THE EFFECT OF JUDICIAL IDEOLOGY IN INTELLECTUAL PROPERTY CASES

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ABSTRACT

This article investigates the relationship between ideology and judicial decision-making in the context of intellectual property. More specifically, it attempts to determine whether and to what extent right-of-center justices are more likely to support the claims of copyright, patent, trademark and trade secret owners against third parties (and vice-versa for left-of-center justices). Using data drawn from Supreme Court intellectual property cases decided in between 1954 and 2006, we show that ideology is a significant determinant of cases involving intellectual property rights. However, our analysis also shows that there are significant differences between intellectual property and other areas of the law with respect to the effect of ideology.

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INTRODUCTION

The Supreme Court's 2006-2007 term witnessed a remarkable number of major intellectual property cases that raise fundamental questions in relation to both the acquisition and the legitimate exercise of intellectual property rights.[1] The increasing attention given to intellectual property issues by the Supreme Court is not surprising, given the paradigm shift created by the rise of the internet economy and the biotechnology industry, each of which has made the impact of intellectual property laws pervasive. Consequently, analyzing the determinants of intellectual property cases has become a pressing imperative for Supreme Court scholarship. It is particularly important to know whether intellectual property cases are shaped by the same ideological rifts that drive divisive social issues, such as abortion, executive power, and Supreme Court nominations.

This article explores whether the outcomes of intellectual property (IP) cases are determined by judicial ideology – as measured on the traditional liberal-conservative scale – or whether IP is indeed exceptional. Political scientists working within the attitudinal model have shown that ideology is a significant,[2] and arguably the dominant,[3] determinant of judicial decisions generally, but this inquiry has not been pursued systematically in relation to IP. In contrast, many intellectual property scholars claim that intellectual property law is a function of its own peculiar jurisprudential complexities and is not amenable to conventional ideological analysis. There is good reason to think that IP might constitute an exception to this general tendency. IP raises questions that have the potential to divide conservatives and liberals alike, as it pits principles of liberty, property and free-expression against one another. For example, vindicating the property claims of an IP owner arguably interferes with the ability of rivals to compete, subsequent authors to build upon the work, or of the public to freely express a point of view.[4] Furthermore,

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[1] The Court has arguably raised the threshold of patentability by changing the non-obviousness standard; made patents easier to invalidate by giving licensees standing to challenge the very patents they have licensed; and diluted the hold-up power of patent owners by ruling that injunctive relief is not mandatory upon a finding of patent infringement. *See* KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007); and eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006).

[2] *See e.g.* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (finding in search and seizure cases, the attitudinal model predicts 76% of cases correctly); Richard Reversz, *Environmental Regulations, Ideology and the DC Circuit*, 83 VIRGINIA LAW REVIEW 1717 (1997) (finding in environmental cases that ideology significantly influences judicial decision-making and judges' votes are also greatly affected by the party affiliation of the other judges on the panel). The attitudinal model is discussed in more detail in Part I-A, *infra.*

[3] See e.g. Jeffrey A. Segal, *Separations-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AMERICAN POLITICAL SCIENCE REVIEW 28 (1997) (reviewing the attitudinalist literature and arguing the attitudinal model has strong empirical support, whereas the empirical evidence of strategic models is problematic); Jeffrey A. Segal and Harold Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 971 (1996) (showing Supreme Court Justices decide cases according to their pre-existing revealed preferences in 90.8% of cases, and in only 9.2% of cases did a justice switch to the position established in the landmark precedent; concluding *stare decisis* does not strongly influence Supreme Court judges).

[4] *See* Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry*, 1979-1995, 32 RAND J. ECON. 101-128 (2001); and Jean O.

there is anecdotal evidence supporting the exceptionalist argument. For example, it is frequently observed that the coalitions seen in IP cases cross the standard partisan ideological lines. However, attitudinalist studies have in other areas indicate that such anecdotalism is often misleading.

To resolve this important question we conduct a broad empirical study to rigorously test the attitudinal model as applied to IP litigation. This is the first study of this kind. There are two prior relevant empirical studies, both of which only partially address this question: they are both narrow in scope and have negative results,[5] from which no conclusive inferences can be drawn.[6]

In this article, we examine the effect of judicial ideology on IP case outcomes before the Supreme Court from 1954 to 2006. We find that ideology is a significant determinant of IP cases, but a number of factors that are specific to IP are also consequential. As such, we conclude that ideology is an important element in predicting IP decisions, but that the relationship is more complex than the standard political science model claims: our results suggest that law matters too.

Part I explains the basis for the broad attitudinal claim that case outcomes are ideologically derived. It then presents the theoretical basis for the competing claim that IP is immune to the general impact of ideology on the law, a claim we term "IP Exceptionalism". Part II provides an overview of some of the anecdotal evidence relied upon by both exceptionalists and the attitudinalist response. Scholars point to three interrelated phenomena as evidence of IP's exceptionalism: the unusual prevalence of unanimous opinions; surprising judicial coalitions; and judges voting against ideological type. Part II also considers and counters these claims from an attitudinalist perspective.

We conduct our empirical analysis in Part III. It first offers some impressionistic evidence of whether judicial coalitions seen in IP cases are exceptional, by comparing them against coalitions seen in Supreme Court decisions generally. We then apply logistical regression analysis to test: the role of ideology in predicting judicial votes generally; the significance of ideology when factoring in different types of IP and other legal factors; whether the effect of ideology is consistent for both liberal and conservative justices; and the relative significance of ideology in IP cases compared to all other areas

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Lanjouw & Josh Lerner, *The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature*, 49/50 ANNALES D'ECONOMIE ET DE STATISTIQUE 223-46 (1998)

[5] Barton Beebe's study of the application of the "*Polaroid* Factors" in trademark cases averts to the possibility that political ideology might affect judicial decision making in this context but finds no significant effect. *See* Barton Beebe, *An Empirical Study of The Multifactor Tests For Trademark Infringement*, 94 CAL. L. REV. 1581 (2006). Likewise, Kimberly Moore's study of patent claim construction appeals finds no significant difference in how judges appointed by Republicans and judges appointed by Democrats construe patent claims, nor any discernable difference in their tendencies to affirm or reverse district court claim constructions. *See* Kimberly A. Moore, *Are District Court Judges Equipped To Resolve Patent Cases?* 15 HARV. J.L. & TECH. 1 (2001).

[6] The failure of regression analysis to reject the null hypothesis should not be taken to indicate that the null hypothesis is true.

of the law. Part IV presents the implications of our analysis for IP and for judicial scholarship more generally and considers potential extensions of our analysis.

I THE INFLUENCE OF IDEOLOGY IN INTELLECTUAL PROPERTY: THE CASE FOR AND AGAINST

A. Intellectual Property and the Attitudinal Model

There is a rich literature demonstrating the significance of ideology in judicial decision making in both the U.S. Supreme Court and in the Federal Courts of Appeal.[7] The "attitudinal model" of judicial decision making holds that ideology is not only *an* important factor in understanding the behavior of judges, but more controversially that ideology is the *most* important factor.[8]

The attitudinal model regards judges as rational maximizers of ideological preferences, who attempt to bring the law in line with their own political commitments.[9] "[Judges] accomplish this mission, according to some political science accounts, by voting on the basis of their sincerely held ideological (liberal or conservative) attitudes vis-à-vis the facts of cases, and nothing more."[10]

Comment [dl1]: This quote is probably unnecessary.

At its most basic, the attitudinal model predicts that conservative judges will vote in favor of conservative outcomes and that liberal judges will vote in favor of liberal outcomes. A recent Supreme Court case on environmental regulation is illustrative. In *Massachusetts v. EPA*, the Court split 5 to 4 on the question of whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1) of the Environmental Protection Act.[11] Stevens, Souter, Ginsburg, and Breyer (who are conventionally thought of as liberal) and Kennedy (who is conventionally thought of as mildly conservative) determined that the EPA did have such authority and furthermore that where the EPA Administrator is required by the Clean Air Act to set auto emission standards for pollutants that may endanger public health, the Administrator may not decline to do so for policy reasons not specifically found in the

[7] Segal & Spaeth, *supra* note 2; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) [hereafter, Segal & Spaeth, Revisited]. See also, Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (finding ideology a statistically significant determinant of decisions at all levels of courts); Lee Epstein, Jack Knight, & Andrew D. Martin, *Childress Lecture Symposium: The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783.

[8] Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 84 (2006) ("[I]n virtually all political science accounts of Court decisions ideology moves to center stage.")

[9] *Id.* See also Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 S. CT. ECON. REV. 2 (1993)

[10] Epstein & Segal, *Id. But see* Judge Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA L. REV. 1335 (1998) for a challenge to the attitudinal model. *See also* David E. Klein & Stefanie A. Lindquist, *Measuring Disordered Voting Patterns on the U.S. Supreme Court: Implications for the Attitudinal Model of Judicial Behavior*, presented at the 2005 Annual Meeting of the American Political Science Association (challenging the consistency of ideology between and within courts)

[11] Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

Clean Air Act.[12] In two separate dissents, the more conservative members of the Court (Roberts, Scalia, Thomas, and Alito) argued that the broad coalition of states, cities and environmental groups that brought the lawsuit against the EPA did not have standing to challenge the Agency's decision.[13]

The political content of this and many other decisions is readily discernable: enthusiasm for environmental regulation (especially with respect to global warming) is a characteristically liberal enterprise and the decision in *Mass v. EPA* was widely seen as a rebuke to the Bush administration's environmental policies.[14] What is also evident is that in this case, as in many others, the Court split along ideological lines.[15] The decision in *Mass v. EPA*, reflects commonly held intuitions as to the ideological make-up of the Court.[16] The decision also neatly fits the extensive social science literature which attempts to model judicial ideology more exactly.

The attitudinal model is controversial because it necessarily implies that judges do not simply follow or discover the law, but rather that, as Holmes put it:

> *The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.*[17]

The effect of ideology in Supreme Court decisions has been demonstrated across a number of issue areas including: death penalty;[18] first amendment;[19] search and seizure;[20] federalism;[21] and administrative law.[22] The effect of ideology has also been

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[12] *Id.* At 1459, 1462–3.
[13] *Id.* At 1463–1464.
[14] *See e.g.*, Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, April 3, 2007. The Bush administration "has maintained that it does not have the right to regulate carbon dioxide and other heat-trapping gases under the Clean Air Act, and that even if it did, it would not use the authority. The ruling does not force the environmental agency to regulate auto emissions, but it would almost certainly face further legal action if it failed to do so."
[15] Other recent 5-4 cases illustrating this ideological divide include: Lawrence v. Florida, 127 S. Ct. 1079 (2007) (application of statute of limitations for seeking federal habeas relief); Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (restrictions on abortion); Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (death penalty); and Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (employment discrimination).
[16] *See e.g.*, Charles Lane, *Kennedy Seen as The Next Justice In Court's Middle: Alito Expected to Tilt Conservative*, WASHINGTON POST, January 31, 2006, at A04.
[17] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881)
[18] Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decisionmaking*, 86 AM. POL. SCI. REV. 323 (1992)
[19] Epstein & Segal, *supra* note 8 (finding that in general, the more liberal a justice, the higher the likelihood that she or he will vote in favor of litigants alleging an abridgment of their First Amendment rights. But also showing that in disputes in which other values, such as privacy and equality, are prominently at stake, liberal justices are no more likely than their conservative counterparts to support the First Amendment and that if anything conservatives more likely and liberals less likely to vote in favor of the speech, press, assembly, or association claim.)
[20] Segal & Spaeth, Revisited, *supra* note 7 at 316 – 320.

demonstrated in the Federal Courts of Appeal in areas as diverse as environmental regulation, administrative law, piercing the corporate veil, campaign finance law, and affirmative action and discrimination law.[23]

However, there is some question as to the salience of ideology outside the more obviously politicized areas such as civil rights, civil liberties, criminal law, environmental law and labor regulation. Nancy Staudt et al., have commented recently that:

> *"Study after study confirms a strong correlation between judges' political preferences and their behavior in civil rights/liberties-type cases, but researchers have only rarely identified an association between politics and decisions in economics cases."*[24]

Sunstein et al's comprehensive analysis of voting on Federal Courts of Appeal also illustrates the varied effect of ideology across different issue areas.[25] Sunstein's team examined almost 15,000 individual judges' votes across twelve issue areas.[26] The Sunstein study concludes that in most of the areas they investigated, ideology (as measured by the political party of the appointing president) was a fairly good predictor of how individual judges will vote.[27] However, in three areas – criminal appeals, takings

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[21] Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000) (finding that ideology predominates over questions of institutional federalism.) See also, David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125 (1999) (finding that Federal Court judges decide preemption cases partly based on ideology, but constrained by the facts and the legal context, and not necessarily monolithically based on party affiliation.) But see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court*, 14 S. CT. ECON. REV. 43, 86 (2006) (finding that preemption cases are multi-dimensional and are unlikely to yield clear confirmation for either an "attitudinal" or a "legal" model of judicial behavior)

[22] Donald Crowley, *Judicial Review of Administrative Agencies: Does the Type of Agency Matter*, 400 WESTERN POL. Q. 265, 276 (1987) (a study of decisions reviewing administrative agency determinations found that Rehnquist consistently favored conservative determinations, while Brennan showed the opposite conclusion.)

[23] Revesz, *supra* note 2 (a study of D.C. Circuit rulings in environmental regulation cases found a pronounced difference in the decisions of judges appointed by Democratic presidents and those appointed by Republicans.); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998). (reviewing administrative regulations under a deferential Supreme Court rule likewise found a significant ideological effect.); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 236 (1999). (a study of circuit court decisions in several areas found significant, but varying, effects of panel ideology on decisions.) For additional categories see *infra* note __.

[24] Nancy Staudt, Lee Epstein and Peter Wiedenbeck, *The Ideological Component Of Judging In The Taxation Context*, WASH. U. L. REV. (Forthcoming), Available at SSRN: http://ssrn.com/abstract=978069.

[25] Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

[26] *Id.* at 304, 311. The areas were: abortion, affirmative action, campaign finance, capital punishment, Commerce Clause challenges to congressional enactments, the Contracts Clause, criminal appeals, disability discrimination, industry challenges to environmental regulation, piercing the corporate veil, race discrimination, sex discrimination, and claimed takings of private property without just compensation.

[27] *Id.* at 305.

claims, and Commerce Clause challenges to congressional enactments – ideology did not predict judicial votes.[28]

A study of Supreme Court cases dealing with securities and antitrust law discounts the attitudinal model, noting that there was "an expansive period as to both securities and antitrust during the Warren Court, followed by a distinct correction period after Justices Powell and Rehnquist joined the Court in 1972 preceding a third period after Powell's retirement and with Rehnquist as Chief Justice, in which the results are more evenly split, but the cases are few and far between."[29]

Traditional measures of ideology have also fared badly in the context of Supreme Court tax cases. Recent analysis of the Court's tax cases found no support for the role of ideology.[30] Another study found that decisions on taxpayer standing are ideological, but only when legal doctrine is vague and when little or no judicial monitoring exists.[31] Likewise, a study of circuit court tax decisions found that political ideology has some influence on tax case outcomes but only when combined with other sociological characteristics of a judge – namely, race and the eliteness of the judge's law school education.[32]

Why would ideology affect some areas of judicial decision making and not others? One explanation is that these cases are quite simply the 'boring cases' – "cases requiring technical legal analysis such as statutory interpretation and doctrinal analysis, without much impact on constitutional rights or other 'interesting' areas of law."[33] Tax cases in particular are often singled out as 'boring' in this sense.[34]

A second explanation is that there is nothing wrong with the attitudinal model, it is simply that the coding traditionally relied upon is inapposite. Staudt et al take this view:

> *We find it extremely unlikely that judges and justices simply do not have political preferences in cases involving business and finance questions or, alternatively, that the preferences are so weak they do not show up in empirical studies.*[35]

Rather than doubting the explanatory power of ideology, they suggest that the traditional case coding rules misclassify outcomes in tax cases.

