatical complexity. For instance, certain rules have a very simple structure, with straightforward explanations for implementation written as declarative sentences (e.g., The lower court must "determine if the amount of work leave requested falls within the statutory time period of thirty days").[28] Others rules however, are more complex, involving multiple phrases, sub-clauses, or factors for a judge to consider (e.g., The judge must "balance the reasonableness of the work leave request with the needs of the employer, attending to the facts and circumstances of each case").[29]

How might the flexibility of a rule influence whether or not it is favored by a particular justice? As discussed in the previous chapter, the literature has made several competing but largely untested claims about when jurists might favor specific or vague guidelines. In early approaches, scholars argued that justices would always prefer specific guidelines, as ambiguity enhanced the chance of non-compliance (Rosenberg 1991; Johnson 1979; Baum 1976). Similarly, the justices themselves have indicated they feel an obligation to assist lower courts in carrying out their own duties, a process which more specific rules should facilitate. Thus, I hypothesize that, relative to the alternative rule:

> *H2: When selecting between alternative rules, a justice is more likely to select the less flexible rule.*

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[27] Aside from language and structure, the content of a rule can indirectly affect the discretion given to lower courts. For instance, rules that grant (or deny) jurisdiction to a lower court, grant (or deny) the lower court the capacity to issue a legal remedy, or affect which legal provision a court should apply do have some bearing on what the lower court can or cannot do in the instant case. Because my concept of rule flexibility is based primarily on extant works, it, like that scholarship, does not cover all ways in which a rule can affect the power or capacity of a lower court judge, but only how the language or structure of a rule does so. Therefore, cases where the rules varied on the power given to lower courts but did not vary in their language or structure were not considered as rules that varied in flexibility. These twenty-five cases have been noted for future research.

[28] *King v. St. Vincent Hospital*, 502 U.S. 215 (1991).

[29] Ibid. To what extent the language and structure of a rule increased or decreased a rule's flexibility was left to the discretion of the coders, using instructions provided in Appendix A.

Recently, however, other scholars have challenged the claims about concerns for lower court compliance as overly simplistic and have posited instead that jurists' attraction to rule flexibility depends upon the perceived likelihood of non-compliance by the lower courts. If it is unlikely a lower court actually would shirk, there is no reason for the justices to be concerned with that refutation of their authority, and thus no reason to consider how much leeway a lower court should have (Jacobi and Tiller 2007; Staton and Vanberg 2006; Spiller and Spitzer 1992). Expectations about such shirking, moreover, hinge upon the ideological distance between the higher and lower courts: the greater that divergence, the more likely the lower court will not comply, and the more likely the justices will select the more specific legal rule to constrain that behavior (Jacobi and Tiller 2007; Epstein and O'Halloran 1999). Thus, I hypothesize:

> *H2(a): The greater the ideological distance between the justice and the lower courts, the more likely the justice is to select the less flexible rule.*

Lastly, the nature of the case itself may condition the influence of rule flexibility.[30] In particular, cases that are salient should be more likely to provoke concerns of shirking in the justices (Lax 2011a), because the results of the case are more likely to be watched by legal professionals and the public. A justice therefore should be particularly interested in preventing defiance by lower courts . Thus, I hypothesize:

> *H2(b): A justice will be more likely to select the less flexible rule in salient than in non-salient cases.*

Again, however, the likelihood of that defiance likely hinges on the chance the lower court actually would shirk, a chance determined by the ideological distance between the

[30] Staton and Vanberg (2006) also hypothesize how the location of the legislature can affect judicial choice of doctrine. I specifically set aside the legislature in this project, but future work should incorporate such concerns.

higher and lower court. If a justice is confronting a lower court likely to shirk, the justice may be even more likely to adopt the less flexible rule.[31] Thus, I hypothesize that:

> *H2(c): In salient cases, the greater the ideological distance between the justice and the lower courts, the more likely the justice will select the less flexible rule.*

Rule Quality

Supreme Court justices are also concerned with the quality of their work product. Whether it is for enhanced communication with lower courts, increased policy impact, or from professional socialization and legal training, the justices do seem to care about generating high quality opinions (Corley 2009; Lax 2008; Lax and Cameron 2007; Lindquist and Klein 2006; Bueno de Mesquita and Stephenson 2002; Wahlbeck et. al. 1999).

While the "persuasiveness, clarity, and craftsmanship" the authoring justice employs may indeed enhance quality (Lax and Cameron 2007: 277), so too will writing that opinion around a quality legal rule. By the quality of the rule, I mean the degree to which the rule is grounded in extant law or can be seen as a reasoned extension of that law. I suggest that certain rules are of higher quality than others and by selecting that rule, an authoring justice can go a long way towards forming a quality opinion, opinions toward which both authors and non-authors should be disposed. In looking at legal rules, then, justices should be attuned to their quality and, all else being equal, find the higher quality rule more attractive.

To be sure, legal innovation does occur and a justice does not have to discard a rule simply because it is novel. Most often, however, the law builds upon and favors pre-existing rules and previously decided cases – the more embedded in law one's position, the more

[31] At least one work in the literature has pointed to case complexity and jurist expertise as additional considerations that affect whether a justice will create a "bright-line rule" or a vague "standard" (Lax 2011a). Because I focus on the competing rules in a case, rather than the case itself, the complexity of the case (measured by the number of legal issues involved) is not relevant to my work. The claim about judicial expertise is that a justices' level of skill can affect how much time and effort they must invest to clearly communicate their positions to lower courts with the rules they craft. Because I suggest that the justices may not craft their own rules, this factor is also not particularly relevant to this project.

well-regarded it is, at least from the legal perspective. This push against novelty is, in fact, one of the professional standards and practices to which Supreme Court justices feel some pressure to conform (Lindquist and Klein 2006; Baum 1997; Shapiro and Levy 1995; Perry 1991). The slow pace of law's development (Kornhauser 1992) does not mean that new rules are never chosen or even that they are necessarily of lesser quality, but it does mean that a rule must be grounded in some way in extant jurisprudence to be deemed legitimate (Rubin and Feely 1997; Levy 1949). Thus, I hypothesize:

> *H3: When selecting between alternative rules, a justice will be more likely to select the higher quality rule.*

On the other hand, a justice's desire for rule quality may be fueled primarily by strategic, rather than jurisprudential concerns. A justice may in fact want to select the sounder rule not because of any sincere attempt at "good faith" judging (Lindquist and Klein 2006: 136), but simply because it will enhance compliance in the lower courts. The more well-grounded a rule is in existing law, the better able the lower court is to understand it and apply it correctly, and the more likely the justice's policy preferences are implemented (Bueno de Mesquita and Stephenson 2002). The more the justice is concerned about this compliance, the more likely the justice will select the higher quality legal rule. Again, the concerns about compliance are conditioned on ideological distance to the lower courts – the greater the distance, the greater the risk of non-compliance and the greater the need for a higher quality rule Thus, I hypothesize:

> *H3(a): The greater the ideological distance between the justice and lower courts, the more likely the justice will select the higher quality rule.*

Rule Selection, Strategic Litigants, and Anticipatory Lower Courts

My theory of rule selection suggests that the presence and nature of the legal rules offered to the justices – their ideology, flexibility, and quality – influence judicial behavior, shaping the decision-making process and producing choices that, absent these factors, might be different. It is possible, however, that the litigants and/or lower courts are creating rules specifically designed to appeal to certain justices, offering ideologically moderate rules for Justice O'Connor, for example, or suggesting bright-line rules known to be favored by Justice Scalia. If this were the case, though the justices still are not actually crafting whatever legal rule they prefer, their preferred legal rule is being offered to them and they need make no (or no significant) departure from their own ideological, legal, and strategic preferences. Rather than it being a constraint, then, the rule becomes an ideal vehicle for the justices to do just as they wish.

The Strategic Litigant

Several elements of the legal process render this challenge less troubling than it appears, however, particularly in regard to litigants. It is important to remember first that a case does not automatically arrive at the Supreme Court as soon as any trial is completed. Rather, cases go through multiple stages of appeal, before state, district, and circuit courts, and often spend years, if not decades, in these lower courts. As such, a litigant looking to offer an "ideal" rule to a justice would need to be able to predict who would be on the Supreme Court well before the Court's make-up was established. While some approximation based on the party of the current president and the age of current justices might be possible, such predictions could be reasonable, at the most, for only the four years of a presidential

administration. Any guesses about which justices would be on the Court and who might be the appropriate justice(s) to target years in advance generally would be quite speculative.

Second, and more importantly, even if the litigant were able to ascertain correctly the future make-up of the Court, that Court - no matter who sits on it - is extremely unlikely to hear that litigant's case. Indeed, the Court's unwillingness to grant *certiorari* to the vast majority of cases which come before it is well-known, with grant rates in recent years as low as 1.1% ((*Caperton v. Massey Coal*, 1922 S.Ct. 2252, 2272) (2009)). A litigant may be able to raise that probability by provoking an inter-circuit conflict, but overall rates remain extremely low (Clark and Kastellec 2010; Shapiro 1998; Perry 1991). Starting litigation years or decades before Court membership is known and with such small probably of actually receiving a Court ruling seems a particularly precarious strategy for a litigant to pursue. Rather, litigants seem better advised to develop a strategy acceptable to the district and courts of appeals judges who are required to hear their case.

If any case participant were willing to adopt this risk and invest the significant time and resources required to target particular justices with a particular rules, it would be interest groups. Interest groups, acting as *amici*, often devote a large amount of resources to litigation and do so not necessarily to win a particular case, but to shape, sometimes through a series of cases, an entire legal area (Patterson 2001; Epstein and Kobylka 1992; O'Connor and Epstein 1983). Given their larger agenda, such groups may be more than willing to sacrifice time and resources, and to endure legal defeats, blows that a litigant who just wants to win the case is probably unwilling to suffer. Moreover, while litigants are usually confined to arguing the legal rules already used by the lower courts, organized interests acting as amici are free to

articulate any legal rule they wish.[32] In addition, because they often do not join litigation until it reaches the Supreme Court, they are ideally positioned to determine what rule might appeal to what justice and develop their rules accordingly.

Interest groups therefore should be crafting rules that the justices find very appealing, rules they are particularly willing to adopt. However, as I show in the next chapter, it is rare that organized interests ever offer their own unique rules to the justices: in the vast majority of cases, they simply echo the legal rule favored by a particular litigant. More importantly, even when they do offer their own rules, those rules are almost never adopted by any member of the Court, much less a Court majority. Indeed, out of the nearly 4,500 individual justice votes examined in this study, a justice voted for a rule suggested by an amici only eighteen times, a majority of justices only twice.

If those groups that should be litigating strategically are doing so rarely and doing so successfully almost never, it seems unlikely that the justices are in fact being offered rules crafted to match their preferences. It seems more likely that, as I have suggested, the rules themselves are shaping the process by which justices make their selections. At the very least, the claim is worth empirical assessment. Moreover, even if judicial preferences did influence the litigant's rule selections, each justice still must make a choice between the suggested options. Therefore, it is still worth exploring whether and how the nature of the rules shapes that decision.

[32] At least in theory, a litigant could refuse to argue the legal rule adopted by the circuit involved in their case. Given that the Court has taken the case in order to resolve the inter-circuit rule conflict, however, such a course seems unwise. Indeed, in my dataset of 500 cases, a litigant failed to offer a rule already in use in a circuit court only 13 times.

Lower Courts and Rule Creation

As for lower courts, some scholars have asserted that lower court judges strategically shape their behavior in anticipation of the preferences of the Supreme Court (Westerland et. al. 2010; Lax 2011a; Heytens 2008) and it could be that lower courts are creating rules they believe will appeal to the higher court (Carrubba and Clark 2011). More specifically, because the Supreme Court can use its *certiorari* power to reverse those lower court decisions it finds troubling (Cameron et. al. 2000), these scholars suggest that lower court judges generally operate with an eye towards appeasing the justices and avoiding the loss of institutional legitimacy and policy that can result from a high court rebuke (but see Benesh and Reddick 2002; Klein 2002). Westerland et. al. (2010), for instance, suggest that judges reject precedents which they believe the Supreme Court no longer supports. Similarly, Carrubba and Clark (2011, 2010) develop formal models of rule creation and opinion writing by lower courts and argue that the presence and position of the higher court is key to determining how the lower courts will carry out these tasks.

Other works challenge these claims, arguing that lower court judges rarely make decisions based on the presumed preferences of the higher court. Some have argued that the threat of reversal is actually too attenuated to shape lower court behavior in any meaningful way (Bowie and Songer 2009). The justices also seem aware of their own limited capacity to oversee courts of appeals behavior. In *Hubbard v. U.S.* (514 U.S. 695) (1995), for example, Justice Rehnquist pointed out that because the Court grants only a "tiny fraction" of certiorari petitions, it is "deprived of a very important means of assuring that the courts of appeals adhered to its precedents."

Others claim that workload, the shifting nature of lower court panel memberships, and the need to attend to district as well as the Supreme Court's preferences severely limit the extent to which courts of appeals judges can engage in any type of "upward-looking" strategic behavior (Hettinger et. al. 2004). Lower court judges themselves also disclaim such anticipatory behavior (Bowie and Songer 2009; Klein 2002), particularly as it relates to predicting what legal doctrine the high court might articulate in the future.[33]

Given the competing theoretical and empirical claims of the literature, it remains at least an open question whether and to what extent lower court judges craft doctrine by factoring in the likely preferences of a future Supreme Court. At least one indicator from my project, however, suggests that the lower courts are in fact not creating rules at all, much less rules designed to appeal to certain justices or high courts. As discussed further in Chapter 4, it is quite rare that the justices themselves craft their own legal rules; in fact, in all but a relatively small percentage of cases (less than 10%) in my sample, every justice selects a rule offered by case participants. Remarkably, despite having time, resources, and institutional security, factors which would seem to offer the justices the ideal opportunity to articulate whatever legal rule they prefer, the justices are instead allowing others to do this work for them. My data demonstrate that regardless of whether the justices are in the majority or

[33] For example, echoing the words of the famed Judge Learned Hand, Ninth Circuit Court of Appeals Judge Hawkins (joined by 3 colleagues) admonished the majority in *U.S. v. Jose* (131 F.3d 1325) (1997) for "anticipating what the Supreme Court might do" and for "'embrac[ing] the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'" Similarly, Judges Hunter and Aldisert of the Third Circuit found that it was neither "sound policy nor sound jurisprudence" for their court to "base its own decision based upon a prophecy of how the Supreme Court would decide the same case." (*Jaffee v. U.S.*, 663 F2d 1226) (1980). Of course, simply because judges claim to not engage in a particular type of behavior does not mean that they actually do not engage in that behavior, but it does suggest that at least some judges seek to enforce a norm against anticipatory decision-making.

minority coalitions, are liberal or conservative, or are extreme or moderate,[34] they almost always make their rule choice from this extant menu of rule options.

This then raises the key question: if the jurists who easily could design their own rules are rarely doing so, then why would lower court judges? Given that they are burdened with a significantly higher workload, far fewer resources, and an institutional mandate to implement the doctrine of the higher court, why would they ever invest the time and effort necessary create legal rules? Moreover, given that creating a legal rule would require predicting not only what rule the Supreme Court might prefer, but how that rule would operate in numerous subsequent cases at the circuit and district level, it seems highly unlikely that an already overworked courts of appeals judge would devote so many resources towards drafting legal rules. It seems more that likely they would follow the model of the justices and allow others to do the work for them. At the very least, the claim that lower court judges are strategically drafting rules warrants more evidence than has yet been produced, certainly before the results of this project are dismissed.

The Process of Rule Development

If neither litigants nor lower courts are drafting rules designed to appeal to future Supreme Courts, however, then from where do the rules presented to the justices come? More precisely, how does the rule that is ultimately presented to the Court and chosen by the justices, become the rule that it does? Though well beyond the scope of this dissertation, it may be worthwhile to articulate at least one way in which legal rules might reach the Supreme Court, an account that stands in marked contrast to the claim of the strategic scholars noted above.

[34] See Chapter 6.

Again, evidence from this dissertation demonstrates that, at least in cases of inter-circuit conflict, the justices themselves are not crafting legal rules, and I have suggested several reasons why lower court judges are likely not doing so either. Given that district court judges primarily decide issues of fact rather than questions of law (Friedman 2006) and thus lack the opportunity for rule creation, the leaves only one potential author of legal rules: the litigants and the amicus curiae. As articulated above, it seems improbable that these case participants are generating rules designed to appeal to Supreme Court justices, but that same logic does not apply when circuit or district courts are at issue. More precisely, unlike the Supreme Court, these lower courts are courts of mandatory jurisdiction: they must hear every case brought to them and must do so within a relatively short time period. Accordingly, though litigants and amici might not be able to predict which judge(s) would be assigned to a particular case, they will have a good idea of at least the group of judges from which their judge(s) is likely to arise. Consequently, estimations of who might hear the case and what rule that judge might find more appealing, while likely not perfect, are sure to be more accurate when made at lower court rather than Supreme Court level. The notion is of course highly speculative, but it may be that the ultimate source of legal rules is those who pursue their cases in the lower levels of the judiciary. The Supreme Court may issue national doctrine, but the doctrines from which the Court choses its own may have been generated by those removed in time and distinct in function.

In sum, while it may be reasonable to posit that the rules presented to the justices have been strategically created by others, it is just as reasonable to suggest that rules are not crafted to appeal to the Supreme Court, but rather to lower court judges. Moreover, given that no scholar has yet compiled data on the actual source of legal rules, the theoretical challenge

created by a strategic litigant or lower court should not be fatal to this project. Perhaps most importantly, even if the menu of rule options from which the justices choose are in fact not random, it is from that menu that the justices do make their choice - and it is with explaining that choice that this dissertation is concerned.

Research Design

In a previous section, I outlined my theoretical expectations and hypotheses about the judicial selection of legal rules. Drawing on the literature, I suggested how a justice's concerns for policy, lower court compliance, and legal quality might impact which legal rule that justice favored. In this section, I detail the research design used to test these predictions. I begin with a discussion of my data collection process, followed by a description of dependent and independent variables, coding procedures, and modeling strategy. The chapter concludes with a discussion of how this approach, while not without challenges, may offer some advantages not found in existing works.

The Legal Rules – Data Collection

A lack of available data is one of the primary challenges for those interested in judicial selection of legal rules. To be sure, this problem has been driven to some extent by theoretical positions: if a justice simply develops whatever rule that justice desires, then gathering the rules suggested to the justices by case participants is largely unnecessary. Since I posit that justices may in fact select their legal rules from among the options presented to them by litigants and amicus curiae, such data is central to the project.

One goal of my data collection process is to construct an original compilation of all the legal rules suggested to and adopted by the justices in 500 Supreme Court cases, from the

Warren through (part of) the Rehnquist Court, 1954 to 2002. Selection of these years was motivated by a desire to cover a range of Court eras and by data availability.[35]

Because I needed cases where the justices were presented with competing legal rules, I chose to study only those cases where the federal circuit courts had adopted differing positions, so-called "inter-circuit conflict" cases. These cases offer the clearest opportunity to study rule choice (as that is precisely what such cases usually present) and also contain the most easily recognizable and codeable rules. Given that over 30% of the Court's recent docket involves such conflicts (Lindquist and Klein 2006) and that resolution of lower court conflicts is a key goal for the Court (Clark and Kastellec 2010; Perry 1991; Ulmer 1984), a study of these data can generate substantive insights into court decision-making, at least in these types of cases.[36]

To compile my cases, I drew on the well-regarded U.S. Supreme Court Database (Spaeth 2002). The Spaeth Dataset is an extensive collection of information about every Court ruling from 1946 to the present day; for each case, 247 variables are coded, including case and justice-based information. The dataset is a primary source for virtually all scholars who study the Court, and it has recently been updated to facilitate ease of access for legal professionals, policymakers, and journalists.

Using this database, I first generated a random list of every case decided during the relevant time period. I used three variables to define the potential list of cases: the unit of

[35] At the time I constructed my dataset, my chosen measure of the justices' ideology was not updated past 2002.
[36] There is some evidence that several justices vote differently in conflict vs. non-conflict cases. Lindquist and Klein (2006) state that Justices Scalia, O'Connor, Kennedy, Souter, and Rehnquist were more likely to cast a liberal vote in conflict cases decided from 1985-1995. They also find that conflict cases involve more statutory (as opposed to constitutional) claims than non-conflict cases, a claim my data validate. Although Lindquist and Klein study votes on case outcomes rather than rules, and cover only a limited time period, caution is warranted before extending my results about the nature of rule choice to non-conflict cases.

analysis, the reason for granting *certiorari*, and the type of decision.[37] I set the unit of analysis to be the case citation; I set the reason for granting *certiorari* to produce cases where the Court indicated it was hearing the cases because of an actual or putative federal court conflict.[38] I set the type of decision to produce formally decided full opinion cases in which the Court heard oral arguments and issued a signed opinion. I then randomized the resulting list. Any decision in which the court conflict was between the Supreme Court and a lower court or between a district or state and a circuit court was dropped from the list and replaced with the next case. My search was not limited to any particular area of legal doctrine.

To gather the legal rules suggested by the case participants, I consulted every brief submitted to the justices by both litigants and amici. I used both of the available electronic legal databases - Lexis and Westlaw - to ensure that every brief was included in my data. From these briefs, I then identified and extracted every legal rule suggested to the justices.

The procedure for this part of the data collection was relatively straightforward. Briefs often used explicit language to signal that the proffered rule was about to be suggested. For instance, case participants frequently stated, "We urge the Court to adopt the following…" or, "The Court should apply the standard adopted by the lower court, in which…." Other times, the briefs simply labeled the favored rule, calling it, for example, the "reasonable diligence rule" or the "harmless error test." Where such statements were not made, I relied upon my legal training to isolate the relevant legal language.[39]

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[37] More specifically, I used analu = 0, certreason = 2, 3, or 4 and decisiontype=1.

[38] Admittedly, this method of identifying cases of inter-circuit conflict relies upon the Court itself to note correctly the presence of lower court division. Given that it is unlikely that the Court would systematically choose to identify only some cases as involving circuit division and not others, this method should not create any significant bias in my results. In addition, there was no feasible alternative for identifying inter-circuit conflict cases.

[39] Occasionally, the rules articulated by the case participants seemed on their face to be the same rule, but differed slightly in their wording. If the differences were major (i.e., one rule involved a two-factor test and the other added a third factor), these were considered different rules, even if the briefs were urging the same result.

I then recorded who suggested the rule to the justices, including all Petitioners, Respondents, and amici.[40] All participants had to express explicit support for a particular legal rule to be counted as suggesting that rule: general claims about what outcome the court should reach or why were not sufficient to count as urging adoption of a particular rule. Where the case participants offered several legal rules, each was treated separately and coded as a primary or alternative rule. A rule was coded as alternative if it was not the first rule suggested in the brief or if the brief itself indicated (through language such as "in the alternative" or "if the Court rejects our first argument, we suggest…") that the rule was in fact not the primary rule. Otherwise, the rule was coded as the primary rule.

This process of case collection and rule extraction produced a final dataset of 500 cases, ranging from 1955-2000, with 1,120 rules suggested to the justices by all case participants. The dataset contains cases from every one of Spaeth's (2002) 13 case types, except one (type 11, interstate relationships) which did not appear in the randomized list. A further discussion of the descriptive statistics for the data is included in the next chapter.

The Justice's Choice of Rule – The Dependent Variable

This project aims to determine why the justices select the legal rules they do, and the dependent variable captures which rule a justice selected. To code the dependent variable, I read all of the opinions produced by the Court in each case and determined which, if any, of the suggested legal rules the justice favored. Importantly, if a justice favored a legal rule not suggested by a case participant - that is, raised a rule *sua sponte* - that case was dropped from

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If the differences were minor (i.e., the words were the same but ordered differently), these were considered the same rule. In cases where it was more unclear, I examined whether the cases used to support the first rule were also used to support the second rule: if they were, it was considered the same rule; if they were different, the rules were considered different.

[40] In the one instance (*Ornelas v. United States*, 517 U.S. 690 (1996)), where the court invited an amicus to argue the position of the Respondent, that amicus was categorized as the Respondent.

the analysis and replaced with the next case on the list. While this occurred in a small portion of the cases I examined (41 out of well over 500 cases), these cases raise important questions about why a justice would ever invest the time and resources necessary to articulate a separate rule. Accordingly, I conduct an initial exploration of these cases in Chapter 6.

If a justice authored or joined the majority opinion, that justice was presumed to support the rule favored by the majority opinion; if a justice authored or joined a dissenting opinion that supported another rule, that justice was presumed to support that other rule. For concurring justices, the justice was coded as supporting the majority rule unless the justice explicitly rejected the rule, refused to join that portion of the majority opinion that contained the rule, or endorsed a competing rule.

Occasionally, I had to code a justice's vote as missing. In general, if a justice did not personally express - nor join an opinion that explicitly expressed - support for a particular rule, that justice was coded as missing. Dissenting or concurring justices, for example, were coded as missing if they rejected the majority's rule, but did not clearly adopt a rule of their own, or if their decision was based on a different legal issue. In the one concurring opinion where the justices favored a party's alternative rule (and the majority favored a party's primary rule), the concurring justices were coded as missing. In the four cases in which a concurring or dissenting justice chose a rule suggested by an amici rather than a litigant, those votes also were coded as missing. Finally, justices who did not participate in the case also were coded as missing. When complete, this process produced a dataset of 4,449 individual judicial votes, with 91 coded as missing.[41]

[41] The total number of votes is 4,449 rather than 4500 because there were 51 instances in which a justice (or justices) did not participate in the decision. These votes are not included in the 91 missing votes, though they are coded as missing in the dataset.

Again, the dependent variable for the project captures which legal rule a justice favored. Given that in 485 of the 500 sample cases, every justice favored the primary legal rule that was suggested by one of the two litigants, I was able to code the dependent variable as a 1 if the justices supported Petitioner's Rule, 0 otherwise.[42]

Explaining the Justice's Choice – The Independent Variables

I employ two types of independent variables: primary independent variables and control variables. As a large-N study of the actual legal rules suggested to and selected by the justices, the project required several novel measurement strategies for some of these independent variables. The description of each variable and its associated operationalization and coding are outlined below.

Primary Independent Variables: Ideology, Flexibility, and Quality

A major goal of this project is to determine if the traits of the legal rules themselves affect whether or not they are preferred by the justices. I have identified three such attributes that should affect the probability of their selection: rule ideology, rule flexibility, and rule quality. In this section, I discuss the concepts and coding of these variables.

The Role of Ideology

Good evidence exists that political preferences drive judicial behavior and I hypothesize that a justice's choice of rule will be strongly influenced by the ideological proximity between a justice and a rule. This requires a measure of both the ideology of the justices and the legal rules from which they choose. In addition, because several of my hypotheses involve the ideological distance between the justice and the circuit courts, I need

[42] Of course, I could have coded the variable as 1 if a justice chose Respondent's rule, 0 otherwise. The Petitioner's rule is used simply for convenience.

measures of the ideology of the circuit court judges serving at the time the Supreme Court issued the rulings in my dataset. I now detail each of the measures for these variables.

The Ideology of the Rule

As explored in the previous chapter, scholars are just beginning to develop measures of the ideological content of Court opinions (Clark and Lauderdale 2010); no one has yet created a measure of the ideological content of the legal rules contained in those opinions.[43] Following Black and Owens (2009), who use the ideology of circuit court judges as their measure of extant legal policy, I employ the ideology of the circuit court judges (sitting on the circuits noted as divided by the Court opinion) who favored each rule as a measure of the ideology of the rule. [44] In particular, I used the GHP scores (Giles et. al. 2002) for the ideology of those lower court judges recorded as supporting each rule. These scores have recently been re-calculated using the Bailey (2007) ideal points for Senators and Presidents, a measure which I explain below (Giles 2012). The GHP/Bailey (GHPB) scores present an advance over earlier measures which rely solely on the party of the appointing President, as they also incorporate the party of the home-state Senator. I then took the mean score of all the circuit judges who favored each rule to represent the ideological score of the rule. [45]

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[43] I do not employ the Clark and Lauderdale measure because that measure is designed to capture the ideology of the entire opinion, not just the rule in that opinion. Because I argue against conflating the rule and the opinion, this measure is inappropriate for my project.

[44] Of course, this measure assumes that the behavior of lower court judges is driven in large part by ideology, with judges supporting the legal rules that reflect their ideological predisposition and rejecting those that do not. While good evidence exists that lower court judges are attentive to non-ideological factors such as Supreme Court precedent (Cross 2005; Benesh and Reddick 2002), it is important to remember that in my cases, the circuits are divided, suggesting no clear guidance has been issued from the high court. In addition, even while acknowledging that lower court judges may behave less ideologically than Supreme Court justices, it is unlikely that any reasonable scholar would suggest ideology is not a significant influence even on lower court judges, particularly where there is no established Court precedent. Finally, no alternative measures of rule ideology are currently available. In combination, I suggest that these factors (along with my validity tests) render my measurement of rule ideology quite reasonable.

[45] Judges who serve(d) on the Court of International Trade, Court of Customs or the Federal Circuit are appointed by the President without Senatorial courtesy; hence, there is no GHP measure for those judges. In these instances, I used the Bailey score for the ideology of the appointing President in the year of appointment.

Since this measure is novel but critical to my analysis, I tested it for measurement validity. Using a random sample of fifty cases from my dataset (10%), I compared my rule ideology score with the Spaeth scores for each Supreme Court case. More specifically, Spaeth assigns each Court ruling a score of liberal (=2) or conservative (=1) based upon the identity of the winning party. I first converted these scores into the 1/-1 scale generally used for judicial ideology, with 1 indicating a conservative decision and -1 indicating a liberal decision. I then labeled my rule ideology scores as liberal if they were less than zero and conservative if they were greater than zero and compared my score to the Spaeth measure. I considered my score to match the Spaeth score if the Court majority chose the more conservative(liberal) rule and the ruling was categorized as conservative(liberal). When completed, this comparison indicated that the measures produced the same result in 52% of the cases. While only a moderate relationship, this number is not surprising given the distinction I draw between the rule of a case and its outcome. In fact, had the percentage been higher, this claim would have been undermined; had it been much lower, it would be more questionable whether my measure was in fact capturing ideology.[46]

There were twenty-eighth cases in my dataset for which the rule ideology score for one or both of the rules could not be calculated. These instances arose either because the lower court judges were appointed too early to have GHPB scores or because there was no lower court supporting one of the rules. My approach here was to employ substitute measures of rule ideology where possible, and treat the remaining cases as missing data on this variable. For the twelve cases where a rule was supported by the Solicitor General or an

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In addition, a retired Supreme Court justice occasionally sat on a panel. Here, I used the Bailey ideology score for the justice during the last year of that justice's service on the high court. Judges who were appointed prior to 1950, or district court judges sitting by designation on a circuit, have no Bailey score and were left missing. I used the mean of the remaining judges supporting that rule for the calculation of the rule ideology scor**e.**

[46] The correlation coefficient (Pearson's r) between the two measures was effectively zero, with a value of -.04.

agency of the federal government as a litigant or amicus, I used the Bailey (2007) measure of the President's ideology in the year the brief was filed. For the one case in which a union appeared as an amicus supporting a rule, I used the mean of the Bailey (2007) measures of the members of Congress rated highest by the AFL-CIO for the year in which the brief was filed. I used a similar procedure for the one case where the ACLU appeared as an amicus, employing the interest group measures available from Groseclose (2003) for both. In the one case in which a group of U.S. Senators appeared as amicus supporting a rule, I used the mean of the Bailey (2007) measures for those Senators in the year in which the brief was filed. In the remaining thirteen case, the rule ideology variable was coded as missing.

The Ideology of the Justices

For the ideology of the Supreme Court justices, I used the Bailey (2007) measures. Though not yet widely used, these scores are more sophisticated than other extant measures: they change over time, utilize "bridging observations" to place the member of Congress and president on the same ideological scale as the justices, and create scores that comport more with conventional wisdom about certain Courts.[47] Some have challenged the use of vote-based measures such as these to predict the choices of the justices as improperly "using votes to predict votes" (Bartels 2009). This issue could arise in my project if the cases I employ constitute a subset of those cases used by Bailey, as this would create correlation between my independent (ideology) and dependent (rule choice) variable. Even if this were the case (which seems unlikely given mine and Bailey's randomized approach), however, it would only generate stronger effects for ideology than if I employed non-vote-based measures.

[47] For instance, Bailey (2007) notes that the often-used Martin-Quinn scores classify the Supreme Court in 1973, the year it issued *Roe v. Wade* (finding a constitutional right to terminate a pregnancy) and *Furman v. Georgia* (striking down the death penalty) as one of the most conservative courts of recent times.

Moreover, my study is not about votes on outcomes, but rather choices of legal rules, phenomena which are conceptually and, I argue, empirically distinct.

Ideological Proximity

Ceteris parabus, a justice is more likely to favor a rule that comports with that justice's ideology. To capture the ideological congruence between the justice and the rule, I started with the GHPB score for the rule and the Bailey scores for the justices. To operationalize the proximity between the justice and the rule, I first took the absolute value of the distance between Petitioner's rule and the justice and between Respondent's rule and the justice. I then took the difference between these two distances. Lower scores indicate that the Petitioner's rule is in closer ideological proximity and more likely to be favored; higher scores indicate that the Respondent's rule is in closer ideological proximity and more likely to be favored.

I theorize that the justices' choices about legal rules may also be influenced by the ideological make-up of the circuit courts that will implement their rulings. To capture the ideological distance between the justice and the lower courts, I took the mean value of the GHPB scores for all the circuit court judges serving at the time the Supreme Court issued its opinion[48] and then calculated the absolute value of the difference between the justice and that mean score. Larger values indicate that the justice and the lower courts are ideologically distant; smaller values indicate the justice and lower courts are more ideologically aligned.

Though my expectation is that when selecting a rule, a justice will be attuned to those lower courts charged with applying the rule, circuit court judges join and leave the lower courts on an ongoing basis. Consequently, the ideological make-up of the appellate courts may change from the time a justice selects a rule to the time that rule is implemented in the

[48] My thanks to Josh Strayhorn for this data.

lower courts. Given that my measure of lower court ideology involves between 68 and 180 judges (in 1954 and 2000, respectively), the effect of the arrival or departure of a few judges on the mean score for all circuits is likely minimal.

Rule Flexibility

Drawing from scholarship, I conceive of rules as varying in the amount of leeway they provide to subsequent political actors. Unlike most extant work, however, I do not conceive of rules as being either "bright line rules" or vague "legal standards." Instead, I argue that the flexibility of a rule exists on a continuum from highly flexible to highly restrictive, and I develop a four-point scale to measure rule flexibility. The scales ranges from 1 (very flexible; gives a lot of leeway), 2 (flexible; gives a fair amount of leeway), 3 (somewhat flexible; gives a bit of leeway) to 4 (not at all flexible; gives no leeway).[49] While this scale is admittedly subjective, others have used similar measures of related concepts with success (Boyd 2008; Breitmeier 2008; Spriggs 1997). To enhance the validity of the coding, I employed five research assistants to code this variable and had each rule coded by at least three different coders. These assistants were all second or third year law students hired for their legal expertise.

My own initial examination of the legal rules indicated that less than half of the sample cases involved rules that varied in their flexibility at all. More specifically, in 322 cases, the only difference in the two rules was the answer the rule produced. In these instances, the Court confronted legal disputes where one rule was, for example, "yes the state of California can tax liquidation sales" while the other rule was "no, the state of California cannot tax liquidation sales" (*California State Bd. of Equalization v. Sierra Summit*, 490 U.S.

[49] While this scale relies on a summary judgment by the coders, the instructions given to the coders (contained in Appendix A) reflected the concept of rule flexibility laid out earlier in this chapter.

844 (1989) or "yes, the district court's order about permissive interventions is immediately appealable" versus "no, the district court's order about permissive interventions is not immediately appealable" (*Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)). Since the wording and structure of the rules was virtually identical, with the only difference coming from the outcome the rules produced, these rules were coded with a 0 on the flexibility variable. As discussed further in Chapters 4 and 5, this suggests that in large proportion of cases, rule flexibility is irrelevant to rule choice and that the scholarship's focus on "rules versus standards" to the exclusion of other rule characteristics may be misplaced.

For the 178 cases where the rules did vary in their flexibility, I divided the coders into 3 groups of 3 different coders each. I assigned two groups 59 cases each and one group 60 cases. For each case, the coders received a document that contained only a case identification number, two rules - the rule from the Petitioner and the rule from the Respondent - and a space to indicate their flexibility code for each rule. I removed all references to the name of the case, the justices or lower court judges, previous cases, procedural history, the identification of the party or amici suggesting the rule, and any other information which might divulge which case was under review. Where the same rule was articulated slightly differently by a case participant or justice, I included both versions of the rule; otherwise, the coders examined one rule from the Petitioner and one rule from the Respondent. The coders then read each rule and assigned the rule a code of 1, 2, 3 or 4. The precise instructions given to the coders are included in Appendix A.

After the first round of coding, in which three coders read each rule, I determined that all three coders agreed which rule was the more flexible in just over half (94 or 52%) of the

cases. This produced a Kappa value of .46, which generally indicates moderate agreement. [50] In the other 84 cases, the outlying coder judged both rules to have the same level of flexibility in 41 cases (or 22% of the total cases) and found the other rule more flexible in 43 cases (or 23% of the total cases). In the remaining two cases, all three coders were in complete disagreement over which rule was more flexible, with one coder coding one as more flexible, the other coder coding the other as more flexible, and the third coder indicating the rules were of equal flexibility.

To construct a measure of the flexibility of each rule, I first standardized the codes given by each coder for each rule.[51] I then took the mean score for each rule. For the final measure of relative flexibility, I took the difference of those means for each case. The more negative this value, the more flexible the Petitioner's rule relative to the Respondent's rule; the more positive this value, the less flexible the Petitioner's rule relative to the Respondent's rule.

Rule Quality

In addition to rule flexibility, I posit that the legal quality of a rule will affect the probability that it is favored by a justice. A direct measure of rule quality - how well-grounded a rule is in extant law and whether it can be seen as a reasoned extension of extant

[50] More specifically, I used Fleiss' Kappa which measures the inter-coder reliability between more than two coders coding ordinal data (Fleiss and Paik 2003). The measure is considered more rigorous than simply calculating percent agreement (Lombard 2010). The value was calculated with the software program ReCal3 (Freelon 2010). The value for Krippendorf's Alpha was nearly identical, at .47. I also calculated pairwise agreement scores to ensure that no one coder was driving the disagreement. These were basically identical across all coder pairs, at around 67%.

[51] This was done because the coders did not necessarily treat the 4 possible values for flexibility in the same way. Coder 1, for instance, might employ a narrow range of scores, coding one rule as a 2 and another rule as a 3 while Coder 2 might code the same rule as a 1 and 4. While both agree which rule is the more flexible, the difference between the values given by each coder may reflect more of their perception of the scale rather than their perception of the absolute flexibility of each rule. Standardizing by coder removes this problem.

law - is difficult to develop.[52] Instead, I operationalize quality based on how lower court judges and litigants responded to the rule before it reached the Supreme Court. These individuals, also socialized into legal reasoning and the legal profession, should be familiar with relevant legal rules and should tend to support those rules that have greater foundation in precedent. A rule that is favored by lower court judges and cited by litigants in other cases should be of higher legal quality than a rule that is infrequently cited or often criticized. Thus, I use the extent to which judges and litigants employ the rule in support of their own legal positions as a proxy for the legal quality of the rule.

To capture quality, I measured three aspects of each rule: the proportion of lower court judges (involved in the inter-circuit conflict the Court is resolving) who favor and reject each rule,[53] whether other lower courts treated the rule positively or negatively, and whether other litigants cited the rule when arguing their own cases. Because the correlation among each of these three variables was quite low, each was included separately in the model.[54]

To generate these scores, I first recorded each circuit that the Supreme Court's majority opinion listed as supporting each rule in my dataset. While this measure relies on

[52] Indeed, my initial plan had been to measure rule quality based on the number and type (case, law review article, legal treatise) of citations used to support each rule. Upon further study, however, I determined that this measure was infeasible (citations were often peppered throughout the brief rendering it difficult to determine which citation was in support of the rule itself) and probably unreliable (often, the same citations were used as support for different rules). In future work, however, I hope to revisit the possibility of using this more direct measure of rule quality.

[53] Importantly, this count of lower court judges as a measure of quality differs from the most similar extant measure. In their work, Lindquist and Klein (2006) measure the "jurisprudential quality" of a litigant's position by the number of circuits favoring that litigant and find that the litigant with more favorable circuits is more likely to win in the Court. However, a justice favoring of the rule supported by more circuits could indicate the justice favors legal stability (that is, wishes to preserve extant law in the greater number of circuits) rather than legal quality. Accordingly, I suggest the number of judges favoring and disagreeing with a rule is a better measure of its legal quality. I also control for the number of circuits, however.

[54] More specifically, the correlations ranged from .12 for the treatment by lower courts and litigant briefs variables and 0 for the division among lower court judges and the litigant briefs variables. A higher correlation between at least two of the variables might have been preferable, as it would have indicated that the variables were both tapping into a single underlying dimension of rule quality; low correlation allows me to include all three measures in the model, however, and gain a more fine-grained understanding of how each of these factors operates at the Supreme Court.

the Court itself to identify correctly the division among the circuits, there is no reason to think that the authoring justice would misrepresent the division or that misrepresentation would occur systematically enough to bias my data. To guard against the possibility that the justices would manipulate the number of circuits holding a particular position to enhance their own argument, I also examined the dissenting opinions on the Court for any claim that other justices had misrepresented the circuit splits. This did occur in two cases in my dataset. In one case, the dissenting justice directly accused the majority of misreading several lower court rulings; for that case, I read each of the disputed decisions to determine if they in fact adopted the rule suggested by the Court majority, coding the rule accordingly. In the second case, the dissent argued that eight additional circuits not listed by the majority supported the dissent's proffered rule. In that instance, because I am interested in the number of circuit cases of which I can presume the justices are aware, I counted those eight circuits as supporting the dissent's rule. Otherwise, I proceeded on the assumption that majority's list of the number and positions of the circuits involved in the split was accurate.[55]

When it was unclear whether the circuit cited by the Court did in fact support the particular rule,[56] I read each lower court opinion to ensure that court favored the legal rule and only counted those circuits that clearly expressed support for a rule. This occasionally produced a list of supportive circuits that differed from that produced by the Court.

I then divided the 500 cases such that each case was coded by two coders; each coder coded 200 cases. For their cases, I provided the assistants with the list of relevant circuits. Using the Court opinion to identify the actual lower court case citations, the coders examined

[55] Admittedly, if the Court's list of supportive circuits for each rule is not exhaustive, the count of lower court judges may underestimate rule support. Because I am only concerned with the support for one rule *relative* to the support for the other rule, any underestimation of the absolute number of judges should not bias my results.

[56] This occurred when the Court listed circuits as divided over a particular outcome but did not indicate which rule each circuit used to reach that outcome.

each circuit opinion in Westlaw, recording the name and number of judges who supported that court majority's rule and the name and number of those judges who did not. If the circuit opinion was not published, the number and names of supporting and non-supporting judges were coded as missing.[57]

If a judge joined the majority, that judge was assumed to support the majority's rule. For concurring and dissenting opinions, the assistants scanned the opinion. If the judge wrote (or joined) a concurring opinion that did not specifically reject the majority's rule, that judge was included as supporting the majority's rule. If the judge wrote (or joined) a dissenting opinion that did not specifically adopt the majority's rule, that judge was counted as rejecting the majority's rule.[58] The coders then repeated this process for each circuit supporting each rule. Where the coders disagreed on any values, I examined the lower court opinions myself to resolve the disagreement.

I then calculated the total number of supportive judges and the total number of judges (supporting and non-supporting) for all the circuits which heard cases on each rule.[59] I then divided these values to generate a percentage of positive support score for each rule. Using percentages rather than raw numbers prevented a rule heard by a circuit sitting *en banc* (a hearing where all the circuit judges participate rather than the typical 3-judge panel) from receiving extra weight on the quality measure.

