POLICY AND DISPOSITION COALITIONS ON THE SUPREME COURT OF THE UNITED STATES

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ABSTRACT

Empirical studies of collegial courts typically analyze the *dispositional* votes of judges. Theoretical models of collegial courts, by contrast, typically assume that judges care about, and choose, *policies*. In this paper, we use data on the behavior of justices of the Supreme Court of the United States (from the Spaeth Supreme Court Database, 1953-2008) to show that this discrepancy is not innocuous: dispositional votes are different from policy choices, and that difference has implications for understanding the doctrine the Court produces. We present evidence that dispositional coalitions differ from policy coalitions in a significant number of cases, and argue they differ along ideological lines. For this reason, we claim dispositional votes are not an adequate proxy for policy choice.

Our preliminary analysis establishes two other claims. First, we show that within a natural court, policy coalitions are diverse rather than homogeneous. Second, we present evidence that the ideological content of opinions moves in tandem with the ideological makeup of the policy coalition supporting the majority opinion.

1 INTRODUCTION

A curious divide between empirical and theoretical analyses plagues the study of courts. Empirical studies of collegial courts generally focus on or rely on the *dispositional* votes of the judges. The vote on the merits often has pride of place. Theorists, by contrast, generally assume that judges care about and choose *policies*. Decision-making about policies is the métier of formal models of collegial courts. Recently, Jack Knight has criticized empiricists for not asking the right questions, and theorists for ignoring the implications of their models for real and readily observable empirical entities, like dispositions (2009).

Of course, the distinction between dispositions and policies would not matter much if the former determined the latter. But many terms of the United States Supreme Court provide startling examples in which the coalition supporting the majority disposition displayed multiple coalitions supporting distinctly different policies. Consider, for example, the assisted suicide case, *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). The court, though dispositionally unanimous, produced six opinions, five of them substantial.[1] Chief Justice Rehnquist wrote for a majority of five justices –Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas. Justices O'Connor, Souter, Stevens, and Breyer all wrote separate concurrences that articulated different understandings of the rationale for the Court's disposition.[2] Though the nine justices agreed on the correct disposition of the case before them, they had truly substantial disagreements over the appropriate policy the Court should promulgate.

Or consider the case of *Elkanich* v. *United States* 401 U.S. 646 (1971). Again, the Court was dispositionally unanimous[3] but, in this instance, it failed to produce a majority opinion. Justice White wrote an opinion joined by Justices Burger, Stewart, and Blackmun. Justices Brennan, Black, Harlan and Marshall each wrote separately. The policy question before the court concerned the retroactive application of one of the Court's recent criminal procedure decisions; the justices expressed disagreement over the policy underlying the prior decision as well as the appropriate policy for

[1] Justice Ginsburg wrote a two line concurrence, endorsing Justice O'Connor's concurring opinion.

[2] Justices Ginsburg and Breyer joined Justice O'Connor's concurrence.

[3] 8-0 with Justice Douglas not participating

determining retroactive application of its own decisions. Dispositionally, the Court was unanimous. Doctrinally, however, it was deeply divided.

But perhaps these cases are flukes. Or are they? In this paper, we provide empirical evidence in support of three claims:

1. The coalition supporting the majority *opinion* is often different from the coalition supporting the majority *disposition*.
2. The ideological make-up of majority opinion coalitions varies extraordinarily widely, even on single natural courts.
3. The ideological make-up of majority opinion coalitions appears to be consequential for the content of the majority opinion.

We see these results as supporting Knight's contention that the right questions involve policy, but they also attempt to respond to his criticism of policy-oriented analysts. Specifically, we develop a series of verified but readily stylized facts about the opinions justices join, as opposed to the disposition for which they vote. Guided by these stylized facts, future theories may be able to consider more forthrightly the link between opinion content and observable policy-relevant behavior. Theorists can study the choice to join, concur, or dissent—choices already documented and ready to be studied empirically.

Despite our relatively novel focus on majority opinion coalitions, we employ no new data. Rather, we use old data in new ways. All the information we deploy on the make-up of majority opinion coalitions and the distinction between them and disposition coalitions is readily available in the U.S. Supreme Court Judicial Database, the Spaeth data. We wish to make clear that data availability poses no obstacle to empiricists who wish to study policy. There is simply no need to test theories about policy coalitions using data on case dispositions.

ASKING THE WRONG QUESTIONS AND IGNORING EMPIRICAL REALITIES?

