

Does Legal Doctrine Matter?

Unpacking Law and Policy Preferences on the U.S. Supreme Court

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Abstract

To understand and assess the impact that the law has on judicial decision-making on the U.S. Supreme Court, one must disentangle the effects of law and policy preferences. In this paper, we elaborate the fundamental character of this challenge, and then present a novel approach to measuring the effect – if any – of the law on justices’ decisions. Key to our approach is the use of positions taken by political actors outside of the court who put less emphasis on legal considerations. The positions taken by these actors allow us to pin down policy elements of voting. We use these elements to identify statistically the effects of legal forces including adherence to precedent, judicial restraint in the form of deference to Congress and a strict interpretation of the First Amendment's protection of speech clause that may guide judicial decision-making. The evidence suggests that legal factors play an important role and that their effects vary across the justices in interesting ways.

We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It is because we want him or her to apply the law....They are constrained when they do that.....They need to be bound down by rules and precedents: ...the rules, the laws that you [Congress] pass, the precedents that judges before them have shaped.

--John Roberts, September 13, 2005

...Legal rules governing decision making (e.g. precedent, plain meaning) in the cases that come to the Court do not limit discretion.... because the Supreme Court is the court of last resort, the justices...may freely implement their personal policy preferences.

--Jeffrey A. Segal and Harold J. Spaeth (2002, 111)

To what extent does the law matter on the Supreme Court? Some, like Chief Justice Roberts, argue that the law is key to understanding judicial outcomes since justices operate within the bounds of legal constraints such as precedent and appropriate deference to legislative authority (see, *inter alia*, Clayton 1999; Richards and Kritzer 2002). Others, like Segal and Spaeth (2002), disagree. They argue that there is no systematic evidence that legal factors influences the decisions justices make (2002, 351). Instead, they believe that justices base their decisions upon their personal policy preferences. The normative implications of this question are enormous: if Segal and Spaeth are correct and justices are effectively nine political actors advancing their policy goals, the Court's legitimacy may be called into question.

A definitive answer to this question has been elusive, due in part to the difficulty of disentangling the justices' legal and policy motivations. Qualitatively, one can explain almost any Court decision in terms of either legal motivations or the narrow pursuit of policy objectives. Statistically, this muddle of policy preferences and law creates an identification problem; as we show below, the dividing line between liberals and conservatives on any given case can be explained in policy or legal terms.

We use a spatial model to devise a novel test for measuring the extent to which prominent legal doctrines (*stare decisis*, judicial restraint, and protection of speech) constrain the justices' decisions. Key to the approach is the use of positions of elected officials on Supreme Court cases. Because elected officials are less likely to be constrained or influenced by legal doctrines than justices, their revealed behavior helps us to pin down the policy implications of each case. This enables us to isolate and statistically identify the effects of legal doctrines such as precedent, the notion of deference to Congress and a strict interpretation of the constitution when the justices render their decisions.

Thinking in these terms allows us to make two contributions. First, we show that even if the justices place great weight on legal doctrines, it is possible for the Court to divide consistently along policy lines, creating a misleading impression of a completely politicized court. Second, we find evidence that non-policy factors influence Supreme Court justices and that the extent of such influence varies across individual justices in interesting ways. These factors do not replace policy preferences, but they do lead us to challenge the stark view that the Court is a small legislature of nine unelected politicians.

Disentangling the Law and Policy Preferences

One of the most important tasks for scholars of the Court is determining how justices make their decisions (George and Epstein 1992; Richards and Kritzer 2002). Scholars typically give one of two answers. On one side, attitudinalists argue that “institutional features designed to secure judicial independence... insure that the Justices can give their ideological preferences 'free play' and 'base their decisions solely upon personal policy preferences'”(Whittington 2001, 482, quoting Rohde and Spaeth 1976, 72). In this view, “legal considerations—efforts to interpret the law accurately and well—play essentially no role in the Court’s decisions” (Baum 1994, 3).

Numerous quantitative studies have supported the view that policy preferences drive judicial decision-making (Rohde and Spaeth 1976; Segal and Spaeth 1993; Hagle and Spaeth 1993; Segal et. al. 1995; Segal and Cover 1989).

On the other side are those who emphasize the limits that legal doctrines impose on judicial discretion. American legal education continues to be dominated by those who believe that the decisions of the justices reflect their interpretations of the law (Spaeth and Segal 1999, 314). Those who subscribe to the legal model argue that justices are influenced in a meaningful way by legal norms and principles that arise from justices' socialization in law schools and the legal community (Baum 1997; Kahn 1999). Justices may also internalize a sense of obligation from their institutional position that leads them to base their decisions upon the law (Gilman and Clayton 1999, 4). Even Walter Murphy, a scholar strongly associated with the view that justices strategically pursue their policy preferences, admits that “much of the force of self-restraint can be traced to individual Justices' concepts of their proper role in American government ...” (1964, 29).

Despite being placed at the poles of academic debates, the logic of the legal and attitudinal models can be reconciled. Both models suggest that the decisions justices make are shaped by a set of underlying values. But what are judicial values? Are they simply about policy, as Segal and Spaeth (2002, 111) suggest? This view, coupled with the notion that there is a paucity of constraints on Supreme Court justices, is the backbone of the attitudinal model.

Or do legal values also include views about how legal issues are to be addressed? Given that justices are likely to interact on a daily basis with those who study jurisprudence, it is possible that values about the law, not just policy, matter. Such a view would be consistent with the view that process—rather than simply outcome—oriented preferences can shape decision-making (Ferejohn and Weingast 1992, 5; Baum 1997, 61).

The challenge for scholars trying to test the relative influence of attitudes versus legal forces is that one can usually explain a decision by a justice in either policy or legal terms. A case in point is Justice Thomas's concurrence with Scalia's dissenting opinion in *Lawrence v. Texas*. In this case, the Court struck down Texas's anti-sodomy law and overturned the Court's ruling in *Bowers v. Hardwick*. Thomas argued that even though on policy grounds he found Texas's law "uncommonly silly," he believed that the choice to overturn it should be left in the hands of the democratically-elected state legislature. Although it is possible that Thomas's conception of the law required that the decision be left in the hands of the Texas legislature, it is also possible that he wrote his opinion to mask his sincere policy preferences, as he was a regular opponent of the gay rights advocates who were fighting to strike down the Texas law (Pinello 2003, 100).

Figures 1 and 2 translate this general problem into spatial terms. In the underlying spatial model for Figure 1, each justice has an ideal point at θ_i . The utility of justice i of voting for the petitioner is a quadratic loss function: $U_i^P = -(\theta_i - \gamma^P)^2$ where γ^P is the spatial location of the outcome associated with voting for the petitioner. The utility of voting for the respondent is analogous: $U_i^R = -(\theta_i - \gamma^R)^2$ where γ^R is the spatial location of the outcome associated with voting for the respondent.¹ Following standard spatial theory, a justice will vote for the petitioner if his or her ideal point is on the same side of the midway point (often referred to as a cutpoint) between the outcomes associated with voting for the petitioner and respondent.