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[28] *Id.* at 306.
[29] E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004).
[30] Staudt, Epstein and Wiedenbeck, *supra* note 24. ("In other words, knowing the Martin- Quinn score of the median justice does not help us to predict outcomes in tax cases (at least using Spaeth's database).")
[31] Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 647 (2004).
[32] Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges favor the taxpayer?*, 25 VA. TAX REV. 201 (2005).
[33] Neil M. Richards, *The Supreme Court Justice & "Boring" Cases*, 4 GREEN BAG 2d 401, 403 (2001).
[34] *Id.* at 403–408.
[35] Staudt, Epstein and Wiedenbeck, *supra* note 24.

The traditional coding refers to the Spaeth dataset,[36] which codes tax decisions in favor of the taxpayer as conservative and decisions in favor of the government as liberal. Staudt et al conclude that "these coding rules work well in the civil rights context but produce unexpected errors in business and finance litigation."[37] More generally, they speculate that "the null findings in the extant literature may be a by-product of the ways that scholars have defined ideology in business and finance cases."[38] Indeed, by adopting a more selective classification system Staudt et al are able to show that politics does indeed play a role in Supreme Court decision-making in business and finance litigation.[39]

In summary, there is a wealth of evidence that ideology is a significant factor in judicial decision making, but there is also evidence that the salience of ideology is stronger in non-economic issue areas. The strong version of the attitudinal model holds that ideology is everything; the moderate version simply holds that ideology is highly determinative. A finding that ideology was not significant with respect to IP would present a serious challenge to the attitudinal model. It would also contribute significantly to our understanding of when and how law matters separate to ideology.

B. Theories of IP Exceptionalism

Against the significant body of evidence that political ideology plays a role in higher court decision making, there is a widely held view amongst those practicing and studying IP that the traditional ideological divide between "liberals" and "conservatives" is of little or no relevance in their specialized field.[40]

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[36] The Supreme Court Judicial Database is a database of Court decisions handed down since 1953. The database records a multitude of attributes for each decision relating to the origins of the case, the legal subject at issue, key dates such as the date of oral argument and final decision, the identities of the parties and the votes of the individual justices. The database is available at the S. Sidney Ulmer Project website at http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm, The Original U.S. Supreme Court Judicial Database. Each decision in the database is coded as either "liberal" or "conservative", 1 and 0 respectively. In general, a case outcome is coded as liberal if it favors classic liberal underdogs such as: the accused in a criminal case, a person claiming the protection of civil rights of civil liberties, children, indigents, American Indians. Outcomes favoring affirmative action and reproductive freedom are also coded as liberal. Pro-union decisions are coded as liberal except in the context of antitrust cases, where a pro-union decision is regarded as conservative. Spaeth relies on slightly different under-dog/upper-dog coding in cases pertaining to economic activity. Liberal outcomes in those cases include pro-competition, anti-business, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-bankrupt, pro-Indian, pro-environmental protection, pro-consumer and pro-economic underdog. However, in the context of issues pertaining to federal taxation, Spaeth adopts a much simpler scheme, coding any decision in favor of the United States as liberal and any outcome which favors the taxpayer as conservative. Harold J. Spaeth, *The Original United States Supreme Court Judicial Database 1953-2003 Terms Documentation*, 2005.

[37] Staudt, Epstein and Wiedenbeck, *supra* note 24 at 5.

[38] *Id.* at 11.

[39] *Id.* at 17.

[40] See e.g. William Patry, *Does Ideology Matter in Copyright?*, THE PATRY COPYRIGHT BLOG, http://williampatry.blogspot.com (December 14, 2005, 7:17 AM EST). Partry questions whether there is an ideology of copyright in a functional sense and whether ideologies of copyright have ever had any demonstrable impact. See also, James E. Rogan, *Intellectual Property and the Challenge of Protecting It*, 9 J. TECH. L. & POL'Y xv (2004) (relating his personal experience that intellectual property issues rarely were partisan: "battle lines typically did not break down along Republican or Democrat lines: when IP warfare erupted, it tended to be a battle between those who understood the importance of intellectual property, and those who did not.")

Those in the IP trenches appear to regard judges as either impartial or indifferent on questions of IP.[41] The marginalization of questions of ideology is so substantial in the IP literature that there are very few articles where the question is even raised.[42] Those who consider the issue of ideology usually conclude either that the political labels of "liberal" and "conservative" are inapplicable in the context of IP or that to the extent party alignment has any salience, it is in the opposite direction to that which is ordinarily assumed.[43]

IP exceptionalism (the perceived irrelevance of ideology to the adjudication of IP disputes) raises some interesting questions. If the prevailing wisdom of the IP community is correct, it poses a significant challenge to the attitudinal model and suggests that proponents of the attitudinal model failed to account for differences in specific fields of law. Alternatively, if the prevailing wisdom of the IP community is wrong, it suggests that scholars and practitioners of IP may have fundamentally failed to understand a critical aspect of their own discipline.

There are two main reasons to think that IP cases might not reveal any significant ideological content. The First is that IP cases are largely technical and legalistic and judges simply do not have policy preferences with respect to the outcomes of such cases. For the reasons discussed below, we find this implausible. The second (and more plausible) explanation of IP exceptionalism is that judicial policy preferences with respect to IP do not fit within the stereotyped view of the liberal-conservative ideological continuum.

The claim that judges simply do not have policy preferences due to the technical nature of IP cases is similar to the 'boring cases' view of tax – i.e. IP cases are also "cases requiring technical legal analysis such as statutory interpretation and doctrinal analysis,

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[41] *Id.* See also, Melvin Simensky, *Does the Supreme Court Have a "Liberal" or "Conservative" Intellectual Property Jurisprudence?*: An Evening with Kenneth Starr & Martin Garbus, 11 MEDIA L. & POL'Y 116 (2003). (Kenneth Starr rejects the notion that the Supreme Court is ideological and argues that the number of unanimous decisions on the Supreme Court "bespeaks the underlying and, in many respects, overriding professionalism of this very lawyerly court."); Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES MAG., Jan. 25, 2004, at 42 (Stating that the lawyers, scholars and activists forming Lawrence Lessig's "free culture movement" are neither "wild-eyed radicals opposed to the use of copyright" and "[n]or do they share a coherent political ideology.")

[42] With the exception of the studies by Beebe and Moore which found no relationship between ideology and judicial decision-making in two fairly narrow contexts, see *supra* note 5.

[43] See e.g., Brian Leubitz, Note, *Digital Millennium? Technological Protections For Copyright On The Internet*,11 TEX. INTELL. PROP. L.J. 417 (2004) (noting that in the 2000 election cycle, the entertainment industry gave $24.2 million to Democrats and $13.3 million to Republicans); Jacob Weiss, *Harmonizing Fair Use And Self-Help Copyright Protection Of Digital Music*, 30 RUTGERS COMPUTER & TECH. L.J. 203 (2004) (noting that Democrats sought to make disc-embedded protection – which expands IP rights – a legal requirement for the industry and Republicans favored a laissez faire approach); Sara K. Stadler, *Forging A Truly Utilitarian Copyright*, 91 IOWA L. REV. 609 (2006) at fn 34. (acknowledging that the political labels of "liberal" and "conservative" have crept into the discourse of copyright, but also noting confusion as their meaning.)

without much impact on constitutional rights or other "interesting" areas of law."[44] This seems implausible. Given their significance in the modern economy, it is unlikely that judges would not have opinions and policy preferences on the fundamental questions raised by IP disputes. At a policy level, IP cases raise fundamental questions regarding property rights, government regulation and freedom of speech. The effects of IP laws are also widely felt at a practical level. Copyright and patent law defines the relationship between creators (authors and inventors) and the public; perhaps more importantly, these laws also mediate the relationships between creators who build upon the work of one another. Similarly, trademark law and trade secret law each police the means of competition between rival businesses: trademark law regulates the ways in which a business may represent its products to consumers; and trade secret law regulates the means through which one business may acquire valuable information held by another business.

The more plausible explanation of IP exceptionalism is that judicial policy preferences regarding IP do not fit within the stereotyped view of the liberal-conservative ideological continuum. The labels liberal and conservative (Democrat or Republican) extrapolate easily in certain contexts: liberals (in the modern sense) tend to look favorably upon government intervention in the economy but unfavorably upon government regulation of individual expression or "morality";[45] conservatives in contrast resist government regulation of the economy but often endorse laws to enforce "traditional values."

According to this caricature: liberals are soft on criminals, whereas conservatives take a tough "law and order" stand; liberals identify with employees and unions, whereas conservatives take the side of management and big-business; liberals are environmentally conscious, conservatives are hostile to environmental regulation. Of particular relevance to this enquiry, it is generally conceived that conservatives are more likely to see private property as an end unto itself whereas liberals are more tolerant of incursions of private property rights for the greater good. This division is reflected in the Supreme Court's infamous *Lochner* decision, in which it invalidated a New York law limiting the working hours of bakers as an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."[46]

If the conventional measures of ideology apply to IP, then one would expect conservatives to view IP as end unto itself. Equally one would expect liberals to be more receptive to placing limitations on IP rights in the pursuit of other social values, such as free speech.

But do the conventional measures apply? While it seems naive to think that the justices do not have preferences relating to the IP, it does seem plausible that the nature of IP

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[44] Richards, *supra* note 33. It should be noted that the description of "boring" here is somewhat circular as it essentially boils down to not interesting.
[45] See e.g. the reaction to *Laurence v. Texas* and discussion as to its effects on "morals" legislation and the division this provokes in liberals versus conservatives – Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1595 (2004)
[46] Lochner v. New York, 198 U.S. 45 (1905)

itself is ideologically ambiguous. This ambiguity manifests in three closely related questions. First, should the origin of IP rights be traced to a natural rights framework or a utilitarian one? Second, should IP rights be seen as a form of property or as an instrument of government regulation (or as something entirely different)? Third, does the existence of IP rights ultimately detract from or enhance individual liberty?

Natural Rights vs. Utilitarian Accounts of Intellectual Property

In the U.S., the institution of private property is predominantly justified in terms of natural rights,[47] whereas the primary justifications for IP tend to be instrumentalist and utilitarian.[48] This contrast between property and IP is discernable in the text of the U.S. Constitution itself. For example, the Due Process clause of the Fifth Amendment provides that: "no person shall be… deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[49] Similarly, the Fourteenth Amendment states that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."[50] In contrast, all that the Constitution says about IP is that: "The Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[51] Although the Constitution gives Congress the authority to grant patents and copyrights, it does so only for the limited purpose of promoting "the Progress of Science and useful Arts."[52] The Constitution protects private property rights as a fundamental aspect individual liberty; in contrast, its provision for patents and copyrights is merely instrumental and it makes no provision for trademark or trade secret rights whatsoever.[53]

The text of the Constitution may not be dispositive on this question; however it does raise a strong presumptive case for viewing property rights in general through the lens of

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[47] See e.g., Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288 (1988).

[48] See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)

[49] U.S. Const. Am. 5.

[50] U.S. Const. Am.14. See also the United Nations Universal Declaration of Human Rights, Article 17; The French Declaration of the Rights of Man and of the Citizen, Article XVII, the European Convention on Human Rights (ECHR), Protocol 1.

[51] U.S. Const. art. I, § 8, cl. 8.

[52] U.S. Const. art. I, § 8, cl. 8. See, Twentieth Century Music Corp. v Aiken (1975) 422 U.S. 151; Sony Corp. of America v Universal City Studios, Inc. (1984) 464 U.S. 417 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); Bonito Boats, Inc. v Thunder Craft Boats, Inc. (1989) 489 U.S. 141 (The Constitution "reflects a balance between the need to encourage innovation and the avoidance of monopolies that stifle competition without any concomitant advance in the progress of science and useful arts.")

[53] Trade-Mark Cases, 100 U.S. 82 (1879). Congressional power with respect to trademarks is based on the Commerce Clause.

natural rights but at the same time regarding IP rights instrumentally. Furthermore, even if one accepts that the underlying rationale for creating, recognizing and enforcing IP rights has roots in both utilitarian and natural rights based theories,[54] that too becomes a cause for ideological uncertainty as utilitarian and rights-based approaches to IP frequently conflict.[55] To the extent that IP rights are not attributable to a natural rights framework we would expect that they would have less intrinsic appeal to political conservatives.

Property, Regulation or Tertium Quid?[56]

The concept of property in physical objects is well understood and among the oldest institutions of human civilization.[57] The concept of IP – or more specifically, the discrete concepts of patents, copyrights, trademarks and trade secrets – is of far more recent origin.[58] This is significant because whereas conservatives such as Edmund Burke and Friedrich Hayek idealize forms of social order that evolve over time, they condemn institutions imposed by planners, engineers, politicians, and other societal decision-makers.[59] From this perspective, the common law of property is both evolved and long-standing, whereas the various forms of IP are more recent and conspicuously engineered.[60]

Indeed, IP can be analogized to many other legal forms:[61] property,[62] tort[63] government subsidy,[64] and government regulation.[65] Each of these analogies tilts in different

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[54] Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT. L. REV. 842, 850 (1993).
[55] Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 544 (2004).
[56] *Tertium quid* is something that cannot be classified into either of two groups considered exhaustive; an intermediate thing or factor – a term artfully employed by Justice Scalia in Wal-Mart Stores, Inc. v. Samara Brothers, Inc. 529 U.S. 205 (2000).
[57] ROBERT P. MERGES, PETER S. MENELL, AND MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2 (2006).
[58] Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).
[59] *See* ROBERT COOTER & TOMAS ULEN, LAW & ECONOMICS 4d. 118 (2004).
[60] *See* e.g. Dan L. Burk & Mark A. Lemley, *Policy Levers In Patent Law*, 89 VA. L. REV. 1575 (2003); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004)
[61] *See generally* Lemley, Free Riding, *supra* note 58.
[62] *See e.g.*, Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990); Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL STUD. 321 (1995); Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000). See also Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) (discussing similarities between copyright law and common law property); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005). *See generally* Lemley, Free Riding, *supra* note 58 (reviewing the literature).
[63] Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," and "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003).
[64] Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229 (2003).
[65] *See e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 104, 194 (2004); Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315

ideological direction.[66] One might predict that conservative judges who favor private property would be inclined to favor the holders of IP rights, but those same judges may also see IP laws as government intervention in the free-market. Equally, one might predict that liberals would be more predisposed to see the virtue of government intervention in the marketplace, but would also be more likely to see the costs of property in information.