For the second measure of rule quality, the coders examined how other lower courts treated each of these circuit cases before the Supreme Court resolved the circuit split. Using

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[57] In those instances where the judges' names were listed, their names and number were recorded. Unpublished cases were also examined for their values on the remaining measures of quality.

[58] The only exception to this rule were instances in which a concurring or dissenting judge specifically refused to articulate support or against a particular rule. In those cases, that judge was treated as missing and not counted as either favoring or disfavoring the majority's rule.

[59] Those judges not counted as favoring or disfavoring the majority's rule were not included in this total count.

KeyCite in Westlaw, the assistants recorded how many cases decided before the instant Supreme Court case treated the circuit case positively and how many treated it negatively. Westlaw classifies positive cases into four categories, depending upon the depth of treatment: "Examined," "Discussed," "Cited" and "Mentioned." For this project, cases listed as "Citing" or "Mentioning" the circuit case were deemed too tangential to capture rule quality and so were excluded. Every case listed under the category "Negative Cases" was counted.[60] The coders repeated this process for each circuit listed as supporting each rule and I again remedied any disagreements. To ensure that rules with more circuits in their favor were not over-valued, I calculated the ratio of positive citations to total citations for each rule, and converted that to a percent. I then took the difference in the percentages for the Petitioner and Respondents' rules.

For the third aspect of rule quality, the assistant examined how frequently litigants arguing other cases cited each circuit case in their own legal briefs. Again using Key Cite, the coders simply recorded the number of appellate briefs filed before the instant Supreme Court case which referenced the circuit case. Although information is available about citations to the circuit case in appellate petitions, oral arguments, trial documents, and settlement agreements, using only citations in appellate briefs - legal documents which litigants draft to persuade circuit judges - seemed the best measure of how well-regarded the rule was among those legal professionals most familiar with the appellate court system. The coders then repeated this process for each circuit listed as supporting each rule with any disagreements resolved by me. Again, to prevent over-weighting for the rule with more circuits, I divided the total number of appellate briefs by the number of circuits favoring that rule.

[60] This was done because Westlaw does not rank negative treatment cases according to depth of treatment.

As I needed a measure of the quality of each rule relative to the other rule, I took the difference in the ratios of quality for each case. My dependent variable is whether or not the justice chose the Petitioner's rule, so I subtracted the quality ratio of Respondent's rule from the quality ratio of Petitioner's rule. The larger and more positive the results, the greater the quality of the Petitioner's rule relative to Respondent's rule; the smaller and more negative the results, the greater the quality of Respondent's rule relative to Petitioner.

A Note on Endogeneity & Rule Quality

There is at least the potential for endogeneity in the measures of rule quality which rely on lower court behavior: if judges are treating certain rules more favorably because they believe the Supreme Court prefers certain rules over others, then this measure is not actually capturing the extent to which lower courts find a rule to be of higher quality. As noted above, there is some evidence that lower court judges anticipate the preferences of the Supreme Court, at least when deciding how to respond to Supreme Court precedents (Westerland et. al. 2010). Given that other works, however, challenge claims of strategic lower court behavior (Bowie and Songer 2009; Klein 2002; Benesh and Reddick 2002), it remains an open question whether and to what extent such anticipatory behavior is in fact occurring.[61]

In addition, no work has demonstrated that attentiveness to the preferences of the Supreme Court affect how judges and litigants respond to cases from their own and other circuits, which my measure captures. It may well be that in attempting to comply with the high Court's rulings, lower courts are attuned to how the justices might view that response (Westerland et. al 2010), but it is a separate question why and how the justices' preferences would affect how lower courts treat the rules from their sister circuits. As scholars have

[61] In fact, Westerland et. al. admit (892, n.1) that the literature has reached "mixed conclusions" on the extent to which lower court judges comply with Supreme Court precedent.

noted, such concerns should exist only if the lower court judges are especially worried that their opinions might be within the 1% of those the high Court reviews (Bowie and Songer 2009; Baum 1978). It is difficult to believe that, given such a minuscule chance of review, fear of reversal would shape how lower courts treat cases from other circuits.

Most importantly, my dataset involves only cases of inter-circuit conflict, in which there is no applicable high Court precedent. Those works which examine compliance do so by assuming an existing, applicable precedent (Westerland et. al. 2010; Cameron et. al. 2000; Cross and Tiller 1998), a factor which does not exist in the circumstances I study in this project. Indeed, if less clear precedents mitigate the extent of compliance (Baum 1978), then, at the very least, so too should the absence of any precedent. In such instances, if a lower court did want to discern the preferences of the high Court, they would face a rather challenging task, as there is no extant case demonstrating those preferences. Lower courts, of course, could look at related case law, but this would likely only provide some outer boundary of acceptable rules, leaving much room for the lower courts' own evaluations and preferences to matter.[62]

In addition, I study the justices' rule choices at the individual, rather than Court-level. A lower court trying to target individual judges would confront the Herculean chore of managing the preferences of at least five different justices; trying to target a median or "swing" justice would be more manageable, but it would still leave the rule choices of the other eight justices - at whose preferences the lower court behavior is not aimed - needing explanation. Of course, future work should continue to explore the concept of legal quality and develop other measures, but given both the division among scholars and the absence of

[62] Indeed, the sheer existence of the split itself provides some evidence that high Court preferences are unclear.

any controlling precedent in the cases employed here, any chance of endogeneity certainly does not prohibit the use of the measure I employ.

Other Variables

As other factors besides rule flexibility, rule quality, and ideological congruence may drive rule choice, I also include other relevant variables. First, because the Court may be especially inclined to support a rule offered by the Solicitor General (SG) and the SG may be more likely to offer a higher quality rule (Bailey et. al. 2005; McGuire 1998), I created a variable coded 1 if the SG is the Petitioner, 0 otherwise, and another coded 1 if the SG is the Respondent, 0 otherwise. The number of amici briefs supporting a particular rule may also affect the probability that rule is selected by a justice (Collins 2008; Songer and Sheehan 1993). To capture this, I counted the number of amici briefs (not including those filed by the SG) favoring the Petitioner and the Respondent's rule and calculated the difference between them.[63] I also coded whether or not the SG acted as an amici for the Petitioner or Respondent.

There also is some evidence that, at least in cases of inter-circuit conflict, the justices favor the party with more circuits on its side (Lindquist and Klein 2006). Accordingly, I counted the number of circuits supporting each rule and then calculated the difference between the number of circuits that support the Petitioner's rule and the number of circuits that support the Respondent's rule. I hypothesize that the rule selection process may differ in salient cases, so I code a case as 1 if it is salient, 0 otherwise. I use the well-known NYT measure of salience (Epstein and Segal 2000), in which a case is salient if it appeared on the

[63] My measure here differs from extant work on amicus curiae, in that I do not count an amici as supporting a rule merely because the amici files a brief in support of a particular litigant (Collins 2008). Amici had to express explicit support for a particular legal rule to be counted as supporting that rule; general claims about what outcome the court should reach or why were not sufficient to count as amici support for a rule.

front page of the New York Times the day after the decision. These scores have recently been updated by Collins and Cooper (2011) to the 2005 term. Lastly, because of the correlation between rules and outcomes, I included a variable to capture whether or not Petitioner's rule produced an outcome that comported with the justice's ideological preference.[64]

Modeling Strategy

In this project, I primarily employ a large-N quantitative approach that allows me to isolate the effect of my independent variables on the justices' choices about legal rules. While this method does not permit the in-depth analysis generated by qualitative analysis, it does enhance external validity and generalizability. In addition, in Chapter 6, I discuss my initial qualitative research, which improves the project's internal validity. Here, I explain my quantitative approach, detailed further in Chapter 5.

Although my dataset contains 500 sample cases, eleven of these cases were dropped prior to statistical analysis.[65] I dropped the two cases in which the Court majority favored a rule that was suggested only by an amicus, rather than the Petitioner or the Respondent, and the nine cases in which the majority favored the alternative rule of a party. This produced a dataset of 489 cases for statistical analysis. The unit of analysis is the case/justice.

Again, the dependent variable for this project is whether or not a justice favored the Petitioner's Rule, coded 1 if the justice did support that rule, 0 otherwise. Given the dichotomous nature of the variable, a logit model is appropriate (Greene 2003; Long 1997). More information about the model and the results are reported in Chapter 5.

[64] Chapter 5 contains a detailed explanation of how this variable was coded.
[65] These cases, however, are studied in Chapter 6.

Conclusion

In this chapter, I outlined a theory of rule selection on the U.S. Supreme Court. Drawing on existing literature, I argued that, even when confronting only two legal rules, the process of choosing between them is influenced by a combination of ideological, strategic, and jurisprudential factors to which the justices attend, and offered eight hypotheses about how these factors might operate on rule choice. I then explained the research design used to test my theory, detailing the data collection process, coding protocol, and method of analysis. While the dissertation does involve challenges, particularly in the measurement of certain variables, it represents an approach that both extant work and my validity tests suggest is quite reasonable. In addition, the data collection and coding I have undertaken represents a systematic attempt to explain how and why justices of the U.S. Supreme Court select the legal rules they do. In the following three chapters, I explain the results of my analysis and discuss how these findings indicate that rule selection in the high Court is indeed a complex process, but one into which my work offers fresh insight.

CHAPTER 4

THE LANDSCAPE OF LEGAL RULES OFFERED TO THE U.S. SUPREME COURT

The previous chapter outlined a theory of rule selection on the U.S. Supreme Court. Drawing on extant literature, I explored how a justice's concerns for policy, lower court compliance, and legal quality might explain why the justice chooses a particular rule among the options presented by case participants. An explanation of the research design used to test the resulting hypotheses then followed, including a description of the data collection process. In this chapter, I further detail the dataset, providing descriptive statistics about both the cases themselves and the rules presented to the Court by litigants and amici. I also offer some initial assessments of which rules the justices tend to favor. Although these descriptions do not permit inferences about why justices favor certain rules above others, they still offer novel and important insights into the nature of inter-circuit conflict cases and the menu of rule options those cases generate.

Description of the Data: The Cases

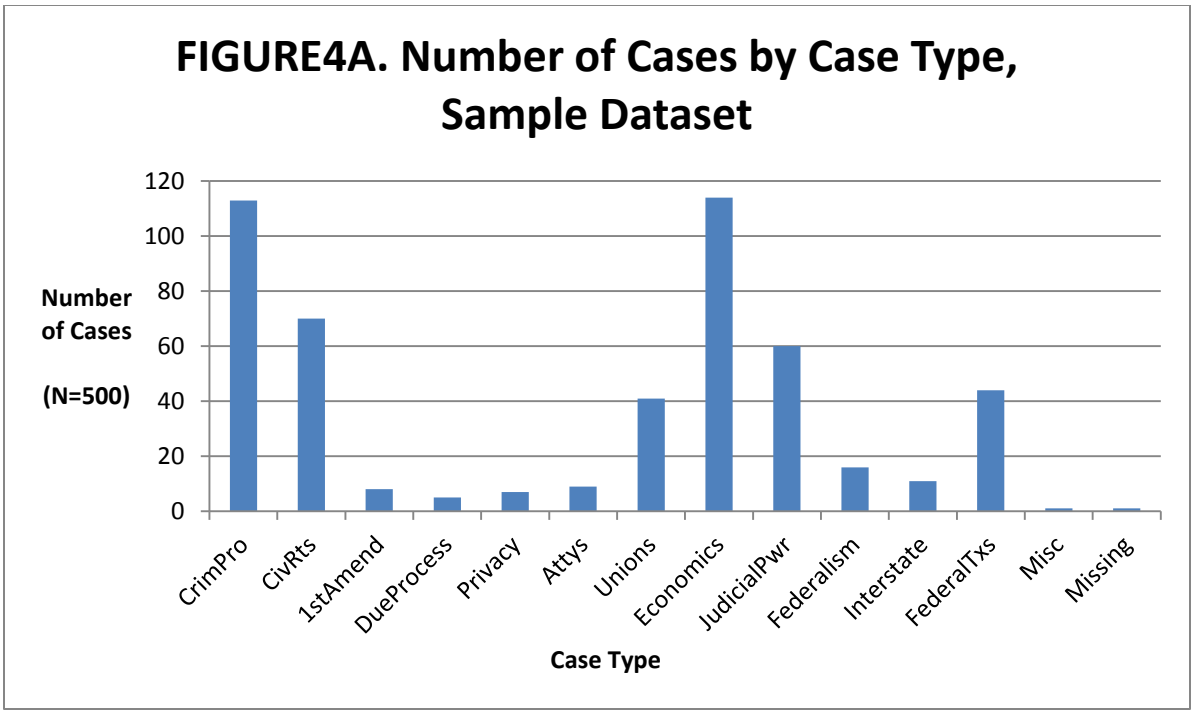
As noted in the previous chapter, the dataset used in this dissertation is comprised of 500 randomly selected cases involving conflict among the circuit courts. These cases were all decided between 1955 and 2000 and thus cover the Warren, Burger, and part of the Rehnquist Courts. Although the randomized list of cases from which these were drawn included all cases decided by the Court from 1954-2000, the sample cases are not distributed evenly among the three Court eras: 9.6% (48/500) are from the Warren era, 22.8% (114/500) are from the Burger era, and 67.6% (338/500) are from the Rehnquist era. This distribution across court eras likely results from the growth in the number of inter-circuit conflicts that

developed during this time period and (perhaps) an increasing desire on the part of the justices to resolve divisions among the circuit courts (Stras 2007; Perry 1991; Ulmer 1984). Moreover, although conclusions drawn about rule choice on the Rehnquist court may be slightly more sound than those drawn about the Burger or Warren eras, the number of cases heard under the tenure of each of these three Chief Justices still permits robust inferences about rule choice across five decades, inferences I detail in the next chapter.

In terms of subject matter, the sample cases cover a wide range of the "issue types" utilized by Spaeth (2002). These codes are designed to capture the nature of legal issues at play in the case and are based upon the Court's own statements of the legal topic under consideration. Spaeth uses 13 major legal categories: criminal procedure, civil rights, First Amendment, due process, privacy, attorneys, unions, economic issues, judicial power, federalism, taxation, interstate relations, and miscellaneous.[66]

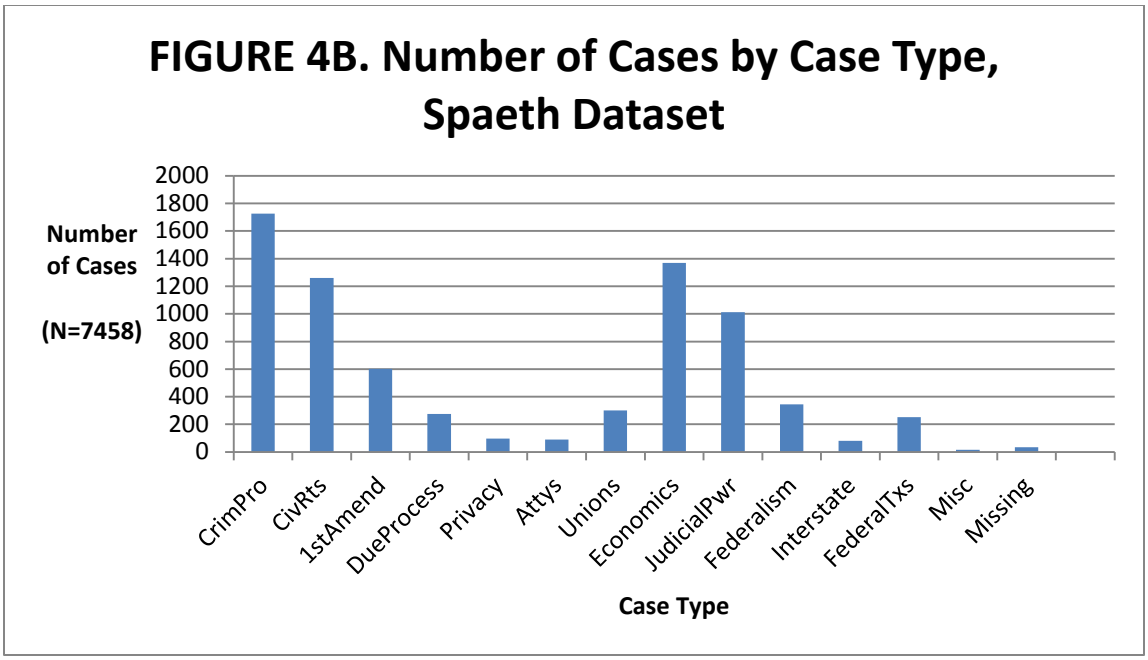
As illustrated in Figure 4A, the dataset includes at least one case from all but one of the issue types: there are 113 cases involving criminal procedure, 70 involving civil rights, 8 involving the First Amendment, 5 involving due process, 7 involving privacy, 9 involving attorneys, 41 involving unions, 114 involving economic issues, 60 involving judicial power, 16 involving federalism, 44 involving federal taxation, 11 involving interstate relations, 1 miscellaneous, and 1 without any issue type code.

[66] Spaeth also has further subcategories under each issue type, with which he codes a total of 260 issues.



While this distribution indicates that inferences about rule choice in certain types of cases will be stronger than in others, the overall assessment of rule choice on the high court is not limited to particular legal areas, an advantage over previous work on rule choice (Epstein and Kobylka 1992) and doctrinal development (Richards and Kritzer 2002). In addition, this distribution generally matches the distribution by issue area for all cases heard by the Supreme Court.

As seen in Figures 4A and 4B, most cases in both datasets involve criminal procedure, civil rights, economic issues, and judicial power; cases involving due process, privacy, attorneys, and inter-state relations appear least often. There do appear to be more cases involving unions and federal taxation and fewer cases on the First Amendment in the sample dataset than in the Spaeth dataset, but the differences are slight. Overall, then, there are no significant legal issue differences between cases involving inter-circuit conflict and all cases



. This suggests that any claims in this project about rule choice and case type may be generalizable to the entire set of issues heard by the Supreme Court, another advance over extant literature.[67]

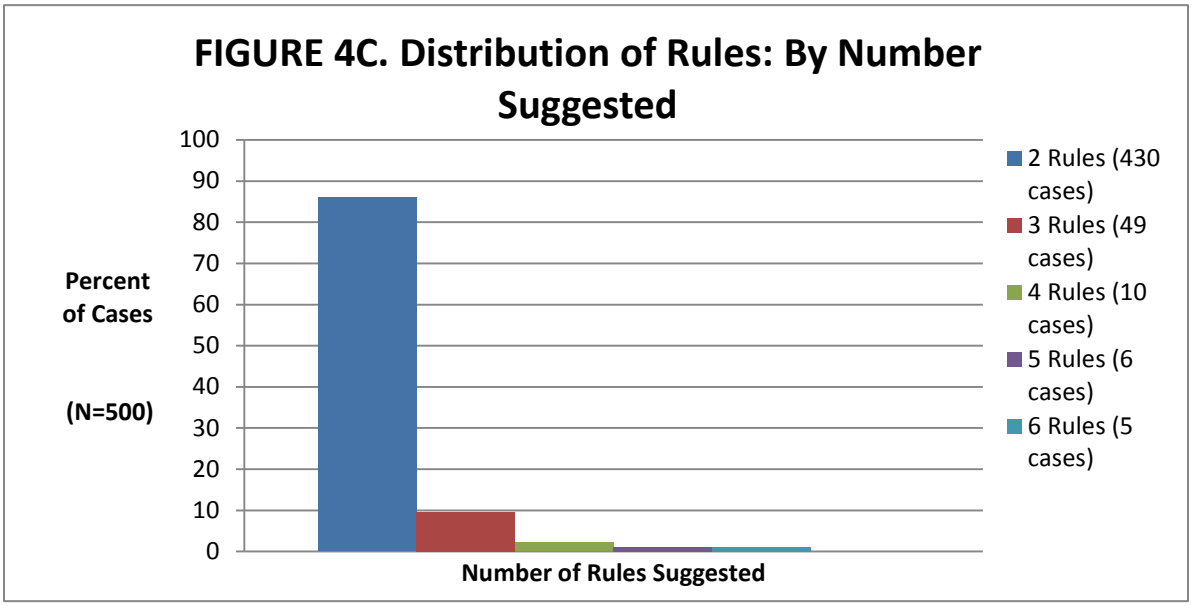
Description of the Data: The Rules Suggested to the Justices

A major contribution of this dissertation is the collection of every legal rule suggested to the Supreme Court by case participants. Here I provide a description of these rules, including their distribution across case type and court era. I also offer a categorization of rules based upon their potential to generate discretion in subsequent decision-makers, and posit that scholars may have overemphasized their attention to this aspect of legal rules.

[67] The sample and Spaeth datasets are different in terms of the number of statutory versus constitutional cases decided by the Court. 81% of cases in the sample dataset involve statutory interpretation, 11% involve Constitutional issues, and 8% involve another type of decision (i.e., federal common law). In the Spaeth dataset, 32% of the cases involve Constitutional issues, 45% involve statutory and 23% involve another type of decision. This result is not surprising, as inter-circuit conflict cases generally involve many more statutory than Constitutional issues (Lindquist and Klein 2006), but it does suggest that the results from this project may not be applicable across all types of decisions the Court makes.

Rules By Case

Across all 500 cases, the justices were presented with a total of 1,120 rules, producing an average of 2.24 rules per case. As shown in Figure 4C, there is actually minimal variation in the number of rules offered per case, with only five cases involving six rules (5/500 or 1%), six cases involving five rules (6/500 or 1.2%), eleven involving four rules (10/500 or 2%), and forty-nine involving three rules (49/500 or 10.2%). The remaining 430 cases involved two rules (430/500 or 86%).

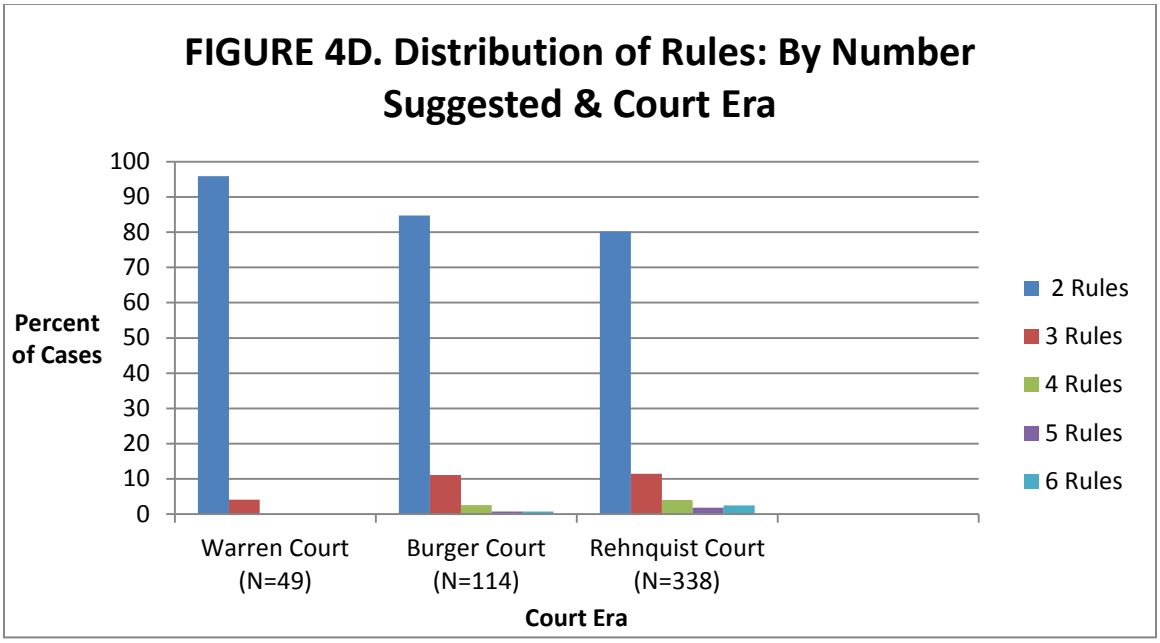


In the vast majority of cases, then, case participants offered only two rules to the justices; in only a small number of cases - less than 15% (70/500) - did the justices face more than two rules, and in only 3.4% (17/500) did they face more than three. Thus, although the justices are free to fashion any rule they wish in response to a case, they overwhelmingly are presented with two rule options by the case participants and, as demonstrated below, almost always select one of those proffered alternatives.[68]

[68] The presence of an additional third, fourth, or fifth rule does not necessarily indicate that there was a multi-way split among the lower courts. In fact, out of the 108 additional rules, only 29 were also supported by a circuit court. I hope to explore the source of such rules in a future project.

Rules by Court Era

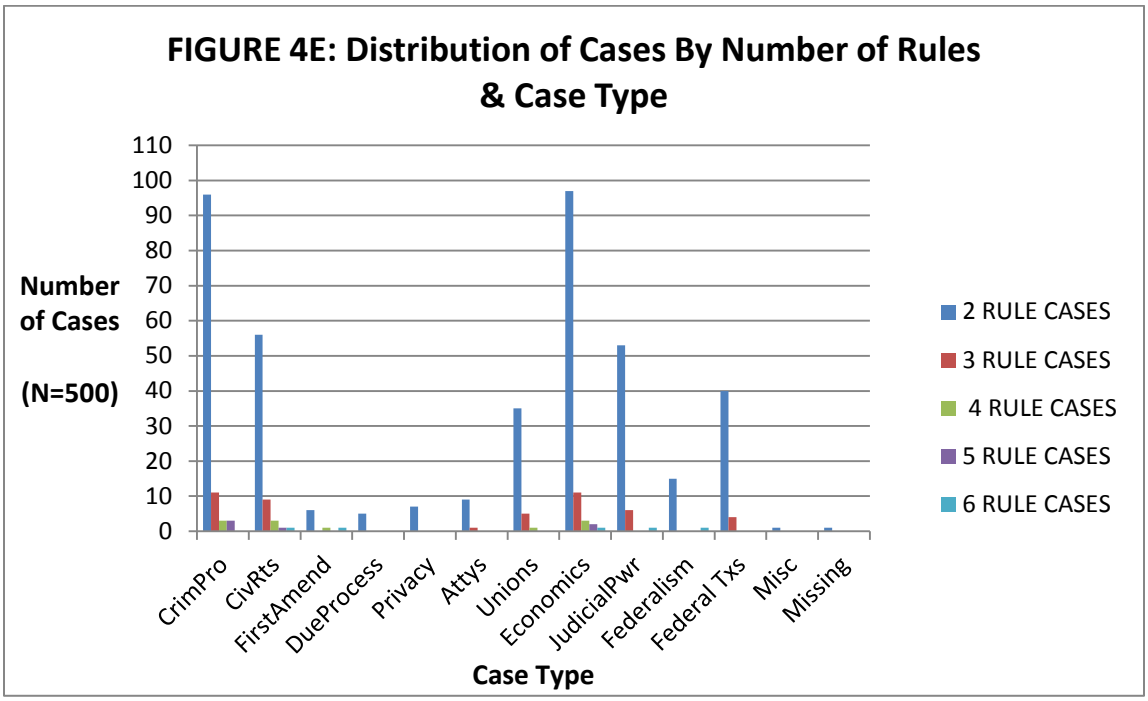
This pattern persists even when the number of suggested rules is broken down by Court era. As seen in Figure 4D, though there is a small increase over time in the number of cases involving more than two rules, probably due to the increasing participation of amici (Collins 2008), the number of rule options across all three court eras is most often two. Indeed, it is not until the Burger court that the justices ever face more than three rule options and, even by the time of the Rehnquist court, such a choice was only rarely presented. Again, regardless of which Court is under consideration, these findings suggest that the selection of rules on the U.S. Supreme Court can be conceptualized, and modeled, as a choice between two competing legal rules.



Rules by Case Type

There is also an interesting distribution of rules by case type, with certain types of cases more likely than others to produce multiple rule options. More specifically, as seen in Figure 4E, the suggestion of three or more rules occurs in less than one-half of the case types:

criminal procedure, civil rights, unions, economic issues, attorneys, judicial power, and federal taxation. In several other categories - due process, privacy, federalism, and miscellaneous subjects - only two rules were ever suggested to the justices.



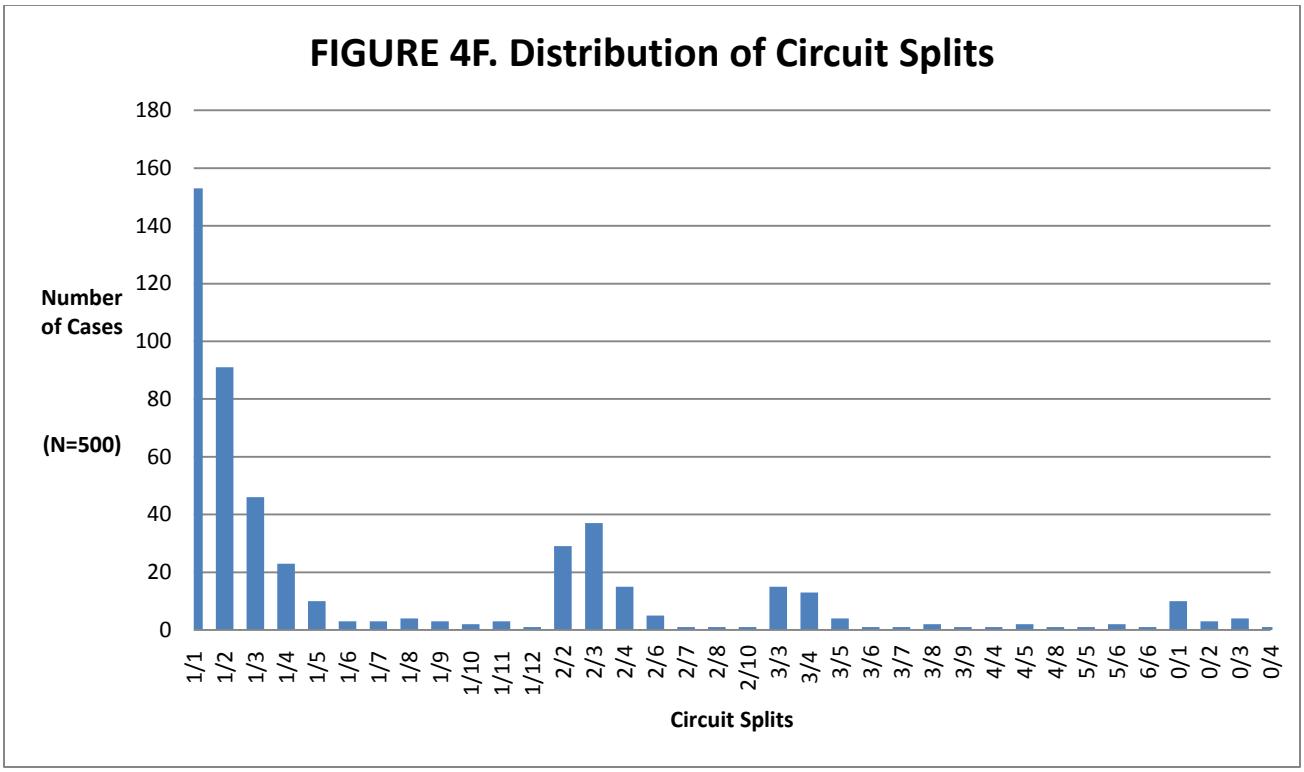
It appears, therefore, that multiple rule cases are not distributed evenly among case types; rather, particular areas of the law seem to produce a more intricate set of rule choices than others. In addition, though the Court's troubled history with certain legal areas - such as the right to privacy and due process - might indicate those subject matters are particularly complex (Abraham and Perry 2003), that complexity is not manifested in the number of legal rules at issue. Determining precisely why certain legal areas generate more rules than others must be left to future research, but these results do suggest that fully understanding rule choice on the Supreme Court requires at least some attention to the legal subject under consideration.

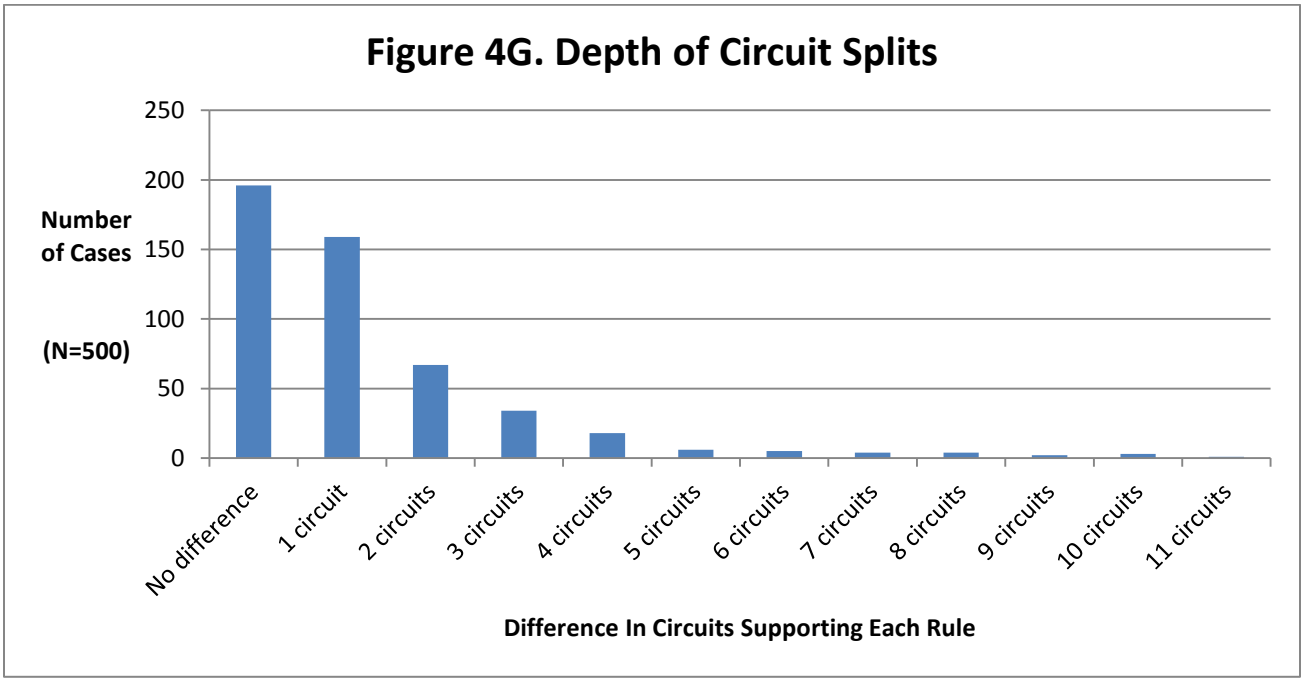
Rules and Circuit Support

There are also some notable results about how the lower courts favoring each rule are distributed and divided. More specifically, as illustrated in Figure 4F, in the vast majority of the cases, the divisions involved a relatively small number of circuits that were fairly even divided: in 31% of the cases (153/500), both rules had one supportive circuit; in 18% (90/500), one rule had one circuit and the other had two; in 9% (46/500) cases, one rule had one circuit and the other rule had three; and in 7% (37/500) cases, one rule had two circuits while the other had three. In only 11% of the cases (54/500) did the splits involve more than four circuits favoring one rule or the other. [69]

As seen more clearly in Figure 4G, the difference in the number of circuits favoring each rule was also relatively small. Most often, there was no difference in the number of circuits supporting each rule. In fact, in almost 40% of the cases (196/500), both rules had the same number of supportive circuits; in 32% of the cases (159/500), one rule had a one-circuit advantage; and in 13%, one rule had a two-circuit advantage. Indeed, as the circuit division becomes more and more imbalanced, the number of cases consistently drops. In only 5% of the cases (25/500) did one rule have an advantage of five or more supportive circuits.

[69] For visual presentation, where a potential circuit split had no cases of that type (i.e., 2/5 split) that column was not included in the figure. Future research should explore this variation in the extent of circuit division, particularly whether and why the Court grants *certiorari* more quickly in certain cases, thus preventing a more extensive split from developing (Clark and Kastellec 2010).





In combination, then, these findings suggest that the circuit court conflicts the Court resolves are neither extensive nor particularly "one-sided." It seems instead that the justices generally face cases in which both rules have a small number of circuits supporting them.

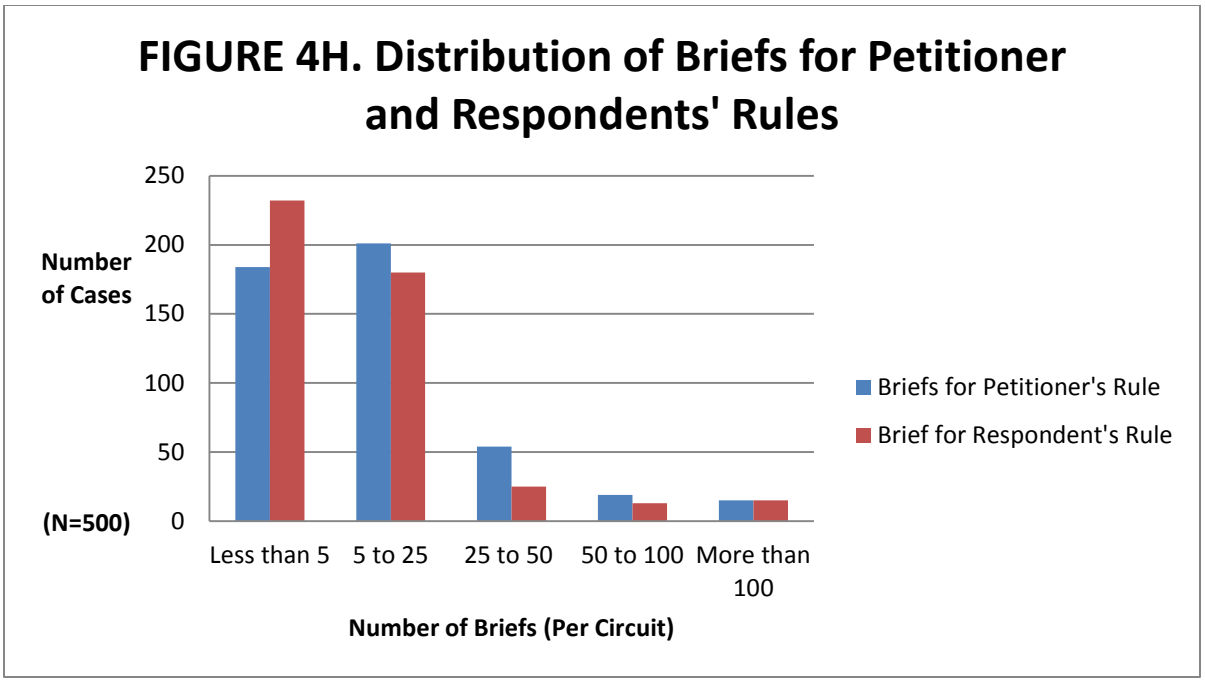
Thus, contrary to at least one extant work (Lindquist and Klein 2006), the difference in the number of circuits supporting each party's rule should not be a significant predictor of which rule the justices favor.[70]

Rules and Litigant Briefs

Just as the difference in the number of circuits supporting each rule was relatively minimal, so too is the difference in how litigants have responded to each rule prior to the Supreme Court making its rule choice. (Recall that this variable is measured by counting the number of briefs filed by any litigant that cited the circuit(s) supporting each rule. This number was then divided by the total number of circuits that supported the rule to produce an average number of briefs per circuit per rule). Though the range of these filings was large, ranging from 0 to 1066 per case, the average number filed for each rule - and the difference between the average number filed for each rule - remained relatively small. Figures 4H and 4I display these results.

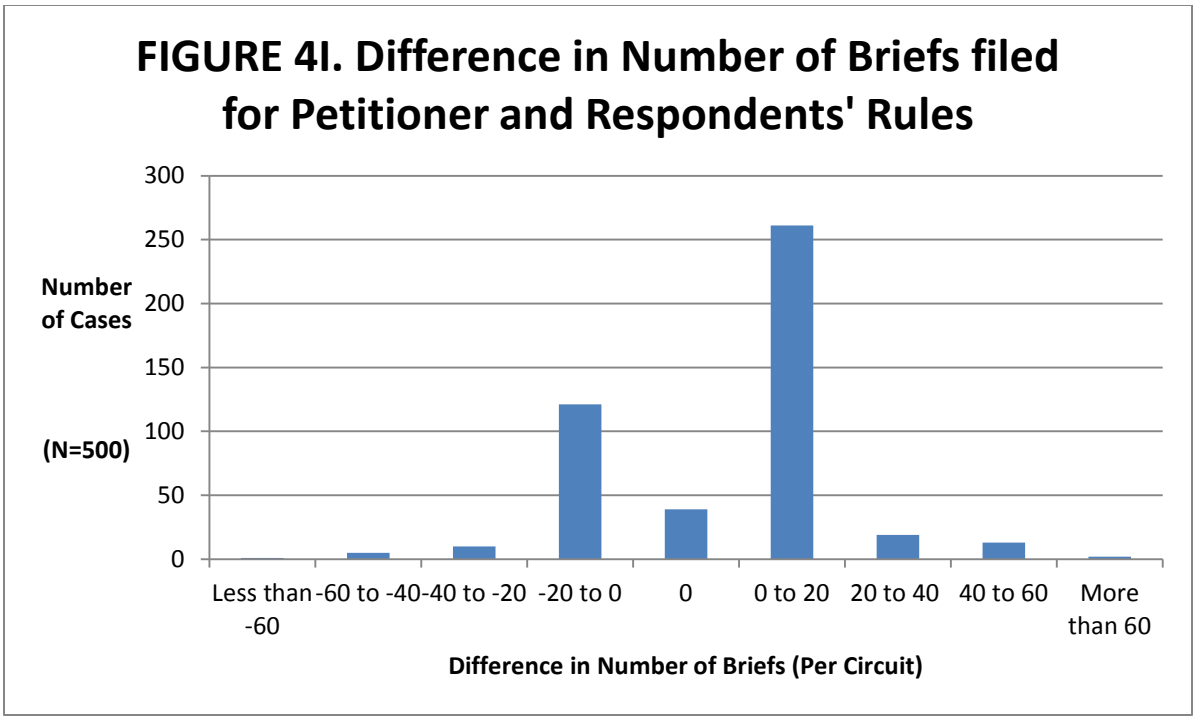
As Figure 4H shows, in most cases, fewer than five briefs per circuit supported the rule of either party, though Respondent had the advantage in more cases than the Petitioner. Between five and twenty-five briefs per circuit were filed in a significant number of cases, with Petitioner's rule having the advantage in this category. There were far fewer cases in which more than twenty-five briefs were filed which favored either party's rule, though in those instances Petitioner again had the advantage.

[70] It should be remembered that in counting the number of circuits favoring each rule, circuits were only counted if either the Court or the lower court itself indicated support for a particular rule (see Chapter 3). Occasionally, for instance, the Court would list a large(r) number of circuits, but because no case participant suggested a rule adopted in that circuit, that circuit was not counted as involved in the split. This occurred so rarely, however, that it should not significantly undermine the findings here.



As Figure 4I shows, the difference in the number of briefs per circuit filed for each party's rule is not particularly large. In thirty-nine cases, both parties' rules had the same number of briefs per circuit. In an additional 382 cases, one party's rule had between zero and twenty more briefs than the other party's rule. Within that category, there were more than twice as many cases in which the Petitioner's rule garnered the advantage than cases in which Respondent's rule did. Only rarely did one party's rule have more than a twenty brief per circuit advantage, and in only three cases did either party have more than a sixty brief advantage.

Overall, then, it appears that in most cases, fewer than twenty-five briefs are filed per circuit per rule, and that neither party enjoys a significant advantage over the other in the per circuit number of briefs filed for each rule. This suggests that the number of briefs which cite a particular circuit's rule may not be a particularly helpful way for a justice to compare rules. Whether any advantage in briefs affects the probability that one rule is chosen over the other is explored in the next chapter.



Rules and Salient Cases

Comparing the distribution in the number of rules offered in salient and non-salient cases also yields a novel insight. Scholars have suggested that salient cases are more likely to draw the interest of amici (Maltzman and Wahlbeck 1996) and that amici are likely to offer legal rules to the Court that the parties do not (Collins 2008; Collins 2004; Epstein and Kobylka 1992).[71] Salient cases, therefore, should have more rules at play than non-salient cases.

