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The Emergence of a New Ideology: the Business Decisions of the Burger Court

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Unlike the Vinson and Warren Courts, efforts to cumulatively scale the business decisions of the Burger Court on the basis of the justices' responses toward economic liberalism have proven unsuccessful. Several reasons are advanced for this change including the Court's attitude toward transfers of power between state government, federal government, and individual business entities; the exercise of agency or judicial power; and two-case characteristics. Through the use of probit, we find that distinct patterns exist among the independent variables in relation to the direction of the Court's decision. Based on the explanatory power of our model, it is evident that a new ideology has emerged: "instrumental libertarianism," in which the Court effectuates its libertarianism through the exercise of judicial power, agency action, and considerations of federalism.

Schubert (1962, 1965), Spaeth (1963), and Rohde and Spaeth (1976) successfully constructed cumulative scales of the business decisions of the Warren and early Burger Courts in which the value of economic liberalism putatively explained the justices' votes. Dudley and Ducat (1986) were unsuccessful in their effort to replicate and update this earlier work, however. In an attempt to explain the lack of scalability, Ducat and Dudley (1987) factor analyzed three consecutive terms from the earlier (1972–1974) and later (1981–1983) Burger Court. They found that although the justices' attitudes toward business explain some of their voting, deference to administrative agency discretion and considerations of federalism are also important factors.

Because highly reliable data for the entire Burger Court are now available, some of the data for this research were drawn from the U.S. Supreme Court Judicial Data Base, Harold J. Spaeth, principal investigator, a project funded by the Law and Social Science Program of the NSF, SES-8313773. Jeffrey A. Segal of the State University of New York at Stony Brook perceptively critiqued this work from genesis to completion.

An earlier report of this research was presented at the annual meeting of the Midwest Political Science Association, April 13–15, 1989, Chicago.

1 Speaking in reference to the E-scale, of which the B-scale is a subset, Schubert says "[t]he basic value that permeates the issues of economic liberalism is that of favoring claims of underprivileged economic interests as against those of affluence and monopoly power" (1962, 100).
in Spaeth's United States Supreme Court Judicial Data Base, we undertake a systematic analysis of all the Burger Court's business decisions. If, in fact, the ideological construct of economic liberalism no longer characterizes the Court's decisions, it is important to know what does.

Our universe includes all of the Burger Court's orally argued decisions that pertain to the issue areas that constituted the so-called "B," or business, scale (Schubert 1962, Spaeth 1963). These include all antitrust, bankruptcy, intellectual property, consumer protection, environmental, securities, transportation, communication, power, and energy cases involving business; those construing ERISA, FLSA, and OSHA; state business regulation and taxation cases; the regulation of business by federal agency action; tort actions, excluding those alleging violation of civil rights; nonattorney commercial speech litigation; federal preemption of state action; national supremacy matters pertaining to business; and various kinds of miscellaneous business regulation, state as well as federal. Because the "B" scale does not include Internal Revenue Code cases, they are excluded. Given the foregoing economic focus, we include the takings clause cases in the data set for purposes of completeness even though they concern an aspect of due process of law.

We identify these cases from the list of issues contained in Spaeth's data base. We use case citation rather than docket number as the unit of analysis except for Bowsher v. Merck & Co., 460 U.S. 824 (1983). We counted this case twice because several justices voted differently on one of the docket numbers from their votes on the others. Because multiple docket numbers abound in cases involving administrative agencies, we opt for case citation to preclude their unduly dominating the data set. These decision rules produce a data set with 481 cases.

PROCEDURE

Although earlier examinations of the Court's business decisions focused on the justices' votes, we choose to focus on case outcomes for two primary reasons. First, our examination of the justices' behavior confirms Dudley and Ducat's (1986) finding that the cases do not form acceptable scales. Only six of 23 narrowly based issue areas comprising 12.7% of the cases (61 of 481) did so. Clearly then, considerations other than economic liberalism explain the other 87% of these decisions. Second, as noted by Epstein, Walker, and Dixon, the voting behavior of the justices is certainly of interest, but "from the perspective of the nation's governmental and social systems, the decision of the Court is of greater practical consequence than is the particular voting array of the individual justices who produced that result" (1989, 826).