The politics of the Copyright Term Extension Act ("CTEA") illustrates both the Court's internal disagreement as to the conceptual basis for IP rights (natural rights or utilitarianism) and the appropriateness of the property analogy. The CTEA extended copyright terms in the United States by 20 years, both prospectively and retrospectively. Proponents of this extension argue that extending the basic term of protection from the life of the author plus 50 years, to the life of the author plus 70 years would harmonize U.S. law with that of the European Union and would create better incentives to create and maintain copyrighted works.

Critics of the legislation observed that the additional incentives created by the legislation were economically irrelevant as their net present value was close to zero. Additionally they argue that retrospectively extending the copyright term cannot logically be reconciled with an incentive based system (dead people are notoriously unresponsive to incentives). Furthermore critics contend that the retrospective term extension would effectively freeze the advancement of the public domain.[67]

The CTEA and the subsequent *Eldred*[68] litigation place liberal and conservative intuitions in tension. Although liberal justices might embrace an unrestricted view of congressional power to regulate the economy, they would not be expected to embrace the extension of private property and redistribution of wealth in favor of large corporate interests.[69] On the other hand although conservatives are predisposed to favor private property rights, a narrow reading of Congressional authority under the Copyright Clause would have added support to cases such *Morrison* and *Lopez* which adopted a narrow reading of the Commerce Clause.[70]

Intellectual Property Rights and Individual Liberty

As the Supreme Court itself has noted on a number of occasions, IP laws must "balance between the need to encourage innovation and the avoidance of monopolies that stifle competition without any concomitant advance in the progress of science and useful

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(2004); Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 336-37.

[66] *See e.g.* Lessig, supra note 65 at 249 ("When you focus on the issue of lost creativity, people can see that the copyright system makes no sense. As a good Republican might say, here government regulation is simply getting in the way of innovation and creativity. And as a good Democrat might say, here the government is blocking access and the spread of knowledge for no good reason.")

[67] Eldred v. Ashcroft, 537 U.S. 186, 251-252 (2003) (Breyer dissenting)

[68] 537 U.S. 186 (2003)

[69] Paul M. Schwartz and William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2333 (2003).

[70] *Id.*

arts."[71] As the Court discussed in the *Sony* case, copyrights and patents are "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[72] The same reasoning applies with respect to questions of the scope of IP rights, not just their duration.

This balance is not only utilitarian in nature; it has fundamental implications for individual liberty in at least three dimensions. First, because we live in a world highly saturated with proprietary images and text, copyright and trademark law have the potential to impede individual autonomy in a unique way.[73] Documentarians filming outside a tightly controlled studio,[74] children playing at being superheroes,[75] fans expressing pride in their association with their sporting teams,[76] all run the risk of infringing the copyrights and/or trademarks of numerous rights holders.[77]

As Judge Alex Kozinski observed, there is a deep irony in defending free-expression when it affronts public morality[78] or compromises national security,[79] but curbing that same free-expression out of respect for copyright law.

> *"Think about this for a moment. Congress has given courts the power to order books burned. In a legal regime as jealously protective of freedoms of speech and press as ours, this ought to give us some pause. What's that, you say? Classified documents about our Vietnam war effort have been stolen from the Pentagon and given to the newspapers? You want an injunction to avoid risking the death of soldiers, the destruction of alliances, the prolongation of war? No way, Jose; this is the land of the brave and the home of the free. But wait a minute - did you say someone drew a picture of OJ Simpson wearing a goofy stovepipe hat? Light the bonfires!"*[80]

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[71] Twentieth Century Music Corp. v Aiken 422 U.S. 151 (1975).
[72] Sony Corp. of America v Universal City Studios, Inc. 464 U.S. 417 (1984). *See also* Bonito Boats, Inc. v Thunder Craft Boats, Inc. 489 U.S. 141 (1989).
[73] See, e.g., PATRICIA AUFDERHEIDE AND PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2005); MARJORIE HEINS AND TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (2005); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972-75 (1993).
[74] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 95-99 (2004).
[75] Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999).
[76] Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory Or Fait Accompli*? 54 EMORY L.J. 461 (2005).
[77] For a number of examples, see James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).
[78] Cohen v. California 403 U.S. 15 (1971) (F*** the Draft)
[79] New York Times Co. v. United States 403 U.S. 713 (1971) (Pentagon Papers)
[80] Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC. U.S. 513, 515 (1999) (available at http://www.kozinski.com/~alex/articles/Whats_So_Fair_About_Fair_Use.pdf).

Second, copyright in the digital age converts reproduction rights into use rights, thus enabling copyright owners an unprecedented degree of control as to how their products are used.[81] This conversion is an artifact of the shift from analog to digital technology, which requires information stored in a device memory to be reproduced in Random Access Memory (or its equivalent) in order to be accessed.[82] Consequently, consumers who may freely lend or sell a paper copy of a used book often have no such rights with respect to e-books or software.[83] Copyright's balance between incentives and restrictions on individual liberty begins to look quite strained when the copyright owners of electronic books forbid not only resale and lending, but also reading out-loud.[84]

Finally, patent and trademark laws also present a unique challenge to individual autonomy because they can be innocently infringed by a party who has no knowledge of the rights-holder's claim – in real property terms this is the equivalent to trespass from a thousand miles away.[85] Thus, eBay has been found liable for infringing MercExchange's electronic auction patents even though eBay's own technology was independently developed before it had notice of MercExchange's patents and even though the patents arguably offered no real guidance as how to implement MercExchange's claimed inventions.[86] Similarly, the defendant boat-builder in *AMF, Inc. v. Sleekcraft Boats*,[87] was unaware that in adopting the trademark "sleekcraft" it was infringing the plaintiff's "slickcraft" mark.The defendant selected the name sleekcraft without knowledge of trademarkl owner's use and in good faith. Nonetheless, the Court of Appeal found that the defendant had infringed the Slickcraft mark and concluded that a limited mandatory injunction was warranted.[88]

IP laws have the potential to promote individual autonomy by giving authors and inventors control over the product of their labors. However, these same laws also constrain the autonomy of non-owners by restricting the reuse and reinterpretation of protected works. This tension emphasizes the potential ideological ambiguity of IP and

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[81] See, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).
[82] NAT'L RESEARCH COUNCIL, COMM. ON INTELLECTUAL PROP. RIGHTS AND THE EMERGING INFO. INFRASTRUCTURE, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 28-31 (2000) ("When information is represented digitally, access inevitably means making a copy, even if only an ephemeral (temporary) copy. This copying action is deeply rooted in the way computers work . . ."); see also Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 31-32 (1994) (RAM copy doctrine "would enhance the exclusive rights in the copyright bundle so far as to give the copyright owner the exclusive right to control reading, viewing, or listening to any work in digitized form.")
[83] Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 W, & MARY L. REV. 1245, 1266 (2001).
[84] Claire Elizabeth Craig, *"Lending" Institutions: The Impact Of The E-Book On The American Library System*, 2003 U. ILL. L. REV. 1087, 1090 (2003). *But see* 37 C.F.R. 201.40(b)(4) (Providing an exemption allowing the user to disable access controls that prevent the enabling of an ebook's read-aloud function).
[85] Kewanee v. Bicron, 416 U.S. 470, 478 (1974) (patent protection extends to independent creation); M2 Software, Inc. v. Madacy Entertainment, 421 F.3d 1073 (9th Cir. 2005) ("It is settled that a party claiming trademark infringement need not demonstrate that the alleged infringer intended to deceive consumers.")
[86] MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 722-720 (D. Va. 2003), *vacated and remanded on other grounds*, eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006).
[87] 599 F.2d 341 (9th Cir. 1979).
[88] *Id.* 346 (9th Cir. 1979).

explains why elements of both the left[89] and the right[90] express concern over the expansion of IP.

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In summary, IP is ideologically ambiguous at a theoretical level because (i) IP rights are not unequivocally linked to a natural rights framework, (ii) while the property analogy is common, the government regulation analogy is equally compelling, and (iii) the exercise of IP rights can detract from individual liberty and freedom of expression. Although it seems implausible that judges do not hold preferences about IP, the ideological ambiguity of IP explored above could reasonably suggest that there may be no observable relationship between IP and ideology because IP issues do not fall neatly across party lines.

II EVIDENCE OF IDEOLOGY IN INTELLECTUAL PROPERTY DECISIONS

The previous section explored the application of the attitudinal model to IP and the contrary claim of IP exceptionalism. Attitudinalists have amassed a formidable body of evidence that that judges make decisions based on their ideological predilections. However, the one arguable weakness of the attitudinal account is the dearth of evidence of ideological voting in "business cases" such as tax, securities and antitrust. The previous section explored some of the theoretical reasons underpinning the widely held view that conventional measures of ideology are little or no relevance to IP. This section assesses the extent to which evidence in individual cases lends support to the claim of IP exceptionalism and the attitudinalist response to those claims.

A. Evidence of Exceptionalism

There are three basic arguments in support of IP exceptionalism. First, the Supreme Court decides a large number of IP cases unanimously. Second, there are a number of IP cases in which justices vote against type, i.e. cases in which conservative justices vote against the IP owner or liberal justices vote in favor of the IP owner. Third,
there are also many IP cases which produce strange coalitions of liberals and conservatives that would appear to defy the predictions of an attitudinal model. .We address each of these observations in detail before turning to the attitudinal response in Part II-B.

Unanimous Opinions

Even Supreme Court justices agree sometimes. In fact, the Court averages about one unanimous opinion for every two divided opinions.[91] The Court's level of unanimity in

[89] See e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); and YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)

[90] See Roderick T. Long, *The Libertarian Case Against Intellectual Property Rights*, (1995), available at http://libertariannation.org/a/f3111.html; and N. Stephan Kinsella, Against Intellectual Property, JOURNAL OF LIBERTARIAN STUDIES, Volume 15, no. 2 (2001) available at http://www.mises.org/journals/jls/15 2/15 2 1.pdf.

IP cases is higher than average, about 45% between 1954 and 2006. Indeed, between 1997 and 2007 the Supreme Court decided 15 IP cases on a unanimous basis and only 6 otherwise.[92] These cases include several significant decisions such as *Wal-Mart Stores v. Samara Bros.*,[93] *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*,[94] *Merck KGaA v. Integra Lifesciences I, Ltd.*,[95] *MGM Studios Inc. v. Grokster, Ltd.*,[96] and *eBay Inc. v. MercExchange, L.L.C.*[97] Interestingly, of these 15 unanimous cases only three, *Festo*, *Grokster* and *Illinois Tool*, were decided in favor of the party claiming an IP right.

It has been suggested that these unanimous decisions demonstrate the justices impartiality and the ascendance of precedent over political preference.[98] Critics of the attitudinal model often argue that unanimity and near-unanimity are "hard to square" with attitudinal model. For example, Michael Gerhardt argues that "many unanimous and nearly unanimous opinions involve salient issues on which the justices transcend their ideological differences to reach agreement about the law."[99]

Voting Against Type

The second empirical observation that causes many to doubt that IP cases are ideologically determined is that there are a number of cases where the justices vote against type. Applied to the realm of IP litigation, the attitudinal model predicts that conservative judges will be predisposed to side with those asserting IP rights and that liberal judges will be correspondingly predisposed against them. Thus, when a conservative (liberal) judge votes for (against) the IP owner, we say that the judge is voting according to type.

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[91] See *Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 520 tbl.IV (2004). On average, 35.5% of Supreme Court decisions in the 1994 to 2003 terms were unanimous. The proportion of unanimous cases was as low as 29.6% in 1998 and as high as 43% in 1997. *Id.*

[92] Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 1153 (U.S. 1997); Quality King Distribs. v. L'Anza Research Int'l, 523 U.S. 135 (U.S. 1998); Feltner v. Columbia Pictures Tv, 523 U.S. 340 (U.S. 1998); Pfaff v. Wells Elecs, 525 U.S. 55 (U.S. 1998); Wal-Mart Stores v. Samara Bros., 529 U.S. 205 (U.S. 2000); Traffix Devices v. Mktg. Displays, 532 U.S. 23 (U.S. 2001); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (U.S. 2002); Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826 (U.S. 2002); Moseley v. V Secret Catalogue, 537 U.S. 418 (U.S. 2003); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (U.S. 2003); KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (U.S. 2004); Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005); MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (U.S. 2006); and eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006).

[93] 529 U.S. 205 (2000).

[94] 543 U.S. 111 (2004).

[95] 545 U.S. 193 (2005).

[96] 545 U.S. 913 (2005).

[97] 126 S. Ct. 1837 (2006).

[98] Kenneth Starr argues explicitly that the number of unanimous decisions in relation to IP shows that the Supreme Court is not ideological with respect to IP. Instead, he argues that the number of unanimous decisions "bespeaks the underlying and, in many respects, overriding professionalism of this very lawyerly court." Simensky, supra note 41 at 116.

[99] Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003) (Reviewing The Supreme Court and the Attitudinal Model Revisited by Jeffrey A. Segal and Harold J. Spaeth.)

IP practitioners and scholars frequently point to the decisions of Justice Ginsburg as refutation of the attitudinal model in the context of IP. Justice Ginsburg is generally considered to be one of the more liberal judges on the Court, however she is also widely perceived as a reliable vote in favor of the IP owner.[100] Ginsburg is not the only justice who votes against type from time to time. There are, for example, a number of split decisions in which Rehnquist, a conservative, voted against the IP owner,[101] and in which Stevens, a liberal voted in favor of the IP owner.[102]

There are particularly salient examples of voting against type for with respect to Thomas and Scalia who appear to lead the Court in adopting a view that reduces property rights in cases such as *eBay Inc. v. MercExchange*,[103] *Merck KGaA v. Integra Lifesciences*,[104] *Dastar Corp. v. Twentieth Century Fox*,[105] *Holmes Group, Inc. v. Vornado*,[106] and *Wal-Mart Stores v. Samara Bros.*[107] In each of these cases, the Court decided against the party claiming an IP right.

"Strange" Coalitions

Not only do the IP cases produce numerous examples of voting against type, they also give rise to strange coalitions of liberals and conservatives that would appear to defy the predictions of an attitudinal model.

Figure 1 illustrates the mean ideological positions of the members of the Rehnquist Court from 1994 to 2004 based on the ideology scores developed by political scientists Andrew Martin and Kevin Quinn.[108]

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[100] Ginsburg has only once voted against the IP owner in a non-unanimous Supreme Court decision, see Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006). *See also*, Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS, Mar./Apr. 2004, available at http://www.legalaffairs.org/printerfriendly.msp?id=544.

[101] Examples include: Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985); Dowling v. United States, 473 U.S. 207 (1985); Dow Chem. Co. v. United States, 476 U.S. 227 (1986); Stewart v. Abend, 495 U.S. 207 (1990); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990); Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974); Twentieth Century Music Corp. v. Aiken 422 U.S. 151 (1975)

[102] Examples include: Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); San Francisco Arts & Ath. v. United States Olympic Comm., 483 U.S. 522 (1987); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); and Unitherm Food Sys. v. Swift-Eckrich, Inc. 546 U.S. 394 (2006).

