

**Political Control of the Supreme Court :  
The Splendid Myth of Judicial Independence**

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Recently, in a rare and candid discussion of the Supreme Court, Justice John Paul Stevens elaborated on two decisions (rendered by his own majority opinions) that he considered unwise. For both cases, he was “convinced that the law compelled a result I would have opposed if I were a legislator.”<sup>1</sup> This is an interesting comment given the current political climate facing the Supreme Court. As Justice Sandra Day O’Connor said, in her first speaking engagement following her resignation from the Court, “in all the years of my life, I don’t think I’ve ever seen relations as strained as they are now between the judiciary and some members of Congress.”<sup>2</sup> And when a nominee was named to replace her, presumably it did matter whether the appointment was made by George W. Bush or John F. Kerry. John Roberts’ nomination sparked immediate concerns among liberals that he was a closet conservative who would overturn *Roe v. Wade*. Meanwhile, conservatives were concerned that Roberts might not be a real conservative. They wanted to avoid the possibility that another Anthony Kennedy or David Souter, both named by Republican presidents but considered to be traitors to the conservative cause, would become the next swing vote on the Supreme Court.

The idea that the courts are completely independent is perhaps the holy grail of American political thought. Politics may not stop at the water’s edge anymore, but certainly it does not intrude upon the independence of the judiciary. While it is considered to be acceptable for outside political actors to have an interest in the composition and decisions of the Supreme Court, it is widely believed that the members of the Court are independent-minded judges. But are they? Can presidents influence the

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<sup>1</sup> Quoted in Linda Greenhouse, 2005. “Justice Weighs Desire v. Duty.” *NY Times*: August 25, 2005.

<sup>2</sup> Quoted in, Sarah Kershaw, 2005. “O’Connor Sees Strains Between the Judiciary and Some in Congress.” Sarah Kershaw *NY Times*: July 22, 2005.

Court through the appointments they make? Can Congress impact judicial decision making through the legislation it enacts? We address these questions in this paper by examining the impact of ideology and statutory interpretation on judicial decision making. In so doing, we examine whether political control of the Supreme Court is possible and, if so, whether judicial independence is simply a “splendid” myth.

### **Political Control of the Courts**

On February 4, 2004 the White House reacted to a Massachusetts Supreme Court decision on gay marriage. “Today's ruling of the Massachusetts Supreme Judicial Court is deeply troubling. Marriage is a sacred institution between a man and a woman. If activist judges insist on re-defining marriage by court order, the only alternative will be the constitutional process.” Likewise, in June 2002, White House Press Secretary Ari Fleischer responded to a San Francisco court decision regarding flag desecration and free speech: “The President's reaction was that this ruling is ridiculous.”<sup>3</sup> As these quotes suggest, Presidents and their advisers often are critical of decisions made by the courts. So too are members of Congress. In response to judicial decisions in the Terry Schiavo case, Representative Tom Delay (R-TX) said, “This Congress is not going to sit by and let an unaccountable judiciary make these kinds of decisions.”<sup>4</sup>

Presidents and members of Congress have important political interests in the decisions that our courts make and they often react to particular decisions with vitriolic condemnation. But is this all elected officials are capable of doing (railing against

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<sup>3</sup> Found in WhiteHouse.gov.

<sup>4</sup> Quoted in “Republican Lawmakers Fire Back at Judiciary” by Sheryl Gay Stolberg. *Ny Times* July 1, 2005.

obstreperous, activist judges) or can they directly impact judicial behavior? If we accept the idea that our judiciary is independent, then the speeches of elected officials seem purely rhetorical. According to this view, judges should decide cases on their individual merits, evaluating case facts, precedent, relevant legislation, and constitutional prescriptions. As former Supreme Court justice Felix Frankfurter said, “Political considerations should be out of bound. It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded all together when one is doing one’s duty on the bench” (quoted in Baum 1997, 57).

But how realistic is the idea that judges put aside their ideology and political attitudes when they decide cases? Watson and Stookey (1995, 39) take a somewhat cynical view when they note, “It is to the advantage of both the president and the Senate to maintain that justices are selected on the basis of legal and judicial qualifications and not because of political ideology or because of some view on a particular issue. This belief constitutes one of the splendid myths of American politics.”

Is judicial independence a “splendid” myth and if so is political control of the courts possible by elected officials such as the president and the U. S. Congress? The literature on this question is replete with various qualitative arguments but relatively thin regarding empirical analysis. In terms of the Constitution, Scigliano (1971, vii) posits that the presidency and the Supreme Court “were intended by the framers of the Constitution to act, for certain purposes, as an informal and limited alliance against Congress...” As a result, the Constitution grants its greatest source of potential influence over the courts to the president: the power of appointment. Research demonstrates that presidents can influence the courts through the appointments they make (e.g., Lindquist,

Yalof and Clark 2000; Segal, Timpone and Howard 2000). As Baum (1997, 62-3) writes, “Presidents are fond of talking about Supreme Court nominees skill in the legal craft,” which fuels the notion that they are not interested in political control of the courts. Yet, “Democrats seldom choose highly skilled conservatives, and Republicans typically refrain from nominating equally impressive liberals.” In fact, leaving a Supreme Court legacy (often defined in policy terms) is one of the touchstones of a president’s historical reputation.

