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Ideology, Issues, and Group Affect

When people talk about the U.S. Supreme Court, whether they are scholars, commentators, or interested observers, they regularly use the language of ideology. Decisions, justices, and the Court as a whole are described in terms of their liberalism or conservatism.

Yet in all this talk about ideology, there is surprisingly little attention to its meaning.¹ Why are certain positions on affirmative action or government health care programs or regulation of campaign finance labeled as conservative or liberal? Even scholars who study the Court typically apply these labels to issues that the Court addresses without probing their sources. Much of the political science research on the Court does rest implicitly on one conception of the linkages between ideology and the issues in the Court, but the validity of that conception generally goes unexamined.

This book is about the functioning of ideology in the Supreme Court. I argue that the ideological element in decision making by the justices is not as simple as it is generally thought to be. By probing

1. I focus on one aspect of the meaning of ideology here. Fischman and Law (2009, 137–42) note a broader inattention to that meaning.

how and why the justices' ideological stances² are applied to the issues and specific questions that the Court addresses, I think, we can gain a better understanding of both the Court and ideology.

A good place to start is with the Court's 2000 decision in *Bush v. Gore*, which raised significant questions for people who study the Court. The most fundamental question stemmed from the Court's 5–4 division along ideological lines in the case. Of course, that division was hardly unusual. Rather, it was the apparent basis for the division that concerned some scholars. In a reversal of the justices' usual positions, the conservative justices favored a claim under the equal protection clause of the Fourteenth Amendment and the liberals opposed that claim. The key to that reversal, as some scholars saw it, was simple: every justice voted in favor of the candidate whom that justice presumably favored in the election.

Writing shortly after the decision, Sanford Levinson contrasted the justices' responses to *Bush v. Gore* with the usual form of decision making in the Court: "Though judges are 'political,' the politics are 'high' rather than 'low'; that is, decisions are based on ideology rather than a simple desire to help out one's political friends in the short run."³ Levinson and his fellow legal scholar Jack Balkin later elaborated on this idea: "We should make a distinction between two kinds of politics—'high politics,' which involves struggles over competing values and ideologies, and 'low politics,' which involves struggles over which group or party will hold power."⁴ Political scientist Howard Gillman distinguished between high and low politics in his own analysis of *Bush v. Gore*, contrasting "a form of relatively consistent ideological policymaking" with "mere partisan favoritism."⁵

The dichotomy between high and low politics is both insightful and valuable. Yet the difference between high and low politics is not quite as sharp as it might seem. Balkin and Levinson referred to high

2. I will refer to justices' places on a conservative-liberal scale across all issues as ideological stances; I use the term "stances" to distinguish ideology as a whole from "positions" on specific issues.

3. Levinson (2001).

4. Balkin and Levinson (2001), 1062; see Balkin (2001), 1408–9.

5. Gillman (2001), 7.

politics in terms of values. However, values in their usual meaning are not the only basis for the divisions between liberal and conservative justices that would fit in the category of high politics. Those ideological divisions also reflect favorable and unfavorable attitudes toward social groups whose interests are affected by decisions and toward political groups that advocate positions on issues in general and on individual cases. The justices who participated in *Bush v. Gore* appeared to act on their rooting interests in the success of one political party, but the role of rooting interests in the decision was not an anomaly. Justices' positive feelings about certain social and political groups and their negative feelings about others help to create ideological divisions in a wide range of cases in which partisan considerations do not play a direct part.

An example that Levinson used to differentiate between high and low politics highlights that point.⁶ Levinson contrasted the partisan motivations he perceived in *Bush v. Gore* with cases in which Democratic justices vote to uphold legislative districting maps that maximize the number of African American legislators and in which their Republican colleagues vote to strike down those maps, "in spite of reasonably good evidence that" the maps "run contrary to the institutional interest of the Democratic Party." That is a powerful example, one that effectively highlights the distinction between high and low politics that Levinson and others have made. But if the justices do not act on a partisan basis in these districting cases, their affect toward groups in society may still influence their responses to those cases. Indeed, their votes likely are shaped to a degree by their affect toward the African American community and toward political groups that favor or oppose efforts to maximize the community's representation in government.

The conception of ideological decision making as value-based has deep roots in political science scholarship on the role of ideology in the Supreme Court. That scholarship incorporates a second and related conception, the idea that justices work deductively from broad premises to positions on specific issues and then to positions

6. Levinson (2013).

on the questions that arise in individual cases. This conception too is accurate only in part. The identification of certain issue positions as conservative or liberal occurs through a social process in which justices and other political elites work out what positions are appropriate for conservatives and liberals to take. In that process of developing shared understandings about the meaning of ideology, general premises are only one basis for those understandings.

In the first two sections of this chapter, I develop a perspective on the linkages between issues and ideology in the Supreme Court and in the world of political elites of which the Court is a part. The first section looks at those linkages in general terms. The second section focuses on affect toward social and political groups (more simply, group affect), with particular attention to its role in the linking of issues to ideology.

The final section of the chapter lays out an analytic approach with which to identify the sources of linkages between ideology and issue positions in the Supreme Court. That approach makes use of changes in the linkages between ideology and issues over time. On certain issues the ideological polarity of the justices has shifted, in that the relationship between justices' stances on a liberal-conservative scale and their positions on an issue came to take a different form. Inquiries into the reasons for those changes provide a way of identifying the reasons why the polarity of an issue takes a particular form at any given time.

Chapters 2 through 4 carry out that analytic approach by applying it to three issues. The first is freedom of expression, an issue on which a relatively recent change in ideological polarity in the Court has received considerable attention. The second is criminal justice, an issue with a polarity that we take for granted because it has lasted for so long, but one that has not always existed in the Court. The final issue is takings, a relatively obscure issue on which the Court's ideological polarity has shifted twice in the past century.

Chapter 5 continues the inquiry by analyzing the ideological polarity of other issues in the Court, giving particular attention to variation in that polarity among cases falling under the same issue. Chapter 6 pulls together the evidence and considers the implications

of the study for our understanding of the Court and of the ways that ideology functions in decision making.

Ideology and Issues: General Considerations

In considering the relationship between ideology and issue positions, the first task is to make clear what I mean by ideology and by issues. As John Gerring demonstrated, the term “ideology” has been used in a bewildering variety of ways.⁷ I am concerned with the two facets of ideology that receive the greatest attention from students of American politics.⁸

The first is ideology as a set of policy preferences or policy positions. Hans Noel defined ideology as “a nearly complete set of political issue preferences that is shared by others in the same political system.”⁹ Noel’s definition is another way of describing the well-known concept of constraint among issue positions that Philip Converse emphasized.¹⁰ One set of positions that is widely shared by members of political elites in the United States has been labeled conservative, while another set has been labeled liberal. In the United States, people who are highly educated and politically sophisticated tend to show high levels of constraint, holding predominantly what are considered to be liberal positions or predominantly conservative positions on issues.¹¹ The existence of constraint facilitates placing people’s policy preferences on an ideological scale.

In an analogous process, we can place government officials on an ideological scale on the basis of their votes and decisions on policy

7. Gerring (1997).

8. These facets correspond in part with what have been called the operational and symbolic aspects of ideology. Jost, Federico, and Napier (2009), 312. In focusing on these two facets, I leave aside some complexities about ideology that are important for other analytic purposes, such as the various strains of conservatism and liberalism that scholars of political thought have identified.

9. Noel (2013), 41.

10. Converse (1964).

11. Kritzer (1978); Hagner and Pierce (1982); McClosky and Zaller (1984), 259–62; Jennings (1992); Poole and Rosenthal (1997), 4–5; Lewis-Beck et al. (2008), 280–86; Jost, Federico, and Napier (2009), 314–15.

questions. Both scholars and other observers of government routinely do so for legislators and judges. These policy positions do not necessarily match officials' personal policy preferences; they may stem from other sources as well. The extent to which preferences and positions do match can be expected to vary with the attributes of policy-making bodies.