For these reasons, we deem it appropriate to attempt to devise a model of the Court's decisions, even though we recognize that the Court's decisions are only the aggregate of the votes of the participating justices. If the justices
marched to the beat of a common ideological drum—though in different tangents and directions—as they do in civil liberties (Spaeth and Peterson 1971; Spaeth 1990), a model of the Court's behavior would be redundant. But because the business decisions no longer scale, that is not the situation here. Our focus on the Court means that we leave to another day the task of creating models of the behavior of the individual justices. Once a reasonably explanatory model of the Court's behavior has been created, then it will be appropriate to consider (a) whether and to what extent the behavior of the individual justices fits that model, and (b) how the individual justices differ from one another in their response to the independent variables that explain their behavior.

We begin with the hypothesis that the failure of the Burger Court's business cases to scale is the result of intervening variables that affect the operation of economic liberalism and destroy the patterned effect it had during the Warren Court. We, therefore, specify our dependent variable as support for or opposition to business, thus defining it compatibly with previous research and the data base from which we gathered the business cases. Opposition to business (coded 1) includes those decisions that are antibusiness, including those that are pro-competition, pro-injured person in tort actions, pro-liability, pro-debtor, pro-bankrupt, and pro-small business in a conflict with big business. Support for business (coded 0) is the opposite of the foregoing.

Compatibly with the works cited earlier, we view the Supreme Court as a policy-making body whose decisions result from the operation of its policy (ideological) preferences. As Rohde and Spaeth (1976, 75–88) have shown, preferences may vary from one specific aspect of a broad issue area, such as business, to another.

All but two of our independent variables are ideological factors that characterize the policy preferences inherent in the Court's business decisions. As such, they are unobserved preferences underlying the Court's decisions. Such unobserved factors, which manifest themselves as ordinal variables, are at the heart of both the probit (McKelvey and Zavoina 1975) and Poisson (King 1989) estimation models. Although these ideological variables are theoretically independent of the direction of, and exist prior to the Court's decision, they can only be measured concurrently with that decision. Nevertheless, operational independence is guaranteed by the separate criteria used to determine the direction of the Court's decision and the numerical values assigned to the ideological variables.²

The first of these ideological factors concerns the question of federalism. State action is present in many cases and support or opposition to it may explain why certain cases are decided in an anti- rather than a pro-business

²For example, for reasons discussed later we hypothesize that the Court's attitude toward agency action is such that a decision in support of agency action is more likely to be antibusiness. The underlying preference with regard to agency action exists prior to the Court's decision, but only manifests itself when the decision is revealed.
fashion. The same may be true of cases in which the Court upholds or overturns administrative agency action regulatory of business, and we include this as our second factor.

For our third factor, we add the exercise of judicial power. The exercise of judicial power presumably explained the justices' votes in a set of cases substantially involving business activity that were decided during the first half of the Warren Court (Spaeth 1962). As a life-tenured non-representative body, the Court regularly confronts the propriety of its resolving certain controversies that arguably ought to be made by other decision makers. Inasmuch as judicial power continues to be the focus of more recent studies (Canon 1982; Rathjen and Spaeth 1979, 1983), presumably its exercise (or the Court's refusal to do so) will help explain the Court's decisions.

Fourth, a heretofore untested consideration that may motivate the Court's decisions is the "growing movement to disentangle and deregulate economic interests" (Dudley and Ducat 1986, 248). This libertarian-like movement manifests itself in the Court's business decisions as a continuum of preferences for the rights of the individual over those of government, state or federal. This libertarianism should not be confused with the first ideological factor, considerations of federalism. Federalism concerns the transfer of governmental power from one level to another, while libertarianism concerns the relationship of the individual vis-à-vis government, regardless of whether that government is state or federal.

In addition to these ideological factors, we include two case characteristic factors to control for two important aspects of the cases. Thus, fifth, most business cases, unlike those pertaining to civil liberty, involve statutory construction rather than constitutional interpretation; e.g., antitrust, bankruptcy, intellectual property, OSHA. Because the Court may employ different standards of review in statutory as opposed to constitutional cases, we add this as a controlling factor.

The sixth and final factor bearing on the Court's decision is the direction of the lower court's decision. Did the lower court decide the case favorably to business or not? Several studies have addressed the strategy of "error correction" in the context of Supreme Court decision making (e.g., Baum 1977; Songer 1979; Armstrong and Johnson 1982; Brenner, Hagle, and Spaeth 1990). To the extent the Court does in fact accept cases in order to reverse them (Stern and Gressman 1978, 291–300, 469–72), we can expect the effect of the lower court's decision on business to be an important factor in the Court's decision.