In this regard, presidents gain little or no policy benefit if justices are independent. While one can argue about the merits of Chief Justice Earl Warren or Justice William Brennan as judges, their later decisions did not reflect the political attitudes of Dwight Eisenhower. Thus, presidents secure a policy benefit only when justices render decisions on the basis of political attitudes that are congruous with the president’s ideology. This point is particularly important since a vast literature concludes that judicial attitudes exert a significant impact on judicial decision making behavior (Schubert 1965; 1974; Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002; Segal 1997; 1998; Spaeth and Segal 1999). This is because, as Watson and Stookey (1995, 78) write, a “Court decision is a human process. In exercising this human process a judge inevitably interjects personal attitudes and values.”

The argument has been posited that Supreme Court justices are even more likely to decide cases on the basis of their attitudes than judges on other courts because specific situational characteristics accentuate this outcome: (1) justices are not term limited (they serve for life, with the less than tangible threat of impeachment a consideration); (2) they serve in a “high prestige” position; (3) they possess “discretionary jurisdiction;” (4) there

is an absence of a higher court which can overturn their decisions; and (5) there is infrequent “review and limited control by other branches” of government (Baum 1997, 36; Rodhe and Spaeth 1976; Segal and Spaeth 1993). Consequently, and particularly with regard to the Supreme Court, if justices decide attitudinally, presidents can nominate individuals who will reflect their policy interests long after they have left the White House.

Theoretically then, presidents have a palpable means (the appointment process) to influence judges, and they have tangible reasons to do so. Still, the finding that judges employ their attitudes when they decide is tainted, at least to some extent, by the quality of the measures used to represent the alternative legal model. Most studies examining attitudes control for imprecise measures of legal concepts. For example, studies of the legal model most often employ dummy variables representing case facts or other aspects of legal doctrine (see Segal 1984; George and Epstein 1992; Songer and Haire 1992; Songer, Segal and Cameron 1994). Other scholars examine progeny cases from landmark decisions (Songer and Sheehan 1990, Knight and Epstein 1996; Segal and Spaeth 1996; Songer and Lundquist 1996). These measures are not continuous and may account for the lack of statistical support that has been found for various legal factors, as well as overstating the impact of judicial attitudes. Therefore a more appropriate test of the attitudinal model requires a more nuanced, continuous measure to represent legal factors.

An inadequately operationalized legal model also has potential implications for research on congressional influence of the courts. While scholars have been attentive to the appointment process, they generally view Congress as having few tools at its disposal beyond the Senate’s “advice and consent” function. It is true that most of Congress’

resources are blunt and rarely used, such as the power of impeachment or the ability to add or eliminate layers of courts. Congress can change the size and composition of the courts, though it has not done so with regard to the Supreme Court since 1869. And while the Senate does provide “advice and consent” on judicial nominees, this process occurs before a justice takes a seat on the Court, thus leaving Congress with little leverage once the justice is confirmed.

Hence, while legal research has not ignored the possibility that Congress can influence the courts, this literature mostly has been limited to the nomination process (Segal, Cameron and Cover 1992; Allison 1996; Barrow, Zuk, and Gryski 1996; Goldman 1997; Moraski and Shipan 1999) and congressional overrides of judicial decisions (Stumpf 1965; Henschen 1983; Eskridge 1991a; 1991b; Spiller and Gely 1992; Segal 1997; 1998; Hettinger and Zorn 1999).<sup>5</sup> Some research also has examined congressional influence through separation of powers (SOP) models (e.g., Eskridge 1991a; 1991b; Ferejohn and Weingast 1992a; 1992b; Shepsle 1992; McNollgast 1995). Yet, as with the legal model, empirical tests of congressional influence have been limited by the availability of reliable measures, as well as a restricted vision of how Congress can influence the courts.

This is the case because scholarship tends to ignore the one area where Congress can exert its greatest impact: the passage of legislation. As Ferejohn and Weingast (1992a, 567) write, though “Congress enacts statutes and the courts interpret them, Congress is not always silent on how its actions are to be interpreted.” SOP models begin with the assumption that both the Court and Congress possess policy preferences and seek to enact outcomes as close to those preferences as possible. Yet, by initially

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<sup>5</sup> For additional research on Congress and the courts see Katzmman 1992 and Paschal 1992.

modeling legislative policy outcomes as status quo points – and examining the proximity of these points to the ideal points of the Court and subsequent congresses – SOP models overlook the fact that policy outcomes are arrived at through a myriad of statutory details. These details may describe policy outcomes in vague terms, leaving the justices with large amounts of discretion to interpret statutes according to their ideal points; or, the policy outcomes may be the result of extremely specific statutory language which constrains the ability of judges to alter the status quo points based on their individual ideological preferences. Thus, the language of legislation is an important and largely overlooked area of potential congressional influence. It is therefore necessary to consider Congress's ability to limit judicial discretion or provide courts with a broad pallet upon which to render decisions through the passage of legislation.