Most theoretical work about the politics of the Supreme Court has focused on policy (Epstein and Knight 1998; Rohde and Spaeth 1976; Jacobi and Tiller 2007; Friedman and Martin 2009; Kornhauser 1992). Though there are exceptions, this work tends to assume the justices care only about policy. In doing so,

much of the formal work abstracts from joining, concurring, and dissenting, as well as deciding cases. There are a number of recent exceptions. In Fischman's (2008) model, the court only renders judgment; it does not announce rules.. Carrubba et al. (2007) assume that judicial policy choice is constrained by dispositional preference. Their paper, like this one, explicitly studies observed policy choices, but they do so at the expense of attention to the dispositional vote. Cameron and Kornhauser (2010) assume that judges care about both policy and disposition and that their strategic choices include both a disposition decision and a join decision that concerns policy. That paper reviews theoretical models of collegial courts in more detail, but broadly supports Knight's contention that many models, despite focusing on policy, fail to offer predictions about observable policy choices..

In contrast, most quantitative empirical work has focused on dispositional votes (George and Epstein 1992; Segal 1984; Richards and Kritzer 2002). Despite a growing body of research on the strategy of concurrence at the individual level (Corley 2011, Wahlbeck, Spriggs, and Maltzman 1999, Winters 2011), scholarship at the Court level has continued to focus on size of the dispositional coalition rather than on size of the coalition joining the majority opinion. As Klein (2002) notes, "Political scientists interested in judicial decision making have overwhelmingly tended to concentrate on individual judges' votes on case outcomes. While some studies of judicial behavior give close attention to the part that judges and courts play in developing legal doctrine (e.g. Shapiro 1965, 1970; Landes and Posner 1976; Canon and Baum 1981; Epstein and Kolbya 1992; Glick 1992; Wahlbeck 1997), these remain rare." The exceptions employ different approaches. Some work, like Wahlbeck (1997), studies policy and rule change directly rather than using justices' votes. Wahlbeck et al. (1999) study predictors of concurring and dissenting. Johnson and Belleau (2006) study dissents on the Canadian Supreme Court in an attempt to overcome the "circumscribed insights" gleaned from statistical studies of dispositional votes. Posner (2005) provides normative and empirical discussion of concurrences—especially of the effects of concurrences on judicial interpretation. Corley (2009) studies how plurality opinions are interpreted by lower courts. However, even works that are clear about the difference between dispositional voting and policy choice are interpreted as if dispositions and policies were interchangeable. For example, the attitudinal model (Segal and Spaeth 2002) was written as a theory of final votes on the disposition but has been uniformly interpreted as a theory of policy preferences.

As Knight notes, this general disjunction between the two strands has disturbing consequences. On the one hand, theorists develop models about opinion content without considering the actual decision

processes employed by courts. Conversely, much purely empirical work employ dispositional data without considering what, if any, relevance it has for opinion content.

Our object here is not to resolve Knight's dilemma but to begin to address it. We proceed as follows. The next section sets out the data we use and how we propose to analyze it. Section 3 shows that policy coalitions differ from disposition coalitions. Section 4 demonstrates that policy coalitions are not ideologically uniform, even on natural courts. Section 5 provides some evidence that policy content of the majority opinion varies with the ideological make-up of the majority opinion coalition.

2. DATA

Our data comes from the Spaeth Supreme Court Data Base. The version of the database we use codes all cases decided by the Supreme Court of the United States from 1953 through 2008. During this period, by our count, the Court decided 7,366 cases. Some of these cases are consolidated, meaning they may contain more than one fact pattern. The Court may also rule on multiple issues in one case, regardless of whether it is consolidated or not. As a result, many cases give rise to complex decisions. To capture this complexity, the database includes multiple rows for some cases. In consolidated cases, each docket number—which loosely corresponds to each fact pattern—gets one row. In cases that decide more than one issue each issue gets one row. Often, policy and/or disposition coalitions are different across these rows within a case. Each case citation produces one set of opinions, but we believe the bargaining process leading to that set is constituted by individual bargaining processes over each question the Court chooses to answer.

For this preliminary study, we take each row of the Spaeth data base as the unit of analysis.[4] Thus our total sample includes 11,037 observations which we treat as dispositional coalitions. This is an imperfect choice: empirically, we do not know the correlation structure between those rows while, from a theoretical perspective, we lack both a theory of case consolidation and a theory of opinion content (though see Anderson and Tahk 2007). Kornhauser (1992) and Epstein and Shvetsova (2002) suggest the choice of issues on which to rule simultaneously should be strategic, but that equilibrium prediction does not yet exist.