One important complication is that policy preferences and positions do not fall perfectly along a single dimension. Indeed, some scholars have concluded that a multidimensional characterization of policy preferences and positions is superior to a unidimensional characterization. There is considerable evidence for this conclusion about attitudes of the mass public.¹²

A single dimension fits the preferences of political elites better than it does for the mass public.¹³ Still, it is uncertain whether the policy positions of people in government are better described in unidimensional or multidimensional terms. As the analyses of congressional voting by Keith Poole and Howard Rosenthal suggest, the answer may change over time.¹⁴ Major early studies of Supreme Court voting by Glendon Schubert¹⁵ and David Rohde and Harold Spaeth¹⁶ identified multiple dimensions. More recently, quantitative studies of the Court tend to assume a single dimension, in part because of the popularity of unidimensional measures of justices' policy preferences¹⁷ and their voting behavior.¹⁸ Among scholars who have probed this question, some favor a unidimensional interpretation of the Court,¹⁹ others a multidimensional interpretation.²⁰

12. Swedlow and Wyckoff (2009); Feldman and Johnston (2014); Gries (2014), ch. 2; Jacoby (2014).

13. Lupton, Myers, and Thornton (2015); Jewitt and Goren (2016).

14. Poole and Rosenthal (1997).

15. Schubert (1965).

16. Rohde and Spaeth (1976).

17. Segal and Cover (1989).

18. Martin and Quinn (2002).

19. Martin and Quinn (2002); Grofman and Brazill (2002).

20. Lauderdale and Clark (2012, 2014); Robinson and Swedlow (2015); see Fischman (2015). Multidimensional interpretations have two versions. In one, the justices' positions in a specific domain are unidimensional, but those single dimensions look different in different domains. That is the classical version, reflected in Schubert

The second key facet of ideology is individuals' self-identifications.²¹ A majority of adults in the United States are willing to identify themselves as conservatives or liberals even when they are given the appealing alternative of "moderate."²² The same is true of political activists and elites, such as national convention delegates.²³ Identification with an ideological group can be an important part of a person's social identity. That is especially likely in a time like the current era, when partisan and ideological identifications tend to reinforce each other.

But just as issue positions can vary among people whom we would identify as liberals or as conservatives, the strength of identifications with an ideological group can also vary. Any degree of identification as a liberal makes that affiliation an element of a person's social identity, but liberals differ in the importance of that element. Thus, when I refer to people's assimilation of shared understandings about what position someone with their ideological identification should take on an issue, it should be kept in mind that as people's identifications with an ideological group strengthen, so does the influence of those shared understandings.

Inevitably, the two facets of ideology are related empirically. Even in the general population, there is a substantial correlation between ideological self-identification and attitudes on political issues, one that increases with political sophistication.²⁴ If national convention delegates are typical, as they probably are, the correlation for political elites is very strong.²⁵

Students of mass political behavior give considerable attention to ideological self-identifications. This is less true of scholarship on

(1965) and Rohde and Spaeth (1976). In the other version, the justices' positions in specific domains fall along multiple dimensions. In this version, the second dimension is not necessarily ideological; rather, it may be based on considerations other than the justices' policy preferences as these preferences are usually defined. Fischman and Jacobi (2016).

21. Devine (2015).

22. Associated Press (2016a, 2016b).

23. Devine (2011), 113.

24. Lewis-Beck et al. (2008), 223–25; Lupton, Myers, and Thornton (2015), 376.

25. Lupton, Myers, and Thornton (2015), 375–76.

public officeholders, primarily because of the difficulty of obtaining accurate self-identifications. In research on the Supreme Court, for instance, justices are nearly always characterized in terms of where their votes and opinions place them on an ideological scale rather than their self-identifications. But it is likely that identification as a conservative or liberal is a significant element in the social identities of many and perhaps most justices. That possibility needs to be taken into account in analyzing the workings of ideology in the Court.

Issues can be defined at varying degrees of generality.²⁶ In the Supreme Court, the right to counsel could be considered an issue. Alternatively, cases involving that right could be considered part of a broader issue, the procedural rights of criminal defendants. In turn, that issue can be treated as a subset of criminal justice, which also includes the interpretation of statutes that define crimes and establish rules for sentencing. I use the term “issue” to refer to all those levels. The issues that are considered in the next three chapters range from very broad (criminal justice) to moderately broad (freedom of expression) to moderately narrow (takings).

Even relatively narrow issues in this sense of the term can be distinguished from the specific legal and policy issues that appellate courts address in cases, which I call “questions” rather than “issues.” For my purposes, the right to counsel is an issue; the choice of rules to determine whether a defendant was deprived of that right by a lawyer’s poor performance and the application of those rules to a particular defendant are questions.

The linkages between issues and ideology could be studied in any policy-making body. The Supreme Court is an especially good subject of such a study because justices are relatively free to act on their policy preferences. The justices’ life terms and their general lack of interest in other jobs enhance their insulation from

26. Beyond degrees of generality, issues can be defined in multiple ways. As a result, the grouping of cases into issues inevitably has an arbitrary element, an element that is heightened if cases are assigned to only a single issue. That arbitrariness is highlighted by criticisms of the assignment of issues to cases in the Supreme Court Database. C. Shapiro (2009, 2010); Harvey and Woodruff (2013).

external influences. With their nearly complete power to set their own agendas, justices select primarily cases in which strong legal arguments can be made on both sides, so the legal merits of cases constrain them less than the legal merits constrain judges on most other courts.

Students of the Court do disagree strongly about the extent to which external influences and the state of the law influence justices' choices.²⁷ But it seems clear that policy preferences play a more powerful role in shaping those choices than they do in most other policy-making bodies. Moreover, even if other considerations have substantial effects on the justices' choices, differences in policy preferences almost surely are the dominant reason for disagreements among the justices in decisions. This attribute facilitates inquiry into linkages between issues and ideology.

It is important to keep in mind that policy preferences are not synonymous with ideology. Even if justices' ideological stances are characterized as falling along multiple dimensions, individual justices have some policy preferences that do not fit any of these dimensions. But the fact that the preponderance of variation among the justices in votes on case outcomes can be described with a small number of dimensions—to a considerable degree, a single dimension—indicates that patterns of differences among the justices can be understood primarily in ideological terms.

The conceptions of linkages between issues and ideology as deductive and value-based occupy a central place in research on the Supreme Court. In the classic and influential analysis by Glendon Schubert, induction from patterns of justices' votes was used to identify justices' issue positions and values, but the patterns were interpreted in deductive terms.²⁸ Schubert conceived of political and economic ideology as the primary values guiding the justices. Most issues that the Court addressed fell into those two categories, and

27. The most comprehensive argument for the dominance of policy preferences over those two considerations is presented in Segal and Spaeth (2002). Bailey and Maltzman (2011) present a strong argument for the significance of those considerations.

28. Schubert (1965).

Schubert indicated that in each category liberal and conservative issue positions were derived from the premises of political or economic liberalism and conservatism.²⁹

Similarly, in this formulation, issue positions were translated deductively into votes in individual cases. Schubert³⁰ used psychologist Clyde Coombs's³¹ theoretical work to describe a process in which the justices' votes on the questions to be addressed in specific cases rested on the relationship between the justices' issue positions and those specific questions on a linear ideological scale. If a justice's *i*-point was to the left of the *j*-point for a case, the justice would cast a liberal vote.

In the past few decades, students of judicial behavior seldom have described their conception of how ideology functions in the Supreme Court's decision-making process. For this reason it is not clear to what extent they would accept Schubert's formulation of a deductive process that works from values to issue positions to votes in cases. But Court scholars' treatment of ideology is usually consistent with that formulation, and it implicitly incorporates the deductive element of that formulation. In quantitative research, multivariate analyses of justices' voting behavior typically include a measure of their overall ideological stances. Similarly, analyses of the Court's collective decisions use measures of the Court's collective stance. Both usages rest on an assumption that general ideological stances translate into positions on issues and votes in cases.

As I have suggested already, by no means do scholars agree that ideology is the dominant force in Supreme Court decision making. Indeed, studies frequently treat ideology as one force among others, most often the preferences of other political institutions or the general public and the state of the law. But to the extent that scholars see ideology as a component in the justices' decision making—for

29. Rohde and Spaeth (1976, 137–40) were more explicit about values as the basis for issue positions. They identified three overarching values, an economic dimension they labeled “New Dealism” and two civil liberties dimensions called “freedom” and “equality.”