Interestingly, the main theoretical alternative to the attitudinal model, the legal model, which does consider the role of legislation, seldom does so with potential congressional influence in mind. Rather, it is most often assumed that when justices interpret the law they are interested in legal accuracy and clarity (see Brigham 1978; Perry 1991; Gillman 1993; Kahn 1994; Brenner and Steir 1996). Instead of conceptualizing statutes as a source of potential congressional influence, the legal model posits that the law provides a powerful constraint on the ability of justices to decide specific cases according to their political attitudes.

We argue that this interpretation is lacking on two dimensions. First, it may understate the potential and ongoing political role that Congress exerts over the Court when it passes legislation that is consistent with its policy preferences. Second, scholars generally argue that when judges interpret the law as written they are not influenced by

political factors, but rather are judging cases on their legal merits. *Yet we know that Congress is not an unbiased policy actor when it enacts legislation any more than presidents are when they advocate legislation or when they nominate a judge.*

Presumably, then, when Congress enacts legislation on important issues (as opposed to more mundane legislation) it reflects the policy preferences of legislators. Therefore, we should expect a Republican controlled legislature to enact laws that limit the rights of criminals and provide greater support for the victims of crime. A Republican controlled Congress also should be more concerned with quotas when it passes civil rights laws and more concerned with promoting the rights of states over the federal government when it enacts economic legislation. Likewise, when Democrats control Congress, and pass significant legislation in the areas of civil rights, civil liberties, and environmental protection, these laws too should reflect the more liberal political views of its congressional members. While it is true that Congress has less latitude to pass legislation reflecting its policy preferences during periods of divided government, when presidents can either veto or veto bargain (Cameron 2000) to secure a policy advantage, it is naïve to assume that laws do not reflect legislative preferences (see Poole and Rosenthal 1997; Krehbiel 1998).

There is one very important reason why this is the case. *The law making stage represents the one opportunity members of Congress have to make a long term impact on the courts.* Thus, when Republicans stand on the floor of the House or the Senate and rail against liberal judges on issues ranging from gay marriage, to sentencing guidelines, and the Terry Schiavo case, or when Democrats are concerned that judges are not sufficiently supportive of civil rights, it is reasonable to assume that they consider these political

factors when they legislate: that is, they enact legislation with an eye toward these judges. If this is the case, then laws can be a powerful tool promoting legislative influence. Consequently, when judges interpret laws they may be constrained by legislation that provides them with specific cues on important political issues. Conversely, legislation that accords with judicial ideology may provide an additional incentive for judges to rule in a liberal or conservative direction. In this way, then, not only can legislation constrain the behavior of Supreme Court justices, which is consistent with the legal model, it also may provide political incentives that compliment their own policy oriented attitudes. Such a finding would not support the idea of judicial independence. Instead, it would suggest that Congress has an ability to politically control the judicial branch.

### **Statutory Constraint**

Baum (1997, 121) writes, “Further research with a variety of assumptions and analytical approaches, will tell us more about the Court’s attentiveness to the president and Congress in statutory interpretation.” First, however, new measures are required to provide a rigorous test of congressional influence. In developing a measure, we consider the theoretical framework developed by Rowland and Carp (1980). They note that the more discretion judges have when they make decisions, the more likely judges are to render decisions that reflect their own personal attitudes.

Elsewhere we argued that Congress has the ability to affect the behavior of appeals court judges through the legislation it passes (Randazzo, Waterman and Fine 2004). To demonstrate this relationship, we developed a measure of statutory constraint.

The measure is based on Huber and Shipan's (2002, 31) study of the bureaucracy, in which they wrote, "...legislation is potentially the most definitive set of instructions that can be given to bureaucrats with respect to the actions they must take during policy implementation." In their examination of the implementation of Medicaid laws, they examined the impact of statutes on the discretion of bureaucrats. "Legislative statutes are blueprints for policymaking. In some cases, legislatures provide very detailed blueprints that allow little room for other actors... to create policy on their own. In other cases, legislatures take a different approach and write statutes that provide only the broad outlines of policy, which gives bureaucrats the opportunity to design and implement policy" (2002, 76).

Clearly, judges are not the same as bureaucrats, whose role is to administer or implement the law. Bureaucrats do not have the authority to determine which laws are constitutional, nor can they strike down specific provisions within statutes. Yet, the key concept captured by Huber and Shipan is the level of discretion provided by congressional legislation, also the key concept in Rowland and Carp's (1980) theoretical formulation of a potential tradeoff between ideology and legal factors. Huber and Shipan posit that legislators will try to limit discretion in areas where they want the law implemented according to their own policy preferences, and provide broader discretion to bureaucrats in other areas. We thus argued and demonstrated that levels of discretion within statutes can exert a similar influence on appeals court judges (Randazzo, Waterman and Fine 2004).