**Operationalization of Variables**

We operationalize the independent variables, federalism and libertarianism, with how the Court's decision affects the relationships between the
individual, state government, and the federal government. *Federalism-* measures whether the decision favors the federal government over state government. Its companion, *Federalism-*, measures whether the decision favors state government over the federal government. For each case, two determinations were made: whether the decision favored, opposed, or did not involve state government action, and whether the decision favored, opposed, or did not involve federal government action. *Federalism-* is coded 1 for decisions which both favored the federal government and opposed state government, and 0 otherwise. *Federalism-* is coded 1 for decisions which both favored state government and opposed the federal government, and 0 otherwise. Increased political pressure to scale back the federal government and return more power to the states (Nathan 1986) leads us to expect a positive estimated coefficient for *Federalism-* and a negative estimated coefficient for *Federalism-*.

The variables, *Libertarianism-* and *Libertarianism-* , also make use of the determination whether a decision favors, opposes, or does not involve the two levels of government. The two *Federalism* variables are concerned with the transfer of governmental power from one level to another. Here, however, we are concerned with the relationship of the individual vis-à-vis the government, regardless of whether that government is state or federal. When the decision favors either the state or federal government, *Libertarianism-* is coded 1 and 0 otherwise. When the decision opposes either state or federal government (i.e., favors the individual), *Libertarianism-* is coded 1 and 0 otherwise. When the decision does not involve either level, or favors

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3The political pressure referred to comes from the Nixon and Reagan administrations. Richard Nathan has stated most succinctly the desire of these presidents to decentralize certain aspects of the federal government:

Both Reagan and Nixon embraced the idea of devolution, the transfer of responsibility and power from the central government to subnational governments. The main difference is that Reagan proposed devolution from the national government exclusively to the states—not to localities (1986, 59–60, emphasis in original, footnote deleted).

Many other works document this desire to decentralize; e.g., Palmer and Sawhill 1984, 217–59; Champagne and Harpham 1984; Rubin 1985; Kymlicka and Matthews 1988, 25–41; Chubb and Peterson 1985, 273–306.

4When we say we expect the estimated coefficient of a variable to be negative, we are indicating that we expect that variable to detract from the probability of an antibusiness decision. The coding of our dependent variable, antibusiness = 1 and pro-business = 0, requires the statement to be phrased in negative terms. It is just as accurate to state that we expect that factor to increase the probability of a pro-business decision. The probit algorithm, however, attempts to maximize the probability that the observation takes on the higher of the two possible values of the dependent variable. Thus, any factor that increases the probability of an observation taking on the lower of the dependent variable’s two values must, of necessity, decrease the probability of taking on the higher value. Therefore, the estimated coefficients of factors which increase the probability of a pro-business decision must be negative.
one level and opposes the other, both Libertarianism variables are coded 0. (Note that Libertarianism-I does not pertain to civil rights and liberties but rather to a decision that involves governmental regulation of a natural or legal person's business activity, e.g., Jefferson County Pharmaceutical Assn. v. Abbott Laboratories, 460 U.S. 150 [1983]; Limbach v. Hooven & Allison Co., 466 U.S. 353 [1984].) There were no instances where a decision either favored or opposed both levels of government. The pressure to transfer power to the states does not include increasing individual rights (Nathan 1986, 59–60). It is, rather, an intergovernmental exchange of power. Thus, we expect the estimated coefficient of Libertarianism-G to be positive and the estimated coefficient of Libertarianism-I to be negative.5

The independent variables, Proagency and Projudicial, are measured directly from the cases so we are able to employ a three-point scale (see note 5). Decisions supporting agency action are coded 1, those which oppose it are coded -1. Similarly, decisions which support the exercise of judicial power (e.g., a decision not to defer to ongoing state proceedings or the actions of other branches, granting exceptions to the abstention, mootness, or exhaustion of state or administrative remedies doctrines) are coded 1, and those which oppose it are coded -1. The codings for both Proagency and Projudicial are made in accordance with the coding of the cases in Spaeth's United States Supreme Court Judicial Data Base. Decisions that do not involve agency action or the exercise of judicial power are coded 0.

We expect a positive estimated coefficient for Proagency because the demise of the doctrine of laissez-faire in the mid-1930s has forced the Court to display more tolerance to governmental regulation of business in general. Moreover, agency personnel have expertise in the regulated activity, while the courts do not. In this regard, the Court faces the same dilemma as Congress when confronted with professional expertise: the trade off between authority and expertise (Perrow 1986, 42–46).