30. Schubert (1965), 26–28.

31. Coombs (1964).

most, a quite substantial extent—their treatment of ideology follows the general lines that Schubert laid out.

This is true of both the attitudinal and rational choice conceptions of Supreme Court decision making. In the attitudinal model, justices simply adopt the positions in cases that accord with their policy preferences.³² Attitudinal justices gain what has been called expressive utility by taking what they see as the right positions.³³ In most strategic models, justices take the positions that best advance their policy goals in the Court’s collective decisions and in public policy as a whole.³⁴ Their utility comes from achieving desirable outcomes.

Different as these two conceptions are in some respects, both rest implicitly on a conception of justices who act deductively on the basis of broad values that are components of their ideological stances. The linkage between ideology and issue positions is not as straightforward in a rational choice conception, because justices may modify the positions that follow from their values on the basis of strategic considerations. But those modifications are likely to be at the margins.

Over the last few decades, judicial scholars have given little explicit attention to the content of justices’ values.³⁵ In contrast, social and political psychologists have been engaged in a continuing inquiry into the values that are elements of liberalism and conservatism. Their research has also done much to identify possible antecedents of these values in more fundamental values, psychological traits, and even genetics.³⁶

Most often, two broad values are identified as underlying people’s issue positions. Stanley Feldman calls these values economic preferences (“greater equality/compassion vs. market outcomes/self-interest”) and social preferences (“modern vs. traditional

32. Segal and Spaeth (2002).

33. Hillman (2010).

34. L. Epstein and Knight (1998).

35. But see Robinson and Swedlow (2015).

36. Stanley Feldman (2013), 602–16. On possible genetic roots of ideology, see Smith et al. (2011) and Funk et al. (2013). Psychological traits, whether based on genetics or other sources, might shape issue positions independently of ideology.

values or social freedom vs. order”).³⁷ Jost, Federico, and Napier describe the two key values as “rejecting versus accepting inequality” and “advocating versus resisting social change (as opposed to tradition).”³⁸

For any formulation of ideological values, perhaps the key question is how these values translate into positions on policy issues. For some values, the translation is straightforward and clear. That is especially true of economic issues such as government benefits for low-income people, which relate directly to attitudes toward equality. But there are also many issues on which the application of general values is at least somewhat ambiguous.³⁹ Based on the economic and social preferences that Feldman described, what are the liberal and conservative positions on regulation of firearms or support for nuclear power? The application of general values to many foreign policy issues is also far from obvious.⁴⁰

In research on judicial decision making, the absence of clear logical connections between ideology and some issues is suggested by disagreements with the coding of the ideological direction of votes and decisions in the Supreme Court Database, the most widely used source of information for quantitative analyses of Supreme Court decision making.⁴¹ Many of these disagreements would be quite difficult to resolve deductively on the basis of conservative and liberal values. To take one example, it is far from obvious whether liberal values would lead a justice to support protesters at abortion clinics or to support the clinics that seek to limit protest activities.

One consequence of this kind of ambiguity is that the ideological polarity of issues can change over time. As I have noted, substantial changes in polarity that occurred on three issues—both in the

37. Stanley Feldman (2013), 595.

38. Jost, Federico, and Napier (2009), 310.

39. McClosky and Zaller (1984), 259; Tedin (1987), 77; Malka and Lelkes (2010), 158–59.

40. Gries (2014) identified a larger set of values that help to account for foreign policy positions, though the connections between values and positions that he identified were complex and partial.

41. Landes and Posner (2009), 828; C. Shapiro (2009, 2010); Harvey and Woodruff (2013).

Supreme Court and in the larger elite world—are the subjects of the major case studies in this book. To take another example, one involving an issue that the Court barely touches, over the last century there have been several shifts in the polarity of the two sides in debates about military interventions by the United States.

To a degree, change in the polarity of issues could be reconciled with a deductive and value-based explanation of linkages between ideology and issue positions. Changes in the content of the questions that arise on an issue may shift the relationship between an issue and the broad values that relate to it. Such changes in issue content can be substantial, as Richard Pacelle has documented for the Supreme Court.⁴² Further, as one analysis of economic issues suggests, polarity can change when justices (or other policy makers) reconsider how their general values apply to an issue.⁴³ But the existence of fundamental changes in the polarity of issues suggests that something else is going on as well.

What else is there? The mechanism of logical deduction from general premises is only one possibility; the same is true of values as the source of connections between ideology and issues. For mechanisms, the primary alternative to deduction from general premises is the development of shared understandings among political elites about which issue positions are liberal and which are conservative. “Ideas in belief systems go together not because, in some substantive sense, they belong together but, rather, because they have been put together by the course of events.”⁴⁴ At least in part, these shared understandings arise from direct and indirect interactions among the sets of political thinkers, political activists, and public officials who can be thought of as liberal or conservative camps.⁴⁵ The diffusion of what Converse⁴⁶ called “packages” of issue positions can create considerable consensus within political elites about the identities of liberal and conservative positions at a

42. Pacelle (1991, 1995).

43. Hagle and Spaeth (1992).

44. Sniderman and Tetlock (1986), 81.

45. See Noel (2013).

46. Converse (1964), 211.

given time, even when it is not obvious which positions logically fall under each heading.⁴⁷

In this way people who think of themselves as conservatives or liberals learn that certain issue positions are appropriate for them to adopt as conservatives or liberals, a process that extends beyond political elites to portions of the mass public.⁴⁸ These shared understandings may be stable, but they can also change as members and especially leaders of ideological camps rethink their positions on issues.⁴⁹ Some scholars have discussed this process of change. Among them are David Rabban⁵⁰ on free speech issues, Ken Kersch⁵¹ on multiple issues relating to civil liberties, and Christopher Schmidt⁵² on the broad categories of civil rights and civil liberties.

If the identification of issue positions as liberal and conservative is best understood as a product of shared understandings, this does not mean that deduction from general premises plays no part in that process. After all, some items in the packages of conservative and liberal positions follow in a fairly direct way from the values that underlie conservatism and liberalism. But where the connection between premises and issue positions is unclear, members of political elites such as commentators fill in the gaps.⁵³ There are also issues on which reasoning by deduction would lead to positions with which members of an ideological camp are uncomfortable for one reason or another, and on those issues the shared understandings that develop may supersede the logic of deduction from general premises.

The concrete questions that government policy makers decide are usually much more specific than issues, and elites outside of government often focus on specific questions as well. For this reason, shared understandings about the ideological content of issues may develop inductively, growing out of responses to various questions

47. Lane (1973), 101–3.

48. Malka and Lelkes (2010); Jewitt and Goren (2016).

49. Noel (2013).

50. Rabban (1997).

51. Kersch (2004).

52. Schmidt (2016).

53. Noel (2013), 46.

on an issue. For that matter, on some issues the shared understandings may be about subsets of issues. In that situation what scholars and other observers perceive as issue positions may really be aggregates of more specific positions.

Supreme Court justices come from the elite world in which shared understandings develop, and they remain part of that world when they serve on the Court. As justices they are not simply passive adopters of those understandings. Because justices confront issues in the form of legal questions and in the context of disputes between specific litigants, they may perceive linkages between issues and ideology somewhat differently from other elites. As a result, they can depart at least marginally from shared understandings about those linkages in their decisions. Moreover, they help to create and solidify these understandings through the ideological polarity of their decisions, which are visible to other segments of the political elite. *The Onion Book of Known Knowledge* touched on this role in jest when it referred to the Roberts Court as a “small but influential Washington, D.C.-based conservative think tank” that “helps shape the national debate.”⁵⁴

I think that the case for shared understandings as the mechanism by which linkages are forged is strong. That conception accounts for the development of broad consensus on the identities of conservative and liberal issue positions on a wide range of issues. In any event, the concept of shared understandings provides a very good framework for the analysis of the relationship between ideology and issue positions. The balance between deductive logic and more arbitrary and contingent judgments can be considered within that framework as it is applied to particular issues.

What I call mechanisms relate to the process by which linkages between ideology and issues are forged; what I call sources relates to why those linkages take the form they do. Values are one important source of the linkages. Of other possible sources, the two that stand out are politics and group affect.

