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POLARIZATION AND THE SUPREME COURT

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Introduction

Political polarization has been commonly observed in American Politics. Abramowitz and Saunders (2005) found that while the majority of Americans are moderate, there are deep divisions between Democrats and Republicans, driven by activist and elites on both sides. These divisions have translated into polarization on political issues between the two parties. Increasing trends of polarization have pushed the ideologies of liberals and conservatives further apart in recent decades (Hetherington 2009). This split is most evident in certain social issues, which have resulted in culture wars in American politics. In this study, I analyze the relationship between judicial decision making on the Supreme Court and polarization. I look at both the legal model and the attitudinal model of judicial decision making. To find support for the legal model, I should expect to see justices that are uninfluenced by their personal preferences while using legal arguments to support their decisions. If there is support for the attitudinal model, then I should expect to see justices making decisions based on their political preferences. In this study, I examine seven landmark Supreme Court cases that deal with the polarized issue of LGBTQ rights, and compare the language used by justices in their written opinions. Through a linguistic analysis of the opinions, I anticipate observing evidence of polarization in the different languages used by justices from different ideological persuasions.

Research Question

Does the political polarization that is commonly observed in other American institutions translate into an institution like the Supreme Court?

Literature Review

Political polarization has been commonly observed in American politics and has drawn recent scholarly interest (Layman, Carsey and Horowitz 2006, Poole and Rosenthal 1984,

Baldassarri and Gelman 2008, Hetherington 2009, Fiorina and Abrams 2008, Baum and Groeling 2008, Abramowitz and Saunders 2005). In recent years, trends of polarization have appeared to increase in Congress, with Democrats and Republican camps drifting further and further apart (Hetherington 2009). Americans appear to be deeply split on many social issues that have come to be part of the American culture wars. According to the legal model of judicial decision making, decisions handed down by the Supreme Court should be unaffected by these trends of polarization. However, recent scholarship finds empirical support against this assumption, and questions the role of polarization within the Court.

In *Putting Polarization in Perspective*, Marc Hetherington (2009) touches upon polarization trends among elite and mass levels. He uses DW-NOMINATE scores, a common measure of ideology created by Poole and Rosenthal to map the ideology of members of Congress. From these scores, Hetherington (2009) asserts that clear polarization exists among political elites and writes, “The process of partisan polarization in Congress has been occurring over time...Starting with the 97th Congress, the parties began to grow apart steadily and sometimes dramatically” (p.417). Hetherington (2009) also seeks to identify the origins of current polarization within Congress. He argues that these causes can be traced to the 1950s and 1960s when differences between parties were relatively small. He attributes the Democratic Party’s embrace of civil rights as a key factor that caused white southern conservatives to depart from the party. This caused the displacement of conservative southern Democrats with more conservative southern Republicans (Hetherington 2009). African Americans receiving the right to vote also caused more liberals to be elected to office. Hetherington (2009) also describes changes in the north-east as another contributing factor to present day polarization. He describes the northeastern United States in the following way: “Although among the most liberal areas in the country, it long had a

tradition of electing liberal Republicans. As the national image of the Republican party grew more conservative, however, these states turned increasingly to liberal Democrats” (Hetherington 2009 p.421). According to Hetherington (2009), these patterns were reflected in Congress as early as the 1980s. He argues that this caused greater differences between parties, but also caused the activists within the parties to grow more homogenous. Hetherington (2009) also points out that not only have party lines changed regionally, but changes have occurred within both of the parties over time, with Republicans becoming increasingly more conservative and Democrats becoming more liberal. His explanation for this is that interest groups reinforce polarization through monetary contributions that are aimed towards ideological extremes on both sides (Hetherington 2009).

Hetherington’s (2009) analysis provides evidence of polarization within Congress and identifies the root causes of polarizations between the two parties. However, it is not yet known whether this polarization also applies to the Supreme Court. If it is true that the Court is insulated from broader political pressures, then we can expect that the Court will not be plagued by the same political polarization seen in Congress, since its general purpose is not to further ideology, but rather to interpret the law as it applies to the Constitution.

Tom Clark (2009) explains why studying polarization on the Supreme Court is important.