My data, however, do not support this claim. More precisely, in the 41 salient cases in the dataset, [72] case participants offered more than two rules in only 17% (7/41) of the cases; in the other 83% of the salient cases (34/41), the justices again faced (only) the dichotomous

[71] It should be noted that Collins does not use the term "legal rule," but he does argue that amici can influence Court doctrine by presenting the justices with legal options they would otherwise not have had.

[72] This low number of salient cases serves as a reminder that the vast majority of inter-circuit conflict cases decided by the Supreme Court escape public attention. While scholars are often drawn to high-profile and controversial cases, much of the Court's work revolves around legal issues of limited relevance to the general public.

choice. Non-salient cases display generally the same distribution, with only 14% (64/459) involving more than two rules. In addition, given that among all the cases involving three or more rules, only 10% were salient, it seems, in fact, that the salience of a case does not affect the likelihood that the justice will confront more than two proffered rules. Although this may simply indicate that measures of case salience are flawed (Epstein and Segal 2000), this pattern suggests caution is warranted before assuming that case salience increases the complexity of rule choice on the high Court or that the presence of amici is *ipso facto* a hallmark of case complexity or salience.

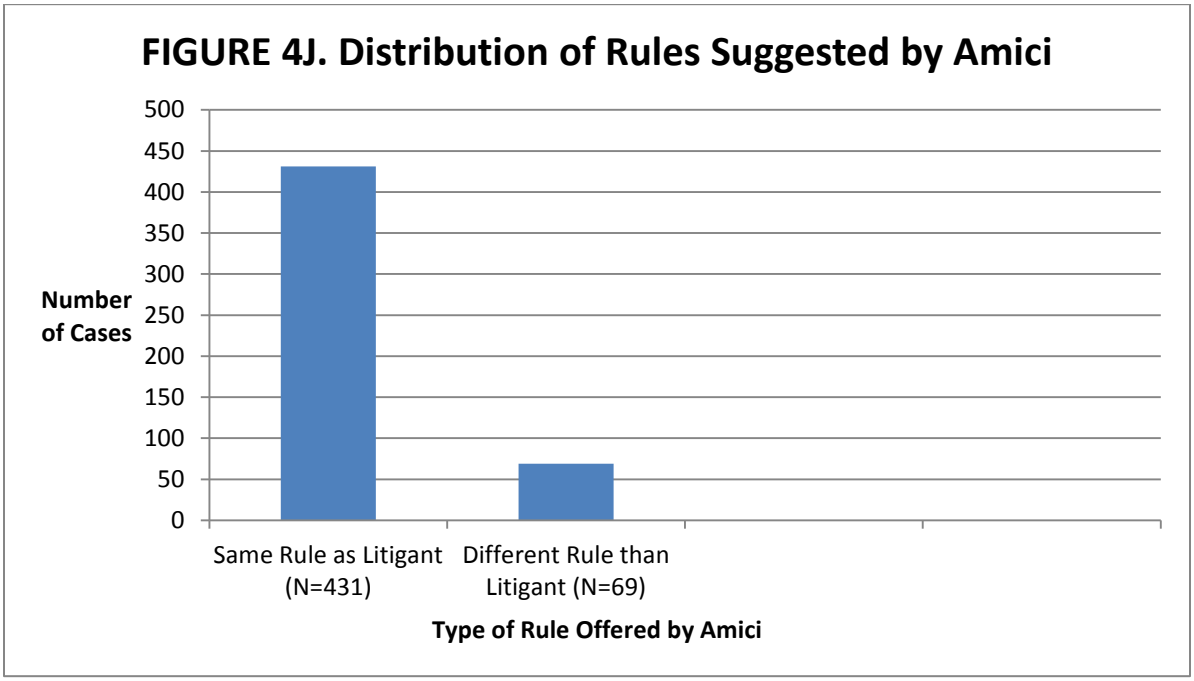
Rules and Amicus Curiae

The data also provide striking findings about the role of amicus curiae in the generation and selection of legal rules. Anecdotal evidence exists that amici can play a significant role in shaping the doctrine of the Court by offering unique legal arguments not also suggested by the parties to the litigation, and scholars have used these examples to argue that amicus curiae therefore can exert a powerful influence on the development of Court doctrine (Collins 2008; Samuels 2004; Epstein and Knight 1998; Epstein and Koblyka 1992; but see Johnson 2005). [73] My data suggest, however, this claim is likely overstated, at least in cases of inter-circuit conflict.

First, in the vast majority of the cases in the sample, the amici simply did not offer a rule that was not also offered by a litigant. In fact, in 86.2% of the cases (431/500), there were only two rules suggested to the justices: one by the Petitioner and one by the

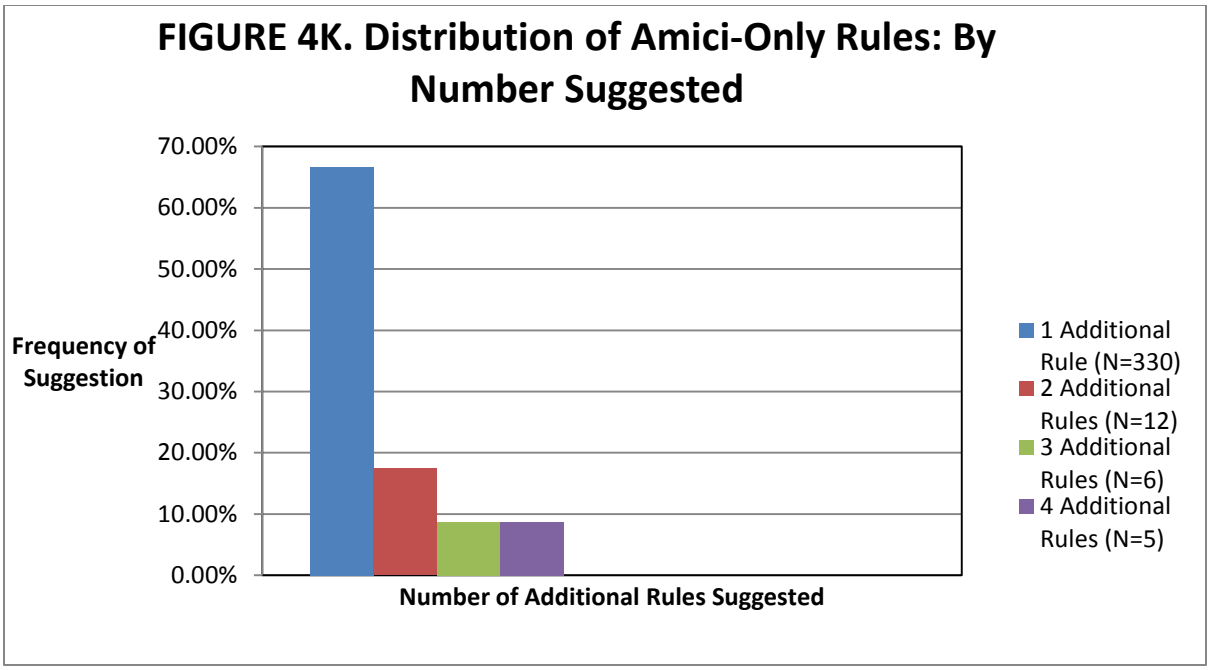
[73] The literature often points to *Mapp v. Ohio*, 367 U.S. 343 (1961), and *Craig v. Boren*, 429 U.S. 190 (1976).

Respondent; only in 13.8% of the cases (69/500) did amici suggest rules that were not also suggested by a litigant.[74] Figure 4J displays this result.



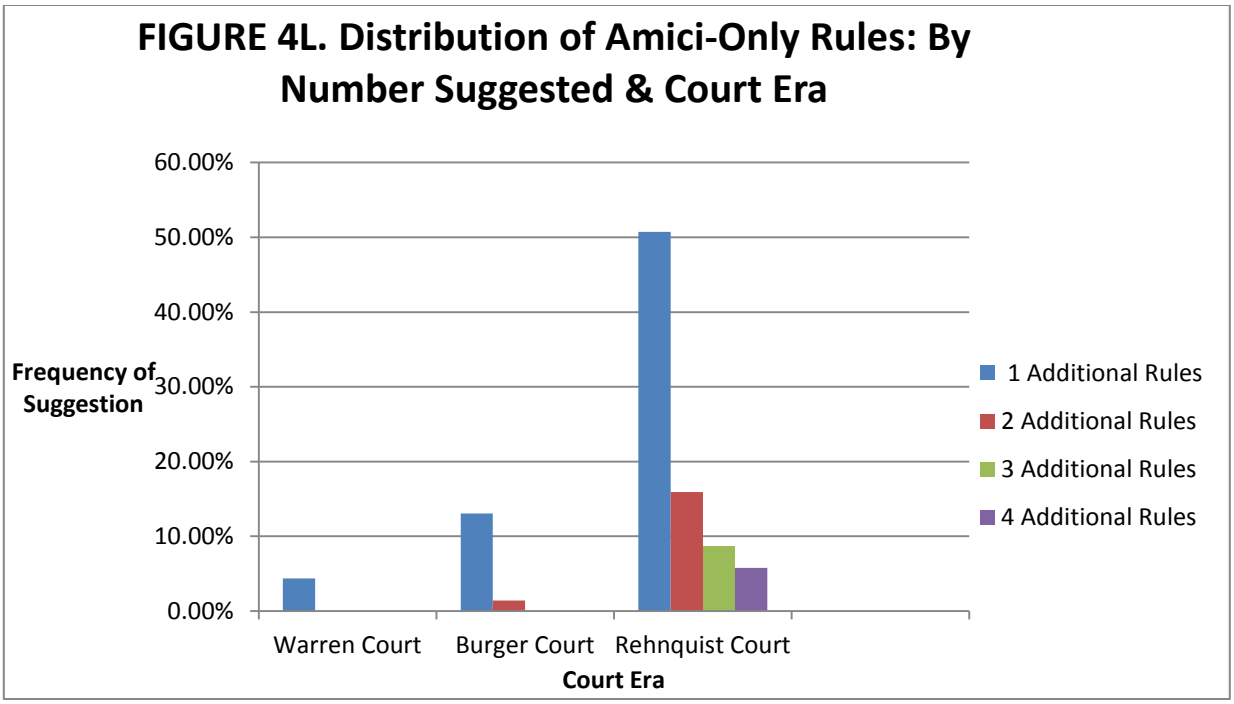
Secondly, in those few cases where amici did offer a different rule than a litigant, they contributed a relatively small number of additional rule options. As illustrated in Figure 4K, amici most often offered only one additional rule to the court, which they did in in 66.6% (46/69) of the cases. In twelve cases, they offered two additional rules, in six cases, three additional rules, and in five cases, amici suggested four additional rules.

[74] Part of this pattern is likely attributed to the nature of the legal questions answered by the Court, a phenomenon detailed in Chapter 3 and discussed more below. Here, it should simply be noted that in a large majority of cases, the legal question at issue was one in which an amici did not offer a unique legal rule.



It seems, at least from these initial figures, that organized interests are taking a rather moderate approach to influencing the selection of legal rules on the Court – most often supporting the same rule as a litigant, occasionally suggesting their own rules, but doing so with only a small number of additional rule options. They are not, in short, burying the justices in a flurry of legal rules.

This pattern of offering only a small number of additional rules persists across court eras as well. As seen in Figure 4L, though amici were much more likely to offer additional rules to the Rehnquist, rather than Warren or Burger Courts, they still most often offered only one additional rule, which they did in just over 50% of the cases; in fact, even during the Rehnquist era, the rate of offering more than one additional rule was quite low, with amici only offering two additional rules in around 15% of the cases, three is around 8%, and four in around 6%.



Again, these results suggest that amici generally are not increasing the complexity of rule choice on the high Court by adding more rule options. Their presence may of course influence the resolution of the case in other ways, but they are not altering the number of rules faced by the justices in any consistent or significant way. Along with the rarity with which these amici-only rules are ever adopted (discussed below), this suggests that the influence of amici on Court doctrine is perhaps much more limited than extant work presumes.[75]

[75] When amici support a rule that is already suggested by a litigant, however, they do seem to exert some influence. This finding is discussed below and in Chapter 5. The role of the Solicitor General (SG) is also explored in that chapter. In the dataset, the SG participated as a Petitioner in sixty-two cases, as Respondent in eight-seven cases, and as amici in ninety-three cases (supporting the Petitioner in fifty of those and the Respondent in forty-three). Regarding amici influence more generally, it should be noted that amici and litigants may be collaborating about rules before formally suggesting particular ones to the Court. Though extant literature suggests that certain interest groups have influenced Court doctrine this way (Tushnet 1987; Epstein and O'Connor 1983; Stewart and Heck 1982; Cowan 1976), the extent to which amici exert influence over rules "behind the scenes" is beyond the scope of the current project.

Rule Choice, Flexibility, and Types of Legal Rules

Finally, the data reveal new findings about the different types of legal rules confronted by the Court, ones with significant implications for much extant scholarship. More specifically, as explored in Chapters 2 and 3, the literature has generally conceived of legal rules as being either "bright line" rules or vague "standards," depending upon the level of flexibility the rule imparts to subsequent decision-makers. "Bright line" rules provide little room for discretion, generally mandating a particular outcome, while standards offer less guidance and allow the decision-maker to make a more independent judgment.[76] Scholars are in fact so interested in this aspect of rules that most of the leading work invokes rule flexibility as a fundamental influence on the rules judges articulate and adopt. (Cross et. al. 2012; Lax 2011a; Clark and Carrubba 2010; Staton and Vanberg 2008).[77]

As illustrated in Figure 4M, the data indicate that this attention may be misplaced. First, in a sizable majority of the cases, the rules offered simply did not vary in their flexibility. In particular, in 64.4% of the cases (322/500 cases), the Court confronted cases where the only difference in the competing rules offered to the Court was the answer they produced: one rule answered "yes" to the particular legal question; the other answered "no." These rules, which I label "inverse rules" were simply mirror images of each other, invariant in either language or grammatical structure and therefore invariant in their flexibility.[78]

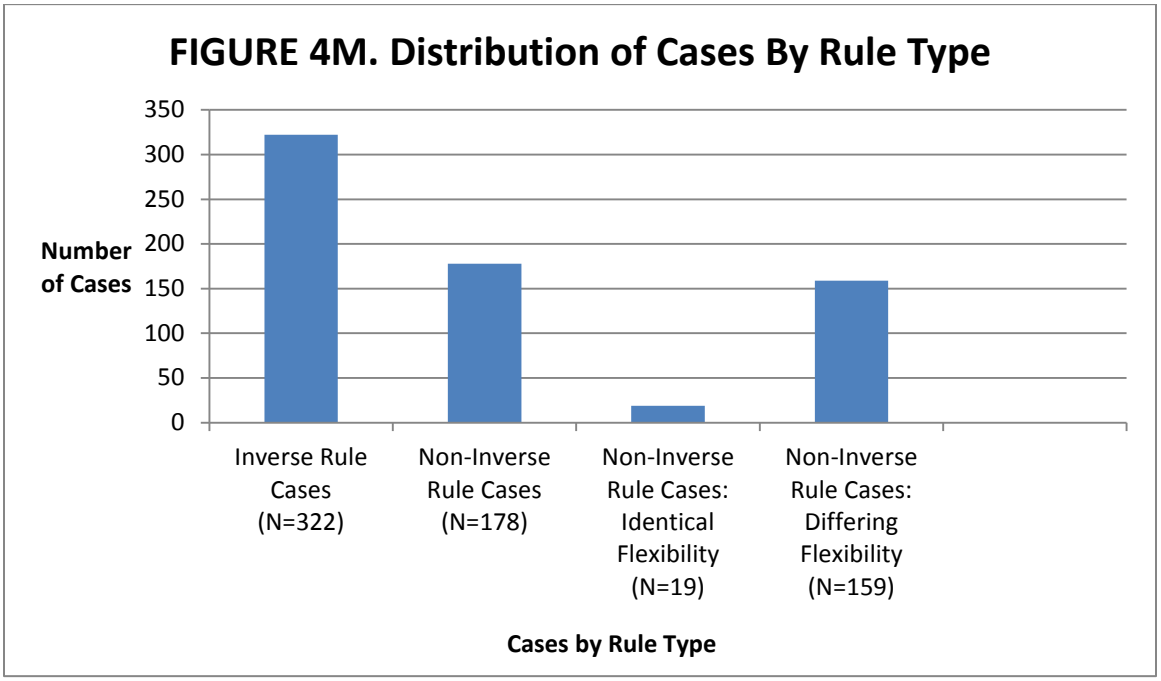
In contrast, in 35.6% (178/500) of the cases, the justices faced a choice between what I term "non-inverse rules." These rules do vary in language and/or grammatical structure, and

[76] To take a classic example from the literature, a "bright-line" rule for speeding would be that no driver may drive over 55 miles per hour. A standard might simply say that the speed should be "reasonable and prudent." (Lax 2011a). Of course, such rules would be promulgated by a legislature, not a court (and certainly not the Supreme Court), but the example is illustrative nonetheless.

[77] As explored below and in Chapter 6, my data also undercut the claim that the justices generate legal rules themselves.

[78] See Chapter 3 for examples.

therefore have at least the potential to generate more or less discretion in subsequent application. Of course, non-inverse rules do not necessarily have to vary in their flexibility: though their language and structure can differ, they can still produce identical levels of discretion for lower court judges. However, in the vast majority of non-inverse rule cases in my data, the rules had differing levels of flexibility: in only 19 out of 178 non- inverse rule cases did a majority of coders deem the rules equally flexible and in only five did they do so unanimously.[79]



Still, in only 31.8% (159/500) of all the cases in the dataset did the justices confront cases in which the amount of discretion generated by each rule differed. Accordingly, in only 31.8% of the cases could flexibility have been a factor in the rule selection process; in the remaining 68.2%, rule selection must have been driven by other factors. Given the prominence of the claims about rule flexibility in the literature, I still test the resulting hypotheses in this project. My findings here suggest, however, that scholars may wish to re-

[79] Further detail about the results of the coding of rules for flexibility is contained in Chapter 5.

consider whether their continued emphasis upon "bright line" rules and vague "standards" is worthy of such intense focus.

Another prominent feature of this literature is the general framing of rule choice as between a rule and a standard. Albeit only for theoretical purposes, scholars have built their models around the claim that a judge will articulate *either* a rigid rule *or* a more amorphous standard (Cross et. al. 2012; Lax 2011a). The data here, however, suggest that conceiving of rule choice in this way may also warrant some re-examination.

To state it most generally, at least in cases of inter-circuit conflict, the justices are almost never confronted with one "bright-line" rule and one vague standard. Instead, what they generally face, to use the parlance of scholarship, are "bright line" rules versus "bright line" rules and standards versus standards. Figure 4N illustrates the types of rule choices the justices actually do face.

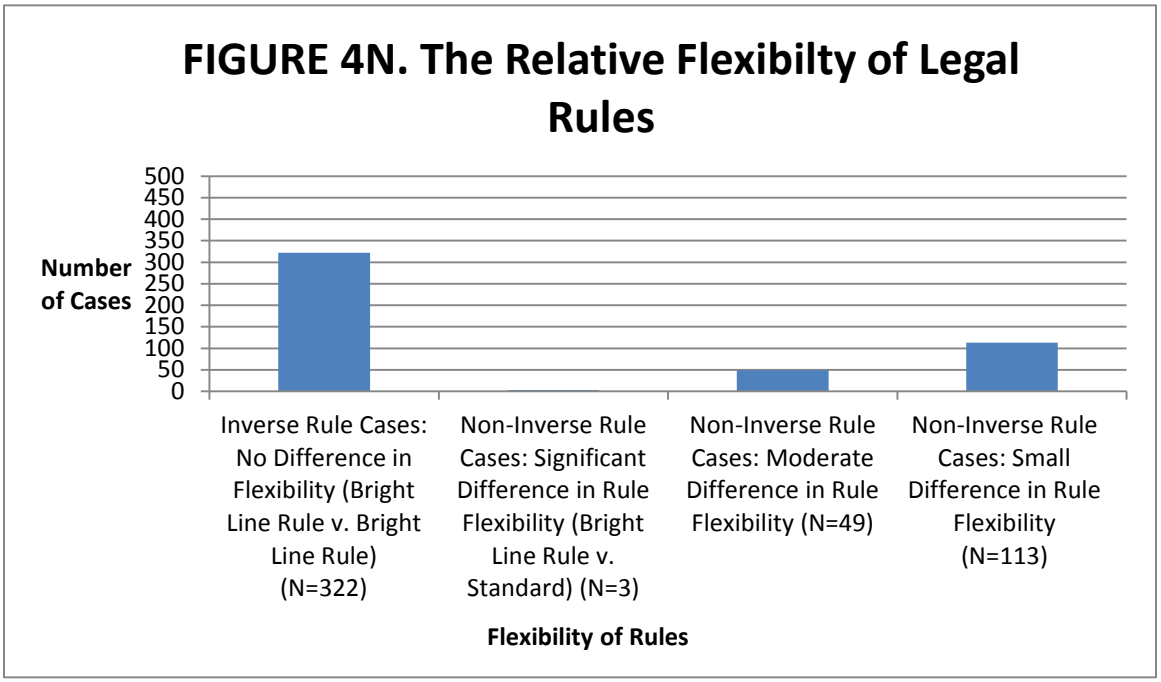
First, and as noted above, a significant majority of the cases in my sample involve "inverse rules" which, by their nature, cannot generate differing levels of flexibility in a lower court or other decision-maker. These rules are in fact "bright line rules" which draw a clear line between permissible and impermissible behavior.[80] Accordingly, in almost 65% of the cases the Court decides, they choose between a "bright line" rule and a "bright line" rule.

This pattern of selecting between rules of the same type persists even in those "non-inverse rule" cases. Again, these are cases in which the rule has at least the potential to vary in its flexibility, and thus could involve the pitting of a "bright line" rule against a more ambiguous standard. The presentation of rule options with such significant differences in flexibility is, however, extremely rare.

[80] Again, see Chapter 3 for examples.

In my dataset, for example, among the 178 non-inverse rule cases, only three cases were coded as having one rule that generated no discretion and one rule that generated a great deal of discretion.[81] This means that in only .6% of the cases decided by the Court did they actually decide between these two rule types.

Even under a more generous conception of a "bright-line" rule versus a standard, the finding remains generally consistent. In only 27.5% of the cases (49/178), did a majority of the coders find any moderate difference between the flexibility of the rules.[82] In 63.4% of the cases (113/178), in fact, the coders judged both rules to have almost the same level of flexibility.[83]



[81] These were cases where one rule was coded as a 4 on the flexibility scale and the other rule coded as a 1 (by a majority of the coders). Chapter 3 contains the description of these codes.
[82] These were cases where one rule was coded as 2 and the other 4 or one rule coded as 3 and the other as 1.
[83] These were cases where the rules were coded as either (1,2), (2,1), (2, 3), (3,2), (4,3) or (3,4). These totals do not include the 13 cases in which there was no majority about the difference in flexibility between the two rules. This occurred, for instance, when two coders gave the rules a 1 and 2, two gave them a 1 and 3 and the fifth rated them as equally flexible.

This suggests, then, that even when the justices confront cases where the flexibility of the rules could drive their rule choices, the difference in flexibility between the two rules is generally quite small. In fact, among all the rule pairings the justices face, the "bright line" rule versus the standard is actually the least common pairing, and constitutes only a tiny fraction of all the rule choice cases. Again, given the literature's attention, my hypotheses warrant testing, but scholars might wish to reconsider whether framing rule choice as simply between rigid rules and amorphous standards is the most productive approach.

Description of the Dependent Variable: The Rules Selected by the Justices

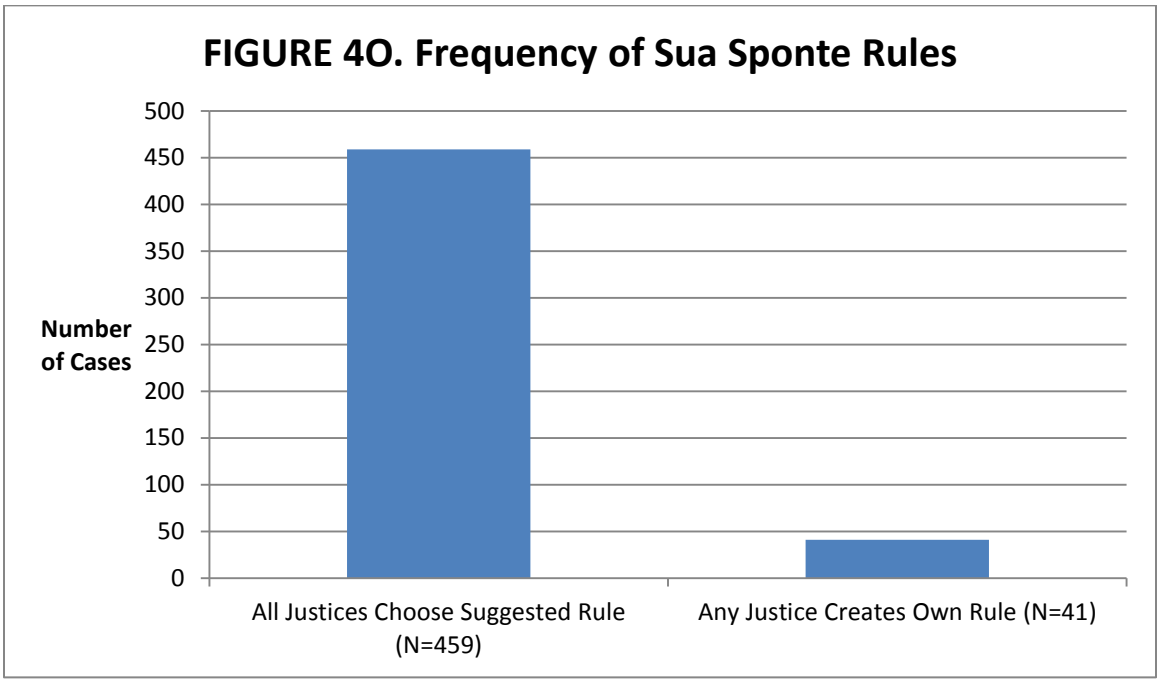
The descriptive statistics also provide important information about the rules the justices actually select. Here I detail both the source of the rules suggested to the justices and which participants were more likely to see their proffered rule favored.

Sua Sponte Rules

In Chapter 2, I detailed how almost all the political science scholarship on legal rules has rested on the presumption that legal rules are created by jurists themselves. Building on this assumption, scholars have developed highly sophisticated models about what factors will influence that creation and what types of rules a court is likely to promulgate. At first glance, the assumption seems reasonable, as there are good reasons to think that Supreme Court justices, given their time, resources, and professional security, would be eager to articulate legal rules that reflect, as closely as possible, their own preferred doctrines. Whether the justices actually do this, however, has yet to be subjected to empirical scrutiny.

Though not the primary focus of my dissertation, the data I have collected indicate that, at least in cases of inter-circuit conflict, this presumption is unwarranted. In fact, in over 90% of the sample cases, every justice adopted a rule that was suggested by a participant in

the litigation – either the litigant or amici. Indeed, in only a small percentage of cases (8.2%) did any justice articulate a legal rule not suggested by a case participant. Figure 4O illustrates this result. Thus, though they are free to develop their own legal rules, the justices almost always choose instead from among the alternatives offered to them by case participants.



These sua sponte rule cases are certainly notable and are explored further in Chapter 6, but the relative infrequency with which the justices generate their own rules suggests that scholars may need to reconsider their presumption.[84] At the very least, these results provide further support for my claim that rule selection on the high Court is most frequently a dichotomous choice between two competing rules presented to the justices by case participants.

[84] The implication of this finding for those models that do rest upon this assumption is beyond the scope of this project, but may be explored in future work.

Amicus Curiae & Legal Rules

The data also reveal another pattern about which case participant is likely to see their rule chosen, a pattern that again cuts against extant claims of the literature. First, as noted above, scholars have argued that amicus curiae can play an important role in shaping court doctrine (Collins 2004; Epstein and Knight 1996). The litigant's ability to do so has been generally overlooked (Baird 2007). The data show, however, that it is virtually always the litigants themselves - not amici - who offer the legal rules ultimately chosen by the justices.[85] More specifically, while amici are somewhat reluctant to offer their own legal rules, the justices are even more reluctant to adopt them: in fact, in only two of 500 cases did the Court majority favor a rule suggested by an amici alone.[86] Moreover, in only three cases did *any* justice select a rule suggested by an amici alone.[87]

While the behavior of the justices in these cases is certainly striking, it occurs too infrequently for further statistical analysis; future work should attempt to develop more

[85] Again, amici may be collaborating with litigants before the briefs are filed with the Court.

[86] In the first, *Gwaltney v. Chesapeake Bay*, 484 U.S. 49 (1987) the justices were asked to decide when citizens could sue to recover the cost of environmental damages. While the Petitioner argued that the environment damage must be "presently occurring" at the time of the suit and the Respondent argued that suit was permissible for environmental harm that "occurred only prior to the filing of a lawsuit," the Court chose the rule suggested by the Solicitor General and the U.S. Chamber of Commerce: that suit was permissible for damage that occurred before the lawsuit, but only if the "citizen-plaintiffs allege a state of either continuous or intermittent violation - that is, a reasonable likelihood that a past polluter will continue to pollute in the future." In the second, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Court had to determine the proper standard for calculating attorney fees in a copyright action. Again, the justices rejected the rule of Petitioner (that "both prevailing plaintiffs and defendants should be awarded attorney's fees as a matter of course, absent exceptional circumstances") and the Respondent (that "prevailing plaintiffs are generally awarded attorney's fees as a matter of course, while prevailing defendants must show that the original suit was frivolous or brought in bad faith") for the rule of amicus Hewlett-Packard that "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion."

[87] Justices Stevens and Scalia (in dissent) favored a rule suggested by the Association of Criminal Defense Attorneys in *U.S v. Rodriguez-Moreno*, 526 U.S. 275 (1999), Justice White (in concurrence) voted for the rule of the Chamber of Commerce in *United Airlines v. McMann*, 434 U.S. 192 (1977) and Justice Stewart (in concurrence) selected the rule offered by the AFL-CIO *in U.P.S. v. Mitchell*, 451 U.S. 56 (1981). In one additional case (*Ornelas v. United States*, 517 U.S. 690 (1996)), because the Respondent chose not to do so, the court invited an amici to argue for the rule adopted in the lower court and Justice Scalia in dissent did favor this rule. However, since amicus in this case was, in effect, functioning as a party to the litigation, this case is not included as one where a justice favored an amici-only rule.

rigorous theory about when and why a justice would favor an amici-only rule. Even with these limited results, however, it appears that the anecdotal cases so frequently cited by scholars remain just that – anecdotal. The ability of amici alone to shape directly court doctrine appears to be quite constrained – by both their own choices about when to present unique rules and by the justices' choices about which rules to favor. It seems instead that it is litigants who make the more significant contribution to the legal rules considered and adopted by the high Court.

That amici-only rules are uncommonly offered and rarely adopted does not mean that amici play no role in the selection of legal rules, however. In fact, most rules suggested by litigants in my sample were likely to have some at least some organized interest support. In particular, the rule offered by the Petitioner or the Respondent was supported by at least one amici in 66.4% (332/500) of the cases; in only 33.2% (166/500) did both litigants offer rules with no support from organized interests.

Moreover, a rule with amici support was slightly more likely to be selected than a rule with no such support. More specifically, in those cases where Petitioner had no amici supporting the rule and Respondent had at least one supportive amici, the Court chose the Respondent's rule 54% (55/102) of the time; in those cases where Respondent had no amici supporting the rule and the Petitioner had at least one supportive amici, the Court chose the Petitioner's rule 53% (54/102) of the time. Though the effect is slight and the difference not statistically significant, this result does suggest that having amici favor the rule offered by either litigant might increase the chance that litigant's rule is selected. As documented with the multivariate analysis in Chapter 5, this influence persists even when other factors which influence rule selection are controlled. It seems, therefore, that while amici might not be the

actual authors of much of the Court's doctrine, their presence does have some effect on which legal rule will be selected.

Litigants and Legal Rules: Which Litigant

Given that the justices almost always choose a litigant's rule, which litigant is more likely to have their rule favored? Some scholarship suggests that the Court tends to grant *certiorari* in cases where they wish to reverse the lower court (McGuire 1995; Hellman 1983; Palmer 1982), and therefore rule more often for the Petitioner than the Respondent. Other work indicates that this propensity to reverse is mitigated in cases of inter-circuit conflict, when the Court is more concerned with providing legal uniformity than with mere "error correction." (Clark and Kastellec 2010). The former claim finds some minimal support in the data here, though the finding is by no means definitive. Out of 500 cases, the Petitioner won 258 of the cases, or 51.6% of the time. Notably, that number increased somewhat when there were no amici participating in the case: in the 166 cases where the litigants were the sole participant supporting each rule, Petitioners were again slightly more likely to have their rules chosen, with a winning percentage of 52.8%.

Litigants and Legal Rules: Which Rule

Knowing which party is more likely to have their rule chosen does not, however, indicate which of the parties' rules is likely to be selected. More precisely, as lawyers well know, a litigant can offer more than one rule to the Court, suggesting both a "primary" and "alternative(s)" rule. Perhaps unaware of this practice, political scientists have yet to devote any attention to when, why, or to what effect litigants might do so, even though such

decisions could be motivated by an array of strategic considerations about the nature of the rule and the likely preferences of the high Court.[88]

The data reveal, however, that scholars have not overlooked a major litigation tactic. In fact, the proffering of alternative rules by parties is quite uncommon, with one litigant doing so in only 7% (35/500) of the cases in the sample and both litigants doing so in only 1% (5/500).[89] Moreover, just as litigants are extremely unlikely to suggest alternative rules, the justices are extremely unlikely to adopt them: the Court majority chose the alternative rule of a litigant in only six out of those thirty-five cases and non-majority justices did so in only five of the thirty-five.[90] Thus, a justice favored the non-primary rule of a party only 2.2% of the cases in the sample. Figure 4P illustrates these results.

Why the justices are so unlikely to adopt alternative rules is unclear. It may be that the litigants devote less time and effort to these rules, thereby offering rules that are simply less persuasive to the justices. Or, it may be that these rules themselves are in some way deficient, and thus less appealing. On the other hand, the justices may, as they claim when

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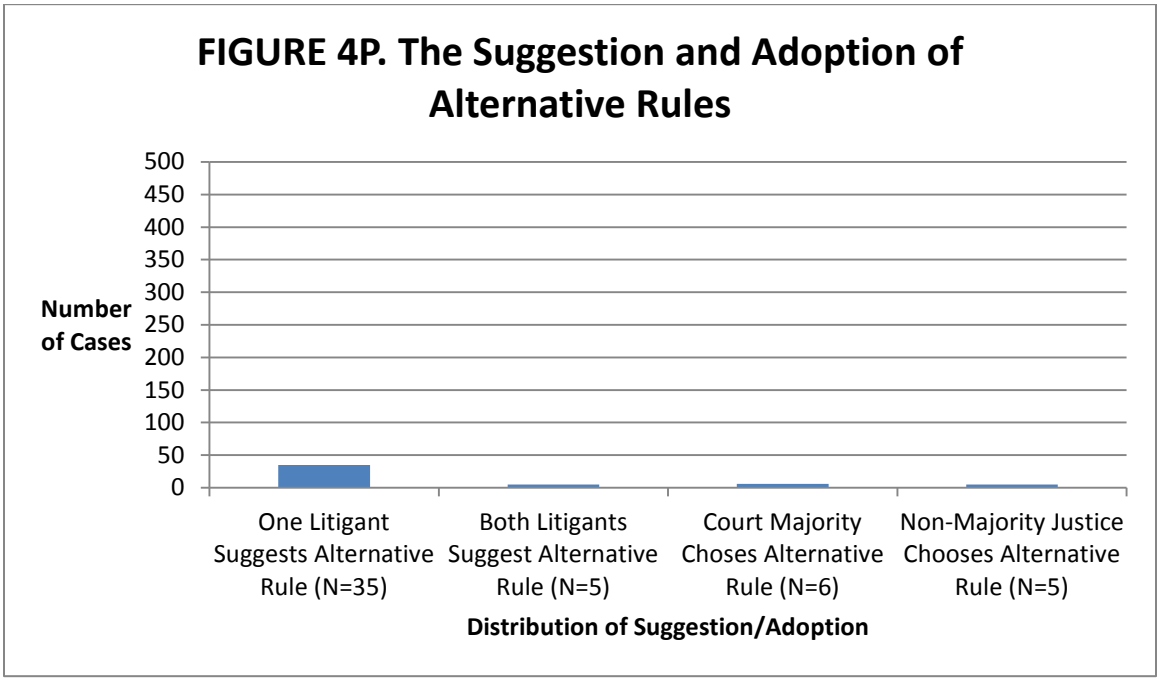
[88] Of course, an organized interest also can offer more than one rule, and in my dataset this occurred in 14 cases. Though no justice ever adopted one of these alternative rules, their use by amici also raises interesting questions for future research.

[89] Those cases were: *Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), which involved a First Amendment challenge to pamphleting in airports; *U.S. v. Kokinda*, 490 U.S. 720 (1990) which involved a First Amendment challenge to ban on leafleting in front of a Post Office; *Lewis v. U.S*., 518 U.S. 322 (1996) which involved whether the right to a jury trial attached to a conviction for multiple petty offenses; *Community for Creative Non-Violence v. Reed*, 490 U.S. 730 (1989) which involved whether a commissioned artist constituted an "employee" for copyright purposes, and *Chandris v. Latsis*, 515 U.S. 347 (1995), which involved whether a harbor worker was a "seaman" covered by a labor statute. Chapter 3 details how I coded rules as primary or alternative.

[90] These non-majority justices were Justice Stewart (in dissent) in *Scarborough v. U.S*., 431 U.S. 563 (1977), Justices Blackmun, Burger, Rehnquist, and Stevens (in concurrence) in *Int'l Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); Justices Souter, Blackmun, Stevens (in dissent) and Justice Kennedy (in concurrence) in *Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), Justices White, Rehnquist and Kennedy (in concurrence) in *United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991), and Justice Kennedy (in concurrence) in *U.S. v. Kokinda*, 490 U.S. 720 (1990). As noted in Chapter 3, these votes were coded as missing on the dependent variable.

explaining their *certiorari* decisions (Perry 1991), sincerely wish to resolve the extant circuit conflict, a conflict which is reflected in the primary rules.



Regardless of the explanation, along with the rarity of sua sponte rules and the infrequent adoption of amici-only rules, this finding provides further evidence that the Supreme Court resolves disputes among litigants' competing rules in a relatively straightforward way – it selects one of those rules. Rather than looking to an amici, reaching deep within a party's brief for an alternative rule, or investing the time and resources necessary to articulate their own, the justices of the high Court seem to prefer adopting a rule from among the major options presented to them by either the Petitioner or the Respondent. Whether they do so out of sheer laziness, a desire for efficiency, or a sense of professional obligation to the parties who appear before them, the justices of the Supreme Court do at least appear to make a conscious effort to resolve the dispute before them, a dispute which is centered around the primary rules of the litigants. That the justices resolve that dispute by selecting one of those rules may not be particularly surprising (except perhaps to those who

believe the justices are “activist” policymakers with unbridled discretion), but the documentation of it is nonetheless a novel and important finding of this project.

Conclusion

In this chapter, I have offered descriptive statistics about the landscape of legal rules that case participants – both litigants and amici – offer to the U.S. Supreme Court. After a description of the cases employed in the project, I drew attention to both the nature of the rules that were suggested to the Court and the rules the justices tended to favor. These results suggest that at least when it comes to conceptualizing rule choice on the high Court, scholars may wish to re-examine several of their presumptions.

In addition, though interesting in their own right, the findings also further substantiate the claim that the choice of rules on the high Court can be conceptualized and modeled as a choice between the primary rules of litigants. The next chapter contains the results of this approach and provides a statistical analysis of which of these two competing rules is favored by which justice and why. On its own, however, the information contained in this chapter offers fertile ground for future study, particularly about how and why the cases participants decide to present the rules they do.

CHAPTER 5

EVAULATING RULE SELECTION ON THE U.S. SUPREME COURT

In the previous chapter, I detailed the dataset used in this project and offered descriptive information about the rules and cases confronted by the justices. I drew attention to several patterns about rule choice on the high court, emphasizing in particular that, though the justices are free to articulate whatever legal rule they wish, they almost always choose between the primary rule of either the Petitioner or the Respondent. The data also countered several claims of the literature, including the frequency of sua sponte rules, the extent of amici impact on legal doctrine, and how often justices confront the choice of a "bright-line" rule or a standard.

In this chapter, I move beyond description to test empirically a model of rule selection on the Supreme Court. Using regression techniques, the hypotheses contained in Chapter 3 are statistically evaluated as I explore how the ideology, flexibility, and quality of the legal rules offered to the Court influence which rule a justice ultimately selects. These results confirm several of the hypotheses but indicate that others are not well-supported. The findings suggest again that scholarship may wish to re-consider whether certain aspects about rules, particularly their flexibility, should inform theories of rule creation and rule choice.

Testing a Theory of Rule Choice: The Rule/Outcome Correlation Challenge

As noted in Chapter 3, one of the challenges of modeling rule choice on the U.S. Supreme Court arises from the structure of the rule choice process itself. More specifically, because the justices generally select a rule offered by one of the litigants, the choice of rule is often highly correlated with the choice of case outcome. As a result, it is at least possible that the justice simply votes for the party that justice prefers, paying little heed to the rule that

produces that victory.[91] Particularly given the important role that ideology seems to play in determining how justices rule on case outcomes (Bartels 2010; Segal and Spaeth 2002), it could be that a justice simply votes for that litigant – liberal or conservative – that better comports with the justice's ideology. The rule that justifies that result therefore would be largely irrelevant.

I offered several reasons in Chapter 3 why justices should still attend to the existence and nature of legal rules, regardless of the litigant who offers that rule. Here, I move beyond theoretical arguments to test whether justices are concerned with rules independent from their concerns over case outcome. These results, which indicate that the justices do in fact care about the ideological content of legal rules, substantiate my claim that legal rules are themselves important, and that certain traits of those rules can influence whether or not they are favored by a particular justice. In this section, I detail the model and the results of this analysis.

The Rule/Outcome Correlation Challenge: A Model

I develop a theoretical model to suggest when a justice should attend to a rule apart from its associated outcome. To borrow from utility theory (Morrow 1994), a justice should favor the Petitioner's rule when the utility achieved from selecting that rule outweighs the utility achieved from selecting the Respondent's rule.[92] This can be written formally as:

$$U(P_r) > U(R_r)$$

[91] As also mentioned in Chapter 3, a legalist would suggest that a justice likely focuses solely on the legal rule, paying little attention to the outcome produced by that rule.

[92] I make no definitive claims about what that utility is over, other than some benefit that arises from selecting one's preferred rule.

where U represents the utility gained by selecting that rule, P_r represents Petitioner's rule and R_r represents Respondent's rule. Again, a justice should favor P_r when the above situation holds: the utility from P_r is greater than the utility from R_r.