[4] We use the data that includes cases organized by issue/legal provision including split votes, which is equivalent to using ANALU=0, =1, =2, =3, =4, and =5.

The case space approach developed in Kornhauser (1992) or Cameron and Kornhauser (2010) identifies the appropriate unit of analysis as the "case" understood as a distinct fact pattern. Each fact pattern gives rise to a disposition (with associated dispositional coalitions) and each disposition gives rise to a set of policy coalitions . As we can not easily observe the number of fact patterns addressed in each decision of the Supreme Court, we choose, for the time being, to take each row as its own observation. (Some single-docket number cases still contain more than one fact pattern, but this is the best approximation available in the data.)

For some analyses we want to focus on ideological compositions; in those instances we consider a subset of the data and examine a few long natural courts. This procedure allows us to keep composition of the Court static and tell how one group of Justices behaves. We analyze the dispositional and policy coalitions of the natural Warren Court that decided the most cases (Warren 8, 1962-1965, which decided 474 cases yielding 719 dispositional coalitions), the natural Burger Court that decided the most cases (Burger 6, 1975-1981, 965 cases yielding 1497 observations of dispositional coalitions) and the natural Rehnquist Court that decided the most cases (Rehnquist 7, 1994-2005, 971 cases yielding 1401 dispositional coalitions).

3. POLICY COALITIONS DIFFER FROM DISPOSITIONAL COALITIONS

We first define more carefully *dispositional coalitions* and *policy coalitions* as well as some other useful terminology.

Dispositional coalitions form around case dispositions. In adjudication, there are generally two possible dispositions: for petitioner or against petitioner.[5] The disposition that receives support from a majority of the justices is the majority disposition, and we designate the members supporting that coalition as the *majority dispositional coalition*, MDC. Empirically, the size of this coalition varies from four to nine.[6]

[5] Strictly speaking, the U.S. Supreme Court reverses or affirms the judgment of the lower court; a reversal implies a judgment or disposition for Petitioner, an affirmance a judgment or disposition for Respondent. Of course there are different kinds of reversals; the court might reverse and remand, or it might reverse tout court. Sometimes the court affirms in part and reverses in part; this often indicates that the case includes more than one set of facts (or more than one set of plaintiffs or defendants) and sometimes there is disagreement over the appropriate disposition: some justices want to affirm, others to reverse and remand, and still others simply to reverse. The number of trichotomous cases, however, is very small.

[6] Decision by the U.S. Supreme Court requires a quorum of six justices. When a Court is equally divided the decision below is affirmed. This yields a theoretically smallest MDC of three.

We refer to the *majority dispositional coalition size* as the MDCS. When one hears that a case was decided 5-4 (say), the "5" is the MDCS. With respect to the mechanics of supporting a disposition on the U.S. Supreme Court, a justice may support a disposition in several ways: a justice may "join" an opinion that reaches the disposition. (The opinion may or may not be the majority opinion). Or, he may write a separate opinion which naturally implies that disposition.

Policy coalitions, by contrast, form around *opinions* rather than litigants and dispositions. A policy coalition consists of those justices who "join" a given opinion. The number of possible policy coalitions thus depends on the number of opinions written.[7] Of the opinions supporting the majority disposition, in most cases one opinion receives more joins than the others.[8] We call the justices joining this opinion the *majority opinion coalition* or MOC. The MOC may be of any size from one to nine.

When all members of the majority disposition coalition are also members of the majority opinion coalition, we call that a *full coalition*. When the MOC is not full, there is policy disagreement *within* the dispositional majority. Of course, when the size of the MDC is less than nine, there is policy disagreement between the dispositional majority and the dispositional minority. In this paper, we focus on policy disagreement *within the dispositional majority*. The greater the extent of policy disagreement within the majority disposition coalition, the less valid is equating the disposition coalition with the policy coalition.

BOUNDS ON POLICY DISAGREEMENT

What are reasonable upper and lower bounds on policy disagreement on the Court? First, in about two-thirds of all cases, there is at least one alternative or additional statement of doctrine, besides the majority opinion. However, this calculation includes dissents, that is, policy statements supporting the non-winning disposition. We are concerned with disagreement within the majority.

