

# Errors in Judgment: Evidence of the Fundamental Attribution Error in Supreme Court Decision-Making

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Politics Honors Thesis (American Politics)  
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04/26/2015

## **Chapter 1: Introduction**

This paper examines whether the Fundamental Attribution Error (FAE) affects Supreme Court decision-making. The FAE was first analyzed in 1977 by the social psychologist Lee Ross, who argued that individuals have a tendency to attribute the root causes of unfavorable actions to the situations of those whom they liked, but to the dispositions of those whom they dislike. Psychological analysis of political elites has been popular for some time. However, the FAE has been under-examined in political science literature. This is the first paper to attempt to examine the FAE's potential presence and effect in Supreme Court decision-making. Identifying how and why justices make decisions is important not just for political scientists—who are obviously intrigued by the nature of elite decision-making and the factors that drive it—but also for wider applications of good governance. Understanding the factors justices consider when issuing decisions can help society correct and avoid unjust biases, and this study and others like it may help broaden our understanding of these problems. This paper aims to further that understanding by identifying the frequency of situationalist and dispositionalist words in transcripts of Supreme Court decisions from the start of the Rehnquist court to present (1987-2012). I analyze a number of variables predicting the frequency of the words, in order to assess whether conscious and/or subconscious drivers can account for the FAE's presence. I predict that: the FAE is not as prevalent when there is more consensus on the Court; majority opinions are least prone and dissenting opinions are most prone to the FAE; dispositional references are used more often by conservative justices and that situational references are utilized more often by liberal justices; the FAE is more prevalent when the issue of law before the Court deals directly with human parties; cases with less complex language will have greater use of the FAE; the FAE is

more prevalent as the Court's term lengthens; and that the Chief Justice does not impact the prevalence of the FAE. I elaborate upon the rationale for these predictions in the following chapters.\*

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\* There are many people I would like to thank for their guidance and support throughout the process of writing this paper. Professor Michael Parkin, my First Reader, deserves tremendous credit and gratitude for his guidance and steadfast patience as I accosted him numerous times in his office asking for help with my regression work. Professor Ronald Kahn, my Second Reader, has been a profound inspiration for my desire to study the Supreme Court and for furthering my understanding of its decision-making processes. Professor Kristina Mani, the Honors Seminar leader, created a forum of discussion and mutual support amongst the Honors cohort from which all students benefitted immensely. Professor Justin Wedeking at the University of Kentucky provided excellent assistance in the early stages of my project. My housemate, Jeremy Reynolds, also deserves my thanks for his tolerance of the enormous mess that was created in our living room over the final month of this project as I piled books up on almost every available surface. Finally, I would like to thank my wonderful mother, Dr. Amy Parish, for providing excellent research guidance, emotional support, and editorial evisceration as I prepared this paper. I would not be where I am today without her help.

## Chapter 2: Theory

This chapter explores the reasons *why* the Fundamental Attribution Error (FAE) might be present in Supreme Court opinions. Both unconscious and conscious decisions drive the occurrence of the FAE to varying degrees and different types of opinions may be more or less vulnerable to the FAE. For instance, assuming, *arguendo*, that the results suggest the FAE primarily occurs in majority opinions, a theoretical analysis might lead to the conclusion that the FAE is strategic. Since it is mostly employed in the context of a “successful” opinion, the FAE may be utilized in order to ensure a positive result or to develop the logic of successful opinions. Conversely, if the FAE is mostly identified in dissenting opinions written by an individual justice, two explanations are worthy of exploration. One theory is strategic in nature: perhaps the FAE is an avenue for the realization of a justice’s goals. Another theory is that unconscious biases, perhaps activated by collegial rejection of the author’s opinion, have influenced part of the opinion such that it contains an FAE reference. This chapter reviews a number of approaches that have been utilized by other scholars to identify whether the presence of the FAE can be explained by a variety of strategic considerations, as well as unconscious biases.

As reviewed in the introduction, the FAE is the tendency to attribute the root cause of an action to the situations of people we like, but to the dispositions of people we dislike (Houghton 2009, 119). Everyone is vulnerable to this phenomena. For instance, when I’m watching my beloved Chelsea Football Club play, I attribute my team’s fouls to the other team’s dirty play. Hence I blame the situation of my team’s players. At the same time I will readily use a litany of profanity to describe the moral dispositions of the

opposing team's players. David Patrick Houghton provides a more elegant explanation of such attributions,

When we are explaining our own actions, we very often use situational attributions, and in fact we often overestimate the extent to which our actions are the result of the situation. On the other hand, when asked to explain why someone else acted as they did, we often make the opposite kind of mistake: we underestimate the extent to which the situation matters. (Ibid. 119)

It is easy to identify instances in which the FAE appears in Supreme Court decisions. *Ake v. Oklahoma* (1985) is illustrative. The case involves the double-murder of a reverend and his wife and the double-attempted murder of their children after Glen Burton Ake broke into their Oklahoma home and robbed them at gunpoint with an accomplice. At the trial, the prosecution presented testimony from a psychiatrist who testified that Ake was sane and fit to stand trial. Ake was denied a psychiatrist for his defense (he was indigent) and he appealed his conviction to the Supreme Court, arguing that a due process violation had occurred. Justice Thurgood Marshall delivered the opinion of the Court. As Lawrence S. Wrightsman reviews in *The Psychology of the Supreme Court*, “Nothing in [the majority opinion] suggests the possibility that Ake was faking or malingering. We are led to believe that his symptoms are genuine, and the opinion cites the diagnosis, prior to medication, of Ake as a paranoid schizophrenic person” (Wrightsmen 2006, 117). Justice Rehnquist, in contrast, focuses on different facets of the case in his dissent: “[the dissent] gave a description of the actual crime; he named the victims, thus personalizing them; and [the dissent] used emotion-laden terms such as ‘brutal murders’ and ‘month-long crime spree’” (Ibid. 118). Justice Marshall, in his majority opinion, focused almost exclusively on the situational aspects of Ake’s trial:

he was not provided with adequate legal council, he was clearly psychologically unstable, and he was not on medication to treat his paranoid schizophrenia. Justice Rehnquist, instead, focused on Ake's dispositional aspects: that Ake managed to provide a coherent statement when he was booked and that he had told a cellmate he planned to "play crazy" (that testimony was not presented to the jury) (Ibid. 119). These factors, presented on their face, would suggest that Ake was a pathological criminal who enjoyed serial murders and rape. The contrast between the opinions—and their focus on dispositions and situations—provide an archetypical example of the way the FAE is employed in decisions.

Ziva Kunda, a social psychologist from the University of Waterloo in Canada, provides a framework that might explain the differences in the *Ake* opinions: motivated reasoning. She argues that individuals (including justices) "rely in [*sic*] cognitive processes and representations to arrive at their desired conclusions, but motivation plays a role in determining which of these will be used on a given occasion" (Kunda 1990, 480). Justice Marshall was motivated to protect the rights of a defendant—even if he obviously didn't endorse the defendant's behavior—and selectively invoked the evidence that, in his mind, would best defend that position (namely, situational factors surrounding Ake's behavior). Justice Rehnquist, on the other hand, had a history of voting against *Miranda* rights and other expansions of due process, and he invoked dispositional evidence that, in his mind, would support his "desired conclusion" (Wrightsmen 2006, 119-120; Kunda 1990, 483).

The argument that individuals rely on such cognitive processes and representations in their decision-making implies that the decision to include FAE

language is subconscious. The FAE is, as its name suggests, an *error*. Judges presumably want to avoid errors in their judgments. Commentators might be tempted to blame inter-judicial politics and strategic games, but at the end of the day there are still nine individuals on the bench who have undergone a serious vetting and confirmation process (although sometimes, admittedly, justices are not chosen for the correct reasons<sup>†</sup>). One hopes that justices endeavor to effect justice, not create injustice, and that they acknowledge that their own personal biases might lead to the wrong decisions if not checked. As Justice Rehnquist proclaimed during his confirmation hearings, “My fundamental commitment, if I am confirmed, will be to totally disregard my own personal beliefs” (Wrightsman 2006, 109). Of course, it is also possible that such statements are for show, but even if that were the case, obvious utilization of the FAE would come at a cost—embarrassment from the criticism of fellow justices for using non-legal theory in decisions—with presumably little gain.

If judges are indeed committing the FAE unconsciously, one can surmise that justices are simply human. As Wrightsman observes,

Judges are human—that statement is obvious. [...] But what does it mean to be human? It means to have biases but sometimes to be able to overcome those biases. It also

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<sup>†</sup> Wrightsman presents several examples: Shay Minton simply walked up to President Truman and asked him for the nomination, to which the president replied “Shay, I’ll do just that.” President George H.W. Bush, when introducing his nomination of Clarence Thomas, chose to defend his choice by saying “[Thomas] is the best person for the position... the fact that he is Black and a minority has nothing to do with this.” William Rehnquist was President Nixon’s eighth choice for the Supreme Court—he had formerly described him as “the guy dressed like a clown.” Finally, Wrightsman supplies the memorable anecdote of James McReynolds’ nomination by Woodrow Wilson, with Wilson nominating McReynolds because “as Wilson’s attorney general, McReynolds had been obstinate, opinionated, and unable to work with the president and the rest of the Cabinet” (Wrightsman, 29-30).

means to make mistakes, on occasion. [...] To be human also means to be concerned with one's own self-interests but also concerned with the reactions of others to one's choices, and even, at times, concerned with the attainment of higher goals. (Wrightsmann 2006, 22-23).

It is well documented that humans are exceptionally bad at being rational in their decision-making. As Jonathan Haidt observes in his book *The Righteous Mind: Why good People Are Divided by Politics and Religion*, for humans “intuitions come first, strategic reasoning second” (Haidt 2013, xxv). He asserts that there are two types of thought processes: System I thought and System II thought.<sup>‡</sup> System I thought processes are instant and represent our intuition, while System II thought governs our rationality (Ibid. 52). System I processes control approximately 99% of a person's actions, and only once an action has been determined by our intuition do we rationalize it. However, we aren't very good at rationalizing our instincts. Haidt offers an example: two siblings, after a night of partying, decide that it would be fun to engage in sexual intercourse. There is no danger of a pregnancy resulting from the action, and no one other than the siblings finds out about the action. It is simply a night that they enjoyed together. After telling people of this story, Haidt would ask for a reaction. Overwhelmingly, people had a problem with the actions of the siblings. Whenever they presented a reason (a rationalization of their instinct), Haidt would present a compelling counter-argument that invalidated their rationalization. Eventually, people were left morally dumbfounded: they could not explain why they had a problem with this incestuous action. Nonetheless, people maintained their initial belief that the action was wrong (Ibid. 29).

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<sup>‡</sup> He terms System I thought as an “elephant” and System II thought as a “rider.” However, I have decided to stick to actual psychological terminology for this paper, rather than New York Times Bestseller pop-psychology lingo.



System I thought is activated by affective priming: the presentation of certain stimuli to impact instinctual reactions. Lodge and Taber devote a significant portion of their book *The Rationalizing Voter* to exploring how affective priming can influence our political decision-making. Their central thesis is that decisions are made within 100 milliseconds of brain activation, and that only then do our brains begin to work to justify the decision. One of their most compelling studies in affective priming is their study of the impact of physical attractiveness on character assessment (Lodge and Taber 2013, 12). For instance, just by looking at pictures of political candidates, people can predict with 68% accuracy the outcome of the election because they instinctively choose the more attractive candidate, both in the photo selection and in the voting booth. Lodge and Taber hypothesize that people are affect-primed by the attractiveness of a candidate to instinctively like them, and only then do they try to justify why. Such attractive priming isn't even limited to the voting booth: Zebrowitz and McDonald found that attractive people were generally treated less harshly in sentencing hearings by judges than unattractive people (1991, 610).