In Figure 1, justices with ideal points at $\theta_1, \theta_2, \theta_3, \theta_4,$ and θ_5 support the petitioner and justices with ideal points at θ_6 through θ_9 support the respondent. This pattern suggests a cutpoint between θ_5 and θ_6 . Behavior here is completely consistent with the attitudinalist approach in which "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal and Spaeth 1993, 65).

[Figure 1 about here]

But what happens when we add the legal dimension? Justices' decisions now depend upon both their policy preferences (X-axis) and their support for legal doctrines such as *stare decisis*, judicial restraint, and a literal reading of the First Amendment; for simplicity we refer to the Y-axis in Figure 2 simply as “the Law.” In Figure 2, the justices hold the same policy preferences as they did in Figure 1, but they also have preferences on a second legal (Y-axis) dimension. The policy implications of the respondent and petitioner outcomes are also the same as in Figure 1, but the two sides’ legal implications are now different. In the two dimensional figure, the respondent’s outcome is on ground that is more legally sound than the petitioner’s outcome, pushing it higher on Y-dimension. The justices care about both policy and law; mathematically, let

$$U_{iv}^D = -(\theta_i - \gamma^D)^2 + \delta_i Law_v^D \quad (1)$$

where δ_i is the weight justice i places on the value of *Law* for case v . The utility of voting for the plaintiff is analogous.

How justices will vote in Figure 2 depends on which model is correct. If a justice's decisions reflect only his or her policy preferences, the line that divides liberals and conservatives (labeled cut-line #1) is the vertical line between θ_5 and θ_6 just as in Figure 1. If *both* policy and legal factors matter, though, the cutting line is a line whose angle depends on the relative weight of “the Law” (labeled cut-line #2). In Figure 2, this leads to a majority ($\theta_4 - \theta_9$) vote in favor of the respondent.

[Figure 2 about here]

This situation creates the identification problem: Even when law matters, we get a division of liberals and conservatives that can be explained by another vertical line, marked as cut-line #3,

or the “observationally equivalent” cut-line. Observing a 6 to 3 conservative vote in favor of the respondent on a case in which (say) the respondent had precedent on his side does not necessarily mean that the justices were moved by the law; it could be simply that the policy implications of the case were such that purely policy-driven justices would divide in that manner. In the appendix, we use the above utility function to demonstrate mathematically the qualitative point we have been making—the weight of law is not identified in an analysis using only votes by Supreme Court justices.

Three Legal Doctrines

To assess the extent to which the "law" affects judicial decisions, independent of policy preferences, we need to identify legal concepts that may influence justices and that can be coded in a reasonably straightforward way. To be sure, numerous legal doctrines may shape judicial decision-making. We concentrate on three doctrines that have commonly been used to explain justices' decisions: *stare decisis*, judicial restraint and strict interpretation of the First Amendment. We selected these particular doctrines because of both their salience in American jurisprudence and our ability to identify empirically the cases in which these factors may operate.

Stare Decisis

The most widely celebrated legal influence is *stare decisis*, the notion that prior Court decisions serve as precedents that guide judges' decisions. Public law scholars and Supreme Court justices routinely argue that precedent shapes the decisions of the Court (Levi 1949; Dworkin 1978; Kahn 1999; Gilman 1999; Clayton 1999). Judges themselves emphasize precedent more frequently than any other legal factor (Knight and Epstein 1996).

Quantitative evidence in support of *stare decisis* has been mixed. Richards and Kritzer (2002) find evidence that doctrinal changes in First Amendment case law led to measurable

changes in the determinants of case outcomes, and George and Epstein (1992) conclude that both law and ideology affected death penalty cases. In contrast, Segal and Spaeth (1996a) and Spaeth and Segal (1999) focused on whether individual justices who dissented on landmark cases subsequently supported the precedent in future progeny cases. They found that justices' votes generally – but not always -- do not change on progeny cases, implying that policy preferences exert a strong effect and that precedent may exert little or no effect.

Segal and Spaeth's evidence is not definitive, however. First, in the pure attitudinal model precedent does not influence the action of any justice. Yet Segal and Spaeth (1996a) conclude that Justices Powell and Stewart appear to have been moved by precedent more than preferences in a non-trivial number of cases. Second, it is possible that their coding of cases masks precedential behavior in instances where precedent becomes embedded in the law (Songer and Lindquist 1996). After adjusting the coding accordingly, Songer and Lindquist (1996) found more evidence of significant precedential behavior (see also Brenner and Stier 1996), although Segal and Spaeth (1996b) raise questions about the appropriateness of Songer and Linquist's (1996) and Brenner and Stier's (1996) coding.

In some respects, Friedman (2006) raises more serious problems for Segal and Spaeth's interpretation. First, he argues that adherence to precedent does not require an individual justice in the minority to bow to the will of the majority. Second, he argues that narrowing a precedent is not necessarily being unfaithful to *stare decisis*. Hence, the 1980 decision in *Rhode Island v. Innis* that defined the scope of questions that required a *Miranda* warning was not inconsistent with the Court's 1966 *Miranda* ruling because this question was not raised *when Miranda* was decided.

Justices may employ a *stare decisis* constraint for several different reasons. First, they may have been socialized to accept a norm of deference (Knight and Epstein 1996). Second, the Court's ability to entice other actors to comply may depend on clarity, for which adherence to *stare decisis* may be useful (Hansford and Spriggs 2006, 19-20; Bueno de Mesquita and Stephenson 2002). Third, the legitimacy of the Court (and, indirectly, its policy effectiveness) may depend on reliance on legal principles such as precedent (Hansford and Spriggs 2006, 20; Kahn 1999, 189).

Judicial Restraint

Another legal doctrine that may shape judicial decision-making is judicial deference to legislatures. This factor comes into play when justices argue, as in Thomas's comment above, that although they do not agree with a given case outcome, it is the task of duly elected legislators, not unelected judges, to change policy. As Anthony Kronman, the former dean of the Yale Law School, explained to the Senate Judiciary Committee during the Supreme Court confirmation hearings for Samuel Alito, "The temperament of the judge, as I see it, is marked by modesty, by caution, by deference to others in different roles with different responsibilities" (2006, 711). Kronman's views reflect Wechsler's (1959) argument that justices should refrain from infringing upon legislative authority except when neutral principles can be employed to provide clear guidance.

Justices can be among the most forceful advocates for judicial restraint. Justice John Marshall Harlan II wrote: "This Court, limited in function..., does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process" (1964, 624-625). More recently, Chief Justice Roberts has elaborated on his belief in judicial restraint:

Members of Congress have been chosen by hundreds of thousands of people, millions of people. Not a single person has voted for me.... And that is, to me, an important constraint. It means that I'm not there to make a judgment based on my personal policy preferences or my political preferences (Barnes 2006).