[103] eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837. Thomas delivered the unanimous Opinion of the Court. Roberts filed a concurring opinion, in which Scalia and Ginsburg joined. Kennedy filed a concurring opinion, in which Stevens, Souter, and Breyer joined.

[104] Merck KGaA v. Integra Lifesciences 545 U.S. 193 (2005). Scalia delivered the Opinion of the Court.

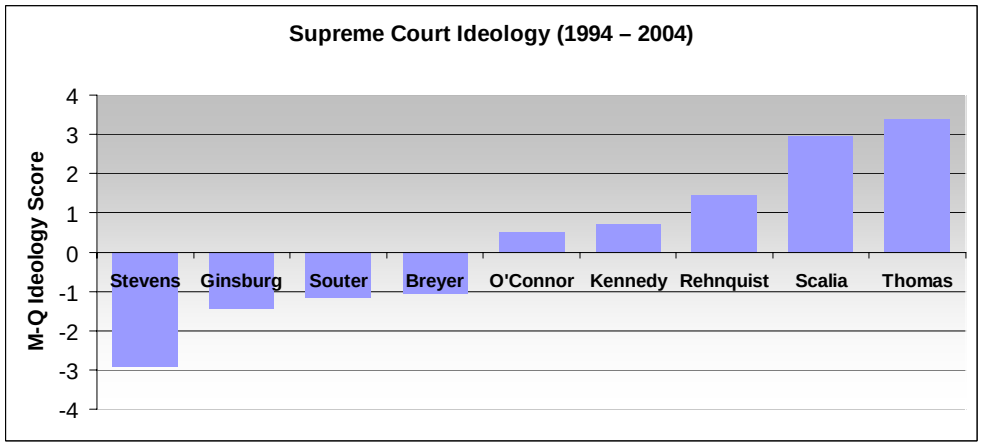
[105] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003). Scalia delivered the Opinion of the Court.

[106] Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826 (2002). Scalia delivered the Opinion of the Court, in which Rehnquist, Kennedy, Souter, Thomas, and Breyer joined, and in which Stevens, joined in part and filed an opinion concurring in part and concurring in the judgment. Ginsburg filed an opinion concurring in the judgment, in which O'Connor joined.

[107] Wal-Mart Stores v. Samara Bros., 529 U.S. 205 (2000). Scalia delivered the Opinion of the Court.

[108] Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*. 10 POLITICAL ANALYSIS 134-153 (2002). Updated data available

Figure 1: Rehnquist Court Judicial Ideology Scores (Martin-Quinn), 1994 – 2004



Data: Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php

As Figure 1 illustrates, the justices are positioned from most liberal to most conservative as follows: Stevens, Ginsburg, Souter, Breyer, O'Connor, Kennedy, Rehnquist, Scalia, and Thomas.[109] Accordingly, we might expect to see coalitions of Justices who are ideologically proximate; we would not predict ideologically discontinuous coalitions, such as a majority of Stevens, Souter, O'Connor, Rehnquist, and Thomas or Ginsburg, Breyer, Kennedy, Rehnquist and Scalia.

As noted, Justice Ginsburg appears to present something of a paradox if the attitudinal model of IP is to be believed.
In Part III of this article we undertake a detailed analysis of the correlations between the justices in IP cases and compare that to the correlations between the justices across all Supreme Court cases. That comparison shows that the votes of Ginsburg and Rehnquist have a .42 correlation across all cases, but that in IP cases her votes have a .91 correlation with Rehnquist.[110] Indeed, Ginsburg's tendency to vote more often with Rehnquist in IP cases than she does with her more liberal colleagues is evidence of both the strange coalitions phenomena and of voting against type.[111] We examine these correlations in more detail in Part III-A.

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at http://mqscores.wustl.edu/measures.php. The figure shows the average Martin-Quinn score for each justice during the period 1994 – 2004. We discuss the Martin-Quinn scores in detail below, see *infra* note __ and accompanying text.

[109] Stevens (-2.94); Ginsburg (-1.43); Souter (-1.17); Breyer (-1.05); O'Connor (0.51); Kennedy (0.72); Rehnquist (1.45); Scalia (2.95); and Thomas (3.38).

[110] See table __ for detailed correlations. *Florida Prepaid* is the only case in which Ginsburg cast her vote in a different direction to that of Rehnquist, see Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

[111] In the IP database, the correlation between Ginsburg and Stevens is .51, the correlation between Ginsburg and Breyer is .58.

B. The Attitudinal Response

To recap, the main evidence that is usually presented in favor of IP exceptionalism is either (1) unanimous cases (2) instances of voting against type and (3) strange coalitions of liberals and conservatives.

Unanimous Opinions

The argument that unanimous decisions demonstrate the judicial impartiality or the ascendance of precedent over preference is erroneous. The unanimity argument proceeds on the assumption that the underlying case facts faced by a reviewing court are within the ideological range of the court and not outside that range.[112] Whereas, if a lower court decision is to the extreme right or left of all the judges on the higher court, a unanimous opinion could arise, even under a reviewing court with heterogeneous preferences.[113]

For example, in the recent *Grokster* case, it was fairly clear that all of the justices considered that allowing the providers of file sharing services to blatantly encourage unlawful copying would be an extreme result.[114] Thus, despite their differences on the arguably more important issue of the correct application of the *Sony* doctrine,[115] the Court held unanimously that the defendants were liable for inducing infringement.[116]

Also, unanimity in a ruling can mask disagreement in the Court as to the details of the ruling. For example in *eBay*, the Court was of one mind in holding that a plaintiff seeking a permanent injunction against patent infringement must satisfy the traditional four-factor test focused on "well-established principles of equity."[117] However, the Court was divided as to the implications of this ruling. Chief Justice Roberts (joined by Justices Scalia and Ginsburg) stressed that history suggests that most patent owners would be

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[112] See Tonja Jacobi, *Competing Theories of Coalition Formation and Case Outcome Determination* (November 2007). Northwestern Law & Economics Research Paper No. 06-09 Available at SSRN: http://ssrn.com/abstract=947592.

[113] *Id.*

[114] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 923–925 (2005).

[115] The concurring opinion of Ginsburg (joined by Rehnquist and Kennedy) would have substantially narrowed the application of the Sony doctrine by adopting a ratio test in relation to substantial-noninfringing use. *Id.* at 942 (Ginsburg concurring). In contrast, the concurring opinion of Breyer (joined by Stevens and O'Connor) expressly rejected the application of a ratio test in relation to substantial-noninfringing use. *Id.* at 949 (Breyer concurring).

[116] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 923 (2005) (One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.)

[117] eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006). ("A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. These familiar principles apply with equal force to disputes arising under the Patent Act. As this Court has long recognized, "a major departure from the long tradition of equity practice should not be lightly implied.")

entitled to injunctive relief.[118] In contrast, Justice Kennedy (joined by Justices Stevens, Souter, and Breyer) argued that the lessons of history may not apply because "in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases."[119]

As the *Grokster* and *eBay* cases illustrate, it is unsafe to rely on unanimity as evidence against the attitudinal model without some understanding of the underlying status quo to which the Court's opinion is addressed. Indeed, once we scratch the surface of the Court's so-called unanimous decisions we often see deep underlying differences that do in fact tend to correlate with the justices ideological profiles. Ultimately, unanimity is not an effective measure of the impact of ideology.

Strange Coalitions and Voting Against Type

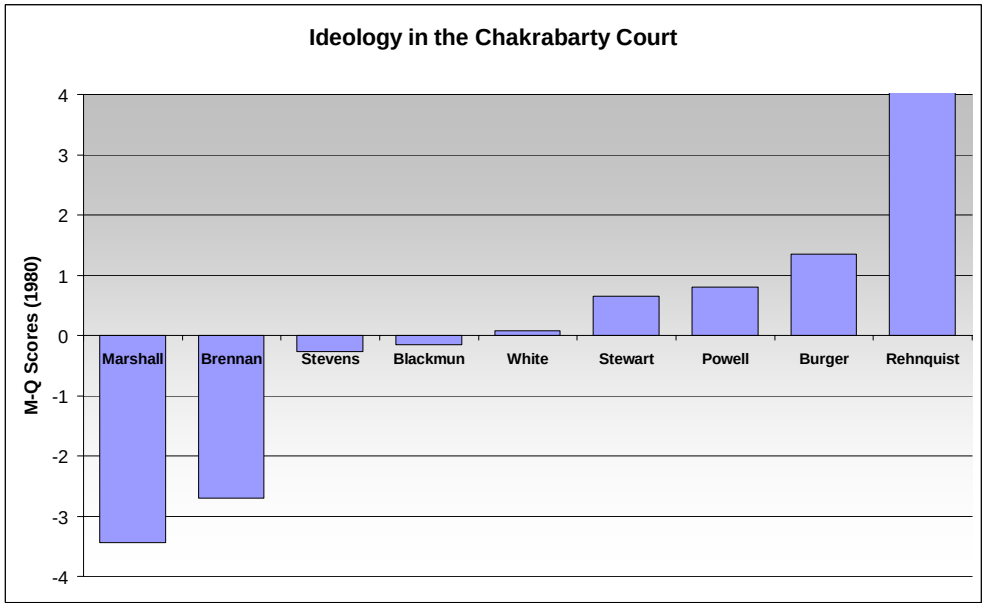
There are a number of examples in the IP cases of liberals and conservatives teaming up to form unusual coalitions and of individual Justices voting against type. However, the existence of such instances do not fundamentally challenge the attitudinal model.

First, it is important to understand that the attitudinal model is *a model*. As Segal and Spaeth explain, "[a] model represents reality, it does not constitute reality itself.[120] There may well be idiosyncratic factors that account for discrepancies between the model and that which is modeled; however, the model is useful if it highlights variables that explain a significant amount of the behavior in question.[121]

Second, evidence of individual Justices voting against type in any particular case needs to be assessed in light of all the other cases where Justices vote in accordance with type. One such case is the Court's landmark patent decision in *Diamond v. Chakrabarty.*[122] The *Chakrabarty* decision largely reflects the ideological composition of the Court at the time. Figure 2 represents the ideological composition of the Supreme Court in 1980 based on the Martin-Quinn scores for that year.

[118] *Id.* at 1841–42.
[119] *Id.* at 1842.
[120] Segal & Spaeth, *supra* note 2 at 32.
[121] *Id.*
[122] 447 U.S. 303 (1980). Burger delivered the Opinion of the Court, in which Stewart, Blackmun, Rehnquist, and Stevens joined. Brennan filed a dissenting opinion, in which White, Marshall, and Powell joined.

Figure 2: Judicial Ideology (Martin-Quinn) in the Chakrabarty Court, 1980



Data: Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php

The majority in that case – Chief Justice Burger, Justices Stewart, Blackmun, Rehnquist, and Stevens – took an expansive reading of the Patent Act and held that a live, human-made micro-organism is patentable subject matter under § 101. In contrast the minority – Justices Brennan, White, Marshall and Powell – argued against expanding the boundaries of patentable subject matter. The minority argued that the Court should "proceed cautiously" when "asked to extend patent rights into areas wholly unforeseen by Congress."[123] As illustrated above, the *Chakrabarty* majority is conservative with the exception of Justices Blackmun and Stevens who are each only mildly liberal at that time; the *Chakrabarty* minority is liberal with the exception of Justice Powell. This outcome is broadly consistent with the predictions of an attitudinal model: conservative judges voting to extend property rights, liberal judges voting to limit them. The significance of the *Chakrabarty* decision can hardly be understated; the Court's decision to expand the scope of patentable subject matter to comprise genetically engineered bacteria and living organisms more generally "jump-started the fledgling biotechnology industry" in the United States.[124]

[123] *Id.* at 322. (quoting *Parker* v. *Flook*, 437 U.S. 584, 596 (1978).) ("the Court's decision does not follow the unavoidable implications of the statute. Rather, it extends the patent system to cover living material even though Congress plainly has legislated in the belief that § 101 does not encompass living organisms. It is the role of Congress, not this Court, to broaden or narrow the reach of the patent laws. This is especially true where, as here, the composition sought to be patented uniquely implicates matters of public concern.") Diamond v. Chakrabarty, 447 U.S. 303, 321-322 (1980) (Brennan dissenting).

[124] See, Margo A. Bagley, *Academic Discourse and Proprietary Rights: Putting Patents in Their Proper Place*, 47 B.C. L. REV 217, 235 (2006). See also, John M. Golden, *Biotechnology, Technology Policy, And Patentability: Natural Products and Invention In The American System* 50 EMORY L.J. 101, 125 (2001) (*Chakrabarty* set the stage for a decade of aggressive expansion of biotechnology patenting)

Third, impressions taken from individual cases manifest two significant cognitive biases: the fundamental attribution error and the availability heuristic. The fundamental attribution error describes the human tendency to over-emphasize personality-based explanations for observed behavior while under-emphasizing the role and power of situational influences on the same behavior. The availability heuristic describes the tendency of people to over-emphasize the significance of vivid and salient events.[125] In this context it is not surprising that IP exceptionalists would point to examples of voting against type and the strange coalitions it produces; however, more rigorous analysis is required to determine whether such examples are merely vivid anecdotes that stand out against a sea of less remarkable voting that is consistent with the attitudinal model.

C. The Need for an Empirical Approach

As the foregoing discussion makes clear, the relevance of ideology to decision-making in IP cases is ultimately an empirical question. However, until now, there has not been systematic attempt to analyze it in a rigorous empirical fashion.

III EMPIRICAL ANALYSIS

A. Hypotheses

In this section, we empirically test the relationship between ideology and judicial decision-making. The theoretical and anecdotal accounts described in the previous sections suggest two competing claims over the relationship between intellectual property and ideology: the attitudinalist model suggests that support for (or opposition to) IP owners will be significantly shaped by political ideology; conversely, an exceptionalist model of IP suggests that the typical ideological divide observed in Supreme Court cases will not be able to predict the outcomes of IP cases.

To answer to this debate, we first provide some impressionistic tests of some of the elements that make up these two competing theories. It was suggested that the coalitions formed in intellectual property cases are different to other cases: we test this by comparing the correlations among Supreme Court justices' decisions in general cases and in intellectual property cases.

We then test the two competing theories more rigorously. Using judicial vote as a unit of analysis, we begin by testing the null hypothesis that that ideology does not predict judicial decisions in intellectual property cases. The attitudinalist theory would predict that judges' ideology will be significantly related to their voting behavior in intellectual property cases. Establishing this result would suggest that noteworthy cases that seem to defy ideological explanations are outliers are given undue attention because of their salience. The exceptionalist theory in contrast would predict that we will not see a

[125] Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207 (1973).

significant relationship between ideology and judicial votes in intellectual property cases.[126]

The theory explored in section III argued that intellectual property is exceptional because both liberalism and conservatism will each be pulled in different directions, due to competing concerns. Arguably, ideology does not answer intellectual property questions for conservatives, as they must choose between their core values of property and liberty; similarly, liberals must choose between free speech and governmental regulation. However, although these effects are driven by similar causes, they may be independent. This raises a viable second possibility: that the effect of ideology on judicial voting behavior will be different for liberals and conservatives. We subsequently test this possibility.

