The U.S. Supreme Court and the Model of Contingent Discretion*

Kirk A. Randazzo and Richard W. Waterman

Congress passes statutes defining particular areas of the law, but the Supreme Court can interpret those statutes. This tension over the meaning of the rule of law has profound implications for democratic theory and the separation of powers. Though scholars have examined whether the Supreme Court issues decisions against the preferences of Congress, there has been little focus on whether legislators can constrain the Court. Our study examines how much discretion Congress provides in statutes it enacts into law. Our basic argument is that ideological decision making by Supreme Court justices depends upon the level of discretion Congress incorporates into the law. The greater the discretion, the less constraint federal judges and justices will encounter, making them more likely to vote according to their individual ideologies. Conversely, more detailed statutes will reduce the judges' discretion. Using data on 1953-96 Supreme Court decisions, our analysis supports this model of contingent discretion.

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.[1]

The above quotation raises an important question about the development of law in the United States: from where does the law emerge? As Corwin (1957/1984:171) observed, the Constitution creates an "invitation to struggle" among the branches of government, with each vying to expand its sphere of influence. Following Corwin's lead, many scholars focused on one particular struggle: between Congress and the president. Yet the constitutional struggle between Congress and the courts is of equal importance, particularly if we are interested in determining who makes the law—the Congress that writes statutes, or the courts that interpret them?

Consequently, an inherit tension may exist between the legislative and judicial branches—Congress initially passes statutes defining particular areas of the law, but the Supreme Court (as the highest judicial authority) has the opportunity to interpret those statutes. Given this relationship, the above quote suggests that the Supreme

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[1] Benjamin Hoadly, quoted in Lockhart et al. (1986:1).

Court possesses the ultimate legal authority. To this end, advocates of the attitudinal model of judicial decision making would readily agree; the Court has the final say in matters of legal policy, and the justices can make decisions according to their personal ideological preferences. Yet the struggle between Congress and the judiciary leads advocates of the legal model to argue that justices are influenced by legal considerations, which constrain purely ideological decision making because of "a sense of duty or obligation to follow particular legal principles, rights, and norms" (Hansford and Spriggs, 2006:9). In other words, the statutes passed by Congress may constrain judicial behavior. Therefore, understanding how Supreme Court justices reconcile their ideological preferences for legal policy with their obligation to follow the laws enacted by Congress becomes a paramount concern for students of the judiciary.

"While many (if not most) scholars recognize that the justices probably respond to both of these concerns [attitudes and the law], the literature nonetheless tends to present them as competing explanations" (Hansford and Spriggs, 2006:9-10). Consequently, a more robust and dynamic theoretical model is needed that integrates both ideological and legal factors, thereby allowing researchers of the Supreme Court to fully integrate both Congress and the courts into a single model of judicial behavior. The main reason for this lack of integration is that while scholars possess viable measures of judicial ideology (e.g., Segal and Cover, 1989; Martin and Quinn, 2002) to support theories of attitudinal voting, similar empirical measures of legal concepts have been less forthcoming. As Segal and Spaeth (2002:59) argue, "no one [has] systematically demonstrated that [the law] influences the decisions of Supreme Court justices."

We take up this challenge and provide a model that dynamically integrates ideological and legal factors via a new empirical measure. In developing this measure, we focus specifically on how much discretion Congress provides in the statutes it enacts into law. The basic argument is that Supreme Court justices will render decisions according to their ideological preferences *contingent on the level of discretion* afforded by the law. For those statutes containing vague or ambiguous language, justices will possess more discretion to vote according to their individual preferences. However, for statutes containing more detailed language, justices will have less discretion and, consequently, will be constrained from ideological voting.[2]

ANECDOTAL EVIDENCE OF STATUTORY INFLUENCE

Briefly examining a few specific cases illustrates how legislative statutes affect judicial behavior and highlights the tension between the legislative and judicial branches over statutory interpretation and the law. For example, in the case of *Burlington Industries,*

[2] We also recognize that justices may consult other sources, such as the congressional record or various historical documents, when interpreting legislative statutes. Though our argument does not preclude this possibility, it is important to note that examinations of statutory meaning must include the actual language of the statute in question. It is therefore an empirical question whether this language systematically affects judicial behavior.

Inc. v. Ellerth, a civil-rights case heard before the Rehnquist Court in 1998,[3] the Supreme Court voted 7-2 in favor of the respondent, who had been sexually harassed by her boss, a vice-president at Burlington Industries. After fifteen months she quit her job, and later sued Burlington Industries, claiming they were liable to pay civil damages because the company was negligent in addressing the circumstance and was therefore liable under the Civil Rights Act of 1964. The Court held that even if the employee had no adverse job-related consequences employers are vicariously liable for supervisors who create hostile work environments, even if said employer is not directly responsible for the supervisor's behavior (42 U.S.C. § 2000e is a subsection of Title VII of the Civil Rights Act). This subsection contains a list of legal definitions, which include very specific instructions for judges about how to define vague terms such as "employer," "employment agency," and "labor organization." In the Court's opinion, Justice Anthony Kennedy, a moderate Republican appointee, cited detailed language in 42 U.S.C. § 2000e, which defines an employer to include any agent of the employer. Because the vice-president was an agent of the Burlington Industries, the company was liable, and the employee was able to receive damages. This specific language compelled Kennedy, his moderate Republican colleagues Justices O'Connor and Souter, as well as Chief Justice Rehnquist to vote with the high court's liberal wing (Justices Stevens, Ginsburg, and Breyer).

A second example is found in *Mansell v. Mansell* (1989),[4] which involves an interpretation of the Uniformed Services Former Spouses' Protection Act, where the Supreme Court adjudicated a question concerning retirement pay. Though the justices preferred to rule in favor of the spouse, they were constrained from doing so by the specific language of the act. In writing for the majority, Justice Thurgood Marshall states:

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.[5]

A third example comes from *Guidry v. Sheet Metal Workers National Pension Fund.*[6] In this case, the Supreme Court reviewed a trial-court order that placed a constructive trust on an individual's pension benefits pursuant to a guilty plea involving the embezzlement of union funds. The dispute arose, in part, because of a conflict between provisions in the Labor-Management Reporting and Disclosure Act of 1959 and the Employee Retirement Income Security Act of 1974. In ruling on behalf of the

[3] 524 U.S. 742 (1998).