Humans are lazy in their attempts to rationalize: they react instinctively to a stimulus, and then attempt to explain that reaction with whatever information is readily available. The utilization of situational and dispositional references to explain actions can be similarly activated: we have an instinctual reaction to a person, and then we rationalize that reaction by either focusing on positive situational attributes or negative dispositional attributes.

There is, however, another explanation for the FAE's presence: it might be strategically employed. Perhaps justices are at least somewhat aware of the FAE's

presence in their decision and hope to gain some benefit from its use in a decision. This theory is not mutually exclusive with the subconscious-driver theory that is reviewed in the previous pages. It is entirely possible that both conscious and subconscious behavioral traits are driving the FAE's presence. To explore the possibility of strategic consideration further, an analysis of several models of judicial decision-making is required. These models explore the considerations justices employ and their motivations for the strategic choices that appear in their official Court opinions.

Three main models of judicial decision-making predominate in the literature: the Legal Model; the Attitudinal Model; and the Rational Choice Model. All three models suggest that justices have some goals in mind when they make decisions, but differ in their perceptions of judicial motivation.

The Legal Model emerged from the normative traditions of political science that dominated the field in the middle of the twentieth century (Malzman et al. 2000, 10). According to Segal and Spaeth, the Legal Model argues that the facts of a case are interpreted on face legal value, and justices construct their jurisprudence "in light of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent" (Segal and Spaeth 2002, 48). If this model sounds like a highly normative version of Originalism, that's because it is: Justices Scalia, Thomas, and Chief Justice Rehnquist are its main proponents (Wrightsmen 2006, 111). The Legal Model argues that decisions must be interpreted based on at least one of the aforementioned criteria. One touchstone is strict framer intent, the application of which can be seen in Justice Scalia's dissent in the case of *Maryland v. Craig* (1990), which upheld legislation compelling sexually abused children to testify (albeit via intercom), as he believed the Confrontation

Clause of the Constitution did not permit an exception under any circumstances, even to allow children to avoid confrontation with their attackers. Another litmus test for decision-making is a literal reading of the text of the Constitution, as illustrated by Justice Scalia's argument that the death penalty is permissible because the Constitution states "no person shall be... deprived of life, liberty, or property, *without due process of law*" (emphasis added), meaning that, as long as due process is present, a person may be deprived of those rights. The final metric for decision-making in the Legal Model is adherence to *stare decisis*: in comparing current cases with similar past cases, justices might be able to draw connections that are constitutionally permissible (Wrightsmen 2006, 112). In sum, according to the Legal Model, all other avenues of Constitutional interpretation are invalid.

The Legal Model approach also excludes analysis of the situations and dispositions of parties in a case. The esteemed Justice Felix Frankfurter advanced this point in *West Virginia State Board of Education v. Barnette* (1943), when he observed that "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench" (Wrightsmen 2006, 114). Lawrence Baum of Ohio State University suggests that Frankfurter's advice is not universally adopted: when cases are not clear-cut, justices "justify whatever decision best accords with their policy views" (Baum 1997, 66). Legal Modelers face an additional quandary: how can a decision adhere to at least one of the three central tenants of the model if the correct answer in a case is not inherently obvious? Justice Robert Jackson concedes this point: "We are not final because we are

infallible, but we are infallible only because we are final” (Schwartz 1996, x). Alan Barth expresses a similar sentiment:

Judicial judging is not encompassed by general expressions of principle and theory. Intuition, personal experience, surges of human sympathy are also influences upon decision [*sic*]. And, in the end, judges, like other human beings, are certain to be swayed by what they think, and feel, is *right*. The Supreme Court may be a court of law, but it is a court of justice, too. For justice must be the end of law. And law is but a reflection of ethical values. (Barth 1974, 192).

To completely embroider the point that the FAE is incompatible in a Legal Model Court, we return to the subconscious-driver hypothesis. As Chief Justice Hughes once observed to Justice Douglas, “You must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections” (Douglas 1980, 8). The evidence would suggest that the Legal Model cannot accommodate nor tacitly condone the presence of the FAE, and therefore this theory cannot explain its presence.

Many political scientists use another model to analyze Court behavior: the Attitudinal Model. The model was formalized and promulgated by Segal and Spaeth in their book *The Supreme Court and the Attitudinal Model Revisited*. The authors argue that Court decisions reflect interpretation of facts “in light of the ideological attitudes and values of the justices” (Segal and Spaeth 2002, 32). The Attitudinal Model relies on several assumptions. First, attitudes have utilitarian function: in this case, justices develop positive attitudes toward aspects of the case that support their ideological opinion. Second, attitudes are “ego-defensive”; that is, attitudes shield their owner from certain realities of the world that would upset the justice and instead allow the justice to only

interpret certain facts—thereby leaving him or her blissfully ignorant of the realities of their surroundings. This assertion is not far fetched: as Lodge and Taber observe, humans employ extremely selective interpretations of the world, and we usually only absorb about 1/250,000 of what is going on around us at any given time (Lodge and Taber 2013, 1). The third assumption is that attitudes provide schema within which individuals can organize copious amounts of information. As Wrightsman observes, some attorneys—e.g. Professor Laurence Tribe—can appear upwards of 30 times at the Supreme Court over the course of their career. The prior performances of that attorney impact the attitudes and opinions of justices, regardless of the specifics in the pending case (Wrightman 2006, 122). A final assumption is that individuals gain satisfaction through expressing their attitudes. Again, the ubiquitous Justice Scalia illustrates this point: “To be able to write an opinion solely for oneself, without the need to accommodate... the more-or-less differing views of one’s colleagues... is indeed an unparalleled pleasure” (Ibid. 103, 121-123).

Many studies support these assumptions and the Attitudinal Model in general. For instance, Segal and Cover content-analyzed newspaper editorials of all justices from Warren to Kennedy, and the justices were ranked based on their ideological score. The authors then regressed the results against the justices’ votes on civil liberties cases and found a high degree of relationship between being a liberal justice and voting for an expansion of civil liberties (Segal and Cover 1989, 561-562).

On the face of it, the Attitudinal Model seemingly explains the presence of the FAE by arguing that decisions are driven by ideology. This is particularly supported by George Lakoff’s work in *Moral Politics*. Lakoff contends that liberals and conservatives

possess fundamentally different moral conceptions of the world. Conservatives adopt a “strict father” model of morality. For them the world is a dangerous place where survival can only be guaranteed through self-discipline, which is built through reward and punishment. Their moral priorities include: moral strength; order; wholeness; integrity; and self-interest (Lakoff 2002, 70). Conversely, liberals have a “nurturant parent” model of morality. They believe that empathy, nurturance, happiness, fairness, and personal growth are key for a healthy society, and that self-fulfillment can be achieved through nurturance. Their moral priorities reflect this belief (Ibid. 109). There is an intuitive obviousness that links both moral systems to the FAE. Liberals, with their focus on fairness and empathy, are likely more prone to focus on situational aspects of behavior, while conservatives, with their emphasis on moral purity and order, are likely to focus on dispositional aspects of behavior. If we accept the Attitudinal Model’s presumption that ideology drives decision-making, then judicial ideology probably manifests itself in the FAE: conservative justices will likely utilize dispositional references to explain the actions of people they dislike, while liberal justices will look for situational excuses for those whom they favor. That’s not to say that a liberal justice can’t reference the disposition of the disfavored party or a conservative justice can’t speak to the situation of the favored party; it’s just more likely that the inclinations will follow a predictable pattern.<sup>§</sup>

There are, however, two problems with the Attitudinal Model. Firstly, the Attitudinal Model is heavily criticized on methodological grounds. Maltzman, Spriggs II,

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<sup>§</sup> It also seems likely that the content of dispositional references will shift depending on judicial ideology: conservatives will likely focus on issues of purity and moral corruption, while liberals will focus on issues of inequitable treatment. I cannot test this theory in the scope of the current work, though it might be worth exploring in the future.

and Wahlbeck maintain in *Crafting Law on the Supreme Court: The Collegial Game* that experiments which seek to support the Attitudinal Model have a major advantage compared to those that would seek to support alternative models: the data available to prove the saliency of the Attitudinal Model is readily available. The attitudinal scholar must only score the ideology of a justice and regress it against the outcome of a case (Maltzman et al. 2000, 6). Wrightsman sums up the issues:

The attitudinal advocates, by focusing on justices' votes as their dependent variable, have taken on an ambitious assignment. It is true that justices' votes are observable and final, hence their determination is important to the justice, as well as to the country. But votes are behavior, and any complex behavior has many causes, many of them extending beyond attitudes, values, and ideology. Second, the Attitudinal Model has been criticized for limiting itself to the search for determination of voting behavior [instead of focusing on other topics, such as *cert* decisions, the influence on past attitudinal decisions on present ones, and other strategic considerations that justices make]. (Wrightman 2006, 131).

Despite this methodological problem, the Attitudinal Model can still explain the presence of the FAE. Previous research suggests that ideology might be a factor in the utilization (not just the content) of the FAE. In the 1980s, Philip Tetlock of the University of Pennsylvania conducted a series of studies on the “conceptual complexity” of Supreme Court decisions. Tetlock and his colleagues describe conceptual complexity as the differentiation of environmental interpretation that individuals undertake:

Individuals at the simple end of the complexity continuum tend to rely on rigid, one-dimensional, evaluative rules in interpreting events, and to make decisions on the basis of only a few salient items of information. Individuals at the complex end of the continuum tend to interpret events in multidimensional terms and to integrate a variety of

evidence in arriving at decisions. (Tetlock et al. 1985, 1228).

As Wrightsman observes, emotionally-laden language is often used in the presentation of a dissenting opinion (e.g. italics, “verb modifiers,” and louder punctuation) (Wrightsmen 2006, 100). It seems reasonable to conclude that FAE is more likely to arise in opinions dictated by emotion rather than by legal logic. Tetlock et al. would likely agree with this perspective, as it aligns well with two of their observations about conceptual complexity: minority opinions are less complex than majority opinions, and ideology underlies conceptual complexity. Majority opinions are a cooperative effort amongst at least five (usually) highly intelligent justices (this is elaborated further in this paper’s section on the Rational Choice Model). Majority decisions tend to be more cognitively complex because of the complexity that is required to integrate all of their competing policy desires. Conversely, minority opinions do not require cognitive complexity and have “the rhetorical freedom to take strong, unqualified stands in opposition to the majority” (Tetlock et al. 1985, 1235). On the other hand, dissents are costly to construct, both in terms of time and political capital on the Court, and they usually are constructed only when a justice feels that the decision is an injustice.

Tetlock’s conclusion that political ideology drives conceptual complexity is derived from his observation that conservative arguments in Supreme Court opinions generally rest on less complex notions of the world and are more consistent in their invocation of absolutist language than moderate or liberal arguments (Ibid. 1227). Wrightsman opines, however, that Tetlock’s analysis of Supreme Court decisions was drawn primarily from a period when majority opinions were written by liberal justices. Gruenfeld’s 1995 work likewise reveals a major methodological flaw in Tetlock’s work:



minority opinions are generally lacking in complexity, regardless of the ideology of the author (Wrightsmann 2006, 106). Gruenfeld drew a different sample of Supreme Court cases from those that Tetlock et al. relied upon and found that, while dissenting opinions did feature lower levels of conceptual complexity, conceptual complexity was not statistically different amongst liberal and conservative justices when they were in the minority of the Court (Gruenfeld 1995, 11). Therefore, cognitive complexity can be viewed as one potential driver of the FAE in opinions, since lower cognitive complexity is associated with more emotional language choice, without the danger of collinearity with ideology. While it is almost impossible to measure cognitive complexity without a brain scan, we can look at language complexity as a close proxy (which is exactly what this paper does; see “Chapter 3: Methodology, Predictions, and Summary Statistics”).