Deference may also be practically useful for justices. Rosen, for example, maintains "history suggests that courts can best maintain their democratic legitimacy...by practicing judicial restraint" (Rosen 2006, 13). In this view, the political system works best when judges "defer to the view of the political branches" (Rosen 2006, 13). As Ferejohn and Kramer (2006, 163) have observed, "The judiciary is a self-regulator: it has created a system of self-imposed institutional and doctrinal constraints that keep judges within the bounds required by institutional vulnerability."

Strict Interpretation of the First Amendment

Another legal value that could lead justices to vote against their policy preferences is the protection of speech. The concept of strictly interpreting the Constitution has a storied history in American jurisprudence. The First Amendment's "Congress shall make no law ..." prohibition on restricting free speech has frequently been invoked by those who believe in a strict interpretation. For example, Justice Hugo Black -- stating that "no law means no law" -- would vote to strike laws that he may have agreed with but for his interpretation of the Constitution.

The contemporary justice who is most frequently associated with the view that the Constitution should be interpreted literally is Scalia (Tushnet 2005). This view has led Scalia to cast a number of votes that have resulted in alliances that span the ideological spectrum. Perhaps the most prominent examples are Scalia's decision to join Justice William Brennan in striking down state (*Texas v. Johnson*) and federal (*United States v. Eichman*) laws prohibiting flag-

burning. While delivering a speech at the University of Mississippi School of Law, Scalia explained that he cast the deciding vote for Gregory Lee Johnson in the *Texas* case even though “I would have been delighted to throw Mr. Johnson in jail...Unfortunately, as I understand the First Amendment, I couldn't do it” (UM Lawyer 2003, 1).

Identifying the Effect of Jurisprudence

Our goal is to pin down a policy based cut-line that will enable us to isolate the extent to which the decisions of each justice are constrained by the three legal doctrines we have just discussed. Central to our approach are four factors. First, members of Congress and the President take positions on Supreme Court cases and are less likely than Supreme Court justices to be influenced by the legal doctrines on which we focus. As we explain below, the fact that elected federal officials are more likely to take positions based upon policy preferences than justices allows us to pin down the policy implications of votes on Supreme Court cases, in turn enabling us to identify whether legal concepts matter.

Second, a precedent can influence judicial decision-making only after it has been established. Thus, we have a second “control” group available to us when testing for the effect of precedent: Supreme Court justices who ruled on an earlier case in which precedent did not have the same implication. For example, the principle of *stare decisis* did not have the same implications for the justices initially ruling on *Roe* as it did for post-*Roe* justices ruling on *Casey*.

Third, the importance of *stare decisis*, judicial restraint, and strict construction of the First Amendment varies from case to case. For example, even though the importance of *stare decisis* was central to the decisions in *Atkins v. Virginia* (in which the Court overturned *Penry v. Lynaugh's* ruling that executing the mentally ill was acceptable) and in *Casey v. Pennsylvania* (in which the Court opted to support the plaintiffs and not overturn *Roe v. Wade*), a decision to

uphold *stare decisis* was not a central question in *Rostker v. Goldberg*, in which the Court addressed the constitutionality of requiring only men to register for the draft.

Fourth, when *stare decisis*, restraint, and First Amendment scrutiny are central to a case, support for the legal doctrine normally has clear ideological implications. For example, in *Atkins* support for *stare decisis* (upholding *Penry*) had clear conservative implications (allowing the mentally ill to be executed).

We use members of Congress and presidents (and in the case of *stare decisis*, pre-precedent justices) to identify the policy cut-points on Supreme Court cases. In terms of Figure 2 from above, the control actors allow us to pin down the location of the policy cut-point which in turn lets us isolate the effect of law. Without the control actors, the estimated vote cut-point would capture both the policy cut-point and the effect of law, if any. If justices exhibit the same behavior conditional on policy preferences as do elected officials or pre-precedent justices on cases in which legal concepts are clearly implicated, we can infer that these legal concepts do not explain behavior once the preferences of each justice are accounted for. On the other hand, if—conditional on policy preferences—our control group is less likely to allow the relevant legal doctrines to influence and its positions, we can infer that law matters.

Although it is possible that members of Congress and presidents also care about the three legal doctrines we assess, such concerns are unlikely to dominate congressional decision-making—a conclusion we draw from evidence that members of Congress are primarily motivated by ideology (Poole and Rosenthal 1997), party needs (Cox and McCubbins 1993), and constituencies (Arnold 1990). However many members of Congress and some presidents are lawyers, and to the extent that legal influence shapes congressional and presidential positions, our estimated policy cut-line will not be completely purged of legal effects. In this case, we

would be estimating the differential effect that the legal doctrines have on justices relative to members of Congress and the president. Nonetheless, it seems a reasonable characterization of the legal model that justices on the Supreme Court should care more about the law than do elected officials.

Figures 3a and 3b illustrate our identification strategy via an example in which precedent implies a liberal vote. In the figures, various elected officials are arrayed according to their policy preferences and their position on a particular case. The positions taken by members of Congress imply some cut-line, one that we can infer is policy-based relative to Supreme Court justices because members of Congress are less likely to be affected by *stare decisis* and other legal considerations.

[Figure 3 about here]

In Figure 3(a), the three circled justices in the bottom row vote liberally and consistent with precedent, even though they are to the right of the policy-only cut-line. This is the behavior we would expect if law is influential. On the other hand, in Figure 3(b) the cut-line is the same for the control group and the Supreme Court justices subject to the legal principle. This implies that law does not matter to the justices. In this case, the justices vote in complete accord with the members of Congress who share their policy preferences. Our estimation strategy, elaborated below, isolates policy preferences using members of Congress and then identifies whether justices systematically differ from members of Congress in the directions predicted by the legal implications of cases.

Modeling and Estimating the Role of Law

To ascertain whether a commitment to *stare decisis*, deference to Congress and a strict interpretation of the First Amendment influences decision-making on the Supreme Court after

controlling for the policy preferences of each justice, we model the positions taken by justices, presidents, and members of Congress on Supreme Court cases and congressional roll calls. The model is derived in the appendix from Equation 1, using the standard techniques of random utility models and ideal point preference estimation. The dependent variable indicates whether or not an individual voted conservatively. Our interest in the effect of law leads us to add three specific legal variables to a standard voting model. The model estimated is

$$\Pr(y_{itv} = 1) = \Phi[\alpha_v(\theta_{it} - \kappa_v) + \pi_i PREC_v + \delta_i DEF_v + \sigma_i SPEECH_v] \quad (2)$$

where y_{itv} is 1 if individual i takes a conservative position at time t on vote v , α_v is the vote discrimination parameter,ⁱⁱ θ_{it} is the policy preference of individual i at time t (the higher the value, the more conservative), κ_v is the vote “cut-point,” π_i , δ_i , and σ_i are the weights justice i places on precedent, legislative deference, and protection of speech, respectively, and $PREC_v$, DEF_v and $SPEECH_v$ are the precedent, deference, and speech variables, coded as described below. Policy preferences are permitted to vary over the course of an individual’s career; details are in the on-line appendix.