[4] 490 U.S. 581 (1989).

[5] *Mansell v. Mansell* (1989) at 594.

[6] 493 U.S. 365 (1990).

petition (Guidry), Justice Harold Blackmun commented specifically on the language of the congressional statutes. He stated that "courts should be loath to announce . . . exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. . . . The impracticability of defining such [an exception] reinforces our conclusion that the identification of any exception should be left to Congress."[7]

LEGISLATIVE-JUDICIAL INTERACTIONS

While the anecdotal evidence presented above provides useful illustrations of the tension between legislatures and the judiciary, it does not provide a systematic accounting of the influence of statutory language on judicial behavior. Consequently, in expanding on the "invitation to struggle" between the legislature and the judiciary, one must ask to what extent do legal factors (such as legislative statutes) influence systematically the behavior of judges and justices? Madison remarks about this particular question in Federalist 37, when he states:

> All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their means be liquidated and ascertained by a series of particular discussions and adjudications. . . . Perspicuity therefore requires not only that ideas should be distinctly formed, but that they should be expressed by words distinct and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally devoted different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.

In this passage, Madison speaks about the ambiguity of language as it relates to legislative statutes. Though Congress may work diligently to draft well-worded legislation, the limits of language introduce a degree of uncertainty and subjectivity into every law. Consequently, this becomes the basis upon which interpretations are formed. Yet, while there is an inherent ambiguity in all laws, the level of ambiguity varies across a wide continuum—some laws are more detailed than others. Certainly, Congress has an incentive to write laws that clearly reflect the intent of the legislators if it wants to ensure obedient implementation of the laws. However, the legislators in Congress often disagree about desired outcomes, and the statutes written subsequently reflect compromise—which often leads to increased variation regarding the ambiguity in the law.

Our research focuses precisely on the extent to which this variation in statutory detail matters as an influence on the voting behavior of Supreme Court justices.

[7] *Guidry* (1990) at 376.

Unfortunately, there is a limited amount of research on this particular question. Examining the literature on legislative-judicial interactions reveals numerous examples of empirical studies focused on the nomination process (Segal, Cameron, and Cover, 1992; Allison, 1996; Barrow, Zuk, and Gryski, 1996; Goldman, 1997; Moraski and Shipan, 1999) or congressional overrides of judicial decisions (Stumpf, 1965; Henschen, 1983; Eskridge, 1991a, b; Segal, 1997, 1998; Hausegger and Baum, 1999; Hettinger and Zorn, 1999). Yet these studies ignore an important area where the Constitution creates the "invitation to struggle" between Congress and the courts: the realm of statutory creation and interpretation.

Among the empirical studies that examine statutory factors are those that rely on separation-of-powers (SOP) models (Eskridge, 1991a, b; Ferejohn and Weingast, 1992; Shepsle, 1992; Spiller and Gely, 1992; McNollgast, 1995; Spiller and Tiller, 1997). Though the SOP models generate powerful insights into legislative-judicial behavior based on preferences over policy outcomes, they neglect the specific language through which legislative policy is dictated. Yet, while "Congress enacts statutes and the courts interpret them, Congress is not always silent on how its actions are to be interpreted" (Ferejohn and Weingast, 1992:567). Consequently, SOP models overlook the range of options available to Congress to specifically describe policy outcomes. "These details may describe policy outcomes in vague terms, leaving the courts 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 abilities of judges to alter the status quo points based on their individual ideological preferences" (Randazzo, Waterman, and Fine, 2006:1007). It therefore becomes incumbent upon students of the judiciary to examine Congress's ability to limit judicial discretion (whether intentional or not) or to provide courts with wide leeway to interpret congressional statutes.

This is especially important because scholars often examine legislative-judicial interactions in terms of a trade-off between judicial attitudes and legal constraints (Rowland and Carp, 1980; Segal 1997, 1998; Spaeth and Segal, 1999; Segal and Spaeth, 2002). Yet "few studies have been undertaken by empirically oriented scholars to examine the effects of traditional legal concepts on case outcomes or judicial votes" (Songer and Haire, 1992:979). In part, this lack of empirical analysis on legal influences arises because of the difficulty inherent in measuring concepts such as plain meaning, legislative intent, and precedent. Some scholars rely on strategies that examine progeny cases from landmark decisions (Songer and Sheehan, 1990; Knight and Epstein, 1996; Segal and Spaeth, 1996; Songer and Lindquist, 1996). Other scholars employ a series of dummy variables to capture the presence or absence of specific case facts or legal doctrine (Segal, 1984; George and Epstein, 1992; Songer and Haire, 1992; Songer, Segal, and Cameron, 1994). We argue that a more continuous measure, grounded within an applicable theoretical framework, is essential to understanding the potential legal constraints judges encounter when adjudicating disputes. This article, therefore, makes two important contributions. First, it continues recent efforts at pro-

viding more suitable measures of legal influences (in this case, a measure of statutory influence) and tests these measures against the influence of judicial preferences. Second, our analysis offers a more dynamic theoretical model of the interplay between law and ideology for justices of the Supreme Court.

THE MODEL OF CONTINGENT DISCRETION

A key step in developing and testing the model of contingent discretion involves the development of a suitable measure representing statutory influence. In a recent study of the bureaucracy, Huber and Shipan (2002:31) argue, "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 discover 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. Randazzo, Waterman, and Fine (2006) demonstrate that levels of discretion within statutes significantly affect the behavior of federal appellate judges; laws with more detailed language provide less discretion, and thereby constrain appellate judges from rendering decisions according to their individual ideological preferences.