Since our focus in that research was the Courts of Appeals, we argued only that judges are constrained by the plain meaning of the statute - with more specific language

providing less discretion, thereby constraining judges from employing their ideological attitudes when making decisions. But appellate judges face a different set of constraints than Supreme Court justices. Most importantly, the decisions of the appeals courts can be overturned by the Supreme Court. Hence, when appellate judges examine statutory factors, they are more likely to be constrained by them, and less likely to use statutory provisions to justify decisions that accord with their own ideology. With regard to the Supreme Court, however, we expect a slightly different result: while the justices may be constrained by more detailed legislation that runs counter to their political attitudes, we also argue that they may be more inclined to use detailed legislation that is consistent with their attitudes as a justification to decide ideologically in a particular case. Thus, at the Supreme Court level, it may be more appropriate to think in terms of statutory interpretation, rather than merely statutory constraint. We therefore posit that broadly written statutes or those containing vague language will provide justices with greater latitude to rule attitudinally. On the other hand, more specific legislation is likely to constrain justices who disagree with the policy prescriptions included in legislation, while simultaneously encouraging those who agree with the legislation to decide attitudinally.

In sum, since Congress cannot develop perfect enforcement mechanisms over judges (i.e., limited threat of impeachment, cannot revoke life tenure or reduce salary of judges), “the incentives to design control mechanisms ex ante are heightened” (Shipan 1997, 9). Because legislative policy outcomes are the result of congressional preferences, legislators have significant incentives to craft the language of statutes in such a way as to minimize the discretion of judges who disagree with their preferences, while providing additional policy incentives for judges who do agree with them. Once legislation is

passed it can influence future judges, as well as ones currently on the bench. With this promise of an enduring impact, drafting legislation becomes a palpable tool of Congressional influence.

To measure this influence, and examine the effects of statutory interpretation on judicial behavior, we borrow directly from Huber, Shipan and Pfahler (2001) and Huber and Shipan (2002). In their analysis of statutory constraint on bureaucratic behavior they rely on a proxy measure based on the length of the statute. They write,

Our qualitative and quantitative investigation of a huge number of statutes suggests that the more words a legislature puts into legislation on the same issue, the more it constrains other actors who will implement the policy on that issue. Similarly, the fewer words it writes, the more discretion it gives to other actors (2002, 73).

After conducting a series of validity tests on this measure for Medicaid statutes, their analyses reveal a statistically significant relationship between the length of statutes and the degree of bureaucratic discretion. They discover that the measure successfully accounts for variation caused by fairly meaningless generalizations, situations where legislators deliberately pass vague consensus statutes, and instances where legislators move beyond mere platitudes to enact statutes containing specific details designed to affect implementation and interpretation.

Following Huber and Shipan's lead, we examine the length of congressional statutes. To measure the length of statutes we relied on information in the Justice Centered Supreme Court Databases<sup>6</sup>, compiled by Harold J. Spaeth and recoded by Sara C. Benesh to identify the statute in question, and subsequently employed Lexis-Nexis and the 'word count' feature in Microsoft Word. While this strategy provides a raw count of

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<sup>6</sup> These databases are archived at the S. Sidney Ulmer Project for Research in Law and Judicial Politics at the University of Kentucky [www.as.uky.edu/polisci/ulmerproject](http://www.as.uky.edu/polisci/ulmerproject).

the number of words per statutes, there are several reasons why the raw number is not useful in an empirical model. First, from a theoretical perspective there is no reason to believe the addition of a single word will provide more constraint on judges. Second, from a methodological standpoint using the raw number of words is problematic both because of the inherent noise associated with a raw count and the considerable skewness in the measure.<sup>7</sup> Consequently, since we are interested in legal constraint brought by substantial differences among statutes, it is reasonable to take the natural log of each statute as the operationalization of our variable. Taking the natural log allows us to minimize the noise associated with raw counts and reduce the variable's skewness, while preserving the expected theoretical relationship. Thus, we hypothesize that when statutory constraint increases (i.e., as the natural log of the number of words increases), justices should be less likely to rule according to their personal ideological preferences. Likewise, judges who agree with the political philosophy in legislation (what we call statutory interpretation) should be more likely to rule consistent with their ideological preferences. Our past research found evidence for the former hypothesis with regard to Appellate Court justices (Randazzo, Waterman and Fine 2004). Whether statutory constraint or interpretation at the Supreme Court level exists, however, is an empirical question we address here for the first time.

## **Our Hypotheses**

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<sup>7</sup> For this analysis we removed several laws that represent extreme outliers. We intend to include these in subsequent analyses, relying on alternative coding approaches.

We are interested in examining potential political influences on the Supreme Court. By including a continuous measure of statutory constrain/interpretation, we also provide a more rigorous test of the attitudinal model. Segal and Spaeth (1993: 70) argue that legal factors have no impact because the kinds of cases that the Supreme Court decides to hear “tender plausible legal arguments on both sides.” Yet this evidence is subject to methodological criticism because the legal model is represented only by dummy variables and is therefore somewhat of a straw man (Brisbin 1996). In order to provide a more rigorous test of the attitudinal model we develop and test a more nuanced legal measure. Second, our analysis also provides a more rigorous test of potential congressional influence over the Supreme Court than has been provided in the past. Finally, by testing for both presidential and congressional sources of influence, we shed considerable empirical light on whether political control of the Supreme Court is possible or whether a judicially independent interpretation of court behavior is more appropriate. To empirically analyze this phenomenon, we operationalize our dependent variable as whether an individual justices casts a sincere vote (i.e., according to his or her preferences) or whether that vote is constrained (i.e., against his or her preferences).