54. *The Onion Book of Known Knowledge* (2012), 185.

At least in conceptual terms, politics is fundamentally different from values. Politics involves the adoption of issue positions with the goal of maximizing political support, in either of two senses. The first is success for the policies that people favor. The second, which follows the more conventional definition of politics, is success in winning office for themselves personally or for the political groups they favor.⁵⁵ In the scholarship on political parties in the United States, politics in the second sense is the most widely accepted explanation of party positions on issues, since party leaders have strong incentives to win elections.⁵⁶ Studies of change in the packages of policies supported by the parties emphasize this explanation: because party leaders and officeholders seek primarily to win elections, they change positions with that goal in mind. In particular, according to these studies, leaders and officeholders try to maintain the support of groups in the electorate that are important to the party coalition and to add new groups to that coalition.⁵⁷

Members of political elites who are not directly involved in political parties and the electoral process do not necessarily have these incentives. But they generally care about politics in the first sense, so they may take potential support for their agendas into account when they adopt particular policy positions.⁵⁸ Similarly, if Supreme Court

55. Of course, political considerations also affect positions on specific questions. One example is the tendency for members of Congress to vote for or against increases in the debt ceiling based on which party holds the presidency. Asher and Weisberg (1978), 406–9. Another is the growth in Republican opposition to the idea of an individual mandate to purchase health insurance and to the “Common Core” education standards after President Obama supported them. Klein (2012); Somin (2012); J. Martin (2014). Undoubtedly, affect toward the president and the president’s party reinforces politics in those situations.

56. Carmines and Stimson (1989); Karol (2009).

57. Karol (2009). Studies of change in the parties’ issue positions include Carmines and Stimson (1989), Berkman (1993), Adams (1997), Burns (1997), Gerring (1998), Wolbrecht (2000), Shoch (2001), Sanbonmatsu (2002), Fordham (2007), and Karol (2009). In contrast, Noel (2013) has made a strong case that changes in the issue positions associated with conservatism and liberalism eventually change the positions that parties take. In an era in which the parties have become more ideologically homogeneous at the elite level, the influence of ideological groups on party positions can be expected to strengthen and to occur more quickly.

58. Noel (2013), 30–31.

justices act strategically in relation to the political world outside the Court, as posited by rational choice models, one motivation is to maximize the impact of the policies they favor. That motivation may be reflected in the content of specific decisions, such as the Court's 1955 decision in *Brown v. Board of Education* on how school desegregation was to be implemented. But it seems less likely to shape the broader positions that liberal and conservative justices develop on issues that the Court addresses.

Some scholars argue that a different political consideration, the desire to maintain support for the Court as an institution, has more extensive effects on the justices' positions.⁵⁹ That argument is the primary impetus for studies of the impact of the public's overall ideological stance on the ideological content of Supreme Court decisions.⁶⁰ Even if that impact is substantial, however, it is unlikely to shape the basic ideological polarity of issues within the Court.⁶¹

Political considerations aside, most conservative and liberal justices have rooting interests in the success of the major political party whose ideological stance and issue positions better match their own. Those rooting interests may have a strategic element, because the outcomes of presidential and Senate elections affect the Court's composition. On the whole, however, they are best understood as an element of affect toward social and political groups.

Politics can have an indirect impact on the polarity of issues in the Supreme Court by shaping the shared understandings of conservative and liberal positions that develop in the larger world of political elites. Because those shared understandings affect the justices' own thinking, justices may act in part on the basis of political considerations that are not directly relevant to them. But those shared understandings do not form solely in the segments of political elites in which partisanship is central. Further, even in those segments,

59. E.g., B. Friedman (2009).

60. McGuire and Stimson (2004); Giles, Blackstone, and Vining (2008); Casillas, Enns, and Wohlfarth (2011).

61. That is especially true if the most liberal and most conservative justices are the least likely to be swayed by external influences such as public opinion. See Enns and Wohlfarth (2013).

political considerations are not necessarily dominant as sources of ideological polarity.

Most important, as I have noted, the justices do not just adopt shared understandings that develop elsewhere. They help to shape those understandings and to develop their own specifications of those understandings. Because politics as I have defined it has relatively limited relevance to the justices, its impact on their conceptions of conservative and liberal positions is more limited than that impact in some other segments of political elites.

For those reasons, the chief rival to values as a source of linkages between issues and ideology in the Supreme Court is not politics. Rather, it is affect toward social and political groups. This affect is a powerful basis for policy-relevant attitudes throughout the worlds of elite and mass politics. At the elite level, it is considerably more powerful than is generally recognized. In the next section, I consider group affect in the elite world and specifically in the Court, with special attention to its role in shaping the ideological polarity of issues.

Group Affect and Ideology

People have positive and negative feelings about the groups that are part of their world. Especially powerful is their positive affect toward groups with which they identify, those that constitute their social identity. In the classic definition, social identity is “that *part* of an individual’s self-concept which derives from his knowledge of his membership of a social group (or groups) together with the value and emotional significance attached to that membership.”⁶² People’s attitudes toward other groups can also be strong, especially if they feel a sense of competition with those groups.

People’s affect toward groups inevitably comes into play in politics.⁶³ One object of people’s thinking about policy issues is the groups in society whose well-being is affected by policy choices in some

62. Tajfel (1978), 63; emphasis in original.

63. Conover (1988); R. Jackson and Carsey (2002).

way. Thomas Nelson and Donald Kinder refer to “group-centric” opinion about policies, “shaped in powerful ways by the attitudes citizens possess toward the social groups they see as the principal beneficiaries (or victims) of the policy.”⁶⁴ This conception of group-centric opinion can encompass the material or symbolic self-interest of a person’s own social groups.⁶⁵ A second object of group-oriented thinking is the political groups that advocate positions on the two sides of an issue, including political parties and liberals and conservatives. Affect toward social groups is connected with affect toward political groups, in that attitudes toward social groups shape people’s self-identifications with political groups.⁶⁶

In the scholarship on public opinion, group affect is generally portrayed as an alternative to ideology rather than an element of ideology. For the large portion of the mass public that is relatively unsophisticated about politics, ideology is thought to play a minimal role in shaping political choices.⁶⁷ Further, some of this scholarship suggests that the most common alternative to ideology is thinking in terms of groups in society. For instance, the classic study *The American Voter* found that many people evaluated political parties and presidential candidates on the basis of “group benefits,” which were contrasted with ideology as a basis for choice.⁶⁸

There is considerable evidence that political opinion in the general public does have a large group-centric component. Americans typically hold strong attitudes toward some social groups. Most people also have strong affect toward political groups, especially the Republican and Democratic parties.⁶⁹ Personal identification with particular groups and likes or dislikes for other groups affect other political attitudes in powerful ways.⁷⁰

64. Nelson and Kinder (1996), 1055–56.

65. See Noel (2013), 44–45.

66. Green, Palmquist, and Schickler (2002), 10.

67. Converse (1964); Levitin and Miller (1979); Lewis-Beck et al. (2008), 279; but see Peffley and Hurwitz (1985); Sniderman, Brody, and Tetlock (1991), 140–63.

68. Angus Campbell et al. (1960), 249.

69. Iyengar, Sood, and Lelkes (2012); Iyengar and Westwood (2015).

70. Conover (1988); Wlezien and Miller (1997); Zinni, Rohdebeck, and Mattei (1997).

Group-centric opinion extends to the positions that people take on policy issues.⁷¹ “Citizens tend to support policies perceived to benefit groups they like and oppose policies perceived to benefit groups they dislike.”⁷² Moreover, one reason that Democrats in the mass public adopt different issue positions from Republicans is because positive and negative affect toward the parties causes people to gravitate toward positions that they associate with one party and away from positions identified with the other party.⁷³ This process is consistent with what we know more generally about the influence of people’s identifications with groups and affect toward other groups on their attitudes.⁷⁴

If group-centric thinking is simply a substitute for ideological thinking, then it is irrelevant to political elites who do think in ideological terms. Yet the two types of thinking are compatible. Indeed, affect toward social and political groups can shape ideological thinking in at least two ways. First, people may choose ideological identifications on the basis of their attitudes toward the groups they associate with liberalism and conservatism, groups that are either beneficiaries of liberal and conservative policies or adherents to the ideological camps.⁷⁵ Second, the issue positions that are identified as conservative or liberal, identifications that make them attractive to people who think of themselves as conservative or liberal, may reflect the attitudes toward social and political groups that predominate in each ideological camp.