[7] Opinions are a proxy for policy rather than policies themselves. In some cases, the justices' join decisions have a "Chinese menu" appearance: justice A joins part I of B's opinion, part II of C's opinion, and part III of D's opinion. In these cases, the parts typically correspond to issues and a policy consists of a concatenation of issue resolutions.

[8] In rare cases, two opinions may tie for "most" joins, and indeed the tying number may be less than a majority of the Court, e.g., 3 or 4. In these rare cases, the Court generally indicates one of the two tying opinions as the more predominant opinion, and this opinion is indicated as the majority opinion in the coding in the Spaeth data base.

//Figure 1 about here – histogram of number of opinions on majority side–

All cases, full coalitions, & unanimous cases //

To address this concern, Figure 1 displays the distribution of concurrences offered within the dispositional majority in cases decided by the Supreme Court between 1953 and 2008. The upper left panel shows the distribution of concurrences for all cases. The upper right panel shows the distribution of concurrences for those cases with full coalitions; all these concurrences are so-called "regular" concurrences in which the Justice joins the majority opinion and writes or joins an additional statement of doctrine. The lower panel shows the distribution of concurrences, both "regular" and "special," in dispositionally unanimous cases. The percentage of cases falling into each bin is indicated.

Notably, in about 40% of all cases, the dispositional majority disagrees over policy—in other words, at least one member of the dispositional majority writes a concurrence.[9] This estimate counts both opinions that specially concur with the majority opinion and those opinions that concur both in the disposition and the statement of doctrine. Specially concurring opinions specifically disavow the majority policy and often state a distinctly different policy. In regular concurrences, policy disagreement is typically less extreme—though not always—but still sufficient to provoke a distinct statement. As shown in the figure, in some cases the number of concurrences was large.

Even in cases with full coalitions, so that *all* members of the disposition coalition joined the majority opinion, there still were additional concurring opinions about 20% of the time. And, perhaps unexpectedly, even in *unanimously disposed* cases, there was frequent disagreement over policy: about 38% of the time, there were concurrences in unanimously disposed cases. And as shown, in both types of cases the number of concurrences could be quite large.

//Insert Figure 2 about here– Crosstab of MOC size and MDCS size//

Figure 2 provides a lower bound on the extent of policy disagreement within each majority disposition coalition size. Each cell in the figure indicates the number of justices who joined the majority opinion – the MOC size – given the size of the disposition coalition. Of course, a justice who joins the majority opinion may still write a concurring opinion, but the endorsement of the majority opinion – the join – denotes a considerable agreement with the majority opinion. In the figure, the cells of the upper-left

[9] Of course, more than one member of the dispositional majority may have *joined* this concurrence.

diagonal indicate the full coalitions; here the dispositional majority spoke in a single voice, at least to the extent that all members of the dispositional majority were willing to endorse the majority opinion. For example, there were 2063 unanimously disposed cases (MDCS = 9) in which every member of the Court also joined the majority opinion. But there were 133 cases in which only five members of the dispositionally unanimous Court actually joined the majority opinion. Scholars who ignore unanimously disposed cases would miss these 133 instances of extensive policy disagreement. This large difference indicates how critical it is to study policy choices when the object of interest is policy—dispositional choices often hide the important doctrinal decisions with which scholars are really concerned.

The numbers arrayed vertically on the far right of Figure 2 indicate the percentage of cases falling into that diagonal row across the figure. So for example, some 13% of cases had a dispositional majority in which one member of the disposition majority refused to endorse the majority opinion; 6% had MDCs in which two members of the disposition majority opted out of the majority opinion coalition; 3% had MDCSs in which three members opted out; and 2% had MDSCs in which four members opted out of the majority opinion coalition.

Three patterns in the figure stand out.

- First, most policy coalitions were full coalitions, but many were not.
- Second, there was considerable variance in the percentage of full coalitions across majority dispositional coalition sizes.
- Third, if the opinion coalition was not a full coalition, it could be quite different from the dispositional coalition.