We also expect Projudicial to have a positive estimated coefficient because of the policy-making role the Court has played since the time of John Marshall. In exercising its powers, the Court may serve liberal and conservative objectives with equal facility. Legislatures commonly pass the law-making buck to the courts. They certainly have not been reluctant to enact an ever

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5Two primary reasons exist for the bifurcation of Federalism and Libertarianism. First, both pairs of variables are derived from other measures; whether the decision favored, opposed, or did not involve the exercise of state or federal power. As such, we cannot characterize observations which do not meet the criteria for being coded "1" as neutral. Second, with both variables, we are looking at a specific type of power transfer. Federalism is concerned with a two-level transfer between the state and the federal government; Libertarianism with a single-level transfer between the government and the individual business entity. Taken as a group, the four bifurcated variables form a mutually exclusive set; i.e., no two of these variables can be coded as 1 in the same case. When all four are coded 0, the decision did not pertain to the exercise of governmental power.
increasing number of laws, most of which, sooner or later, receive judicial construction. Furthermore, the position of the Supreme Court at the top of the judicial hierarchy requires that it supervise the actions and decisions of the lower courts. Decisions in which the Court indicates it is appropriate to exercise judicial power or to judicially review administrative action are scored as 1, while those in which the Court deems judicial action inappropriate or defers to agency action are scored as $-1$. In other words, judicial activism equals 1; judicial restraint equals $-1$.

The first of the controlling variables, Statute, is a dichotomous variable indicating whether the case involved the construction of a statute. Eidelberg says it may "be argued that the essential purpose of the Constitution or of its authors was to protect the interests of property" (1986, 13, emphasis in original). One may reasonably assume that an interest in the preservation of property includes an interest in promoting business activity. Given Congress's proclivity for enacting relatively broadly worded statutes, the Court's skill in crafting its decisions to conform to its personal policy preferences, the fact that a great majority of the business cases only construe statutes (314 of 481 cases), and the Burger Court's conservative orientation (Segal and Spaeth 1989, 104), we expect Statute to have a negative estimated coefficient.

The second controlling variable, Lower Court, is a dichotomous variable indicating whether the lower court decision supported or opposed business. Consistent with the coding of the Court's decision, Lower Court is coded 1 if the lower court decision opposed business and 0 if it did not. Given the Burger Court's conservative orientation and the Court's tendency to reverse the cases it accepts for review, we expect Lower Court to have a negative estimated coefficient.

**ANALYSIS AND RESULTS**

The observationally dichotomous nature of our dependent variable makes the use of the maximum likelihood estimation technique probit most appropriate for multivariately testing our hypotheses (Aldrich and Nelson 1984). Table 1 presents the results of the probit estimation for the model containing the eight independent variables. Overall, the model correctly classifies 74.4% of the cases (358 of 481) resulting in a reduction of error (ROE)$^6$ of

$$ROE(\%) = 100 \times \frac{\% \text{ correctly classified} - \% \text{ in modal category}}{100\% - \% \text{ in modal category}}$$

where \% correctly classified is the percentage of observations which the model correctly classifies, and \% in modal category is the percentage in the modal category of the dichotomous dependent variable (Brenner, Hagle, and Spaeth 1990).
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## TABLE 1

PROBIT ESTIMATION OF THE BURGER COURT’S BUSINESS DECISIONS

<table>
<thead>
<tr>
<th>Dependent variable: Was the decision antibusiness?</th>
<th>Antibusiness</th>
<th>Pro-business</th>
<th>Estimated</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antibiusiness</td>
<td>255</td>
<td>226</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro-business</td>
<td>53.01%</td>
<td>46.99%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Coefficient</th>
<th>Error</th>
<th>t-Statistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>0.71</td>
<td>0.16</td>
<td>4.44</td>
</tr>
<tr>
<td>Federalism-S</td>
<td>0.54</td>
<td>0.35</td>
<td>1.55</td>
</tr>
<tr>
<td>Federalism-F</td>
<td>-0.75</td>
<td>0.29</td>
<td>-2.57**</td>
</tr>
<tr>
<td>Libertarianism-G</td>
<td>0.65</td>
<td>0.17</td>
<td>3.90***</td>
</tr>
<tr>
<td>Libertarianism-I</td>
<td>-0.90</td>
<td>0.20</td>
<td>-4.40***</td>
</tr>
<tr>
<td>Proagency</td>
<td>0.48</td>
<td>0.13</td>
<td>3.66***</td>
</tr>
<tr>
<td>Prejudicial</td>
<td>0.75</td>
<td>0.18</td>
<td>4.22***</td>
</tr>
<tr>
<td>Statute</td>
<td>-0.27</td>
<td>0.14</td>
<td>-1.89*</td>
</tr>
<tr>
<td>Lower Court</td>
<td>-0.90</td>
<td>0.13</td>
<td>-6.99***</td>
</tr>
</tbody>
</table>

