

All Relationships Dissipate Except This:
The Attitude-Behavior Link on the Roberts Court

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ABSTRACT

In contrast to two prominent themes in behavioral research—that major findings often cannot be replicated, and that there is a very weak relationship between attitudes and behavior—this Article shows that the observed relationship between the ideology of Supreme Court Justices, as measured by newspaper editorials in prominent papers between the nomination by the President and their confirmation by the Senate, and their voting behavior once on the Supreme Court, as first reported by Segal and Cover, has strengthened from the Burger Court to the Roberts Court. The Article identifies several explanations consistent with this trend.

ALL RELATIONSHIPS DISSIPATE, EXCEPT THIS

A prominent theme in psychology over the past few years is that key findings cannot be replicated, or a little less severely, that relationships dissipate. A recent review in *Science* found that efforts to replicate twenty-seven “well-known” studies resulted in “complete failure” in more than one-third of the attempts.¹ In another set of

¹ John Bohannon, *Replication Effort Provokes Praise—and ‘Bullying’ Charges*, 344 *SCIENCE* 788–89 (2014). See also Richard A. Klein et al.,

replication studies, the original findings were not as strong as the original results, in other words, the relationships dissipated.²

These findings are not limited to psychology: Schoenfeld and Ioannidis gathered fifty common ingredients from random cookbook recipes in *The Boston Cooking-School Cook Book*.³ For those ingredients with more than ten published studies assessing the relative risks of cancer from the ingredients, most had studies showing both increased and decreased risks.⁴ A popular discussion of their findings in *Vox* sardonically claims “everything we eat both causes and prevents cancer.”⁵ The exceptions were bacon, pork, salt

Investigating Variation in Replicability, 45 SOC. PSYCHOL. 142 (2014); Jens P. Asendorpf et al., *Recommendations for Increasing Replicability in Psychology*, 27 EUR. J. OF PERSONALITY 108 (2013); Harold Pashler & Christine R. Harris, *Is the Replicability Crisis Overblown? Three Arguments Examined*, 7 PERSPECTIVES ON PSYCHOL. SCI. 531 (2012); David C. Funder et al., *Improving the Dependability of Research in Personality and Social Psychology Recommendations for Research and Educational Practice*, 18 PERSONALITY & SOC. PSYCHOL. REV. 3 (2013); Daniel T. Gilbert et al., Comment, *Estimating the Reproducibility of Psychological Science*, 351 SCIENCE 1037-a (2016) (arguing that the replication efforts were not precise enough to offer firm conclusions as to replicability); Christopher J. Anderson et al., Response, *Comment on “Estimating the Reproducibility of Psychological Science,”* 351 SCIENCE 1037 (2016) (a reply to the Gilbert critique); Daniel T. Gilbert et al., Response, *Reply to Our Technical Comment on “Estimating the Reproducibility of Psychological Science,”* GARY KING (Apr. 7, 2016), <https://gking.harvard.edu/publications/comment-estimating-reproducibility-psychological-science> (response to the Anderson critique of Gilbert).

² Bohannon, *supra* note 1, at 789.

³ Jonathan D. Schoenfeld & John P.A. Ioannidis, *Is Everything We Eat Associated with Cancer? A Systematic Cookbook Review*, 97 AM. J. CLINICAL NUTRITION 127 (2012).

⁴ *Id.* at 130.

⁵ Julia Belluz, *This is Why You Shouldn't Believe that Exciting New Medical Study*, VOX (Feb. 27, 2017), <http://www.vox.com/2015/3/23/8264355/research-study-hype>.

(every study showed an increased risk), and olives (every study showed a decreased risk). But for studies of wine (six decreased, three increased), coffee (four, and four), eggs (four, and six), and thirteen other ingredients, they found both positive and negative effects.⁶

The reasons for failures to replicate are plentiful. First, there is the famous “file drawer” problem.⁷ Given the nature of classical hypothesis testing, journals are more likely to publish findings that reject the null hypothesis than findings that fail to. This leads scholars whose work fails to reject their null hypothesis to place those manuscripts in their file drawer, rather than submit them for publication. Consider two variables that are not related to one another. Most studies examining such a relationship will fail to reject the null and thus probably won’t see any more light of day than that provided at disciplinary conferences. Five percent of the studies, though, will be significant at the 0.05 level. Under such circumstances, journals “will publish only the papers that come to the wrong conclusions, and our file drawers will be filled with all the papers that come to the right conclusions!”⁸

A second explanation is that social and behavioral research may be time bound. Ulmer noted that background variables vary over time in the extent that that were able to predict the votes of Supreme Court Justices.⁹ Support for treating everyone equally regardless of race was once the position of liberals in the United States,¹⁰ though support for race-conscious admissions and hiring is now more

⁶ Schenfeld & Ioannidis, *supra* note 3, at 130.