While we have developed a measure of statutory constraint, we use an existing measure to represent judicial attitudes and to measure potential presidential influence. Several refined measures exist for the ideology of justices of the Supreme Court (Segal and Cover 1989; Martin and Quinn 2002). We use the Martin and Quinn measure of ideology, using the absolute value of their scores (generated through a Bayesian analysis) with zero representing moderates and the end of the scale representing extreme ideologues.

Presidents are more likely to leave a lasting legacy through the ideology of the justices they appoint to the court. Republicans should be more interested in appointing more conservative justices, while Democrats should be more interested in appointing more liberal justices.<sup>8</sup> Even if there is a period of divided government, as existed during the presidencies of Richard Nixon, George H. W. Bush, and Bill Clinton, we still expect these presidents to be more inclined to appoint justices who reflect their political preferences. Even though they may have to appoint more moderate judges than they would otherwise have preferred, it is unlikely that a Democrat will appoint a conservative or a Republican president a liberal judge. Since ideology should be a primary interest of presidents we hypothesize:

*H1: In all policy areas, liberal Supreme Court justices are more likely to decide cases in a liberal direction, and conservatives will decide cases in a conservative direction. That is justices should decide cases in a sincere manner.*

We expect the legislation that Congress enacts to influence judicial decision making. Yet, it would be too simplistic to claim that the level of detail should affect all judges in a similar fashion. Such a statement implicitly assumes that members of Congress seek to limit the discretion of all judges, regardless of their ideological preferences. Stated differently, we should not expect a conservative Congress to pass conservative legislation aimed at constraining conservative judges. Rather, if a constraining effect exists, we would expect it to be aimed at liberal judges (and vice versa for liberal legislation constraining conservative judges). Additionally, conservative legislation may provide conservative justices with another rationale for deciding cases in a conservative direction (and vice versa for liberal judges).

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<sup>8</sup> Our subsequent analyses proceed according to this assumption; separately analyzing Democratic and Republican appointees, though we understand that this assumption contains notable exceptions.

While precisely measuring the policy motivations of Congress is beyond the scope of this particular research, we can deduce general hypotheses about statutory interpretation for specific issue areas, and based on conventional wisdom we offer the following. First, criminal cases are designed to specify the authority of the state over individuals and outline the various options of punishment for individual transgressions. Consequently, if Congress desired to constrain federal judges, it is reasonable to assume that the constraint would be leveled at liberal judges (who tend to rule in favor of the individual and against state authority). This is particularly evident in the debate over the federal sentencing guidelines, which explicitly limit judicial discretion by proscribing mandatory minimum sentences for convicted felons. Therefore, we hypothesize:

*H2: In the area of criminal law, as statutory constraint increases the discretion of liberal justices to rule according to their ideological preferences will decrease.*

*H3: In the area of criminal law, the more detailed the law is (that is the less discretion it provides), the more likely that conservative justices will be to use the law to render sincere decisions.*

A finding supporting hypothesis 2 alone would provide evidence for the legal model, while a finding for hypothesis 3 would provide evidence that Congress also can encourage justices who agree with them politically to decide cases in accordance with congressional policy preferences. This finding would be evidence of a broader congressional influence that is more consistent with a political control of the courts thesis.

Civil rights law operates in a different manner than criminal law. In this area, congressional statutes tend to specify the rights of individuals that can be usurped by state authority. One needs to look no further than the Civil Rights Act of 1964 for examples of

these statutes. Consequently, if Congress wanted to constrain federal judges with civil rights legislation, it is plausible to argue that the constraint would be aimed at conservative judges (who tend to rule in favor of state authority over individual rights).

Therefore, we hypothesize:

*H4: In the area of civil rights, as statutory constraint increases the discretion of conservative justices to decide cases according to their ideological preferences will decrease.*

*H5: In the area of civil rights, the more detailed the law is, the more likely liberal justices will be to use the law to render sincere decisions.*

Finally, with regard to economic legislation we argue that both statutory constraint and interpretation will not exist since areas of economic policy are most impacted by bureaucratic agencies. Thus, if Congress wanted to limit discretion, we believe that bureaucracies serve a better target for statutory constraint and interpretation.