We estimate the parameters of the model for all justices, presidents, and members of Congress in the dataset. The identification assumption is $\delta_i = \pi_i = \sigma_i = 0$ for all non-justices, which means that we are identifying the effect of these factors on justices relative to any effect they may have on non-justices. Finding $\delta_i > 0$ or $\pi_i > 0$ or $\sigma_i > 0$ for at least some justices would be consistent with the idea that legal factors exert a real effect independent of judicial policy preferences.

The model is estimated via a Bayesian Markov Chain Monte Carlo (MCMC) algorithm that simultaneously estimates the parameters in Equation 2. This approach is flexible enough to incorporate constraints on cut-points, and it readily produces standard errors of all estimated

quantities (see, e.g., Clinton, Jackman and Rivers 2004, Clinton and Meirowitz 2001). The on-line appendix provides additional details.

Data

The dependent variable is the position—conservative or not—taken by justices, members of Congress, and presidents on 842 Supreme Court cases and 761 congressional votes that arose between 1977 and 2003.ⁱⁱⁱ No observation exists for those who did not take a position on a given case or roll call vote.

Identifying Policy Implications of Supreme Court Cases

Key to the approach are 8,286 inter-institutional bridge observations that consist of members of Congress and Presidents taking positions on Supreme Court cases via amicus filings, public statements, bill sponsorship or on roll-call votes that directly commented on case outcome. For example, President George W. Bush's declaration that “The Supreme Court of the United States gave a great victory to parents and students throughout the nation by upholding the decisions made by local folks here in the city of Cleveland, Ohio” (Bush 2002) constitutes a presidential bridge observation for *Zelman v. Simmons-Harris*, in which the Court upheld the right of parochial schools to receive school vouchers. Likewise, an example of a congressional bridge observation would be Representative Tom Osborne’s (R-NE) statement in regard to *Lee v. Weisman* that “In 1992, the Supreme Court declared an invocation and benediction at a graduation ceremony unconstitutional....this seems to fly in the face of the way our country was founded” (U.S. House, 1993). An example of a congressional roll-call bridge observation for *Selective Service v. Minnesota Public Interest Research Group* would be the July 28, 1982 roll call on the Solomon amendment, a law upheld in *Selective Service*.

In addition to votes and statements, we create more robust estimates by including 17,662 implicit observations. These implicit observations help us pin down preferences across institutions and time and in particular aid our ability to establish a member of Congress's preferences on a Supreme Court case even when they do not explicitly mention the case. For example, we have identified every member of Congress who embraced amending the U.S. Congress to prohibit abortions as taking a conservative position on both *Planned Parenthood v. Casey* and *Webster v. Reproductive Health Services*. Likewise, based on the fact that Senator Robert Byrd (D-WV) proposed to amend the U.S. Constitution so that “Nothing in this Constitution. . . shall be construed to prohibit voluntary prayer. . . or to prohibit voluntary prayer . . . at a public school extracurricular activity” (1996) we treat Senator Byrd as having embraced the school district's position in *Santa Fe Independent School District v. Doe*, in which the Supreme Court banned public school districts from allowing students to lead pre-game prayers at football games. While these observations provide more information, they do not drive the results; we show in the on-line appendix that results without these implicit observations are quite similar.

Use of bridging data raises issues that do not arise with conventional roll-call data. One issue is that our observations are from a self-selected sample that may not be representative of Congress. As discussed in the on-line appendix, there is a slight skew to the right in the ideology of those making bridge observations. For example, we have 68 bridge observations for Senator Orin Hatch (R-UT) only 20 for Senator Barbara Mikulski (D-MD), even though both were first elected to Congress in 1976. However, this is not sufficient to cause bias because we are conditioning on policy preferences in the outcome equation. Selection bias occurs only if error in the selection equation is correlated with error in the outcome equation (Greene 2000, 976). In our model this would occur if an individual were more likely to express an opinion on an issue

when he or she is idiosyncratically more liberal or conservative than his or her ideal point. Having a sample skewed to one direction or another will not cause bias (nor, by the way, is a non-skewed sample sufficient to show that selection bias is not occurring). The appendix discusses a diagnostic test that determines whether members of Congress are ideologically different when they take positions; we find no such evidence.

In addition to inter-institutional bridge observations, we also employ 416 inter-temporal observations to help us isolate the effects of *Stare Decisis*. These are comments by justices that express support or opposition to a prior ruling of the Court. Usually, they were made by a justice about a case decided before the justice served on the bench. For example, Justices Breyer and Ginsburg noted in *Lawrence* (2003) that they would have voted with the minority in *Bowers* (1986). Another example is Stevens' assertion "I would have joined Rehnquist's dissent in *Weber* [*United Steel Workers v. Weber*]...had I not been disqualified" (2005, 14).^{iv} Thus, we created a *Bowers* observation for Breyer and Ginsburg and a *Weber* observation for Stevens. All these observations were made after 1978 by justices who were on the Court at the time of the comment. When these observations refer to a case for which a precedent had not previously existed, they are useful for assessing the impact of precedent, as discussed above. Results without these observations are reported in the on-line appendix and are substantively similar to those with the observations.

While our interest centers on the behavior of Supreme Court justices, we include congressional votes because they are useful in estimating preferences of members of Congress relative to one another. And, this helps us to pin down the policy implications of votes and in turn helps us to use elected officials' positions to isolate the effect of the law on Supreme Court justices.

Coding Cases

In addition to creating inter-institutional and inter-temporal bridge observations, we also code cases with respect to the three legal concepts: precedent, deference to Congress, and the sanctity of the First Amendment's free speech clause. This is no simple task. As Friedman explains, "Law may seem frustrating to political scientists in that, because of the way it works, the actions of legal actors are not so easily coded as they may like" (2006, 267). However, we believe that it is possible to identify in an objective manner a set of cases in which each of the three legal doctrines we explore is particularly relevant.

Although every case could theoretically be used to overturn a precedent, precedent is a prominent issue in only a subset of cases. For example, an important question in *Webster* was whether the *Roe* precedent should remain standing. Indeed, the petitioner's brief asked the Court to use the case as a vehicle for overturning *Roe* (Segal and Howard 2001, 435). In contrast, in *Texas v. Johnson* (1989) there was no serious question of overturning the precedent that established that the Constitution protected symbolic speech; in this case, none of the parties or justices involved in the case argued that precedent needed to be reversed.

To denote cases in which precedent was particularly likely to be in play, we relied upon the actions of the justices, the plaintiff and the respondent. Precedent was coded as in play if (a) any of the parties or justices expressly supported overturning a specific precedent and (b) the votes divided justices into pro-precedent and anti-precedent camps; that is, we would not code precedent as being in play if some, but not all, of the majority expressed an interest in overturning precedent.^v The value of the precedent variable depends upon whether supporting the precedent in question implied a liberal or conservative vote. If a liberal decision overturned precedent, that would mean that conservatives were voting deferentially (to uphold the

precedent) and the precedent variable would be coded as 1. If a conservative decision struck down precedent, the liberals were voting in favor of precedent and the precedent variable would be coded as -1. A good way to understand the logic is to refer to Equation 2: a positive weight on precedent (π) coupled with a positive value of the precedent variable would increase the probability of a conservative vote. Precedent was implicated in 158 cases.^{vi} We also provide results in the on-line appendix based on several different approaches to coding precedent; the results are discussed in footnote 11.