Emotional intensity in opinions is likely also determined by the case in front of the Court. Martin and Quinn argue that certain areas of law invoke more emotional responses from some justices than others (2007, 367). Justice Brennan, for instance, was passionate in his protection of *Miranda* rights, while Justice Rehnquist concerned himself with issues of federalism. Generally, cases involving “human” subjects elicit more emotional responses, and the Court is more likely to listen to public perception on such issues (Fleming and Wood 1997, 490). It seems fair to surmise that such human cases will elucidate more FAE references than cases dealing with non-human parties.

The Attitudinal Model provides some insight into drivers of the FAE despite its methodological shortcomings. It does point to issues of ideology and language/cognitive complexity as drivers of the FAE. However, the Attitudinal Model falls short of a full explanation of judicial decision-making, as there is more to the process than mere

ideology. There are other models of judicial decision-making that offer additional theories that might explain the presence of the FAE.

The third popular model of judicial decision-making is the Rational Choice Model. The model seeks to expand beyond the sole analysis of Supreme Court *votes* and instead focuses on other strategic considerations. As Wrightsman reports, the model assumes that justices “pursue multiple goals; ...act in ways that maximize their goals, and the institutions within which they operate sometimes affect their goals. Thus, sometimes they must do things that fail, in the short run, to achieve goals” (Wrightsmen 2006, 131-132). Maltzman et al. are major proponents of this theory, and their book, *Crafting Law on the Supreme Court: the Collegial Game* is often referenced as *the* cornerstone of the Rational Choice Model. Their assessment is similar to Wrightsman’s, however, they explicitly emphasize the role of institutionalism in the model:

Institutions... provide the structure within which decision making occurs and thereby affect the choices that can be made. [...] Instead of deterministically responding to psychological or sociological forces beyond their control, rational actors understand that they face a number of constraints imposed by the actions of other political actors and by the institutional context in which they act. Justices as strategic actors must take into consideration those constraints as they attempt to introduce their policy preferences into law. (Maltzman et al. 2000, 13).

The authors also explain that the institutional constraints within which justices operate can be formal or informal. Formal rules are intransigent: for instance, the separation of powers delineated in the Constitution would prevent a justice from declaring war on another nation. Informal rules are generally procedures and cultural norms; for instance: opinion assignments originate from the most senior justice in the majority; the majority opinion is circulated amongst the justices during the writing process; and a plurality

opinion is not actually binding unless interpreted in the most narrow of contexts (Ibid. 14). Walter Murphy, the founder of judicial rational choice analysis, recognizes that this creates a major constraint on judicial decision-making: justices cannot merely vote their policy preferences. A majority opinion requires five votes, and from those five votes a final, *singular* opinion has to be reached. Justices will utilize a “mixture of appeals, threats, and offers to compromise” in order to have as much of their policy preferences represented in the opinion as possible (Murphy 1964, 42). Lawrence Baum of Ohio State University expands on this idea arguing that “Judges who vote strategically take into account the effects of their choices on collective results when they vote on outcomes and write or support opinions... because of this motivation, the positions they take may differ from the positions they most prefer” (Baum 1997, 90).

This observation, however, should not be interpreted to mean that justices do not want decisions to reflect, as much as possible, their policy preferences. The best example of a justice operating under constrained choices in order to influence a decision in such a way as to achieve desired policy outcomes involves an opinion from Justice Brennan. In his majority opinion in *Pennsylvania v. Muniz* (1990), Justice Brennan limited the scope of *Miranda v. Arizona* (1966)—a decision he had been a great patron of—by finding that physical evidence, such as a videotape showing the defendant slurring his speech upon being arrested under suspicion for driving under the influence, was not protected under the Fifth Amendment’s provision against self-incrimination. After being heavily criticized by Justice Marshall, another proponent of *Miranda* rights on the Court, Justice Brennan explained his unusual behavioral pattern in a private response:

I made the strategic judgment to concede the existence of an exception [to the Fifth Amendment’s self-incrimination

provision] but to use my control over the opinion to define the exception as narrowly as possible... If Sandra [Day O'Connor] had gotten her hands on this issue, who knows what would have been left of *Miranda*. (Maltzman et al. 2000, 3-4).

Because Justice Brennan had been the most senior justice in the majority—Chief Justice Rehnquist dissented in part—he was able to assign the opinion to himself, and therefore managed to exert unusual influence in a case where he might otherwise have had no power. As Maltzman et al. conclude, “Brennan’s actions and correspondence... reveal that more than his understanding of legal precedent or his ideology shaped his final vote and the opinion he crafted for the Court” (Ibid. 4).

Justices also capitulate to pressure from their fellow justices to join an opinion because of conformity pressure to join the majority opinion (which presents an image to the outside world of a united Court). Vote-shifts can occur in at least three permutations: “conformity voting,” wherein an individual votes with the majority at all times; “counter-conformity voting,” where a justices switches from voting with the majority at the conference to voting against the majority when the final opinion is released; and “shifting,” where a justice switches coalition groups in response to other justices doing the same, resulting in a new majority and/or minority opinion (Wrightsmen 2006, 149). An analysis by Dorff and Brenner reveals that justices changed their votes from the majority block to the minority block 2.2 percent of the time, while shifts from the minority to the majority occurred 26.9 percent of the time (Dorff and Brenner 1992, 764). Wrightsmen suggests that this dichotomy might be attributable to the desire to avoid a “minimum winning coalition”—that is, 5-4 decisions. “A minimum winning decision fuels the fires of discontent and can damage the Court’s image of authority” (Wrightsmen 2006, 151). Therefore, it is to be expected that justices will be more adaptable to shifts

when the vote is close—a finding Brenner supports through his analysis of Justice Burton’s private records. According to Brenner, conformity voting was substantially more likely to occur when the initial majority from a conference vote was only five or six justices. However, when a coalition is larger, the likelihood of additional conformity votes decreased dramatically (Brenner 1980, 531). This likely relates to the minimal marginal benefit accrued from an additional vote.

Since justices are so deliberate in which opinions they join, opinion type is likely a large determinant of the presence of the FAE. As discussed in the Legal Model, justices want to give the illusion that decisions are based solely upon legal considerations. Majority opinions, by requiring more votes than dissenting or concurring opinions, are likely less prone to the FAE for this reason. They are also subject to more bargaining, and therefore a more rigorous editorial process, which might also dampen non-legal language use (i.e. the FAE). Additionally, dissenting and concurring opinions are under less scrutiny, since they don’t become law, and therefore justices don’t lose as much political capital through employing the FAE in their decisions.

The Rational Choice Model is also important for predicting when the FAE might arise because it factors in court culture. Chief Justice Burger, for instance, was famous for voting strategically to influence decisions that he disagreed with, which led his colleagues to adopt similar behavioral patterns (Woodward and Armstrong 1979). Such factors can create a culture on the Court that drives certain types of behavior. Court culture could easily drive the FAE in opinions, thus the chief justice is included in the model (see Methodology) as a control variable.

There are likely conscious and subconscious drivers of the FAE in Supreme Court

opinions. Intuition possibly dictates the perceptions justices have of parties in cases, and this can manifest itself in the form the FAE takes. Similarly, strategic considerations might drive the FAE to become more prevalent as justices determine the actions that will maximize their utility on the Court. I explore the FAE's presence from an Attitudinal Model perspective, as well as from a Rational Choice Model perspective. This paper proceeds by generating hypotheses and testing predictions in order to identify factors that likely drive the presence of the FAE in Supreme Court decisions.

### Chapter 3: Methodology, Predictions, and Summary Statistics

This chapter delivers an overview of: the sample population selection process; an explanation of why each variable is included in the dataset; and a description of the methods used to collect and analyze each variable. Summary descriptive statistics are also included and predictions presented.

Dataset: In order to generate a dataset comprised of a broad range of cases while still controlling for the unique cultural effects that each chief justice brings to the Court (Lanier 2011, 684), I generated a list of every case that the Supreme Court heard from the start of the 1986 term—the start of the Rehnquist court—through the end of the 2012 term, (the last term that data is consistently available). In total, the established date range included 2,625 cases. I sorted the data first by the term in which the opinion was issued rather than heard, as on some occasions cases were heard for several terms before a decision was issued (the most notable instance, while not in my dataset, is *Roe v. Wade* (1973), which, due to membership changes on the Court and jurisdictional inconsistencies, was heard in the 1970, 1971, and 1972 terms) (Greenhouse 78, 2005). I then sorted the cases alphabetically within each term, and assigned each case a unique number, between 1 and 2,625. Using a random number generator, I created a list of 26 numbers with a range of 1 to 2,625 and matched those numbers to 26 of the numbers that I had assigned to the cases in the overall dataset. I further delineated the cases in order to distinguish each separate opinion (i.e. majority, concurring, dissent) and therefore the actual resulting sample size (N=59) is larger than the 26 cases. The number of opinions per case ranges from one (found in six cases) to four opinions (found in one case). The

average number of opinions per case in the sample is 2.27.\*\*

Variables: There are 11 variables in the dataset: situational and dispositional references (the two dependent variables); the number of justices who joined (signed onto) the opinion; the opinion type (majority, concurring, dissenting); the mean ideology score of the authoring justice and the “joiners”; the area of law that the opinion addresses; a language-complexity measure (Flesch-Kincaid Grade Level Score) for each opinion; the fatigue of the Court when the opinion was issued; and the chief justice for the term. I constructed the two dependent variables in the sample by summing the number of words referencing the situation of the party the opinion supports and the number of words in the opinion that reference the disposition of the disfavored party. I converted these observations into a word-ratio by dividing the total number of words in the situational or dispositional references by the total number of words in each opinion. I then multiplied the ratio output by 100 so that the numbers could be interpreted as percentages.††

I collected the variable by first obtaining a text copy of all the opinions in the sample. There is no centralized and comprehensive website which compiles Supreme Court opinions (even the Supreme Court’s website is not all-inclusive), so I relied upon a combination of Oyez.com, findlaw.com, and the Cornell Legal Institute (law.cornell.edu).

I assembled all of the text in one document, and, in order to obtain an accurate word

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\*\* I recognize that a sample size of 59 observations is rather small. However, the data collection process was quite arduous. Data collection for 59 observations required reading over 400 pages (single spaced, Times New Roman 12 point font) of raw Supreme Court cases. Careful collection of the dependent variable mandated a slow reading speed, and it took approximately 60 hours to simply collect and code that particular data. This, coupled with the difficulty of determining which justices joined certain opinions (see below), resulted in a data collection process that required approximately 120 hours.

†† I also collected data for references to situations of disfavored parties and to dispositions of favored parties. That data is not presented, since it is not within the scope of this research question.



count, I eliminated brackets that often divide words. For instance, I adjusted language in an opinion that read “[T]he State must present” to read “The State must present” so that the word count would accurately reflect four words instead of five. Brackets were not removed in instances where word count was not affected—e.g. when an entire word was bracketed as in “cue [a] dog to alert” or “the facts available to [him].”

When counting the words in a dispositional or situational reference, I excluded words that were merely referencing statutory language. For instance, in *Salazar v. Ramah Navajo Chapter* (2012), there is a reference which reads “Nothing, for instance, prevented the BIA from paying in full respondent Ramah Navajo Chapter’s contract support costs rather than other tribes’, whether based on its greater need or simply because it sought payment first.” All of these words counted. However, if the reference contained a statute, for instance §450j–1(b) (the statute in question in the case), the words devoted to the statute were not counted. I also did not count words that merely referenced a situation or a disposition of a party in a case but which did not refer to the action in question before the Court. In essence, the reference must be a *condition* of an action. It is not enough for a reference to simply assert that “Party A is a good person because they have a dog.” Rather, a reference has to either read or strongly imply that “Party A took [X action] *because* they have a dog.” Justice Sotomayor’s majority opinion in *Salazar v. Ramah Navajo Chapter* (2012) provides an illustration of a situational reference that qualifies for inclusion:

...the tribal contractors were entitled to rely on the Government’s promise to pay because they were not “chargeable with knowledge” of the BIA’s administration of Congress’s appropriation, “nor [could their] legal rights be affected or impaired by its maladministration or by its diversion.