Consequently, because bureaucratic agencies operate more frequently in the economic policy arena – instead of criminal and civil right cases – we expect congressional motives will target those agencies rather than federal judges. Thus, our final hypothesis states,

*H6: In economic statutes we do not expect a relationship to exist between either statutory constrain or interpretation and judicial discretion.*

In addition to our two primary variables, our model includes several other control variables. The first is a dummy variable representing whether a question of federal judicial review is involved, that is a constitutional challenge to the statute. The expected relationship to the dependent variable here is positive for liberals and negative for conservatives. Second, we control for the ideological directionality of the lower court. The variable is coded ‘1’ if the lower court ruled in a conservative manner, ‘2’ if the court rendered a mixed decision, and ‘3’ if the court ruled liberally. Theoretical

expectations indicate that the Supreme Court will be more likely to reverse the lower court (Epstein, et al. 1996). Thus conservative justices are expected to cast sincere votes in order to reverse a liberal decision of the lower court, and liberal justices are expected to cast sincere votes to reverse a conservative decision from the lower court. Finally, we control for the presence of a minimum winning coalition, positing that these situations are likely to encounter sincere voting from all justices; therefore generating a positive expected relationship between this variable and the dependent variable.

## **Findings**

Is political control of the courts possible and if so is judicial independence really a “splendid” myth? “The absence of partisanship is asserted by judges and Supreme Court justices, who are quite fond of telling how often they must decide cases in accordance with what the law dictates and against their personal preferences and values” (Watson and Stookey 1995: 4). Justices also deny that they decide cases on the basis of policy considerations, political ideology, or their own personal attitudes. For example, at his confirmation hearing in 1971, William Rehnquist testified, “My fundamental commitment, if confirmed, will be to totally disregard my own personal belief” (quoted in Baum 1997: 57). The inference then is that judges, particularly Supreme Court justices, are guided only by the Constitution, precedent and the law. Yet what does the empirical evidence tell us? We examine cases decided by the Supreme Court from 1953 to 2000 as coded by Harold Spaeth in the Justice Centered Warren, Burger and Rehnquist Court Databases. In all instances we rely only on those cases where a question exists over

federal statutory interpretation. We also examine decisions in three types of cases: criminal, civil rights, and economic cases. We begin first with criminal cases.

### **Criminal Cases:**

Because we are interested in the differential effects of ideology and statutory constraint on liberal and conservative justices, we divide the data set and examine justices appointed by Democratic presidents and those appointed by Republican presidents. Since our dependent variable is dichotomous, we employ probit models to analyze our data. In Table 1 we present the results of our analysis of criminal cases.

- Insert Table 1 about here -

We hypothesized that liberal judges will be more inclined to decide cases in a liberal direction and vice versa for conservative justices (H1). In Models 1 and 2, consistent with past research on the attitudinal model we find that ideology is a palpable determinant of judicial behavior. On the other hand, we find no evidence that Supreme Court justices in criminal cases are influenced by the language of congressional legislation (H2 or H3). This conclusion suggests that Supreme Court justices may be more interested in promoting judicial autonomy than following the dictates of Congress. As Baum (1997: 86-7) writes,

In recent years Congress and many state legislatures have reduced judges' discretion through mandatory minimum sentences for specific offenses or through general schemes that confine sentences to a narrow range for specified combinations of circumstances. It is noteworthy that judges often protest against such statutes. It appears that judges want freedom over sentencing choices in order to advance their policy goals and perhaps to maintain their self-esteem as autonomous decision makers, even though this freedom increases the costs of decision making.

Our finding is consistent with this interpretation. We do find, however, that both conservative and liberal judges are influenced by the lower court directionality of prior

decisions. On the other hand, only liberal justices are influenced by the presence of a minimum winning coalition.

### **Civil Rights Cases:**

As with our conclusions in criminal cases, in Table 2 we also find that ideology exerts a tangible influence in civil rights cases. Both liberal and conservative justices are likely to decide cases in a manner that reflects their political attitudes. Again, this finding is consistent with findings regarding the attitudinal model. What is new here, however, is that unlike our finding in criminal cases, we find statutes do constrain conservative justices, as exemplified by the negative coefficient for the natural log of legislation (H4). This finding is consistent with our earlier research on the Appellate Courts. Statutory constraint of the judiciary is possible. It is also consistent with the legal model, which posits that laws and other legal factors constrain judicial behavior.

- Insert Table 2 about Here -

Yet, our findings here move beyond the basic assumptions of the legal model and the idea that the courts are independent of political influence. We also find that statutes have more than the ability to constrain justices when they render decisions. For liberal justices, the less ambiguity there is in civil rights legislation, the more likely they are to decide cases in a sincere manner (i.e., in a liberal direction). This finding is consistent with our research expectations (H5). Therefore, with regard to civil rights legislation, we find that Congress has the ability to both constrain conservative judges and to further promote their own policy orientations with regard to liberal judges. While the finding with regard to conservatives is evidence for the legal model, the finding with regard to liberal judges suggests that judges do not merely seek legal clarity when they interpret

legislation. Rather, they are inclined to decide according to congressional policy preferences. This finding is more consistent with a political control of the courts thesis, with Congress having the power to both constrain judicial behavior as well as to affirmatively promote its own policy preferences when it legislates. Hence, at least in one policy area, we find evidence for both presidential and congressional influence.

Again, with regard to our control variables, lower court directionality significantly influences conservative justices. Likewise, only the decisions of conservative justices are related to the presence of minimum winning coalitions. Our findings in this regard therefore further point out the need to examine the different incentives that liberal and conservative justices consider when they decide cases.