The question we address is whether a similar effect occurs for the justices of the Supreme Court. If so, we expect to observe justices voting according to their ideological preferences when they interpret vague or ambiguous statutes that provide high levels of discretion. Conversely, when the Court encounters statutes that proscribe more detailed outcomes, and therefore reduce the level of discretion, then we expect the ability of justices to decide cases attitudinally will be constrained. Yet it is important to note that not all judges will experience these potential constraining effects at the same time—even when some judges are constrained from voting ideologically, the law can facilitate the expression of ideological voting among others. Thus, the contingent effect can operate in two ways—it can constrain judges from voting according to their ideological preferences or it can facilitate the influence of ideology.

Intuitively, this argument seems extremely plausible. If a legislature passes a broad statute with ambiguous language to prescribe policy outcomes, then one would expect judges to interpret that statute based on their ideological preferences. Yet if that legislature passes a detailed statute that prescribes a conservative outcome, one would expect liberal judges who subsequently interpret that statute to be constrained from

voting in a liberal fashion, whereas conservative judges could rely on the same statutory language to facilitate their conservative votes (and vice versa). This *Model of Contingent Discretion* is therefore dynamic in the sense that some judges may encounter statutory language that constrains their behavior while others are facilitated to rule ideologically.

To measure these potential effects, we borrow a measure of statutory constraint from the literature on bureaucratic politics. Huber, Shipan, and Pfahler (2001) and Huber and Shipan (2002) develop a measure of statutory influence based upon the length of congressional statutes. As they indicate,

> 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 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 that the length of statutes 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.

Of course, we recognize that Supreme Court justices may be called upon to examine only a specific section of the statute rather than the entire law. Whenever possible we recorded specific portions of statutes, as determined by the judicial case record. However, in many instances it is difficult to determine with certainty whether justices also reference the remaining portions of the bill to obtain contextual information on the intended effect or purpose of the legislation passed by Congress. The notable canon of statutory interpretation *noscitur a sociis* (it is known from its associates) "dictates that words be read in context with surrounding words in the same document" (Breger, 1987:366). Thus, judges are encouraged to examine surrounding portions of the statute to determine more precisely the context under which a particular section is referenced. If the judges examine other portions, then relying on the overall word count of the statute as a measure of constraint does not systematically bias the analysis. Yet, if the justices only examine the specific section under dispute, then our inclusion of the overall word count poses a higher threshold for determining statistically significant relationships. For example, if a dispute occurs involving a large statute, our theory predicts that the behavior of the justices will be constrained by the statute's language. However, if the justices only examine a specific section of that statute and ignore the remaining language, then their behavior will not be affected according to our prediction. Consequently, the empirical results will not display a statistically significant relationship for our measure of constraint.

Under this more stringent test, if judges are affected by the *Model of Contingent Discretion,* we expect more ambiguous laws to provide more discretion to alter policy

according to their individual ideological preferences, generally speaking. Conversely, statutes containing more detailed language will constrain judges from casting ideological votes. This leads to our initial hypothesis:

> **Statutory Constraint Hypothesis:** *If the* Model of Contingent Discretion *affects judicial behavior, as statutory detail increases we expect justices to have less discretion to vote ideologically.*

Yet, as we stated earlier the contingent effect can operate in two ways—it can constrain some judges from voting according to their ideological preferences and facilitate the influence of ideology for others. As we stated earlier, we should not expect a conservative legislature to pass conservative laws that effectively constrain conservative justices. Instead, if an effect exists we should observe conservative legislation constraining liberal judges (and vice versa for liberal legislation constraining conservative justices). Therefore, if liberal judges experience constraining effects from detailed statutory language, then conservative judges should be able to rely on the legislative statute to facilitate their ideological voting. Doing so provides these judges with a greater opportunity to vote ideologically because the language of the statute offers "legal cover" for an expression of political ideology. That is, judges can cast more conservative votes or announce more conservative policy positions and rely on the statutory language to justify these outcomes from a legal perspective. This leads to our second hypothesis:

> **Statutory Facilitation Hypothesis:** *If the* Model of Contingent Discretion *affects the judicial behavior of one ideological group of justices (e.g., liberals), then for justices of the opposite ideology (e.g., conservatives), as statutory detail increases we expect an increase in ideological voting.*

While precisely measuring the policy motivations of legislatures is beyond the scope of our analysis, we can deduce general expectations about statutory effects for specific issue areas, and based on conventional wisdom we offer three. First, criminal statutes tend to prescribe conservative outcomes by specifying the authority of the government over individuals and outlining the various options of punishment for transgressions. Consequently, if criminal statutes affect levels of judicial discretion, it is reasonable to expect that liberal judges (who tend to rule in favor of the individual and against governmental authority and also impose more lenient punishments) would be most constrained. Conversely, since conservative judges generally desire a conservative outcome in criminal cases, more detailed statutes make it easier for them to reach decisions in line with their ideological preferences. Consequently, their ideological voting will be facilitated by more detailed criminal statutes.

The second area of law involves civil liberties. As with criminal law, most state statutes in this area negatively impact individual rights by asserting greater state authority at the cost of individual liberty. This general trend is exemplified by many of today's most salient political issues, from abortion rights to hate-crimes speech; states frequently pass laws restricting individual civil liberties in the name of state authority.

Thus, if these statutes have an impact on the level of discretion of judges, it should be liberal judges that are constrained. Conversely, the level of ideological voting of conservative judges should be facilitated by greater levels of specificity in the language of state civil-liberty statutes. As most of these laws will prescribe outcomes in accordance with the ideological preferences of conservative judges, greater detail simply makes it easier for them to vote according to their predispositions.

One notable exception involves civil-rights statutes. In the civil-rights arena, legislative statutes tend to prescribe more liberal outcomes by specifying the rights of individuals that cannot be usurped by governmental authority. One needs to look no further than the Civil Rights Act of 1964 or the Voting Rights Act of 1965 for examples of these statutes. Consequently, if federal civil-liberties statutes affect judicial discretion, it is plausible to argue that the constraint would be felt more by conservative judges (who tend to rule in favor of state authority over individual rights). Conversely, liberal judges should be able to rely on the statutory language to facilitate their ideological voting.