If there is a significant positive relationship between judicial voting behavior in intellectual property cases and ideology, the next natural question would be whether the relationship is different when compared to that in the entire population of Supreme Court cases.

In summary, our three null hypotheses are:

H_{01}: there is no relationship between a justice's votes in IP cases and his or her ideology;

H_{02}: the effect of ideology in IP cases does not differ between liberal justices and conservative justices ;

H_{03}: there is no difference in the relationship between ideology and justices' voting in IP cases and the effect of ideology and voting LIBERAL in the entire population of Supreme Court cases.

Below, we describe our data and then our results.

B. The Data

To test these hypotheses, we developed the Supreme Court Intellectual Property database. This database contains a comprehensive set of Supreme Court opinions dealing with IP from 1954 through 2006. Much of our IP database is adapted from a widely used database of Supreme Court opinions developed by Harold Spaeth, the United States Supreme Court Judicial Database.[127] For simplicity we shall refer to these databases as the IP database and the general database respectively.

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[126] In a set of additional analyses, we explore whether the impact of ideology on judicial voting behavior in IP cases may vary with the subject matter (i.e., antitrust, copyright, patent, trademark, and trade secret), parties involved (i.e., when author or inventor is involved), and institutional phase (pre- or post 1982).

[127] Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 23 (2002) (reviewing and assessing the Supreme Court Judicial Database). Other studies using this data include: Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA L. REV. 1301, 1305 (2002); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 148391 (2001); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices Decision Making*, 29 J. LEGAL STUD. 721 (2000); Lee Epstein, Daniel E. Ho, Gary

The IP database consists of 102 IP cases decided by the U.S. Supreme Court between 1954 and 2006. Within those 102 decisions there are 827 separate votes by the individual Justices. Spaeth's general database contains four subject matter codes relating to areas IP: patent (611), copyright (622), trademark (633), and patentability of computer processes (664). The general database yielded 72 cases relating to these issue codes. We cross-referenced the initial 72 cases with a list of IP cases generated through a Lexis search for the core-terms: patent, copyright, trademark, trade secret, and fair use.[128] Of the 166 cases generated by this search, 70 overlapped with the initial 72 cases from the general database and 66 were excluded because they did not relate to IP.[129] We included the remaining 30 cases in the IP database.[130] The 102 cases in the IP database consist of 52 patent cases, 26 copyright cases, 20 trademark cases and 4 trade secret cases. 12 of these cases also deal with issues of antitrust law such as IP owners should be presumed to have market power for the purposes of tying analysis under the Sherman Act.[131]

The general database records a multitude of attributes for each decision relating to the origins of the case, the legal subject at issue, key dates such as the date of oral argument and final decision, the identities of the parties and the votes of the individual justices. Each decision in the database is coded as either "liberal" or "conservative", 1 and 0 respectively. Since liberal outcomes are coded as 1 and conservative as 0, this variable is referred to in both the general Spaeth database and herein as simply "LIBERAL." The term "liberal" appears in all caps when referring to the variable, in plain text when referring to a justice or case outcomes itself being liberal, rather than conservative.

In general, a case outcome is coded as liberal if it favors classic liberal underdogs such as, the accused in a criminal case, a person claiming the protection of civil rights of civil liberties, children, indigents, or American Indians. Outcomes favoring affirmative action and reproductive freedom are also coded as liberal. Pro-union decisions are coded as liberal except in the context of antitrust cases, where a pro-union decision is regarded as conservative. Spaeth relies on slightly different under-dog/upper-dog coding in cases pertaining to economic activity. Liberal outcomes in those cases include pro-competition, anti-business, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-

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King, & Jeffrey A. Segal, *The Supreme Court During Crisis*, 80 N.Y.U. L. REV. 1 (2005); and Epstein & Segal *supra* note 8. The general database is available at the S. Sidney Ulmer Project website at http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm, under the heading "The Original U.S. Supreme Court Judicial Database."

[128] We searched Lexis for U.S. Supreme Court Cases as follows: core-terms(copyright) or core-terms(patent) or core-terms(trademark) or core-terms(trade secret) or core-terms(fair use) and date(geq (01/01/1953) and leq(05/30/2006)). Note that our core-terms did not include the right of publicity and thus our database does not include Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that the First Amendment did not immunize a TV broadcaster from publicity rights claims by a performer).

[129] For example, we excluded cases relating to land patents, grants of certiorari, purely procedural issues, and recovery of attorney fees.

[130] Appendix A lists the cases contained in our final dataset.

[131] *See e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (holding that the mere fact that a tying product is patented does not support a presumption of market power). There are eight patent/antirust cases, two copyright/antitrust cases and two trademark/antitrust cases.

bankrupt, pro-Indian, pro-environmental protection, pro-consumer and pro-economic underdog.[132]

In spite of its impressive scope and complexity, the general database is not well suited to an analysis of IP issues. We supplemented the LIBERAL coding in the general database with additional variables relevant to IP. We created new control variables relating to case subject matter (Antitrust, Copyright, Patent, Trademark, Trade Secret) and a new dependant variable, XIPO, which records case outcomes in relation to IP. XIPO stands for "Against IP Owner." XIPO is a binary variable such that a decision favoring the party asserting an IP right is coded as 0 and a decision against that party is coded as a 1.[133]

We did not attempt to code decisions along subjective criteria such as whether the Court "followed precedent" or created a rule favorable to IP owners generally.[134] Accordingly, the XIPO variable does not capture the differences between the justices in their many split concurrences. In a case such as *Grokster*, it would be fair to characterize Chief Justice Rehnquist, Justices Kennedy and Ginsburg as taking a high-protectionist view; and to similarly characterize Justices Breyer, Stevens and O'Connor as taking a low protectionist view. However, to make that determination requires a somewhat subjective analysis that would raise questions as to the reliability of the data.[135] Because the XIPO variable does not capture this kind of nuance, it may understate the extent of the differences between the justices.

Comment [MS2]: We may add more detailed consideration of Samuelson's article in a future draft.

Table 1: Case Outcomes in the IP Database[136]

	Liberal Outcome	**Conservative Outcome**
Against IP Owner	50	16
For IP Owner	10	23

Table 1 above summarizes the outcomes of the IP cases both in terms of IP and in terms of ideology (relying on the LIBERAL coding in the general database). It is noteworthy that almost three-quarters of the cases necessitated a choice between a conservative outcome which upheld the claim of the IP owner versus a liberal outcome which rejected that claim. Only about a quarter of cases presented a conflict between voting for a liberal outcome and voting against the IP owner.

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[132] See generally, Harold J. Spaeth, *The Original United States Supreme Court Judicial Database 1953-2003 Terms Documentation*, 2005.

[133] We adopted this coding scheme to maintain consistency with both the general database's liberal-conservative coding and with the attitudinal hypothesis that conservatives will favor intellectual property interests.

[134] For a qualitative study of Supreme Court IP cases between 1975 and 2005, see Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831 (2006) (reviewing trends in IP law during Justice Stevens's tenure on the Supreme Court).

[135] Epstein & King, *supra* note 127 at 82 – 97 (discussing the importance of reliability and validity in data collection and measurement).

[136] Three cases were excluded from this table because they were not used for our statistical analysis, see Appendix A and accompanying notes.

Table 2: Case Outcomes in the IP Database, by IP Type

	Against IP Owner	For IP Owner
Patent	35	16
Copyright	14	11
Trademark	14	5
Trade secret	3	1

Our statistical analysis which follows uses two different measures of judicial ideology: one simple, one complex. The simple measure is the Party of the Appointing President. It is often assumed that a judge's ideological leanings can be determined by identifying the party of the president who nominated the justice.[137] The assumption here is that Republican presidents are conservatives and Democrat presidents are liberal. This measure of ideology has the advantage of simplicity and is often used in this type of analysis.

However, there are reasons to question the validity of Party of the Appointing President as a measure of judicial ideology. First, presidential ideology is more nuanced than a simple binary choice between liberal and conservative.[138] Second, other factors such as the composition of the Senate and its prevailing norms may either constrain or enhance the power the president with respect to judicial appointments.[139] Third, Party of the Appointing President is a time-invariant proxy for ideology and hence precludes the possibility of accounting for variations in each justice's ideology over time.

The more complex measure we employ is that developed by Andrew Martin and Kevin Quinn.[140] Unlike other measures of judicial ideology, the "Martin-Quinn" scores are derived by actually looking at the votes of the justices over time. These scores are estimated for every justice serving from 1937 term to the 2004 term. The Martin-Quinn scores are estimated using a dynamic item response theory model which takes into account not just case outcomes, but also voting patterns in each term.[141] There are several advantages to using the Martin-Quinn scores for empirical analysis such as ours. First, Martin and Quinn provide a standardized measure that allows for comparison over time. Second, the Martin-Quinn scores for individual justices can and do change over time and are thus more realistic than measures of ideology that hold judges ideology constant.[142] Third, although the method used to derive the scores is quite complex, the Martin-Quinn scores themselves align closely with press and popular perceptions of the ideological

Comment [MS3]: We now have data for 2005.

[137] *See, e.g.* Cross and Tiller, *supra* note 23; Revesz, *supra* note 2.
[138] *See* Epstein & King, *supra* note 127 at 88-89. (Noting that on Segal's measure of presidential economic liberalism, for example, Jimmy Carter is ideologically closer to Richard Nixon than to Lyndon Johnson).
[139] *See* Tonja Jacobi, *The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in 'Advice and Consent' Nominations*, 30 LEGISLATIVE STUDIES QUARTERLY 193 (2005).
[140] Martin & Quinn, *supra* note 108. Item response theory models are mathematical functions used to specify the probability of an outcome in terms of the underlying characteristics or latent traits of the subject of interest.
[141] For a discussion of other measures, see Epstein & King *supra* note 127 at 95.
[142] See, Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. (forthcoming 2007)

positions of the Justices – in other words, the scores "look right."[143] Finally, the Martin-Quinn scores are quickly becoming an accepted as a measure of ideology in the Supreme Court, so using these scores enables direct comparison with other studies.[144]

To ascertain whether IP is exceptional, or alternatively is typical in that it is equally explicable by ideological preferences as other areas of the law are, we undertake two types of analyses. Our starting point is an impressionistic comparison of the correlations between the justices in the general Spaeth database and our specialized IP database; we then turn to detailed logistical regression testing of our hypotheses.

C. Impressionistic Results

One impressionistic method of assessing the merits of IP exceptionalism is to simply compare the observed coalitions of justices in the general database to those in the IP database. This analysis is by no means definitive; but it does provide a preliminary test of whether IP looks significantly different from other areas of the law and directly addresses some of the arguments raised in favor of IP exceptionalism.

Table 3: Correlations Among Justices, General Spaeth Database†

Justice (n)	Stevens	Ginsburg	Breyer	Souter	O'Connor	Kennedy	Rehnquist	Scalia
Ginsburg	.66 (1726)							
Breyer	.62 (1555)	.75 (1562)						
Souter	.62 (2331)	.80 (1739)	.73 (1561)					
O'Connor	.46 (5072)	.54 (1625)	.58 (1451)	.61 (2225)				
Kennedy	.41 (3062)	.51 (1740)	.45 (1563)	.57 (2340)	.66 (2945)			
Rehnquist	.38 (6576)	.42 (1601)	.40 (1423)	.50 (2204)	.69 (5033)	.74 (2939)		
Scalia	.30 (3579)	.37 (1729)	.27 (1554)	.44 (2335)	.57 (3455)	.69 (3071)	.70 (3457)	
Thomas	.22 (2069)	.32 (1724)	.23 (1546)	.38 (2080)	.53 (1974)	.60 (2089)	.68 (1955)	.80 (2085)

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml.

† All correlations significant at the .001 level.

[143] In 2004 O'Connor held the position of median justice with a Martin-Quinn score of 0.079; with her retirement and the death of Rehnquist, Kennedy now becomes that median justice with a Martin-Quinn score of 0.486. Media portraits of Kennedy as the new "swing vote" on the Court fit very well with Martin and Quinn's analysis. *See e.g.*, Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court's 5 to 4 Decisions Underscore His Power*, THE WASHINGTON POST, May 13, 2007; Robert Barnes, *In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, THE WASHINGTON POST, June 25, 2007.

[144] *See*, Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimate be Used as Explanatory Variables?* Working paper, available at: http://adm.wustl.edu/supct.php.

Table 4: Correlations among Justices, Intellectual Property Database††

Justice	Stevens	Ginsburg	Breyer	Souter	O'Connor	Kennedy	Rehnquist	Scalia
Ginsburg	.50 (26)							
Breyer	**.83*** (23)	.65 (23)						
Souter	.65 (30)	**.92**** (26)	.74 (23)					
O'Connor	.51 (42)	**.83**** (23)	.70 (20)	**.93**** (27)				
Kennedy	.48 (35)	**.84**** (26)	.47 (23)	**.79*** (30)	**.80** (31)			
Rehnquist	.53 (50)	**.91**** (23)	.49 (20)	**.84**** (27)	.75 (41)	.80 (32)		
Scalia	**.62*** (36)	**.85**** (26)	**.66*** (23)	**.93**** (30)	**.88**** (32)	.71 (35)	**.94**** (33)	
Thomas	**.59*** (29)	**.85**** (26)	**.66**** (23)	**.93**** (29)	**1.00****[#] (26)	**.87**** (29)	**.92**** (26)	1.00**[#] (29)

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml.

† † All correlations significant at the .01 level, except: Rehnquist-Breyer, Kennedy-Breyer and Stevens-Kennedy, each significant at the .05 level; and Thomas-O'Connor and Thomas-Scalia, for which there is multicolinearity.

** p<0.01, * p<0.05 for tests of significance of the differences between correlations of each pair of justices in the general database and the IP database, using a two-tailed test.

[#] Approximated p-values, where the correlation in IP database is assumed 0.999 and not 1.000. The correlation comparison formula is based on the conversion of correlations into Fisher z-scores, which are undefined for p=1.000

Tables 3 and 4 provide correlations among the justices on the Rehnquist Court, for the general database and the IP database, respectively. In the former, as expected given the large number of cases, all correlations are significant at the .001 level; in the latter, the numbers of cases are smaller, but all correlations are significant at the .01 level except for the following: Rehnquist-Breyer, Kennedy-Breyer and Stevens-Kennedy, which are significant at the .05 level, and Thomas-O'Connor and Thomas-Scalia, which has no computable p-value, since their votes are identical. The number of cases each dyad of justices heard together is in parentheses below the correlation coefficient.

The most striking difference between the two tables is that the correlations are dramatically higher in the intellectual property database. The lowest correlation is Kennedy-Stevens at .43, compared to Thomas-Stevens at .22 in the general data. In contrast, 10 justice-pairs have significant correlations over .90 in the intellectual property data, 18 over .80; there were no correlations above .80 in the general data. These correlation patterns are further reflected in the high level of unanimous decisions in intellectual property cases, as discussed above, and may suggest a broader level of consensus generally in intellectual property cases.

Table 4 also indicates which justice-pair correlations are significantly different in the IP database than in the general database. All of the differences between the IP database and the general database that reach significance are those that indicate a higher correlation between pairs of justices in the IP database.