Because the choice of rule is often correlated with the choice of outcome, however, the utility from each rule choice can arise from the rule, the outcome that results from that rule, or both. To determine whether a justice cares about the rule independent of its attendant outcome, the model must include a justice's preferences for both rule(s) and the outcome produced by that rule(s). I assume here that these preferences are primarily ideological, such that a justice will prefer the rule that is in closer ideological proximity and the outcome that comports more with a justice's ideological tendencies. Using a quadratic loss function to represent the decline in utility as the justice's ideology diverges from the rule's ideology,[93] the model can be rewritten as:

$$-(i_j-P_j)^2 + I(P) > -(i_j-R_j)^2 + I(R)$$

where i_j represents the ideology of the justice, P_j and R_j represent the ideology of the Petitioner and Respondent's rules, respectively, and I(P)/I(R) represent the ideological tenor of the outcome associated with the Petitioner and Respondent's rule. Again, a justice will prefer rule P (i.e., the Petitioner's rule) when this inequality holds true. Rewriting the model, we get

$$0 > (i_j-P_j)^2 - (i_j-R_j)^2 + [I(R) - I(P)]$$

Putting weights on the utilities produces:

$$0 > \alpha[(i_j-P_j)^2 - (i_j-R_j)^2] + \beta[I(R) - I(P)]$$

which can be rewritten as:

[93] A quadratic loss function is appropriate because deviations from the preferred rule or outcome in either direction are assumed to be equally distasteful to a justice. The functions are additive because a justice gains utility from voting for both the preferred rule and the preferred outcome.

$$\alpha[(i_j-R_j)^2 - (i_j-P_j)^2] + \beta[I(P) - I(R)] > 0$$

where α represents the weight the justice puts on the (ideology of the) rule and β represents the weight the justice puts on the (ideology of the) outcome produced by that rule. This model can then be conceived of in a regression framework as

$$vote_{jp} = \beta 0 + \beta 1[(i_j-R_j)^2 - (i_j-P_j)^2] + \beta 2[I(P) - I(R)] + \varepsilon_i$$

where $vote_{jp}$ represents whether or not the justice voted for Petitioner's rule. For my purposes, all that is needed from this regression is that β1 be greater than zero. If so, this suggests that the justices do put at least some weight on the ideological tenor of the rule independent of its associated outcome.

The Rule/Outcome Correlation Challenge: Testing the Model

To test the model described above, I needed a measure for each justice's ideological preferences over rules and over case outcomes. To capture the former, I first took the distance (in absolute value) between the justice and each rule.[94] I then squared these values and took the difference in the distance from the justice to Respondent's rule and the distance from the justice to the Petitioner's rule. This gave me a single variable that measured the extent to which each justice, based on ideological preference, should prefer the Petitioner's rule over the Respondent's rule. The larger and more positive this value, the more likely the justice would prefer Petitioner's rule; the smaller and more negative the value, the more likely the justice would prefer Respondent's rule.

The model also requires a measure of whether each rule gave the justices their preferred outcome. I measured this preference over outcome by whether the rule produced an ideological outcome in the lower courts that the justice was likely to prefer: if rule A produced a liberal outcome below, then a liberal justice is presumed to prefer the result

[94] The explanation and coding rules for these variables are included in the research design section Chapter 3.

produced by rule A, a conservative justice the outcome produced by rule B. If rule A produced a conservative outcome below, then a conservative justice is presumed to prefer the result produced by rule A, a liberal justice the outcome produced by rule B.

Because the Respondent always suggests the rule used by the lower courts,[95] I coded the ideology of the outcome associated with the Respondent's rule with the Spaeth (2003) variable for the ideological direction of the lower court ruling (conservative = 1; liberal = 2); the ideology of the outcome associated with the Petitioner's rule was then coded as the opposite. Treating justices with an ideology score less than zero as liberal and those with an ideology score greater than zero as conservative, I then matched the justice to the outcome associated with each rule, coding the justice as 1 if the justice preferred that rule, 0 otherwise.[96] I then took the difference between the justice's ideological preference for the outcome associated with Petitioner's Rule and the outcome associated with the Respondent's rule. This produced a single variable which captured whether, based on ideological preference, the Petitioner's rule gave each justice that justice's preferred disposition.

With a dependent variable coded 1 if the justice voted for Petitioner's rule and 0 otherwise, I was then able to regress the justice's rule choice on the justice's preference for both the rule and the outcome, using a logit model (Long 1997). To control for the likely correlation among the justice's votes within each case, I used random effects, grouping by case.[97] I first ran the model on all cases in the dataset. Table 5A presents these results.

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[95] There was one instance in my dataset in which the Respondent did not argue the lower court's rule. In that instance, however, the Court asked an amici to do so, so there is an ideology score for that rule's outcome.

[96] Only Justice Stewart has an ideology code of zero, and then in only two years. The six Stewart votes in my dataset where his ideology was 0 were therefore counted as missing on this variable.

[97] The use of random effects as opposed to clustering by case is discussed further below.

TABLE 5A. LOGIT MODEL, PREFERENCE FOR RULE VERSUS PREFERENCE FOR OUTCOME (ALL CASES)

Independent Variable	Coefficient	Standard Error
Ideological Preference for Rule	0.09**	.041
Ideological Preference for Outcome	0.77***	.056
		N=4104

*p-value < .1; ** p-value <.05; ***p-value < .01

As indicated by the positive coefficient and p-value associated with the justice's ideological preference for each rule, it does appear that justices attend to the rule, apart from the outcome that rule produces.[98] This confirms my claim that the choice of rule is not simply a choice over case outcome, even when the justices select between a pair of rules offered by competing litigants.

In certain types of cases, however, the preference for rule and for outcome might be more difficult to distinguish. More precisely, in what I have termed "inverse rule cases," the rule is very closely aligned with the outcome. For instance, in a case which asks whether or not a federal magistrate can conduct *voir dire* of a jury, the rule favoring the magistrate is "yes, a federal magistrate can conduct *voir dire* of a jury" and the rule favoring the other party is "no, a federal magistrate cannot conduct *voir dire* of a jury."[99] In such an instance, the rule and the outcome are so closely affiliated that it might be difficult to discriminate between a preference for the rule and a preference for the outcome. In fact, because a vote for the magistrate necessitates a vote for the magistrate's rule (or a vote for the magistrate's rule necessitates a vote for the magistrate), whether the justice even can prefer the rule independent of any preference for the litigant remains somewhat unclear.

[98] Whether and how factors about the rule other than its ideological proximity to the justice affect the likelihood it is chosen is explored in the next section of the chapter.
[99] *Gomez v. U.S.*, 490 U.S. 848 (1989).

Contrast this with a "non-inverse" rule case, such as one that asks when a ship-owner can seek indemnity from a stevedore for an injury sustained by a ship-owner's employee on the stevedore's equipment.[100] In that case, one rule is that the ship-owner can seek indemnity when the stevedore "breaches its implied warranty that the equipment it furnishes will be suitable for the purpose intended" and the other rule is that indemnity is allowed only when the stevedore has been negligent, failing to exercise "reasonable care" over his equipment.

Unlike the instance above, the difference between the rule and the outcome is clearer here – the rule sets a standard of behavior to be met by any stevedore and the outcome is simply that this particular stevedore is or is not subjected to indemnity. A justice with a preference for stevedores might want the stevedore to win the case, but that does not necessarily mean that the rule suggested by the stevedore must be selected.

In other words, these non-inverse-rules rules do not, by their very nature, mandate a victory for one party or the other. One rule may be more favorable to one party (and is thus likely to be suggested by that party), but the rule itself does not necessarily determine who wins the case. As a result, the justices should be able to maintain a preference for a rule apart from the preference for case outcome. Because of this difference between inverse and non-inverse rule cases, I ran the analysis separately on each group of cases. Tables 5B and 5C display the results.

TABLE 5B. LOGIT MODEL, PREFERENCE FOR RULE VERSUS PREFERENCE FOR OUTCOME (INVERSE RULE CASES)

Independent Variable	Coefficient	Standard Error
Ideological Preference for Rule	-0.09*	0.052
Ideological Preference for Outcome	0.89***	0.081
		N=1864

*p-value < .1; ** p-value <.05; ***p-value < .01

[100] *Italia Society v. Oregon Stevedoring*, 376 U.S. 315 (1964).

TABLE 5C. LOGIT MODEL, PREFERENCE FOR RULE VERSUS PREFERENCE FOR OUTCOME (NON-INVERSE RULE CASES)

Independent Variable	Coefficient	Standard Error
Ideological Preference for Rule	0.39***	0.069
Ideological Preference for Outcome	0.64***	0.081
		N=2239

*p-value < .1; ** p-value <.05; ***p-value < .01

In Table 5B, which includes only inverse rule cases, the coefficient on the preference for rule fails to reach statistical significance at the .05 level, and is signed in the negative direction. While not conclusive, this suggests that a justice's preference for rule may not exist independently of the preference for outcome in inverse-rule cases. In contrast, as seen in Table 5C, when the case involves only non-inverse rules, the coefficient is positive and reaches statistical significance at the .01 level. This indicates that in these cases, a justice does have a preference for the rule offered by each litigant, apart from the preference for that litigant as the victor.

In combination then, these findings support my argument that, at least in certain types of cases, the justice's attend to the rules offered by litigants, not just to the litigants themselves. Since the analysis illustrates the importance of distinguishing between inverse and non-inverse rule cases, I examine the differences between these two types of rule choice cases as I evaluate several of the hypotheses.[101] The following section details that analysis.

Testing a Theory of Rule Choice: The Roles of Ideology, Flexibility, and Quality

As suggested in Chapter 3 and demonstrated in Chapter 4, when the justices of the U.S. Supreme Court select a legal rule, they, at least in cases of inter-circuit conflict, almost

[101] The differing results for inverse and non-inverse rule cases also indicate that the conceptual difference between rules and outcomes may be more complex that either extant scholarship or this dissertation has considered. Future work should develop these concepts further.

always select the primary rule offered by one of the parties to the litigation. As a result, the selection of rules on the high court can be modeled as a choice between the rule of the Petitioner and the rule of the Respondent. Although other aspects of the case, including the identity of the party (whether it is the United States or not), the presence and number of amici, the number of circuits favoring each party's rule, and whether the case involves particularly salient legal issues can influence the rule choice process, I have suggested that it is the primarily the traits of the rule itself - its ideology, flexibility, and legal quality - that affect the probability of its adoption by a justice. If the Petitioner's rule fits better with the justice's preferences on those dimensions, then that justice will favor the Petitioner's rule; if the Respondent's rule is a better fit, then that justice will favor the Respondent's rule.

I detailed the hypotheses that flow from this argument in Chapter 3. Recall:

H1: When selecting between alternative rules, a justice will be more likely to select the legal rule that is in closer ideological proximity to the justice's own ideological preferences.

H1(a): A justice will be more likely to select the rule in closer ideological proximity to the justice's own ideological preferences in salient cases.

H2: When selecting between alternative rules, a justice is more likely to select the less flexible rule.

H2(a): The greater the ideological distance between the justice and the lower courts, the more likely the justice is to select the less flexible rule.

H2(b): A justice will be more likely to select the less flexible rule in salient cases.

H2(c): In salient cases, the greater the ideological distance between the justice and the lower courts, the more likely the justice will select the less flexible rule.

H3: When selecting between alternative rules, a justice will be more likely to select the higher quality rule.

H3(a): The greater the ideological distance between the justice and lower courts, the more likely the justice will select the higher quality rule.

In this section, I subject these hypotheses to empirical analysis. Given the key independent variables and the controls (described below in Table 5D),[102] the following equation was used to assess the influence of rule characteristics on the probability of their selection:

$$\text{Vote}_J = \beta 0 + \beta 1\text{IdeoProximity} + \beta 2\text{IdeoProximity*Salience} + \beta 3\text{Flexibility} + \beta 4\text{Flexibility*IdeoDistance} + \beta 5\text{Flexibility*Salience} + \beta 6\text{Flexibility*Salience*IdeoDistance} + \beta 7\text{Salience*IdeoDistance} + \beta 8\text{Quality} + \beta 9\text{Quality*IdeoDistance} + \beta 10\text{CircuitDifference} + \beta 11\text{AmiciDifference} + \beta 12\text{SGPetitioner} + \beta 13\text{SGRespondent} + \beta 14\text{AmiciSGPet} + \beta 15\text{AmiciSGRes} + \beta 16\text{Salience} + \beta 17\text{IdeoDistance} + \beta 18\text{OutcomePref} + \varepsilon$$

Table 5D provides a summary of each of these independent variables, including a description of how the variable was measured and the predicted direction of the variable's coefficient.

A Note on Model Choice

Given the dichotomous dependent variable (1 if a justice favored Petitioner's rule, 0 otherwise), I selected a logit model (Long 1997). However, setting up the model as a panel, where each justice votes on a given case, assumes that the observations – here, the justices' votes on rules – are independent; in other words, it assumes that one justice's rule choice exerts no influence on another justice's rule choice. As with many studies of judicial decision-making, this assumption may be violated in this project.

There is good evidence that the justice's often bargain with each other prior to issuing their opinions (Maltzman et. al. 2002; Epstein and Knight 1998), so it is important to employ a model where judicial votes are not assumed to be independently and identically distributed (i.i.d).

[102] The descriptive statistics for the primary independent variables are contained in Appendix B.

TABLE 5D. EXPLANATION OF INDEPENDENT VARIABLES

Independent Variable	Description of Variable	Predicted Sign of the Coefficient
Ideological Proximity	Difference between ideological distance from justice to Petitioner's rule and ideological distance from justice to Respondent's rule	Negative
Flexibility	Difference in flexibility of Petitioner and Respondents' rules	Positive
Quality(Judges)	Difference in the extent of division among lower courts judges between Petitioner and Respondents' rules	Positive
Quality(Lwr Courts)	Difference in treatment by lower courts prior to Court ruling of Petitioner and Respondents' rules	Positive
Quality(Briefs)	Difference in number of briefs filed prior to Court ruling citing Petitioner and Respondents' rules	Positive
Amici Difference	Difference in number of (non-SG) amici supporting Petitioner and Respondents' rules	Positive
Amici SG for Petitioner	SG as amici supports Petitioner's rule	Positive
Amici SG for Respondent	SG as amici supports Respondent's rule	Positive
Petitioner U.S.	Petitioner is U.S.	Positive
Respondent U.S.	Respondent is U.S.	Negative
Circuit Difference	Difference in the number of circuits supporting Petitioner and Respondents' rules	Positive
Outcome Preference	Justice prefers outcome produced by Petitioner's rule	Positive
Salience	Case appears on front page of NYT day after ruling	Conditional
Ideological Distance	Distance from justice to mean of circuit courts	Conditional

Though no one has yet demonstrated that the justices also bargain systematically over legal rules *per se,*[103] it seems reasonable to employ a model flexible enough to account for any such negotiations. If a justice's choice of rule is correlated with another justice's choice of rule, failing to attend to this non-independence of observations (and ensuing error correlation) could produce standard errors that are misleadingly small and, under certain circumstances, bias the regression coefficients (Kennedy 2003).[104]

Scholars have developed several empirical approaches to handle the difficulty of non-independence. The first, and standard approach of much of the literature (see e.g., Bonneau et. al. 2007, Lindquist and Klein 2006), is simply to employ robust standard errors by clustering on case after the analysis. Though easy to implement, such an approach serves only as a *post-hoc* correction to a problem, rather than considering the error correlation as a fundamental aspect of the data generating process itself.

A better alternative is to model case specific effects (whether fixed, random, or a mix of the two), grouping by case (Maltzman and Wahlbeck 2004).[105] This approach explicitly accounts for the non-independence of observations and allows the intercepts for each group to depend on group membership.[106] Advice about whether to employ fixed or random effects

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[103] Epstein and Knight (1998) present several examples of negotiations over rules (*Craig v. Boren* (429 U.S. 190) for example), but they do not demonstrate that these instances are part of any systematic pattern.

[104] Bias would results if any of the omitted variables (such as intra-court bargaining) were correlated with both the dependent and independent variables. In my project, there could be some correlation between intra-court bargaining and the primary independent variables, if certain aspect of the rules affect the need for, and extent of, such negotiations.

[105] An alternative to grouping by case would be to group by justices. This would be necessary if I suspected that the votes of a particular justice are correlated across cases. While such a correlation seems more likely in studies which focus on a particular doctrinal area and/or a relatively shorter time period, given the range of legal issues contained in my cases and the number of years involved, this difficulty should not manifest here. To be sure, I ran the model grouping by justice and the results matched those reported in this chapter. The only exception was that one variable (rule flexibility) reached statistical significance in this model, but was (again) signed in an unexpected direction.

[106] Fixed effects directly models a case-specific propensity for the outcome and produces a different intercept for each group. Random effects treats the propensity as a random variable that varies according to a (usually) normal distribution.

abounds in the literature (Gelman and Hill 2007; Kennedy 2003; Zorn 2001), but two factors in this project weigh in favor of a random effects approach. First, there are a relatively large number of groups in this dataset (489). Because a fixed effects model would generate a separate intercept for each group (implicitly adding 488 dummy variables), the model would lose 488 degrees of freedom (Kennedy 2003).

Second, and more importantly, my primary interest in this project is not how the justice's rule choices are related within a case (for which fixed effects might be more useful), but rather how they are driven by factors generally exogenous to any intra-court relationships. In other words, though I am aware that the justices' rule choices might be interrelated, I am not interested in studying the variation across cases. Therefore, a generic characterization of the intercept distribution (here, I assume it is normal) seems most appropriate (Zorn 2001). The advantage of this random effects approach is that it explicitly incorporates the correlation among the observations; the disadvantage is that it does not directly model the variation across cases.

A final option would be to employ a full multi-level model (Gelman and Hill 2007).[107] Multi-level models can be appropriate when the data has a hierarchical structure, with both individual and group-level observations. With a multi-level model, for example, there can be one level for the individual justice information and another for the court-level information.[108] This type of model is ideal when the primary treatment is at the group level and the data on the outcome is collected at the individual level and can be particularly useful

[107] It should be noted that Gelman and Hill consider both fixed and random effects to be multi-level models with extreme assumptions. Given that scholarship generally does not classify them as such, I will not do so either.
[108] In implementation, both regressions are conducted simultaneously.

when one is interested in comparing the variation at the individual level with the variation across groups.[109]

In one sense, the dataset for this project does reflect a hierarchical structure – the justices are nested within cases – and several of the independent variables (rule flexibility, rule quality, salience) are constant within each case. On the other hand, because I am primarily interested in the variation in rule choice at the individual level – not the variation in rule choice across different categories of cases – a full multi-level model is not as useful here as it might be for other types of research projects.[110] While future research should explore further the applicability of multi-level models to studies of rule choice, given both the nature of the data and the substantive questions at issue in this project, a logit model with random effects seems most appropriate. The results of that analysis are reported in the following sections.

Results

To assess the hypotheses, I ran the model displayed above. These results are presented in Tables 5E-5G.

The Role of Ideology

To determine whether the ideological proximity of the rule and the justice affected rule choice as predicted by Hypotheses 1 and 1a, I first ran the model on all the cases in the dataset. These results are contained in Table 5E.

[109] Gelman and Hill use the example of testing the effect of city-level policies on the likelihood that individual fathers in those cities will pay their child support.

[110] Bartels (2010) for instance, uses a multi-level model to explore how the role of ideology on voting behavior differs across salient and non-salient cases. While I too have hypotheses that explore the interaction of ideology and rule flexibility with case salience, comparing salient and non-salient (or other types of) cases is not my primary concern.

Because the variable for ideology is interacted with others in the model, the coefficient on the ideological proximity variable (-.135) cannot be interpreted as the unconditional effects of ideological proximity on rule choice (Brambor et. al. 2006); instead, it represents the effect of that variable when the other constituent term – here, salience - is 0. Given that in most cases in the dataset, however, (459/500) are non-salient, it is at least worthy of notice that, although it fails to reach statistical significance, the variable is signed in the expected direction.

When the model is run on inverse and non-inverse rule cases separately, the results shift somewhat. As seen in Table 5F, while the coefficient on the ideological proximity variable is still signed in the expected direction, it continues to lack statistical significance when the model is tested only on inverse-rule cases. In contrast, as seen in Table 5G, the ideological proximity between a justice and rule is more likely to affect rule choice in non-inverse rule cases. The coefficient is signed as expected and reaches statistical significance at the <.01 level, indicating that it is perhaps in cases where the rule and the outcome are not so closely aligned that the ideology of each rule becomes more influential.

To accurately assess the effect of ideology on rule choice, I examined the substantive effects of this variable, using predicted probabilities (Brambor et. al. 2006). To determine how the probability of a vote for a rule would change as the ideological proximity between a justice and the rule grew, I set all independent variables other than ideological proximity at their means (for continuous variables) or their medians (for categorical variables).

TABLE 5E. LOGIT MODEL, PROBABILITY OF VOTING FOR PETITIONER'S RULE (ALL CASES)

Independent Variable	Coefficient	Standard Error
Ideological Proximity	-0.135	.091
Flexibility	-0.258	.296
Quality(Judges)	1.220	1.01
Quality(Lwr Courts)	0.798**	.402
Quality(Briefs)	0.001	.013
Amici Difference	0.124	.084
Amici SG for Petitioner	3.26***	.636
Amici SG for Respondent	-2.33***	.651
Petitioner U.S.	1.13**	.556
Respondent U.S.	-0.760	.508
Circuit Difference	0.135	.083
Outcome Preference	0.772***	.057
Salience	1.05*	.650
Ideological Proximity*Salience	-0.765**	.350
Flexibility*Ideological Distance	-0.098	.214
Flexibility*Salience	-0.603	.965
Flexibility*Ideological Distance*Salience	0.507	.631
Quality(Judges)*Ideological Distance	-1.59**	.654
Quality(Lwr Courts) * Ideological Distance	0.009	.233
Quality (Briefs) * Ideological Distance	0.003	.010
Constant	-0.128	.255
		N=4068

*p-value < .1; ** p-value <.05; ***p-value < .01

TABLE 5F. LOGIT MODEL, PROBABILITY OF VOTING FOR PETITIONER'S RULE (INVERSE RULE CASES)

Independent Variable	Coefficient	Standard Error
Ideological Proximity	-0.011	.109
Quality(Judges)	1.710	1.18
Quality(Lwr Courts)	0.622	.487
Quality(Briefs)	0.000	.020
Amici Difference	0.101	.855
Amici SG for Petitioner	2.55***	.733
Amici SG for Respondent	-2.84***	.797
Petitioner U.S.	1.14**	.631
Respondent U.S.	-0.971**	.587
Circuit Difference	0.014	.114
Outcome Preference	0.849***	.068
Salience	1.68*	.733
Ideological Proximity*Salience	-0.847**	.367
Quality(Judges)*Ideological Distance	-1.44*	.718
Quality(Lwr Courts) * Ideological Distance	0.015	.275
Quality (Briefs) * Ideological Distance	0.002	.017
Constant	-0.151	.289
		N=2750

*p-value < .1; ** p-value <.05; ***p-value < .01

I then calculated the probability that a justice would vote for the Petitioner as the ideological proximity of the Petitioner's rule rose from its minimum to its maximum. (Recall that as the Petitioner's rule, relative to the Respondent's rule, becomes more and more distant, the ideological proximity variable becomes more and more positive.)

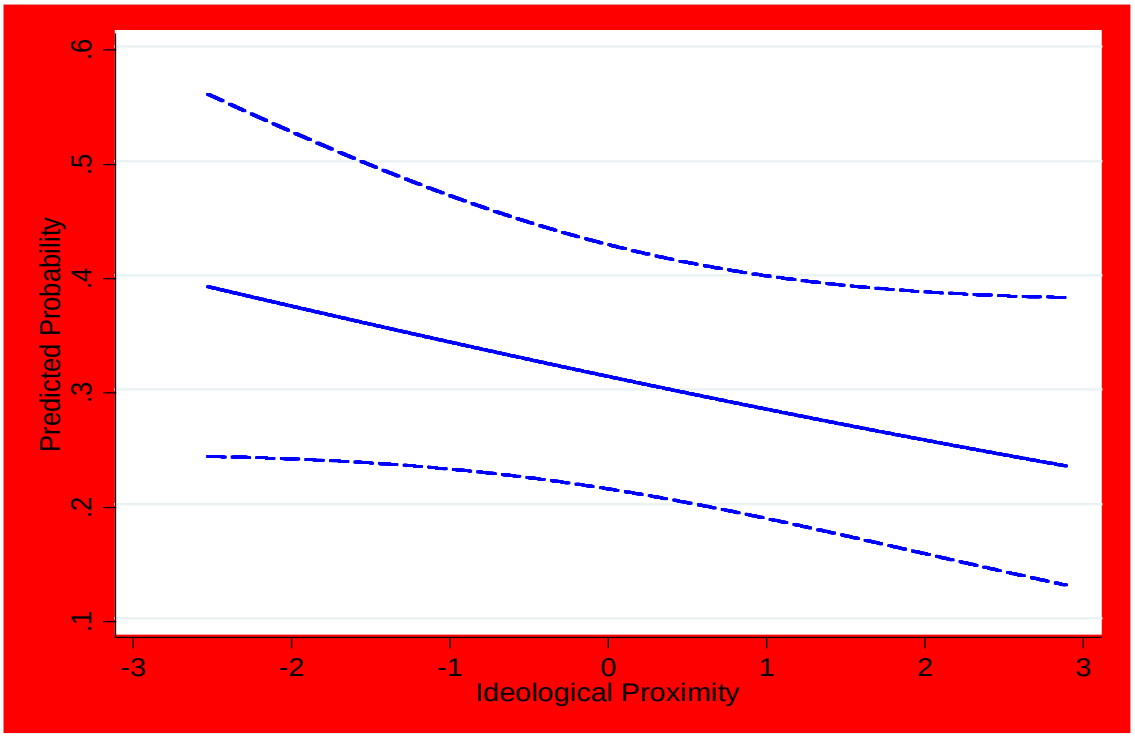
TABLE 5G. LOGIT MODEL, PROBABILITY OF VOTING FOR PETITIONER'S RULE (NON-INVERSE RULE CASES)

Independent Variable	Coefficient	Standard Error
Ideological Proximity	-0.432***	.166
Flexibility	-0.231	.335
Quality(Judges)	-0.190	1.97
Quality(Lwr Courts)	1.388*	.751
Quality(Briefs)	0.010	.019
Amici Difference	0.484*	.278
Amici SG for Petitioner	5.585***	1.42
Amici SG for Respondent	-1.441	1.99
Petitioner U.S.	1.474	1.10
Respondent U.S.	0.031	.994
Circuit Difference	0.286**	.137
Outcome Preference	0.572***	.106
Salience	-1.266	1.42
Ideological Proximity*Salience	-1.555	1.68
Flexibility*Ideological Distance	-0.114	.219
Flexibility*Salience	-0.670	1.13
Flexibility*Ideological Distance*Salience	0.385	.687
Quality(Judges)*Ideological Distance	-1.793	1.33
Quality(Lwr Courts) * Ideological Distance	-0.202	.457
Quality (Briefs) * Ideological Distance	0.007	.013
Constant	-0.184	.524
		N=1318

*p-value < .1; ** p-value <.05; ***p-value < .01

Figure 5A displays this result for all cases in the dataset. The solid line represents the predicted probabilities, while the dotted lines represent the 95% confidence intervals around those estimates.

FIGURE 5A. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS IDEOLOGICAL PROXIMITY SHIFTS (ALL CASES)



As seen in the figure, changes in ideological proximity can have an effect on the probability that the Petitioner's rule is chosen: as the variable moves from its minimum of -2.74 (when the justice and Petitioner's rule are ideologically aligned) to its maximum of +3 (when the justice and the Petitioner's rule are ideologically distant), the predicted probability of selecting the Petitioner's rule decreases from around 39% to 23%, a drop of 16 percentage points. Moreover, even when the confidence intervals are at their widest point, a decline in probability still appears. For instance, the lower bound ranges from approximately .24 when ideological proximity is at its minimum to .14 when it is at its maximum, a decline of 10 percentage points. It appears, therefore, that just as ideology is a critical factor in which party a justice favors (Bartels 2010; Segal and Spaeth 2002), it is also important in predicting which rule a justice will select, as suggested in Hypothesis 1.

The Role of Ideology – By Case Type

Given the differing model results for inverse and non-inverse rule cases, as well as the evidence above (Table 5B-5C) that the justice's preference for a rule apart from its outcome may vary across case type, I then explored the effect of ideology on inverse and non-inverse rule cases. To do this, I first interacted the ideological proximity variable with the dummy variable that indicates whether the cases involves an inverse rule (=1) or not (=0) and then re-ran the model with the interaction term included. Table 5H displays these results.[111]

TABLE 5H. LOGIT MODEL, PROBABILITY OF VOTING FOR PETITIONER'S RULE, INTERACTING IDEOLOGICAL PROXIMITY AND CASE TYPE

Independent Variable	Coefficient	Standard Error
Ideological Proximity	-3.73**	1.65
Case Type	-.352	.382
Ideological Proximity*Case Type	.340*	.196
		N=4068

*p-value < .1; ** p-value <.05; ***p-value < .01

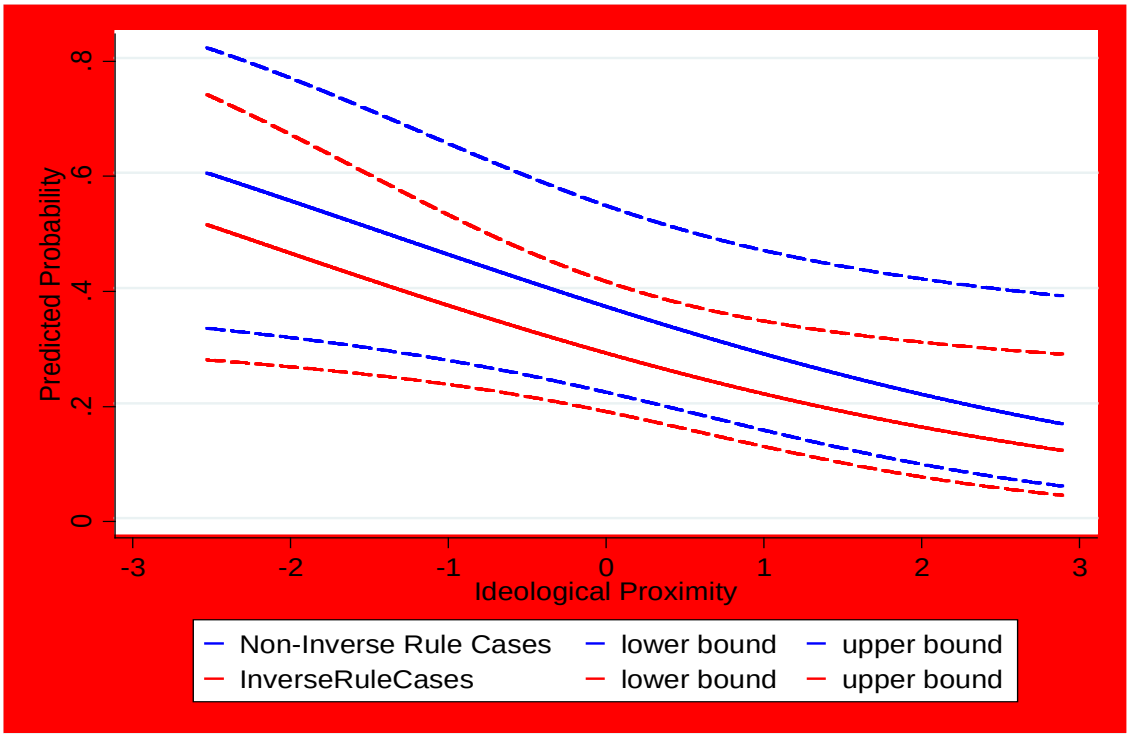
Though it is standard practice to display regression results for interaction terms, caution is warranted before drawing any conclusions about the hypotheses from these results. More precisely, in non-linear models, the sign, size, and statistical significance on the coefficient for an interaction term should not be interpreted as a measure of the effect of the interaction term (Berry et. al. 2010; Brambor et. al. 2006; Ai and Norton 2003). Rather, one must examine the substantive impact to assess whether and how the interaction influences the dependent variable (Kam and Franzese 2006).

To do this, I again employ predicted probabilities, setting all other independent variables at their respective means/medians, and varying the ideological proximity variable

[111] For brevity and ease of interpretation, I include only the results for the interaction variable and its constituent terms.

from its minimum to its maximum. Figure 5B displays these results. The x-axis represents the ideological proximity between the justice and Petitioner's rule, relative to Respondent's rule, with smaller values indicating greater proximity and larger values indicating less proximity. The probability in inverse rule cases is colored red; the probability in non-inverse rule cases is colored blue.

FIGURE 5B. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, INTERACTION OF IDEOLOGICAL PROXIMITY AND CASE TYPE



From the predicted probabilities alone, it appears that ideological proximity may play a generally stronger role in non-inverse rule cases, as expected. When that variable is at its maximum, the predicted probability of a vote for Petitioner's rule is approximately 60%, as compared to a probability of around 52% for inverse rule cases; similarly, when the variable is at its minimum, the probabilities are approximately 19% and 15%, respectively. However, the effect of a change in ideological proximity does not appear to differ by case type, with the slope of each line declining at a similar rate. Given this result and the width of the confidence

intervals, no firm conclusion can be drawn here as to whether ideology does in fact have a greater influence in certain types of cases.

Because of the findings in Figure 5B and Table 5H, it remains somewhat unclear whether and how ideological proximity between a justice and a rule varies across inverse and non-inverse rule case, but the evidence does warrant some explanation and further study. Though any such difference by rule type was not predicted originally by the model or my theory, it could be that the rule and the outcome are so closely aligned in inverse rule cases that a justice need not consider the ideology of the rule as closely, if at all. Instead, the justice simply could look to the ideology of the party suggesting the rule to learn about ideological tenor of the rule. As a result, because the justice may have garnered the necessary information from the identity of the litigant, the ideology of the rule itself would have less of an impact on rule choice.

In contrast, in a non-inverse rule case, the ideology of the party and of the rule can be much more divergent, and may require a justice to attend more carefully to the ideological nature of the rule itself. The "cognitive shortcut" from outcome to rule may be impossible in these cases and the justice has to pay more attention to - and therefore may be more influenced by - the ideological tenor of the rule itself. This, of course, is merely speculative, but the results here suggest that scholars may wish to add another category of cases (those involving inverse and non-inverse rules) to their studies of how case-level characteristics mitigate the impact of ideology on judicial decision-making (Bartels 2010; Unah and Hancock 2006).

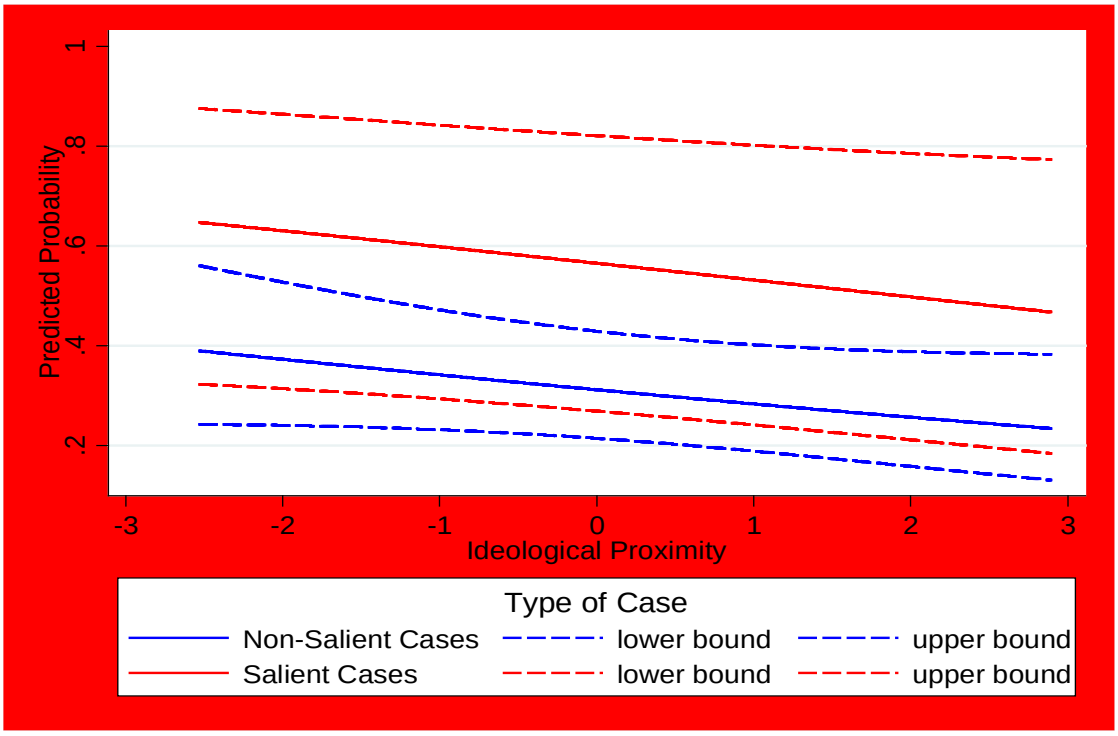
The Role of Ideology – Case Salience

In contrast, I did articulate specific *ex ante* predictions about how ideology might differ across another case type - salient and non-salient cases. In particular, Hypothesis 1(a) suggests that the impact of the ideological proximity between the justice and the rule should be greater in salient cases. The regression coefficient and p-value associated with the interaction (Table 5E) suggest the hypothesis may be correct, but the predicted probabilities fail to confirm this result.

Figure 5C represents the change in the probability of voting for the Petitioner's rule, as ideological proximity shifts, across salient and non-salient cases. The x-axis measures the ideological proximity between the justice and the Petitioner's rule, relative to the Respondent's rule. Smaller values indicate greater proximity; larger values indicate declining proximity. The Y-axis displays the predicted probability of a vote for the Petitioner's rule as ideological proximity rises from its minimum to its maximum. The solid lines represent the predicted probabilities and the dotted lines provide the confidence intervals. The probability in salient cases is colored red; the probability in non-salient cases is colored blue.

As above, while there is some difference in the predicted probabilities across salient and non-salient cases, there does not appear to be any significant difference in how a change in ideological proximity influences rule choice in the two case types. There is, as expected, a slight decline in the probability of voting for Petitioner's rule as the ideological proximity between a justice and that rule increases, with a decline from approximately .65 to .55 for salient cases and a decline from approximately .39 to .24 for non-salient cases, but the width of the confidence intervals again prevent any claim that these differences are statistically significant. This result, in other words, fails to confirm Hypotheses 1(a).

FIGURE 5C. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, INTERACTION OF IDEOLOGICAL PROXIMITY AND CASE SALIENCE



The Role of Flexibility

The results also do not support Hypothesis 2, which proposes that a justice should be more likely to favor a rule as it, relative to the other rule, become more rigid. As seen in Table 5E, the coefficient on the flexibility variable is signed in the wrong direction and fails to reach statistical significance. Because the majority of cases were inverse rule cases, in which the flexibility variable was constant, I also ran the model on only non-inverse rule case. These results, displayed in Table 5G, confirm those of Table 5E, with a coefficient signed in the wrong direction that fails to reach statistical significance.

Again, however, little can be inferred from these coefficients, as they represent the impact of flexibility only when the other variables with which it is interacted (ideological

distance and salience) are 0.[112] I therefore examined the substantive significance of this variable on both all cases and those involving non-inverse rules, again using predicted probabilities. Figures 5D and 5E illustrate the results. The x-axis displays the change in rule flexibility as it rises from its minimum to its maximum, with negative numbers indicating Petitioner's rule was more flexible than Respondent's and positive numbers indicating Respondent's rule was more flexible than Petitioner's. The y-axis displays the predicted probability of a vote for Petitioner's rule. The solid lines represent the predicted probabilities and the dotted lines represent the 95% confidence interval.

In looking at the predicted probabilities, it seems that rule flexibility does have a slight impact on rule choice, though not in the direction suggested by Hypothesis 2. Instead, it appears that as Petitioner's rule becomes less flexible relative to Respondent's, the probability that it is selected declines, from around 48% to 18%, or 30 percentage points.

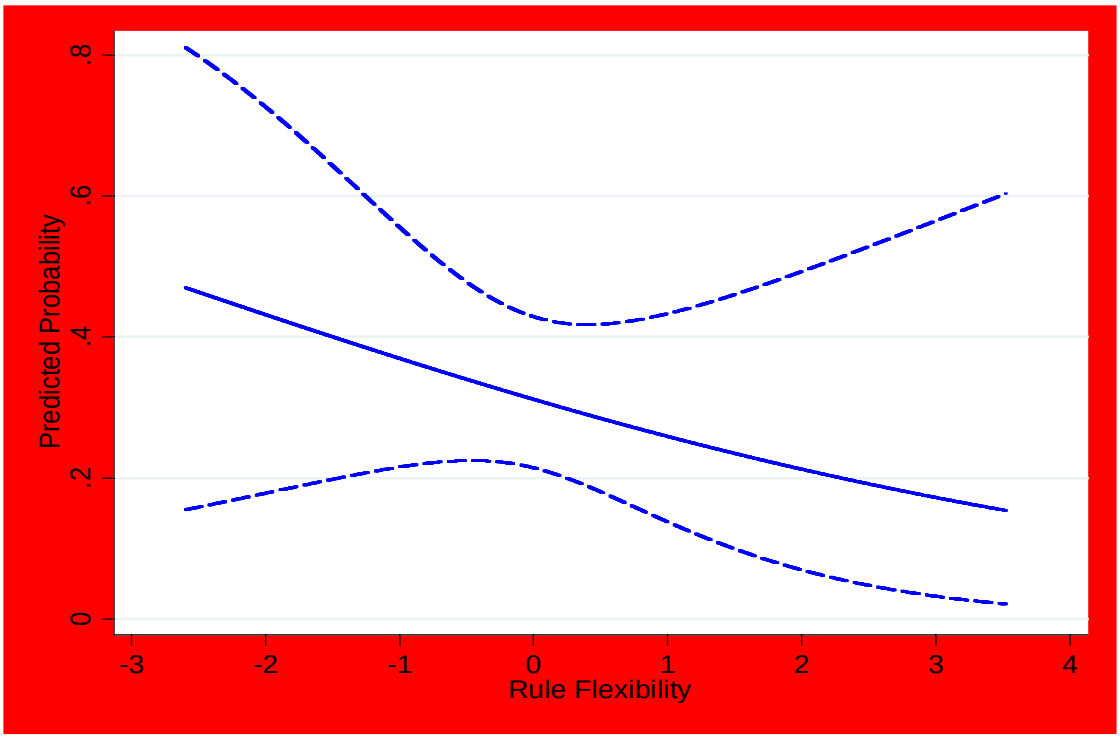
These results, moreover, do not differ significantly when the probabilities are calculated for non-inverse rule cases, as seen in Figure 5E, where the probability drops from approximately 50% to 20%, another decline of 30 percentage points. Though the confidence intervals in both figures are large, they confirm this finding. More specifically, even when the confidence interval is at its widest point, the predicted probability of selecting Petitioner's rule still declines as the flexibility variable rises, albeit very slightly.