⁷ GARY KING ET AL., *DESIGNING SOCIAL INQUIRY* 105 (1994); Satish Iyengar & Joel B. Greenhouse, *Selection Models and the File Drawer Problem*, 3 *STAT. SCI.* 109, 110 (1988).

⁸ KING ET AL., *supra* note 7, at 105

⁹ Sidney S. Ulmer, *Are Social Background Models Time-Bound?*, 80 *AM. POL. SCI. REV.* 957 (1986).

¹⁰ DAVID ROHDE & HAROLD SPAETH, *SUPREME COURT DECISION MAKING* (1976) (see generally chapter 7).

strongly supported by liberals.¹¹ Similarly, support for free speech rights is something that liberals on the Supreme Court once favored more strongly than did conservatives.¹² That relationship is no longer the case.¹³ Changes in institutions certainly influence behavior.¹⁴ Examples of changed institutions include the Senate's change in cloture rules, the Supreme Court's reapportionment decisions or the establishment of the Supreme Court's Rule of Four, which provides the mechanism for the Court to grant petitions for writs of certiorari, could readily lead to time bound behavioral results.

Third, some scientists narrow their hypotheses until they find a positive result, what is referred to as the "garden of forking paths."¹⁵ Simply put, most hypotheses have dozens if not hundreds of ways in which they could be tested. Researchers have choices as to how to measure the dependent and independent variables, which data to include, which control variables to include, and which interactions to examine. If each of those options has five alternatives there are $5^5 = 3125$ options. This is among the reasons that it is always acceptable to broaden your hypothesis in response to patterns found in data, but if you wish to narrow your hypothesis in response to patterns found in data, you must retest the hypothesis with independent data.¹⁶

¹¹ LAWRENCE BAUM, *IDEOLOGY IN THE SUPREME COURT* 166 (2017).

¹² ROHDE & SPAETH, *supra* note 10.

¹³ Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment*, 21 WASH. U. J.L. & POL'Y 81, 81–83 (2006).

¹⁴ Douglass C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97, 109 (1991).

¹⁵ Andrew Gelman & Eric Loken, *Ethics and Statistics: The AAA Tranche of Subprime Science*, 27 CHANCE 51 (2014) (citing Andrew Gelman & Eric Loken, *The Garden of Forking Paths: Why Multiple Comparisons Can Be a Problem Even When There Is No "Fishing Expedition" or "P-hacking" and the Research Hypothesis Was Posited Ahead of Time* (Nov. 14, 2013) (unpublished article, Columbia University), http://www.stat.columbia.edu/~gelman/research/unpublished/p_hacking.pdf).

¹⁶ KING ET AL., *supra* note 7, at 104 n.14.

Another cure for this problem is the pre-registration movement,¹⁷ in which scholars publically list exactly what they intend to examine, including the number of subjects they plan to test.

A final explanation for the inability to replicate findings is, sadly, that some published research is just fraudulent. As virtually every political scientist knows, *Science* recently withdrew an article by LaCour and Green on support for same-sex marriage at the request of Professor Green and under suspicion of fraud by LaCour. Other prominent examples of alleged fraud include Burt's studies on the heritability of IQ;¹⁸ John Lott's studies of the effectiveness of brandishing a weapon when approached by an attempted mugger;¹⁹ and Bellesiles's study of the extent of gun ownership in colonial and early national periods of American history.²⁰

Beyond the replication crisis afflicting behavioral sciences, the relationship between attitudes and behavior is fairly weak. Wicker's survey of the literature, found the typical correlation between attitudes and behavior to be about 0.3.²¹ More recent analyses have

¹⁷ *What is Preregistration, Anyway?*, ASS'N PSYCHOL. SCI., <https://www.psychologicalscience.org/publications/observer/obsonline/what-is-preregistration-anyway.html#.WQnlUtLysdU>

¹⁸ Cyril Burt, *The Inheritance of Mental Ability*, 13 AM. PSYCHOL. 1 (1958). *They Cyril Burt Affair*, HUM. INTELLIGENCE, <http://www.intelltheory.com/burtaffair.shtml> (discussing the allegations of fraud).

¹⁹ JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 5 (1998). *The GOP's Favorite Gun "Academic" Is A Fraud*, THINK PROGRESS, <https://thinkprogress.org/debunking-john-lott-5456e83cf326> (discussing the allegations of fraud).