Our *deference* variable indicates cases that involved the court upholding or overturning the constitutionality of a law passed by Congress.^{vii} For example, a case involving a federal statute banning flag burning implicates legislative deference, while a case involving the constitutionality of a shopping center that bans leafleting does not. Likewise, a case involving a National Park Service ban against oversized placards on a national monument would implicate deference to a legislative body only if the question before the Court clearly involved a policy adopted by Congress, rather than an administrative decision of the Park Service.

The value of the *deference* variable depends on whether deference implied a liberal or conservative vote. For example, if an act of Congress authorized the attorney general to expel foreigners without a hearing and was challenged, a vote for deference (accepting an act's constitutionality) would imply a conservative outcome; the "deference" variable in this case would be coded as 1. Likewise, if an act of Congress mandated minority set asides in contracting, a vote for deference (accepting an act's constitutionality) would imply a liberal outcome; the "deference" variable in this case would be coded as -1. Deference was implicated in 111 cases. These cases are relatively contested, as individual justices voted 39 percent of the time to overturn the statute.

Our coding with regard to *freedom of speech* proceeded in a similar fashion. To ascertain whether each justice allowed a strict interpretation of the First Amendment’s free speech protections to drive their decision-making, we relied upon Spaeth (2006) to identify cases in which freedom of speech questions were particularly prominent. The value of the *speech* variable depends on whether protection of free speech implied a liberal or conservative vote. For example, in the Texas flag burning case, a vote to protect speech would imply a liberal outcome; the “speech” variable in this case would be coded as -1. Likewise, if a “free speech vote” implied a conservative outcome, the “speech” variable would be coded as 1. For example, in *Airport Commissioners v. Jews for Jesus*, the Supreme Court ruled against the Los Angeles Airport Commission to prohibit it from banning the distribution of religious pamphlets. Speech is implicated in 158 cases.

The ability to discern the extent to which legal concepts limit judicial behavior depends in part upon our ability to denote a set of cases in which *stare decisis*, deference to Congress, and free speech are at play. It also depends upon the validity of our assumption that the positions articulated by members of Congress and Presidents are more likely to be influenced by policy preferences than by the sorts of legal doctrines we are investigating. Of course, the positions that some legislators take on Court cases may in part be shaped by these same legal concepts. This seems particularly likely to be the case when freedom of speech is at stake. In other words, it is conceivable in these cases that legislators’ policy goals are the legal doctrine—protecting the First Amendment. If, after we control for justices’ ideological positions, the justices look no different than ideologically similar politicians on cases implicating speech, we would have to reject the hypothesis that legal ideas about the First Amendment lead justices to value the protection of speech more than their policy preferences alone would suggest.

Putting the above sources of data together, we have a data structure in which there is a dependent variable (whether or not a given actor was conservative on a given case or roll call) and a series of parameters that allow us to estimate ideal points (θ), vote parameters (α and κ), and the law variables (π , δ and σ) identified in Equation 2.

Results

Table 1 reports the estimated precedent (π), congressional deference (δ), and speech (σ) parameters for the justices in the sample. The first notable finding is that the parameters are statistically significant for most justices.^{viii} The estimated precedent parameters (π) are significant for 13 of 16 justices (all except Stewart, Scalia, and Thomas). The congressional deference parameters (δ) are statistically significant for 12 of the 16 justices (all justices except Scalia, Kennedy, Thomas, and Ginsburg). The protection of speech parameters (σ) are significant for all 15 of 16 (all except Breyer).

Because of the non-linear probit-like structure of the model, the substantive implications of the parameters are not directly interpretable. Therefore, we used the estimated parameters to simulate justices' probabilities of voting conservatively. Figure 4 shows one set of simulation results for the precedent parameter. For each justice we calculated his or her average policy preference over the time period in the sample and calculated the probability of voting conservatively given that the precedent either was implicated and implied a liberal vote (the blue bar in the figure) or was implicated and implied a conservative vote (the yellow bar).^{ix} If after controlling for policy preferences a justice's votes were swayed by precedent, his or her yellow bar would be higher than his or her blue bar. For example, with precedent implicated and suggesting a conservative outcome, Stevens is simulated to vote in a conservative direction with 41% probability; but with precedent implicated and suggesting a liberal outcome, Stevens is

simulated to have an 8% probability of voting conservatively. Although Stevens clearly prefers liberal outcomes, if *stare decisis* suggests a conservative outcome, Stevens is more likely to embrace such a position. In contrast, Scalia's yellow and blue bars are relatively the same height and thus suggest that *stare decisis* plays a relatively small role in his jurisprudence.

[Table 1 and Figure 4 about here]

Figure 5 aggregates a series of simulations in order to compare effects across justices. Because the magnitude of the non-linear effect varies for each justice and with the simulated cutpoint, we used the parameter estimates to simulate effects for three different policy cutpoints (κ).^x One simulated cutpoint is 0.0, meaning that a justice with a policy ideal point of 0.0 would have a 50% chance of voting conservatively (for reference, Stewart has an average estimated ideal point of -0.03). This is the same cutpoint used in Figure 4. The two other simulated policy cut-points are -0.5 and 0.5. For each of these three cut-point values, we calculate the difference in the probability that a justice would vote conservatively if the legal concept in question implied a conservative or a liberal vote.

[Figure 5 about here]

The results for precedent are in the left most column of Figure 5. Chief Justice Warren Burger and Justices Lewis Powell and David Souter are portrayed as the most influenced by precedent. In contrast, the *stare decisis* parameters for Scalia and Thomas suggest that their interpretations of the Constitution are not significantly influenced by precedent. That Justice Scalia is unconstrained by *stare decisis* is not particularly surprising; as he himself has noted, "I do not myself believe in rigid adherence to *stare decisis* in constitutional cases" (Scalia 2003). Thomas, too, has frequently been portrayed as willing to ignore precedent when he believes the underlying case was improperly decided. For example, Goldstein (2007) concluded that Thomas

“believes that precedent *qua* precedent concerning constitutional law has no value at all; he does not give *stare decisis* any weight. Justice Thomas' view is, at bottom, a doctrine of *stare indecisis*.”^{xi}

The rankings on the deference to Congress variable are in the middle panel of Figure 5. Justices Burger, Powell, and Byron White rank highest, and Kennedy lowest. These results also accord well with judicial reputations. Kennedy frequently maintains that the role of judges is to promote broad values such as “liberty” and “human dignity.” Breyer’s relatively large weight on congressional deference is consistent with his concept of liberty, which looks to the Court to ensure that citizens can effectively govern themselves (Breyer 2005). It is also what one might expect given his background as a congressional staffer. Of the three justices (Scalia, Kennedy, and Thomas) who put no value on deference to Congress when a case raises questions about the constitutionality of a statute, only Kennedy appears to harbor anti-restraint sentiments: his estimated effect is negative and nearly statistically significant. A *New York Times* op-ed by Yale Constitutional law professor Paul Gerwitz and former Justice Stevens clerk Chad Golder (2005) provides additional validity for our measure. They characterized Breyer as the justice most likely to practice judicial restraint and to uphold the constitutionality of congressional acts, while portraying Thomas (followed by Kennedy and Scalia) as the least likely. Our findings are also compatible with Howard and Segal's (2004) finding that White and Powell are the two justices who most clearly showed a preference for deference when both liberals and conservatives sought to overturn a congressional act.