Similarly, Justice Souter's majority opinion in *Ortiz v. Fibreboard Corp.* (1999) contains a reference to the disposition of the disfavored party's lawyers (who were essentially the party in the case, since their settlement agreement was in question) which illustrates the inclusion criteria:

In this case, certainly, any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, 90 F. 3d, at 969-970, 971, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute (either by litigation or by agreement, as eventually occurred in the Trilateral Settlement Agreement).

While many of the references easy are to code, often the decision whether or not to code a sentence as a reference is a judgment call based on the context of the case. Generally, the same principle that Justice Potter Stewart applied to pornography in *Jacobellis v. Ohio* (1964) applied during this data collection process: "I know it when I see it."

Table 3.1 provides the mean values for the two dependent variables. The mean values are rather low. Situational references for the favored party account for 0.85% of an average opinion. The standard deviation for this variable is 1.84%, but the range extends from 0% to 9.79%, which is almost five standard deviations away from the mean. This range is attributable to Justice Souter's dissenting opinion in *Lackawanna County District Attorney v. Coss* (2001), which contains 47 words referencing the situation of the favored party in a 480 word opinion. The small word count is likely driving that large discrepancy (the number of words in each opinion varies from 78 to 15,991, with a mean of 3,549 words and a standard deviation of 2,857 words).

<b>TABLE 3.1 Summary Statistics for Dependent Variable</b>				
	Mean	Std. Deviation	Min	Max
Percentage of Situational References for Favored Party	0.85%	1.84%	0	9.79%
Percentage of Dispositional References for Disfavored Party	0.13%	0.40%	0	1.98%
n = 59				

References to dispositions of the disfavored party, the other dependent variable of interest, has a mean of 0.13%. The standard deviation is 0.4%, which is rather small, and the maximum value is 1.98%. However, the small size of these variables should not imply that their effects are unsubstantial. As discussed in the “Chapter 2: Theory”, justices are conscious of the fact that they will be criticized for straying from a “Legal Model” of judicial methodology. The fact that there are references to situations and dispositions at all implies that the desire to include them is rather strong, since otherwise the editing process would have eliminated their presence.

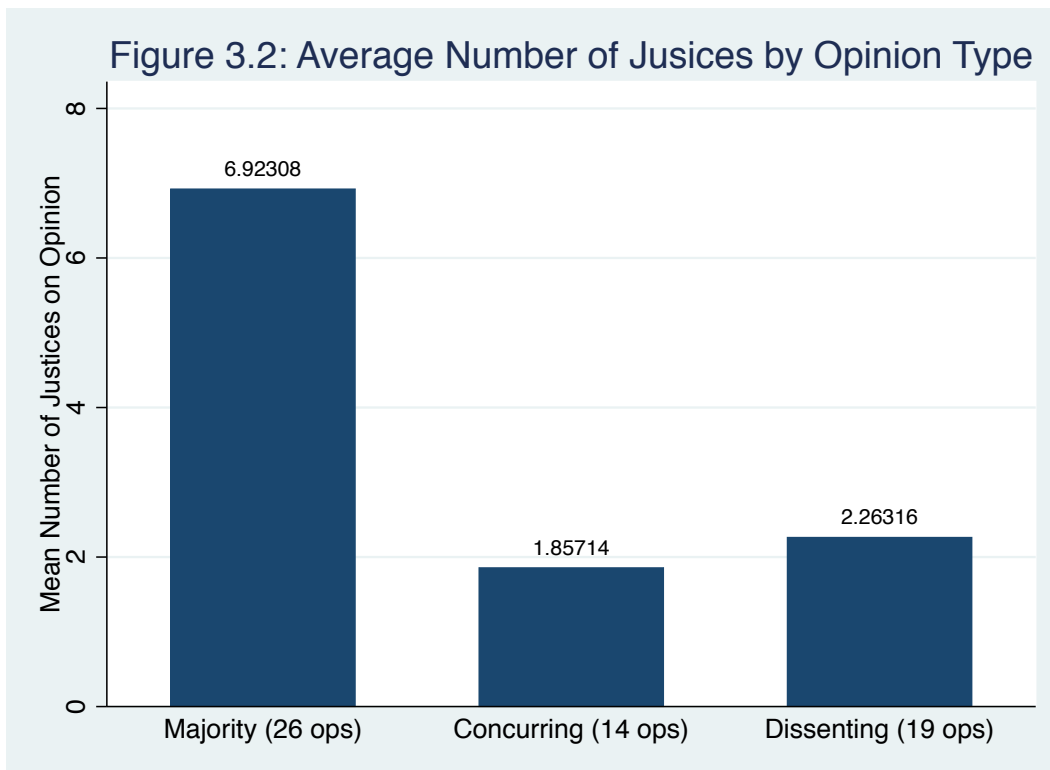
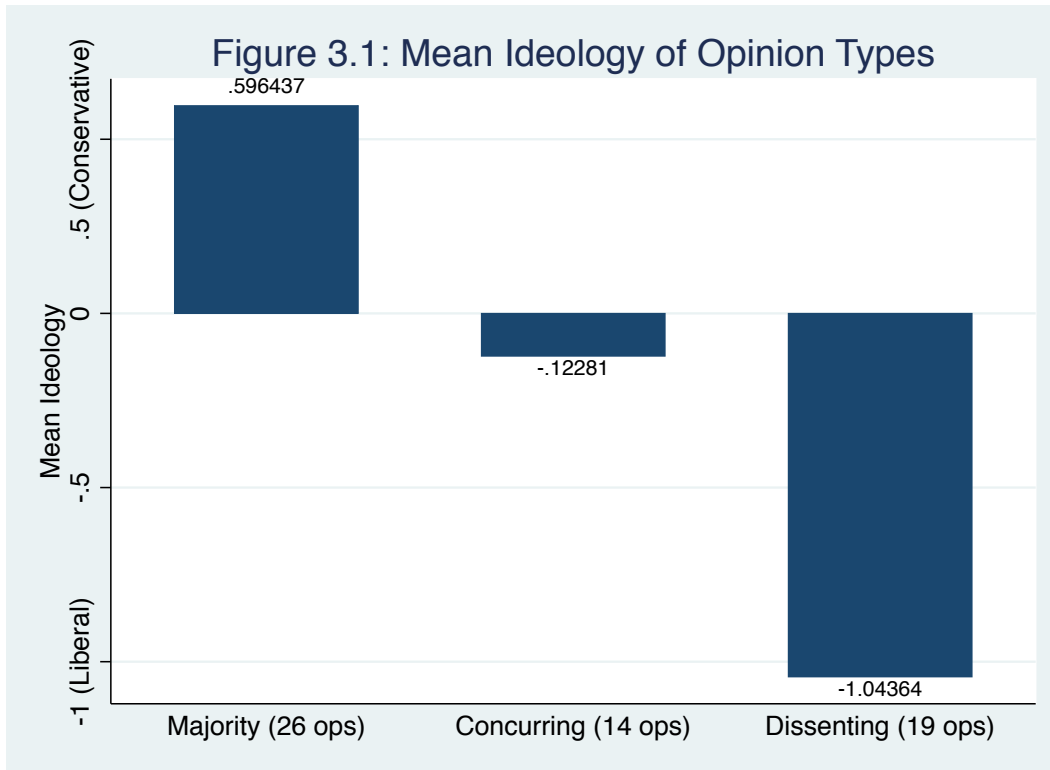
Finally, it should be noted that in my actual regression analysis I rounded these two dependent variables to the nearest percentile so that I could obtain a standard “count” variable (i.e. integers) for a Poisson Model. However, I presented the statistics in the above summary table to convey a comprehensive overview of the data.

Opinion Type: The Supreme Court issues three types of opinions: majority, concurrence, and dissent. I created three dummy variables, one for each opinion type. Justices who joined in part on majority opinions are counted as having joined. When an opinion is listed as 9-0 (as in *Knowles v. Mirzayance*, 2009) but only some justices are listed on the opinion (Thomas, Scalia, Souter, and Ginsberg), all justices are still counted as having joined. While coding majority and dissenting opinion type was relatively easy,

it proved shockingly difficult to code concurring opinions. This is due to the fact that there are actually two different types of concurring opinions: a regular concurring opinion (also sometimes known as a “simple concurring opinion”); and a special concurring opinion (also sometimes known as “concurring in the judgment of the opinion”). A justice utilizes a regular concurring opinion to sign onto a majority opinion, while also submitting his or her own separate opinion. A justice issues a special concurring opinion when he or she doesn’t want to sign onto a majority opinion (usually because they disagree with the legal methodology). Instead, they issue their own opinion that agrees with the result but is premised upon a different rationale. The Supreme Court Database differentiates between these two concurring opinion types in its publically available data and in its codebook. The authors of the Supreme Court Database (political science authorities such as Spaeth, Epstein, Ruger, Benesh, Segal, and Martin) presumably have project-specific reasons for distinguishing between the two types of concurrences. I decided to combine the two types into one general concurring opinion variable. While, on the face of it, there is apparently limited difficulty in determining how an opinion should be scored, the difference between a special concurrence and a regular concurrence creates significant obstacles when attempting to determine which justices joined which opinions. This difficulty is further explained in the methodology for the next variable.

As reviewed in “Chapter 2: Theory”, the literature suggests that opinion type can have a direct effect on opinion content. Concurring opinions are generally issued when the author agrees with the legal outcome of a decision but employs a different methodology to reach that conclusion. Concurring opinions carry no legal weight, and are unlikely to become precedent, but they do: convey a sense of “democratic dialogue” with

the public; undermine the legal theory of majority opinion, which can lead to it being overruled; and are an officially sanctioned way for justices to defy their voting bloc if they do not agree with the majority opinion but agree with the outcome (Collins 2011, 363). Most importantly, concurring opinions are potentially issued when a justice is experiencing cognitive dissonance—when the justice’s desire for a particular legal outcome cannot be squared with the justice’s legal approach. Collins finds that “there are both strategic and psychological incentives to engage in special opinion authorship when casting an attitudinally incongruent vote” (Ibid, 366). In the Collins sample, ideologically extreme justices used concurring opinions most frequently, and concurring opinions were usually authored alone. As can be seen in [Figure 3.1](#), my sample differs from the Collins findings in respect to ideology. Dissenting opinions in my sample tend to be the most ideologically extreme (and liberal), while concurring opinions, on average, are ideologically moderate. However, my sample does match the Collins study in terms of the number of justices that sign onto each opinion type. As can be illustrated in [Figure 3.2](#), majority opinions include the most authors (naturally; otherwise they wouldn’t be a majority) with a mean of 6.92 justices per majority opinion. Dissenting opinions include the second-most justices in my sample, with a mean of 2.26 justices per opinion. Finally, concurring opinions include the fewest number of justices, with a mean of 1.86 justices per opinion.