The only correlations that were lower in the intellectual property data than the general data were Ginsburg-Stevens (.51 as opposed to .66), Ginsburg-Breyer (.58 as opposed to .75) and Souter-Breyer (.70 as opposed to .72). None of these differences is statistically significant. Stevens and Breyer are unusual in being the only two justices for whom most of their correlations with the majority of other justices are *not* significantly higher in the IP database.

Together, these effects show that there are unusually high correlations among the justices in IP cases when compared to the general database, but that the increased agreement among the justices is lower for some of the liberal justices. Both of these effects provide some support, albeit impressionistic, to the claim that the usual coalitions that we see generally on the Supreme Court in the general data are not replicated in intellectual property cases. As such, this evidence provides some support for the claim that intellectual property may in fact be special; whether this translates into not being amenable to prediction on the basis of traditional definitions of judicial ideology remains to be seen. The following section tests whether this impressionistic evidence is in fact supported by more rigorous analysis.

D. Statistical Testing of Intellectual Property Exceptionalism

Given our dependent variable is a binary outcome, which takes on the value of "1" if the justice voted against the IP owner and "0" if otherwise, we use logit, to test the relative effects of judicial ideology on justices' voting behavior.[145] Similarly, we used logit to estimate the effect of judicial ideology on voting in the general database, as the dependent variable is also binary with "1" reflecting liberal votes and "0" conservative. Since several observations often belong to the same judges and cases, we relax the assumption of observation non-independence by adjusting standard errors given the heteroskedastic and clustered structure of the data. For key models, we report three variations of estimation, with Huber-White standard errors,[146] with standard errors clustered by judges and clustered by cases.[147] Doing so helps mitigate the

[145] We also verified our results using probit. Logit and probit are both designed for estimation of binary outcomes; they vary with respect to the assumptions made about the distribution of the error term. While logit assumes a logistic distribution, probit builds on the assumption of a normal distribution. The pattern of results produced by probit estimation was substantively similar to the one obtained using logit and hence is not reported here.

[146] P. Huber, *The Behavior of Maximum Likelihood Estimates Under Non-standard Conditions*, 1 PROCEEDINGS OF THE FIFTH BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 221 (1967); H. White, *A Heteroskedasticity-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity*, 48 ECONOMETRICA 817 (1980).

[147] W. H. Rogers, sg17: *Regression Standard Errors in Clustered Samples*, 13 STATA TECHNICAL BULLETIN 19 (1983). Reprinted in 3 STATA TECHNICAL BULLETIN REPRINTS, 83. William Roger's robust estimator of the covariance matrix of the estimates may be considered an extension of Peter Huber's earlier formula. See P. Huber, *The Behavior of Maximum Likelihood Estimates Under Non-standard Conditions*, 1 PROCEEDINGS OF THE FIFTH BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 221 (1967).

underestimation of standard errors – a typical hazard in panel data – and reduces the risk of rejecting a false null.[148]

The Significance of Ideology in IP Cases

Our initial regression analysis shows that ideology is a statistically significant determinant of whether an individual justice will vote for or against the IP owner. This result holds regardless of whether ideology is measured in terms of Martin-Quinn scores or simply the Party of the Appointing President. Furthermore, by converting our logit regressions into predicted probabilities, it becomes evident that the effect of ideology is substantive as well as significant.

Table 5 shows the results of some simple regressions testing the effect of our two different measures of ideology – Martin-Quinn scores, and Party of the Appointing President – in order to get a preliminary notion of the effect of ideology on intellectual property cases using a variety of robustness checks, and also to compare the value of our two ideology scores. Martin-Quinn scores reflect an ideological array from left to right; as such, liberal justices receive negative scores and conservative justices have positive scores. Similarly, Party of Appointing President codes justices appointed by a Republican president as 1 and appointment by a Democratic president as 0. As such, our null hypotheses are that the coefficients for judicial ideology, both when regressed on voting LIBERAL and on voting against the IP owner, will be zero, and there will be no difference between these coefficients. The ideological effect predicted by the attitudinal model will be represented by a significant negative co-efficient on ideology.[149]

[148] For a similar approach *see e.g.*, J. Core and W. Guay, *Stock-Option Plans for Non-Executive Employees*, 61 JOURNAL OF FINANCIAL ECONOMICS 253 (2001). J. Agnew, P. Balduzzi and A. Sundén, *Portfolio Choice and Trading in a Large 401(k) Plan*, 93 AMERICAN ECONOMIC REVIEW 193 (2003). The most effective way to factor our judge- and case-level heterogeneity entirely would be to use fixed-effects estimation. In our data, however, using fixed-effects is not possible as it leads to a severe selection bias, since all observations related to cases with unanimous decisions and to judges who voted strictly in one direction would be dropped. Further, given the dramatic reduction in the number of observations and small group sizes, fixed-effects would additionally pose an incidental parameter problem, or the hazard of inconsistent estimates resulting from a small number of cases used to estimate a large number of parameters. *See e.g*. J. Neyman and E. Scott, *Consistent Estimates Based on Partially Consistent Observations,* 16 ECONOMETRICA 1 (1948); T. Lancaster, *The Incidental Parameters Problem since 1948,* 95 JOURNAL OF ECONOMETRICS 391 (2000).

[149] A significant but positive coefficient would indicate the more conservative a justice was, the more likely the justice was to vote against the IP owner.

Table 5: Effect of Judicial Ideology on Voting against the IP Owner and Voting LIBERAL, using Case and Judge Robust Errors

	XIPO: M-Q Scores		**LIBERAL: M-Q Scores**		**XIPO: Appointing President**		**LIBERAL: Appointing President**	
Ideology	**–0.15**		**–0.23**					
Robust SE	(0.04)	**	(0.04)	**				
Clustered SE on Judges	(0.03)	**	(0.05)	**				
Clustered SE on Cases	(0.05)	**	(0.05)	**				
Ideology					**-0.43**		**-0.38**	
Robust SE					(0.16)	**	(0.16)	*
Clustered SE on Judges					(0.18)	*	(0.24)	
Clustered SE on Cases					(0.18)	*	(0.18)	*
N	760		760		827		827	
Log-Likelihood	-486.21**		-472.09**		-537.87**		-536.95**	

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml; Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php
** p<0.01, * p<0.05

The results from Table 5 show that judicial ideology, as measured by Martin and Quinn, has a highly significant negative impact on both voting against the IP owner and on voting LIBERAL. The coefficient for the effect on voting LIBERAL is -0.229, and for voting against the IP owner is -0.146. In other words, the higher a justice rates on the Martin-Quinn score (higher scores reflect more conservative ideology) the lower the likelihood that justice will vote against the IP owner and voting LIBERAL.

We observe very similar effects when using Party of the Appointing President as a measure of judicial ideology; however these results have lower p-values. The coefficient for the effect on voting LIBERAL is -0.380 and for voting against the IP owner is -0.429. These results are statistically significant at the .05 level, with the only exception being the test for LIBERAL voting when using robust errors on judges, which has p=0.11 (a difference that does not affect the conclusion on the effect of ideology on IP cases).

When using both measures of judicial ideology *together* – Martin-Quinn scores as well as Party of Appointing President – the Martin-Quinn coefficient remains negative and significant throughout, and completely absorbs the explanatory power of the Party of Appointing President measure. Additionally, we ran the same tests using a measure of each judge's prior voting history, by using either the count or the fraction of judicial votes against the IP owner for each justice, over the five years prior to the focal year or over all preceding years. While this is also a significant predictor of future voting when

run independently, when combined with the Martin-Quinn score the history measure became insignificant while leaving the effect of Martin-Quinn score intact. These additional analyses also show that establishing the effect of ideology is not contingent upon use of one particular score of ideology. The results further indicate that while the Martin-Quinn scores are congruent with the same broad effect of ideological preferences and consistency, the Martin-Quinn scores are empirically more refined and reflect a more precise estimate of ideology than these alternative proxies. As such, the remainder of our analysis uses only the Martin-Quinn scores as a measure of ideology.

We have shown that there is a significant relationship between IP outcomes and ideology, but how substantive is this effect? We can answer this question by converting our logit coefficients into expected changes in the odds. Martin-Quinn scores of ideology are theoretically unbounded, but the actualized range of ideological differentiation is from -6.33 at the most extreme historical liberal end to 4.31 at the most extreme historical conservative end. Moving from the liberal extreme to the conservative extreme reduces the odds of voting against the IP owner by 79%. Thus the difference between strong liberals and strong conservatives translates to a massive difference in the likelihood of supporting an IP claim. This effect is not limited to the extremes. A move from one standard deviation below the mean ideology (-2.33) to one standard deviation above the mean (2.19) reduces the odds of voting against the IP owner by 48%. To put this in context, the same movement decreases the odds of voting LIBERAL by 63%.

Comment [MS4]: Is this right, changes in the odds, not changes in the predicted probabilities?

Specifically for the Rehnquist Court, moving the ideological distance from Stevens at the liberal end of the court to Thomas on the conservative end translates to a 51% decrease in the odds of voting against the IP owner. The increase in ideological conservatism from Stevens to O'Connor at the median of the Court translates to a 30% decrease in the odds of voting against the IP owner. Similarly, the increase in conservatism from O'Connor to Thomas at the conservative end of the Court translates to a 29 % decrease in the odds of voting against the IP owner. [150]

The Effect of Ideology on Different Types of Intellectual Property

Thus far, we have drawn no distinctions between the various types of IP: patents, copyrights, trademarks and trade secrets. These areas are different in a number of respects, and so it is worth exploring whether the effect of ideology is contingent upon a particular subset of IP cases. For example, conservative judges might be expected to be less amenable to patent and trademark claims, given that both plaintiff and defendants in patent and trademark cases are often businesses. In contrast, liberal justices might be expected to be less amenable to copyright claims which pit the commercial interests of large companies against a diverse range of less powerful individuals.

Table 6 shows the effect of ideology, using Martin-Quinn scores, on voting against the IP owner (XIPO) after respecifying the model to include variables relating to the type of intellectual property at issue in each case. We tested the effect of ideology, controlling for

Comment [MS5]: Is there a way to say this without saying controlling?

[150] Based on the tenure average Martin-Quinn scores for each justice.

copyrights, trademarks and trade secrets, using patents as our default category, since approximately half of the cases in the IP database involve patents.

Table 6: Effect of Judicial Ideology (Martin-Quinn scores) on Voting against the IP Owner, for Type of IP cases, using Huber-White Robust Standard Errors

	XIPO	
Ideology	**-0.14** (0.04)	**
Trade Secret	0.08 (0.40)	
Trademark	**0.45** (0.21)	*
Copyright	**-0.44** (0.18)	*
Intercept	**0.61** (0.11)	**
N	760	
Log-Likelihood	-478.62	**

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml; Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php
** p<0.01, * p<0.05

Table 6 confirms our earlier result showing that intellectual property case outcomes are significantly related to ideology. Additionally, it shows that patent and trade secret cases have no discernible differences from one another in justices' propensity to vote against the IP owner. In contrast, when compared to patent cases, in copyright cases, the justices were significantly less likely to vote against the IP owner, and conversely, were significantly more likely to vote against the IP owner in trademark cases. One interpretation of this result is that the justices are more convinced by the incentive theory underlying copyright protection than they are by the consumer protection theory underlying trademark law.

While Table 6 shows our results using Huber-White robust standard errors, we also tested these results using standard errors clustered by judge and by case. When clustering by judge, ideology, copyright and trademark all remain significant at the .01 level, and trade secret remains insignificant, mirroring the pattern of results established in Table 5. When clustering by case, ideology remained significant at the .01 level, but copyright and trademark coefficients lost their significance. But given that there is no intellectual property variation within any case cluster, it is not surprising that the standard errors become large when clustering by case. Taken together, these results indicate important variation in justices' propensity to vote against the IP owner, across cases of different subject matter.

We reflect these variations by mapping the logit-derived predicted probability of a justice's voting against the IP owner in Figure 3. It graphs the range of the Martin-Quinn

ideological scores for the entire range of that variable's realized scale[151] on the x-axis and the probability of voting XIPO on the y-axes.

Figure 3: Predicted Probability of Voting XIPO, by Type of IP

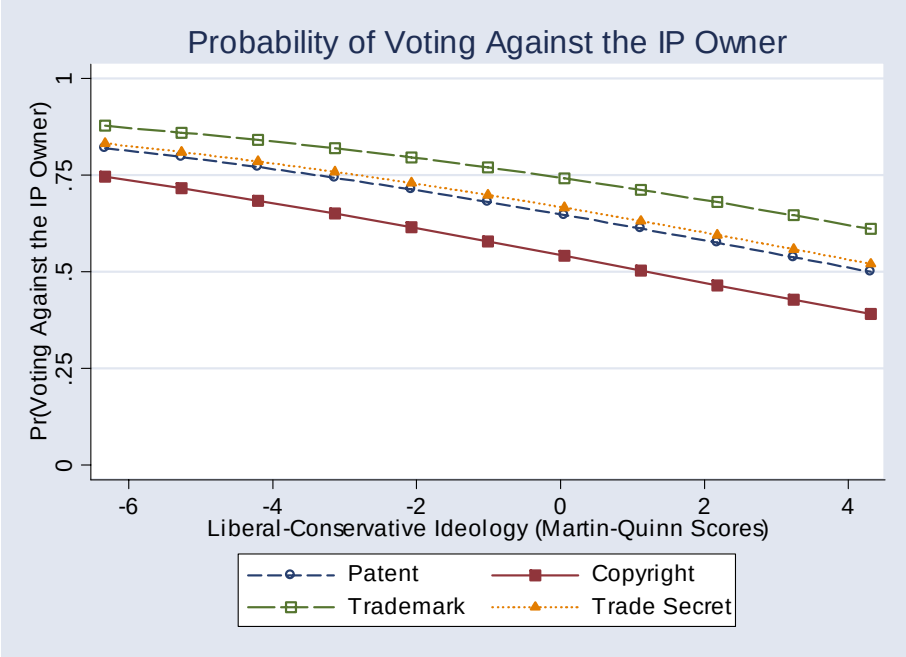


Figure 3 illustrates the effect of ideology on the probability of voting against the IP owner, varying by type of IP issue. For instance, at the zero point on the Martin-Quinn ideology score, the probability of a justice voting against the IP owner in patent and trade secret cases is 66.8%. In contrast, the equivalent probabilities for the copyright and trademark cases are 54.3% and 74.4%, respectively.

Comment [MS6]: I don't understand how it can be the same number for both patent and trade secret, they certianly look different in the figure.

Observing these differences begs the question whether the effect of ideology on IP is contingent on type of IP. To test this, we added interaction terms between our measure of ideology and each type of IP to the model reported in Table 6. None of the interaction terms were significant, suggesting that the effect of ideology does not vary across different types of IP. This confirms that the impact of ideology on voting against IP owner is not driven by cases of a particular type of IP only, and that this effect holds across all subject areas.