In the right most panel of Figure 5, we rank the justices with regard to the weight they place on free speech doctrine. Kennedy, Thomas, and Scalia, the three justices who placed the least weight on deference when reviewing acts of Congress, placed a great deal of weight on a strict

interpretation of the First Amendment in evaluating the constitutionality of restrictions on free speech. Scalia has been a vocal and articulate defender of the First Amendment (Abrams 1997). The justice who appears to place the greatest weight on the protection of speech guarantees is Stewart, who believed that “censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime” (Stewart 1966, 498). Meanwhile, Justices Brennan, Breyer, and Thurgood Marshall placed relatively little emphasis on this value. This does not mean that they were conservative on free speech issues; rather, they were not distinctively liberal on cases in which protection of speech implied a liberal vote. Likewise, the fact that they placed relatively little weight on a strict interpretation of the First Amendment suggests that in cases where support of the First Amendment produces a conservative outcome, Brennan, Breyer, and Marshall were unlikely to feel doctrinally constrained by arguments regarding the importance of the First Amendment. Thus, Brennan and Marshall refused to employ a strict scrutiny test and thus voted against the First Amendment in upholding the spending limits contained in the Federal Election Campaign Act of 1971, *Buckley v. Valeo*. Similarly, Breyer (2005, 40-41) believes that

...to limit the distinctions to the point at which First Amendment law embodies the slogan “speech is speech” cannot work...if strong First Amendment standards were to apply across the board, they would prevent a democratically elected government from creating necessary regulation.

Judicial Restraint and Partisanship

So far we have presented evidence on the extent to which the legal doctrines of restraint, *stare decisis* and a strict reading of the First Amendment influence the decisions of justices. There are, however, two possible non-legal explanations for our judicial restraint findings. One

possible explanation is that justices may defer to Congress because they fear upsetting Congress. This is the core of separation-of-powers models that suggest that justices defer to Congress when it is most likely to overrule the Court (Ferejohn and Shipan 1990; Bawn and Shipan 1997; Segal 1997; Harvey and Friedman 2006).

Our finding that some justices are more likely to defer to Congress than others also suggests another explanation for what we portrayed as a norm of restraint: some justices might practice deference due to a strategic calculation that Congress is more likely to produce policy outcomes consistent with their views than the Court is. Such a model suggests that liberal justices would be more likely to defer during periods when the Democrats control Congress and conservatives when Republicans control the institution. Consistent with this is Howard and Segal's (2004) finding that most justices embrace restraint when either liberals or conservatives request that a legislative act be declared unconstitutional.

To test these alternative explanations, we expand our main model in two ways. First, we control for general strategic effects. If the elected branches are all controlled by the Democrats, justices who are fearful of contradicting the preferences of those who control the government should be more likely to embrace liberal outcomes; if the Republicans control the government, we would expect the opposite. Therefore we include a unified government variable that denotes whether the House, Senate, and the White House are controlled by Republicans (+1) or Democrats (-1) or are split across the parties.

Second, we control for the possibility that justices are more inclined to defer to a Congress controlled by a particular party and that control of Congress matters only when the Court is reviewing the constitutionality of congressional acts. Therefore we also created a variable to denote whether the Republicans (+1) or the Democrats (-1) controlled both the House and

Senate. If control across the two chambers is split, the party control variable is set to zero. We then interacted this variable with the deference variable used in the main specification. This variable was a 1 if a case pertained to the constitutionality of an act of Congress and if deference to Congress implied a conservative vote, or a -1 if deference implied a liberal vote. Thus, for example, the interaction variable is -1 in the *Harris v. McRae* (1980) review of the constitutionality of the Hyde amendment's restriction on funding for abortions. If the estimated coefficient on this variable is positive, a justice is more deferential to Congress when the Republicans control Congress; if the estimated coefficient is negative, a justice is more deferential to Congress when the Democrats are in control. We do not estimate this parameter for Stewart or Breyer due to the very small number of observations for them in which there was unified control and deference to Congress was implicated.

[Table 2 about here]

The results are in Table 2 established, most importantly, that the inclusion of separation-of-powers related variables does not change our conclusions about the effect of law. First, the pattern of statistical significance for the precedent and speech variables is unchanged; in fact, the correlations between these π and σ parameter estimates and those in Table 1 are 0.997 and 0.995, respectively. For judicial restraint, the correlation is 0.91. Likewise, the Table 2 restraint coefficients for the individual justices are similar to the coefficients in Table 1.

Second, the effect of the unified government variable is positive and significant for 11 of 16 justices (all but Burger, Rehnquist, Scalia, Ginsburg, and Breyer). This pattern provides weak empirical support for the separation-of-powers model, but it does not change our conclusion that legal doctrine matters.

Third, the interaction variable is significant for only a small number of justices. The results imply that O'Connor and Blackmun were more deferential when reviewing the constitutionality of acts of Congress when Democrats control the House and Senate and that Powell was more likely to accept the constitutionality of an act of Congress when Republicans controlled the Capitol. Because all three of these justices were appointed by Republican presidents, that none of them are generally regarded as ideological extremists, and that only three justices had a deference to Congress parameter that is distinct when either Republicans or Democrats controlled the institution, we are reluctant to accept the claim that deference reflects a strategic calculation regarding how to best achieve one's policy objectives.

Conclusion

Few questions are more important to scholars of the Court than understanding the factors that shape justices' decisions. Unfortunately, those with opposing viewpoints have often talked past one another. Those in the "law" camp have frequently eschewed systematic quantitative tests while those in the "attitudes" camp "have limited sharply the promise and utility of their own work by not looking beyond their own discipline to the one place most apt: the law" (Friedman 2006, 262).

We have tried to build on the strengths of both positions. We provide a statistical analysis of Supreme Court behavior of a type that should be very familiar to those steeped in the attitudinal model. At the same time, we take seriously the theoretical and empirical implications of legally-motivated judicial behavior. We use models to show that legal factors can easily get hidden or, in statistical terms, be hard to identify. We then use the positions taken by members of Congress, presidents, and previous Supreme Court justices to separate policy and legal elements. In contrast to the pure forms of the attitudinal model, we find strong evidence that legal

principles are influential. This finding differs dramatically from the standard judges-as-policymakers view that is prominent among judicial process scholars.