Evidence suggests that ideologically extreme justices utilize concurring opinions most frequently and that concurring opinions are usually authored alone. These factors

indicate that concurring opinions are a tool to deal with the effects of cognitive dissonance (Ibid, 371). I believe that it is reasonable to conclude that the likelihood of a justice basing their opinion, either verbally or *sub silentio*, on a non-legal factor could potentially be higher in such a situation. *The FAE could very well occur in such an opinion, particularly when a concurrence is issued for non-legal reasons, and I therefore hypothesize that concurring opinions will be positively correlated with the FAE (the independent variable).*

Similarly, dissenting opinions are likely to be vulnerable to the FAE. As discussed in “Chapter 2: Theory”, the frequency of emotionally-laden language rises in a dissenting opinion, with increased use of italics, “verb modifiers,” and louder punctuation compared to other opinion types (Wrightsmann 2006, 100). Because dissents actively state a counter-claim to a majority opinion, the language used can potentially lead to a rift on the Court. Dissents are costly to produce for this reason, and therefore are often issued when the justice feels that a gross error is occurring. Dissents are written by fewer justices than majority opinions, and therefore require less cooperative effort and are subject to a less rigorous editorial process. Therefore, dissenting justices have “the rhetorical freedom to take strong, unqualified stands in opposition to the majority” (Tetlock et al. 1985, 1,285). *Again, I would hypothesize that the nature of dissenting opinions would drive a positive correlation between that type of opinion and the presence of the FAE.*

#### Mean Judicial Ideology of the Opinion:

I used Martin-Quinn Scores to score each justice’s ideology over each term (Martin and Quinn 2002). It is important to use a score that recognizes that judicial

ideology shifts over time. The Attitudinal Model of judicial behavior would suggest that ideology is static since justices are appointed for life and have little need to change their opinions once they are appointed to the Court. This notion is reflected in Segal-Cover Scores of judicial ideology, which do not allow for ideological change over time. Martin and Quinn (2007) demonstrated that this is an inaccurate representation of judicial ideology. Using a Bayesian ideal point model analyzing the opinions of the 18 justices who served more than 10 years on the Court between 1937 and 2003, they demonstrated that judicial ideology does change over time (Martin and Quinn 2007, 382).<sup>††</sup>

The collection of the mean ideology variable proved to be extremely challenging. The variable is computed by averaging the ideological scores of all the justices involved in the opinion. Unfortunately, figuring out just exactly *which* justices signed onto an opinion is not a simple task. Concurring opinions and dissenting opinions explicitly list which justices are joining the opinion, but majority opinions do not. On face value this shouldn't present a problem: one could simply add up the justices in the dissents and concurrences, and then determine who is involved in the majority opinion. However, justices seldom state explicitly if they are issuing a regular concurring opinion or a special concurring opinion, and therefore it is nearly impossible to determine who has signed onto a majority opinion. One example of this difficulty can be found in *Reno v.*

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<sup>††</sup> An alternative, non-static score for judicial ideology is the Bailey Ideal Points measure. The scores for justices using this methodology are tied to the ideological scores of members of Congress and the president for each year. This has the benefit of providing context for the ideological score in each year, but the scores are not extensive enough to match the sample population that I have drawn (scores run from the 1930s to 2002, which is not recent enough). Additionally, Martin-Quinn Scores are extremely effective at maintaining a consistent median ideological score for the Court. This prevents the scores from being useful for intertemporal comparison, but the scores are perfect for determining a consistent effect on an independent variable (which is their purpose in this study).



*American Arab Antidiscrimination Committee* (1999). Using the Oyez.com visual representation of the “vote” feature on the website (hovering over the photos of a justice reveals how he or she voted and the type of opinion, including regular vs. special concurrence, that that justice issued), the website suggests that Justice Ginsburg “wrote a special concurrence.” This would suggest that she is credited for the concurring opinion that she wrote, but is *not* a joiner of the majority opinion. However, if one relies upon the transcript of the audio recording of the opinion announcement (also available on Oyez), it quickly becomes apparent that something is amiss: the text reads “Justice Ginsburg has filed an opinion concurring in part and concurring in the judgment which Justice Breyer has joined in part.” This would suggest that Justice Ginsburg both concurred in the majority decision (at least in part) *and* concurred in the judgment. This is the opposite of what the Oyez website suggests from the visual representation (i.e. that she did not join the majority opinion). I decided to score her opinion according to the full transcript of the audio Court announcement of the decision.

It is also unclear how to score Justice Breyer for this case. In the visual representation section, Justice Breyer is noted as “vot[ing] with the majority, join[ing] Ginsburg’s concurrence.” But in the audio transcript of the opinion announcement, the announcement reads “Justice Ginsburg has filed an opinion concurring in part and concurring in the judgment which Justice Breyer has joined in part.” The grammar in the sentence is difficult to interpret. Did Justice Breyer, like Ginsburg, concur in part with the majority and *also* join her concurrence in judgment? Or did he *only* join the latter? The literal reading of the sentence seems to imply that Breyer only joined in Ginsburg’s “concurring in the judgment” opinion. If so, he would not be scored as having joined the

majority opinion in part. This is then at odds with the visual representation at Oyez. Efforts to cross-check with other sources do not clarify situations such as the two described here. For instance, Cornell's Legal Information Institute offers similarly murky presentations of concurrences. Given the difficulty in interpreting the results, I decided to utilize the more formal audio transcripts of the opinion announcements available on Oyez to make uniform coding decisions on concurrences.

Unfortunately, I soon encountered a problem on Oyez where the transcript of the audio recording of the decision announcement did *not* offer full information on concurrences and the visual representation section provided more accurate information (i.e. the opposite of what I found in *Reno*). In *Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer* the visual representation section of Oyez suggested that Justice O'Connor wrote a "special concurrence." However, the audio transcript made no mention of Justice O'Connor concurring at all, only mentioning Justice Stevens' dissent. Relying on the standard set forth above (i.e. that audio transcript of the opinion announcement takes precedence over conflicting information from other parts of the Oyez site), would result in missing some data: that Justice O'Connor issued a special concurrence (which I know she did because I read and scored the opinion for the number of words in it). This led me to believe that perhaps the best standard for coding this variable would be to use whichever part of Oyez provided the most detailed information.

I began implementing this methodology. I went back to *Reno v. American Arab Antidiscrimination Committee* (1999) and looked at the actual text of the opinion, which is what I had been using to code for situational and dispositional references. I checked the language of Ginsburg's concurrence, which reads "Justice Ginsburg, with whom Justice

Breyer joins as to Part I, concurring in part and concurring in the judgment” (carrying forward the phrasing used during the audio announcement in the decision). This phrasing in the master document clarifies the grammar and it becomes clear that Justices Ginsburg *and* Breyer *both* joined the majority opinion (be it only in part, but in part being enough) and issued a concurring opinion.

Therefore, relying on the actual text of the opinion would seem to be the best method to determine which justices joined opinions. The reader might then wonder why I didn’t simply always rely on the original transcript. The short answer is that using the master document works for concurrences (with the exception of the infinitely confusing *Papasan v. Allain* (1986), which reads “Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, concurring in part, concurring in the judgment in part, and dissenting in part”).<sup>§§</sup> However, the official text of a majority opinion does *not* list the justices involved in that opinion (the Supreme Court hasn’t bothered to standardize their writing process). Therefore, a secondary source is needed to confirm that I have included all joining justices to the majority opinion. Oyez’s visual representation section as well as Cornell’s Legal Information Institute have therefore served as the official sources for compiling the list of justices on a majority opinion, while concurring and dissenting opinions are scored using the original text of the opinion.

This extensive explanation is included to provide the reader with a sense of the magnitude of thought and effort that went into solving this methodological quandary. This experience should serve as a cautionary tale for those who rely upon Oyez, a popular “multimedia archive devoted to the Supreme Court of the United States and its work”

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<sup>§§</sup> This case was eventually excluded, as I shortened the data range to just Rehnquist and Roberts court cases, but it is left in the discussion to provide an example.

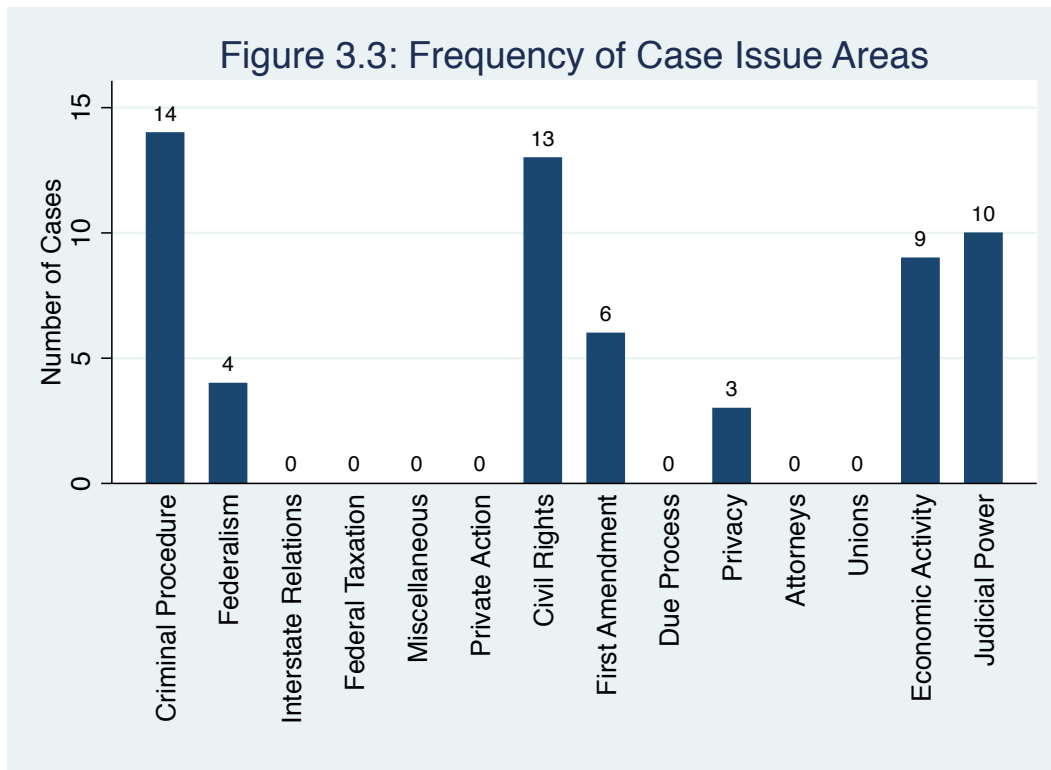
which “aims to be a complete and authoritative source for all audio recorded in the Court since the installation of a recording system in October 1955”

(<http://www.oyez.org/about>). I am not the first scholar to encounter such a problem. As the Supreme Court Database cautions in its coding suggestions, “determination of how a given justice voted is by no means a simple matter of culling the Reports. The justices do not always make their [opinions] clear” (Spaeth et al. 2014).