Political controversy over Supreme Court nominations and the steady politicization of that process during the latter half of the twentieth century, the deep entrenchment of the notion that ideological preferences drive decision making on the Court, and heated political battles over the Court’s role in making national policy are just some of the reasons why scholars and policy officials alike ought to be interested in the degree of ideological polarization on the Court (Clark 2009 p.154).

In addition to providing reasons for why this area of study is important, Clark (2009) also assesses different methods that could be used for measuring ideological polarization on the Court. Clark (2009) used the Esteban and Ray (1994) measure to track polarization on the Court,

which looks at both intergroup alienation and intragroup identification. This method allows scholars to measure polarization on the Court by assessing both homogeneity and heterogeneity among justices, with polarization decreasing with homogeneity and increasing with heterogeneity. Clark (2009) also assessed the relationship between ideological polarization and fractured decision making on the Court by examining dissents, cases decided during a term with at least one dissenting opinion, and cases decided by a one-vote majority. Through this analysis he found that there was a larger portion of cases decided with a dissent than cases decided by one vote, but both were correlated with polarization. He concludes that “polarization is indeed strongly related to (1) the proportion of cases that are decided with dissent, and (2) the proportion of cases decided by a one-vote majority” (Clark 2009 p.154). Clark (2009) argues that an increase in ideological polarization on the Supreme Court is associated with a Court that has an increase in published dissents and one vote majorities.

Concurring opinions may also provide insight to the level of polarization on the Supreme Court because separate opinion writing reflects different views about interpretation of the law. Pamela Corley (2010) has written extensively about the importance of concurring opinions on the Court. She builds on the groundbreaking work of Segal and Spaeth (2002) who argue that concurring opinions are written by justices who are ideologically closer to the majority opinion than justices who have dissented. Corley (2010) studied concurrences by breaking them up into five different types; expansive, doctrinal, limiting, reluctant, and emphatic. According to Corley (2010), the purpose of an expansive concurrence is to expand the holding of the majority opinion. Doctrinal concurrences differ because they offer a different legal reasoning for the majority decision. Limiting concurrences attempt to limit the majority opinion, while reluctant concurrences express the justice’s desire to explain why they felt compelled to join an opinion

that they did not want to join. Finally, emphatic concurrences clarify the majority opinion by emphasizing part of the Court's reasoning (Corley 2010). When analyzing these types of concurrences with the ideological compatibility of justices, Corley (2010) found that

ideological compatibility between the justice and the majority opinion writer, interacted with the ideological direction of the majority decision, decreases the likelihood of a reluctant concurrence; however, this variable has no effect on writing or joining an expansive or limiting concurrence (p.33).

According to this finding, the ideology of individual justices only plays a significant role in the writing of reluctant occurrences. However, Corley (2010) found that when looking at case-specific factors, the political importance of the case was correlated with emphatic and expansive concurrences, a factor that Unah and Hancock (2006) examined in great detail on their research on case salience.

In their research, Unah and Hancock (2006) explore how ideological preferences affect high salience and low salience cases. They argue that the attitudinal model, which explains judicial decision making by the personal preference of the justices, can be used to explain decisions reached in cases that are high in salience but not in low salience cases. High salience cases are defined as cases that involve important issues, which, in turn, attract more attention. They looked at civil rights cases in their study and code the salience of the cases by determining whether the decision was published on the first page of the *New York Times* the day after the decision (2006). They explained the results of their research in the following way:

We can state definitively that the effect of ideology in the United States Supreme Court is regulated by the salience of the case presented for review. When a case is highly politically salient, the attitudinal model predicts an additional 17% increase in the probability that the Court would rule liberally, holding other variables constant. We believe the reason for this outcome is that case salience references the values of the justices more directly by raising their interest and attention in the case to a higher level (Unah and Hancock 2006 p.307).

Additionally, Unah and Hancock (2006) found that the attitudinal model was less predictive of the outcome of cases with lower salience.