All this would make no difference for the behavior of political elites if people who are politically sophisticated and who think in ideological terms did not feel affect toward social and political groups. But they do. Positive and negative references to social groups are a common feature of elite political discourse, and of

71. Conover (1984); Conover and Feldman (1984).

72. Grant and Rudolph (2003), 456; see Kerlinger (1984), 44, 132.

73. Cohen (2003); Slothuus and de Vreese (2010); Druckman, Peterson, and Slothuus (2013).

74. Prislín and Wood (2005); Hogg and Smith (2007).

75. Sniderman and Tetlock (1986); Zschornt (2011); see Sullivan, Piereson, and Marcus (1982), 70–76.

course such references to political groups are a staple of that discourse. These attitudes toward groups inevitably shape positions on public policy issues.⁷⁶

Moreover, these attitudes are intertwined with ideology. There is evidence that polarized affect toward conservatives and liberals increases with education and that more intense affect produces greater consistency between ideological self-identifications and positions on issues.⁷⁷ The association between ideological stances and affect toward political groups is quite strong among segments of political elites such as delegates to national party conventions.⁷⁸ And one study found a degree of constraint in the evaluations of social and political groups by convention delegates that was even greater than the constraint in their positions on policy issues.⁷⁹ Partisan sorting and the growth in affective polarization⁸⁰—hostility between ideological and partisan groups—undoubtedly have made these tendencies even stronger.

Group affect could play a substantial part in the process of developing shared understandings about the ideological content of issues. Like values, attitudes toward social groups can serve as general premises that shape those shared understandings. In the mass public, to take one example, affect toward higher-status and lower-status groups differs substantially between people who identify themselves as conservatives and people who identify as liberals.⁸¹ In light of the evidence of constraint in group affect among people who are sophisticated about politics and policy, it seems likely that such attitudes serve as premises for issue positions. Indeed, the central themes of

76. Some suggestive evidence is provided by one study's finding that attitudes about race have a stronger impact on attitudes toward public welfare policy among people with college educations than among those with less education, a finding that the author attributed to an "improved ability to connect predispositions with policy attitudes." Federico (2004), 387.

77. Sniderman, Brody, and Tetlock (1991), 140–63.

78. Zinni, Mattei, and Rhodebeck (1997); Devine (2011), 99–164.

79. Jennings (1992), 426–27; see McClosky, Hoffmann, and O'Hara (1960), 415–17; McClosky (1964), 372–73.

80. Iyengar, Sood, and Lelkes (2012).

81. Nosek, Banaji, and Jost (2009).

conservatism and liberalism since the New Deal era may be more deeply rooted in efforts to serve different segments of society than in abstract values such as equality.⁸² David Karol observed that “it seems more apt to say politicians are consistent in their views of ‘who’ is good and deserving of help than ‘what’ is good in terms of policy and principles of governmental action.”⁸³

Indeed, affect toward groups may serve as a more comprehensive basis for deducing issue positions than do values, because the likely beneficiaries of alternative policies are relatively easy to identify across a broad range of issues. Still, there will be issues, especially new issues, on which elites are uncertain about who those beneficiaries are. On these issues, affect toward political groups that take positions on an issue helps people to sort out their own positions. Early on, support for nuclear power was not labeled as a liberal or conservative position. In developing opinions on the issue, according to one study, knowledgeable people did not rely on cues from reference groups to the degree that other citizens did. But their attitudes toward groups on the two sides of the issue shaped their perceptions of where they should stand on the issue as liberals or conservatives.⁸⁴

As an explanation of linkages between issues and ideology, group affect is not entirely distinct from either values or politics. On the value side, to take one key example, attitudes toward equality may be closely tied to attitudes toward upper-status and lower-status groups in society. For people who participate in electoral politics, positive and negative affect toward political groups on the two sides of the ideological divide may reinforce political incentives. The possible intermixing of sources must be taken into account in any inquiry into issues and ideology.

Group affect is highly relevant to the Supreme Court as a potential source of ideological polarity. This would be true even if justices themselves had no affect toward political and social groups other than self-identification as conservative or liberal. In that situation,

82. See Piper (1997), 391–93.

83. Karol (2009), 47.

84. Kuklinski, Metlay, and Kay (1982), 633–34.

the affect of other political elites could influence them by shaping shared understandings of which issue positions are appropriate for conservatives or liberals to adopt.

In reality, justices certainly do feel affect toward political and social groups. As is true of other people, their socialization and experiences lead them to identify with certain groups and to develop positive or negative feelings about other groups. In the current period some of the justices talk about themselves in public a good deal, so evidence about their social identities and their evaluations of groups in society is fairly abundant. The memoirs by Clarence Thomas and Sonia Sotomayor, to take two examples, underline the importance of certain groups to their social identities.⁸⁵ The frequent interactions of some justices with political and ideological groups such as the Federalist Society indicate their positive feelings toward those groups.⁸⁶ Harry Blackmun's movement to the left during his career on the Court appeared to stem in part from his growing identification with liberal political groups.⁸⁷

At least two justices in the current era have communicated their negative feelings about certain political groups. Justice Antonin Scalia's dissents from the Court's decisions relating to sexual orientation expressed disdain for "the elite class from which the Members of this institution are selected"—by which he meant the liberal segment of that class.⁸⁸ Justice Thomas has made his antipathy for political liberals clear,⁸⁹ and one year after his 1991 appointment to the Court one of his law clerks reported that Thomas had explained why he would retire in 2034: "The liberals made my life miserable for 43 years, and I'm going to make their lives miserable for 43 years."⁹⁰

The examples of Scalia and Thomas are consistent with the possibility that growth in ideological polarization among political elites

85. Thomas (2007); Sotomayor (2013).

86. Baum (2006), 118–26.

87. Greenhouse (2005).

88. *Romer v. Evans* (1996), 636; see *Romer*, 652–53; *Lawrence v. Texas* (2003), 602–4; *Obergefell v. Hodges* (2015), 658.

89. Baum (2006), 132–35.

90. Lewis (1993).

has given justices stronger positive and negative feelings toward liberals and conservatives than had been true in earlier eras. On the other hand, the sets of justices who were selected prior to the 1970s had considerably more experience in political careers than those who have been chosen since then. The substantial service of many of those earlier justices in elective office or the federal executive branch undoubtedly fostered strong affect toward political groups in its own way.

Justices' attitudes toward political and social groups can affect their votes and opinions in specific ways that are not systematically connected with ideology. One example is the Court's decision in *Wisconsin v. Yoder*, holding that application of a mandatory school attendance law to Amish students violated the free exercise clause of the First Amendment.⁹¹ That decision may have been influenced by the admiration of some justices for the Amish, admiration that comes across clearly in Chief Justice Warren Burger's opinion for the Court. And the negative attitudes toward the news media that were held by Burger and by Justice Byron White may have shaped their responses to cases involving the press.⁹²

The question to be considered is the extent to which the group affect of justices and other elites has a more systematic impact along ideological lines, so that it helps to establish the Court's ideological polarity on particular issues. Scholars who analyze Supreme Court decision making in ideological terms have said little about the possible role of group affect in linking ideology with issues. One reason may be a tendency to take these linkages as givens rather than investigating their sources. But the primary reason is probably an implicit belief that these linkages come through the application of broad values to issues, a belief that precludes a search for other possible sources of the linkages.

Much of the quantitative scholarship on decision making in the Supreme Court and in other courts in the United States does consider the impact of litigants' attributes on case outcomes, either as its

91. *Wisconsin v. Yoder* (1972).