### **Economic Cases:**

In economic cases, we discover continued support for the effects of individual ideology. This variable is statistically significant and positive for both liberal and conservative justices (H1). Additionally, we discover no effect for congressional legislation as we hypothesized. The results in Table 3 indicate that changes in statutory language do not influence judicial behavior, similar to the results observed for criminal cases.

- Insert Table 3 about Here -

However, for a subset of economic cases – those involving questions of federalism – we discover an extremely interesting pattern of behavior. In these cases, for the first time, we do not find that the attitudes of all justices matter. In Table 4 we show that while conservative justices decide cases in accord with their attitudes, liberal justices do not.

- Insert Table 4 about Here -

On the other hand, and contrary to our initial hypothesis (H6), we find that statutes have an impact on both liberal and conservative justices. The coefficients suggest that the more detailed the legislation is, the more likely liberal justices are to be constrained in federalism cases. At the same time, the more detailed the legislation is the more likely conservative justices are to decide cases sincerely. Thus, again, we find evidence that Congress has both the ability to constrain judicial behavior, as well as to promote its policy preferences. The latter finding is further support for a political control of the courts hypothesis.

We admit that the interpretation of the findings in federalism cases is a bit surprising. If we had anticipated an effect here at all, we would have expected conservative judges and not liberal ones to be more constrained by legislation, since laws passed in this area are more likely to promote the rights of the federal government over the states (e.g., with regard to environmental legislation the law provides the federal government with greater authority). That legislation constrains liberals and promotes sincere decisions by conservatives is therefore a subject that deserves additional scrutiny.

Finally, with regard to our control variables, lower court directionality again affects both liberal and conservative judicial decisions, while liberals are influenced by the existence of minimum winning coalitions (though the relationship is weak). Still, the most consequential finding is that with federalism cases, the impact of congressional statutes is more pervasive than judicial attitudes.

## **Conclusions**

We know that presidents and members of Congress in their public statements are often critical of the Court and that both sets of actors have policy interests in the cases that the judicial branch decides. Still, with the predominant assumption that the courts are judicially independent, and with highly imprecise measures available to test for potential legislative influence, it has not been possible to provide a rigorous test of potential presidential and congressional influence over the Supreme Court. This test is important for (1) we need to determine whether it is possible for elected officials in our Constitutional system to exert influence over the Supreme Court; (2) we need to provide a more rigorous test of the possible influence of legal factors such as legislation (that is, beyond the use of dummy variables), and (3) we need to consider whether congressional influence goes beyond enticing judges to pursue legal clarity and provides additional incentives for judges to render sincere decisions. Our research here has contributed to our understanding of Supreme Court behavior on each of these three dimensions.

First, we have provided evidence that both the president and Congress have the capacity to control or at least influence the Court. From a normative perspective one can argue that this influence is not illegitimate, though it clearly represents a challenge to the thesis of judicial independence. Our constitutional system was established in a manner that encourages competition between the three branches of government. Hence, we expect that Congress will provide a check on the behavior of the president and vice versa. We also know that through the process of judicial review (though it is not mentioned in the Constitution) the courts have a palpable means of checking congressional and presidential influence. Why then is it unreasonable to assume that both the president and

Congress have legitimate policy reasons for checking the behavior of the Supreme Court?

By granting the president the power of appointment, and by placing the power to make laws in the legislative realm, subject to an executive veto, the Constitution indeed provides the president and Congress with powerful tools to influence the courts. We have found that with regard to criminal cases, civil rights cases, and among liberal judges in federalism cases, presidents can influence the Court so long as they appoint individuals who reflect their own ideology and policy interests. Likewise, with regard to both civil rights and specific economic legislation, Congress has the ability not only to constrain justices, but also to further promote judicial decisions that align with their policy preferences. By using constitutional mechanisms in political ways, then, both the president and Congress have the capacity to control Supreme Court decision making. While some may have normative concerns about this process, since it threatens judicial independence, it can also be seen as a logical outgrowth of our system of separate powers and checks and balances. Thus, while judicial independence may not in and of itself be a “splendid” myth, and one can argue that many individual justices decide cases in a manner consistent with this judicial approach, it is clear that elected officials can and do provide political influence over the Court.

Second, our analysis shows why we need to develop more rigorous, continuous, and more nuanced measures to represent legal concepts. By developing a continuous measure of statutory constraint/interpretation, we have provided a more rigorous test of the attitudinal model. Findings in that area cannot be merely dismissed as an artifact of poor measures of legal constraint. Our findings therefore not only provide a new means

of conceptualizing legal factors, but also a more rigorous test of the attitudes and legal models themselves.

Third, our results move beyond many past findings regarding the legal model. While our results with regard to the Courts of Appeals indicate that more detailed statutes constrain judicial attitudes (which is consistent with the legal model), our findings here indicate that Congress also can promote its own policy preferences at the Supreme Court. This finding suggests that we need to conceptualize the legal model more broadly. Not only can they constrain judicial attitudes, legal factors also can promote attitudinal decision making. In this manner, the legal model is not so much a stark alternative to the attitudinal approach, but may at times be consistent with it. Consequently, the same types of legal factors may both constrain (in some instances) and promote (in other circumstances) the propensity of judges to decide attitudinally.