Thomas Keck (2014) takes a different approach in analyzing the role of ideology in judicial decision making by assessing the role of the Court in the modern polarized political environment. He does so by focusing on the polarizing issues of abortion, same sex marriage, affirmative action, and gun control. Keck (2014) first focuses on how these issues are fought through the Court from both the left and the right. He then addresses the role of justices themselves on the Court, arguing that

...judges appear to act more like partisans when the constitutional issue before them focuses directly on a key culture war concern and less like partisans when called on to police the process by which such culture war concerns will be addressed, even if those latter decisions might have a substantial impact on ultimate outcomes (Keck 2014 p.140).

Keck (2014) points out that,

if we expect judges to be nonpartisan umpires, then any non-zero difference between the aggregate votes of Democratic and Republican judges would seem to indicate a troubling pattern of polarization. But if we expect judges to be partisan zealots, then any difference below 100 percent would seem to indicate some measure of neutral umpiring (p.148).

When comparing the Court with voters, the two appear to have similar levels of polarization over culture war topics. However, when compared to Congress, Keck (2014) finds that the Court appears drastically less polarized. "If judges were simply behaving as legislators, their votes would diverge along partisan lines far more sharply than they actually do" (Keck 2014, p.148-149). Keck's (2014) findings suggest that justices are not as politically neutral as suggested by the legal model, but are also not seeking to pursue their own political preferences as suggested by the attitudinal model. His argument appears to instead land in the strategic model camp, which argues that justices act within legal constraints while having individual policy preferences.

The alignment of the views of Supreme Court justices and Congress was recognized some time ago by Robert Dahl (1957), who explained that the views of the Court are never for long out of line with the views of lawmaking majorities because Supreme Court justices are regularly appointed to the Court by elected policymakers. According to Dahl (1957), “Presidents are not famous for appointing justice’s hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate” (p. 284). He notes that throughout the history of the Court, a new justice was appointed every twenty-two months, on average. “Thus a president can expect to appoint about two new justices during one term in office” (Dahl 1957 p. 284). Therefore, through the appointment process of the Court, justices are appointed that have policy views that align with the current lawmaking majority. If this is the case, then the judicial branch will lag behind the dominating policy views found in the legislative and executive branch. Under this assumption, the dominating policy views on the Court are never too far behind the dominating policy views of the lawmaking majority (Dahl 1957 p. 284).

There has been a great deal of scholarship written on the role of polarization and ideology on the Supreme Court. While Clark (2009) identified polarization by looking at dissents in Court decisions, Corley (2010) found the presence of political importance in concurrences. Unah and Hancock (2006), instead, chose to look at the role of salience in judicial decision making, and found that cases of higher salience were predicted by the attitudinal model. Keck (2014) took yet an even different approach, and focused instead on how the Court was used to pursue polarized issues, finding that while justices displayed trends of polarization, they did not mirror those of Congress. Dahl (1957) argued that the Court is a political body that lags behind the legislative and executive branch regarding policy preferences. All of these studies found support for

polarization on the Court in some way, ultimately rejecting the legal model of judicial decision making.

The research conducted in this study seeks to further inform the discussion regarding the presence of polarization on the Court. I intend to add to the existing body of research by studying the language used by the Court in LGBTQ cases, to see if there is evidence of polarization across ideological lines. In doing so, I hope to add a new perspective of how polarization can be studied on the Court.

Theory Section

One view of the Supreme Court is that it is an insulated body unaffected by public opinion. Since justices on the Court are granted lifetime appointments by the executive branch and do not face reelection, and are arguably not held accountable by the public. Under this view, justices on the Court decide on the basis of legal interpretations that may be unpopular amongst the public. This view of the Court as an insulated body falls in line with the legal model of judicial decision making, which assumes that justices use legal techniques to make decisions on cases brought before them. Under this theory, justices are assumed to use the application of legal principles, such as *stare decisis*, and the interpretation of legal texts, to arrive at a decision. The model suggests that justices will use legal methods of interpretation, such as textualism or originalism to interpret the Constitution. Segal and Spaeth (2002) describe the legal model as the belief that “the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent” (p. 48). The model also suggests that justices are uninfluenced by personal preferences in their decisions. *Stare decisis* is central to the legal model, because justices are expected to pursue stability in the law. “The practice of *stare decisis* is a central assumption of most explanations of

principles legal choice or the legal model because, if a justice does not practice reliance on the holdings of the Court's past decisions about the Constitution, statutes, and the case law, there is little reason to believe that the justice believes in making decisions because of the law" (Brisbin 1996 p. 1005). This model assumes that justices will follow *stare decisis* even if it goes against their own personal preferences. If I expect to see support for the legal model, I should see justices using legal techniques to make their decisions.