Finally, with regard to economic legislation we do not expect a significant statutory effect to exist—primarily because of the influence exerted by the bureaucracy on areas of economic policy. When courts review economic disputes, they must not only consider the policy prescriptions implied by the federal statutes, but also interpret subsequent rules and regulations drafted by bureaucratic agencies involved with the implementation of these statutes and any quasi-judicial rulings enacted by these agencies. Consequently, the regulatory imprint may be more pronounced during adjudication, which in turn mitigates the potential effects of any statutory language. Therefore, because bureaucratic agencies operate more visibly in the economic policy arena—instead of the criminal or civil-liberties arena where the judiciary is more visible—we expect the effects of statutory language on judicial discretion to be less evident.

RESEARCH DESIGN AND METHODOLOGY

Data for this study come from the three justice-centered Supreme Court databases compiled by Harold J. Spaeth.[8] Though the original data sets contain the universe of formally decided cases,[9] we limit our analysis to those cases in which the Supreme Court interprets a congressional statute. Consequently, we analyze approximately 28,000 justice-votes from 1953 to 1998.[10]

The dependent variable for the analysis is whether a justice voted in an unconstrained or sincere manner.[11] We code the variable 1 if a liberal justice casts a liberal

[8] The original Supreme Court database was coded by Harold J. Spaeth. Each of the justice-centered databases (Warren Court, 1953-69; Burger Court, 1969-85; and Rehnquist Court, 1986-98) was transformed by Sara C. Benesh. These data are archived at the University of South Carolina's Judicial Research Initiative (JuRI) Web site: www.cas.sc.edu/poli/juri.

[9] This is accomplished by setting the variable ANALU = 0 and DEC_TYPE = 1, 6 or 7.

[10] Since we examine subsets of cases based on issue area, the total number of observations in each statistical model will fluctuate.

[11] Since we are not testing a strategic model, we hesitate to use the term sincere. However, this is the most straightforward connotation to determine the influence of ideology and constraint.

vote and 0 if that justice votes conservatively.[12] Similarly, the variable is coded 1 if a conservative justice votes conservatively and 0 if that judge casts a liberal vote. We should also note that in the construction of the data set we eliminate those cases where a clear ideological decision does not exist. Thus, the 28,000 justice-vote observations all include an identifiable ideological directionality.

Theoretically, our independent variable of primary interest is *Statutory Detail*. Following the Huber and Shipan methodology, we examine the length of congressional statutes.[13] To measure the length we relied on information in the Spaeth database to identify the statute in question,[14] and subsequently employed Lexis Nexis and the "word count" feature in the Web browser Firefox. While this strategy provides a raw count of the number of words per statute, there is an important reason why the raw number is not useful in an empirical model. 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. Consequently, because we are interested in constraint brought by substantial differences among statutes, it is reasonable to take the natural log of each statute as our operationalization of the variable *Statutory Detail*. 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.

Because our theoretical expectation indicates that the model of contingent discretion should affect liberal and conservative justices in different circumstances, we include a dummy variable *Liberal Justice* (coded 1 if the justice is liberal) to represent the two coalitions. While this variable captures a baseline effect, we also include an interaction term, *Statutory Detail * Liberal Justice Interaction*, to measure the differential impact of statutory language on liberal and conservative justices. Thus, the interaction term captures the effects of statutory language on liberal justices (i.e., when the variable *Liberal Justice* = 1).[15]

While the concept of statutory influence is related to the legal model, the attitudinal model indicates that judicial decision making is also the result of individual ideological preferences (Segal and Spaeth, 2002). To measure the individual ideological preferences of Supreme Court justices, we rely on the ideology scores developed by Martin and Quinn (2002). We employ these measures (rather than the scores generated by Segal and Cover, 1989) because they are a more dynamic measure—they are

[12] We rely on the Martin and Quinn (2002) measure of Supreme Court ideology to determine whether a justice is considered "liberal" or "conservative" using zero as the cutpoint.

[13] Though we use the term "statute" in reality the coding comes from the publicly available sections of the U.S. Code in which the statutes are published.

[14] To identify the relevant statute, we relied on the LAW variable in the Spaeth data set. This provides information about the sections of the U.S. Code interpreted by the Supreme Court. In some instances, Spaeth lists frequently litigated statutes by acronym (for example, NLRA refers to the National Labor Relations Act). For all cases in which an acronym occurs we recoded the specific statute in question.

[15] We also note that because of the inclusion of this interactive term, the baseline variable *Statutory Detail* consequently captures the effects of constraint on conservative justices (i.e., when *Liberal Justices* = 0).

calculated for each term of the Court. Using a Bayesian analysis, Martin and Quinn develop annual ideology scores for each individual justice. Rather than a static measure of general ideology, we use a measure that changes over time and better captures the potential dynamics of ideological influences. Thus, we rely on their empirical measure of ideological preferences in our variable *Ideological Intensity*. Because our theory argues that statutory language will limit ideological influences over judicial behavior, we "fold" the Martin and Quinn measure into a continuum from the most moderate justices to the most extreme ideologues.[16] Consequently, we hypothesize that justices with stronger ideological preferences will be more likely to render unconstrained or sincere decisions. A positive relationship should therefore exist between our variable *Ideological Intensity* and the dependent variable.

In addition to the two primary variables of interest and the interaction term, our model includes three other variables to control for various relevant factors. The first measures whether the Supreme Court is requested to review the constitutionality of the statute. If the Court exercises its power of *Judicial Review*, we expect the justices to be more likely to cast sincere votes (i.e., we do not expect substantial constraint to exist when the constitutionality of the statute is questioned). Therefore, a positive relationship should exist between this variable and the dependent variable. The second control variable, *Lower-Court Congruence,* measures the case disposition by the lower court (most often a court of appeals). The variable is coded 1 if the lower court rendered a decision in opposition to the justice's ideological preferences, 2 if the lower court rendered a mixed decision, and 3 if the directionality of the lower-court decision is congruent with the justice's ideological preferences. Because the Supreme Court has a tendency to reverse decisions of the lower courts (see Epstein et al., 1996) we expect this variable to be negatively related to the likelihood of casting a sincere vote. Finally, we control for the presence of a *Minimum Winning Coalition*, positing that in these situations the justices are more likely to vote according to their individual ideological preferences because of the contentious nature of the case, therefore generating a positive expected relationship between this variable and the dependent variable.