²⁰ MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE 70 (2000). One *New York Times* article notes Emory University's finding that Bellisiles was guilty of "unprofessional and misleading work." Patricia Cohen, *Scholar Emerges from Doghouse*, N.Y. TIMES (Aug. 3, 2010), <http://www.nytimes.com/2010/08/04/books/04bellisles.html>.

²¹ Allan W. Wicker, *Attitudes Versus Actions: The Relationship of*

confirmed these results,²² with Armitage and Christian noting, “historically, attitudes had been assumed to be predictive of behavior, although this assumption was often held in the face of compelling evidence to the contrary.”²³

My counter-example to both the notion that much behavioral science cannot be replicated, as well as the generally weak relationship between attitudes and behavior, is the relationship between the ideology of Supreme Court Justices and their votes on the Court, otherwise known as “the attitudinal model.”²⁴

Efforts at measuring judicial preferences have focused on two types of measures: endogenous measures, those derived in whole or in part from the votes justices cast; and exogenous measures, those completely independent of the votes the Justices cast.²⁵ Depending on one’s purpose, both have their time and place.

Perhaps the earliest use of exogenous measures of to predict Justices’ votes was Nagel, who used political party as his predictor.²⁶ Nagel conducted a study of “313 state and federal supreme court judges.”²⁷ He gathered their decisions from non-unanimous state and federal supreme courts cases and their political party identification

Verbal and Overt Behavioral Responses to Attitude Objects, 25 J. SOC. ISSUES 41 (1969).

²² Icek Ajzen, *Nature and Operation of Attitudes*, 52 ANN. REV. PSYCHOL. 27, 39 (2001); ICEK AJZEN & MARTIN FISHBEIN, THE HANDBOOK OF ATTITUDES 173, 182 (D. Albarracín, B.T. Johnson, and M.P. Zanna eds.); Christopher J. Armitage & Julie Christian, *From Attitudes to Behaviour: Basic and Applied Research on the Theory of Planned Behaviour*, 22 CURRENT PSYCHOL. 187 (2003).

²³ Armitage & Christian, *supra* note 22, at 187.

²⁴ JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

²⁵ Jeffrey Segal, *Measuring Political Preferences*. 17 J. L. & CTS. 1, 4–5 (2007).

²⁶ Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 AM. POL. SCI. REV. 843, 843–50 (1961).

²⁷ *Id.* at 843.

from either the *Directory of American Judges, Who's Who in America* or from a survey that he sent the judges. Not surprisingly, Democratic judges voted significantly more liberally than Republican judges in twelve of his fifteen issue areas.²⁸

Nagel's survey also asked the judges to provide their agreement or disagreement with a large set of policy issues. He received 118 usable responses.²⁹ The survey included statements such as "colored people are innately inferior to white people," (37% of the judges agreed) "[t]he Jews have too much power and influence in this country" (9% agreed), or "our treatment of criminals is too harsh; we should try to cure, not to punish them" (20% agreed).³⁰ Nagel then associated those attitudinal measures with the decisional data from his 1961 study. He found that those with more liberal attitudinal scores were more likely to vote liberally.³¹ While this was a highly valuable study, it is ever-more doubtful that state supreme court judges would continue to respond to such surveys, especially in the increasingly polarized political environment in which courts exist. It is also a fact that Nagel never states how many, if any, of the 313 responses came from Supreme Court Justices.³²

Danelski's study of Justices Pierce Butler and Louis Brandeis coded speeches by Butler and Brandeis prior to their nomination to the Supreme Court with special concerns for their views on *laissez-faire* economics.³³ Though pioneering, Danelski's methodology was unlikely to be usable by other scholars as Supreme Court nominees often do not have voluminous written records, and like Justice David Souter, may be chosen precisely for that reason.³⁴ In pursuit of a

²⁸ *Id.* at 845.

²⁹ STUART NAGEL, OFF-THE-BENCH JUDICIAL ATTITUDES *in* JUDICIAL DECISION-MAKING 29 (Glendon Schubert ed., 1963).

³⁰ *Id.* at 32.

³¹ *Id.* at 40.

³² *Id.*

³³ David J. Danelski, *Values as Variables in Judicial Decision-Making: Notes Toward a Theory*, 19 VAND. L. REV. 721 (1966).

³⁴ DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES (1999).

valid and reliable exogenous measure of judicial ideology that exists for all modern nominees, Segal and Cover chose newspaper editorials from four of the nation's leading newspapers, the *New York Times*, *Washington Post*, *Los Angeles Times* and *Chicago Tribune*, the first two being left-of-center, while the last two leaned to the right.³⁵ As the *L.A. Times* moved left over time, Segal added the *Wall Street Journal* to the list.