//Insert Figure 3 about here – percentage of full coalitions//

Figure 3 zeroes in on the first two of these patterns, by displaying the percentage of full coalitions for each MDC size. Overall, about 75% of cases had full coalitions. But this figure was much higher for smaller MDC sizes. For example, in cases decided 5-4, about 88% of the MOCs were full. This percentage fell as MDC sizes became larger. In particular, there was a steep decline in full coalitions between MDCs of size five and MDCs of size six, from 88% to about 73%. For MDC sizes larger than six, the percentage of full coalitions was about 70% for each MDC size. In sum, only about 70% of dispositional coalitions were full coalitions, unless a full coalition was essential for the majority opinion to garner at least four or

five joins. When a full coalition was required for full precedential force, the percentage of full coalitions was up to 30% higher. This suggests a degree of strategic joining behavior in the smaller MDC sizes; in particular, it is consistent with a theoretical prediction of "cross-over joins" (Cameron and Kornhauser 2010).

//Insert Figure 4 – distribution of MOC sizes for each MDCS//

Figure 4 examines the third pattern, by showing the distribution of MOC sizes for each majority dispositional coalition size. The diversity of MOCs was large in the larger MDC sizes. The diversity of MOCs shrank for the smaller dispositional coalitions. The majority dispositional coalition and the majority opinion coalition were quite similar for small dispositional coalitions – say, four or five. But *if the dispositional coalition was at all large – six or larger – the policy coalition could diverge considerably from the dispositional coalition.*

//Insert Figure 5 – cross tab picture for long natural courts //

The patterns shown in Figure 2 are common to most natural courts. Figure 5 examines the three longest natural courts of the Warren, Burger, and Rehnquist years. In each, the patterns of Figure 2 reappear: most opinions were full coalitions especially in small dispositional coalitions, but in larger coalitions there was a wide variety of policy coalitions within the majority dispositional coalition.

We reiterate that our focus on full coalitions and departures from full coalitions understates the extent of policy disagreement within dispositional majorities. In a substantial number of full coalitions, one or more of the justices in the MOC concurs. Sometimes this concurrence signifies little; at other times, it signals a policy difference or potential policy difference. Consider, for example, *Gannett Co* v. *DiPasquale* 443 US 368 (1979). The dispositional vote was 5 to 4, with Stewart writing for a full MOC. Three justices in the majority also wrote concurrences. Powell and Rehnquist wrote opinions that express views at odds with each other. (See, for example, footnote 2 to Powell's concurrence directly challenging Rehnquist's view). The two disagreed radically about the nature of the public's right to access to criminal trials under the 1st and 6th amendment. Thus, despite the existence of a full coalition, there was considerable policy disagreement within the dispositional majority.

In sum, dispositional and policy coalitions can be quite different. Theories and empirical studies that conflate the two do so at their peril.

4. THE IDEOLOGICAL MAKE-UP OF POLICY COALITIONS VARIES WIDELY ON NATURAL COURTS

In the prior section, we established that, in a substantial number of cases, the majority dispositional coalition differs from the majority policy coalition. Therefore, if policy coalitions matter for policy, one must examine policy coalitions in their own right, not only dispositional coalitions. We now begin to do so, focusing first on the ideological make-up of policy coalitions. In Section 5, we ask whether the ideological make-up of policy coalitions seems to affect policy.

In this section we use annual Martin-Quinn scores, which use dispositional voting behavior to estimate the ideology of each member of the Court. Since some scholars argue Martin-Quinn scores should be understood as purely ordinal (Quinn and Ho 2010) for some analyses we transform them annually by rank so that "1" is the most liberal justice and "9" is the most conservative of the justices serving then. To get a crude sense of the variation in policy majorities, we look at the ideological rank of the median member of the majority opinion coalition, which we call the "MOC median." We consider the MOC medians for MOCs of sizes five and six (larger MOCs necessarily have centrist MOC medians, by ideological rank). We differentiate left-centered, mid-centered, and right-centered MOCs, based on the position of the MOC median. More specifically, we call MOCs whose median has rank less than or equal to 3.5 *left-centered*; we call MOCs whose median has rank in the open interval (3.5, 6.5) *mid-centered*; and we call MOCs whose median has a greater than or equal to 6.5 *right-centered*. Note the analysis is based on the median member of the policy coalition, not on the exact make-up of the policy coalition—so disconnected coalitions that are made up of the ideological poles may be misplaced. (Our reliance on the median of the policy coalition is somewhat analogous to Westerland (2003) and Carrubba et al.'s (2007) focus on the median of the majority dispositional coalition.)