N = 481

-2LLR (adjusted@) = 151.53***
Percent Correct = 74.43
ROE(%) = 45.58

*Significant at \( p < .05 \); **significant at \( p < .01 \); ***significant at \( p < .001 \).
@see Brenner, Hagle, and Spaeth (1989, 417).

45.6%. The success rate for antibusiness decisions is 79.2% (202 of 255), while the rate for pro-business decisions is 69.0% (156 of 226). One reason for the relatively small difference in success rates is the nearly even distribution of the dependent variable. When the modal category exceeds 80% it becomes quite difficult for a model to classify observations into the nonmodal category (e.g., Caldeira and Wright 1988).

Turning to the independent variables, an initial examination of the results reveals that all of the estimated coefficients are in the correct direction, and all but that of Federalism-S reach a minimally acceptable level of significance.\(^7\) The standard errors are relatively small and consist-

\(^7\)The interpretation of probit coefficients is not as straightforward as those of standard regression analysis. The estimated impact of a variable depends on the values of the other variables present. Using the estimated coefficient of Lower Court as an example, suppose the sum of the other independent variables multiplied by their coefficients equals zero. From the standard normal distribution table, zero is the Z-score indicating the dependent variable has a 50% probability of taking on its highest value. If the lower court decision is antibusiness (Lower Court = 1), this sum is moved almost one standard deviation to the left of the distribution (Z = -1.0) which decreases the probability (because of the negative sign) of the Court’s decision being antibusiness by approximately 32% (or increases the probability of the Court’s decision being pro-business by 32%). If, however, the sum of the other variables is Z = 1.0 the probability of the observation being antibusiness is only 16%. The addition of Lower Court (Z = -1.0 + (-.90) = -1.90) would only decrease this probability by 13% (to 3%). The interpre-

Note there is no necessary correlation between the independent variables and the Court's decision in any given case; i.e., the independent variables are operationally independent from the dependent variable. Indeed, the less likely outcome often prevails. Thus, for example, more than one-third of the Court's decisions that supported agency action produced a pro-business outcome, while in approximately one-fourth of the libertarian cases the pro-business outcome prevailed when the Court's decision supported the transfer of power from individuals to government. The same proportion produced a liberal result when power was transferred from government to individuals.

The model displays relatively equal facility in correctly classifying the lower court's decision, regardless of whether the Supreme Court's decision was pro- or antibusiness. The model correctly classifies 90.3% (140 of 155) of the cases where the lower court's decision was pro-business and the Supreme Court's decision was antibusiness. Conversely, when the lower court's decision was antibusiness and the Supreme Court was pro-business, the model is somewhat less successful, correctly classifying 77.1% (128 of 166) of these cases. This difference is explained in part by the reversal rates of these cases. The Court reversed pro-business lower court decisions at a rate of 2.6:1 (155 reversals, 60 affirmances). This rate is much higher than the 1.7:1 reversal rate for antibusiness decisions (166 reversals, 100 affirmances).

The direction, magnitude, and significance of the estimated coefficient lends strong support to the error correction hypothesis for the Burger Court's business decisions. Recent evidence suggests, however, that the Rehnquist Court may not be following this strategy. Segal and Spaeth report a significant decrease in the Rehnquist Court's reversal rate for cases involving economic activity (1990, 85). Although the number of economic cases decided by the Rehnquist Court is still small (78), should the trend continue it will mark an important change in the Court's behavior. (This is particularly true since the Segal and Spaeth results do not show the decrease in the Rehnquist Court's reversal rates to be consistent across issue areas.)