In 1989, Segal and Cover correlated the Segal-Cover scores with civil liberties data from Harold Spaeth's Supreme Court database covering the years 1953 through 1988.³⁶ Though the n was only eighteen Justices (Earl Warren to Anthony Kennedy), the correlation was 0.80, which is remarkably high for an attitude-behavior relationship.³⁷ Needless to say with so small an n it would be necessary to show that this relationship, strong as it was, did not just capitalize on chance.

Segal and Spaeth added the 1989 term and the correlation coefficient in civil liberties votes dropped from 0.80 to 0.79 in Civil liberties votes from, again Warren to Kennedy.³⁸

Segal et al. backdated the Segal-Cover scores to Hugo Black, while Spaeth backdated the Supreme Court database to pre-1946.³⁹ With thirty-one Justices from Black to Thomas and Supreme Court civil liberties decisions from 1946 through 1992, the correlation coefficient dropped to 0.69.⁴⁰

In 1996, Epstein and Mershon conducted an "audit" of the Segal-Cover scores noting: "it would hardly be an exaggeration to write that almost every recent study of Court decision making has—in one way

³⁵ Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989).

³⁶ *Id.* at 560–61.

³⁷ *Id.* at 561.

³⁸ JEFFREY A. SEGAL & HAROLD J. SPAETH, *supra* note 24, at 228.

³⁹ Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*. 57 J. OF POL. 812, 813 (1995).

⁴⁰ *Id.* at 817.

or another—invoked these scores.”⁴¹ They found “The Segal/Cover scores work quite well—at least for civil liberties cases—during one Court era (1969-1985), perform poorly for another (1953-1986), and produce mixed results for yet a third (1986-1991).”⁴²

Segal and Spaeth returned to Civil liberties votes, this time from Warren through Ginsburg (n = 35) covering the 1953 through 1999 Terms, finding $R = 0.76$.⁴³ In a forum on Segal and Spaeth in the 2003 Law and Courts *Newsletter*, Howard Gillman wrote that the book “is a distinctive combination of rigorous data (*carefully selected to focus on the cases that work best for the model*).”⁴⁴ Gillman explains:

in this long book, the core evidence in favor of the attitudinal model with respect to decisions on the merits is outlined in just two little paragraphs on pp.322-323, and summarized in Table 8.2. Spaeth and Segal compare the (unfortunately imprecise but apparently close enough) Segal-Cover scores (measuring judicial ideology) to... all formally decided civil liberties cases” decided from 1953 through 1999. In case you are interested the correlation is 0.76 with an $r^2 = 0.57$. Believe it or not, that is the sum and substance of the book’s proof for the model, as applied to final decisions on the merits, where the model is said to work best.

Gillman then goes on to declare

even on its own terms, the model is not a general explanation for all Supreme Court decision making; at best it is a partial explanation for a subset of votes in cases that raise the most ideologically divisive issues of law. Other political scientists

⁴¹ Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. OF POL. SCI. 261, 265 (1996).

⁴² *Id.* at 284.

⁴³ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 23 (2002).

who refer to the model would be well advised to incorporate this moderating point in their own work, so as not to leave a misleading impression about the state of the evidence. In fact, it would be a service to the discipline if Segal and Spaeth would provide statistics on the correlation between Segal-Cover scores and a random sample of all Supreme Court decisions over the past half century. That would put all of us in a much better position to get a balanced perspective on the role of conventional political ideology on the justices' behavior.⁴⁵

In response to Gillman's challenge, Segal and Spaeth quickly examined the relationship between the ideology of the Justices and the ideological direction of their votes in all Supreme Court cases (with the minor exception of interstate boundary disputes, which have no conceivable ideological content).⁴⁶ Indeed, in the same newsletter that Gillman made his allegations Segal and Spaeth reported as follows: "In the book we reported a correlation between ideology and civil liberties votes of .76, rounding up from .758. We now report that when we look at all cases, the correlation coefficient does indeed drop, all the way to .757—a whole one-thousandth of a point!"⁴⁷

While most relationships dissipate over time, the relationship between ideology and voting behavior has only strengthened over time. Backdating the data to 1946 and starting with Vinson lowers the Segal-Cover correlation from 0.80 to 0.69.⁴⁸ On the other hand, if we only examine the relationship between ideology and votes for the eight Justices who served prior to the 2016 Term of the Roberts Court, we find a correlation of 0.94. Needless to say, none of the current Justices were part of the original Segal-Cover dataset.

⁴⁵ Symposium, 'The Supreme Court and the Attitudinal Model Revisited'—*Authors Meet Critics*, 13 L. & CT. 12, 14 (2003).