//Insert Figure 6: Dist of MOC medians (ranks) for all cases //

We begin by considering the distribution of MOC medians (by rank) for all cases from 1953 to 2006, as shown in Figure 6. For MOC sizes, the distributions of the three coalition types tends to be rather even, though right-centered opinion coalitions slightly dominate the MOCs of size 5. Of course, we are mixing cases over many natural courts, some of which were famously liberal, others widely seen as quite conservative. So perhaps the left-centered MOCs mostly came from liberal natural courts while right-centered MOCs mostly from conservative ones.

// Insert Figure 7: Distribution of mean MOC medians (MQ Scores) by term //

Figure 7 offers one way to consider this possibility, by plotting for each term the mean MOC median by cardinal Martin-Quinn score, along with bars scoring twice the standard deviation. Because the figure considers cardinal MQ scores rather than ranks, it considers MOCs of all sizes, not merely those of sizes 5 and 6. Larger MOCs will tend to have median MQ scores near that of the median member of the natural Court. In our view, the main lesson from Figure 7 is not the shifts in the average locations, but the extraordinarily large confidence intervals in each term. In other words, in every term there were some remarkably liberal-centered and remarkably conservative-centered policy coalitions.

//Insert Figure 8: Dist of MOC medians (ranks) for 3 natural courts//

Figure 8 provides an arguably apposite way to consider the ideological make-up of policy coalitions, by showing the distribution of MOC medians by rank (left-centered, mid-centered, and right-centered) on three long natural courts - the Warren court for the 1962, 1963, and 1964 terms, the Burger court from the 1975 term to the 1980 term, and the Rehnquist natural court from the 1994 term through the 2004 term. In doing so, we control for the composition of the court. The figure makes two points. First, the distributions display distinctive patterns across the courts. Broadly speaking, the Warren MOC medians tend to be mid-centered and left-centered; the Burger MOC medians tend to be mid-centered and right-centered; and the Rehnquist MOC medians tend to be bimodal. Second, on each of the courts, there are many cases with the "dominated" configuration: right-centered coalitions on the Warren Court; left-centered coalitions on the Burger Court; and mid-centered coalitions on the Rehnquist court. Term-by-term, the coalition distributions for these courts generally show the similar patterns.

One might attribute these strange patterns to strategic assignment of "unimportant" cases. The Court observes an approximate work-load equality norm: the workload of writing opinions for the Court is approximately evenly distributed among the Justices. As the senior justice in the majority makes the assignments, one might believe that the left coalitions on the long Burger and Rehnquist Courts and the right coalitions on the long Warren Court occurred when the Court was dispositionally unanimous in an unimportant case. In such a case, the Chief Justice might then assign the unimportant case to a member of the opposite ideological wing, who writes an opinion yielding the "dominated" coalition type. If this explanation is true, large disposition coalitions should show the dominated policy coalition type while the smaller disposition coalitions should show the dominant policy coalition type.

//Insert Figure 9 about here //

The data flatly contradict this explanation.

Figure 9 contrasts the MOC median for small and large dispositional coalitions on the three courts. In the figure, the left-hand panels display the distribution of MOC medians (ranks) for dispositional coalitions of sizes 5 and 6; the right-hand panels show the distributions for dispositional coalitions of sizes 7-9. (The figure employs smaller bin sizes than previously to better display the exact distribution of MOC medians.) It will be seen that larger dispositional coalitions clearly lead to mid-centered majority opinion coalitions on all three courts, not to "dominated" coalitions. The smaller dispositional coalition sizes tend to lead to left-centered coalitions on the Warren Court; to right-centered coalitions on the Burger Court; and to very bimodal coalitions on the Rehnquist Court. The Warren and Burger courts appear almost the inverse of each other. Thus, narrow dispositional majorities often produce coalitions of extreme justices—though this is a broad tendency since there are an amazingly wide variety of policy coalitions in each panel.

In sum, even in courts with fixed membership, policy coalitions vary widely in composition. In particular, it is among the cases with small dispositional coalitions—in 5-4 and 6-3 cases—that policy coalitions vary most widely. As a result, the median of the dispositional coalition will be the worst proxy for the ideology of the policy coalition in cases in which the disposition is contentious. Among cases with large dispositional coalitions, policy coalitions vary less widely.

This illustrates an additional value to focusing on policy choices. Rather than focusing *exclusively* on policy choices, scholars would do well to focus on both policy and dispositional choices. The interaction between the two is complex: it seems to change as dispositional coalitions grow in size. The Court is an idiosyncratic institution for simultaneously disposing cases and composing opinions to explain those dispositions; only by simultaneously studying both these actions can scholars get a full grasp on the politics of the Court.