92. Journalist Tony Mauro (1998, 219) referred to Burger's "disdain" for journalists. Hutchinson (1998, 4–5) discussed White's attitudes. Mauro did note that Burger's positions in cases involving freedom of the press were generally favorable to the news media.

central concern or as a control in analyses that are focused on other concerns. There is a substantial body of research on the solicitor general as a representative of the federal executive branch in Supreme Court cases and on the success of different types of parties (such as individuals, businesses, and governments) in appellate courts. But this research is concerned chiefly with the capability of parties to make effective cases in court and seldom encompasses judges' affect toward groups.⁹³

In the quantitative scholarship, the work that comes closest to focusing on group affect is probably the research by Harold Spaeth and his collaborators that utilized psychologist Milton Rokeach's distinction between attitudes toward objects and attitudes toward situations.⁹⁴ As operationalized by Rohde and Spaeth in their classic study of Supreme Court decision making, objects include the social groups to which litigants belong as well as their roles in cases (the most common type of object) and aspects of cases unrelated to the litigants.⁹⁵ The inclusion of social groups in this attitude category calls attention to the possibility that the attributes of litigants and other beneficiaries of particular policies shape the justices' responses to cases, and there is some evidence of that shaping in the studies by Spaeth and his collaborators of the impact of attitudes toward objects and toward situations.⁹⁶

Group affect is implicated more directly by scholarship on the impact of criminal defendants' personal attributes, especially race, on sentencing by trial judges.⁹⁷ Findings that such attributes affect

93. The research that focuses on party capability derives in part from Marc Galanter's (1974) essay on the success of "haves" and "have-nots" in court. Examples include Wanner (1975); Wheeler et al. (1987); Sheehan, Mishler, and Songer (1992); Kritzer (2003); Songer, Sheehan, and Haire (2003); and Szmer, Songer, and Bowie (2016). Research that focuses on the success of the federal government as a party in the Supreme Court includes McGuire (1998); Pacelle (2003); Bailey, Kamoie, and Maltzman (2005); and Black and Owens (2012).

94. Rokeach (1968), 118, 134–38.

95. Rohde and Spaeth (1976), 161–67.

96. Spaeth and Parker (1969); Spaeth et al. (1972). These studies did find that situations had a more powerful impact on justices' positions than did objects.

97. Clarke and Koch (1976); Spohn and Holleran (2000); Kansal (2005); Steffensmeier and Demuth (2006); Light (2014).

sentencing decisions can be understood as showing primarily the impact of judges' affect toward social groups. Some studies go an important step further, analyzing the relationship between judges' own social attributes, such as race, and the attributes of defendants as a factor in sentencing decisions.⁹⁸ Research on the impact of judges' gender and race on their responses to issues that directly relate to women and members of racial minority groups also implicates judges' group affect, though judges' group membership may affect their relevant values as well.⁹⁹

Another vantage point on group affect, specifically in the Supreme Court, was presented in two brief but important discussions by Martin Shapiro.¹⁰⁰ Shapiro argued that in the decades after the Court gained a pro-New Deal majority, its policies reflected a clientele relationship with New Deal constituencies such as union members and African Americans. The famous footnote 4 of *United States v. Carolene Products* articulated a rationale for the Court's use of judicial review on behalf of a new set of beneficiaries, transferring the Court's "patronage from a Republican to a Democratic clientele."¹⁰¹

Based on Shapiro's interpretation, the Court's positions on issues such as free expression, labor relations, and racial discrimination in that period could be understood as a product of some justices' positive affect toward social groups with a stake in those issues. Shapiro argued that these justices could have limited the Court's role as a policy maker by adhering to the judicial restraint that liberals had advocated before and during the early New Deal years. But some Franklin Roosevelt appointees chose to use judicial review to serve social groups they favored, perhaps consciously.

The collective sympathy of the justices for the African American community in the mid-twentieth century affected their decisions on an array of issues. For instance, in criminal prosecutions stemming from civil rights protests, the Court collectively did all it could

98. Welch, Combs, and Gruhl (1988); Steffensmeier and Britt (2001); Morin (2014).

99. Peresie (2005); Boyd, Epstein, and Martin (2010); Scheurer (2012); Kastellec (2013).

100. M. Shapiro (1978), 188–94; M. Shapiro (1979), 114–17.

101. *United States v. Carolene Products Co.* (1938); M. Shapiro (1978), 190–91.

to overturn protesters' convictions, resting its decisions on narrow grounds in order to avoid establishing broader doctrines that justices were loath to apply to other circumstances.¹⁰² To take another example, the Court dramatically expanded the scope of state action under the Fourteenth Amendment in *Shelley v. Kraemer*, a case involving racial restrictive covenants.¹⁰³ That step, which the Court implicitly stepped back from later on, was almost inconceivable except in the context of racial discrimination.

There was a substantial ideological element to these clientele relationships. The Court's support for the African American community extended across the whole ideological spectrum, but it was strongest among the Court's liberals. Support for the interests of some other constituencies such as labor unions was even more concentrated among the Court's liberals. Today, the business community might be viewed as a clientele of the Roberts Court, in that its success in the Court extends to a broad range of issues.¹⁰⁴ That support for the business community is strongest among the Court's conservative members.

Scholars with an historical institutionalist perspective have linked group affect to the ideological polarity of issues in the Court more directly. Ken Kersch analyzed how liberals on the Court and elsewhere addressed conflicts between the interests of two New Deal constituencies, labor unions and African Americans.¹⁰⁵ Kersch and David Rabban have pointed to the impact of changes in the perceived beneficiaries of certain issues on the Court's ideological polarity on those issues. Kersch sketched a shifting polarity in the Court's decisions about the rights of criminal defendants in response to changing perceptions of who benefited from those rights.¹⁰⁶ Rabban discussed how the growth of free expression claims from the political right affected the views of people on the left about the First Amendment.¹⁰⁷

102. Grossman (1969); Tushnet (2006), 121–22.

103. *Shelley v. Kraemer* (1948).

104. L. Epstein, Landes, and Posner (2013b).

105. Kersch (2004), 188–234; Kersch (2006).

106. Kersch (2004), ch. 2.

107. Rabban (1997), 381–92.

In conjunction with the other bodies of scholarship that I have discussed, what we have learned about the Supreme Court suggests that affect toward social and political groups can come into play at three levels. At the broadest level, the justices' ideological self-identifications may reflect their affect toward the groups that they associate with conservatism and liberalism. Second, affect toward advocates and prospective beneficiaries of alternative policies may help define the positions of justices on the issues they address. This process can occur both directly, based on the justices' own group affect, and indirectly, through the role of group affect in the development of shared understandings in the world of political elites. At the third and most specific level, the justices' responses to individual cases may be shaped by their attitudes toward the specific litigants in those cases, the advocates for those litigants, and the perceived broader beneficiaries of prospective decisions.

I will leave aside the potential impact of group affect on the justices' ideological self-identifications, powerful as that impact may be. My primary concern is at the level of issue positions. But the case level is important as well. For one thing, the justices' experiences with specific cases may shape their issue positions, especially if they had not developed a position on a particular issue prior to their service on the Court. As they learn about the litigants and advocates on that issue, their affect toward those groups may lead them to adopt or modify an overall position on the issue. Further, the justices' affect toward the participants in specific cases may serve as a powerful filter between their general issue positions and their responses to those cases. In turn, the issue positions that we perceive and measure may actually be a product of quite different responses to cases with different kinds of litigants.

There are also occasional cases for which the justices' issue positions are essentially irrelevant. The justices had little reason to develop positions that would apply to the question of how vote recounts should be conducted before they encountered *Bush v. Gore*. And before they faced *Department of Commerce v. U.S. House of Representatives* a year earlier, they had no reason to develop issue positions that encompassed the question of whether sampling

techniques can be used in the federal census.¹⁰⁸ In that void, it is not surprising that the justices' affect toward the contending political groups structured their responses to the cases: the justices divided along the same ideological lines in the census decision as they did a year later in *Bush v. Gore*.¹⁰⁹

I have referred to the justices' affect toward advocates alongside their affect toward prospective beneficiaries of the Court's policies, and I should say more about the roles of advocates in linking ideology to issue positions and specific decisions. Most directly, justices' positive or negative attitudes toward groups such as the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), or the U.S. Chamber of Commerce may shape their reactions to issues and cases in which those groups participate. It is not obvious which groups in society benefit from the competing positions on government regulation of firearms, and indeed perceptions of those beneficiaries have changed over time.¹¹⁰ In that situation, attitudes toward gun policy in the Court and in the larger world of political elites are shaped by the lineups of political groups on the two sides of the issue at a given time. And just as sponsors of litigation seek out litigants who might attract justices' sympathies, they may also seek amicus support from groups that justices view favorably. One widely noticed example is the briefs from businesses and retired military officers in the University of Michigan affirmative action cases, briefs designed to appeal to the Court's moderate conservatives.¹¹¹

The identities of the advocates for the two sides in a case can also help inform the justices about the prospective beneficiaries of their decisions. If any justice was initially unaware of the stakes in the 1999 census case for the litigants and other groups, the signers of the

108. *Department of Commerce v. U.S. House of Representatives* (1999).