⁴⁶ *Id.* at 31.

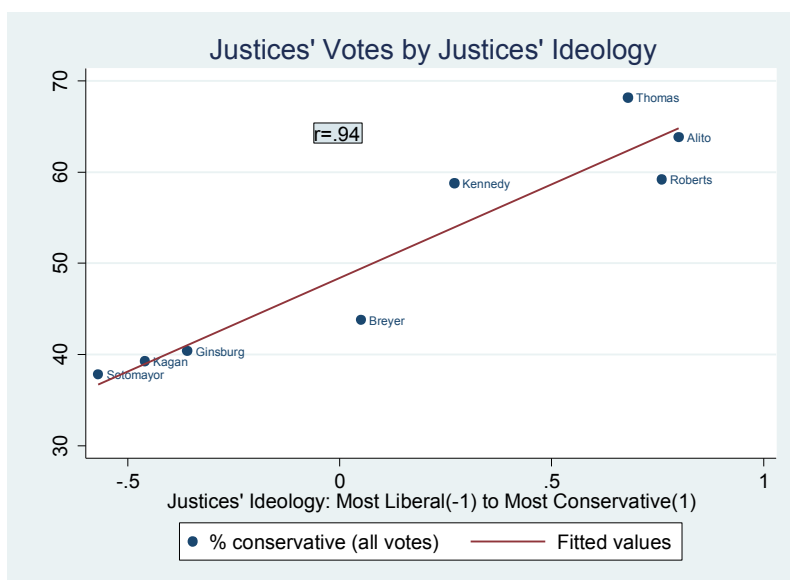
⁴⁷ *Id.* at 33.

⁴⁸ Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 817 (1995).

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For the current Justices on the Roberts Court (excepting Justice Gorsuch), Justices Sotomayor, Kagan, Ginsburg, and Alito vote almost precisely as predicted from their Segal-Cover scores. Justices Breyer and Roberts are a bit more liberal, while Justice Kennedy, who was viewed very moderately following the failed nominations of conservatives Robert Bork and Douglas Ginsburg, surprisingly comes out more conservative than predicted, as does Justice Thomas, though that is not surprising.

Simply put, this is a remarkable relationship, all the more so given the weak relationship that psychologists have found over several decades exploring the attitude-behavior relationship, as well as the “reproducibility crisis.”

Allow me to speculate on some reasons for the increase. One is that the Supreme Court is more ideologically driven than it used to be.⁴⁹ This suggests that there was once a principled age of Supreme

⁴⁹ ROBERT BORK, *THE TEMPTING OF AMERICA 2* (1990) (chapter 3).

Court decision making, though Bork himself does not discuss when that might have been. McCloskey's volume finds politics rampant throughout the Court's history.⁵⁰ Empirically, Spaeth and Segal find no evidence that "precedential" behavior by the Justices has decreased over time.⁵¹

Alternatively, it might be the case that the increase in this relationship is due to the greater importance of the Supreme Court in national affairs. A Court that once spent much of its time on economic questions has, since 1954, taken on segregation,⁵² reapportionment,⁵³ criminal procedure,⁵⁴ sex discrimination,⁵⁵ abortion,⁵⁶ and same-sex marriage.⁵⁷ This has manifested itself in various ways. First, we no longer observe Presidents appointing Justices substantially out of line with the Presidents' preferences, as we do with Eisenhower's appointments of Warren and Brennan. Conservatives cry "No more Souters!" and they are probably correct in that we will not likely see another unknown moderate who is vouched for as a conservative.⁵⁸ Second, interest groups now participate at much higher levels than they once did, providing editorial writers with much greater information than they once had.⁵⁹ Third, there has been a great increase in the number of editorials per

⁵⁰ ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

⁵¹ HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 287 (1999).

⁵² *Brown v. Bd. Educ.*, 347 U.S. 484 (1954).

⁵³ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁵⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁵ *Reed v. Reed*, 404 U.S. 71 (1971).

⁵⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁷ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

⁵⁸ LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 62 (2005).

⁵⁹ LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 703 (6th ed., 2016).

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nominee.⁶⁰ From the nomination of Hugo Black (1937) through Thurgood Marshall (1967), no Justice had more than two editorials per newspaper. Between Burger (1969) and Thomas (1991), eight of the eleven nominees received at least three editorials per newspaper.⁶¹

The confirmation of Justice Gorsuch should continue the economic conservatism and the social liberalism of the Roberts Court. However, replacement of either Justice Kennedy or Justice Ginsburg will pull the Roberts Court strongly to the right on social issues such as abortion, affirmative action, and same-sex marriage.

⁶⁰ Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 814 (1995).

⁶¹ *Id.*