Ideology is closely associated with moral conceptions and the use of moral language. Conservatives typically identify with “moral strengths” such as independence and authority, while liberals typically identify with nurturance of the downtrodden and fairness (Lakoff 2002). Political ideology can affect the complexity of a decision in a Supreme Court case. Conservative opinions generally rely on less complex notions of the world and utilize more absolutist language (Tetlock et al. 1985, 1227). While political ideology of the justices writing an opinion and the actual ideological leaning of the opinion itself are not perfectly correlated, there is no centralized database of the ideology of each opinion that the Court issues (there are measures available for the ideological direction of a *case* available on the Supreme Court Database, but that measure is an amalgamation of all the opinions in a case rather than being broken down for each individual case). Additional studies also suggest that conservatives are more prone to react emotionally to policy issues. Both political and moral conservatism are linked to authoritarian tendencies (Feldman and Stenner 1997, 757). Brain structure can also play a role in political ideology. “Liberalism [is] associated with increased gray matter volume in the anterior cingulate cortex, whereas greater conservatism [is] associated with increased volume of the right amygdala” (Kanai et al. 2011, 677). The amygdala is the

portion of the brain that controls fear response, while the anterior cingulated cortex controls empathy (Ibid. 678). Brain structure also is a highly accurate predictor of an individual's response to conflict monitoring mechanisms, or the ability to overcome situations that deviate from the status quo (Amodio et al. 2007, 1246-1247). *Given these factors, I hypothesize that conservative judicial ideology will be correlated with a greater presence of the FAE.*

Human Case: Coding for the area of law is a straightforward process. I used the Supreme Court Database's code for law issue areas: criminal procedure (1); civil rights (2); first amendment (3); due process (4); privacy (5); attorneys (6); unions (7); economic activity (8); judicial power (9); federalism (10); interstate relations (11); federal taxation (12); miscellaneous (13); private action (14). The data for this variable is freely available on the website, and each case is classified with just one variable (e.g. if a case deals with both issues of federalism and federal taxation, the authors of the Supreme Court Database choose whichever variable is the best fit) (Spaeth 2014). As illustrated in [Figure 3.3](#), there are no cases involving issues of due process, attorneys, unions, miscellaneous, and private actions. However, there is a heavy concentration of criminal procedure, civil rights, judicial power, and economic activity cases. Because my sample size is small, I decided to condense this categorical variable into a dummy variable. The dummy variable includes two categories: cases that generally deal with "human" subjects, and cases which deal with "non-human" subjects. Cases that fall into the criminal procedure, civil rights, First Amendment, and privacy "law areas" are coded as "human" cases in this new dummy variable.

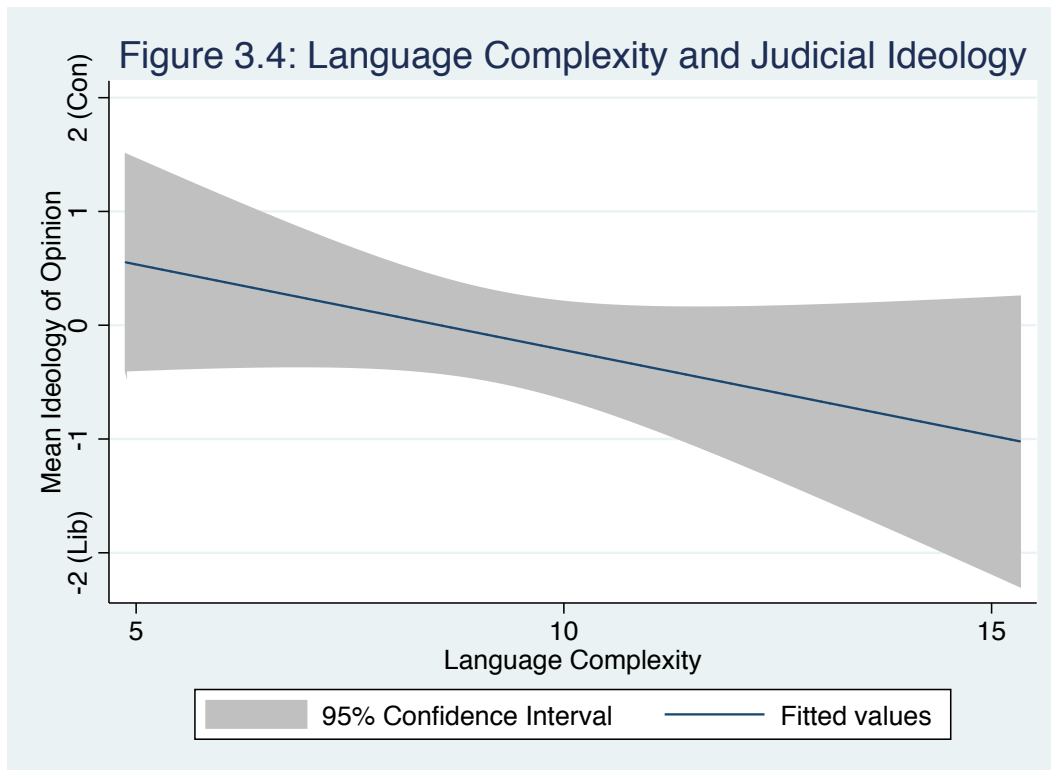


The literature suggests that some areas of law invoke more emotional responses from justices than others (Martin and Quinn 2007, 367). Justices might also be more sensitive to public perceptions of court cases involving civil rights, taxation, and federalism, as opposed to cases that center on issues of economics, criminal law, and labor issues (Fleming and Wood 1997, 490). *I expect that cases dealing with actual human parties (i.e. not cases dealing with federalism or federal taxation) will be positively correlated with the error's presence.*

Language-Complexity Score: This variable is derived using the Flesch-Kincaid Grade Level Score (henceforth simply “FK Score”). An FK Score is a measure of the number of years of education an individual needs to be able to comprehend a passage. The formula analyzes the number of syllables per word, and the number of words per sentence, and regresses those numbers with some constants to produce the FK Score (Williamson and Martin 2010, 1824-1825). I pasted the text of each opinion in my

sample into an online FK scoring machine (<https://readability-score.com>). The text that was used excluded the title description that begins each case (i.e. the header and authoring justices). I also removed all brackets that divided a word (i.e. “[T]he State must present” became “The State must present”) so that a more accurate FK score could be attained.

Tetlock et al. argue that “individuals at the simple end of the complexity continuum tend to rely on rigid, one-dimensional, evaluative rules in interpreting events, and to make decisions on the basis of only a few salient items of information” (1985, 1,228). While language complexity is not a perfect substitute for conceptual complexity, it is a decent proxy that can be used to measure the way cases are perceived by justices. The reader might question the wisdom of including such a measure, since seemingly a “rigid, one-dimensional” conceptual style might be suited to more conservative thought (see section on mean judicial ideology). This was in fact the theory that prevailed in political science literature in the 1980s. However, Gruenfeld disproved this notion by demonstrating that conceptual complexity is not statistically different between liberal and conservative justices (1995, 11). Therefore, there is apparently no risk of multicollinearity between the language-complexity score and the mean judicial ideology score. In contrast to Gruenfeld, however, it does appear that lower levels of language complexity are associated with conservative opinions in my sample. Additionally, liberal opinions seem to have a higher level of language complexity. This is presented in Figure 3.4. *I predict, in opposition to Gruenfeld, that language complexity will be negatively associated with FAE-type language (Gruenfeld would probably argue that there is no correlation).*

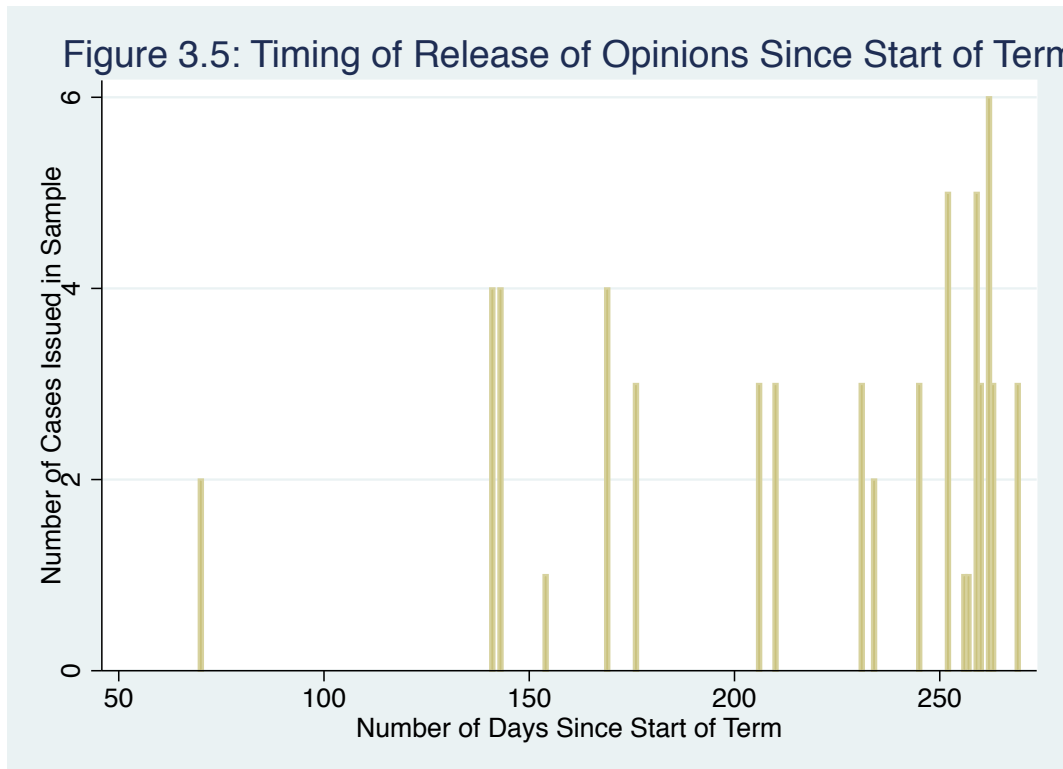


Fatigue: Fatigue was measured by counting the number of days between the start of the term (always the first Monday of October) and the issuance of an opinion. I did not include the day the opinion was issued in the count, since opinions are typically issued in the morning, and therefore a full “day” hasn’t passed.

There are many accounts of how justices struggle to pay close attention to every case that comes before the Court. The Court will hear a little less than 100 cases each year, which means that the average case can only be attended to for three days by each justice. When considering the fact that the Court takes a three-month break, and the sheer mountain of briefs and legal documents that accompany each case, it seems reasonable to conclude that justices might suffer from fatigue: the longer the Court is in session, the more tired justices become. As illustrated in [Figure 3.5](#), the cases are generally issued close to the end of a term, rather than toward the beginning. *I predict that fatigue will be positively correlated with FAE-type language, since justices are likely more emotional*



and rushed when deciding cases late on in the term.



Chief Justice Variable: Controlling for the chief justice has two advantages: it allows for some control of temporal factors—for instance, changing cultural norms in society—and it recognizes the differing degrees of influence that chief justices have on the Court and their colleagues (Lanier 2011, 682-683). Each chief justice is provided with a different variable code: Rehnquist (0); and Roberts (1). Chief Justice Rehnquist replaced Chief Justice Burger in 1986, while Chief Justice Roberts attained his current position in 2005. There are 43 opinions from the Rehnquist court, and 16 from the Roberts court in my sample. *I predict that the FAE will not be more prevalent in one court than in another court, as this is merely a control variable.*

## CHAPTER 4: REGRESSION ANALYSIS AND RESULTS

Analysis of the variables proved to be challenging, due to the small sample size of the dataset (N=59). I began my analysis with a Logit regression to ensure that situational references were correlated with the winning party, while dispositional references were correlated with the disfavored party. The Logit regression confirmed that this was indeed the case, essentially validating the fact that FAE was taking place in the first place. I employed a logarithmic Poisson Model to garner a basic picture of the directional relationships between the dependent variable (FAE references in opinions) and the various independent variables. Utilizing a Poisson Model is the best method to analyze this relationship because it allows the dependent variable to remain close to its natural state (dependent variable values have to be entered as integers, but the loss of variance actually helps with the interpretation of results). In running the Poisson Model (and all subsequent models) I used robust standard errors because I assumed that the error term is stochastically distributed. The results of this regression are presented in Table 4.1.