109. Cases involving election law often fall into this "no-issue" category, and some lower-court studies have found patterns of partisan voting in those cases as well as election cases that do implicate judges' issue positions to a degree. Lloyd (1995); McKenzie (2012); Kopko (2015); Kang and Shepherd (2016); but see Kopko (2008).

110. *McDonald v. City of Chicago* (2010), 770–80, 843–50; Winkler (2011), 230–53.

111. *Gratz v. Bollinger* (2003); *Grutter v. Bollinger* (2003).

amicus briefs on the two sides would have made those stakes clear. In *Coker v. Georgia*, the question was whether the death penalty was allowable as a penalty for sexual assault of an adult.¹¹² A justice who was sympathetic to feminist groups might have assumed that upholding the death penalty would support those groups' advocacy of stronger enforcement of laws against sexual assault. But an amicus brief from the ACLU and several women's groups opposed imposition of the death penalty for sexual assault—partly on the ground that a possible death sentence for that offense made it more difficult to secure convictions. That brief probably helps to explain the votes for Coker by four justices who had voted to uphold the death penalty for murder a year earlier, but whose positions in other cases indicated their support for gender equality.¹¹³

Both as sources of information about beneficiaries and as objects of affect in themselves, then, advocates for competing positions may be important in shaping the justices' perceptions of individual cases and of the issues under which those cases fall. Thus an inquiry into the sources of linkages between ideology and issues needs to take advocates into account.

An Analytic Approach

The conception of shared understandings that I presented in this chapter is a background assumption for the book's empirical inquiries, though I give attention to the question of how much those understandings are shaped by general premises. The more important question is the relative importance of values and affect as sources of the linkages between ideology and issue positions in the Supreme Court.

In the inquiries presented in the next three chapters, the approach I take is to analyze changes over time in the linkages between issues and ideology. The polarity of the justices' voting on an issue can be understood as taking any of three states. In antitrust law, for

112. *Coker v. Georgia* (1977).

113. *Gregg v. Georgia* (1976). Those justices were Byron White, Potter Stewart, Harry Blackmun, and John Paul Stevens.

instance, most cases involve plaintiffs who seek enforcement of the laws against businesses. One possibility is that the justices who vote for plaintiffs in non-unanimous decisions are regularly more liberal (as defined by their overall voting records across issues) than the pro-defendant justices in the great majority of cases. Alternatively, pro-plaintiff justices might regularly be more conservative than justices on the other side, or there might be no clear tendency in either direction. Changes in the linkage between ideology and a particular issue involve movement from one state to another.

Of course, this trichotomy oversimplifies reality. For one thing, no matter how strong the ideological polarity of an issue, there are almost always some cases in which the justices divide along non-ideological lines.¹¹⁴ There are also occasional cases in which the lineup of justices is more or less the opposite of the usual polarity on an issue. Still, the trichotomy provides a good framework for identification of the changes in polarity that occur on some issues.

I focus on changes in ideological polarity because changes provide a very good window on the bases for linkages between issues and ideology. When the polarity of an issue shifts, the conditions that are associated with that shift can be traced. Identification of those conditions provides an understanding of the sources of linkages more generally. Some care is needed in generalizing from issues on which polarity has changed, since those issues are not necessarily representative of all issues that the Court addresses. In part for this reason, I analyze several other issues in less detail in chapter 5.

The expectations that follow from the two alternative sources of ideological polarity on which I focus can be illustrated with antitrust law. Antitrust fits reasonably well into the economic value that Stanley Feldman and others have described, in that support for strong enforcement of antitrust laws is widely perceived as a means to advance equality, while more lenient enforcement gives weight to outcomes that result from an unregulated market. Indeed, when justices divide in antitrust cases, there is a strong tendency for

114. Edelman, Klein, and Lindquist (2008, 2012).

justices who favor the plaintiff to be more liberal than justices who favor the defendant.¹¹⁵

Suppose, however, that at some time in the future this polarity disappears, so that conservative and liberal justices favor antitrust plaintiffs at about the same rate. If that development reflects values, then we should see evidence of a change in thinking about the relationship between antitrust policy and conservative and liberal values. For instance, work by economists demonstrating that strong enforcement of antitrust laws actually undermines economic equality might circulate among political elites and change liberals' understanding of the issue.

In contrast, if such a change in the polarity of antitrust reflects group affect, we should see evidence of change in the identities of the advocates for competing positions, the perceived beneficiaries of those positions, or both. In contrast with the historical pattern, for instance, a pattern might arise in which a high proportion of antitrust suits were filed by large corporations against smaller enterprises. To take another possibility, the Republican Party and interest groups associated with the party might become as favorable to antitrust enforcement as the Democratic coalition.

In reality, both the relevant evidence on a change in polarity and its best interpretation are likely to be ambiguous. Changes in the perceived relationship between an issue and a broad ideological value often can be expected to occur alongside changes in the identities of advocates for competing positions and the perceived beneficiaries of alternative policies. In that situation, the causal ordering of values and group affect and their relative importance will not necessarily be clear. On issues relating to equality, there is an additional complication: it can be difficult to distinguish between attitudes toward equality as an abstract value and affect toward high-status and low-status segments of society.

Still, even in such ambiguous situations the evidence can be probed for its implications. One important source of hints is the extent and form of variation in polarity among cases on an issue during

115. That tendency is documented in chapter 5.

a particular period. For instance, do justices seem to differentiate among cases based on the identities of the litigants, the interests they represent, or the advocates for the two sides? To the extent they do so, that differentiation provides evidence of the impact of justices' affect toward groups. Other kinds of evidence such as the temporal orderings of relevant developments may be relevant as well. Still, it may be that on some issues a close probe into the evidence does not dispel uncertainty about the relative importance of values and affect, and for those issues it will be necessary to accept a non-definitive result. Of course, such a result itself is informative on the sources of linkages between ideology and issues.

In choosing issues to analyze, I started by setting aside structural issues, those that involve the distribution of power between the federal and state governments and among the three branches of the federal government. Those issues are sometimes characterized in ideological terms,¹¹⁶ but public policy makers respond to structural issues largely—if not primarily—in terms of their attitudes toward other, substantive issues.¹¹⁷

Certainly this is true of Supreme Court justices. Although liberal justices favor the federal government on federalism questions more than conservatives, for instance, the positions of both conservatives and liberals are largely determined by their attitudes toward the substantive issues that underlie particular disputes between the federal and state governments.¹¹⁸ To take one example, conservative justices tend to support the federal government more than liberals in decisions about whether federal law preempts state policies that benefit workers or consumers.¹¹⁹ Because of this complication, structural issues are not very useful for my inquiry.

116. The Supreme Court Database treats support for the federal government and for the executive branch as liberal positions (<http://scdb.wustl.edu/documentation.php?var=decisionDirection>).

117. Piper (1997).

118. Baybeck and Lowry (2000); Parker (2011).

119. Examples from recent years include *Cuomo v. The Clearing House Association* (2009); *Wyeth v. Levine* (2009); *AT&T Mobility LLC v. Concepcion* (2011); and *Pliva v. Mensing* (2011). Greve and Klick (2006) discuss justices' responses to preemption cases as a whole.

Possible substantive issues to analyze were selected on the basis of evidence that the ideological polarity of the justices' positions on an issue might have changed over time. Freedom of expression was an easy choice, because observers of the Court have pointed to a shift in the polarity of the Court's decisions on that issue over the past few decades.¹²⁰ I did find a very substantial shift: what had been a strong tendency for liberal justices to give disproportionate support to free expression claims has given way to a mixed relationship between the justices' ideological stances and their support for freedom of expression.