We do not claim to have identified all the non-attitudinal forces that may shape justices' decisions. There are many aspects of the law, ranging from the doctrine of original intent to respecting the “plain meaning” of legislative statutes, which we have not examined. Our claim is that legal forces can matter significantly when justices write opinions and reach decisions, and we marshal specific evidence with regard to *stare decisis*, legislative deference and protection of speech to support this claim.

Our findings demonstrate that it is possible to identify and measure non-attitudinal behavior by the justices, leaving open the possibility that other non-policy factors may also shape their decisions. Indeed, our finding that different legal doctrines shape justices' behavior to different degrees leads us to expect that other legal doctrines may also affect their behavior. That same finding also helps to explain why it has been so hard to estimate a single impact of the law on justices' behavior. Some justices—even after controlling for their policy preferences—show little evidence of being influenced by, for example, *stare decisis*, but this does not preclude other justices from being so influenced. Variation across justices in the import of legal doctrines is perhaps the most striking finding in this study.

Nor should our results be construed to imply that policy preferences are unimportant. First, like all statistical studies before us, we find that policy preferences are clearly important. And given the coarseness of our legal measures, one could consider our findings of legal effects as a lower bound of their influence. Nonetheless, no realistic analysis of Supreme Court decision-making can dismiss the role of policy preferences. Second, policy preferences may operate at a meta-level whereby justices choose judicial values in a manner to advance broad policy goals.

We cannot rule out, for example, that justices use adherence to precedent as a tool to achieve certain long-term policy goals even as this tool forces them to sacrifice policy goals in some instances (Bueno de Mesquita and Stephenson 2002; Hansford and Spriggs 2006).

These possibilities should not obscure the central finding: the attitudinal model is too restrictive. Justices are not simply life-tenured policy maximizers. They operate in an environment in which the freedom to pursue their personal values leads many justices to follow legal values about the proper role of deference to elected officials and the proper treatment of precedents. Justices vary in the weights they place on the legal values measured here, and, presumably, in the weights they place on values we have not been able to measure. But the influence of legal forces is clear. There is a long-tradition among court-watchers of skepticism about a completely political view of the court. Our findings, we believe, should reinforce that skepticism and continue to push the conversation toward understanding how politics and the law interact on the United States Supreme Court.

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ⁱ This functional form is standard in spatial theory and provides a computationally convenient expression of utility.

ⁱⁱ This is a standard part of ideal point estimation and item response theory. The higher the discrimination parameter, the better the vote is at distinguishing between liberals and conservatives. See the online (www.authorsite.edu) appendix for details.

ⁱⁱⁱ We selected this period because of the availability of data used in the coding of precedent, as discussed below. We limit Supreme Court cases to those that involved criminal procedure, civil rights, First Amendment, due process, and privacy. These cases were isolated by using Spaeth's broad issue categories (2006). In particular, the Spaeth *value* variable had to be less than 6. This limitation identifies cases that includes high-profile social issues such as abortion rights, the death penalty, and affirmative action and leads us to focus on the most salient areas of the Supreme Court agenda. We limit congressional and presidential roll-calls to those centering around similar issues. The House and Senate roll-call votes we employ are from Poole and Rosenthal's Voteview website (2007). More details are available in the online appendix.

^{iv} Stevens went on to explain, "The majority came to a different conclusion, however, and...we must accept it" (2005, 14).

^v For 1984-1995, the coding of petitioner and respondent briefs is from Segal and Howard (2001). For the 1978-1983 and 1995-2003 period, we coded the petitioner and respondent briefs. Justices positions on precedent are primarily the from the *alter_du* variable in Benesh and Spaeth (2003). For the few years not included in Benesh and Spaeth (2003), we relied upon both Spaeth's (2006) *alt_prec* variable and our own reading of the opinions. A more detailed description of this process is contained in the online appendix.

^{vi} The coding of this variable has a built-in bias *against* finding an effect for precedent. All cases in which precedent was actually overturned were coded as having implicated precedent and had a majority voting against precedent. However, cases in which precedent did in fact influence justices but no one made an explicit argument for overturning precedent were not coded as having implicated precedent. It is easy to imagine the parties to a case would not advocate overturning a precedent if they did not believe they had a good chance of actually overturning precedent; one could also imagine that justices would be somewhat thrifty in their advocacy of overturning precedent given the social norms on the court valuing precedent. For these reasons, one could interpret these results as a lower bound on the true effect of precedent.

^{vii} We relied upon Spaeth's (2006) *authdec* variable. We also read each case identified in this manner to ensure that they involved the constitutionality of a law enacted by Congress and the President.

^{viii} In the Bayesian context, being significantly greater than 0 at the 5% level means that the δ , π and σ parameters in at least 95 percent of the posterior samples were above 0.

^{ix} We average policy preferences over the time period for ease of exposition. Of course, we could calculate similar plots for the policy preferences of a justice for any given term. Likewise, we could calculate a similar set of plots for different cut-points.

^x This is necessary because of the non-linear aspects of the model. For example, on a vote with cutpoint at -0.5, it is not possible for conservative deference to vastly increase the probability that a conservative justice will vote in a conservative direction; such a justice already has a high probability of voting conservatively, even without deference implying a conservative vote.

^{xi} As a robustness check we ran three additional models with different approaches to coding precedent. In two of these we narrowed the coding rules by dropping the inter-temporal justice

observations and by relying exclusively on the party briefs to identify precedent. In one of these, we expanded the set of cases implicating precedent by relaxing the requirement that the votes divided the justices into pro and anti-precedent camps. The results are quite similar. The correlation with the π parameters reported in Table 1 is 0.91 and 0.93 for the narrowed coding and 0.97 for the broader coding. There are only two individual parameters that change statistical significance. In one case, the π parameter for Justice Stewart becomes significant (thereby increasing the number of justices who appear to respond to precedent); in another case, the π parameter for Justice Brennan becomes insignificant. Imprecise estimates for these two is not a surprise given that both of these justices only served for part of the period in our data set and have relatively few observations. Further details on these additional specifications are available in the online appendix.