Another view of the Court is less as a legal institution and more as a political body. As earlier mentioned, Dahl suggests that the Court is a political body that is never too far behind the dominant policy views of the lawmaking majority. This political view of the Court is featured in the attitudinal model. The attitudinal model of judicial decision making identifies the personal policy preferences justices hold as the key influence in their decisions. Segal and Spaeth (2002) hold these policy preferences as the strongest influence on how a judge will vote on a case. Under this theory, it is assumed that justices will disregard legal methods of decision making, such as *stare decisis*, if they do not align with their political preferences. If I expect to see support for the attitudinal model on the court, I should see justices disregarding legal techniques and voting based off of their policy preferences.

Methods

For my methods I began by reviewing relevant literature about the Supreme Court and models of judicial decision making. I then chose seven landmark Supreme Court cases that dealt with the polarized issue of LGBTQ rights. All of the cases chosen were featured on the front page of the *New York Times* the day after the cases were decided, displaying the salience of the cases. These cases were: *Bowers v Hardwick* (1986), *Romer v. Evans* (1996), *Boy Scouts v Dale* (2000), *Lawrence v Texas* (2003), *U.S. v Windsor* (2013), *Hollingsworth v Perry* (2013), and

Obergefell v Hodges (2015). I used Nvivo to code the majority opinions, concurrences, and dissents, as well as the Justices who authored each opinion. I used the Supreme Court database to determine if Justices who authored opinions were conservative, moderate, or liberal. I then ran word frequency tests to make word clouds, including stemmed words, for each ideological group to compare the language used by Justices with different political preferences. I also looked at the summaries from the word frequency tests to see the number of times different words were used, and the weighted percentage of the words in the written opinions.

Results

When reviewing the opinions in these cases, I discovered that liberals did not play an active role in authoring opinions. The majority of opinions were written by either moderate or conservative justices. While liberal justices authored one majority opinion and four dissenting opinions, moderate justices authored five majority opinions, one concurring opinion and three dissenting opinions. Conservatives authored one majority opinion, one concurring opinion and six dissenting opinions. Because of this, there were less data to analyze regarding the language that was used by liberal justices. In many of the cases, especially those written by Justice Kennedy, liberal justices joined the opinions written by moderates. When looking at the voting records of the seven selected cases, the Court voted along ideological lines in all but one case. *Hollingsworth v. Perry* (2013) was the only case in which justices did not vote in ideological blocs. However, the key issue of disagreement among the justices in the opinions dealt with whether or not there was standing to bring the case, not the issue that addressed the LGBTQ community itself. In every other case the votes were divided between the liberal justices and conservative justice, with moderates acting as the tiebreakers.

When looking at the language used in the opinions, liberals, moderates, and conservatives all used legal language in high frequencies. “Courts,” “laws”, “states,” “rights,” “constitution,” and “case” were among the most commonly used words across all three groups. This suggests

Figure 1: Frequency of Legal Words Used in Opinions

	Liberals		Moderate		Conservative	
Word	Word Count	Weighted Percentage	Word Count	Weighted Percentage	Word Count	Weighted Percentage
Courts	94	0.93%	473	1.70%	313	1.53%
States	107	1.06%	490	1.76%	298	1.45%
Laws	110	1.09%	426	1.53%	280	1.36%
Rights	133	1.32%	270	0.97%	183	0.89%
Constitution	55	0.55%	212	0.76%	176	0.86%
Case	72	0.72%	187	0.67%	97	0.47%

that all three groups referenced legal techniques when authoring their opinions in these cases. However, when looking further down the list, the linguistic techniques begin to change by ideology. “Protection” and “equal” were used in higher frequencies by moderates than by liberals and conservatives. Liberals, on the other hand, referenced “privacy” and “discrimination” in higher percentages than moderates and conservatives (the number of times they referenced the words were lower due to the lack of opinions written, however, across the opinions that were written by liberals they referenced these words in higher percentages). Conservatives referenced “tradition” at much higher rates than both liberals and moderates in the opinions they authored