Criminal law and procedure is a less obvious issue to analyze, because there is a widespread perception that the current liberal-conservative divide on the Court and in other arenas is firmly grounded in the premises of conservative and liberal ideology. But historical evidence suggested that this divide did not always exist.¹²¹ Indeed, there was a shift in the Court's ideological polarity in criminal justice during the first half of the twentieth century, from a mixed pattern to the clear ideological division that has become prevalent. The fact that ideological lines we take for granted have not always existed makes this an interesting issue to examine.

Interpretation of the takings clause of the Fifth Amendment is a somewhat narrower issue than the other two. It is also relatively obscure. I explored this issue because I was intrigued by the liberal-conservative division on the Court in *Kelo v. City of New London*, the most visible and controversial takings case in several decades.¹²² That division was not an especially good reason to suspect that the ideological polarity of the issue changed over time. However, I learned that there have been two periods of change in the ideological polarity of the issue, and the changes (running in opposite directions) are noteworthy. Because the Court decides a relatively small number of takings cases, this issue requires a closer examination of individual

120. E.g., Balkin (1993); Volokh (2001); L. Epstein and Segal (2006); L. Epstein, Parker, and Segal (2013).

121. Kersch (2004), ch. 2.

122. *Kelo v. City of New London* (2005).

decisions than do free expression and criminal justice, and that difference in approach has some analytic value in itself.

Undoubtedly, there are other issues on which there has been substantial change over time in the ideological polarity of the justices' positions. But these three issues provide a good basis for consideration of the sources of such changes. I summarize the methodology for the studies of these issues here. The appendix provides more detail on the identification of cases to analyze for each issue, coding of justices' votes, measurement of ideological polarity, and gathering of information on amicus curiae participation and certiorari petitions.¹²³

Each case study covered the 1910 through 2012 Terms of the Court. That time period was long enough to encompass the changes in polarity that occurred on the three issues. It also coincided with the availability of suitable measures of the justices' ideological positions relative to each other. For freedom of expression, the change in polarity came quite late in that century-long period, so the case study of that issue gives only limited attention to the period prior to 1946. Analyses of the other two issues take full account of the whole study period.

The first task in each case study was to ascertain the change or changes in ideological polarity that occurred on the issue. My approach was to compare the lineups of justices in non-unanimous decisions on an issue with the general ideological stances of the justices relative to each other across all issues. For the 1937–2012 Terms, justices' ideological stances were measured by the Martin-Quinn ideological scores, and the ideological stances of the sets of justices on the two sides in a case were computed as the median of the Martin-Quinn scores of each set of justices.¹²⁴ For the 1910–36 Terms, other ideological scores were used in an analogous way.¹²⁵ Each decision on an issue could then be classified according to whether the justices

123. The last section of the appendix discusses why tests of statistical significance are not presented in the book's case studies, a choice that is somewhat unusual.

124. On the scores, see Martin and Quinn (2002). The appendix discusses how the attributes of those scores relate to their use in this study.

125. Snyder (1958), 235; Leavitt (1970), 146, 186.

who took a particular side—such as voting in favor of a criminal defendant—were more liberal or more conservative than the justices on the other side. The magnitude of the ideological differences between the two sides could be determined and classified as well.¹²⁶ The Court's overall polarity on an issue for a particular time period was characterized on the basis of all the non-unanimous decisions during that period. In turn, changes in polarity over time could be identified and their timing ascertained.

This approach serves the purposes of my inquiry, whether the justices' voting behavior is conceived as falling along a single ideological dimension or along multiple dimensions. Even if the justices' ideological stances across all cases were simply averages of quite different lineups on different issues, those stances would still provide a meaningful reference point. The reality is that there is considerable ideological constraint among the justices' positions on different issues. For instance, even in an era in which some Roosevelt and Truman appointees had distinctly more liberal positions on economic issues than on civil liberties issues, there was a correlation of .75 between justices' scale scores on those two dimensions in Schubert's analysis¹²⁷ and correlations ranging from .75 to .83 between scale scores on Rohde and Spaeth's three issue dimensions.¹²⁸ To the extent that the justices' relative positions on more specific issues or subsets of issues deviate from the overall ideological spectrum on the Court, that deviation can provide insights into the forging of linkages between issues and ideology.

Although the use of votes as indicators of the justices' positions on an issue is standard procedure, it merits consideration. The doctrinal positions presented in opinions are generally more important for public policy than the outcomes on which justices vote. Analysis of votes rather than doctrinal positions in research on judicial behavior results in large part from the difficulty of measuring

126. For reasons that are discussed in the appendix, I analyzed the justices' votes on the outcomes of cases for the litigants in freedom of expression and criminal justice but used their votes specifically on the takings claim in takings cases.

127. Schubert (1965), 125, 145.

128. Rohde and Spaeth (1976), 143.

doctrinal positions in opinions.¹²⁹ However, there are reasons other than convenience in data gathering to focus on votes, and one reason is especially relevant to the inquiries in this book. Justices do care about case outcomes, often a great deal, and they may have rooting interests in those outcomes that are based on their affect toward the litigants and other participants in specific cases. Thus analysis of justices' votes facilitates inquiry into the sources of linkages between issues and ideology.

After identifying the form and timing of a change in polarity on an issue, I probe how and why it came about in several stages. The first stage focuses on the world of political elites as a whole, examining developments that occurred in that world. The initial question is whether there was a change in the ideological polarity of the issue among elites that preceded or paralleled the change that occurred in the Court. If such a change occurred, the task is to trace how and why it occurred. These questions are addressed with information from an array of primary and secondary sources, such as reports in the news media and writings by advocates on the issue.

The second stage concerns the cases that the Court decided on an issue: the kinds of questions that it addressed, the identities of the litigants and (where relevant) attorneys on the two sides, and the identities of the groups that participated as amici. The kinds of questions that the Court addressed provide information relevant to the impact of both values and group affect on the justices, and the identities of participants in cases provide information relevant to group affect. These analyses of cases draw primarily on briefs and opinions in the Court. I am also interested in the kinds of cases that were brought to the Court, and analysis of these cases is based on summaries of petitions for certiorari.

The third and most extensive stage of the analyses concerns the justices' responses to the cases they heard on an issue. To what extent were changes in case attributes associated with a change in the ideological polarity of the issue? To the extent that polarity in one

129. See Clark and Lauderdale (2010).

period varied among cases, what do the attributes associated with that variation suggest about the sources of the divisions between liberal and conservative justices? I also analyze the justices' responses to cases in a more conventional way, examining patterns in the voting behavior of individual justices in different periods and across different kinds of cases.

In each chapter I assess the evidence for what it indicates about the sources of the change or changes in polarity that occurred on an issue. In chapter 5, I present evidence about other issues more briefly to build a broader picture of how and why linkages between issues and ideology are forged.

It is important to keep in mind that ideological polarity is only one facet of decision making in the Court. By definition, a study of polarity focuses on decisions in which justices disagree with each other. As a result, it leaves aside the cases in which the justices agree on the appropriate outcome for the litigants—a substantial minority of decisions in the period since the 1940s, a distinct majority prior to that time. The book's analyses do make use of information on the Court's full sets of decisions on an issue, especially when they consider the content of the Court's agenda and the voting behavior of individual justices.

Still, the focus is on the positions of justices relative to each other rather than their positions in themselves. Thus it should be kept in mind that, to take one example, justices who are distinctly more favorable to free expression claims than their colleagues in general or in a particular class of cases are not necessarily taking a strongly pro-expression position in absolute terms. More broadly, a focus on disagreements among the justices—and the ideological element in those disagreements—provides only a partial picture of decision making in the Court.

An inquiry into polarity does get to the heart of the ideological dimension in decision making that is a fundamental part of Supreme Court decision making. What we can learn about the relationships between justices' ideological stances and their positions on issues and responses to individual cases can add much to our understanding of the justices' choices as decision makers.

And because the functioning of ideology in the Supreme Court is intertwined with its functioning in the world of elite politics as a whole, the lessons of an inquiry into polarity in the Court can inform our understanding of other institutions as well. Those are the aims of the book.