The model correctly classifies 67.9% (108 of 159) of the pro-business decisions in which a statute was construed. Conversely, 83% (83 of 100) of the antibusiness decisions in which no statute was considered were correctly
classified. The significance of the estimated coefficient \((p < .05)\) suggests the Burger Court did have a slightly different standard of review for cases involving constitutional interpretation than those requiring statutory construction. This result might be explained by the character of the statutes under review (e.g., if a large percentage of them restrict business) or deference to the legislative branch when the Court's powers are not challenged. These possible explanations, and whether the result holds for other issue areas, should be addressed in future research.

The model correctly classifies a high proportion of antibusiness decisions in which the Court exercises judicial power \((Projudicial = 1)\), 90.9\% (20 of 22), and pro-business decisions in which the Court was antithetical to the exercise of judicial power, 92.9\% (26 of 28). The positive estimated coefficient of \(Proagency\) indicates a greater probability of an antibusiness decision when the decision also supported agency action or power. The model's ability to correctly classify observations in relation to \(Proagency\) displays a similar pattern, but only when the Court's decision is antibusiness: 63 of 64 cases (98.4\%).

\(Federalism-F\) and \(Federalism-S\) examine the extent to which the Court supported the exercise of state regulatory powers over those of the federal government. The magnitude of \(Federalism-F\)'s estimated coefficient is the third largest of all the independent variables \((- .75)\), somewhat larger in magnitude than the estimated coefficient of \(Federalism-S\) (.54). This suggests the Court was slightly more inclined to slow the expansion of federal power via its business decisions than it was to actively increase state power.

\(Libertarianism-G\) and \(Libertarianism-I\) also examine the transfer of governmental power but from government to individual business entities. To the extent the call of recent administrations for an increase in states' rights has influenced the Court, it apparently does not include increasing the rights of individual business entities as the negative coefficient of \(Libertarianism-I\) demonstrates. Thus, the Court's decisions are more likely to be antibusiness when they support the exercise of governmental power over business \((Libertarianism-G)\). When the Court's decision does favor business autonomy over the exercise of governmental power \((Libertarianism-I)\), the probability that the decision is pro-business increases by nearly one standard deviation.

\(Libertarianism-G\) and \(Libertarianism-I\) are, among the ideological variables, most closely associated with the dependent variable—and hence most explanatory of the Court's decisions. The model correctly classifies all 85 of the G-cases when the Court decided the case against business; it incorrectly classifies 22 of 25 of the G-cases that supported business. \(Libertarianism-I\) mirror images the same striking pattern: correctly classifying 51 of the 52 pro-business cases and none of the 15 antibusiness decisions.

As previously noted (footnote 5), \(Federalism-F, Federalism-S, Libertarianism-G, Libertarianism-I\)
anism-G, and Libertarianism-I form a mutually exclusive set. To determine the significance of the set, we use the formula:

\[ c = -2 \times \log(L2/L1) \]

where \( L1 \) is the likelihood value of the complete model and \( L2 \) is the likelihood value of a second model which excludes the group of variables to be tested. The quantity \( c \) follows a chi-squared distribution with the number of degrees of freedom equal to the number of variables to be tested (Aldrich and Nelson 1984, 59). For this set of four variables, \( c = 62.53 \), indicating a level of significance of \( p < .001 \). This confirms, at a group level, the explanatory power of these variables on the Court's decision.

Assessment of the combinations of independent variables which occur enables us to better explain the impact these variables have on the Court's business decisions. We initially observe that only 99 different combinations, out of a possible 288,\(^a\) occur among the 481 cases. Furthermore, among the correctly classified cases, only eight patterns account for almost three-fourths of the antibusiness decisions, while only five account for more than 60% of the pro-business decisions. Among misclassified cases, one pattern accounts for 40% of the antibusiness decisions, while two account for more than 35% of the pro-business outcomes. These 16 patterns characterize more than 60% of the business decisions (290 of 481), clearly illustrating a markedly nonrandom interaction between the independent and dependent variables.

In sum, our model indicates the Court's decision will be antibusiness if the Court supports: (1) the exercise of judicial power, (2) agency action, (3) state government vis-à-vis Washington, or (4) the transfer of power away from business to government. Of the 202 correctly classified cases, 164 (81.2%) fit this pattern. Including the 37 cases with no positive loading on any variable other than construction of a statute, all but one (201 of 202) fit the pattern (99.5%). Conversely, our model fails to classify only three antibusiness decisions that contain an element from the foregoing pattern, and in one of those the Court opposed the exercise of judicial power.