<b>TABLE 4.1, Analysis of Factors Impacting Size of FAE</b>		
Independent Variable	Situational References of Favored Party	Dispositional References of Disfavored Party
Number of Votes for Opinion	-0.048 (0.179)	-0.155 (0.352)
Majority Opinion Dummy	16.522*** (1.014)	15.781*** (1.527)
Dissenting Opinion Dummy	17.100*** (0.406)	17.039*** (0.636)
Conservative Opinion	-0.213* (0.168)	0.317* (0.229)
Human Case	0.580* (0.506)	0.498 (0.673)
Language Complexity	-0.274** (0.155)	0.246* (0.235)
Fatigue	-0.004 (0.005)	0.030** (0.018)
Court Control Dummy	0.160 (0.619)	-2.774*** (0.874)
	N = 59, Pseudo R2 = 0.276	N = 59, Pseudo R2 = 0.353
***p<.01, **p<.05, *p<.10 (one tailed)		
Cell entries represent Poisson coefficients with robust standard errors in parentheses		

As evidenced in TABLE 4.1, there are a number of variables that are significant when regressed against references to the situation of the winning party. Because opinion types are dummy variables, I eliminated the least-frequently occurring dummy (concurring opinions). Both majority and dissenting opinions are significant. While the coefficients cannot be interpreted for their magnitude of effect, their values imply that both majority

and dissenting opinions are more prone to the FAE than concurring opinions (the excluded category). The ideological mean of the case is also marginally significant in explaining situational references to the winning party. The coefficient would suggest that more conservative opinions are less prone to applying situational references to the winning party than are liberal opinions. Similarly, the case issue area is marginally significant, with cases involving “human” issues (e.g. criminal procedure cases) more prone to FAE-type language than non-human cases (e.g. federalism cases). Language complexity is notably significant, with more complex opinions containing fewer references to the favored party’s situation. Fatigue is also marginally significant, although, interestingly, it is negatively associated with references to situations of the favored party. There are also a number of independent variables that are insignificant in explaining the situational references of the winning party. The number of votes an opinion receives is insignificant, as is the cultural court control variable.

TABLE 4.1 also displays the Poisson Model output for references to the dispositions of the disfavored party, the other component of FAE references. Variables are generally more significant for this part of the FAE than for situational references. Both majority opinions and dissenting opinions contain more references to dispositional factors of the disfavored party than do concurring opinions. The ideological mean of an opinion is also significant, with conservative opinions positively correlated with references to the disposition of the disfavored party (the opposite of the situational references for the favored party). Case issue areas dealing with “human” issues are marginally significant, and are positively correlated with dispositional references. Language complexity is also significant and positively correlated with dispositional

references (the opposite effect of the situational regression). Fatigue is statistically significant in its correlation with dispositional references, but the coefficient is so small that the effect is negligible. Interestingly, the court control variable is statistically significant, with Roberts court opinions containing fewer references to dispositions than Rehnquist court opinions. Finally, the number of votes an opinion receives is not statistically significant, just as it was in the situational regression.

Generally the findings were remarkably strong for a regression with such a small sample size. In fact, the models and the variables were even more significant before I generalized the law issue areas into a simple “human” and “non-human” case area dummy variable. Unfortunately, the sample was too small to generate predicted probabilities due to the large variance of the dependent variables. In order to substantively understand the nature of these independent variables, I tried a different model. I collapsed my dependent variable from an interval-level variable down to a dummy variable. This change allowed me to explore *when* the fundamental attribution error occurs, but not to *what degree*. The arduous nature of data collection for the dependent variables, unfortunately, required such a switch (see Methodology section for estimates of time investment in data preparation and analysis). Dummy dependent variables make it possible to run Logit Models and generate predicted probabilities for the effects of the independent variables on the dependent variable due to the dependent variable’s reduced variance.<sup>\*\*\*</sup>

I used Clarify to develop predicted probabilities for the Logit Model (King et al. 2000). Predicted probabilities function by generating the mean values for the independent

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<sup>\*\*\*</sup> I originally attempted to use an Ordered Probit Model, but the variance was still too great to generate predicted probabilities.

variables in the model. I then changed the pre-set values of a chosen variable to measure its effect *holding the rest of the model constant to the mean values of the independent variables*. Independent variables in such a system must be interpreted independent of one another; that is to say, the effect of a change in the language complexity of an observation should not be combined with the effect of an opinion-type change.

Unfortunately, generating predicted probabilities did not lead to the desired outcome. The Logit Model, while capable of handling a smaller sample size due to the reduced variance, only found drastic effects in its interpretation of the effects of the independent variables on the dependent variable. For instance, for a concurring opinion, the likelihood of a situational references occurring at all dipped to almost 0%, while a majority or dissenting opinion would bring up the likelihood to almost 100%. All independent variables had effects approaching 0% or 100% depending on their significance, and therefore no concrete understanding of the effects of the independent variables on the dependent variable could be generated.

Since interpretable predicted probability values could not be generated, I decided to use the next-best solution for determining effects: interpreting the Incidence Rate Ratio (IRR) of the independent variables. I used the integer-percent breakdowns of situational references for the favored party and dispositional references for the disfavored party as my dependent variable (as I did with the earlier Poisson Model), and re-ran the Poisson Model with robust standard errors while using the model to produce the IRR for the independent variables.<sup>†††</sup>

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<sup>†††</sup> There is a reason IRR interpretation is generally not a favored methodology: it is complicated to interpret. A basic Poisson Model generates its coefficients by taking the difference in the log of its expected values (since the values of the dependent variable can

TABLE 4.2 portrays the IRR for situational references for a favored party. Three variables are insignificant: the number of votes for an opinion, fatigue, and the court control variable. There is a large variance in the size of the IRR amongst the significant variables, from 0.760 for language complexity to 26,700,000 for a dissenting opinion. The large IRRs for majority opinions and dissenting opinions can be explained: FAE language is heavily concentrated in those two opinion types, so the likelihood of a “one point increase” in the value of these two variables (e.g. changing from a concurring opinion to a majority or dissenting opinion) leads to a rate ratio increase by a factor of several million percentage points. Obviously this result is erroneous, but the general principle still can be gleaned: opinion type has the largest impact on the occurrence of situational references, with dissenting opinions containing the greatest likelihood and majority opinions following close behind. More conservative opinions are also negatively associated with situational references. An IRR score of 0.808 implies that, for every increase in an opinion’s mean ideological score (i.e. conservatism), the percentage of situational words in the opinion is diminished by a factor of 0.808. The case issue area, which is marginally significant, has an IRR of 1.786. Interpretation of a dummy variable is straightforward: if a case has a “human” element, the percentage of situational words rises by a factor of 1.786, all other variables held equal. Language complexity has a

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include zero, the actual values cannot be used) (Wooldridge 2012, 546-547). The difference between two logs can be written out as a simple division (i.e. “ $\log(u_{x+1}) - \log(u_x)$ ” becomes “ $\log(u_{x+1}/u_x)$ ”), resulting in a ratio of the two logarithmic values (Introduction to SAS). IRR is merely the rate of this logarithmic difference, or the result of this division. For instance, in Table 4.2 language complexity (fkScore) has a score of 0.760 for the situational model. This means that, taking the difference between two language complexity values, lets say between an opinion with an FK-Score of 10 and another one with a score of 11, the opinion with an FK-Score of 11 would be expected to have a decreased prevalence of situational references by a factor of 0.760 with all other independent variables held constant.

negative association with situational references; an IRR of 0.760 means that each increase in language complexity reduces the situational-half of the FAE. All of these effects, from the (unreasonably) large impact of opinion type to the relatively smaller impacts of ideology, case area, and language complexity, have a large effect on a variable whose mean value is 0.85% with a standard deviation of 1.84%. These IRR values reveal that all significant variables have a substantial impact on the frequency of the FAE.

**TABLE 4.2, Analysis of Factors Impacting Size of FAE**

Independent Variable	Situational References of Favored Party	Dispositional References for Disfavored Party
Number of Votes for Opinion	0.953 (0.171)	0.856 (0.302)
Majority Opinion Dummy	15,000,000*** (15,200,000)	7,137,487*** (10,900,000)
Dissenting Opinion Dummy	26,700,000*** (10,800,000)	25,100,000*** (16,000,000)
Conservative Opinion	0.808* (0.136)	1.374** (0.314)
Human Case	1.786* (0.905)	1.646 (1.109)
Language Complexity	0.760** (0.118)	1.279* (0.301)
Fatigue	0.996 (0.005)	1.031** (0.019)
Court Control Dummy	1.173 (0.727)	0.062*** (0.054)
	N = 59, Pseudo R2 = 0.276	N = 59, Pseudo R2 = 0.353
***p<.01, **p<.05, *p<.10 (one tailed)		
Cell entries represent Poisson Incidental Rate Ratios (IRR) with robust standard errors in parentheses		



I ran the same IRR Poisson regression for the dispositional references. These results are also catalogued in TABLE 4.2. The number of votes an opinion receives remained insignificant, while the case area became insignificant. However, fatigue and the court control became highly significant. The variance in the IRR values remained as large as in the situational model, with IRR values for a dissenting opinion at 25,100,000 and for the court control at 0.062. The large values for both majority and dissenting opinions, once again, are far too large to be accurate. However, we can still, once again, definitively extrapolate: majority and dissenting opinions contain far more references to dispositions of parties than concurring opinions. The other variables in the IRR regression have reasonable values. Conservatism is now positively associated with dispositional references. An opinion with an ideological score of 4, instead of 3, has more dispositional references by a factor of 1.374. Interestingly, language complexity is associated with dispositional references. An opinion with a Flesch-Kincaid Score of 10 has higher dispositional references than an opinion with a score of 9 by a factor of 1.279. Fatigue is also significant, in contrast to the situational references model, and became slightly positively associated with dispositional references. Finally, and most strangely, the court control dummy is noteworthy for its significance: the average Rehnquist court opinion has fewer dispositional references than a Roberts court opinion by a factor of 0.062. This difference is quite large.

These findings are remarkably strong, particularly in light of the small sample size. While a larger sample would have allowed for the construction of predicted probabilities, the coefficients and IRRs of the Poisson regression nonetheless provide a

roadmap which reveals the relative effects of each independent variable on the dependent variable. The original hypotheses include: the FAE fades with increasing numbers of votes on an opinion; dissenting opinions are most prone to the FAE and majority opinions the least prone; conservative cases utilize more dispositional references, while liberal cases employ more situational references; issues of law involving human parties has a positive association with the FAE; cases with less complex language are more likely to contain FAE language; fatigue causes the FAE to become more prevalent; and the chief justice (court control) has no impact on the prevalence of FAE language.

Most of these hypotheses are supported. The most surprising results are the high prevalence of the FAE in majority opinions and the strong association of the Roberts court with dispositional language. The positive correlation between majority opinions and FAE language has two possible explanations. The first is a methodological issue. While the dependent variable had a built-in control for opinion length,<sup>\*\*\*</sup> there is still a potential that the increased lengths of such opinions have an exponential effect on the error. It could be, for instance, that an opinion of 50 words has, generally, a 0% chance of containing the FAE due to its short nature. An opinion of 100 words might have a 2% chance of containing FAE language, while an opinion of 200 words—hypothetically—might have a 10% chance of containing the FAE. Merely dividing the word counts for FAE language in an opinion by the length of the opinion cannot control or extinguish these exponential effects. The principle is similar to the oft-recounted pop-culture legend/theory that, if you let monkeys hit random keys on a typewriter indefinitely, they

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<sup>\*\*\*</sup> The dependent variable was constructed by taking the number of situational/dispositional words and dividing them by the total number of words in the opinion before multiplying the ratio by 100 to obtain a percentage.

will eventually reproduce a manuscript of Shakespeare's *Hamlet*.