EMPIRICAL RESULTS

Before turning to the more sophisticated empirical models, it is useful to examine some descriptive statistics concerning congressional statutes. The average criminal statute passed by Congress contains 1,171 words, with an average natural log of 6.339, and a standard deviation of 1,643 words, with a natural log of 1.240. Additionally, the shortest criminal statute contains only 34 words, with a natural log of 3.526, while the longest criminal statute possesses 10,981 words, with a natural log of 9.304. Similarly, civil-liberties statutes are longer, containing an average number of 2,087 words, with a natural log of 6.362, and a standard deviation of 4,228 words, with a natural log of

[16] The folding is accomplished simply by taking the absolute value of the Martin and Quinn score for each individual justice.

Table 1
Congressional Statutes Under Review by Issue Area

Criminal Statutes	*Raw Number of Words*
Average Length	1,171
Standard Deviation	1,643
Minimum Length	34
Maximum Length	10,981
Natural Log	
Average Length	6.339
Standard Deviation	1.240
Minimum Length	3.526
Maximum Length	9.304
Civil-Liberties Statutes	
Raw Number of Words	
Average Length	2,087
Standard Deviation	4,228
Minimum Length	22
Maximum Length	24,420
Natural Log	
Average Length	6.362
Standard Deviation	1.563
Minimum Length	3.091
Maximum Length	10.103
Economic Statutes	
Raw Number of Words	
Average Length	1,452
Standard Deviation	2,457
Minimum Length	21
Maximum Length	26,308
Natural Log	
Average Length	6.459
Standard Deviation	1.316
Minimum Length	3.044
Maximum Length	10.178

1.563. The shortest civil-liberties statute contains only 22 words, with a natural log of 3.091, while the longest has 24,420 words, with a natural log of 10.103. Finally, economic statutes, generally speaking, are slightly longer than criminal statutes, but shorter than the civil-liberties laws with an average 1,452 words, translating into a natural log of 6.459, and a standard deviation of 2,457 words, with a natural log of 1.316. The shortest economic statute contains only 21 words, with a natural log of 3.044, while the longest possesses 26,308 words, and a natural log of 10.178 (see Table 1).

While this information is interesting, it does not directly address the question of whether statutory language systematically affects judicial behavior on the Supreme Court. To better understand these influences, we turn to the results of our empirical models (see Table 2). Because our dependent variable is dichotomous, we employ a series of probit models—across specific issue areas—to evaluate the empirical relationships. These three models examine the effects of statutory constraint across three general issue categories: Model 1 examines criminal appeals,[17] Model 2 focuses on civil-liberties cases,[18] and Model 3 analyzes economic disputes (see Table 2).[19] Each of these models offers well-identified analyses as seen by an examination of the reduction-of-error coefficients (5.5 percent for criminal appeals, 12.9 percent for civil-liberties cases, and 20.6 percent for economic disputes).

Examining the results in Model 1 (criminal appeals) reveals that liberal and conservative justices respond differently to the language of statutes and provides empirical support for both the Statutory Constraint and Statutory Facilitation hypotheses.[20] As we explain above, our expectation is that longer criminal statutes will exert a constraining effect on liberal justices while simultaneously providing a facilitation effect for conservative justices. The variable *Statutory Detail* is significant and positive, indicating that conservative justices have their ideological voting enhanced by the presence of more detailed criminal statutes.[21] Conversely, the variable *Statutory Detail * Liberal Justice Interaction* is significant and negative. This indicates that liberal justices are increasingly constrained from casting sincere votes as congressional statutes become more detailed.

The remaining independent variables in Model 1 also exhibit significant influences on the behavior of Supreme Court justices. The statistical significance and positive coefficient for the variable *Ideological Intensity* reveals that both liberal and conservative justices are more likely to cast sincere votes as their ideological preferences become stronger. The measure of *Judicial Review* is statistically significant and indicates

[17] These cases are identified in the Spaeth data set by setting the variable CRIM_DUM = 1.

[18] These cases are identified in the Spaeth data set by setting the variables CIVRTS_D, FIRSTA_D, DP_DUM, and PRIV_DUM equal to 1.

[19] These cases are identified in the Spaeth data set by setting the variables UNION_DU, ECON_DU, FED_DUM, and TAX_DUM equal to 1.

[20] For an alternative specification, using a dependent variable that measures the ideological directionality of the vote (where liberal votes are coded 1 and conservative votes coded 0), please see the Appendix.

[21] Due to the inclusion of the interaction term, the variable *Statutory Detail* effectively measures the influence of congressional statutes on conservative justices only (i.e., when *Liberal Justices* = 0).

Table 2
Probit Analysis of Supreme Court Decisions

	Model 1 Criminal	Model 2 Civil Liberties	Model 3 Economic
Statutory Detail	.049**	.022*	.025**
	(.019)	(.011)	(.009)
Liberal Justice	.238	.195	.730***
	(.312)	(.182)	(.140)
Statutory Detail * Liberal Justice Interaction	-.057*	.016	-.017
	(.028)	(.016)	(.012)
Ideological Intensity	.142***	.174***	.074***
	(.019)	(.014)	(.010)
Judicial Review	.107*	.099*	.053
	(.053)	(.046)	(.067)
Lower-Court Congruence	-.476***	-.579***	-.488***
	(.050)	(.037)	(.026)
Minimum Winning Coalition	.562***	.707***	.465***
	(.067)	(.050)	(.039)
Constant	-.087 (.210)	-.138 (.123)	-.298 (.095)
N	2,973	5,416	10,213
Log Likelihood	-1789.684	-3140.165	-6416.324
LR/Wald Test	236.15	662.48	1010.58
Probability > χ	.000	.000	.000
Pseudo R_2	.069	.105	.083
Null Model	65.2%	65.0%	56.4%
Correctly Predicted	67.1%	69.5%	65.4%
Reduction of Error	5.5%	12.9%	20.6%

Dependent Variable: unconstrained or sincere vote (1), constrained vote (0).
Values represent parameter estimates with robust standard errors in parentheses.
* $p < .10$ ** $p < .05$ *** $p < .01$

that questions of constitutionality increase the likelihood of sincere voting. The variable *Lower Court Congruence* is significant and negative indicating that justices are likely to cast sincere votes to reverse lower court-decisions that diverge from the justices' ideological preferences. Finally, the variable *Minimum Winning Coalition* is significant and positive. This finding supports the general expectation that the justices are more likely to cast sincere votes when the majority coalition is small (i.e., minimum winning).