It appears, therefore, that rule flexibility does not affect rule choice in the manner hypothesized in this dissertation. More study is needed, of course, but it seems from these results that justices are not more likely to select a rule as it becomes more rigid; in fact, if anything, they may be more drawn to those rules which provide the lower courts with greater

[112] While there may be some substantive meaning when salience = 0, that there would 0 ideological distance between a justice and the lower courts is less sensible, reinforcing the need to explore the results further.

leeway. Though this finding runs counter to my argument, it does confirm one suggestion in the literature that justices may wish to employ vague promulgations to disguise non-compliance (Staton and Vanberg 2006).[113]

FIGURE 5D. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS (ALL CASES)

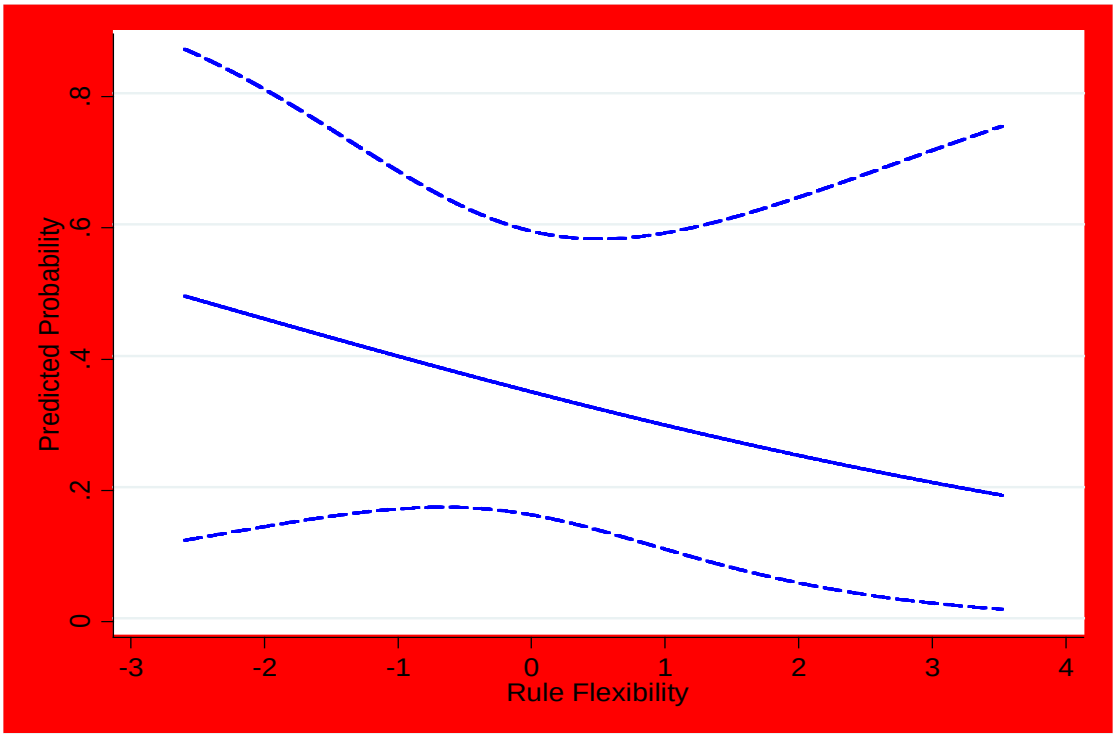


The Role of Flexibility – Ideological Distance

Hypothesis 2(a) proposed that the impact of flexibility on rule choice would be affected by the ideological distance between the justice and the lower courts, with justices more likely to prefer less flexible rules as this distance grows. Tables 5E and 5F contain the coefficient on the variable which captures this interaction. As above, the coefficient is signed in an unexpected direction and fails to reach statistical significance.

[113] Staton and Vanberg specify conditions under which this phenomenon should appear, primarily involving the position of the legislature and the attention of the general public. I hope to incorporate these conditions into my own study of rule choice in future work.

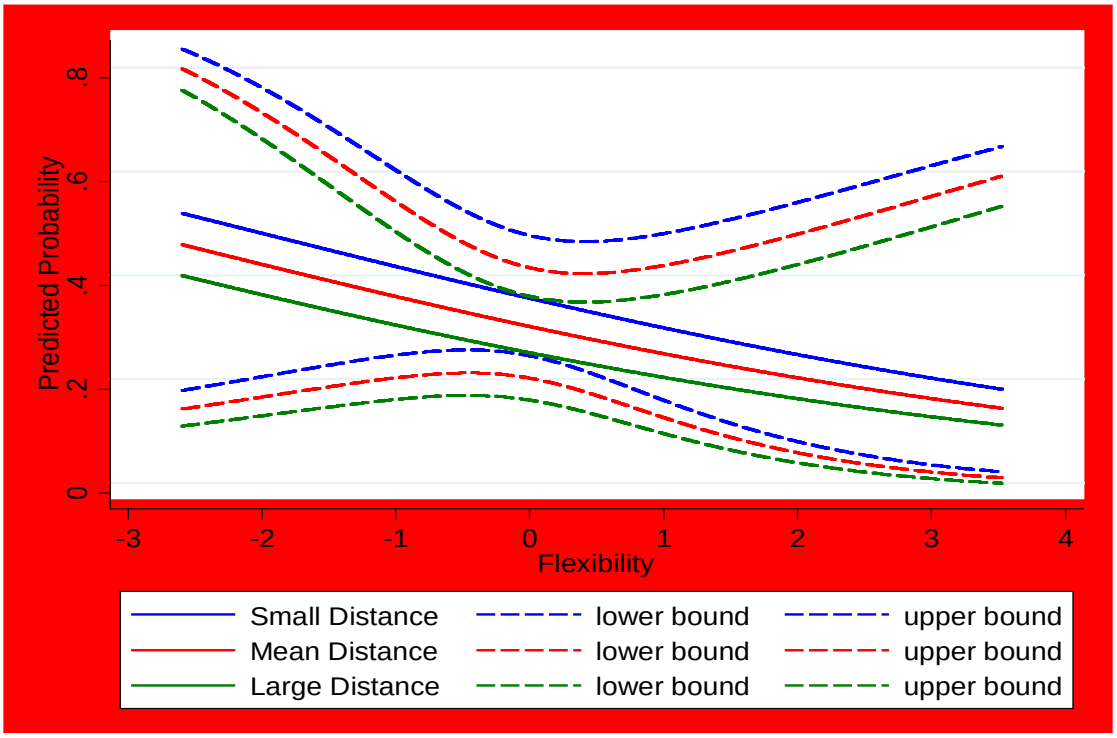
FIGURE 5E. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS (NON-INVERSE RULE CASES)



However, as also noted above, the statistical significance (or lack thereof) on interaction terms does not mean further analysis should not be pursued. More specifically, the lack of significance on an interaction term indicates only that the slopes of the interaction and non-interaction terms did not differ from zero, not that they did not differ from each other (Brambor et. al. 2006; see also Braumoeller 2004). I therefore calculated the predicted probabilities as the ideological distance variable moves from its minimum to its maximum.

To calculate the effect of rule flexibility as this distance rises, I set the latter variable to three reasonable values: small distance (1 standard deviation below the mean), moderate distance (the mean), and large distance (one standard deviation above the mean). I held all other independent variables at their respective means/medians. Figure 5F contains the results.

FIGURE 5F. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS, BY DISTANCE BETWEEN JUSTICE AND LOWER COURTS



As seen in the figure, there is little difference in the effect of rule flexibility across the three categories of ideological distance. Though the predicted probabilities generally decline as the flexibility variable rises from its minimum to maximum (indicating again that justices actually may be more drawn to more flexible rules), there generally is no difference between the probabilities, whether that distance is small, moderate, or large.

Given all the results for this interaction, it therefore is unlikely that rule flexibility has the predicted impact as the justice and the lower courts diverge ideologically. The findings above and the descriptive statistics in Chapter 4 have already indicated that, generally speaking, flexibility does not have the predicted effect on rule choice. The results here simply confirm that, at least in cases of inter-circuit conflict, any concern for flexibility does not manifest itself as the lower courts become more ideologically distant from the justices.

The Role of Flexibility – Case Salience

A similar finding appears when flexibility is interacted with case salience. In Hypotheses 2(b), I theorized that flexibility would have a greater effect in salient cases, such that the less flexible the Petitioner's rule relative to Respondent's, the more likely it was to be chosen. The result on this variable in Tables 5E and 5G suggests that no solid assessment of Hypotheses 2(b) can be drawn; the predicted probabilities, displayed in Figure 5G, confirm this.

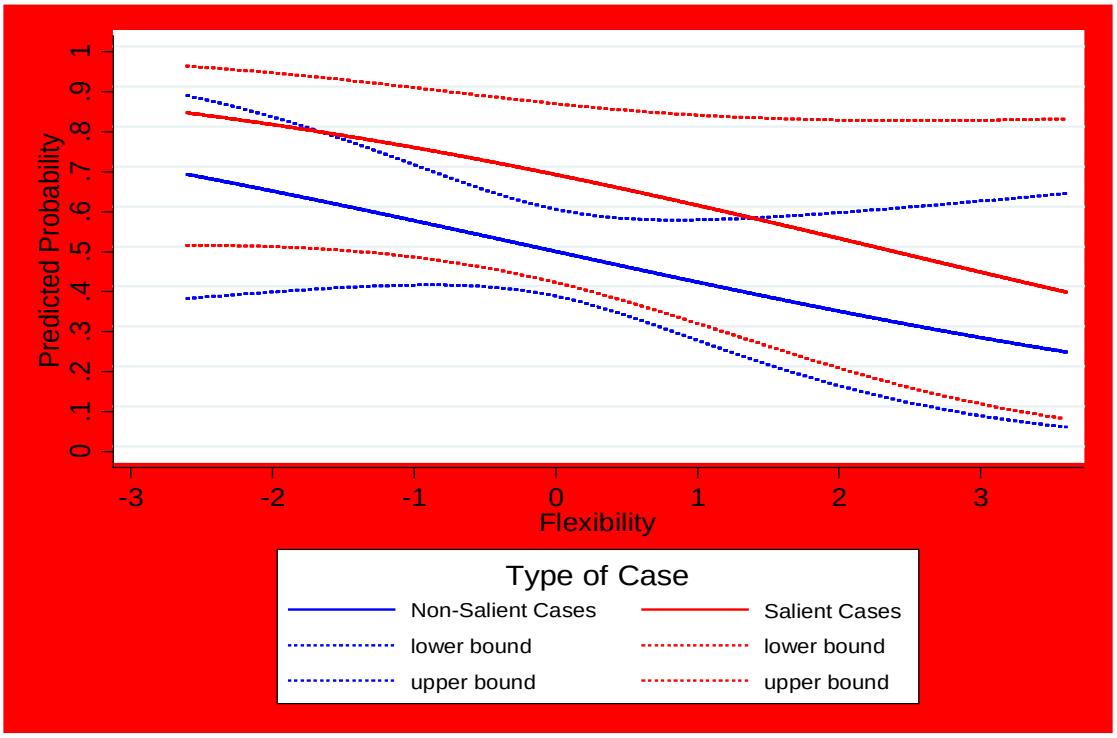
These results indicate that the effect of flexibility does not differ between salient and non-salient cases. Though the probability of voting for the Petitioner is generally higher in salient cases, the width of the confidence intervals prohibit any firm inferences. More importantly, there appears to be no difference in how the probability changes between the two case types, as the flexibility variables rises from its minimum to maximum. In short, Hypotheses 2(b) is not supported by the data.

The Role of Flexibility - Ideological Distance & Case Salience

In the final hypothesis on rule flexibility (Hypothesis 2(c)), I posited that in salient cases, the greater the ideological distance between the justice and lower courts, the greater the effect of rule flexibility. The coefficient results in Tables 5E and 5G suggest no such relationship and the calculation of substantive effects confirm this.[114] In Figures 5H and 5I, I display the predicted probabilities of rule flexibility as the distance between the justice and lower courts rises from small, to moderate, to large, for both non-salient and salient cases.

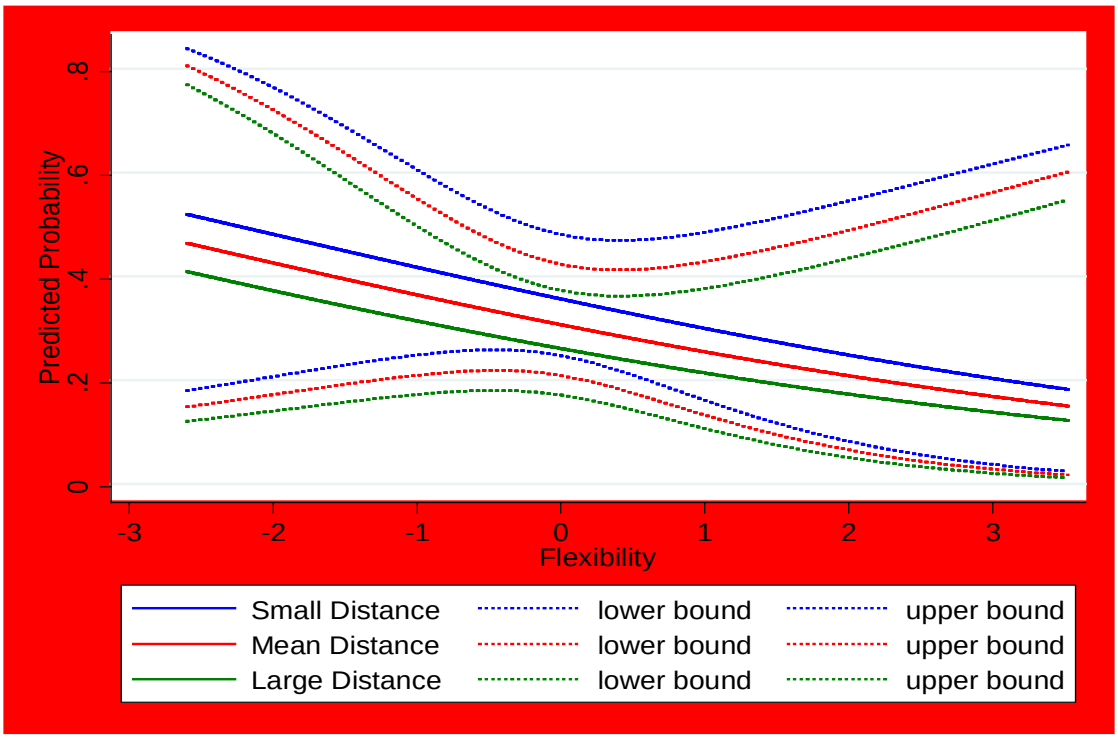
[114] While this hypothesis does require a triple interaction term (distance*flexibility*salience), the calculation of the substantive effects for such a higher-order variable is done just as with a lower-level interaction term, with one variable set to vary and the remaining variable(s) held constant (Kam and Franzese 2006).

FIGURE 5G. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS, SALIENT AND NON-SALIENT CASES



As seen in these figures, the evidence again fails to support the hypothesis. The probabilities generally decline as the flexibility variable increases, indicating again that a justice may be less, not more drawn to the less flexible rule, but the width of the confidence intervals indicates that this statement is extremely tentative. Regarding the interaction, there does not appear to be any marked difference between the probabilities in salient and non-salient cases. While the overall probability of voting for the Petitioner is higher in salient cases, the rate of decline in those probabilities is generally consistent across both case types and all categories of ideological distance. Given this and the model results, it is reasonable to assert that a justice's preferences over rule flexibility given the ideological location of the lower courts probably do not differ systematically between salient and non-salient cases.

FIGURE 5H. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS, BY DISTANCE BETWEEN JUSTICE AND LOWER COURTS, NON-SALIENT CASES



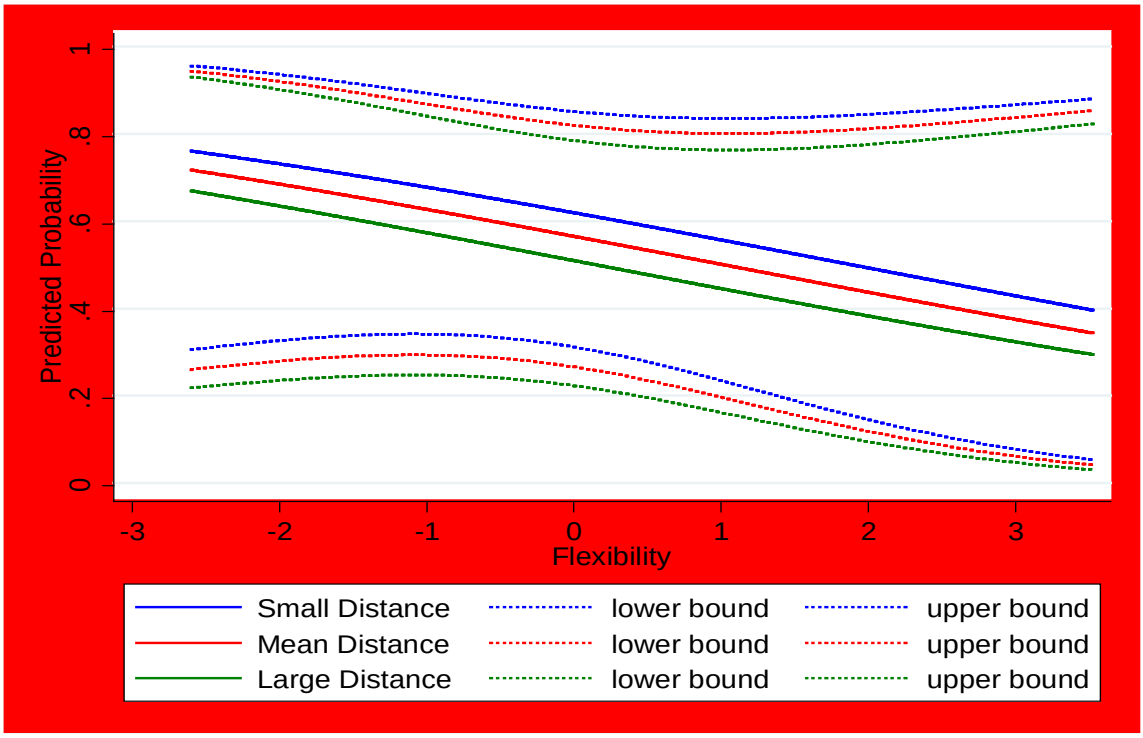
The Role of Quality

Three variables – the division among the lower court judges involved in the circuit conflict, and the treatment of each rule by other courts and litigants prior to the Court ruling – were used to assess Hypothesis 3.[115] As seen in Table 5E, though each coefficient is signed in the expected direction, only the treatment of the rule by lower courts reaches statistical significance.[116]

[115] As noted in Chapter 3, a test for multicollinearity among these three variables indicated this was not of concern. The largest correlation was between the treatment of the rule by the lower courts and the treatment of the rule by the litigants, at .1. This absence of significant correlation permits the utilization of all three variables in the model, but may indicate either the absence of an underlying dimension of quality or the failure of these measures to tap into that dimension.

[116] This variable loses its significance when the model is tested on non-inverse rule cases (Table 5F).

FIGURE 5I. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE FLEXIBILITY SHIFTS, BY DISTANCE BETWEEN JUSTICE AND LOWER COURTS, SALIENT CASES



While this would suggest that a split among lower court judges and how litigants respond to a rule does not affect rule choice, and that a whether other circuit courts treated a rule favorably might, these effects are conditional on the other variables with which they are interacted being zero. I again employ predicted probabilities to assess the magnitude of the influence of these variables on rule choice.

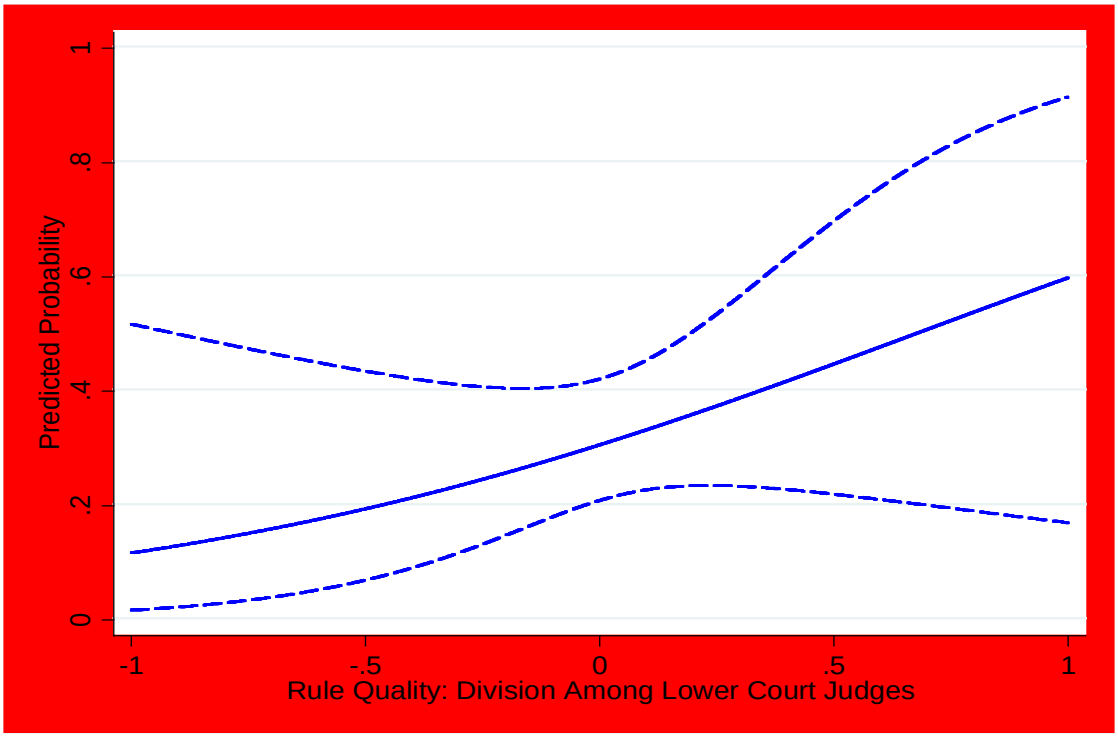
I first calculated the predicted probabilities for the variable measuring the division among the lower court judges. Recall that this variable captures the extent to which the circuit courts which have ruled in favor of a rule are divided within their own panels, as compared to the division in those courts which have ruled in favor of the competing rule. With the other independent variables set at their mean or median values, I calculated the probability that a justice would vote for the Petitioner's rule as the division among judges supporting Petitioner's rule, relative to the divisions among the judges supporting

Respondent's rule, became smaller. Figure 5J displays the result. The x-axis contains the values on the quality variable, with negative numbers indicating that judges were more divided over Petitioner's rule than over Respondent's rule and positive numbers indicating that judges were less divided over Petitioner's rule than over Respondent's rule. The y-axis display the shift in the probability of a vote for the Petitioner's rule, as the quality variable rises from its minimum to maximum.

As seen by the figure, the probability that a justice will select Petitioner's rule does rise as the quality measures becomes increasingly positive, from around 16% when the lower court judges supporting Petitioner's rule are most divided (relative to the division over Respondent's rule) to around 60% when they are least divided (relative to the division Respondent's rule). The confidence intervals are wide, indicating a great deal of uncertainty around this change in probabilities, but even they suggest some increasing probability as the rule quality variable rises. For instance, at the very least, the probability rises from just above 0 when the quality variable is at its minimum to .18 when it is at its maximum. Given the general lack of variation in this independent variable (see Appendix B), even such a relatively small percentage change is quite notable.

Admittedly, it was rare that the lower court judges were extremely divided. Though the variable itself ranges from -1 to 1, over 85% of the observations fell within the range of -.33 to .33. I therefore calculated the predicted probability of a vote for the Petitioner's rule, as the division among lower courts ranged between these values. Figure 5K illustrates these results.

FIGURE 5J. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS DIVISION AMONG LOWER COURT JUDGES SHIFTS

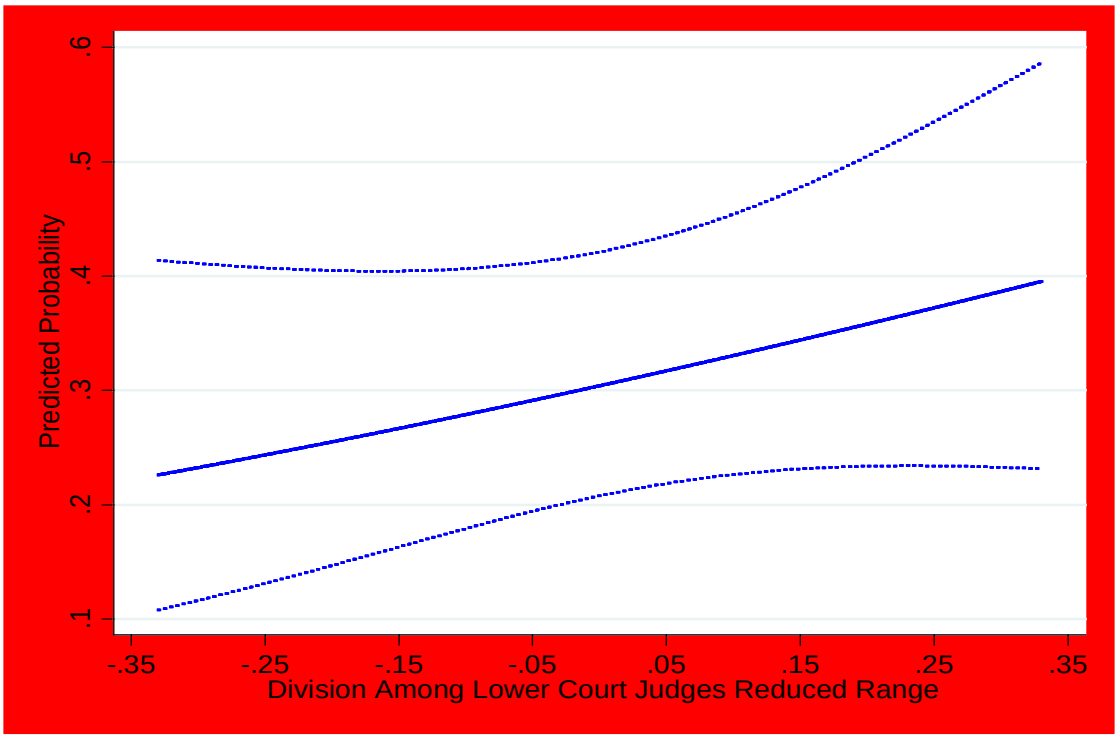


Once again, the justices become more likely to vote for a rule when it, relative to the other rule, has generated less division among lower court judges. More precisely, as this quality variable rises from the minimum to the maximum, the probability shifts from approximately 22% to 39%, a difference of 17 percentage points. It appears then, that as suggested in Hypotheses 3, as the quality of Petitioner's rule relative to Respondent's rule rises, so too does the likelihood that rule will be favored by a justice, even when the difference in quality is not that striking.

The evidence provides even stronger support for Hypothesis 3 when the second rule quality variable - treatment of the rule by the lower courts - is examined. This variable measures the extent to which lower courts have responded positively and negatively to each

rule prior to the Court ruling.[117] The variable's statistical significance (Table 5E) indicates that this variable may be a strong predictor of rule choice, but I generated predicted probabilities to confirm.

FIGURE 5K. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS DIVISION AMONG LOWER COURT JUDGES SHIFTS, REDUCED RANGE



With all other independent variables again set at their mean or median values, I calculated the probability that a justice would vote for the Petitioner's rule as the treatment of that rule, relative to the treatment of the Respondent's rule, became increasingly positive. Figure 5L displays this result. The x-axis contains the values on the treatment variable, with negative numbers indicating that lower courts were less favorable to Petitioner's rule than Respondent's rule and positive numbers indicating that lower courts were more favorable to

[117] Recall that this is measured by evaluating how other lower courts treated each circuit case involved in the conflict before the Supreme Court resolved the split. Using KeyCite in Westlaw, the assistants recorded how many cases treated the circuit case positively and how many treated it negatively. I calculated the ratio of positive citations to total citations for each and then took the difference in the values for the Petitioner and Respondents' rules.

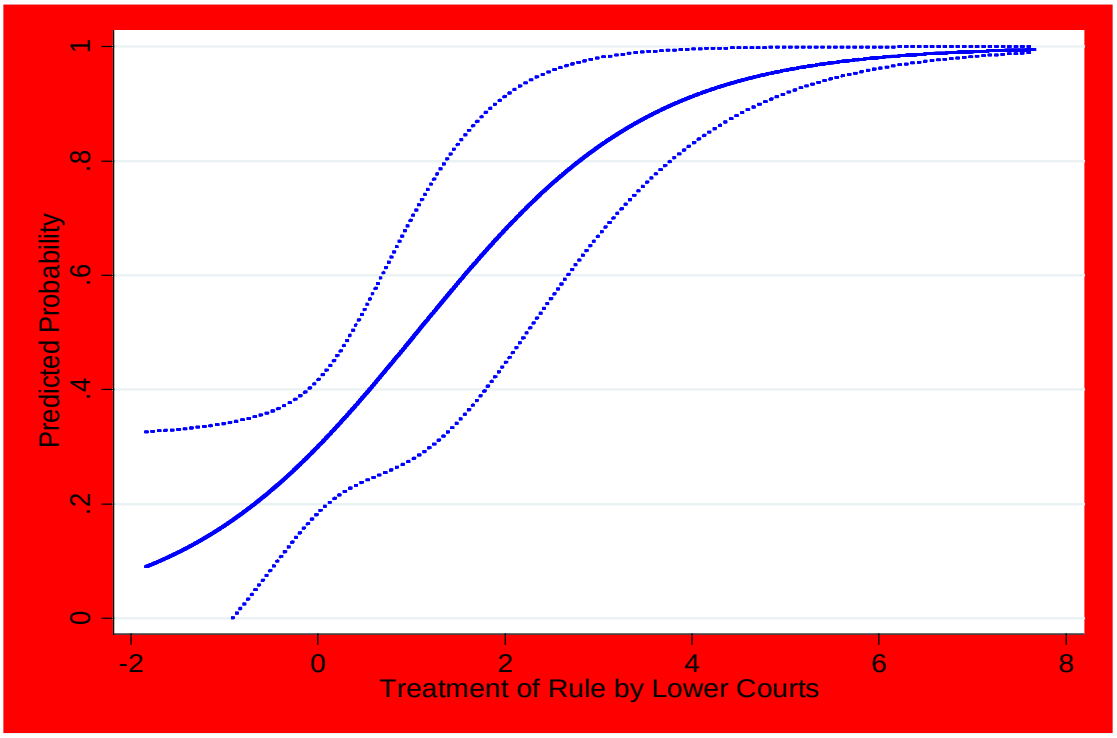
Petitioner's rule than Respondent's rule. The y-axis display the shift in the probability of a vote for the Petitioner's rule, as the treatment variable rises from its minimum to maximum.

The figure also confirms Hypothesis 3: a justice is more likely to vote for Petitioner's rule as its treatment by lower courts improves. Moreover, this effect can be quite large. The probability shifts from almost 10% when the treatment variable is at is minimum to approximately 98% when it is at its largest, an increase of almost 78 percentage points. This suggests that when Petitioner's rule has a solid advantage in terms of how lower courts have responded to the rule prior to its appearance in the Supreme Court, it is almost always selected.

As with division among lower court judges, the imbalances of rule treatment displayed at the extremes of the x-axis of this graph were rare in the data: there were only 16 cases in which Petitioner's rule had a score of +1 or better and 9 cases where Petitioner's rule had a score of less than -1. Indeed, 93% of the observations fell within a -1 to 1 range. Nonetheless, even at these values, the probability of selecting Petitioner's rule still rises with its quality. To illustrate this, Figure 5M contains the change in predicted probabilities when the lower court treatment variable ranges from -1 to 1.

Again, as the values for Petitioner's rule improve, so too does the probability that rule is adopted by a justice. When the Respondent's rule has received more favorable treatment in the lower courts, the probability of selecting Petitioner's rule is around 18%; by the time Petitioner's rule has that same score, the probability of its selection has risen to 49%, an increase of 31 percentage points. This finding confirms that even when neither rule has a particularly strong advantage in how lower courts have responded to it, the difference in that response can impact rule choice.

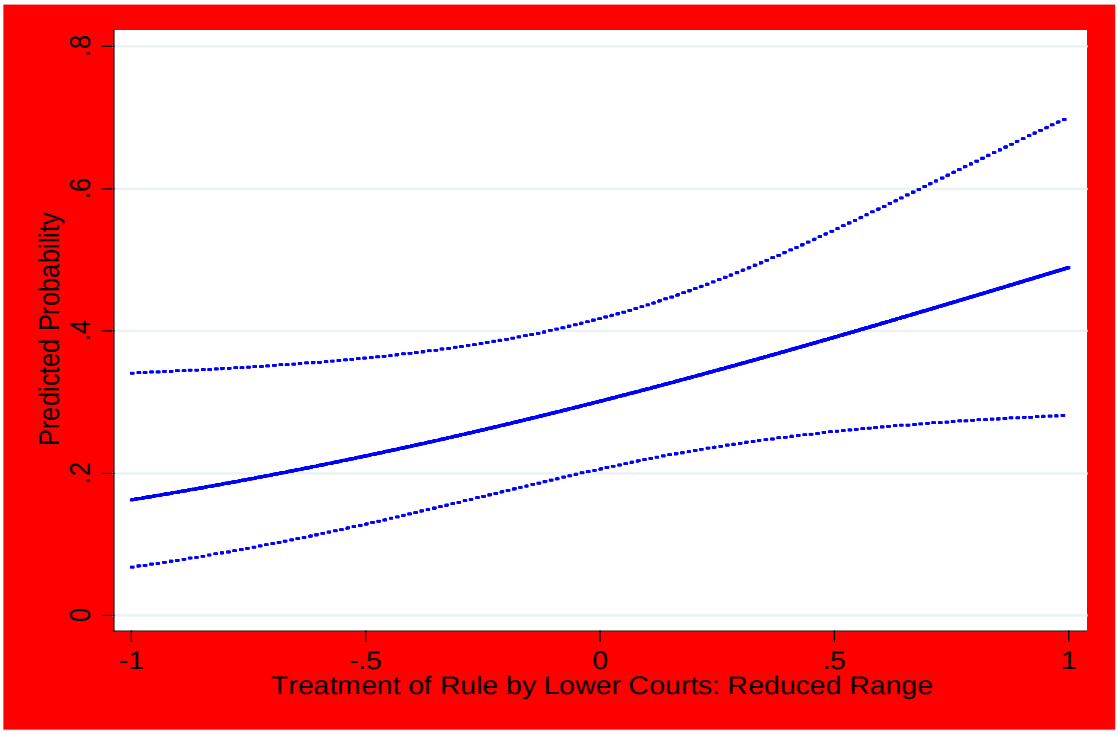
FIGURE 5L. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS TREATMENT BY LOWER COURT SHIFTS



Finally, I examined the predicted probabilities for the third measure of rule quality – how litigants have responded to a rule prior to the Court decision. The hypothesis predicted that as litigants cited Petitioner's rule more often than Respondent's in their own appellate filings, Petitioner's rule was more likely to be chosen. The results on the coefficient for this variable in Table 5E suggest the hypothesis is not well-supported; the predicted probabilities validate this finding.

Figure 5N illustrates these predicted probabilities. The x-axis contains the values on the quality variable, with negative numbers indicating that litigants cited Petitioner's rule less than Respondent's and positive numbers indicating the reverse. The y-axis display the shift in the predicted probability of a vote for the Petitioner's rule, as the litigant response variable rises from its minimum to maximum.

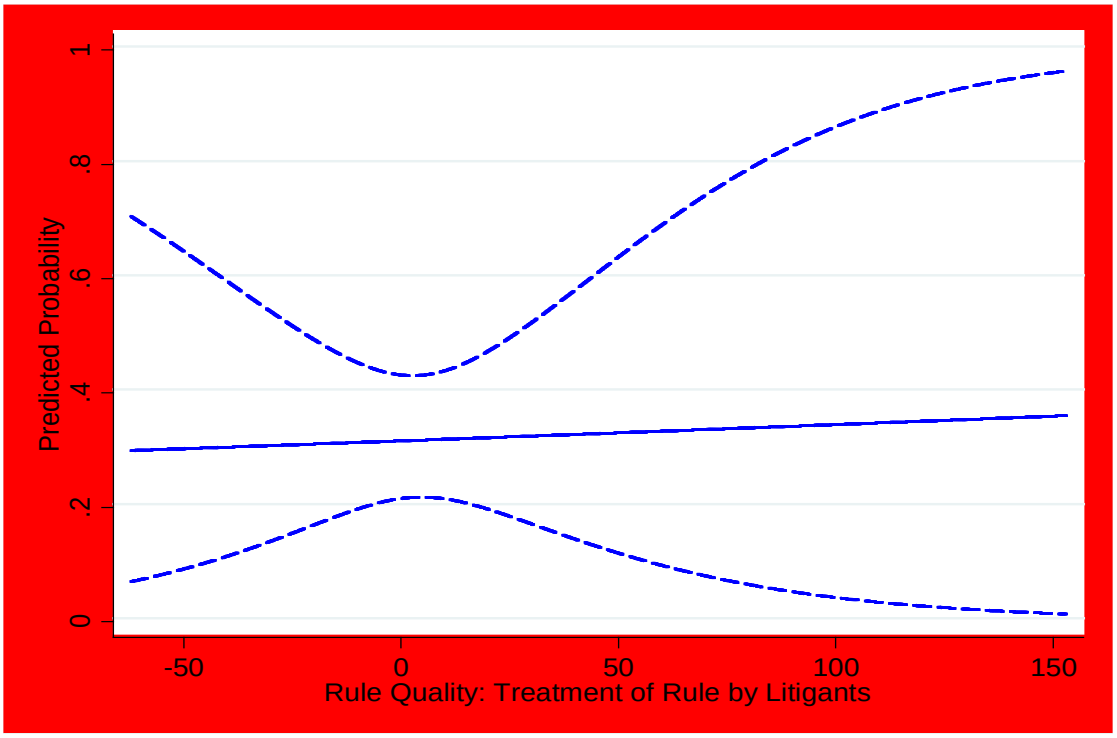
FIGURE 5M. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS TREATMENT BY LOWER COURT SHIFTS, REDUCED RANGE



The values displayed in the figure confirm that how litigants responded to a rule prior to the Court ruling has little impact on the probability that rule is selected. The predicted probabilities rise very slightly as the quality variable moves from its minimum to its maximum, but given the width of the confidence intervals, no conclusion about this shift can be drawn.[118] Along with the null result in the model, the data therefore indicate that this variable has no systematic influence on rule choice. Whether litigants cited one rule more than another in their own briefs seems, in other words, to make very little difference to the justices of the U.S. Supreme Court.

[118] In fact, the lower bound indicates that justices might actually be less, not more drawn to rules that have received more favorable treatment by litigants.

FIGURE 5N. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS TREATMENT BY LITIGANTS SHIFTS



Rule Quality and Ideological Distance

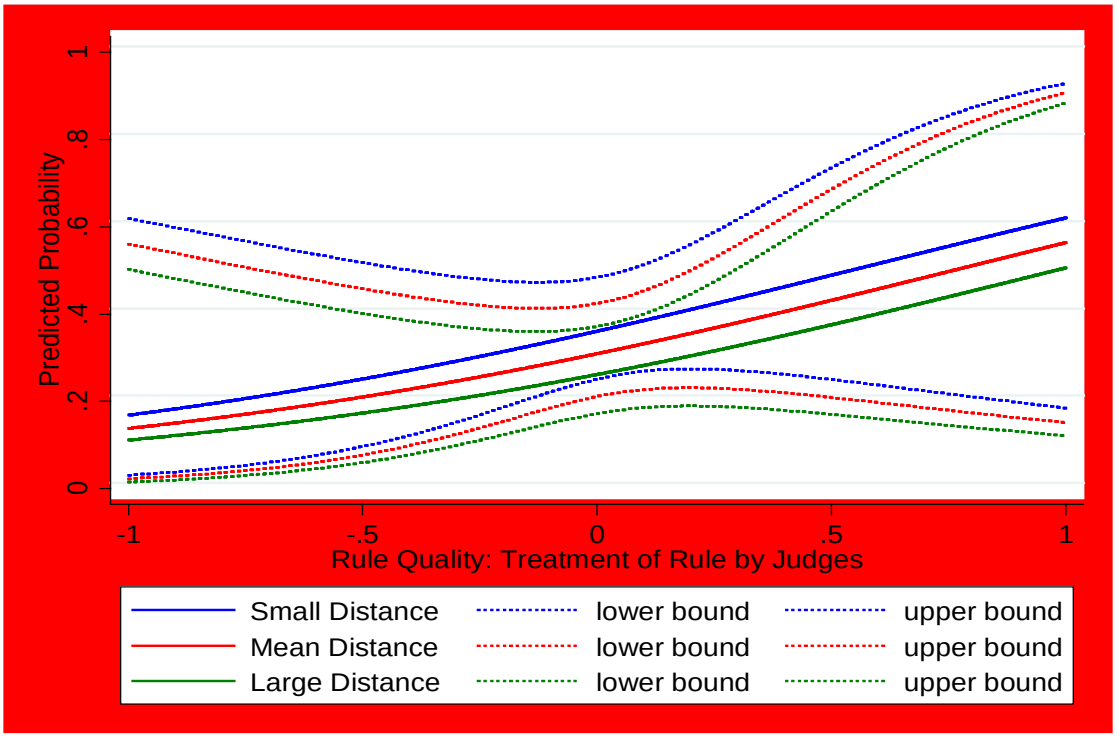
In the final hypothesis, I posited that the impact of a rule's quality would grow as the distance between the justice and the lower courts increased. Hypothesis 3(a) proposed that, to communicate preferences more clearly and enhance compliance, a justice might wish to adopt the higher quality rule as the lower courts diverged. Here I assess that hypothesis with each of the three measures of rule quality, setting the ideological distance variable to small (1 standard deviation below the mean), moderate (at the mean) and large values (1 standard deviation above the mean). In the model results (Table 5E), the variable interacting the division among lower court judges and ideological distance was significant, but the other two interactions were not. Again, however, testing the substantive impact of an interaction term is required before any inferences can be drawn.

I first generated the predicted probabilities for the quality measure involving the division among lower court judges. Figure 5O illustrates these results. The x-axis displays the measure of rule quality: the treatment of the rule by lower court judges involved in the circuit split. The y-axis displays the probability that the justice will select the rule of the Petitioner. The interior lines display the change in probability across three categories of distance to lower courts - small, moderate, and large.

With this first measure of rule quality, the results do not support Hypothesis 3(a). The probability of voting for the Petitioner's rule does rise as the division among lower court judges decreases, indicating again that this variable exerts the expected effect, but there is no difference in the effect across the three categories of ideological distance. Whether the lower courts are ideologically proximate or distant from the justices, the impact of the division among lower court judges remains generally consistent. These findings indicate, therefore, that while justices do seem to attend to the extent of the division among lower court judges in making their rule selections, that attention does not change in any systematic way as the lower courts diverge from the justices' own ideological preferences.

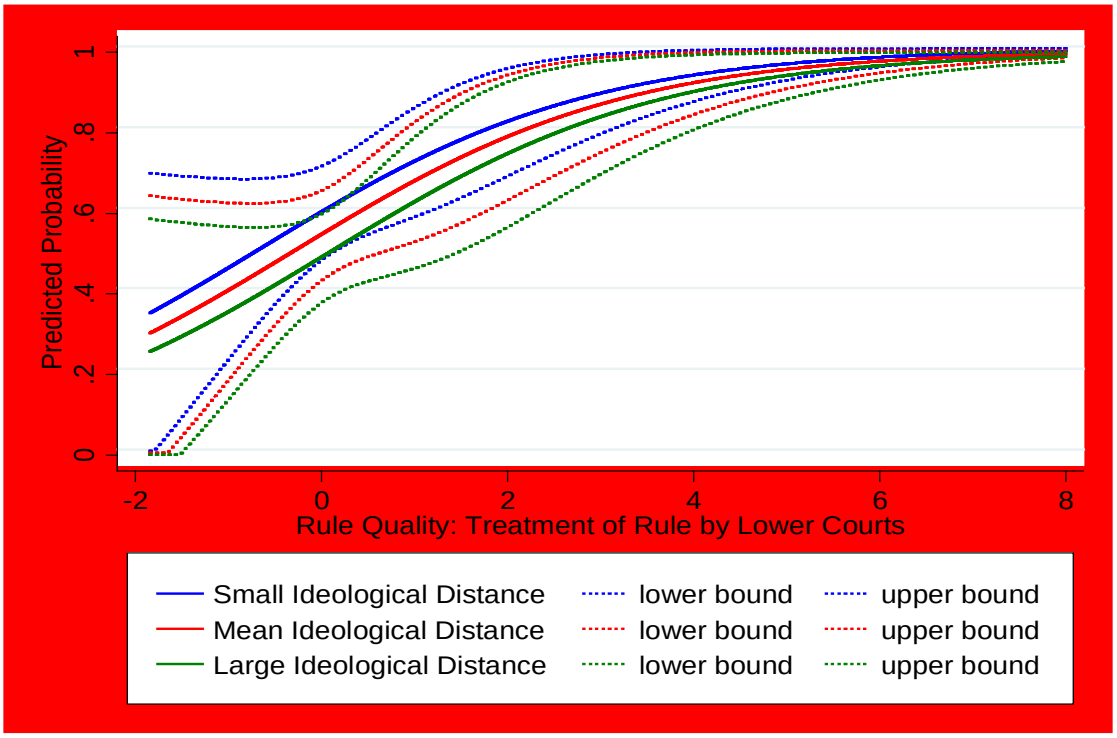
When quality is measured with the treatment of a rule by lower courts, the results, displayed in Figure 5P, again fail to support Hypothesis 3(a). The predicted probability rises as the quality variable shifts, indicating that a justice is more inclined to support a rule as the lower courts have treated it more favorably, but these probabilities do not change across the categories of ideological distance. Though how lower courts have responded to a rule does seem to affect the probability it is chosen, a justice's concern for that variable does not shift as the lower courts become increasingly ideologically distant.