A second explanation for the positive correlation between majority opinions and FAE language relates to public perceptions of the Court. As Fleming and Wood (1997, 490) establish, the Court tends to incorporate public opinion into their decision-making process. The Court also attempts to communicate with the public about *why* it is coming to such a decision. It is possible that majority opinion authors, with the knowledge that in all likelihood their opinion will be the only one read by the public, try to “simplify” their opinions for easier public digestion. A full exploration of these theories extends beyond the scope of this paper, but they are useful in considerations of why the majority opinions have such a strong correlation with the FAE.<sup>§§§</sup>

At first I imagined that the positive correlation between the Roberts court and dispositional references was explained by a conservative ideological shift in composition of the justices on the Court from Rehnquist's tenure to Roberts'. However, this was not the case. The Court's median ideological score in 1986 (the midpoint in the Rehnquist court era) was 0.631. This score is greater than in 2009 (the midpoint in the Roberts court samples), when the mean ideology was 0.572 (Martin & Quinn 2002). There must be a different cultural factor in play—perhaps a justice with a tendency to edit out such dispositional references departed when Roberts became chief justice—but I have no definitive evidence for such a claim. Clearly, however, some cultural shift allowed for an increase in the use of dispositional references.

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<sup>§§§</sup> It is important to remember that majority and dissenting opinions are positively correlated with the FAE *relative to concurring opinions*. The reader might propose a third theory: that majority and dissenting opinions have no correlation with the FAE, and that rather it is concurring opinions that have a negative correlation. I reject this premise, the median case has no FAE language at all, and therefore only a positive correlation can explain the presence of the FAE in an opinion.

There are several variables that did not have significant outcomes for at least one of the models. Most of these variables had P-values that could, theoretically, become significant if the sample size were expanded. The number of votes an opinion receives, however, had such large P-values for both models that it seems extremely unlikely that it would become significant with a larger sample size. The significance of the variable might be driven down by the fact that there are other independent variables that essentially control for the number of votes an opinion receives: majority, concurring, and dissenting dummy variables. This is a methodological explanation that explains the insignificance of the variable. There is also a pragmatic explanation: FAE language may be edited out by clerks as opinions are written in order to ensure that opinions are not attacked for addressing non-legal concerns. FAE language that survives the edit of four or five law clerks for an authoring justice might be able to just as easily survive edits if there are 20 clerks working on the opinion. There might be a minimal threshold that, once reached, exempts a FAE reference from elimination (i.e. if it survives the edits of one clerk, it is almost always left in). This might explain the insignificance of the variable.

All other variables behaved as expected. Ideology seemingly dictates whether attribution is primarily situational or dispositional. George Lakoff, in *Moral Politics* (2002), argues that conservatives have a tendency to assess issues using a framework that focuses on moral strength (inherently a dispositional assessment) while liberals have a tendency to look for opportunities to nurture others (which I believe can be inherently situational). That's not to say that conservatives can't focus on situations and liberals on dispositions—after all, part of the error is that we participate in both—but clearly such differing moral outlooks have an impact on which half of the FAE justices utilize the

most.

I also predicted that the issue of law in question in a case would have an impact on the presence of the FAE. Martin and Quinn (2007, 367) posited that areas of law that deal with what I have termed “human” issues (cases directly involving human parties) illicit more emotional responses than cases dealing with “non-humans” (e.g. states). I predicted that such emotional responses might manifest themselves in the FAE. Generally, this prediction is upheld in this study. Situational references do increase in “human issue” cases and, while the variable was not statistically significant, it seems to affect dispositional references as well.

Language complexity, in the form of Flesch-Kincaid Scores, also is statistically significant. I relied on Tetlock et al.’s findings that simple language is correlated with individuals who “made decisions on the basis of only a few salient items of information” (1985, 1,228). I predicted that individuals focus on situational and dispositional aspects of character as two of those salient items, and that the FAE would therefore be associated with low language complexity. Increased language complexity was associated, quite strongly, with fewer situational references. Interestingly, the opposite was true for dispositional references: as language complexity rose, so did the prevalence of that component of the FAE. However, subtracting the value of standard error from the values of the coefficient and for the IRR bring their values close to zero and below one, respectively. This implies that the effect is actually rather small, and therefore the small sample size might be playing a role in this unanticipated effect.

Finally, fatigue seems to be correlated with increased levels of dispositional reference. This is unsurprising, as justices are often pressed for time toward the end of

their terms. The more surprising aspect of the variable is the statistical insignificance of fatigue with respect to situational aspects. The small sample size, once again, might provide an explanation for this insignificance.

These regression results suggest that both conscious and subconscious drivers of judicial decision-making are influencing the presence of the FAE. Subconscious drivers, such as the manifestation of ideology in moral conceptions of the world, are driving liberals to utilize situational references more frequently than conservatives, while the inverse is true for dispositional references. Similarly, fatigue, human case issues, and language complexity—all subconscious phenomena—have an impact on the frequency of FAE references. Conscious decisions, such as the decision to join write join a majority opinion rather than a issuing a concurring opinion, also have an impact on the frequency of FAE language. Other conscious decisions, such as strategic voting motivated by Court culture, have an impact as well.

## Conclusion

Justices are prone to the FAE. This is not necessarily surprising, since several models of Supreme Court decision-making argue that justices consider factors that are outside of the scope of mere statutes. What is surprising is just how many factors in judicial decision-making are correlated with the presence of FAE language. All variables that were controlled for, with the exception of an opinion's vote total, were statistically significant in explaining the frequency of the FAE in an opinion.

While a dispositional references rate of 1% might seem harmless, it might actually indicate deep-seated bias. As elaborated in “Chapter 2: Theory”, justices are wary of being denounced by their peers for employing non-legal rational in their decision-making. The fact that there are situational and dispositional references at strongly suggests that the FAE is powerful. This can have a profound impact on our system of justice which, supposedly, provides a neutral space for the weighing of facts without consideration for the likeability of the parties involved. These findings imply that justices consciously use strategies that invite the FAE's presence. Justices also apparently fall victim to subconscious biases that make it difficult for justices to possess neutral views of the parties in the cases. I'm not going to pretend that I have a solution to the problem—I don't—but these findings suggest that legal advocates need to be aware of the impact of extra-legal ideas on justices. Framing the character of your client, particularly to emphasize their situation, could potentially present one avenue to greater courtroom success for lawyers, albeit at the expense of a judicial system which is ostensibly relying only on legal considerations.

## BIBLIOGRAPHY

- Amodio, David M., John T. Jost, Sarah L. Master, and Cindy M. Yee. "Neurocognitive Correlates of Liberalism and Conservatism." *Nature Neuroscience* 10, no. 10 (OCT, 2007): 1246-1247.
- Barth, Alan. *Prophets with Honor; Great Dissents and Great Dissenters in the Supreme Court*. 1st ed. New York: Knopf; distributed by Random House, 1974.
- Baum, Lawrence. *The Puzzle of Judicial Behavior*. Analytical Perspectives on Politics. Ann Arbor: University of Michigan Press, 1997.
- Brenner, Saul. "Fluidity on the United-States-Supreme-Court - a Reexamination." *American Journal of Political Science* 24, no. 3 (1980): 526-535.
- Collins, Paul M., Jr. "Cognitive Dissonance on the US Supreme Court." *Political Research Quarterly* 64, no. 2 (JUN, 2011): 362-376.
- Dorff, Robert H. and Saul BRENNER. "Conformity Voting on the United-States-Supreme-Court." *Journal of Politics* 54, no. 3 (AUG, 1992): 762-775.
- Douglas, William O. *The Court Years, 1939-1975 :The Autobiography of William O. Douglas*. New York: Random House, 1980.
- Feldman, Stanley. and Karen Stenner. "Perceived Threat and Authoritarianism." *Political Psychology* 18, no. 4 (DEC, 1997): 741-770.
- Flemming, Roy B. and B. Dan Wood. "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods." *American Journal of Political Science* 41, no. 2 (APR, 1997): 468-498.
- Greenhouse, Linda. *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. New York: Times Books, 2005.
- Gruenfeld, Deborah H. "Status, Ideology, and Integrative Complexity on the United-States-Supreme-Court - Rethinking the Politics of Political Decision-Making." *Journal of Personality and Social Psychology* 68, no. 1 (JAN, 1995): 5-20.
- Haidt, Jonathan. *The Righteous Mind: Why Good People Are Divided By Politics and Religion*. New York: Vintage Books, 2013.
- Houghton, David Patrick. *Political Psychology :Situations, Individuals, and Cases*. New York: Routledge, 2009.
- Introduction to SAS. UCLA: Statistical Consulting Group. From [http://www.ats.ucla.edu/stat/stata/output/stata\\_poisson\\_output.htm](http://www.ats.ucla.edu/stat/stata/output/stata_poisson_output.htm) (Accessed April 20, 2015).



- Kanai, Ryota, Tom Feilden, Colin Firth, and Geraint Rees. "Political Orientations are Correlated with Brain Structure in Young Adults." *Current Biology* 21, no. 8 (APR 26, 2011): 677-680.
- King, Gary, Michael Tomz, and Jason Wittenberg. "Making the most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44, no. 2 (APR, 2000): 347-361.
- Kunda, Ziva. "The Case for Motivated Reasoning." *Psychological Bulletin* 108, no. 3 (NOV, 1990): 480-498.
- Lakoff, George. *Moral Politics: How Liberals and Conservatives Think*. Chicago: University of Chicago Press, 2002 (2<sup>nd</sup> Ed.).
- Lanier, Drew Noble. "Acclimation Effects and the Chief Justice: The Influence of Tenure and Role on the Decisional Behavior of the Court's Leader, 1888-2007." *American Politics Research* 39, no. 4 (JUL, 2011): 682-723.
- Lodge, Milton and Charles S. Taber. *The Rationalizing Voter*. Cambridge Studies in Public Opinion and Political Psychology. Cambridge; New York: Cambridge University Press, 2013.
- Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. *Crafting Law on the Supreme Court :The Collegial Game*. Cambridge, UK; New York: Cambridge University Press, 2000.
- Martin, Andrew D. and Kevin M. Quinn. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10, no. 2 (2002): 134-153.
- Martin, Andrew D. and Kevin M. Quinn. "Assessing Preference Change on the US Supreme Court." *Journal of Law Economics & Organization* 23, no. 2 (JUN, 2007): 365-385.
- Murphy, Walter F. *Elements of Judicial Strategy*. Chicago: University of Chicago Press, 1964.
- Schwartz, Bernard. *Decision: How the Supreme Court Decides Cases*. New York: Oxford University Press, 1996.
- Segal, Jeffrey A., and Albert D. Cover. "Ideological Values and the Votes of United-States Supreme-Court Justices." *American Political Science Review* 83, no. 2 (JUN, 1989): 557-565.
- Segal, Jeffrey A. and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK; New York: Cambridge University Press, 2002.
- Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger,

- and Sara C. Benesh. "Supreme Court Database, Version 2014 Release 01." URL: <http://Supremecourtdatabase.org>. 2014
- Tetlock, Philip E., Jane Bernzweig, and Jack L. Gallant. "Supreme-Court Decision-Making - Cognitive-Style as a Predictor of Ideological Consistency of Voting." *Journal of Personality and Social Psychology* 48, no. 5 (1985): 1227-1239.
- Williamson, J. M. L., and A. G. Martin. "Analysis of Patient Information Leaflets Provided by a District General Hospital by the Flesch and Flesch-Kincaid Method." *The International Journal of Clinical Practice* 64, no. 13 (DEC, 2010): 1824-1831
- Woodward, Bob and Scott Armstrong. *The Brethren*. New York: Simon and Schuster, 1979.
- Wooldridge, Jeffrey. *Introductory Econometrics: A Modern Approach*. Cincinnati: Southwestern College Pub, 2002 (2<sup>nd</sup> Ed).
- Wrightsmann, Lawrence S. *The Psychology of the Supreme Court*. American Psychology-Law Society Series. Oxford; New York: Oxford University Press, 2006.
- Zebrowitz, Leslie A. and Susan M. McDonald. "The Impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Courts." *Law and Human Behavior* 15, no. 6 (DEC, 1991): 603-623.