Taken together, these results show that the effect of ideology exists in every type of IP case to a significant degree, but the level of the propensity to vote against the IP owner depends on the type of intellectual property dispute. In other words, although the effect of ideology is uniformly significant for all types of IP cases, and is not amplified or

[151] The variable is theoretically unbounded, but has ranged from -6.33 to 4.31 between 1953 and 1999.

attenuated by type of IP, the predicted probability of voting against the IP owner for any level of ideological score varies by type of intellectual property.
This suggests that while ideology is highly consequential, legal and factual elements may also be highly determinative.[152]

Next we test if any other factors could be confounding our results of ideology's effect on IP case outcomes.

Other Differences: Antitrust, Author-Inventor and the Creation of the Federal Circuit

Just as we sought to test whether the effect of ideology was contingent on or affected by type of IP case, it is also important to inquire whether other common elements of IP cases could affect the influence of ideology. We added a binary variable, which takes on the value of "1" if the case involved an author or inventor, on the theory that judges might be more sympathetic to the claims of creators of IP than those of mere owners of IP. We also added a binary variable based on whether the case also involved an issue of antitrust law, on the theory that IP-antitrust cases do not address the validity or infringement of IP rights, but instead focus on the legitimacy of the exercise of those rights. Finally, we also sought to consider the significance of time trends in the data. In particular, we tested whether there was an observable difference between those cases decided before the creation of the Court of Appeals for the Federal Circuit in 1982 and those decided after that date. The Federal Circuit was established in 1982 and vested with exclusive jurisdiction over patent appeals in order to make patent law more consistent, reduce forum shopping and (implicitly) to increase the value of patent rights.[153] It seems quite likely that the creation of the Federal Circuit changed both substantive patent law and also the types of patent cases the Supreme Court is likely to review.[154] To perform this analysis, we added another binary variable that takes on the value of "1" if the case was decided in or after 1982 and zero if otherwise.

Table 7 shows the effect of ideology, using Martin-Quinn scores, on voting against the IP owner (XIPO), of the nested regression with these new control variables added.

[152] This is consistent with the attitudinal literature. For example, Segal & Spaeth's analysis of Supreme Court search and seizure decisions from 1962 to 1998 shows that while overall the Court voted in a liberal direction in 36 percent of cases, factors such as the location of the search, the timing of the search and the presence or absence of a warrant affected that result considerably. See Segal & Spaeth, *supra* note 7 at 316–320.
[153] 28 U.S.C. § 1295 (2000) (providing for jurisdiction over appeals of regional adjudication of all patent disputes). See generally Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).
[154] *See generally*, Glynn S. Lunney, *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 S. Ct. Econ. Rev. 1 (2004).

Table 7: Effect of Ideology on Voting against the IP Owner (XIPO), by Type of Intellectual Property Cases, Author/Inventor, Antitrust and Post-1982, using Huber-White Robust Standard Errors

	XIPO	
Ideology	**-0.13** (0.04)	**
Author/Inventor	0.05 (0.20)	
Antitrust	0.36 (0.28)	
Post 1982	**-0.42** (0.19)	*
Copyright	-0.27 (0.20)	
Trademark	**0.62** (0.22)	**
Trade Secret	0.24 (0.43)	
Intercept	**0.67** (0.22)	**
N	760	
Log-Likelihood	-473.63	**

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml; Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php
** p<0.01, * p<0.05

The effect of ideology on case outcomes remains strong and significant at the 0.01 level, even when accounting for factors such as the type of IP at issue, the presence of antitrust issues, and the presence of authors and inventors. This is true whether using robust errors, errors clustering by judge or errors clustering by case. This analysis strongly supports the claim that judicial ideology has significant predictive power in intellectual property cases. The results so far challenge the notion of intellectual property exceptionalism.

It does not appear to be relevant whether a case is brought by an author or inventor, rather than a non-creative owner. Similarly, the involvement of an antitrust issue did not affect the likelihood that a justice would vote against the IP owner.

What does emerge as significant from Table 7, in addition to ideology, is the effect of cases decided after 1982 (1982 included). Since the creation of the Federal Circuit, the Supreme Court justices have been significantly less likely to vote against IP owners. This result is sensitive to certain adjustments on the standard errors: the effect of post-1982 is significant with robust standard errors at the 0.05 level, but not when clustering by judge or by case. This sensitivity does not affect our core result showing the influence of ideology on IP cases – additional tests showed that the difference pre- and post-1982 does not differ by type of IP; it does not vary significantly for the probability of voting LIBERAL; and most centrally for our purposes, it does not in any way affect the impact

of ideology on the probability of voting against the IP owner. Nonetheless, the indication that Court was more likely to vote in favor of the IP owner in the post-1982 era raises interesting doctrinal implications.

To the extent that the result reported in Table 7 is persuasive of the effect of the 1982 time division, it could be interpreted as showing that the creation of the Federal Circuit was responsible for a shift in the attitudes of the justices towards IP. But this interpretation is flawed because there is no reason to expect that the creation of the Federal Circuit had any influence beyond its jurisdiction of patents. However, our results show that the effect of the post-1982 dummy does not differ by type of IP – i.e. it is not restricted in its effect simply to patents. The effect of the post-1982 dummy beyond patents suggests that there was a broader paradigm shift occurring in the 1980's, that affected other types of IP than just patents, and the creation of the Federal Circuit was a response to that broader shift. This alternative view is buttressed by the fact that with the post-1982 dummy included, the *copyright* control variable loses its significance.

The question of whether the creation of the Federal Circuit should be seen as cause or effect in explaining the post-1982 shift in favor of the IP owner is further addressed in the implications section. Overall these results raise interesting doctrinal implications for IP, but the most striking result is that the effect of ideology remains highly significant even when many other influential predictors of justices' voting are accounted for. Next we test the possibility raised in the theoretical discussion of IP exceptionalism that the effect of ideology may be different for conservative as opposed to liberal justices.

Differentiating the Effect of Ideology for Liberals and Conservatives

So far we have seen that ideology measured along the traditional liberal-conservative spectrum is significantly related to with the likelihood of voting against or in favor of an IP claim, and that this relationship is no way diminished by other factors we include in the analysis. However, the theoretical ideological ambiguity of IP addressed earlier raises the question of whether we should expect this effect to be uniform across the ideological spectrum.

To address that question, we test whether liberals and conservatives display the same level of relationship between ideology and voting in IP cases. We used a spline regression specification to create two Martin-Quinn splines: conservative and liberal.[155] The conservative spline was recoded to equal the Martin-Quinn score if the score was greater or equal zero, and was set to zero if otherwise. By the same token, the liberal spline was set equal to the Martin-Quinn score only if the score was below zero, and constrained to zero otherwise. The Martin-Quinn ideology variable, therefore, is no longer restricted to a single slope, and has the slopes for liberal and conservative ideology estimated separately. Spline decomposition is preferred to split-sample analyses because it enables us to retain the full sample and the concomitant statistical power and it also allows for a more straightforward comparison of the effects of liberal and conservative ideology.

[155] *See* J. JOHNSON, ECONOMETRIC METHODS (1984).

Table 8: Effect of Judicial Ideology on Voting against the IP owner and Voting LIBERAL for Liberal versus Conservative Justices, Simultaneous Estimation, using Huber-White Robust Variance-Covariance Matrix

	XIPO		LIBERAL	
Ideology-Conservatives	**-0.25** (0.07)	**	**-0.28** (0.07)	**
Ideology-Liberals	-0.07 (0.06)		**-0.19** (0.06)	**
N	760		760	
Log-likelihood				

Data: Spaeth, Harold J. United States Supreme Court Judicial Database, 1953-1997, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml; Martin and Quinn. 2002. http://mqscores.wustl.edu/measures.php
** p<0.01, * p<0.05

Table 8 shows our results when comparing the effects of liberal and conservative ideology on voting against the IP owner and voting LIBERAL. We used simultaneous estimation on the two logit equations and joint variance-covariance matrix to account for possible correlation among structural errors.

The results in Table 8 confirm the preliminary conclusion we gained from our impressionistic evidence: there is a difference between how conservatives and liberals are affected by ideology in IP cases. Whereas both splines are significant in the negative direction predicted with respect to the effect of voting LIBERAL, and the difference between those splines is not significant, the role of ideology in voting against the intellectual property owner is significant only for conservatives; the effect for liberals is not differentiable from zero.[156] The difference between those splines is significant at p=0.06. Comparing the effects of the respective splines across equations confirms the overall trend: While the conservative splines for XIPO and LIBERAL are not significantly different from each other, the liberal spline for XIPO is significantly different from its counterpart for LIBERAL at p=0.08.

This analysis bears out the intuition that liberal and conservative justices are differently affected in the extent that ideology influences their tendency to vote against (or in favor of) the intellectual property owner. We discuss this at greater detail in the implications section.

The final issue we address in this Part is how the effect of ideology in IP cases compares to the effect of ideology in general.

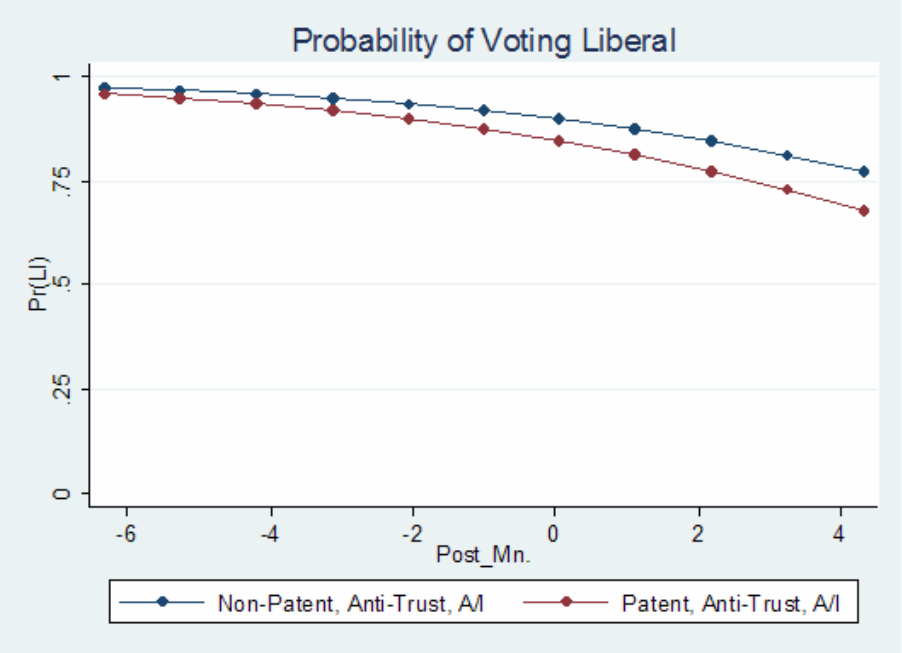
[156] Table 8 shows robust standard errors; once again, these tests were undertaken using standard errors clustering by Judge and by case. The effect of ideology on XIPO for conservatives remains significant for all tests. The effect for liberals remains insignificant when clustering by case; it rises to significance at the .1 level only when clustering by judge. The effects for conservatives and liberals voting LIBERAL are consistent for all measures.

The Relative Significance of the Effect of Ideology on IP

Having established that ideology has a significant effect on the probability of voting against the IP owner – albeit an effect that itself is differentiated by ideology – we also examine whether the probability of voting against the IP owner is affected to the same extent that the probability of voting LIBERAL is. Finally, we test whether the probability of voting LIBERAL in IP cases is the same as the probability of voting LIBERAL in the general database.

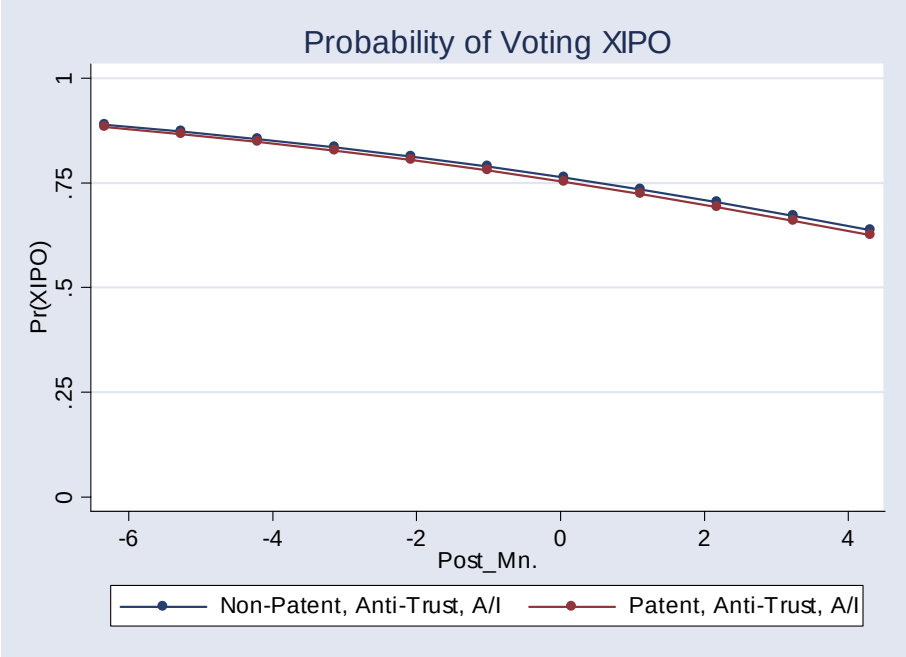
To answer the first question, Figures 4 and 5 illustrate the logit-derived predicted probabilities of voting LIBERAL and voting against the IP owner, respectively, as a function of the judicial ideology measured using Martin-Quinn scores.[157]

Figure 4: Predicted Probability of Voting LIBERAL in IP Cases, as a function of Martin-Quinn Scores, by Type of IP



[157] [This figure will be redrawn, consistent with the description, in the next draft]

Figure 5: Predicted Probability of Voting Against the IP Owner in IP Cases, as a Function of Martin-Quinn Scores, by type of IP



Each Figure shows the relationship between ideology and case outcomes is of the general shape expected: a clear negative relationship between the probability of voting LIBERAL or against the IP owner and having a higher ideological (i.e. more conservative) score. Both predicted probability functions show that a historically liberal judge, such as Douglas, whose score is close to -6 will have odds close to 1 of voting for an outcome that is both liberal and against the IP owner in any given case.[158]

Comparing Figure 4 to Figure 5, it is apparent that both the shape and the realized origin of the functions are very similar. However, the slope for the effect on voting LIBERAL in Figure 4 is steeper than that for the effect of voting XIPO in Figure 5, and the probability of voting LIBERAL for an extremely conservative judge is higher than for voting XIPO. Those differences are statistically significant.

The negative impact of ideology is stronger – i.e. more negative – on voting LIBERAL than on voting against the IP owner, with $p<0.01$ using Huber-White Robust Standard

[158] Douglas's hostility to patents in particular is well documented. See e.g., Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147, 154-155 (U.S. 1950) (Douglas concurring) ("Every patent is the grant of a privilege of exacting tolls from the public… The Constitution never sanctioned the patenting of gadgets.") *See also*, Donald S. Chisum, *The Supreme Court And Patent Law: Does Shallow Reasoning Lead To Thin Law?*, 3 MARQ. INTELL. PROP. L. REV. 1, 8 (1999) ("Justice Douglas was the most extreme of all the anti-patent justices.")