Developing a new expanded theory of legal influence is beyond the present scope of this paper, though we hope that we have provided a first step in that direction. In sum, we believe attitudes and legal factors may not be the strict dichotomy that scholars long have discussed. They may in fact work in *tandem*, influencing each other, and at times even working to promote the same decisional outcome.<sup>9</sup> If so, then the relationship between judicial attitudes and legal factors (at least with regard to the Supreme Court) may be much more interesting, theoretically and empirically, than past research suggests.

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<sup>9</sup> In this regard, it may be interesting to consider interaction effects between the two types of variables. Again, that is beyond the focus of this paper, but is a possibility we will examine in the future.

**TABLE 1: PROBIT ANALYSIS OF CRIMINAL LAW CASES**

	<b>Model 1</b> Democratic Appointees	<b>Model 2</b> Republican Appointees
<b>Statutory Constraint</b>	-.013 (.038)	-.016 (.032)
<b>Individual Ideology</b>	.164 (.044)**	.141 (.064)**
<b>Judicial Review</b>	.179 (.253)	.238 (.264)
<b>Lower Court Directionality</b>	-.752 (.145)***	.561 (.134)***
<b>Minimum Winning Coalition</b>	.845 (.220)***	.093 (.169)
<b>Constant</b>	.078 (.417)	.254 (.337)
N	357	464
Log Likelihood	-214.493	-272.583
Wald $\chi^2$	55.03	21.20
Prob > $\chi^2$	.000	.001
Pseudo R <sup>2</sup>	.129	.046
Null Model	54.3%	69.4%
Correctly Predicted	70.0%	69.4%

\* p < .05      \*\* p < .01      \*\*\* p < .001

**TABLE 2: PROBIT ANALYSIS OF CIVIL RIGHTS CASES**

	<b>Model 3</b> Democratic Appointees	<b>Model 4</b> Republican Appointees
<b>Statutory Constraint</b>	.255 (.051)***	-117 (.040)**
<b>Individual Ideology</b>	.181 (.059)**	.197 (.066)**
<b>Judicial Review</b>	-.508 (.189)**	-1.01 (.334)**
<b>Lower Court Directionality</b>	.557 (.435)	.826 (.158)***
<b>Minimum Winning Coalition</b>	.557 (.435)	.976 (.367)**
<b>Constant</b>	-1.563 (.405)	.293 (.331)
N	234	301
Log Likelihood	-124.981	-181.285
Wald $\chi^2$	37.12	53.70
Prob > $\chi^2$	.000	.000
Pseudo R <sup>2</sup>	.140	.131
Null Model	68.8%	51.5%
Correctly Predicted	72.7%	66.5%

\* p < .05      \*\* p < .01      \*\*\* p < .001

**TABLE 3: PROBIT ANALYSIS OF ECONOMIC CASES**

	<b>Model 5</b> Democratic Appointees	<b>Model 6</b> Republican Appointees
<b>Statutory Constraint</b>	-.031 (.022)	.006 (.020)
<b>Individual Ideology</b>	.064 (.031)*	.183 (.044)***
<b>Judicial Review</b>	N/A <sup>a</sup>	N/A <sup>a</sup>
<b>Lower Court Directionality</b>	-.211 (.106)*	.204 (.093)*
<b>Minimum Winning Coalition</b>	.248 (.131)	.647 (.111)***
<b>Constant</b>	.757 (.218)	-.487 (.193)
N	655	782
Log Likelihood	-385.339	-511.944
Wald $\chi^2$	11.85	59.58
Prob > $\chi^2$	.019	.000
Pseudo R <sup>2</sup>	.016	.055
Null Model	71.5%	51.3%
Correctly Predicted	71.5%	59.6%

\* p < .05      \*\* p < .01      \*\*\* p < .001

<sup>a</sup> Variable dropped due to perfect collinearity

**TABLE 4: PROBIT ANALYSIS OF FEDERALISM CASES**

	<b>Model 5</b> Democratic Appointees	<b>Model 6</b> Republican Appointees
<b>Statutory Constraint</b>	-.267 (.095)**	.374 (.073)***
<b>Individual Ideology</b>	.090 (.082)	.288 (.101)**
<b>Judicial Review</b>	N/A <sup>a</sup>	-.383 (.436)
<b>Lower Court Directionality</b>	-.467 (.278)*	.924 (.261)***
<b>Minimum Winning Coalition</b>	-.723 (.414)	-.341 (.435)
<b>Constant</b>	2.36 (.847)	-3.87 (.697)***
N	99	137
Log Likelihood	-60.988	-72.569
Wald $\chi^2$	10.11	36.60
Prob > $\chi^2$	.039	.000
Pseudo R <sup>2</sup>	.111	.229
Null Model	51.5%	44.5%
Correctly Predicted	71.7%	71.5%

\* p < .05      \*\* p < .01      \*\*\* p < .001

<sup>a</sup> Variable dropped due to perfect collinearity

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