5. THE IDEOLOGICAL MAKE-UP OF POLICY COALITIONS IS CONSEQUENTIAL

Does the ideological make-up of the majority policy coalition make any difference for the ideological content of the majority opinion?

In some sense, this question has become the central issue in contemporary social scientific debates about decision making on the US Supreme Court. If the make-up of policy coalitions does *not* affect the content of opinions – for example, if opinion content is determined entirely by the desires of the median justice – then we need not worry about which policy coalitions form or why. But if the content of opinions is sensitive to the make-up of policy coalitions, then empiricists must address which coalitions form under what circumstances and theorists need to explain why.

To link policy coalitions and opinion content, we pursue the innovative approach developed by Clark and Lauderdale (2010). In that paper, they first derived measures of the ideological content of majority opinions *independently from the voting coalitions – dispositional or policy – associated with the opinion*. In fact, they derived ideological estimates based on subsequent favorable and unfavorable citations to the opinion, in later opinions of the Supreme Court, as well as which opinions are cited favorably and unfavorably by the current opinion. Clark and Lauderdale derived their citation-based measure for freedom of religion cases and search and seizure cases. Then, they examined the covariation in the majority opinion content score with measures derived from contemporary theories of collegial courts: variation in the spatial location of the median justice, variation in the spatial location of the opinion author, and variation in the spatial location of the median member of the majority dispositional coalition. They found that the median justice's ideology was a rather poor predictor of opinion content, and that that the ideology of the median member of the disposition coalition performed much better as a predictor of opinion content. Here, we extend this analysis to consider the impact of the majority opinion coalition median on the Clark-Lauderdale scores.

We proceed in a straightforward way. We regress the Clark-Lauderdale score on the mean Martin-Quinn score of the members of the majority opinion coalition. We use both freedom of religion and search and seizure cases, but keep the two separate.

//Insert Table 1 and Figure 10 about here //

The results are shown in Table 1. Consistent with the view that the make-up of policy coalitions is consequential for the content of majority opinions, the coefficients on ideology are positive and statistically significant (t = 15 in the search and seizure cases and 8.5 in the freedom of religion cases). For a simple bivariate regression employing two noisy and imperfect measures, the fit is remarkably good (the adjusted r^2s are .42 in the search and seizure data and .34 in the freedom of religion data).

The actual data and the fit from the regression models are shown in Figure 10. Among Freedom of Religion cases that were dispositionally unanimous, the most liberal majority policy coalitions had a mean Martin-Quinn score of -1.64; the most conservative majority policy coalitions in cases that were dispositionally unanimous had a mean Martin-Quinn score of 1.17. Subtraction yields a difference of 1.07 in estimated opinion content: about 1.25 standard deviations. Even in dispositionally unanimous cases, the justices who join the opinion matter for understanding what the opinion says.

This analysis is clearly tentative—only the first salvo in what needs to be a concerted barrage of analysis. Nonetheless, it is consistent with the view that the make-up of policy coalitions is consequential for the policy content of majority opinions.

6. CONCLUDING REMARKS

In this essay, we have argued that empirical practice in the study of collegial courts does not match the theoretical models of judicial behavior. Theorists assume that judges care about policies but empiricists rely on the judges dispositional votes to measure their behavior. We have also argued that most theorists ignore the procedures actually employed on collegial courts like the U.S. Supreme Court, procedures that allow disposition coalitions and policy coalitions to differ in their makeup.

Fortunately, collegial courts in the United States generally and the Supreme Court of the United States in particular afford direct observation of judicial policy behavior. Each case records the set of opinions endorsed by each justice. From these we may determine policy coalitions and compare them with disposition coalitions.

Using data of this kind, we have shown that in a substantial number of cases, dispositional coalitions break into two or more policy coalitions. Moreover, the largest policy coalition of a dispositional majority often varies significantly in its composition even for cases decided on the same natural court. And, opinion content appears to track the varying policy coalitions.

This work, preliminary as it is, has both empirical and theoretical implications. At the very least, empiricists should exploit the joining behavior of the justices. The pattern of joins is distinct from the pattern of dispositional votes so it carries additional information about the preferences of judges and,

arguably, the content of opinions. For theorists, it seems clear that a close investigation of policy coalitions and dispositional coalitions, and the links and differences between them, is overdue.

We hope that establishing a basic set of stylized facts about dispositional coalitions and policy coalitions speeds both kinds of work.

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