Errors.[159] Consequently, while the ideology of Supreme Court justices is a strong predictor of whether they will vote in favor or against the IP owner, it is not as strong as the predictor of whether they will vote LIBERAL.

We find a similar disparity when comparing our results for the test of the second question. The effect of ideology on voting LIBERAL in IP cases is again lower than the effect of ideology on voting LIBERAL in the general database. The difference is statistically significant at $p<0.05$.

The predicted probability of once again moving from one end of the historical ideological spectrum to the other (-6.33 to 4.31) decreases the odds of voting LIBERAL in the general database by nearly 97%. Whereas in the IP database, that move shifts the odds of voting LIBERAL by 91%. As we have seen, that shift is nonetheless substantively and statistically significant – ideology is highly determinative of IP cases; but what but these results show is that ideology is *less* determinative of IP cases than other cases.

Thus in answer to our question of whether ideology shapes intellectual property, or conversely intellectual property is exceptional, we have seen that ideology has a statistically and substantively significant effect on the probability of voting for or against the intellectual property owner. However, we have also seen that while this effect is significant for conservative justices, it is so not for liberal justices. We have also seen that the extent of the effect of ideology on the probability of voting for or against the IP owner is less than the effect of ideology on voting LIBERAL, although the effect of ideology does remain consistently statistical significant. These last results show that while it is true that ideology is highly determinative of IP outcomes, there is still merit to the claim that intellectual property is different to other cases, if not entirely exceptional.

IV. IMPLICATIONS AND EXTENSIONS

The accepted wisdom of IP scholars and practitioners is that the traditional liberal-conservative ideological divide is irrelevant to their field. This article establishes the contrary proposition – judicial decision making in relation to IP is ideologically titled. As our statistical analysis has shown, ideology is a significant determinant of whether an individual justice will vote for or against an IP owner. In other words, attitudes about IP are part of the liberal-conservative ideological continuum, not an exception to it.

This finding is significant for the IP community in a number of respects. First, not only are our findings contrary to the orthodoxy of the IP community, they also contrary to the limited empirical evidence that had been available until now. Prior research addressing the relationship between IP and ideology focused on particular narrow issues within IP – the application of the "Polaroid Factors" in trademark cases and patent claim construction appeals – and found no effect. In contrast, our broad-based study of all areas of IP establishes a clear relationship in the context of Supreme Court decisions.

[159] With robustness errors clustering by judges, $p< 0.05$; robustness when clustering by cases dropped the p value to 0.08.

Nevertheless, the evidence does suggest that factors beyond ideology are also significant. For example, we find that the types of IP involved in a case are also a significant determent of the probability that the justices will vote for (or against) the IP owner. Just as interesting, although less definitive, is the fact that we did not find a significant effect for antitrust or author inventor.

A valuable extension of our research would be to consider the effect of ideology on IP cases at the Federal Courts of Appeal and the Federal District Courts. In particular, it would be interesting to see whether the ideological effect we find in relation to the Supreme Court is also evident in the Federal Circuit, given its narrow jurisdiction. There is no equivalent of the Martin-Quinn scores for appellate and district court judges, however, our analysis indicates that a cruder measure of ideology, such as the Party of the Appointing President, should yield similar results, albeit less nuanced ones.

Second, as to the claim of IP exceptionalism, although we can resoundingly reject the notion that IP is immune to the effects of ideological division, there is evidence that IP is different to other areas of the law. There is a significant difference between the extent to which ideology shapes IP cases and other areas of the law. This could be because IP is a commercial subject that less clearly evokes the sometimes emotional division between liberals and conservatives that areas such as civil rights and abortion raise. Or it could be for the diametrically opposite reason: because, as we discussed in our theory section, IP raises high salient but somewhat contradictory core principles, of liberty, property, free speech and the proper role of government.

Third, our research highlights the complexity of the relationship between ideology and IP. Critically, we found that the effect of ideology is not uniform across the ideological spectrum: once we differentiated between the liberal and conservative justices, the effect of ideology on IP was significant only for conservatives.[160] We know that liberal justices are equally ideological generally, so this difference is unlikely to be because conservatives are acting ideologically in IP but liberals are not. Since we have also rejected the notion that IP cases are simply not salient enough to trigger an ideological response, it is likely that the difference we see between liberals and conservatives in IP is due to the two groups of justices being differently affected by the theoretical tensions underlying IP – natural rights versus utilitarianism, respect for property versus suspicion of government regulation and the disputed impact of IP on individual liberty. These theoretical tensions appear to create more ambiguity for liberals than for conservatives.

In particular, the stronger relationship between IP and ideology for conservatives suggests that the status of IP rights as private property may well be a trump against other competing values. This suggests a further extension of our analysis in future work: a direct comparison of the voting behavior of the justices in real property cases and IP cases.

[160] Note that the effect of ideology on voting LIBERAL remains significant for both liberals and conservatives.

In politics it is commonly observed that the conservative camp is split between libertarians and conservatives.[161] In IP, however, it appears that conservative justices are unified and it is the liberals who are split. Our results suggest that liberals are similarly pulled in different directions, at least in the context of judicial attitudes in intellectual property, whereas conservative judges seem to have a more coherent outlook on IP disputes. Thus our third implication has repercussions for litigation strategies in IP cases.

Once again, the *Eldred* decision brings this point into focus. Lawrence Lessig, the architect of the constitutional challenge to the CTEA, argues that the *Eldred* case could have been won if he had adopted a different strategy. Lessig's strategy in *Eldred* was based on an appeal to the conservative members of the Court. Lessig had believed that the same conservative justices who had increasingly restricted the power of Congress in relation to the powers granted under the Commerce Clause since *Lopez* could be persuaded to limit the power of Congress under the Copyright Clause as well.[162]

Our empirical findings suggest that Lessig's attempt to persuade conservatives that interpretative fidelity should trump their pro-property inclinations was quixotic. The relationship between ideology and voting in IP cases is clear for conservative justices but ambiguous for liberals. Lessig would have been better off focusing his argument on the issues that would persuade liberals, i.e. the redistributive effects of the CTEA, the dangers of corporate control over cultural resources and the need to limit the copyright monopoly. The attitudinal model predicts that ideology will trump interpretative fidelity every time. Lessig finds the idea that Supreme Court justices decide cases based on their political preferences "extraordinarily boring,"[163] – this is unfortunate as a greater appreciation for the attitudinal model might have improved his chances before the Supreme Court.

Fourth, our research also suggests that the Supreme Court's attitude to IP may have shifted over time. In particular, our statistical testing showed that the justices were more likely to vote in favor of the IP owner in the period following the creation of the Federal Circuit than before. Most interestingly, this effect was evident across all types of IP and was not confined to patent cases. Given that the pre- and post-1982 difference is not confined to patent cases, it seems unlikely that the creation of the Federal Circuit caused this shift in the Supreme Court's attitude to IP. Instead, it seems more likely that the creation of the Federal Circuit was itself a symptom of a broader trend recognizing the increased importance of the information economy and IP to American competitiveness.

The Supreme Court has been unusually active in patent law in the last few years. Between 2002 and 2007, the Court has decided nine patent cases[164] and conspicuously

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[161] *See e.g.* Patricia Cohen, *A Split Emerges As Conservatives Discuss Darwin*, N. Y. TIMES May 5, 2007.
[162] Lessig, *supra* note **Error! Bookmark not defined.**. United States v. Lopez, 514 U.S. 549 (1995).
[163] *Id.*
[164] KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007); Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746 (2007); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007); eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006); Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193

failed to decide one more.[165] The Court ruled on seven of these cases in 2006 and 2007 alone. The Court's renewed interest in patents reflects both the crisis of confidence in the U.S. patent system and a belief that the Federal Circuit has strayed too far from binding Supreme Court authority in recent years.[166] Although these recent cases provide strong impressionistic evidence of another shift in the Supreme Court's attitude to IP, there is at present not enough data to assess this statistically. Revisiting the Court's IP jurisprudence in the post-2000 era in light of future cases would be yet another valuable extension of our work.

This article also makes a significant contribution to the study of judicial decision making more broadly. Although there is considerable evidence supporting the attitudinal model of judicial decision making in non-economic areas such as criminal procedure and administrative law, there is much less evidence to support the attitudinal model in economic areas such as taxation, securities and antitrust.

The significance of our contribution showing the effect of ideology in IP cases is best understood in relation to comparable studies in the tax field. The most comprehensive study of the effect of ideology in tax cases finds no support for the role of ideology using the coding of the general database.[167] The authors argue that the conventional coding of all tax outcomes favoring the government as liberal is over-inclusive given the heterogeneity of non-government parties. It does seem unreasonable to classify a ruling denying a poor taxpayer the right to the Earned Income Tax Credit as a liberal outcome. The authors seek to overcome this limitation in the conventional coding by focusing on a particular class of taxpayers to which they believe the conventional coding is apposite – corporate taxpayers. Thus refined, the authors do find ideology is significant in corporate tax cases.[168] Our study finds a significant effect for ideology in an economic area of the law without the need for any such refinements.

Our central finding that ideology is a significant determinant of how Supreme Court justices vote in relation to IP addresses a significant gap in the attitudinal literature. But our additional finding that ideology has less of effect on IP than other areas of the law re-emphasizes the need for further inquiry into the differences between the effect of ideology on economic and non-economic areas of the law more broadly.

Finally, locating judicial attitudes about IP within the liberal-conservative ideological continuum enables us to make some predictions about the direction of the Court in relation to IP. The Supreme Court's most recent appointments, Chief Justice Roberts and Justice Alito, have decided only a few IP cases since their recent appointments to the

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(2005); Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826 (2002); and Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002).

[165] Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 126 S. Ct. 2921 (2006) *Writ of certiorari dismissed as improvidently granted.*

[166] Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J.L. SCI. & TECH. 1 (2007).

[167] Staudt, Epstein & Wiedenbeck, *supra* note 24. Note that this study also uses Martin-Quinn scores as a measure of ideology.

[168] *Id.*

Supreme Court. Our study indicates that in addition to this sparse record, we can deduce likely predispositions of these justices in relation to IP by observing their votes in cases that have nothing to do with IP. Based on their voting record in the 2005-2006 term Roberts and Alito are conservative to the same degree as Rehnquist, but significantly more conservative than O'Connor.[169] All other things being equal, this forecasts a Court that is more sympathetic to the IP owner. The model we have presented here can be re-utilized in future work to assess these predictions and other theories about Supreme Court judicial attitudes toward IP.

[169] The 2005-2006 Martin-Quinn scores for Chief Justice Roberts and Justice Alito are 1.382 and 1.407 respectively. The 2004-2005 Martin-Quinn scores for former Chief Justice Rehnquist and Justice O'Connor are 1.408 and 0.079 respectively.

APPENDIX A: Cases in the IP dataset, in descending chronological order

eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006)
Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006)
Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006)
MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)
Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005)
KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004)
Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)
Moseley v. V Secret Catalogue, 537 U.S. 418 (2003)
Eldred v. Ashcroft, 537 U.S. 186 (2003)
Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826 (2002)
Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002)
J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, 534 U.S. 124 (2001)
N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001)
Traffix Devices v. Mktg. Displays, 532 U.S. 23 (2001)
Wal-Mart Stores v. Samara Bros., 529 U.S. 205 (2000)
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)
Dickinson v. Zurko, 527 U.S. 150 (1999)
Pfaff v. Wells Elecs, 525 U.S. 55 (1998)
Feltner v. Columbia Pictures Tv, 523 U.S. 340 (1998)
Quality King Distribs. v. L'Anza Research Int'l, 523 U.S. 135 (1998)
Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17 (1997)
Markman v. Westview Instruments, 517 U.S. 370 (1996)
Lotus Dev. Corp. v. Borland Int'l, 516 U.S. 233 (1996)[170]
Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995)
Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995)
Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)
Cardinal Chem. Co. v. Morton Int'l, 508 U.S. 83 (1993)
Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993)
Two Pesos v. Taco Cabana, 505 U.S. 763 (1992)
Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)
Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990)
Stewart v. Abend, 495 U.S. 207 (1990)
Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
Bonito Boats v. Thunder Craft Boats, 489 U.S. 141 (1989)
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)[171]
San Francisco Arts & Ath. v. United States Olympic Comm., 483 U.S. 522 (1987)
Dow Chem. Co. v. United States, 476 U.S. 227 (1986)
Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986)[172]

[170] Affirmed by an equally divided Court, not used in our statistical analysis.
[171] Not classified as either for or against the IP Owner.
[172] Not used in our statistical analysis.

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985)
Dowling v. United States, 473 U.S. 207 (1985)
Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539 (1985)
Park 'n Fly v. Dollar Park & Fly, 469 U.S. 189 (1985)
Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985)
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)
Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)
GM Corp. v. Devex Corp., 461 U.S. 648 (1983)
Inwood Labs. v. Ives Labs., 456 U.S. 844 (1982)
Diamond v. Bradley, 450 U.S. 381 (1981)[173]
Diamond v. Diehr, 450 U.S. 175 (1981)
Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980)
Diamond v. Chakrabarty, 447 U.S. 303 (1980)
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)
Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979)
Parker v. Flook, 437 U.S. 584 (1978)
Sakraida v. Ag Pro, Inc., 425 U.S. 273 (1976)
Dann v. Johnston, 425 U.S. 219 (1976)
Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975)
Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975)[174]
Kewanee v. Bicron, 416 U.S. 470 (1974)
Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974)
Goldstein v. Cal., 412 U.S. 546 (1973)
United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973)
Gottschalk v. Benson, 409 U.S. 63 (1972)
Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706 (1972)
Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972)
United States v. Topco Assocs., 405 U.S. 596 (1972)
Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313 (1971)
Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1971)
Standard Industries, Inc. v. Tigrett Industries, Inc., 397 U.S. 586 (1970)
Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969)
Lear, Inc. v. Adkins, 395 U.S. 653 (1969)
Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969)
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)
United States v. Sealy, Inc., 388 U.S. 350 (1967)
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)
Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966)
Brenner v. Manson, 383 U.S. 519 (1966)
United States v. Adams, 383 U.S. 39 (1966)
Graham v. John Deere Co. of Kansas City, 383 U.S. 1 (1966)
Hazeltine Research, Inc. v. Brenner, 382 U.S. 252 (1965)
Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965)
Brulotte v. Thys Co., 379 U.S. 29 (1964)

[173] Affirmed by an equally divided Court, not used in our statistical analysis.
[174] Affirmed by an equally divided Court, not used in our statistical analysis.

Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964)
Wilbur-Ellis Co. v. Kuther, 377 U.S. 422 (1964)
Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964)
Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964)
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964)
United States v. Singer Mfg. Co., 374 U.S. 174 (1963)
United States v. Loew's, 371 U.S. 38 (1962)
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)
Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (1962)
Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961)
Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260 (1961)
Hoffman v. Blaski, 363 U.S. 335 (1960)
Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960)
Columbia Broad. Sys., Inc. v. Loew's, Inc., 356 U.S. 43 (1958)[175]
Fourco v. Transmirra, 353 U.S. 222 (1957)
United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957)
United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377 (1956)
Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445 (1956)
Mazer v. Stein, 347 U.S. 201 (1954)

[175] LIBERAL coding unavailable, not used in our statistical analysis.