Model 2 focuses on the voting behavior of justices during the resolution of civil-liberties cases. The data indicate that the variable *Statutory Detail* is significant and positive, revealing that conservative justices are more likely to cast sincere votes as congressional statutes become more detailed. Yet the interaction term *Statutory Detail * Liberal Justice Interaction* is not statistically significant. The results reported in Model 2 also reveal that Supreme Court justices are significantly influenced by their ideological preferences; the coefficient for the variable Ideological Intensity is significant and positive. As the ideological preferences of liberals and conservatives increase (i.e., become stronger), these justices are more likely to cast sincere votes. The variable *Judicial Review* is significant and positive, indicating that questions of constitutionality increase the likelihood of sincere voting. Additionally, the variable *Lower-Court Congruence* is significant and negative, indicating that the justices are more likely to cast sincere votes to reverse lower-court decisions. Finally, the variable *Minimum Winning Coalition* is significant and positive, supporting our expectation that justices cast sincere votes when the majority coalition is narrow.

Model 3 examines patterns of voting behavior when Supreme Court justices adjudicate economic disputes. We notice that the variable *Statutory Detail* is significant and positive, indicating that conservative justices are enhanced in their ideological voting when the plain meaning of congressional statutes becomes more clear and detailed. Yet, the variable *Statutory Detail * Liberal Justice Interaction* is not statistically significant, indicating that liberal justices are not affected by the language of congressional economic statutes. Additionally, the variable *Ideological Intensity* is significant and positive, revealing that as the ideological preferences of liberals and conservatives increase (i.e., become stronger) these justices are more likely to cast sincere votes. Model 3 also reveals that the presence of *Judicial Review* does not affect voting behavior. Furthermore, the variable *Lower-Court Congruence* is significant and negative, indicating that the justices are more likely to cast sincere votes to reverse lower-court decisions. Finally, the variable *Minimum Winning Coalition* is significant and positive, supporting our expectation that justices cast sincere votes when the majority coalition is narrow.

Initially, the results partially support our hypotheses concerning the effects of the model of contingent discretion on Supreme Court behavior (see Table 2). However, closer inspection of both civil-liberties cases and economic disputes reveals that the inclusion of these two general issue categories does not completely capture patterns of voting behavior. Civil-rights laws generally are more liberal in their policy prescriptions

Table 3
Probit Analysis of Supreme Court Decisions

	Model 4 Civil Rights	Model 5 Non-Civil-Rights	Model 6 Federalism
Statutory Detail	.016	.074**	.110***
	(.012)	(.023)(.022)	
Liberal Justice	.109	.110***	1.410***
	(.227)	(.345)	(.353)
Statutory Detail * Liberal Justice Interaction	.043*	-.158***	-.127***
	(.020)	(.034)	(.034)
Ideological Intensity	.192***	.154***	.105***
	(.018)	(.025)	(.029)
Judicial Review	.216**	.046	.818***
	(.071)	(.072)	(.159)
Lower-Court Congruence	-.672***	-.288***	-.757***
	(.045)	(.069)	(.075)
Minimum Winning Coalition	.797***	.565***	.250*
	(.066)	(.081)	(.118)
Constant	-.135 (.144)	-.555 (.255)	-.939 (.235)
N	3,834	1,572	1,353
Log Likelihood	-2122.197	-948.187	-828.712
LR/Wald Test	628.51	129.15	189.45
Probability > χ	.000	.000	.000
Pseudo R2	.146	.067	.113
Null Model	64.8%	65.2%	53.9%
Correctly Predicted	71.3%	67.5%	67.2%
Reduction of Error	18.5%	6.6%	28.9%

Dependent Variable: unconstrained or sincere vote (1), constrained vote (0).
Values represent parameter estimates with robust standard errors in parentheses.
* $p < .10$ ** $p < .05$ *** $p < .01$

than other civil-liberties statutes (for reasons we explain below). Thus, civil-rights statutes should be more likely to constrain conservative justices, whereas other civil-liberties statutes should be more likely to constrain liberal justices. Therefore, we re-estimate the analyses by focusing on subsets of these general issues (see Table 3). Model 4 examines only civil-rights cases,[22] Model 5 examines non-civil-rights cases,[23] and Model 6 focuses on federalism cases.[24] Overall, these three additional models perform remarkably well—each produces a sizable reduction of error (18.5 percent for civil-rights cases, 6.6 percent for non-civil-rights cases, and 28.9 percent for federalism cases). Since the analysis is most concerned about the effects of statutory constraint versus individual ideology, the remaining discussion will focus only on the primary independent variables of interest.

Examining the results in Model 4 (civil rights) reveals that conservative justices are not affected by the language of congressional statutes; the variable *Statutory Detail* is not statistically significant. However, the interaction term *Statutory Detail * Liberal Justice Interaction* is significant and positive, indicating that liberal justices are more likely to cast sincere votes as congressional civil-rights statutes become more detailed. Finally, the variable *Ideological Intensity* is significant and positive. This result indicates that justices possessing stronger ideological preferences are more likely to cast sincere votes.