FIGURE 5O. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE QUALITY (LOWER COURT JUDGES) AND IDEOLOGICAL DISTANCE SHIFTS



Finally, I calculated the predicted probabilities on the last quality variable - treatment of the rule by litigants. Figure 5Q illustrates these results. Unfortunately, because of the width of the confidence intervals, no conclusions about the effect of litigants' response to a rule as ideological distance moves can be drawn. It does not appear, in other words, that a justice's concern for this factor differs across the categories of ideological distance. Given that this rule quality measure also did not have any influence upon rule choice in Figure 5N, these results are perhaps not surprising. Still, they provide further evidence that how litigants have responded to a rule likely is not an important consideration for the justices, even as lower courts become more ideologically distant.

FIGURE 5P. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE QUALITY (LOWER COURTS) AND IDEOLOGICAL DISTANCE SHIFTS

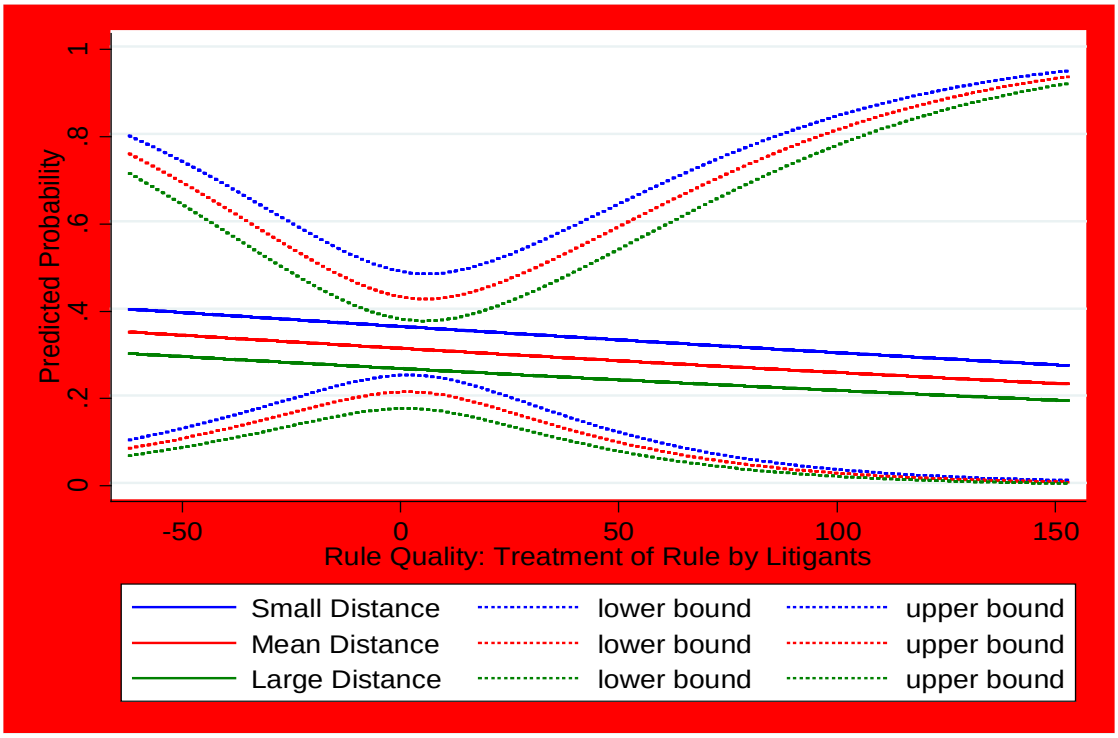


Other Variables

Among the non-primary independent variables, several seem to exert important effects on rule choice, as illustrated in Tables 5E-5G. The variables capturing the presence of the Solicitor General (SG), either as a party or amici, are all signed in the expected direction and reach at least some level of statistical significance. Having the SG act as an amici for the Petitioner appears to be a particularly powerful predictor, significantly increasing the chance that Petitioner's rule is chosen by a justice.[119] Whether this is because the presence of the SG indicates that a rule is of particularly high quality or because the SG serves as a signal to the Court of executive preferences (Bailey et. al. 2005) is unclear, but the critical role of the SG in the rule selection process is quite apparent.

[119] In inverse rule cases, the effect of the SG seems similar for both Petitioner and Respondent's rules. The strength of the SG's influence, as well as the variation when the SG appears as amici for Petitioner, amici for Respondent, the Petitioner, or the Respondent are all worthy of further study.

FIGURE 5Q. PREDICTED PROBABILITY OF VOTING FOR PETITIONER'S RULE, AS RULE QUALITY (LITIGANTS) AND IDEOLOGICAL DISTANCE SHIFTS



In contrast to both this finding and the suggestion of some extant scholarship (Collins 2008; Collins 2004), the difference in the amount of amici support does not seem to affect which rule is favored, except when the cases involves non-inverse rules, where it appears to have a small positive impact. The difference in the number of circuits favoring each rule also does not appear to be a major factor in rule choice, again except in non-inverse rule cases, where it exerts a small positive impact. These findings suggest that those who have documented the impact of amici and circuit support on case outcomes (Collins 2008; Lindquist and Klein 2006; Gorod 2003) may need to condition their claims on the type of rule at play. Finally, congruence between the justice and the outcome associated with a rule does exert a consistently positive and statistically significant effect, with a justice being consistently more likely to adopt Petitioner's rule when it produces an outcome that matches the justice's own ideological tendencies, across both inverse and non-inverse rule cases.

Discussion of Results

What should be made of these results? On one aspect of rule choice, the findings are quite clear: the ideological proximity between a justice and a rule is a key factor in determining whether or not that rule is favored. That proximity, moreover, may be even more important when the case is salient, but the evidence for this is mixed. The findings thus generally support Hypotheses 1 (and, to a lesser extent, 1(a)), and indicate that ideology is a key determinant of rule choice, perhaps especially in non-inverse rule cases. This provides further confirmation of the attitudinal model and suggests that its proponents may be able to extend their claims beyond case outcomes to legal rules themselves.

Regarding the second set of hypotheses, the results are less favorable. Rule flexibility does not seem to be particularly influential in the rule selection process, at least not as hypothesized here and in the broader literature. Unlike these claims, if flexibility plays any role, it is the opposite of that predicted: justices may be more, not less, drawn to more flexible rules. This finding persists even when evaluated on those cases - non-inverse rule cases - where flexibility has a greater potential to be an important predictor of rule selection.

As suggested in Chapter 4, the findings about flexibility do not necessarily indicate that expectations about how flexibility should affect judicial decision-making are logically flawed. Rather, this result may be because the rules from which the justices select simply do not vary that much in flexibility.[120] Whether the rules presented to judges at lower levels in the hierarchy do vary on this dimension is uncertain; but, by the time those rules reach the high court, it seems that the amount of discretion they generate for lower courts is often quite comparable. This finding certainly does not support the hypotheses of this dissertation, but it does indicate again that scholars may wish to re-consider whether the focus on "bright line"

[120] See Appendix B for more detail.

rules versus standards and on the flexibility of rules in general is worthy of such continued emphasis.

Explanations for why justices might be more drawn to flexible rules are more speculative. Again, the data here do not conclusively indicate that extant theories are incorrect, but they suggest further empirical evaluation is in order. If justices are in fact favoring more flexible rules, the literature perhaps should revisit notions of "percolation" (Estreicher and Sexton 1984). In this frame, higher courts want to give lower courts greater amounts of leeway so that the lower courts will struggle with – and perhaps resolve – any problems with a particular rule. Using the lower courts as such a laboratory can increase the quality of rulings, lead to the development of novel solutions, and allow the lower courts to resolve differences among themselves, thereby preventing the Supreme Court from having to grant *certiorari* (Martin and Friedman 2009; Kornhauser 1995; see also Clark and Kastellec 2010). While further study is obviously needed,[121] if the findings here about rule flexibility are substantiated, this would indicate that the percolation model – rather than principal/agent approach adopted in this project – may warrant renewed attention.[122]

As for rule quality, the results here suggest that two aspects of quality - the division among lower court judges and the treatment of the rule by the lower courts - do affect rule choice. That Supreme Court justices seem to evaluate whether lower courts and lower court

[121] For example, it may that the effect of flexibility differs across different types of justices and that by testing rule flexibility on all the justices simultaneously, the approach taken here could be masking that influence. It may be that more conservative justices generally do, as evidenced by the statements of Justice Scalia, prefer more rigid rules and that moderate justices such as O'Connor favor nuanced guidelines. I hope to explore this further in future research. In addition, I hope to employ a different method for calculating rule flexibility, generating more variation in this variable, and perhaps uncovering an effect when the difference in flexibility between rules is more stark.

[122] Though the idea has received less notice in the literature than even percolation, it may also be that the justices generally trust the lower courts to resolve most legal disputes correctly. Rather than constrain those courts with rigid rules, the high court may wish to give the lower court judges sufficient latitude so that they can reach the best result.

judges have generally favored a particular rule is an important finding, as it illustrates that the high court may rely on those below to learn about whether or not a rule has functioned well. Again, some works have speculated that the Supreme Court may use lower courts as a locus for experimentation and problem-solving; my results suggest that the Court may actually pay attention to and be influenced by the results of that process.

The justices do not appear to care as much about how litigants have evaluated or employed legal rules. At first glance, this would seem to cut against arguments for jurisprudential considerations, at least if that measure taps into any aspect of legal quality. It is important to remember, however, that, just as with flexibility, there is simply not that much variation among legal rules along this dimension - litigants generally do not cite one particular rule that much more than any other. That the treatments of a rule by lower courts and lower court judges, which also do not manifest significant variation across rules, can be as influential as they are only further enhances the claim that justices do care at least somewhat about the quality of legal rules.[123]

Conclusion

In this chapter, I have presented the results of a statistical analysis of rule choice on the U.S. Supreme Court. Having demonstrated in Chapter 4 that this process is most often a choice between the competing rules of the Petitioner and Respondent, I employed a random effects logit model to explore whether and how ideology, flexibility, and legal quality

[123] Notably, this lack of variation in rule quality may indicate that the rules that ultimately reach the Supreme Court have been well vetted in the lower courts and are therefore already of high quality. The years of litigation which preceded the presentation of the rules to the justices may in fact have been a process in which poorer quality rules were "weeded out" by lower courts, leaving only the highest quality rules from which the Court makes it selection. I hope to explore this in future research by comparing the quality of the rules suggested by amici (which often are not based in any lower court opinions) with that of litigants.

influence the judicial selection of legal rules. The interaction of these variables with the ideological location of the lower courts and with the salience of a case was also examined.

The results documented in this chapter are mixed. After demonstrating that a justice can maintain an ideological preference for the rule apart from the outcome, the findings revealed that ideology is an important predictor of rule choice. This influence, moreover, may be even stronger when the case is salient or involves non-inverse rules. That the impact of ideology can vary depending upon the type of rule choice at issue is a novel contribution that warrants further study. In general, however, by suggesting that ideology can shape votes on rules as well as votes on outcomes, the results comport well with much extant research on judicial decision-making.

In contrast, rule flexibility did not affect rule choice as expected. Although the nature of the results prevent any solid conclusions, it appears that the justices may actually prefer those rules which give lower court judges more, rather than less, discretion. That this preference does not seem to vary as the justice and the lower courts diverge ideologically provides further evidence that the justices may not seek to control lower courts through rules. At the same time, however, it must be remembered that the justices do not often face competing rules which generate substantively differing levels of leeway in the lower courts. It may not be that justices do not want to employ rules to ensure lower court compliance, but rather that they often lack the opportunity to do so.

Finally, the results demonstrate that rule quality - at least when measured in certain ways - does affect rule choice, with justices more likely to favor those rules that have been treated more positively in the lower courts. On the other hand, the extent to which litigants cited a rule in their own appellate filings did not seem to influence whether a justice favored

a particular rule. As with flexibility, the rules studied in this project not did vary greatly in their level of quality - the difference across all the variables was actually quite moderate. Given this, that how lower courts and judges responded to rule has any impact is in fact testament to how important some aspects of rule quality can be to the judicial selection of legal rules. Scholars who have argued for the relevance of jurisprudential factors to votes on case outcomes may find reason here to extend their claims to legal rules as well.

In the following chapter, I explore those rule choice cases in which the justices did not select the primary rule of the litigants. These cases, in which justices adopted the non-primary rule of a litigant, the rule suggested only by an amici, or developed rules on their own, provide further evidence that, along with the importance of ideology, rule flexibility and rule quality can have important effects on rule choice. What this chapter has demonstrated is that while scholars have generally focused upon several factors I find relevant to rule choice, they may wish to further examine whether others - particularly rule flexibility - even have much potential to influence how justices of the U.S. Supreme Court make their rule choices.

CHAPTER 6

BEYOND VOTES ON THE MERITS: WHEN RULES AND OUTCOMES DIVERGE

The previous chapter presented an empirical analysis of rule choice on the U.S. Supreme Court. Using a logit model, I examined how the ideology, flexibility, and quality of rules influenced their selection by individual justices. The results revealed that rule choice is driven primarily by ideological concerns, but that how lower courts and lower court judges responded to a rule prior to the high Court's ruling are also important factors. The analysis also suggested that the flexibility of legal rules, while of great interest to scholars, is not particularly important to rule selection.

Given the nature of the data, in which there is a high correlation between the choice of rule and the choice of outcome, Chapter 5 also examined whether or not a justice could maintain distinct preferences for both a rule and its associated outcome. The results indicated that a justice can attend to the rule apart from the outcome produced by that rule, particularly in non-inverse rule cases. That the ideological proximity between a justice and rule remained an important predictor in these cases, even when the preference for case outcome is controlled, provided further evidence that the justice's choice of rule is more than simply the afterthought of a choice over case outcome. This chapter extends this analysis by focusing on those cases in which the choice of rule is not correlated with the choice of case outcome.

To be more precise, throughout this dissertation, I have posited that the selection of legal rules on the Supreme Court can be conceived as a choice between the competing pair of rules offered by the Petitioner and the Respondent, which I term "primary rules." In the vast majority of cases in the dataset, this is in fact the menu of options the justices' face and from which they make their selection. In some cases, however, a justice confronts and/or selects

from additional rules suggested by the litigant or an amici, which I term "non-primary rules." This chapter addresses these cases in exploratory fashion and attempts to provide some tentative insights into why a justice would depart from the typical pattern of rule selection.

First, I examine the eighteen cases in my dataset in which a justice rejected the primary rules of the litigants for a non-primary rule. Second, I discuss the forty-one cases in which a justice refused all proffered options and chose to articulate a different legal rule. In each, I explore whether aspects of the cases, the justices, or the rules may have motivated these decisions.[124] Because of limitations in the data,[125] these types of rule choices cannot be studied well with quantitative techniques. Nonetheless, by providing descriptive information about the cases, justices, and rules involved, the chapter does provide some tentative suggestions for why such choices were made, suggestions which can later be developed into a more rigorous theory of rule choice.

Exploring why justices might depart from the type of rule choice that characterizes so much of their behavior is an important addition to the dissertation and enhances our understanding of how rule choice on the U.S. Supreme Court operates. Moreover, because I still examine (where the data permits) how the ideology, flexibility, and quality of rules influence rule selection, the chapter maintains continuity with the rest of the project, and provides further evidence about whether and how these three characteristics of legal rules influence the rule selections of the justices of the U.S. Supreme Court.

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[124] For the sua sponte cases, I also examine whether the presence of the Solicitor General influences the justices' propensity to develop their own rules.

[125] More specifically, because the vast majority of the rules favored by justices across both categories had not been supported by any circuit court, I was unable to employ my measures of rule ideology and rule quality. There were also only a very small number of instances in which a justice opted for a non-primary rule, making statistical analysis much less reliable. In the future, however, I hope to develop alternative measures of ideology and quality and conduct a quantitative analysis on at least the seventy cases in my dataset in which a justice confronted more than two rules.

Multiple Rule Cases

As noted above and detailed in Chapters 3 and 4, in the vast majority of cases examined in this project, the justices faced one competing rule from each of the parties to the litigation. However, in 14% of the cases in the dataset (70/500), there were more than two rules offered to the justices and in 25% of those cases (18/70) at least one justice adopted a non-primary rule – either the alternative rule of a litigant or a rule suggested only by amici.

What motivates the justices' choices in such instances? Why do they reject the primary rules for a non-primary alternative? Was this choice driven by the case, by the justice, or by the rule itself? In this section, I offer some tentative answers to these questions. Building on the information in Chapter 4, I begin with descriptions of the seventy multiple rule cases and the eighteen of those in which a justice picked a non-primary rule. I then explore whether aspects of the justices or the rules may be affecting a justice's decision to favor a non-primary rule.

The findings suggest once again that ideology and at least one aspect of legal quality can be important influences on rule choice. Flexibility may also play a role, though again in an unexpected way. The findings also indicate that although the choices made in these cases may, on their surface, depart from the standard pattern of rule selection, the justices' decisions here are actually not that different from those examined in earlier sections of this dissertation. This confirms that even though certain cases provide justices with a menu of options that is more complex, exactly how the justices navigate those options generally remains consistent.

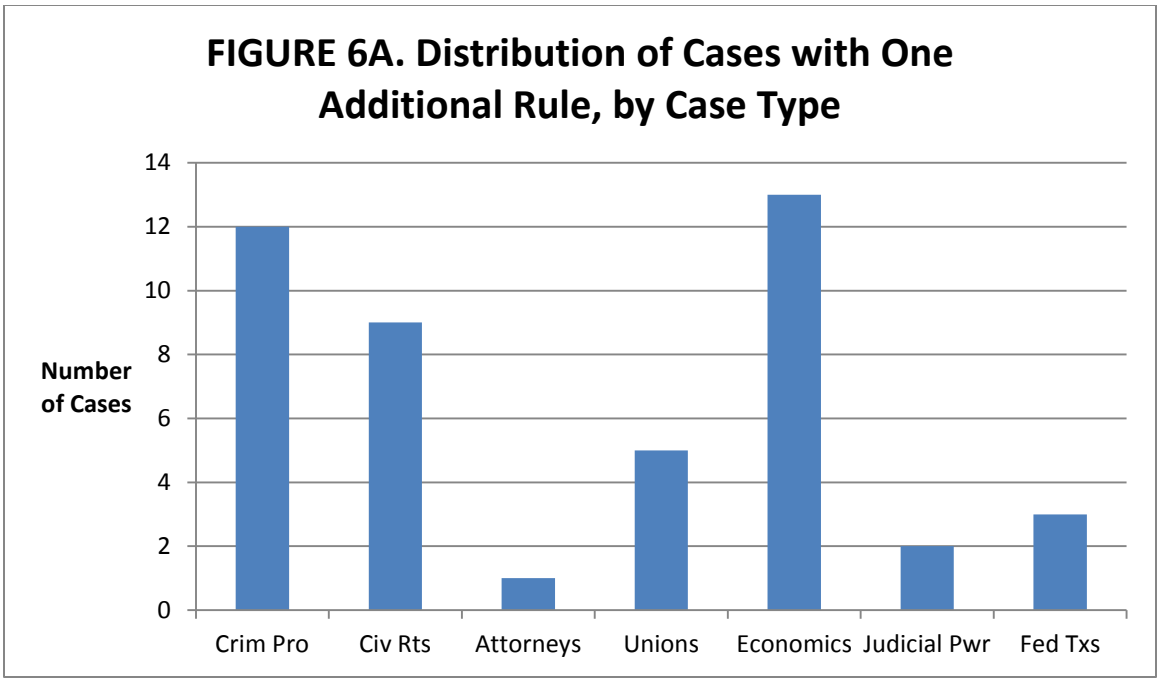
The Nature of the Cases

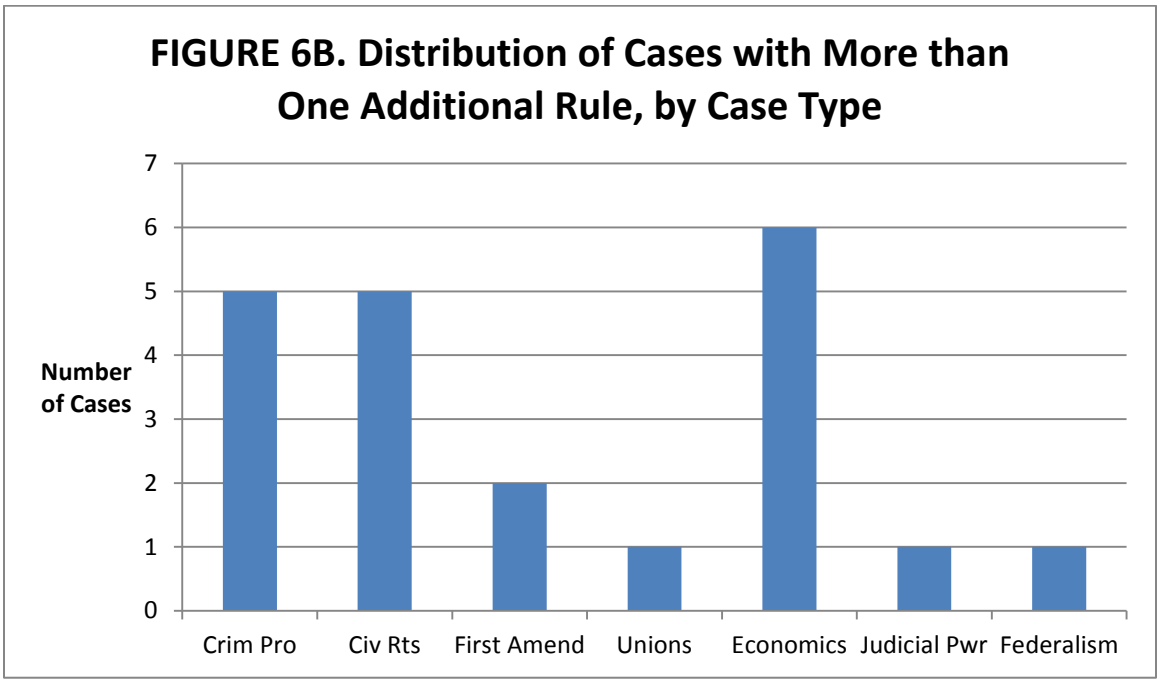
Out of the seventy multiple rule cases, most - forty-nine - had only one additional rule offered. Ten had two additional rules, six had three additional rules, and five had four additional rules.[126] Why would these particular cases produce multiple rules? And why do some of these cases generate two or more additional rule options while others only one? Most importantly, why would a justice favor one of these non-primary rules?

One answer, at least for the first two questions, might be the subject matter of the cases. That is, perhaps certain areas of the law are more complicated and provoke a more complex set of rule options. As documented in Chapter 4 (Figure 4E), these multiple rule cases do tend to have a different distribution by subject matter when compared to the 430 two-rule cases. More specifically, multiple rule cases appear in only about one-half of the case types, and are concentrated in the areas of criminal procedure, civil rights, unions, economic issues, attorneys, judicial power, and federal taxation.

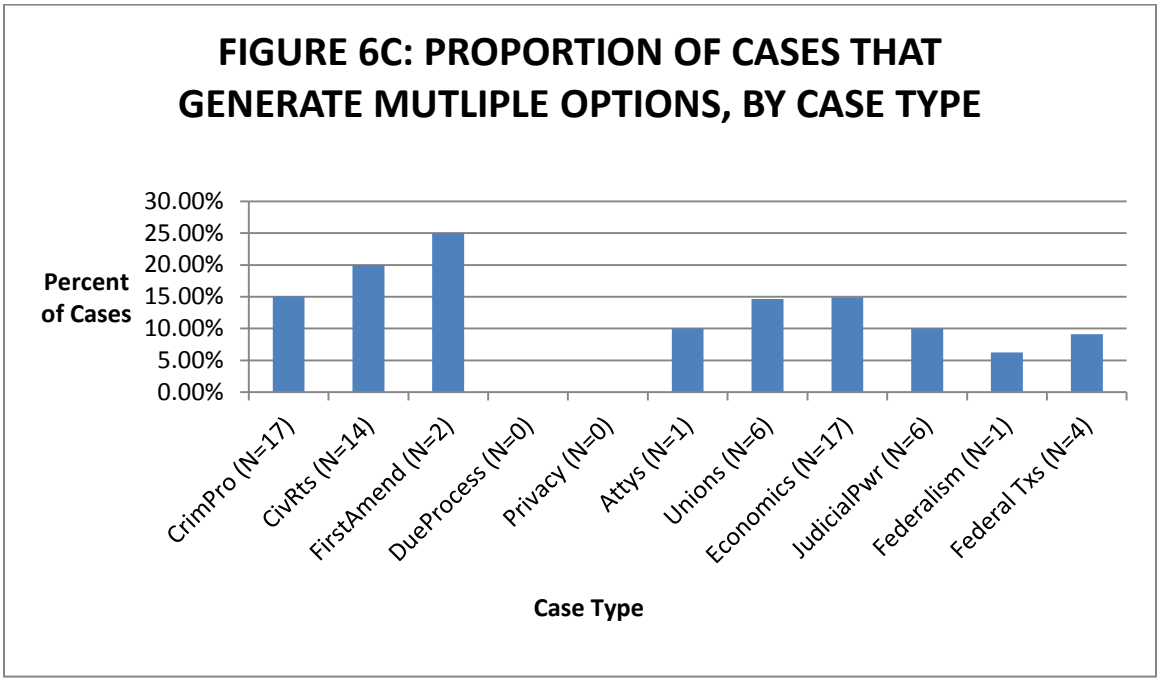
In those forty-nine cases where only one additional rule was offered, the distribution by case type displays generally the same pattern. As illustrated in Figure 6A, most cases with three rule options involve criminal procedure, civil rights, economics, unions, and federal taxes. Similarly, those twenty-one cases in which the justices faced four or more rules are again concentrated in economics, civil rights, and criminal procedure, though there are several involving the First Amendment. Figure 6B displays this distribution.

[126] See Chapter 4 (Figure 4C) for a visual presentation of these data.





To determine if certain case types are in fact more likely to generate more rules, I compared the total number of cases in the dataset involving each case type to the number of cases in each type that generated more than two rule options. Figure 6C displays these figures. The N represents the number of cases in which three or more rules were offered.

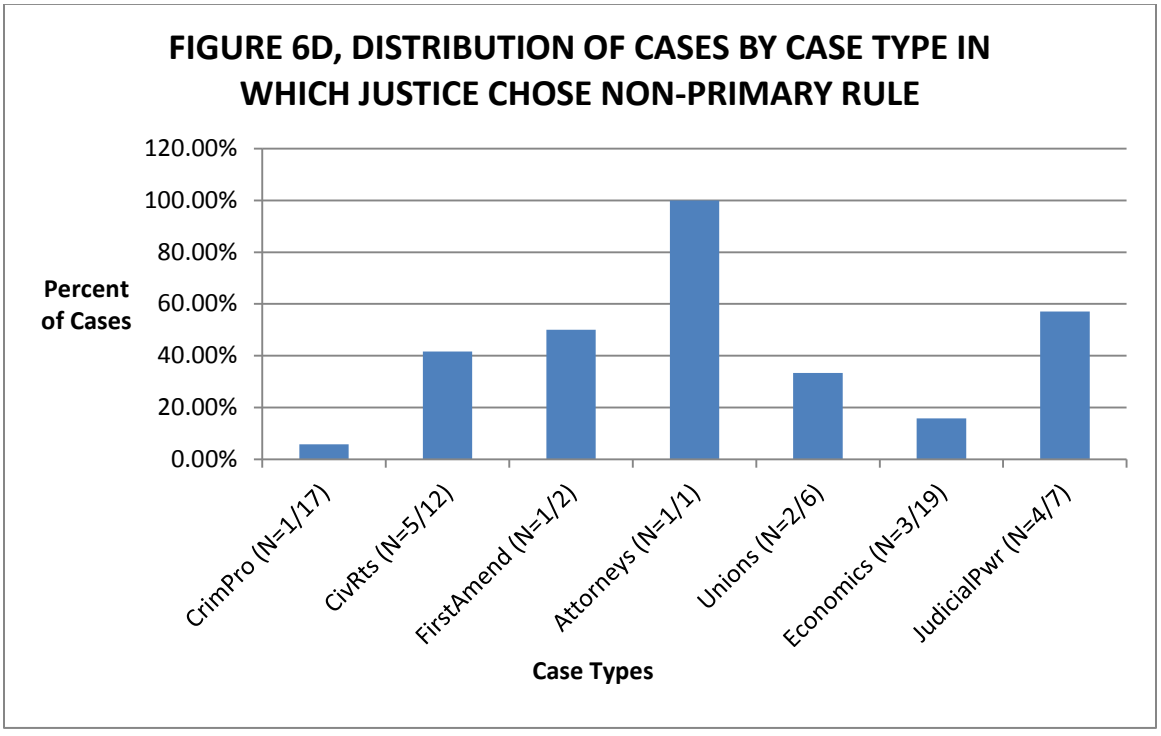


Certain case types do appear to be more likely to generate multiple rules. Cases involving the First Amendment, civil rights, and criminal procedure are most likely to do so, with 25%, 20% and 15%, respectively.[127] In the remaining case types – attorneys, unions, economics, judicial power, federalism and federal taxes – the rate was generally consistent, between 6% and 15%. Cases about due process and privacy never involve more than two rules. In combination with the results above, it appears, therefore, that certain legal areas may provoke more than two rule options. However, how many more rules are presented does not depend on the subject matter of the dispute. In other words, particular areas of the law

[127] Within those case types, there is some moderate concentration by sub-issue, as coded by Spaeth (2003). For instance, both the First Amendment cases involve miscellaneous free speech, four of the fourteen civil rights cases involve sex discrimination in employment, and four of the seventeen criminal procedure cases involve the retroactivity of a statute. Generally speaking, however, the same legal question does not keep reappearing in these cases.

seem more likely to generate a more extensive set of rule options, but differences in how extensive those options are does not appear to be driven by the legal issue.[128]

A slightly different result appears, however, in those eighteen cases in which a justice actually adopted one of the additional rules. More precisely, these cases do differ somewhat in subject matter, both from the standard two-rule and the multiple-rule cases. Figure 6D displays the number and percentage of cases of each case type in which a justice chose a non-primary rule. As seen in the figure, the majority of cases in which a justice chose a non-primary rule are civil rights cases (N=5), with judicial power (N=4) and economics (N=3) as the second and third most common case type. Notably, unlike the other distributions, there is only one criminal procedure case involved here.



[128] Salient cases might provoke additional amici participation which could generate more rules from which a justice can select. As documented in Chapter 4, however, a justice actually is more likely to face multiple rules in non-salient rather than salient cases. It may be therefore, that it is the subject matter of the case – not the extent to which the general public might care about the ruling – that produces more amici participation. Future work should examine this relationship between case type and amici suggestion of rules in more detail.

In terms of percentages, when the justices had the opportunity to select a non-primary rule, they were most likely to do so in cases involving attorneys, judicial power, the First Amendment, and civil rights. In cases involving criminal procedure and economics, the justices were extremely unlikely to favor a non-primary rule, doing so in only 5% and 15% of the cases in which they could chose such a rule, respectively. Why justices would be so reluctant to favor non-primary rules in these cases is unclear, but may, at least in cases of criminal procedure, be motivated by the quality of the non-primary rule suggestions.[129]

Clearly, there are too few cases here for rigorous analysis, but the findings do suggest that cases involving civil rights are more likely to have multiple rules presented in them and, perhaps more importantly, have one of those rules actually favored by an individual justice. Scholars might wish to explore further whether case participants in such cases are putting more effort into developing the rules they ultimately suggest to the Supreme Court, or whether the justices are simply more willing to consider alternative arguments when the dispute involves the rights of certain types of citizens.[130]

Other case types, such as those involving attorneys and the First Amendment, are not as likely to give justices the opportunity to select a non-primary rule, but are very likely to have that opportunity taken when it is presented. Conversely, cases involving criminal procedures are quite likely to involve non-primary rules, but very unlikely to have a justice actually adopt one of those rules. These patterns are quite notable, as they suggest that in

[129] Criminal procedure cases are often argued by public defenders or other types of attorneys (such as those working for interest groups) who may lack the resources necessary to develop high quality alternative rules. That economics cases, which tend to involve corporations with presumably large resources, also tend have their non-primary rules disfavored undermines this suggestion, however.

[130] Civil rights cases are non-First Amendment cases that involve classifications based on race, age, indigency, voting, residency, military or handicapped status, gender, and alienage (Spaeth 2003).

certain areas of the law, the justices are much more willing to make a non-standard rule choice; in other areas, they are much less likely to do so.

I also examined whether these eighteen cases were different on other dimensions as well, including salience and the decade of decision. In both of these aspects, the cases did not differ in any systematic way from either the 430 two-rule or the seventy multiple rule cases. Regarding whether the case involved statutory or constitutional issues, there was a slight difference between the seventy multiple rule cases and those eighteen in which a justice favored a non-primary rule – in the former, only 5.5% involved constitutional issues; in the latter, it was 16.6%. Though perhaps driven by the relatively large number of civil rights cases, that justices seem more willing to adopt a non-primary rule when the case has a constitutional dimension suggests again that certain types of legal disputes may provoke a justice to make the non-standard choice.

The Nature of the Justices

Along with differences in the subject matter of these cases, perhaps there is something unique about the justices who are willing to select a non-primary rule. More specifically, it could be that certain justices – or certain types of justices – have a propensity to reject a primary rule for a non-primary one. In this section, I examine the justices who selected non-primary rules in more detail.

As noted above, at least one justice made such a choice in eighteen of the seventy cases in which a non-primary rule was suggested. This produced a total of ninety votes, comprised of seven votes supporting concurring opinions, five supporting majority opinions, five supporting unanimous opinions, and one dissenting opinion. Notably, it was rare that a

single justice would vote for a non-primary rule. In fact, a justice did so in only three of the eighteen cases;[131] in the remainder, they were acting as part of a coalition.

Out of the twenty-nine justices studied in this project, twenty-five heard cases in which more than two rules were presented. Out of those twenty-five, twenty-two opted for a non-primary rule at least once, suggesting that while the likelihood of selecting a non-primary rule is small, the vast majority of justices (88%) have done so at least once. To determine if certain of these justices were more likely than others select non-primary rules, Table 6A displays each justice who heard a case in which more than two rules were offered, the number of cases in which that justice actually selected one of the additional rules, and the resulting frequency with which a justice was willing to select a non-primary rule.

Among justices who participated in at least five cases where multiple rules were available,[132] several interesting patterns appear. First, the overall rate at which the justices were willing to select an alternative rule was quite low, with most justices doing so at or less than 20% of the time they faced such an opportunity. This confirms again that just as litigants and amici are generally unwilling to suggest extra rules, the justices are generally unwilling to adopt then.

Second, and more importantly, the rate of adoption of non-primary rules did not differ much across justices either. The highest rate of adoption was Justice Ginsburg at 20.83% and the lowest was Justice Stewart at 8.3%.

[131] Interestingly, these justices were Justices White, Kennedy, and Stewart, all "swing votes" on the Court.
[132] There were several justices – Goldberg, Warren, Fortas, Frankfurter, Whittaker, Clark, Black, and Harlan – who heard only a few multiple rule cases. While their rate of adoption of these non-primary rules is notable (ranging from 0 to 100%), there are too few cases here to permit any meaningful analysis.

TABLE 6A. JUSTICES AND THE SELECTION OF NON-PRIMARY RULES

Justice	Number of Cases in Which an Alternative Rule Choice Was Possible	Number of Cases in Which Justices Selected an Alternative Rule	Percentage of Cases in Which Justice Selected an Alternative Rule
Black	3	1	33.33%
Blackmun	46	5	10.87%
Brennan	34	4	11.76%
Breyer	22	4	18.18%
Burger	11	2	18.18%
Clark	3	1	33.33%
Douglas	5	1	20.00%
Fortas	2	0	0.00%
Frankfurter	1	0	0.00%
Ginsburg	24	5	20.83%
Goldberg	1	1	100.00%
Harlan	3	1	33.33%
Kennedy	52	8	15.38%
Marshall	34	3	8.82%
O'Connor	58	7	12.07%
Powell	13	2	15.38%
Rehnquist	67	8	11.94%
Scalia	57	6	10.53%
Souter	36	6	16.67%
Stevens	65	9	13.85%
Stewart	12	1	8.33%
Thomas	32	3	9.38%
Warren	2	1	50.00%
Whittaker	1	0	0.00%
White	45	7	15.56%

Of the remaining, five chose an alternative rule around 10% of the time (Blackmun, Brennan, Marshall, Scalia, Thomas), six did so between 11% and 16% of the time (Kennedy, O'Connor, Powell, Rehnquist, Souter, Stevens, White) and two did so approximately 19% of the time (Breyer and Burger). Again, except for Justice Ginsberg's relative willingness to select non-primary rules and Justice Stewart's relative resistance to doing so, most of the justices favored non-primary rules at approximately the same rate. It does not appear,

therefore, that particular justices are especially prone to favor non-primary over primary rules.

Similarly, among those justices who favored non-primary rules at about the same rate, major differences in ideological bent do not appear. As seen by the pairing of Justices Breyer and Burger, for example, or the group that involves Justices Blackmun, Brennan, Marshall, Scalia, and Thomas, justices who are of extremely different ideological leanings generally manifest the same rate of non-primary rule selection. Justices generally regarded as moderate, such as Kennedy and O'Connor do so at a slightly higher rate than some more extreme liberals and conservatives, but the differences are not large. From these findings then, it appears that a justice's willingness to select the non-primary rule of a case participant is driven by neither a unique individual propensity nor a general ideological predisposition. Exactly what factors do motivate the slight differences observed in Table 6A remains unclear, but certainly warrants further study.

The Nature of the Rules

A final option to explain the selection of non-primary rules is the rules themselves. To be more precise, perhaps the primary rules suggested by the parties were insufficient (enough) on some dimension to motivate the justice to make the alternate choice.[133] If the fundamental claim of this dissertation - that the nature of the legal rules influences whether or not they are favored by a particular justice - is sound, then it should be that those non-primary rules selected by the justice are somehow "better" in terms of their ideology, their flexibility, or their quality than the primary rules. In this section, I explore whether any of these factors might motivate a justice's decision to favor a non-primary rule.

[133] Any insufficiency of the primary rules may also explain why non-primary rules are suggested in the first place, but the question must remain for future research.

Among the seventy cases in which non-primary rules were presented, a justice chose such a rule in eighteen cases; in fifty-two, no justice favored a non-primary rule. I first compare the primary rules offered in these cases to determine if those rules differ across the two case categories. I then compare the non-primary and primary rules offered in the former category of cases.[134] The results are of course quite tentative, but provide further evidence that certain aspects of legal rules, whether primary or non-primary, can affect the probability they are favored by a justice.

To conduct this analysis, I make numerous comparisons across case categories and across the rules - primary and non-primary – that appear in these cases. To facilitate clarity of the presentation, I first include a table that explicates each comparison and notes to what question each comparison is directed. This information is displayed in Table 6B.

The Role of Ideology – Comparing Primary Rules

As noted, the motivation to favor a non-primary rule could arise because of insufficiencies in the primary rules presented by case participants. In terms of ideology, this could arise if the primary rules are "too far away" in ideological distance, such that the justice turns to the non-primary rule. To assess this possibility, I first compared the ideology of the primary rules offered in those cases in which a justice could have, but did not adopt a non-primary rule with the ideology of the primary rules in those cases in which a justice could and did adopt a non-primary rule.

[134] It must be noted than an ideal comparison would be between the non-primary rules that are selected and those which are not. Unfortunately, I lack data on the latter group of rules. I plan to collect this data in Summer 2012, however, and conduct the analysis.

TABLE 6B. EXAMINING THE DECISION TO FAVOR A NON-PRIMARY RULE

First Group in Comparison	N of First Group	Second Group in Comparison	N of Second Group	Type of Rules Compared	Location of Comparison	Question Addressed
Cases Where Non-Primary Rule Suggested but not Selected	52 Cases	Cases Where Non-Primary Rule Suggested and Selected	18 Cases	Primary with Primary	Table 6C	Is the **ideology** of the primary rule different across the two groups?
Cases Where Non-Primary Rule Suggested but not Selected	52 Cases	Cases Where Non-Primary Rule Suggested and Selected	18 Cases	Primary with Primary	Table 6E	Is the **flexibility** of the primary rule different across the two groups?
Cases Where Non-Primary Rule Suggested but not Selected	52 Cases	Cases Where Non-Primary Rule Suggested and Selected	18 Cases	Primary with Primary	Table 6G	Is the **quality** of the primary rule different across the two groups?
Primary Rules in Cases Where Non-Primary Rule was Selected	12 Rules	Non-Primary Rules in Cases Where Non-Primary Rule was Selected	6 Rules	Primary with Non-Primary	Text (p. 192-193)	Is the **ideology** of non-primary rules different from the ideology of primary rules?
Votes for Same Outcome, Primary Rules in Cases Where Non-Primary Rule was Selected	18 Votes	Votes for Same Outcome, Non-Primary Rules in Cases Where Non-Primary Rule was Selected	18 Votes	Primary with Non-Primary	Table 6D	Does the **ideology** of the rules influence the choice between same-outcome primary and non-primary rules?
Primary Rules in Cases Where Non-Primary Rule Suggested but not Selected	18 Cases	Non-Primary Rules in Cases Where Non-Primary Rule Suggested and Selected	18 Cases	Primary with Non-Primary	Figure 6E	Is the **flexibility** of non-primary rules different from the flexibility of primary rules?
Votes for Same Outcome, Primary Rules in Cases Where Non-Primary Rule was Selected	63 Votes	Votes for Same Outcome, Non-Primary Rules in Cases Where Non-Primary Rule was Selected	63 Votes	Primary with Non-Primary	Table 6F	Does the **flexibility** of the rules influence the choice between same-outcome primary and non-primary rules?

Primary Rules in Cases Where Non-Primary Rule was Selected	12 Rules	Non-Primary Rules in Cases Where Non-Primary Rule was Selected	6 Rules	Primary with Non-Primary	Text (p.201-203)	Is the **quality** of non-primary rules different from the quality of primary rules?
Votes for Same Outcome, Primary Rules in Cases Where Non-Primary Rule was Selected	21 Votes	Votes for Same Outcome, Non-Primary Rules in Cases Where Non-Primary Rule was Selected	21 Votes	Primary with Non-Primary	Table 6H	Does the **quality** of the rules influence the choice between same-outcome primary and non-primary rules?

More precisely, using the ideology of the lower court judges who supported each rule as the ideology of the rule and the median of the justices' GHPB scores as the ideology of the Court, I calculated the average distance (in absolute value) between the primary rules of each litigant and the Court median in both categories of cases. Table 6C displays these results.

TABLE 6C. IDEOLOGICAL DISTANCE FROM COURT TO RULE, COMPARING PRIMARY RULES

Case Category	Avg. Distance from Court Median to Petitioner's Primary Rule	Avg. Distance from Court Median to Respondent's Primary Rule
Cases Where Non-Primary Rule Presented, Not Selected (52 Cases)	.585	.578
Cases Where Non-Primary Rule Presented and Selected (18 Cases)	.533	.421

As seen in the table, there is little difference between the primary rules suggested by the Petitioner in both types of cases, with an average distance of .585 in the cases in which a non-primary rule was not favored and an average distance of .533 in cases in which a non-primary rule was favored. On the other hand, the average distance from the Court median to Respondent's primary rules does appear to differ, with .578 in the first type of case and .421

in the latter. Further analysis confirmed that this difference was not statistically significant, however.[135]

From the results, it seems that the primary rules presented in cases where the justices did not favor a non-primary rule and those cases in which they did do not systematically differ from each other, at least in terms of their ideological distance from the justices. While this of course does not indicate that ideology plays a minimal role in explaining the choice of a non-primary rule, it does suggest that the general ideological tenor of primary rules may not be what drives justices to adopt non-primary rules.