Cases classified as pro-business also display a distinct pattern: the Court is most likely to reach such a result when the decision (1) involves statutory

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\(^a\)Complete independence of the dependent variable and the eight independent variables would result in 1,152 possible combinations \((2 \times 2 \times 2 \times 2 \times 3 \times 3 \times 2 \times 2 \times 2)\). As indicated in note 6, however, Federalism-F, Federalism-S, Libertarianism-G, and Libertarianism-I form a mutually exclusive set. Thus, instead of 16 possible combinations of these four variables there are only five. In addition, decisions opposing the use of federal power \( (\text{Federalism-S} = 1) \) cannot also support agency action \( (\text{Proagency} = 1) \). Similarly, decisions opposing agency action \( (\text{Proagency} = -1) \) cannot also support the use of federal power \( (\text{Federalism-F} = 1) \). After excluding these definitionally impossible combinations, 288 remain; nearly three times the actual number occurring in the data set.
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construction, (2) opposes the exercise of judicial power, (3) supports the federal government vis-à-vis the states, or (4) the transfer of power from government to business. All but nine of the 156 pro-business decisions fit this pattern (94.2%). Eight of these nine load positively only on Lower Court. Excluding Statute, the model fails to predict only four cases with some portion of the foregoing ideological pattern.⁹

**CONCLUSION**

The standard model of causality where cause precedes effect is satisfied by the theoretical, and commonsensical, assumption that the Court’s policy preferences exist independently of and prior to its announced decisions in business cases. Nevertheless, since these underlying preferences only manifest themselves in the Court’s decisions we hesitate to require too much of our model. Its utility is its ability to explain and identify the combination of policy preference and case characteristic factors that produce specific outcomes. The identification of these factors yields a greater understanding of the underlying preferences which, in turn, will allow the model to be used in a more predictive capacity.

Comprehensive analysis of the Burger Court’s formally decided cases convincingly shows that a small set of policy preference and case characteristic factors explains the Burger Court’s business decisions. Whether the decision is pro- or antibusiness, correctly or incorrectly classified, the factor that appears to be most explanatory is libertarianism, as table 1 indicates. The exercise of judicial power follows, impacting all but the unsuccessfully classified antibusiness decisions. The intergovernmental transfer of power (federalism) affects the correctly classified cases, while support of agency action affects the outcome of correctly classified antibusiness decisions.

The failure of the Burger Court’s business cases to cumulatively scale on the basis of economic liberalism presumably heralds its demise as the overarching determinant of these decisions. Economic liberalism characterized the New Deal and pertained to the issues that were raised by the transformation of an agricultural economy into an industrialized economy. As characterized by Schubert (see footnote 1), the important dichotomy present in the business cases of this period easily lent itself to cumulative scaling.

Economic liberalism maintained decisional relevance during the Vinson and Warren Courts, and into the early years of the Burger Court. The emer-
gence thereafter of a more conservative Court (Segal and Spaeth 1989, 104), reflecting the policy views of a postindustrial society, has apparently displaced the earlier configuration of economic values. In its place, a new, more complex, multidimensional set of factors seems to have emerged. No longer does the Court view business cases in such simple terms as suggested by Schubert. Rather, the Burger Court's recognized pro-business preference is tempered by competing considerations of governmental power and the Court's position of power atop the judicial hierarchy.

We chose to label the set of decisional factors we have identified as "instrumental libertarianism." We chose this label for two reasons: First, libertarianism, in the form of the variables Libertarianism-G and Libertarianism-I, produces two of the model's three most statistically significant ideological variables. In addition, it is this libertarianism which connects the new set of factors with the dichotomy of interests found in economic liberalism. Second, libertarianism does not operate in isolation. It functions in conjunction with preferences toward judicial power, agency action, and considerations of federalism, which Spaeth and Teger (1982) have shown to be instrumental values. The label, instrumental libertarianism, seems reasonably descriptive of the factors that comprise the model. Judicial power, agency action, and considerations of federalism appear to be the means the Court employs to effectuate its libertarian posture. To what extent each impacts libertarianism is best examined from the standpoint of the behavior of the individual justices. In other words, does a libertarian justice—i.e., one who supports business autonomy—necessarily support or oppose judicial activism or restraint, favor or thwart agency action or considerations of federalism? Or do the justices vary in the means they choose to effectuate their libertarianism? How do those who sustain regulation—the antilibertarians—implement their position? By support or opposition to which of the instrumental values? Indeed, do some of the justices respond to considerations other than those that characterize the Court?

Our findings in this paper provide the starting point for such an inquiry.

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References


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