Since we examined the discrimination cases separately, we also analyze the remaining civil-liberties cases (First Amendment, due-process, and privacy cases).[25] As we indicate earlier, we believe civil-liberties statutes differ ideologically from civil-rights laws. In many congressional statutes pertaining to the First Amendment, due process, or privacy rights, a conservative outcome is described (for example, the Defense of Marriage Act banning homosexual marriage; the "Hyde Amendment" to the Medicaid statute limiting federal funding for abortions; or the Bipartisan Campaign Finance Reform Act [McCain-Feingold Act] placing new limits on campaign contributions). Therefore, it is plausible to expect liberal justices to experience constraining effects from these statutes and conservative justices to rely on the detailed language to support voting according to their ideological preferences.

The results of this examination are reported in Model 5 (non-civil-rights). Here we see that conservative justices are significantly more likely to cast sincere votes as statutory language becomes more detailed (i.e., the variable *Statutory Detail* is significant and positive). Conversely, liberal justices are significantly constrained by the presence of detailed congressional statutes—the variable *Statutory Detail * Liberal Justice*

[22] These cases are identified in the Spaeth data set by setting the variable CIVRTS_D = 1.

[23] These cases are identified in the Spaeth data set by setting the variables FIRSTA_D, DP_DUM, and PRIV_DUM equal to 1.

[24] These cases are identified in the Spaeth data set by setting the variable FED_DUM = 1.

[25] These cases are identified in the Spaeth data set by setting the variables FIRSTA_D, DP_DUM, and PRIV_DUM equal to 1.

Interaction is significant and negative. We notice also that the baseline variable *Liberal Justice* is significant and positive. Taken together, these two variables lead to the conclusion that liberal justices are generally more likely to cast sincere votes in non-civil-rights cases, *except* when the presence of detailed congressional statutes constrains their behavior; as the level of constraint increases liberal justices are less likely to cast sincere votes. Therefore, the empirical evidence indicates that longer congressional statutes in these areas of the law significantly constrain the ideological voting of liberal justices who join the majority coalition, while simultaneously facilitating the ideological voting of conservative justices in the majority.

The final model (Model 6) examines the effects of statutory language during the resolution of federalism disputes. In this issue area, we observe effects similar to those identified in Model 5 (non-civil-rights cases). The variable *Statutory Detail* is significant and positive, indicating that conservative justices are more likely to cast sincere votes as congressional statutes become more detailed. However, liberal justices encounter opposite effects from these statutes. As shown by a significant and negative coefficient on *Statutory Detail * Liberal Justice Interaction,* these justices are less likely to cast sincere votes when congressional statutes become more detailed. This is a somewhat counterintuitive result since one might initially believe congressional statutes would proscribe liberal outcomes by detailing the power of the federal government in relation to the states. However, further inspection of the federalism statutes reveals that many spell out areas of state authority in detail, thereby dictating conservative outcomes (i.e., in favor of states). Consequently, it is plausible that liberal justices would experience the constraining effects of these statutes, while conservatives would view the statutory language as supporting their ideological preferences.

THEORETICAL IMPLICATIONS

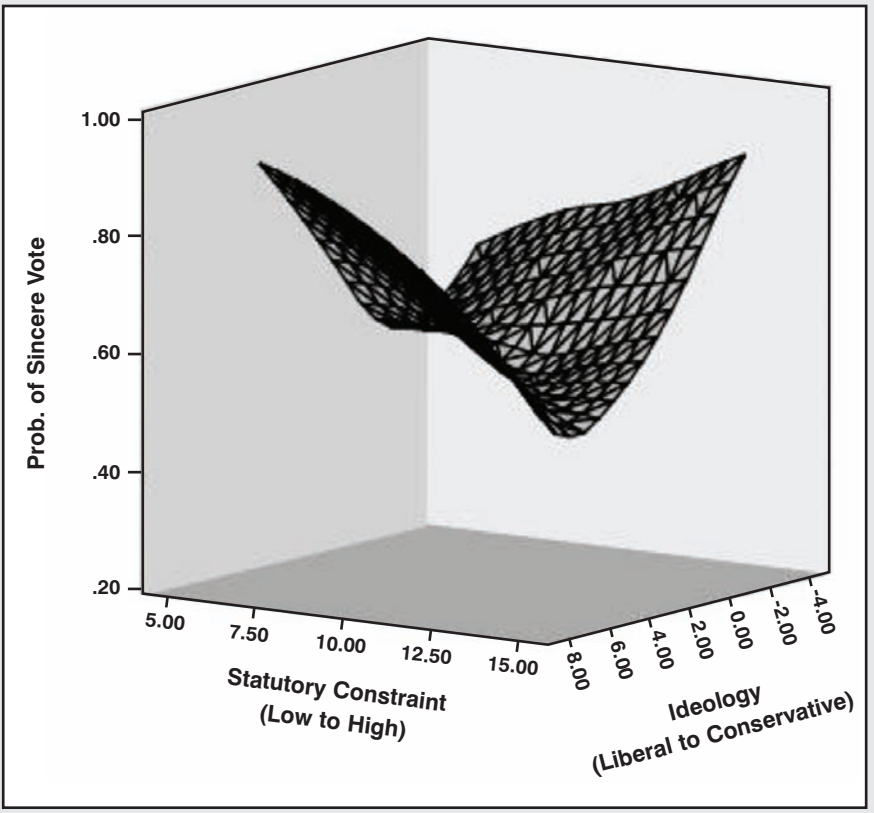
The results we provide offer empirical evidence that the *model of contingent discretion* influences Supreme Court behavior. Even when justices are influenced by their ideological preferences, this influence is contingent on the level of discretion afforded by the law; it can facilitate the expression of ideological voting among some justices while also constraining ideological voting among others. To examine the substantive implications of these results, we graphed the relationships among statutory detail, individual ideological preferences, and the probability of casting a sincere vote.[26]

Figure 1 presents these influences on the probability of a sincere vote for justices adjudicating non-civil-rights cases.[27] Initially, we hypothesize that any effects of statutory constraint would be experienced by conservative justices and that these justices would be less likely to cast sincere votes as levels of constraint increase. Individual ide-

[26] The graphs are constructed holding all other influences (i.e., variables in the statistical model) constant.