The Role of Ideology – Comparing Primary and Non-Primary Rules

An alternate way to examine whether or not shortcomings in the primary rule motivate the choice of a non-primary rule is to compare the primary and non-primary rules in those cases in which a justice made such a choice. Given the small number of cases (18) where this occurred, rigorous statistical analysis of whether the ideological proximity between a justice and a non-primary rule influenced the selection is challenging. However, even a cursory examination of these cases suggests that a substantial number of the rule choices do not appear to be related to the ideological distances between the justice, the primary rules, and the non-primary rules, at least when preference for case outcome is not considered.

To study this relationship, I employed the measure used earlier in this dissertation. With the ideology of the lower court judges who supported each rule as the ideology of the rule, I calculated the absolute value of the distance between the justice and each rule. If

[135] More precisely, a t-test of the difference of means produced a p-value not less than .05.

ideological preference is affecting rule choice, then a justice should favor a non-primary rule when it is in closer ideological proximity than the primary rule alternatives.[136]

There were only six cases, each of which involved three rules, in which a measure for the ideological proximity of each rule was available.[137] In the fifty-four rule choices made in those cases, however, the ideological proximity of the alternative rule, relative to the primary rules, does not seem to influence the justice's choices in any systematic way. Out of the thirty-four votes in which a justice favored a non-primary rule, that rule was closer to the justice only fifteen times, and further away than a primary rule nineteen times. In other words, in more than half of the votes for the non-primary rule, that rule was not in closer ideological proximity than one of the primary rules. Moreover, in the twenty votes in which a justice favored a primary rule, the non-primary rule was closer to the justice in six instances, but was rejected for a more distant rule option.

This suggests that the justices' decisions to favor non-primary rules are not strongly influenced by the ideological location of the proffered rules. Justices often rejected primary rules that were in closer ideological proximity to their own preferences or adopted non-primary rules which were not. Though the findings of Chapter 5 demonstrate the strong role that ideology plays in the choice between the Petitioner and the Respondent's rule, it does not seem to explain the decision between primary and non-primary rules. Given that only six cases could be studied in this way, caution is warranted before making any strong conclusions; nonetheless, the results raise interesting questions about why ideological

[136] Because all of the eighteen cases studied here are non-inverse rule cases, a justice should have an ideological preference for the rule apart from its associated outcome (as demonstrated in Chapter 5).
[137] More specifically, there were only six cases in which a lower court had favored each rule, as needed for my measure of rule ideology.

preferences seem to affect the choice between primary rules but do not exert the same impact on the decision to adopt a non-primary rule.

The Role of Ideology – Controlling for Case Outcome

It may be, however, that ideology plays a more subtle role in influencing role choice. More precisely, these eighteen multiple rule cases allow an examination of why a justice might select a particular rule, given that several rules produce the same outcome. I have posited throughout this dissertation that the choice of rule is not simply an afterthought to a choice of case outcome, but I have never claimed that a justice always chooses the rule first and pays little heed to its attendant outcome. Because a multiple rule case offers a justice several potential rules that generate the same result, these cases provide leverage on whether certain traits of a rule influence its selection, even if the justice determines first which party should win the case.

In terms of ideology, if a justice's ideological preference over the rule is motivating rule selection, then a justice faced with several, same-outcome rules, any of which could produce the preferred case winner, should pick the non-primary rule when that rule is in closer ideological proximity than the same-outcome primary rule. To assess the viability of this claim, I again examined the six cases (fifty-four total votes) for which there were ideology measures for each rule.

In these cases, I first noted whether the non-primary rule was filed in support of the Petitioner or the Respondent and assumed, just as with primary rules, that the rule would produce a victory for that party.[138] Following the method used in Chapter 5, I coded each

[138] This does ignore the possibility that a justice could favor a rule designed to produce a victory for one party, but vote for the other party to win the case. This type of behavior did occur in a very small number of cases in my dataset – 21 votes in 9 cases. While more study is needed, it appears that the choices made in these cases are driven primarily by the facts of the case or are simply idiosyncratic choices.

rule's associated outcome as liberal or conservative.[139] Considering justices with negative ideology scores as liberal and those with positive as conservative, I then matched the justice to the outcome associated with each rule: liberal judges were presumed to favor rules that produced liberal outcomes; conservative judges were presumed to favor rules that produced conservative outcomes.[140] This allowed me to determine which justices confronted multiple rules that would result in the same, preferred outcome. I then took the distance (in absolute value) from the justice to the primary and non-primary rules and compared those two values to determine if, among those same-outcome rules, the justice choose the rule in closer ideological proximity to the justice's own ideological location.

In the six cases, a justice had the option of two or more rules that would generate the same preferred outcome in twenty-eight instances. Of those twenty-eight, a justice actually selected the non-primary rule eighteen times; among those eighteen votes for a non-primary rule, that non-primary was in closer ideological proximity than the primary rule in eleven instances. In terms of percentages, then, a justice rejected a primary rule for a same outcome, non-primary rule 64% of the time. When they made such a choice, moreover, the favored non-primary rule was in closer ideological proximity than the primary rule 61% of the time. Table 6D displays these results.

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[139] Because the Respondent always suggests the rule used by the lower courts, the ideology of the outcome associated with the Respondent's rule was coded with the Spaeth (2003) variable for the ideological direction of the lower court ruling (conservative = 1; liberal = 2); the ideology of the outcome associated with the Petitioner's rule was then coded as the opposite. The non-primary rule was given the same code as the primary rule suggested by the party the non-primary rule supported.

[140] Justice Stewart, who has an ideology score of 0, appeared once in the cases. His voting behavior in that case was not considered.

TABLE 6D. SELECTION OF SAME OUTCOME, NON-PRIMARY RULES, BY IDEOLOGICAL PROXIMITY BETWEEN JUSTICE AND RULE

Justice Can Vote for Same Outcome, Non-Primary Rule	Justice Votes for Same Outcome, Non-Primary Rule	Same Outcome, Non-Primary Rule in Closer Proximity than Primary Rule	Same Outcome, Non-Primary Rule Not in Closer Proximity than Primary Rule
51.8% (28/54 votes)	64.2% (18/28 votes)	61.11% (11/18 votes)	38.88% (7/18 votes)

These results only offer very tentative evidence about the role of ideology in rule selection in multiple-rule cases.[141] Still, the findings suggest that when a justice has the option of two rules that generate the same result, the ideological location of those two rules may influence rule choice, with a justice more like to favor the rule – primary or not – that is more aligned with the justices own ideological preferences. In combination with the results above, it seems therefore, that while ideology may not motivate a justice's decision to reject a primary rule for a non-primary rule, if a justice has multiple rules likely to generate the preferred outcome, the ideological tenor of those rules may shape the choice among them.

The Role of Flexibility – Comparing Primary Rules

If a justice's decision to select a non-primary over a primary rule is not the result of ideological preferences, then perhaps it is the flexibility of the extant rules that motivates that decision. The analysis of Chapter 5 demonstrated that flexibility did not operate as expected on the judicial choice between primary rules, but perhaps it can drive the choice to select a non-primary rule. If, for instance (and as suggested in Hypotheses 2), a justice is concerned with lower court compliance, then a justice might reject the primary rules if the alternative rule(s) are less flexible. In this section, I offer some initial evidence about these claims,

[141] The difference between the voting patterns was not statistically significant, probably due to the small sample size.

evidence which suggests that flexibility can have some effect on rule choice, at least when the case outcome is held constant.

I first compared the flexibility of the primary rules offered in the fifty-two cases where a justice did not select a non-primary rule with the primary rules in the eighteen cases where a justice did select a primary rule. If there are any differences in the flexibility of the primary rules in these two case categories, this would suggest that the decision to favor a non-primary rule may result when a primary rule fails to provide the desired level of leeway for lower court judges.

For the analysis, I used the flexibility scores given to each primary rule by the coders. I then calculated the mean flexibility score of both parties' primary rule in each case category as well as the average difference between the two. Table 6E contains these results.

TABLE 6E. THE FLEXIBILITY OF PRIMARY RULES, COMPARING CASES WHERE NON-PRIMARY RULES WERE SELECTED AND NOT SELECTED

Case Category	Avg. Flexibility of Petitioner's Primary Rule	Avg. Flexibility of Respondent's Primary Rule	Avg. Difference in Flexibility of Primary Rules
Non-Primary Rule Presented, Not Selected (52 Cases)	2.80	2.68	.103
Non-Primary Rule Presented and Selected (18 Cases)	2.85	2.60	.240

As with ideology, there are not any marked differences between the flexibility of the primary rules presented in each type of case. While the Respondents' rules generally offer slightly more discretion for lower court judges than the Petitioners', this is consistent across both case categories. There does appear to be a larger difference between the flexibility of the primary rules in those cases where a non-primary rule was selected than in those case where

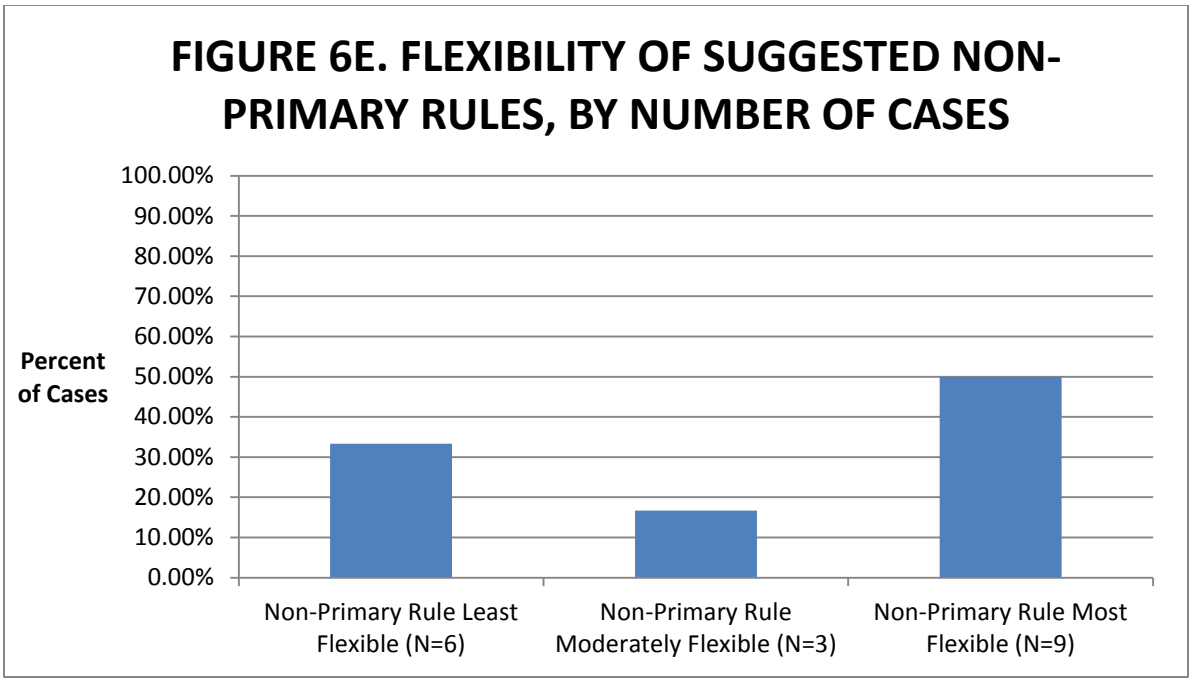
non-primary rule was not selected, but the difference is not statistically significant.[142] It seems, therefore, that justices are probably not selecting non-primary rules because the primary rules are insufficient in the amount of discretion they provide for lower courts.

The Role of Flexibility – Comparing Primary and Non-Primary Rules

A second way to evaluate the role of flexibility in the decision to adopt a non-primary rule is to compare the primary and non-primary rules in those cases where a non-primary rule was favored. To measure the flexibility of the rules here, I again employed the values assigned to each rule by the coders. However, because I was interested in whether or not the justice chose the least flexible rule (rather than the level of or difference in flexibility in the two primary rules), I simply examined mean value for each rule, coding the one with the highest value as the least flexible. I then compared the suggested primary and non-primary rules in each of the eighteen cases in which a justice adopted a non-primary rule.[143]

No clear finding emerges from the results of these calculations. More specifically, a non-primary rule was the least flexible rule in less than half of the cases, or six out of eighteen; in nine out of eighteen cases a non-primary rule was actually the most flexible of the proffered alternatives; in the remainder, the non-primary rule generated a level of flexibility between that of Petitioner and Respondent's primary rules. Figure 6E displays these results.

[142] More precisely, the p-value on the difference of means test was not significant at the <.05 level.
[143] Again, the ideal approach here would also compare the non-primary rules in these cases to the non-primary rules in those cases where such rules were presented, but not selected. Unfortunately, because flexibility measures for the latter rules were unavailable, this comparison was not possible here. In future work, I plan to gather such scores and conduct the analysis.



Because of this distribution, any preference for the least flexible rule could have driven the choice to a non-primary rule in only about 30% of the cases (6/18). In those six cases, of course, seventeen justices did select the least flexible non-primary alternative, but for the remaining seventy-three instances in which a justice choose a non-primary rule, that decision could not have been because that rule was the least flexible. It seems again, therefore, that the desire to control lower courts through legal rules is unlikely to be a particularly a particularly strong predictor of the decision to choose a non-primary rule.

The Role of Flexibility – Controlling for Case Outcome

A different story emerges, however, when the outcome produced by a rule is also considered. As discussed above, it could be that a justice will only select a rule – primary or non-primary – if that rule produces the outcome that justice is likely to prefer. It may be, therefore, that it is only when the justice has the option of several rules, any of which would generate the preferred outcome, that a justice's concern for rule flexibility begins to operate.

To assess this, I again noted whether the non-primary rule was filed in support of the Petitioner or the Respondent. I considered such rules likely to produce the same outcome in the lower courts as the primary rule of the party they supported, and, following the method used in Chapter 5, coded each rule's associated outcome as liberal or conservative. I then matched the individual justice to the rules and determine if, among those rules that would produce the preferred outcome, a justice choose the least flexible rule. Because flexibility measures were available for all of the rules offered in the eighteen cases in which a non-primary rule was chosen, all of those cases were studied here.

Out of the 162 rule choices made in these cases, there were 120 instances in which a justice had the option of more than one rule that would have produced their preferred outcome.[144] Out of those 120 opportunities, a justice actually favored the non-primary, same outcome rule approximately 53% of the time (63/120 votes). Among those sixty-three votes for a non-primary rule, that rule was less flexible than the same outcome, primary rule seventeen times; the non-primary rule was actually more flexible in forty-four of the instances when the justice favored a non-primary rule. In other words, when a justice favored a non-primary rule over a same-outcome primary rule, the former was less flexible less than 30% of the time.[145] This difference, moreover, is statistically significant. Table 6F illustrates these results.

[144] Most often, because only one non-primary rule was suggested, only some of the justices had this opportunity; in seven cases, however, the proffered rules were such that every justice could have selected a non-primary rule that generated their preferred outcome.

[145] Again, the analysis would be improved with a comparison of the flexibility of selected non-primary rules to the flexibility of non-primary rules that were not selected. Lack of data prohibits this comparison at this point in the project but future work will remedy this shortcoming.

TABLE 6F. SELECTION OF SAME OUTCOME, NON-PRIMARY RULES, BY FLEXIBILITY

Justice Can Vote for Same Outcome, Non-Primary Rule	Justice Votes for Same Outcome, Non-Primary Rule	Same Outcome, Non-Primary Rule Less Flexible	Same Outcome, Non-Primary Rule More Flexible	Same Outcome, Non-Primary Rule As Flexible
74.07% (120/162 votes)	52.5% (63/120 votes)	26.9% (17/63 votes)	69.8% (44/63 votes)	3.1% (2/63 votes)

It seems, therefore, that just as with the results in Chapter 5, when selecting between two rules that generate the same outcome, the justices may be predisposed to select the rule that gives the lower courts more, not less, leeway.[146] This claim is tentative, of course, but does provide additional evidence that re-considerations how rule flexibility influences rule choice may be warranted.

The Role of Quality – Comparing Primary Rules

Finally, I have theorized in this dissertation that higher quality rules should be more likely to be favored by Supreme Court justices. Accordingly, when a justice adopts a non-primary rule, rejection of the primary rules may have occurred because they were of lower quality than the non-primary alternative. In this section, I examine the quality of primary and non-primary rules, using each of the three measures of quality employed throughout this project.

Once again, I first compared the quality of the primary rules offered in the fifty-two cases where a non-primary rule was not favored with the primary rules offered in the eighteen cases where a non-primary rule was favored. If justices are selecting non-primary rules when the primary rules are of poor quality, then the primary rules offered in the first set of cases should be, on average, of higher quality than those in the second set of cases.

[146] As noted in Chapter 5, Staton and Vanberg (2006) suggest that judges might issue vague opinions to disguise non-compliance, a claim this finding supports.

To test this, I used the quality measures employed throughout this dissertation: the extent of the division among the lower court judges involved in the circuit splits, the treatment of each rule by the lower courts before the Supreme Court heard the case, and how frequently litigants cited the rule in their own appellate briefs filed before the high Court ruled. Using a ratio for each of these measures - the number of judges supporting the rule divided by the total number of judges who heard the case, the number of positive treatment cases to the total number of cases which cited a particular rule, and the number of appellate briefs divided by the total number of circuits that supported each rule - I then compared the mean values on each for the primary rules in both case categories. This comparison is displayed in Table 6G.

As with ideology and quality, there do not appear to be major differences between the primary rules in each case category. The primary rules in the cases in which a non-primary rule was selected do have slightly lower numbers on each measure of quality, but none of these differences are statistically significant.[147] It therefore seems unlikely that a generally low(er) level of quality in primary rules drives a justice to favor a non-primary rule.

The Role of Quality – Comparing Primary and Non-Primary Rules

To further evaluate the role of quality in these rules choices, I then compared the primary and non-primary rules in those cases where a justice favored the latter type of rule. Out of the eighteen cases in which a justice favored a non-primary rule, complete measures of quality were available for only six cases.[148] In those six cases, I measured the extent of the division among the lower court judges involved in the circuit splits, the treatment of each rule

[147] Given the small number of cases available, future research is needed to confirm these differences are not statistically significant.
[148] In the other twelve, at least one rule had no circuit supporting it, and thus no measure of rule quality.

by the lower courts before the Supreme Court heard the case, and how frequently litigants cited the rule in their own appellate briefs before the high Court ruled.

TABLE 6G. THE QUALITY OF PRIMARY RULES, COMPARING CASES WHERE NON-PRIMARY RULES WERE SELECTED AND NOT SELECTED

Case Category	Petitioner's Primary Rule (Lower Court Judges)	Respondent's Primary Rule (Lower Court Judges)	Petitioner's Primary Rule (Lower Courts)	Respondent's Primary Rule (Lower Courts)	Petitioner's Primary Rule (Litigants)	Respondent's Primary Rule (Litigants)
Non-Primary Rule Presented, Not Selected (52 Cases)	.957	.935	.545	.638	17.66	13.04
Non-Primary Rule Presented and Selected (18 Cases)	.909	.876	.463	.543	10.02	12.02

I then calculated the appropriate ratio for each and compared the primary and non-primary rules to determine whether, in those instances in which a non-primary rule was chosen, it was of higher quality than the primary rules.

The results suggest that when they are selected, alternative rules are not of significantly higher quality than the primary rules. More specifically, on the measurement for the division among the lower court judges, the selected non-primary rule never received a higher score than the primary rules; in two cases, it received a higher score than one of the non-primary rules, but in the other four, all the rules received the same score. It should be noted, however that the rules did not vary significantly in the extent of lower court disagreement.

In terms of how lower courts responded to each rule, there was slightly more variation between the primary and non-primary rules, but the findings are similar. When it was chosen, the non-primary rule had more favorable treatment than either primary rule in two of the six cases; in another two, it had the same score as one of the primary rules; and in two it had worse treatment than the primary rule.

At least when assessed this way, it does not appear that how lower court judges responded to or how lower courts treated each rule before the justices made their decision could be key predictors of when a justice might opt for a non-primary rule. This stands in contrast to the findings in Chapter 5 that favorable lower court treatment and less division among lower court judges can enhance the probability that a primary rule is chosen over another primary rule.

Just as with division among lower court judges, there is no significant difference in the average number of appellate briefs filed by litigants across rule types. In those six cases when a justice favored a non-primary rule, that rule had a higher average number of briefs filed per circuit in one case, tied with a primary rule for the highest number in one case, received the second highest score in three cases, and had the lowest score in one cases. Once again, there seems to be little relationship between how litigants have utilized rules and whether a justice chooses to adopt a non-primary rule.

The Role of Quality – Controlling for Outcome

When a justice's preference for outcome is controlled, however, the findings are slightly more substantive, at least with regards to one measure of rule quality. As above, these results were calculated by comparing the scores for the non-primary and primary, same

outcome rules in those twenty-one votes (from six cases) in which a justice chose the non-primary rule. I discuss each of the three measures of quality in turn.

First, the lack of variation between the two rules in terms of the division among lower court judges prohibits any clear findings. In each of the six cases, the justices in each circuit favored the primary and non-primary, same outcome rules at an identical rate – 100%. It therefore seems unlikely that justices are looking to this factor in deciding which rule to adopt, simply because it can be of little assistance to them in distinguishing among competing rules.

Regarding the treatment of the rule by the lower courts, the findings are more notable. As displayed in Table 6H, justices in these six cases confronted primary and non-primary rules associated with the same outcome twenty-six times; they actually voted for the non-primary rule twenty-one times, or 80.7%.[149] Moreover, out of those votes for a non-primary rule, that rule received more favorable treatment in the lower courts than the same outcome primary rule in thirteen such instances. In terms of percent, this means that when a justice selected the non-primary rule, it was of higher quality on this measure 61.9% of the time. Though this of course leaves eight instances (37.9%) in which a justice favored a lower-quality non-primary rule, it nonetheless does provide some evidence that the treatment of a rule by the lower courts may influence a justice's choice, at least when the choice is between same outcome rules.[150]

[149] These numbers differ from those reported in the section on ideology because these are not the same six cases studied in that section.

[150] Given the small sample size, the lack of statistical significance on this difference is not surprising, but suggests further study is in order.

TABLE 6H. SELECTION OF SAME OUTCOME, NON-PRIMARY RULES, BY QUALITY (LOWER COURTS)

Justice Can Vote for Same Outcome, Non-Primary Rule	Justice Votes for Same Outcome, Non-Primary Rule	Same Outcome, Non-Primary Rule of Higher Quality than Primary Rule	Same Outcome, Non-Primary Rule Not of Higher Quality than Primary Rule
48.1% (26/54 votes)	80.7% (21/26 votes)	61.9% (13/21 votes)	38.1% (8/21 votes)

Finally, just as in the previous analyses, the results for the variable capturing the treatment of each rule by litigants are not particularly noteworthy. In only eight out of the twenty-one votes (38%) for the same outcome, non-primary rule did that rule generate more citations by litigants in their own appellate briefs; in the remaining thirteen votes for the alternative rule, the primary rule had actually been referenced more frequently. No inferences can be drawn from these descriptive figures, of course, but the findings support those of Chapter 5: how litigants react to competing rules before the Supreme Court decides between them seems to have little influence on rule selection.

A Note on the Role of the Solicitor General

Although I have not used the presence of the Solicitor General (SG) as a measure of the quality of legal rules, the analysis of Chapter 5 revealed that the SG can be a very important factor in whether a justice chooses the primary rule of the Petitioner or the Respondent. Given this, it could be that if the SG advocates for the non-primary rule, a justice may be more willing to select it. As noted previously, the SG may send a signal about executive preferences or may be a stronger legal advocate; regardless of the exact mechanism of influence, there may be something about the SG's advocacy of a non-primary rule that renders the justices more likely to depart from their standard rule choice behavior.

To determine if the SG might be exerting such influence, I first noted how often the SG participated in the seventy cases in which the justices were presented with non-primary rules, and how often that non-primary rule was supported by the SG, either as a litigant or as an amici. I then calculated how often that rule was favored by a justice, Table 6I displays these figures.

TABLE 6I. PRESENTATION AND SELECTION OF NON-PRIMARY RULES BY THE SG, BY CASES

SG Participated in Multiple-Rule Case	SG Suggests Non-Primary Rule	SG'S Non-Primary Rule Chosen by A Justice
68.5% (48/70 cases)	25.0% (12/48 cases)	58.3% (7/12 cases)

As evidenced by the figures, the SG participated in a large majority of these multiple-rule cases, acting as either a litigant or an amici almost seventy percent of the time. The SG, however, was not particularly prone to suggesting non-primary rules, choosing to do so only one-quarter of the time. Nonetheless, when the SG did present a non-primary rule, at least one justice favored that rule in almost 60% of the cases, suggesting that while the SG might be reluctant to offer non-primary rules to the justices, the justices are not especially reluctant to adopt them. Compare this to the rate of acceptance for non-primary rules suggested by someone other than the SG. In those instances, the non-primary rule was chosen only around 23% of the time.

These figures are of course merely descriptive, but they do suggest that the advocacy of the SG might be an important predictor of rule choice, even when the justice selects between primary and non-primary rules. In combination with the results in Chapter 5, then, the findings strongly suggest that when the SG advocates for a rule – primary or not – that advocacy can augment the chances that rule is selected.

When the justice's preference for outcome is included, however, the impact of the SG appears mitigated. Using all eighteen cases in which a non-primary rule was favored, I determined how often a justice confronted more than one rule that would produce the outcome that justice preferred, how often the justices selected the non-primary, same outcome rule, and, most importantly, what percentage of those favored rules were supported by the SG. Table 6J presents these results.

TABLE 6J. SELECTION OF NON-PRIMARY RULES SUGGESTED BY THE SG, BY JUSTICE VOTES

Justice Can Vote for Same Outcome Non-Primary Rule	Justice Votes For Same Outcome, Non-Primary Rule	Same Outcome, Non-Primary Rule Supported by SG	Same Outcome, Non-Primary Rule Not Supported by SG
72.8% (118/162 votes)	53.3% (63/118 votes)	36.5% (23/63 votes)	63.4% (40/63 votes)

In contrast to expectations, in those instances in which a justice did vote for a non-primary, same outcome rule, only around one-third of those rules were supported by the SG; in two-thirds of the cases, a justice voted for a non-primary rule that was not favored by the SG. While it is difficult to tell from these descriptive statistics alone, it seems that the presence of the SG is not a dominant influence when the justice is selecting between primary and non-primary rules that produce the same outcome. These results seems difficult to reconcile with those of Table 6I, but it may be that the SG is able to influence the justices to vote for an outcome they might otherwise not; once that decision has been made, however, which rule the justice selects to generate that outcome seems more likely to depend on other factors, including the ideology, flexibility, and quality measures discussed above.

"Sua Sponte" Cases

The second type of case in which a justice's vote for a rule did not correlate with a vote on the case outcome are those in which a justice rejected all proffered alternatives and generated a unique legal rule.[151] As noted throughout this dissertation, much of the political science scholarship on legal rules has presumed – either explicitly or implicitly – that the justices craft whatever legal rules they deem appropriate. Although justices are in fact free to articulate whatever legal doctrine they choose, the results from this dissertation have demonstrated that justices do so in only a small number of instances, at least when they decide cases of inter-circuit conflict.

How often do justices favor sua sponte rules? To generate the 500 cases employed in this project, I examined approximately 575 cases involving inter-circuit conflict. Of these, forty-one cases were set aside because they involved judicial creation of a legal rule.[152] These cases involved 203 votes for a sua sponte rule, generating 11 majority opinions, 17 dissenting opinions, 14 concurring opinions, and 9 unanimous opinions.[153] As noted in Chapter 4, the creation of a sua sponte rule is thus a rare phenomenon, occurring in around seven percent of the cases in which circuit courts are divided.

That judicial creation of rules is rare, however, does not mean it is unworthy of analysis. In fact, it is precisely because the justices in these instances depart so substantially from their normal pattern of rule choice that these cases warrant further study. In this section, therefore, I examine these forty-one cases, the justices who created their own rules, and the

[151] Please note that this does not mean that the justice produced the rule out of whole cloth; in many instances, in fact, other circuits had employed the rule or elements of the rule were mentioned in litigant briefs in the case at hand. By sua sponte, I mean a justice favored a rule that had not been suggested to the Court by the case participants.

[152] The remaining cases were not used because the conflict involved the Supreme Court and a lower court or because one or more litigant briefs were unavailable in either Lexis or Westlaw.

[153] This total is more than forty-one because there were cases that involved several sua sponte opinions per case.

proffered rules that those justices apparently found unsatisfactory.[154] Again, the results are descriptive, but they nonetheless provide some clues as to why a justice of the U.S. Supreme Court might engage in such unusual (and costly) rule choice behavior.

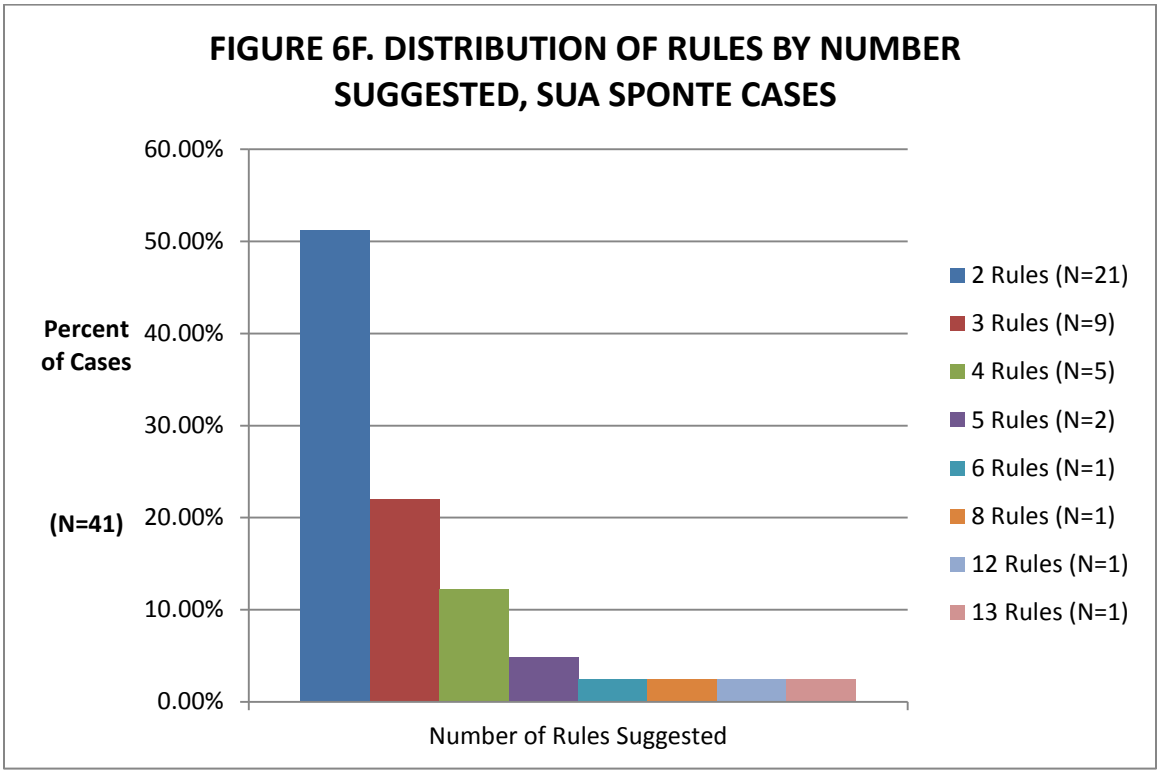
The Nature of the Cases

As above, I examined several aspects of these cases to determine if they differ in any systematic way from those in which a justice selects a proffered rule. First, I determined how many rules were actually suggested to the justices. Recall (Chapter 4, Figure 4C) that in those cases in which a justice selected a suggested rule, only two rules were suggested to the justices in 86% (430/500) of the cases; the suggestion of more than two rules became increasingly less frequent as the number of rules increased, with no case having more than six proffered rules.

In the sua sponte cases, the number of rules offered by case participants has a slightly different distribution. As Figure 6F illustrates, the majority of cases again involved only two suggested rules, but it is not the overwhelming majority that it is in the standard rule selection cases. Moreover, in terms of percentages, there are twice as many cases here in which three rules were suggested (21.95% versus 10.11%). And, though these categories had only one case each, there were at least some cases in this category in which more than six rules were suggested to the justices: one case each with eight, twelve, and thirteen rules.

It appears from this figure, then, that in many cases in which a justice supported a sua sponte rule, that justice had more than two rules from which to select and, in some cases, was given a substantial number of rule options. Though of course the majority of cases still involve only two rules, it is striking that the cases with the largest number of proffered rules were also those in which at least one justice favored a sua sponte rule.

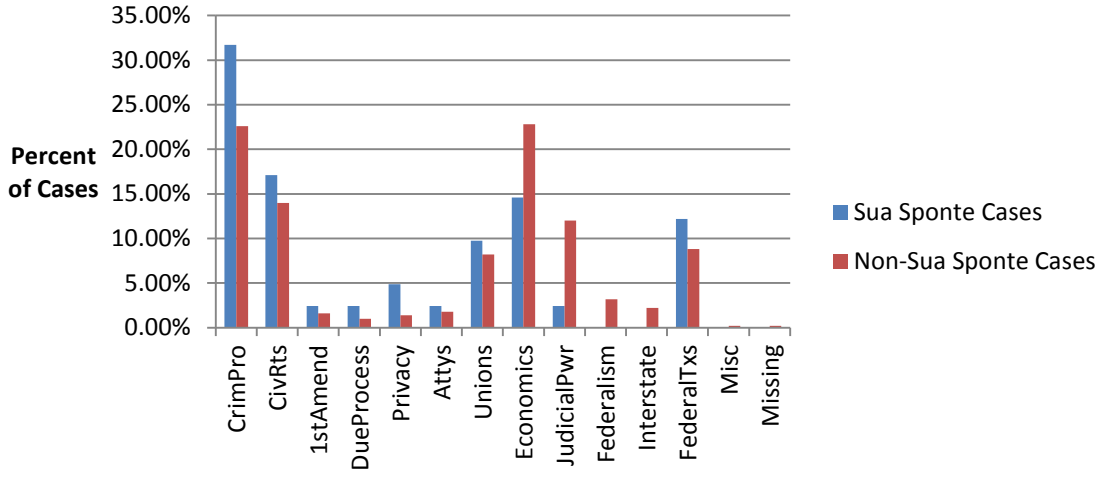
[154] Please note that these cases were not included in the prior section on multiple-rule cases.



The reasons for this pattern remain somewhat unclear. It seems at first glance that a justice given so many rule options could most likely find one of those rules to be satisfactory and have little reason to exert the effort necessary to craft a new rule. On the other hand, it may be that the suggestion of multiple rules indicates that the law is unclear – to lower courts, litigants, and amici; the large number of rule options may illustrate confusion within the legal community about exactly what the correct legal standard is or should be. In that instance, perhaps a justice feels compelled to articulate a new rule that will sufficiently clarify the law and resolve any uncertainty. Alternatively, it may be that these cases present especially complex legal questions which the proffered rules do not settle sufficiently, or involve novel questions that have not yet spent the time in the lower courts needed to winnow down the range of potential rules.

In contrast, there is no significant difference in the subject matter of sua sponte cases and those in which the justices selected from among the suggested rules, as displayed in Figure 6G. Most cases of both types involve criminal procedure, economics, civil rights and federal taxes, and relatively few are about the First Amendment, due process, privacy, federalism, or interstate relations. There is a slightly greater percentage of criminal procedure cases among the sua sponte cases and a slightly smaller percentage of those involving economic issues and issue of judicial power.[155] In general, however, it does not appear that the type of legal issues invoked by a case could motivate a justice to reject all proffered rules.

FIGURE 6G. DISTRIBUTION OF CASES BY CASE TYPE, SUA SPONTE AND NON-SUA SPONTE CASES

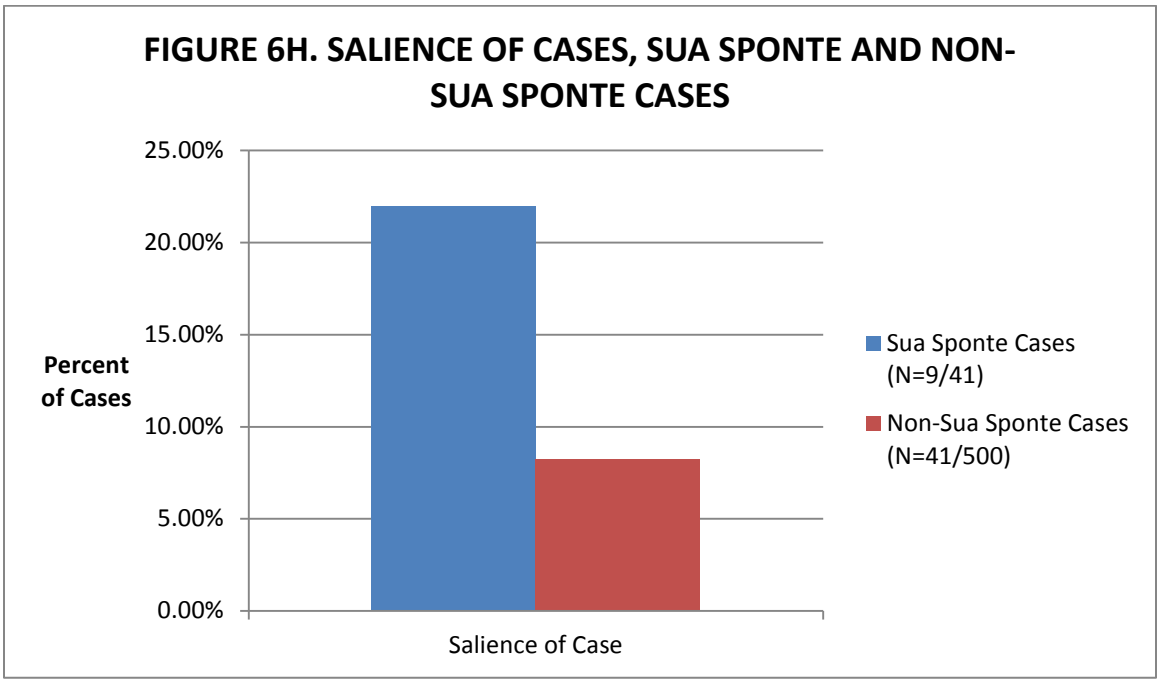


On the other hand, sua sponte cases were much more likely to involve constitutional issues. More specifically, whereas 11.0% of the cases in the main dataset involved questions of constitutionality (as opposed to statutory issues), 19.5% of the sua sponte cases did so. Though more research is needed, of course, perhaps the justices are more willing to exert extra effort when the case has a constitutional dimension, either because they consider such issue as particularly important or because, given Congress' general inability to reverse

[155] A test of the statistical significance of these differences indicated they were not statistically significant.

constitutionally-based rulings, they want to ensure that the "last word" on a case reflects their own preferences as closely as possible.

There are also substantial differences in two other aspects of these cases: their salience and the participation of the Solicitor General. Figures 6H and 6I display these patterns. As seen in Figure 6H, approximately 22% of the cases in which a justice developed a rule sua sponte were salient, as compared to approximately 8% of those in which each justice selected from among the suggested options. This difference, moreover, is statistically significant at p-value < .05.



Why a justice would be more likely to articulate a rule in a salient case is unclear, particularly if case participants, knowing the attention likely to be paid to the case, are putting more effort into their own rule presentations. It may be, however, that the justices, also aware of the case's visibility, are investing more time and resources into their own work. Because they may be more concerned that the appropriate rule is generated than in an "ordinary," non-salient dispute, the justices may be more willing to expend the effort

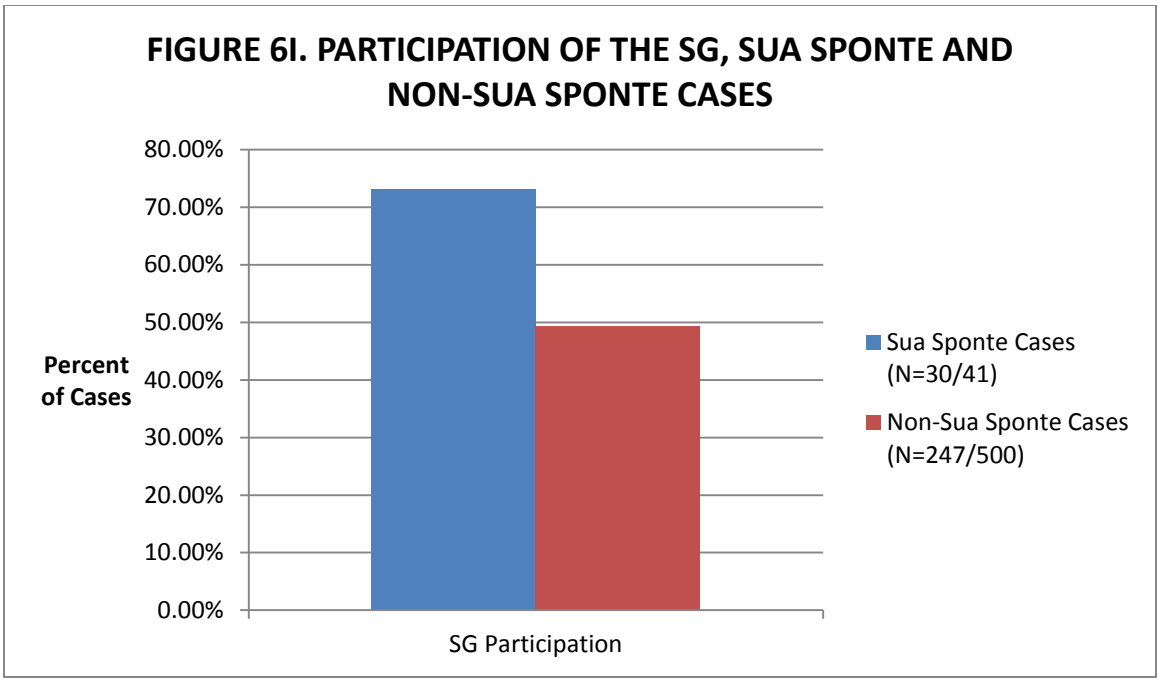
necessary to favor the legal rule they deem most preferable, even if that means they must generate or identify the rule themselves.[156]

The relationship between the presence of the SG and the support of sua sponte rules is no less notable, but it is more unexpected. Chapter 5 demonstrated that the SG's advocacy for a rule can have important effects on the likelihood of its selection, a result which implies that the rules offered or favored by the SG are particularly appealing to the justices. If true, then the justices may be less likely to generate a rule sua sponte when the SG is backing at least one of the proffered rules. Figure 6I shows, however, that this is not the case. In fact, the SG is more likely to participate in sua sponte cases, at a rate of around 73%; in the non-sua sponte cases, that rate is not quite 50%.[157] The difference is statistically significant at p-value < .05

When the SG is adding the perspective of the executive branch to the case, the justices apparently may be more likely to articulate their own rules. Again, if the SG is presenting rules that are "better" on some relevant dimension, then a justice should have little reason to develop a unique rule, and the findings of Table 6I are surprising. It may be, however, that the SG's influence, demonstrated above and in Chapter 5, is not due to the quality of the rules suggested; instead, it may be that the SG simply sends a signal about executive preferences, preferences which then influence the justice's decision about which proffered rule to adopt. If, however, those proffered rules are somehow still insufficient,

[156] Though perhaps less likely, causality may run in the opposite direction, with case salience resulting from the justice's decision to raise a rule sua sponte. Given that salience is measured by the presence of story about the case on the front page of the New York Times the day after the ruling, this would only result, however, if the relevant reporters/editors had been closely tracking the legal rules suggested in the case.