Figure 2: Frequency of Words Used in Opinions

	Liberals	Moderate	Conservative
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Word	Word Count	Weighted Percentage	Word Count	Weighted Percentage	Word Count	Weighted Percentage
Protection	53	0.53%	179	0.64%	117	0.57%
Equal	13	0.13%	100	0.36%	48	0.23%
Private	52	0.52%	68	0.25%	37	0.18%
Tradition	11	0.11%	46	0.17%	70	0.34%
Discrimination	26	0.26%	41	0.15%	34	0.17%
Precedent	1	0.01%	37	0.13%	10	0.05%

on LGBTQ cases. These differences in language correlate with the policy preferences of justices. When looking at the history of interpretation of the Due Process clause on the Court, it is evident that liberals and conservatives have different interpretations of what constitutes a fundamental right. Conservatives tend to rely more on tradition and history to determine what is considered fundamental. In LGBTQ cases, this translates into the use of Judeo-Christian traditionalism and morality arguments to support their assertion against LGBTQ rights as fundamental. Liberals and moderates on the other hand, rely much more heavily on ideals of privacy when discussing fundamental rights. When reviewing LGBTQ cases, liberals invoke the right to privacy as justification for greater protection of rights. The differences in these arguments are reflective of the differences in policy preferences between the groups. Additionally, it is important to note that when justices used certain language, they were using it in an argument to discredit an opposing viewpoint. For example, when conservatives referenced privacy in their dissents, it was often to discredit the right to privacy argument that was used by the majority. This distinction provides even greater insight into how separated justices viewpoints were based on their political preferences. Even when justices from different political groups used similar language, it was

often only to discredit the arguments made by their more liberal or more conservative colleagues. This suggests the presence of polarization, since there was little overlap in the reasoning made by different ideological groups. All three groups referenced “precedent” in very low frequencies, with liberals only using the word once out of all five of their authored opinions. If the legal model was correct in assuming that justices use legal techniques such as *stare decisis* to make their decisions, then precedent should have been referenced in much higher frequencies.

These different interpretations of what constitutes a right as fundamental under the Due Process clause of the Fourteenth Amendment, could be viewed as legal differences amongst judges if they were not linked with political preferences. However, since the differences in thought are found specifically along ideological lines, this suggests that political preferences play a key role in how the justices decided to vote on these cases.

Conclusion

My hypothesis stated that I expected to see support for the attitudinal model through the use of polarized language on the court. If I were to find support for the legal model of judicial decision making, then I should see justices using legal standards to make their decisions, and that they should not be influenced by their personal preferences. If I expected to see support for the attitudinal model, then I should see a trend in justices’ judicial decisions based on their political preferences. I found that all of the justices used legal arguments to support their decisions, however the legal arguments they used were influenced by their ideology. Justices from different ideologies all used similar legal words –words like “court,” “right,” “states,” or “Constitution” – most frequently. However, despite the similar legal language, justices reached different conclusions on the cases. When looking at the ideology of the justices, it is evident that the voting record for LGBTQ cases, with one exception, were split along ideological lines in all of

the cases. If we look past the legal words that were used the most frequently by justices, we begin to see polarized language present in the opinions. Words such as “tradition” were used in higher frequencies by Conservatives, while words like “private” or “privacy” were used in higher frequencies by liberals and moderates. This indicates that justices use legal arguments to support decisions made based on their political preferences. This supports the attitudinal model, as justices relied on their political preferences to reach decisions on the cases. However, looking at the language used in the cases, it is apparent that while justices followed their personal ideology in making their decisions, they then wrapped these decisions in legal justifications. The evidence presented in this study adds to the growing body of work examining the Court as a political body. The results find support for the attitudinal model, and suggest that political polarization does indeed translate into an institution like the Supreme Court. This study has been a preliminary look into the topic of polarization on the Supreme Court, and there is room for further research regarding how language use by justices can be used to find evidence of polarization. Further research can explore how this phenomenon occurs across other polarized issues that come before the court.

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