[27] The graphical relationships in Figure 1 correspond to the statistical results included in Table 2, Model 6.

Figure 1
Substantive Impact of Constraint and Ideology in *non-Civil Rights* Cases



ology exerts a substantial influence on judicial behavior (see Figure 1).[28] As the preferences of justices become stronger (in either direction), the probability of casting sincere votes increases by approximately 30 to 40 percent regardless of whether the justices are liberal or conservative.[29]

Yet when one accounts for the language of statutes, new voting patterns emerge—patterns that depend on whether justices are liberal or conservative. If we focus on the behavior of liberal justices (illustrated by the "leading edge" of the graph) we see that they possess a high probability of casting sincere votes when statutory detail is low. However, as statute length increases, the probability of casting sincere

[28] For graphical purposes we "unfold" the Martin and Quinn measure of ideology. Consequently, the axis labeled IDEOLOGY represents the entire ideological continuum, with scores ranging from the most extreme liberal justices to the most extreme conservative justices.

[29] This result is observed by focusing on the "left edge" of the hyperplane – when statutory constraint is at its lowest level.

votes decreases dramatically—by approximately 35 percent. Conversely, the results for conservative judges are more counterintuitive and unexpected (illustrated by the "trailing edge" of Figure 1). When statutory length is low, these justices possess a relatively high probability of casting sincere votes (though not as high as that experienced by liberal justices). As the statutes become longer and more detailed, the probability of conservative justices casting sincere votes increases by approximately 15 percent (see Figure 1).

The combined findings for *Statutory Detail* and *Individual Ideology* suggest a theoretically important way of thinking about judicial behavior. Rather than conceptualizing the legal model and the attitudinal model as competitors (i.e., that there is a trade-off between constraint and ideology), the strong empirical evidence suggests that legal influences and ideological influences actually work in tandem in the Supreme Court. The justices cast votes according to their individual ideological preferences *contingent on the level of discretion* provided in the law. Occasionally, the traditional tension exists, and statutory language constrains the justices from voting ideologically. However, in other instances these two influences operate in a more dynamic and interdependent manner, and we observe statutory language facilitating the expression of ideological voting among the justices. Thus, the model of contingent discretion represents a vibrant interaction between attitudinal and legal factors, one which fosters both constraint and facilitation of ideological influences during the decision-making process.

CONCLUSIONS

The potential tension between Congress and the Supreme Court caused by the constitutional "invitation to struggle" over the meaning of the rule of law has profound implications for democratic theory and the separation of powers. Though scholars have examined whether the Supreme Court issues decisions against the preferences of Congress, there has been little focus on whether the language included within statutes influences judicial behavior. Our findings demonstrate that members of Congress can constrain Supreme Court decision making over the long term by enacting detailed legislation. Whether this result occurs because of an intentional congressional objective or is an unintended outcome, the final product is that Congress possesses an ability to limit judicial discretion in the Supreme Court through statutory language.

This general conclusion is important because many previous studies of the legal model have not been able to provide empirical support for legal influences. As we argued earlier, continuous and more dynamic measures of legal factors are required to test accurately and rigorously the precise relationship between these aspects and ideological preferences. Our analysis builds upon previous work at the federal appellate court level and depicts a more vibrant relationship between constraint and discretion. As such, the Supreme Court provides a critical venue to test this thesis—since the justices are the ultimate arbiters of the law a higher court cannot overturn their decisions.

In sum, we first answer the question of whether Congress can constrain the Supreme Court and discover that the influence is significant. The measure of statute length reveals that more detailed language (resulting in statutes with higher word counts) significantly affects the discretion afforded to Supreme Court justices to rule ideologically. More important, however, our analysis provides empirical evidence to support a new theoretical conceptualization of judicial behavior, the *Model of Contingent Discretion*. If everything else is held equal, the justices will render decisions according to their ideological preferences. Yet all things are not equal, and the presence of legal factors, such as statutory language, limits the ability of some justices to rule ideologically. Additionally, it is important to recognize that not all justices are affected in the same manner. Thus, while some justices experience significant constraint from the presence of detailed statutory language, others experience support for their ideological positions and are more likely to vote according to those preferences. Based on this dynamic interaction between political attitudes and statutory influences, one should not think of the legal model only as a set of forces that operates in contrast to ideological attitudes. Consequently, a more complete model of judicial decision making should include measures of both political preferences and statutory influences and account for the differential impact of these measures.

While our results here suggest an important new theoretical direction for conceptualizing the attitudinal and legal models, as well as empirically demonstrating the effects of statutory constraint and facilitation on the Supreme Court, the research also raises additional questions for future studies to address. First, do these effects remain consistent over time? It is possible that Congress drafts more detailed legislation in response to periods of "judicial activism" by the justices. If this occurs, then one should expect substantial fluctuations over time in the levels of statutory detail and discretion. Second, does Congress intentionally write statutes in anticipation of Court behavior? If so, then one should expect the preferences of congressional members to interact with the measure of constraint to specifically target select groups of justices. Empirically examining these questions in future research is important to determine additional aspects of the dynamic and interdependent relationship between statutory influences and ideological preferences. **jsj**

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APPENDIX
AN ALTERNATIVE SPECIFICATION FOR CRIMINAL CASES

	Model 7 Alternative Specification
Statutory Detail	-.055*** (.014)
Ideology	.045*** (.011)
Judicial Review	-.171** (.051)
Lower-Court Congruence	-.020 (.047)
Minimum Winning Coalition	.046 (.058)
Constant	.341 (.156)
N	2,973
Log Likelihood	-1948.966
LR/Wald Test	41.79
Probability > χ	.000
Pseudo R2	.011
Null Model	56.5%
Correctly Predicted	64.7%
Reduction of Error	18.9%

Dependent Variable: conservative vote (0), liberal vote (1).

Values represent parameter estimates with robust standard errors in parentheses.

* $p < .10$ ** $p < .05$ *** $p < .01$