[157] These participations rates may be the result of a case's salience. That is, the SG may be more likely to get involved in a salient case and salient cases are those in which the justices are more likely to raise a rule sua sponte. Future work should compare the participation of the SG in salient and non-salient cases.



the justices may be quite willing to develop their own legal rules, regardless of the presence of the SG. Future research should explore this further and examine in particular if sua sponte rules generally comport with the ideological tenor of the rule suggested by the SG. For now, however, it is clear that the participation of the Solicitor General in a case is no guarantee that the justices will not generate their own rules.

The Nature of the Justices

As above, I was also interested in whether particular justices, or particular types of justices, were more willing to generate their own legal rules. Table 6F displays every justice who served during the years studied in this dissertation (1954-2000), the number of cases heard by each justice,[158] and the percentage of cases in which the justice either authored or joined an opinion containing a sua sponte rule. Table 6K displays the results.

The overall rate at which a justice was willing to support a sua sponte rule was, not surprisingly, quite low, ranging from zero for Justices Burton, Clark, Frankfurter, Jackson,

[158] This includes the 500 cases of the sample and the 41 sua sponte cases.

Goldberg, Minton, Reed, and Whittaker to 6.25% for Justice Fortas and 5.65% for Justice Harlan. Among more recently serving justices, Justice Thomas was the most likely to support a sua sponte rule, doing so in 5.36% of the cases he heard, and Justices Burger and Stewart doing so least often, at 2.4% and 2.63%, respectively. Among the remaining justices, the range was generally quite narrow, with Justices Blackmun, Brennan, Breyer, Ginsburg, Kennedy, O'Connor, Marshall, Powell, Rehnquist, Scalia, Stevens, Souter and White all favoring sua sponte rules in around 4-5% of the cases they heard.

Among these justices, however, very different propensities for authoring or joining such opinions also appear. Justices Blackmun and Brennan, for instance, were much more likely to author than join an opinion that contained a sua sponte rule. Other justices displayed the opposite tendency, with Justices Ginsburg, Kennedy, Rehnquist, Stevens, White, being more likely to join rather than author such opinions.[159]

Justices Breyer, O'Connor, Powell, Scalia, Souter, Stevens and Thomas authored and joined such opinions at approximately the same rate. Why these particular justices employ sua sponte rules as they do is uncertain, but future research, perhaps involving the private papers or use of judicial biographies, might provide more insight.

Just as with those cases in which a justice favored a non-primary rule, it does not appear, at least from these figures, that certain types of justices are more or less likely to support sua sponte rules. Liberals such as Justice Stevens, Brennan, and Blackmun, who supported such a rule in a larger number of cases, did so more often than some conservatives, but so did other conservatives such as Justices Rehnquist, Scalia and White.

[159] Indeed, in every instance in which in which Justice Rehnquist supported a sua sponte rule, he did so as a non-author. That Warren and Burger exhibit this same pattern raises interesting questions about whether and why Chief Justices would be more reluctant than Associate Justices to draft sua sponte opinions.

TABLE 6K. JUSTICES AND THE SELECTION OF SUA SPONTE RULES

Justice	Number of Cases Heard by Justice	Percent of Cases in Which Justice Authored Opinion with Sua Sponte Rule	Percent of Cases in Which Justice Joined Opinion with Sua Sponte Rule	Total (Percent of Cases in Which Justice Supported Sua Sponte Rule)
Black	54	0.00%	1.85%	1.85%
Blackmun	346	4.04%	0.86%	4.90%
Brennan	287	3.83%	0.69%	4.52%
Breyer	132	1.51%	2.27%	3.78%
Burger	125	0.00%	2.40%	2.40%
Burton	13	0.00%	0.00%	0.00%
Clark	44	0.00%	0.00%	0.00%
Douglas	76	0.00%	2.63%	2.63%
Fortas	16	0.00%	6.25%	6.25%
Frankfurter	25	0.00%	0.00%	0.00%
Ginsburg	151	0.66%	3.31%	3.97%
Goldberg	11	0.00%	0.00%	0.00%
Harlan	53	3.77%	1.88%	5.65%
Jackson	1	0.00%	0.00%	0.00%
Kennedy	327	0.61%	3.36%	3.97%
Marshall	281	1.77%	3.20%	4.97%
Minton	8	0.00%	0.00%	0.00%
O'Connor	403	0.99%	2.97%	3.96%
Powell	149	1.34%	2.68%	4.02%
Reed	9	0.00%	0.00%	0.00%
Rehnquist	476	0.00%	3.36%	3.36%
Scalia	353	1.41%	3.11%	4.51%
Souter	235	0.85%	2.97%	3.82%
Stevens	454	0.88%	3.52%	4.40%
Stewart	114	0.87%	1.75%	2.63%
Thomas	205	2.43%	2.92%	5.36%
Warren	52	0.00%	1.92%	1.92%
Whittaker	16	0.00%	0.00%	0.00%
White	354	0.56%	3.38%	4.23%

Moderates Kennedy and O'Connor did not shy away from supporting sua sponte rules, but they do not appear to do so at rates that different from their more ideologically extreme colleagues.

It seems, therefore, that a few individual justices might be more willing to favor sua sponte rules, some doing so most often as opinion authors, others as opinion supporters, but there is no one type of justice who is more or less likely to reject all proffered rules for a sua sponte one. Though this leaves continuing doubt as to what exactly drives justices towards sua sponte rules, the pattern suggests that no "rogue" justice is departing from the most common pattern of rule selection - choosing a primary rule suggested by one of the litigants.

The Nature of the Rules

Finally, I examined whether the rules suggested to the justices in these cases could have motivated them to develop their own legal rule. More precisely, perhaps the rules offered were insufficient enough in some relevant dimension - ideology, flexibility, or quality - that the justices chose to use their own resources to articulate a different rule. Unfortunately, determining what makes a rule "insufficient enough" is challenging, as I have no precise measure for each justice of when a rule crosses a threshold of acceptability. To provide some initial evidence, I instead proceed as above, evaluating whether the sua sponte rule the justice favored was in closer ideological proximity, offered less flexibility, or was of higher legal quality than either of the suggested rules.

The Role of Ideology

As illustrated in Chapter 5, a justice is more likely to select a proffered rule when it is in closer ideological proximity to the justice's own ideological preferences. If a justice's decision to reject the rules offered by case participants is also motivated by ideological

concerns, then the sua sponte rule should be closer ideologically to the justice than either of the suggested rules. To assess this, I calculated the absolute value of the ideological distance between each justice who favored a sua sponte rule and the suggested rules in those five cases (a total of fourteen votes) for which an ideological measure was available for each rule. Table 6L displays these results.

Unfortunately, no clear pattern emerges from the data. The sua sponte rules favored by a justice were just as likely to be in closer ideological proximity as they were not to be in closer ideological proximity. It appears, at least from this very limited analysis, ideological proximity may not be fueling the decision to support a sua sponte rule.[160]

TABLE 6L. SELECTION OF SUA SPONTE RULES, BY IDEOLOGICAL PROXIMITY BETWEEN JUSTICE AND RULE

Number of Votes for Sua Sponte Rule	Sua Sponte Rule in Closer Ideological Proximity than Suggested Rule	Sua Sponte Rule Not in Closer Ideological Proximity than Suggested Rule
14	50% (7/14)	50% (7/14)

An alternative way to assess the role of ideology is to compare the rules offered in the sua sponte cases with those offered in the non-sua sponte cases. Perhaps a justice is willing to select a proffered rule when it is in close enough ideological proximity, but not if both rules are simply too far away. Again, when a rule is "close enough" or "too far away" is difficult to assess. To gain some leverage, however, I compared the mean distance between the justices and the two primary rules in the sua sponte and non-sua sponte cases. If there is, on average, more distance between the justices and the rules offered in sua sponte cases than in the non-sua sponte cases, that would provide some evidence that the rules offered in sua

[160] Several limitations of this approach must be taken into account. Five cases is as extremely small sample from which only the most tentative evidence can be derived; in addition, these five cases were ones in which the sua sponte rule had been supported at some time by a circuit court. Those cases in which a justice seemed to generate the rule wholly on their own necessarily lack any ideological measure and so cannot be evaluated with this approach.

sponte cases are less ideologically pleasing than in standard cases, and that a justice's decision to generate their own rule is perhaps at least partially motivated by ideological preferences. Table 6M displays the results of these calculations.

These findings provide mixed evidence about the role of ideology. The Respondent's rule is generally farther away from the justices is sua sponte cases than in non-sua sponte cases, but the Petitioner's rule is closer.[161] This suggests that ideological proximity may be motivating the choice to reject Respondent's rule but not to reject Petitioner's rules, a difference which seems difficult to explain. What seems clearer

TABLE 6M. IDEOLOGICAL PROXIMITY OF RULES, SUA SPONTE AND NON-SUA SPONTE CASES

Average Distance Between Justice and Petitioner's Rule (Sua Sponte Cases)	Average Distance Between Justice and Respondent's Rule (Sua Sponte Cases)	Average Distance Between Justice and Petitioner's Rule (Non-Sua Sponte Cases)	Average Distance Between Justice and Respondent's Rule (Non-Sua Sponte Cases)
.731	.818	.764	.763

is that, at least when it comes to the rules suggested by the Petitioner, ideological distance is probably not a primary reason a justice chose to articulate their own rule. That some justices did so indicates that something other than ideological distance is likely fueling that decision. In the next two sections, I explore whether the flexibility or quality of the rules may be that motivation.

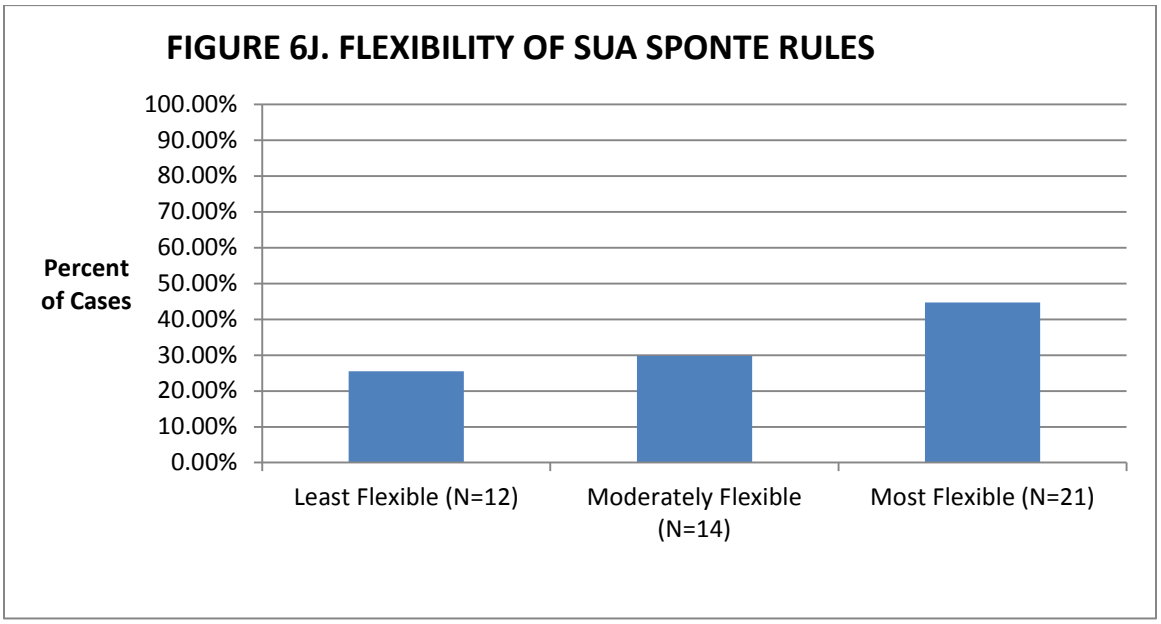
The Role of Flexibility

Just as in those instances in which a justice favored a non-primary over a primary rule, the flexibility of the rules presented by case participants could motivate a justice to

[161] The rules suggested by the litigants in sua sponte cases are more different ideologically from each other than the rules suggested in non-sua sponte cases. In the latter group, the rules of the Petitioner and the Respondent are almost exactly the same distance from the justices, whereas in the former group, the Petitioner's rule is closer than the Respondent's. Why this difference exists and how it influences rule choice is beyond the scope of this project, but may warrant attention in the future.

generate a rule sua sponte. More specifically, if the justice is concerned with lower court compliance, and none of the suggested rules provide a sufficient level of rigidity, the justice might be inclined to develop a rule that is more likely to promote compliance. If this is true, then the sua sponte rules favored by the justices should be less flexible than the rule options presented by case participants.

To measure the flexibility of the rules in this section, I again employed the values assigned to each rule by the coders. As I was interested here in whether or not the justice developed the least flexible rule (rather than the difference in flexibility between the two primary rules), I simply took the mean value for each rule, coding the one with the highest value as the least flexible. I then compared the two primary rules and sua sponte rules to determine if the latter was less flexible. Because I had a complete set of flexibility scores for every rule, I was able to analyze all forty-one sua sponte cases.[162]



[162] Because there were six cases in which a second sua sponte rule was favored by at least one justice, there are actually forty-seven sua sponte rules studied here.

As seen in Figure 6J, most sua sponte rules (around 45%) were actually the most flexible of the rules, with around 30% having flexibility between the two primary rules and the fewest (around 25%) having the least amount of flexibility. These are only descriptive statistics, of course, but they do seem to indicate that when justices favor their own rules, those rules often provide the lower court with more leeway than the rules suggested by case participants. More research must be done before any rigorous claims can be made, but when combined with the results of Chapter 5 and those on the multiple-rule cases, the data are once again suggesting that justices are not employing legal rules – whether of their own or others making – as a mechanism for lower court control.

For further analysis, I then compared the mean flexibility of the primary rules offered in sua sponte and non-sua sponte cases. If the suggested rules in the former are markedly different in how much discretion they provide lower courts, this might be one reason justices chose to articulate their own rules. These findings are illustrated in Table 6N.

TABLE 6N. FLEXIBILITY OF RULES, SUA SPONTE AND NON-SUA SPONTE CASES

Average Flexibility of Petitioner's Rule (Sua Sponte Cases)	Average Flexibility of Respondent's Rule (Sua Sponte Cases)	Average Flexibility of Petitioner's (Non-Sua Sponte Cases)	Average Flexibility of Respondent's Rule (Non-Sua Sponte Cases)
2.65	2.79	2.69	2.74

Similar to the results above, it does not appear that differences in the flexibility of proffered rules in sua sponte and non-sua sponte cases are what motivate justices' sua sponte rule choices. The rules suggested by Petitioners are, on average, slightly more flexible than Respondent's, but there is no statistically significant difference across the two types of

cases.[163] In other words, in both sua sponte and non-sua sponte cases, the primary rules suggested by the parties generally produce the same level of discretion for lower courts. Given this, it is difficult to imagine that dissatisfaction with this aspect of the suggested rules is why the justices would reject those rules for one of their own. Just as with ideology, it does not appear that this aspect of the rules offered to the Court by the case participants fuels the justices' decisions to depart from their standard rule choice behavior.

The Role of Quality

Finally, a justice may decide to reject all suggested rules because those rules were of lower quality than what the justice would prefer. Once again, determining whether a rule is "low enough" in quality is difficult; instead, as above, I first evaluated whether the favored sua sponte rule was of higher quality than the rejected alternatives, using those four cases for which complete measures of quality were available. I then examined whether, on average, the rules suggested by the litigants in sua sponte cases were of lower legal quality than those suggested in non-sua sponte cases. For both analyses, I employed all three measures of quality – division among the lower court judges, treatment by other lower courts, and the reaction of litigants in their own adjudications.

When a justice favored a sua sponte rule, the results indicate that rule was not of significantly higher quality than the proffered alternatives. More precisely, in the four cases available for analysis, the sua sponte rule never received the highest score on the variable measuring division among lower court judges, received the highest score on the variable capturing litigant treatment in only one case, and received the highest score on the treatment by lower courts variable in two of the four cases. Though this sample is of course extremely

[163] In contrast to the ideological proximity of suggested rules (see Table 6I), in which the rules suggested by the litigants in sua sponte cases are more different from each other ideologically than the rules suggested by the litigants in non-sua sponte cases, the flexibility of suggested rules does not vary in the same way.

small, it does not appear that the rules articulated by the justices are of higher legal quality than the proffered rules, suggesting that rule quality is not systematically motivating a justice's decision to support a sua sponte rule.[164]

When I compared the average quality score of the suggested rules in the sua sponte and non-sua sponte cases, the results are similarly unremarkable. As seen in Table 6O, on two measures – the division among lower court judges and the treatment by lower courts, the rules suggested in sua sponte cases actually scored higher than in non-sua sponte case, indicating a higher quality rule.[165] On one measure – treatment of the rule by litigants, the rules suggested in sua sponte cases did score lower than in non-sua sponte cases. [166]

TABLE 6O. QUALITY OF RULES, SUA SPONTE AND NON-SUA SPONTE CASES

Quality Measure	Average Quality Score of Petitioner's Rule (Non-Sua Sponte Cases)	Average Quality Score of Respondent's Rule (Non-Sua Sponte Cases)	Average Quality Score of Petitioner's Rule (Sua Sponte Cases)	Average Quality Score of Respondent's Rule (Sua Sponte Cases)
Division Among Lower Court Judges	.941	.918	1	.979
Treatment by Lower Courts	.554	.557	.747	.605
Treatment by Litigants	13.05	9.80	8.42	3.81

Again, given that only four cases were used to calculate these quality measures, it is difficult to draw much from these results; nonetheless, the findings suggest at least tentatively that the quality of the rules offered to the justices is likely not what motivates a

[164] It should be remembered that these cases were those in which the sua sponte rule had been supported by at least one circuit; whether the rules that the justices develop on their own are of greater or lesser quality is impossible to determine given my measures of quality.

[165] The differences in the treatment by lower courts were more marked than the division among lower court judges.

[166] With only four sua sponte cases available for analysis, it is not surprising that none of these differences were statistically significant. It is also worthy of notice that in both types of cases, across almost every measure, the Petitioner's rule generally receives higher scores than Respondent's rule.

justice to develop a sua sponte rule. When combined with the results for ideology and flexibility, it seems that characteristics of the rules offered by the litigants are not what drive a justice to reject these proffered options. While the salience of the case and the number of suggested rules might play some role, determining with any more specificity why a justice would chose to develop their own rules unfortunately must be left to future research.

Conclusion

In this chapter, I examined those cases in which a justice does not support the primary rule offered by one of the litigants. Organizing these cases into two categories – those in which a justice chose a non-primary rule and those in which a justice favored a sua sponte rule – I studied whether an aspect of the cases, the justices, or the rules might explain why a justice would depart from the standard rule choice behavior. The results indicate that the factors that motivate a rule choice in a multiple-rule case differ from those of a sua sponte case, with the latter remaining particularly difficult to explain.

Regarding the multiple-rule disputes, the cases themselves did not differ significantly from the standard rule choice case studied in Chapter 5, except that they involved more civil rights and (probably as a result) constitutional cases. The justices themselves also did not seem to have markedly different propensities to select non-primary rules, either at an individual or ideological level. Those justices who had earlier tenures seemed slightly more willing to favor non-primary rules, but this may be the result of the small number of cases analyzed, rather than any systematic pattern.

In terms of the rules involved, the data did suggest that, at least when case outcome is controlled, ideology, flexibility, and quality may influence a justice's decision to favor a non-primary rule. More precisely, when faced with a choice between a primary and non-primary

rule that generate the same (preferred) outcome, a favored non-primary rule was more likely to be in closer ideological proximity to the justice, have greater flexibility, and be of slightly higher quality (at least on one measure) than the primary rule counterpart. More research is needed to confirm these results, but they do indicate that characteristics of the legal rules may influence a justice's rule choice behavior, even when that behavior departs from the usual rule choice pattern.

The analysis of the sua sponte cases was less productive. The cases in which a justice favored a sua sponte rule did differ in important ways from non-sua sponte cases - they were more likely to be salient and have a larger number of rules offered by case participants - but neither the justices nor the rules clearly stood out as explanatory factors. The justices' willingness to favor a sua sponte rule did not vary much by individual or ideological tendencies, though some were much more likely to author rather than join such opinions. Perhaps more importantly, the sua sponte rules and the rejected primary rules were not significantly dissimilar, either from each other or from the rules suggested in non-sua sponte cases. That this examination failed to indicate that characteristics of the rules are what is driving the decision to favor a rule sua sponte was unexpected, but may simply indicate that further research is needed. Given the continued emphasis in literature on justices' ability and willingness to articulate their own rules, more study is critical, if only to explain more fully why this phenomenon is so rare.

In the next and final chapter of the dissertation, I summarize the results of the project and explore its limitations. What this and the previous two chapters have demonstrated is that rule choice on the U.S. Supreme Court is an area rich with complexities and ripe for further analysis. Whether the justice are opting for the primary rule of a litigant, favoring the

alternative rule of a party or an amici, or developing a rule on their own initiative, why justices select the rules they do should be of continuing interest to any scholar focused judicial behavior and the development of Supreme Court doctrine.

CHAPTER 7

CONCLUSION: RULE SELECTION ON THE U.S. SUPREME COURT

In the summer of 2012, the U.S. Supreme Court is expected to rule on a case involving the Patient and Affordable Health Care Act, known colloquially (and rather pejoratively) as "Obamacare." Of central interest is that portion of the law that requires individual Americans to buy health insurance or face a monetary penalty. Twenty-six states have challenged the constitutionality of this provision, charging that it is beyond Congress' power under the Commerce Clause of Article I of the Constitution. In response, the Obama administration is arguing that its constitutionally granted ability to "regulate interstate commerce" includes the power to issue to issue the individual mandate.[167]

Given its implications for the political fate of President Obama, who will face re-election just months after the ruling, Court watchers and the media have deemed this case to be one of the most important to be heard by the Court in decades, certainly the most important of the current term. Whether or not the Court permits the individual mandate will likely have major implications for Obama's biggest legislative achievement, as much of the health care reform package rests on the financial savings to the government that will accrue from the mandate. Moreover, many (particularly those in opposition to the law), see the case as a fundamental test of the power of the federal government, particularly in relation to how individual citizens manage decisions about their own health and well-being.

Aside from its political and economic ramifications, the Court's decision in *U.S. Department of Health and Human Services v. Florida* will have major legal significance. More precisely, the decision will rest upon how the Court interprets the Commerce Clause,

[167] In separate cases, other parts of the law are also at issue, including state funding of Medicare/Medicaid and whether the Court has jurisdiction over any of the cases.

the provision that gives Congress much of its ability to legislate across vast aspects of American life. If the Court continues to impose a restrictive interpretation of the clause, as it has since the mid-1990's, then Congress will face potentially important new limits on its regulatory powers; if, on the other hand, the Court imparts a broad reading to the clause, then Congress can likely expand the policy arenas in which it acts and the type of individual behavior its legislation can target.

Attorneys for each party in the litigation have offered two distinct legal standards to the Court, both of which offer a different test for evaluating when Congress has exceeded its power under the Commerce Clause. Opponents of the law urge the Court to find that Congress can only regulate "activity" related to inter-state commerce and that an individual's decision not to purchase health insurance is "inactivity" with which Congress may not interfere. In contrast, the Act's supporters posit that Congress can regulate anything (activity or non-activity) that has a "substantial effect on inter-state commerce."[168]

How will the justices choose between these legal rules? Will their decision be driven primary by their ideological views about the reach of government power, with liberals favoring the government's "substantial effect" rule because they see the mandate a reasonable attempt to solve the health care crisis, and conservatives favoring the "activity/inactivity" distinction because they decry government intervention in private lives? Or, might something more complex transpire as the justices make their rule selections?

Summary of the Dissertation

I have argued in this dissertation that when the justices make such decisions, it is indeed a more complicated process than many, both scholars and non-scholars, have

[168] See the U.S.'s Petition for *Certiorari* in the case, No. 11-398, available at http://www.justice.gov/osg/briefs/2011/2pet/7pet/2011-0398.pet.aa.pdf. A large number of organized interests are expected to file briefs in the case, many of which will likely offer additional legal standards to the Court.

assumed. Rather than being a situation in which the justices simply vote for the party they wish to see emerge victorious, paying little heed to the legal standard that party is offering as a justification for its position, I have suggested that the nature of the legal rule a party offers to the Court also is a critical consideration for the justices. In particular, I have posited that the ideological tenor of a rule, the amount of discretion it imparts to lower courts for subsequent applications, and its jurisprudential quality all affect whether or not a justice is likely to adopt that particular rule. I then tested my claim using 500 Supreme Court cases that involve, as the health care litigation does, a division among the lower courts.

To build my argument, in Chapter 2, I reviewed the extant literature on judicial behavior, focusing on the ideological, strategic, and legal factors that political scientists have employed to understand a broad range of judicial decision-making. I then suggested that while some scholars have begun to attend to the importance of legal rules, rather than just final votes, they have yet to offer a fully integrated theory of rule selection or to evaluate empirically many of their assumptions.

In Chapter 3, I articulated one possible theory of rule choice, suggesting that a justice's ideological preferences, desire to ensure lower courts comply with Court rulings, and concerns for the legal quality of a rule all act to shape which rule a justice will find most favorable. I developed eight hypotheses that flowed from this theory, including how the salience of a case and the ideological location of the lower courts might condition the influence of these three primary factors.

With an in-depth description of the sampled cases, Chapter 4 highlighted several critical, but heretofore overlooked aspects of legal rules and the U.S. Supreme Court. I demonstrated in particular that the justices almost always choose between the rules offered

by the litigants to the case, generally eschewing rules suggested by amicus curiae and the opportunity to create a rule sua sponte. I argued that this latter finding was particularly important, given that many formal models of rule choice rest upon the assumption that the legal rules promulgated by the Court originate with the justices themselves.

Chapter 5 offered a statistical analysis of rule choice in which I used a logit model to evaluate my hypotheses. The results indicated that several of the hypotheses, particularly those involving the influence of ideology and legal quality, were well-supported. I demonstrated that justices are more drawn to rules that comport with their own ideological predispositions, and that how lower courts have responded to a rule also has an impact. I also found that the flexibility of a rule, though of great concern to scholars, is not particularly influential when justices decide between competing rules, and suggested that scholars may wish to re-consider whether the notion of "bright line rules" versus "standards" warrants continued focus. The chapter also documented that justices can and do maintain a preference for particular legal rules, apart from the case outcomes associated with those rules.

To supplement this analysis, Chapter 6 presented an initial exploration of those rare cases in which the justices did not choose the primary rule of a party, but instead opted for an alternative rule of a litigant or amici or developed a rule of their own accord. Those instances in which a justice adopted a non-primary rule appear to be motivated by the same factors as the decisions studied in the previous chapter, but the analysis of the sua sponte cases was less productive. I also argued that study of sua sponte rules should continue, especially to provide further insight on exactly why the justices would adopt rules not suggested to them.

Contributions and Limitations of the Dissertation

To be sure, this dissertation is not the first to recognize the importance of legal rules, as many scholars in the political science and legal disciplines have begun to recognize that legal rules, not merit votes, constitute the legal policy of the U.S. Supreme Court. Nonetheless, by conducting a systematic study of the content of these legal rules and the factors which influence their adoption by the justices, the project makes several contributions to our understanding of judicial behavior.

First, with an extensive new database of all the legal rules suggested to the justices in 500 cases over five decades, the project offers a wealth of descriptive information about the rules presented to the Supreme Court. In particular, I have gathered data on how many rules are associated with each case, the frequency with which litigants and amici curiae offer those rules, and how the menu of legal rules varies by Court era and case type, none of which was previously available to scholars.

Secondly, I have studied the content of these rules, not as they might be predicted by a theoretical model, but as they actually appear in the briefs filed with the high Court. In addition, I have developed novel measures for several aspects of that content, offering new ways to evaluate their ideological tenor, flexibility, and legal quality. Again, while scholars have posited how some of these factors might affect rule development, they have heretofore been unable to assess empirically whether and how their predictions might prove correct.

I have also articulated a new typology of cases and legal rules. In the majority of conflict cases the Court resolves, the rules are actually very closely associated with case outcomes, with selection of a rule generally ensuring a win for the party who suggested it. These rules also vary little from each other in terms of their flexibility. In other cases,

however, the proffered rules are much less tied to a victory for a particular litigant and often generate differing amounts of leeway for those lower court judges who will later implement them. By attending to how rule selection might vary across these case types, the project offers a categorization of cases decided by the Supreme Court that might have important implications for other aspects of judicial decision-making

Finally, I have offered some initial evidence of why the justices make the rule choices they do. Perhaps not surprisingly, a justice's ideological predispositions seem to play the most important role, with justices more likely to favor those rules in closer proximity to their own ideological preferences. More striking is that how lower courts have evaluated and employed rules before they were presented to the high Court also seems to make a difference, with justices tending to favor rules that have generated less dissensus within circuit court panels and more favorable responses from other circuits. Though certainly not a definitive finding, this suggests that justices do in fact attend to how well-regarded a rule might be among those most familiar with its application and highlights once again that judicial behavior is more than simply a myopic, ideologically-driven choice about which party should win a case. Last but not least, the dissertation revealed that scholars' focus on "bright line rules" versus "legal standards" is perhaps misplaced, as justices rarely face such a dichotomous rule choice. In fact, the rules offered to the justices actually differ very little on this dimension, and, when they do, that difference seems to make little impact on which rule a justice adopts. This result runs counter to the predictions of my project, but illustrates that the paradigm through which many study legal rules may warrant some re-evaluation.

Of course, despite all these contributions, the dissertation does have several critical limitations which must be acknowledged. Most importantly, the project involves only those

cases in which the circuit courts are in conflict. These cases constitute a sizable minority of the cases decided by the Supreme Court, but they leave out a large number of Court rulings. It is entirely possible, in fact, that rule selection in non-conflict cases operates differently than what I discovered in my sample of cases. It may involve much - including the judicial creation of rules and the importance of rule flexibility - which I have found to be of little relevance. Though several of the findings in the dissertation are important, it would be a serious mistake to generalize these results to all cases resolved by the high Court.

Even within the context of inter-circuit conflict cases, much is left for future work. The project set aside, for instance, important questions about how bargaining among the justices might influence rule choices. Given the key role of intra-court negotiations in the development of Court opinions, many questions remain about whether and to what effect such interactions shape rule selection. Similarly, how the separation of powers between the Court and Congress might affect rule selection has been ignored here. Subsequent studies should incorporate these dynamics.

In addition, more exploration is needed into the nature of the relationship between legal rules and case outcomes, particularly about whether and how the justices' decisions on these two elements interact. It remains unclear, for instance, when a justice might make a decision on the merits prior to a decision on the rules, or evaluate the rules first, only later paying attention to case outcomes. In fact, a justice could make both choices simultaneously, with an opinion on the proper rule(outcome) intertwined with an opinion on the proper outcome(rule). This project has been able to document that these preferences can be independent in some cases, but precisely how they might be related in others remains somewhat unclear.

More work also is needed on the relationship between rules and individual justices. It could be that how the justices decide among suggested legal rules derives in part from their own views of jurisprudence, their expertise, or the role of the Court, factors that I did not examine. Given the complexities discovered here about both the source and content of the rules suggested to the Court, there likely is a wealth of interesting data waiting to be uncovered about individual differences in how rule choices are made.

Last but not least, future research must devote more analysis to exactly how the legal rules presented to the justices are developed. I have argued that it is unlikely that lower court judges or litigants have designed rules to appeal to the justices' preferences, but given the amount of literature which posits anticipatory behavior by lower courts, more work is needed to ensure that the legal rules are not endogenous to judicial preferences. In a similar vein, future research should develop alternative measures of rule quality, given that those I employ rest upon the treatment of rules by lower court judges, treatment which also might be anticipatory.

Despite these limitations, this dissertation makes an important contribution to our understanding of legal rules and the U.S. Supreme Court. For instance, while predictions about the fate of a particular case, such as *HSS v. Florida*, remain inherently speculative, this project has drawn attention to certain factors, particularly the menu of legal rules from which the justices are likely to make their selections, which other works might have overlooked or been unable to capture empirically. Of course, scholars wishing to understand any decision of the Court will need to incorporate many extant findings from the literature; nonetheless, by offering new information about where legal rules come from, what they contain, and how the

justices seem to evaluate their appropriateness for a particular case, the dissertation has generated insights that warrant notice and further study.

At a larger level, the project has also provided evidence that the justices of the nation's highest court are not free-wheeling ideologues, enacting their policy preferences with little regard for their role as legal professionals or their place atop a hierarchical adversarial system. To be sure, numerous political scientists have documented how many factors aside from ideology shape judicial behavior, but I have demonstrated that - because they almost always select their preferred legal rule from the options presented by the two litigants - the justices, at least in cases of inter-circuit conflict, do seem dedicated to resolving the case before them, as it is presented to them. Of course, the justices probably consider the larger implications of their rule choices, but this dissertation has demonstrated that the menu of rules the justices confront has important implications for how they develop legal doctrine.

That the justices of the U.S. Supreme Court rarely circumvent the boundaries of the disputes they resolve may provide at least some comfort to those concerned about unelected, largely unaccountable jurists enacting major social and economic policy. It seems instead that, at least in cases of inter-circuit conflict, the policy of the nation's highest court does not arise solely from the minds of the justices, but is in large part derived from the options presented by those who argue before it. By drawing attention to these options, this dissertation has highlighted an aspect of Court behavior previously overlooked and has provided fertile new ground for the continued examination of policy-making by the justices of the U.S. Supreme Court.

APPENDIX A:

EXPERT CODING INSTRUCTIONS

Introduction

As you probably know, when the Supreme Court issues a decision, it must decide not only who wins or loses, but what legal rule justifies that result. I define a legal rule as the language in the Court's opinion that defines legal and illegal conduct and that provides guideline for the subsequent behavior of other actors, particularly lower courts.

My project explores why the justices select the legal rules they do. I argue first that the justices choose their rule from among a set of options presented to them by litigants and *amici*, rather than develop whatever legal rule they deem appropriate. My initial research has shown, moreover, that the justices generally chose a rule offered by one of the litigants – the justices' choice, in other words, is simply a choice between two competing legal rules suggested by the parties. I use certain aspects of those rules – their ideological bent, their flexibility, and how lower courts have responded - to predict which rule a justice will select.

I have collected the legal rules suggested to and chosen by the justices in 500 Supreme Court cases from 1956-2000. Your job has two phases – in the first, you will "code" – assign values – to these rules, based on their flexibility. Secondly, you will research and record the treatment of each rule by lower courts and litigants. Each of these concepts and detailed instructions for the work are included below.

Thank you very much for agreeing to participate. You have been hired for your legal expertise and I look forward to the results you produce.

Part One: Rule Flexibility

The Concept of Rule Flexibility

As employed in this project, the concept of flexibility captures the amount of discretion the rule imparts to lower courts – how much leeway a judge has when implementing or using the rule. This variable is measured for each rule on a 4 category scale: each rule will be coded as 1 (very flexible; gives a lot of leeway), 2 (flexible; gives a fair amount of leeway), 3 (somewhat flexible; gives a bit of leeway) to 4 (not at all flexible; gives no leeway).

The flexibility of the rule can come from two sources: the language of the rule or the structure of the rule. In terms of language, the words used in a rule can increase or decrease the rule's flexibility. For example, terms such as "reasonable" or "probable" provide a lot of flexibility in implementation – the judge is (relatively) free to interpret these terms and apply them to the instant case as he or she sees fit. In contrast, rules that use "bright line" terms such as "never" or "shall always" or "60 days after filing" provide much less flexibility to the judge.

By structure of the rule, I mean its grammatical complexity. For instance, certain rules have a very simple structure, with straightforward explanations for implementation written as declarative sentences (i.e., the court must use the foreclosure value of the property; or, the lower court must "determine if the amount of work leave requested is reasonable"). As this example illustrates, a rule may be simple in structure but have language that imparts more discretion. In such cases, it will be up to you the coders to focus on the comparing the two rules to determine which of the two competing rules would offer a judge more or less leeway.

Others rules are more complex, involving multiple phrases, sub-clauses, or factors for a judge to consider (i.e., the judge must "balance the reasonableness of the work leave request with the needs of the employer, attending to the facts and circumstances of each case"). While a more complex rule may provide more discretion to the lower court, this is not always the case. Your job is, to the best of your ability, to determine how much leeway a subsequent judge would have in implementing that rule.

Regardless of the source of the rule's flexibility, the key is to imagine that you were a judge employing the rule and to ask yourself how much leeway you would have using that rule in a particular case. Would the rule bend easily to fit particular facts? Would you be able to consider the facts of the particular case or the context in which it arose? Would you be able to use your own sense of the "right" or "best" result?

How to Code Rule Flexibility

For each case, you will view the appropriate Word document (provided by CBW), read the issue of the case (at the top of the document), read each of the two rules, and place your flexibility code in the space provided under each rule. Occasionally, I have listed several articulations of the rule – where provided, please reach each of these, assume they are the same rule, and provide one flexibility code only. There may also be several articulations of the issue – one that I have written and one provided by the Court and listed in parentheses. Feel free to use either of these as needed to grasp the legal issue in the case.

The following examples should help clarify.

<u>Example One</u>

> Issue: Is a subsidiary railroad "substantially aligned" with the primary railroad as required by a labor statute?
>
> Rule 1: A railroad is substantially aligned with the primary railroad "if it has an ownership interest in the primary railroad, or if it provides essential services or facilities to the primary railroad or otherwise shares with it a significant commonality of interest." Flexibility Code: 2
>
> Rule 2: A railroad is substantially aligned with a primary employer "only if the secondary employer has 'joined the fray' and thus, in effect, has assumed a role in the primary dispute." Flexibility Code: 3

Example Two

Issue: What is the proper method to value collateral used in a bankruptcy proceeding?

Rule 1: The value of the collateral shall be determined by "what the secured creditor could obtain through foreclosure sale of the property" Flexibility Code: 4

Rule 2: The value of the collateral shall be determined by "what the debtor would have to pay for comparable property" Flexibility Code: 4

Example Three

Issue: Is taxpayer's home office his "principle place of business" as required by tax statute?

Rule 1: Whether the taxpayer's home office is the "principle place of business depends upon the particular facts and circumstances of that home office." Flexibility Code: 1

Rule 2: The taxpayer's home office will be the "principle place of business….whenever the office is essential to the taxpayer's business, no alternative office space is available, and the taxpayer spends a substantial amount of time there." Flexibility Code: 2

Additional Coding Notes

Please note that the value given to each rule individually is not as important as the relative flexibility between them. Do not worry excessively about the code given to each rule; it is more important to ensure that they are ranked higher and lower than each other. In other words, don't focus the bulk your time on whether Rule 1 should have a 3 or 2 and Rule 2 should have a 4 or 3 – it is more important to ensure that Rule 2 gets the higher value. As all your codes are important, however, please do be at least reasonably thoughtful with the numbers you assign.

Also, please be aware that the rules may not always differ from each other in terms of flexibility. If you feel that the two rules provide the lower court with the same level of leeway, it is completely appropriate (and desirable) to give them the same code.

Part Two: Rule Treatment

You will be coding three variables designed to capture how other legal actors have responded to each rule, two based upon the circuit courts that have split over the legal issue and one based on the use of the rule by other litigants. You will also be coding a variable indicating the names of these lower court judges (see below). It is probably most efficient to code all four variables at the same time, rather than re-opening the case twice in Westlaw. You will

see that the variables spreadsheet in which you will be entering this information is organized to facilitate this.

Variable 1: Number of Lower Court Judges Supporting Each Rule

The first variable simply requires you to count the number of lower court judges supporting each rule. To code this variable, locate the Supreme Court cite and the circuit courts that supported each rule in the case spreadsheet (provided by CBW). Open the Supreme Court case in Westlaw and locate the citations to those lower court opinions in the majority opinion. The lower courts are usually listed in the first paragraph of the opinion (where the court indicates why it granted cert) or in the discussions of the procedural history. You may also search the case (using "locate" in Westlaw, for instance) for the circuit if you cannot quickly locate the lower courts. Where the lower court citations are particularly difficult to find, a notation has been made in the spreadsheet indicating their location (i.e., "circuits listed in n.4").

Rule 1 Circuits

Click on the cite to each lower court opinion the spreadsheet lists as supporting the first rule. In that lower court opinion, locate the judges at the top of the opinion. Then, count the number of judges in the majority and the number of judges in the dissent. Record these numbers in the appropriate columns of the variables spreadsheet.

You may wish to record their names at this time as well (see bottom of this coding guide). Repeat that process for each circuit the spreadsheet indicates supported Rule 1.

Rule 2 Circuits

Repeat the entire process for the circuits supporting the second rule.

Additional Coding Notes

Sometimes, the lower court cite takes you directly to the section of the opinion that discusses that issue. If this happens, simply scroll up to the top of the opinion and locate the judges in the majority and dissenting positions.

You can assume that the judges who voted with the majority are supporting the rule associated with their circuit. Judges who write concurring opinions should be assumed to support the majority-backed rule unless they explicitly state otherwise in a concurring opinion; if the judge(s) has written a dissenting opinion and does not specifically adopt the majority's rule, include that judge(s) in the columns for non-supporting judges.
For these separate opinions, you will need to read that opinion to determine whether the judge makes statements that run counter to this assumption**.** If you are unsure, please make a note of the case and contact me.

Variable 2: Treatment by Lower Courts of Each Rule

The second variable captures the treatment by the lower courts (circuit, district, or state) of each rule, after the rule was adopted by the lower courts but before the Supreme Court addressed the issue. Therefore, you will only focus on those treating cases that were decided before the Supreme Court decided the instant case.

After you have noted the names and number of judges in each lower court case, click on "Citing References" in Westlaw. Count the number of cases (from any court) that treated this case positively and the number of cases that treated this case negatively making sure that these cases were decided before the instant Supreme Court case (many will be after the Supreme Court's ruling and should NOT be included in the count). Please note that you only need to count those positive cases that are listed as "Examined" or "Discussed"; do not count the cases that are merely "Citing," "Discussing," or "Mentioning" the instant cases. However, count all cases (in the appropriate date frame) that are listed as negative references. Enter each count in the appropriate column of the variables spreadsheet.

Repeat the process for each circuit case supporting Rule 1 and for each circuit case supporting Rule 2.

Variable 3: Treatment by Litigants of Each Rule

In addition to the treatment by courts of each rule, Westlaw provides a list of appellate briefs that have cited the instant case (listed below "Secondary Sources" in "Court Documents"). Again making sure these are within the appropriate date range, count the number of appellate briefs listed (do not count those court documents are listed as "trial court documents"). Enter this count in the appropriate column of the variables spreadsheet.

Repeat this process for each circuit case supporting Rule 1 and for each circuit case supporting Rule 2.

Additional Coding Notes

Where the Supreme Court opinion cites multiple decisions from the same circuits, please examine and record variables for all decisions.

Instructions For Coding Other Variables

Names of lower court judges

This variable simply requires you to record the names of the lower court judges who supported each rule. (You do not need to record the names of those dissenting and concurring judges you identified as not supporting the rule). Consequently, it is probably best done at the same time you are coding the number of lower court judges supporting each rule. In other words, when you are counting that number, enter the name of each judge in the variables spreadsheet. It may be easier to simply copy and paste each judge's name from the opinion

into the spreadsheet, but this is up to you. You need only record last names unless an initial or first name is also given in the opinion.

APPENDIX B:

DESCRIPTIVE STATISTICS, INDEPENDENT VARIABLES

Independent Variable	Mean	Std. Dev.	Min	Max
Ideological Distance	.001	.681	-2.53	2.89
Flexibility	-.007	.736	-2.60	3.52
Quality(Judges)	.030	.196	-1	1
Quality(Lwr Courts)	.063	.542	-1.84	8
Quality(Briefs)	3.26	15.14	-62.1	153
Amici Difference	.058	2.10	-16	13
Amici SG Petitioner	.102	.303	0	1
Amici SG Respondent	.087	.282	0	1
Petitioner U.S.	.126	.332	0	1
Respondent U.S.	.173	.379	0	1
Circuit Difference	.229	2.19	-9	11
Outcome Preference	-.010	.999	-1	1

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