Figure 1

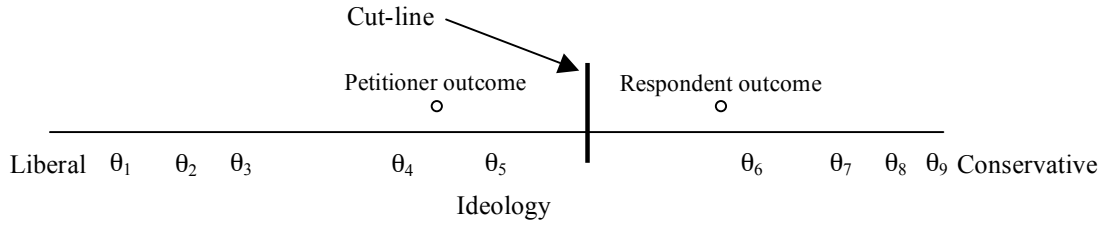


Figure 2

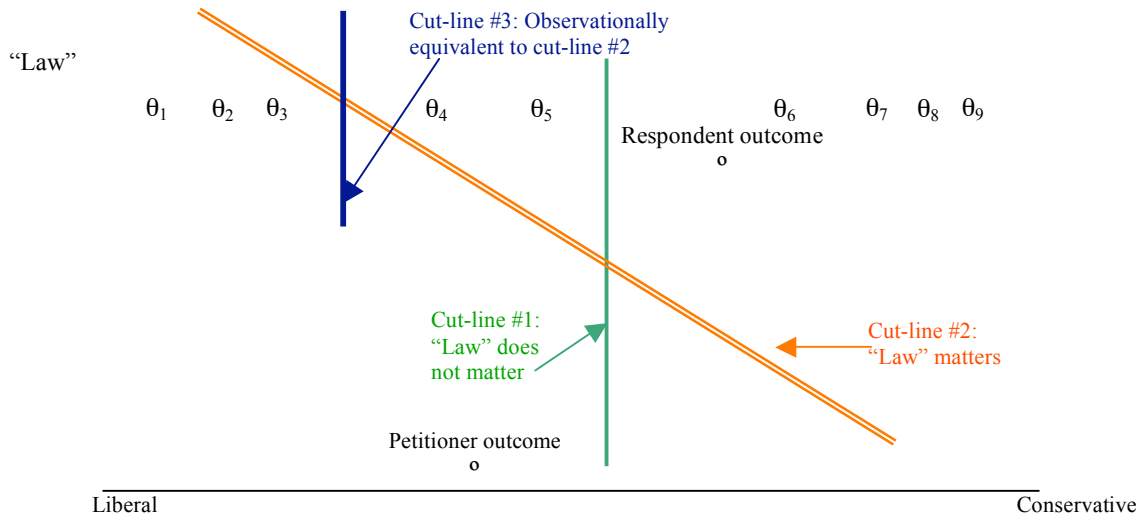


Figure 3
Hypothetical positions on a Supreme Court case

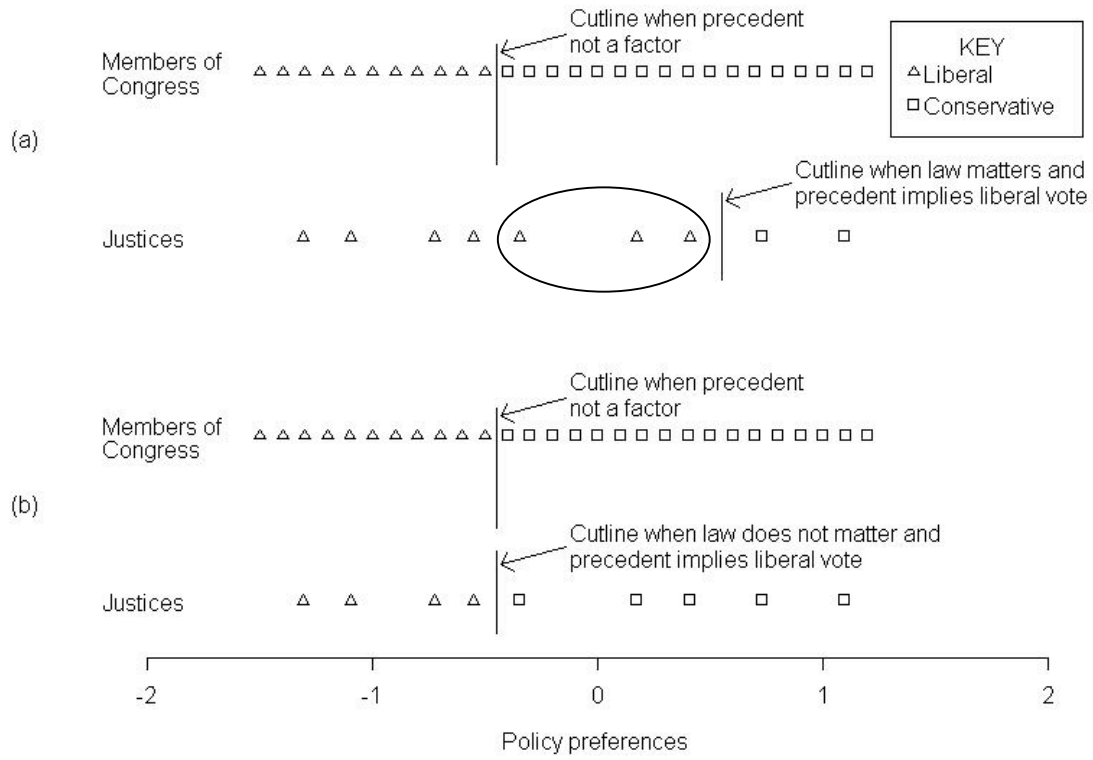


Figure 4
Simulated Effect of Precedent

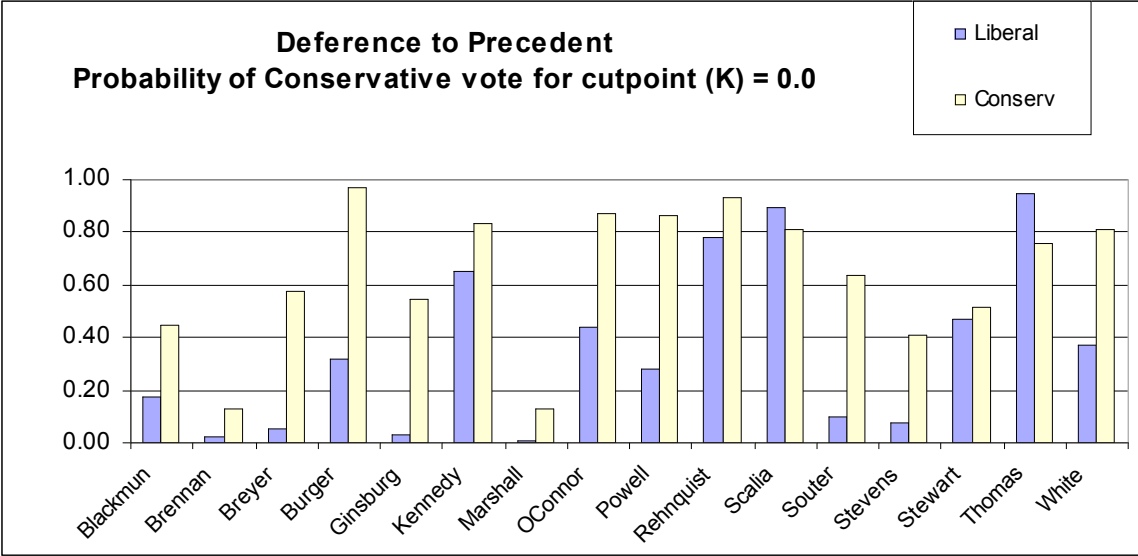


Figure 5
Effect of Legal Variables on Individual Justices

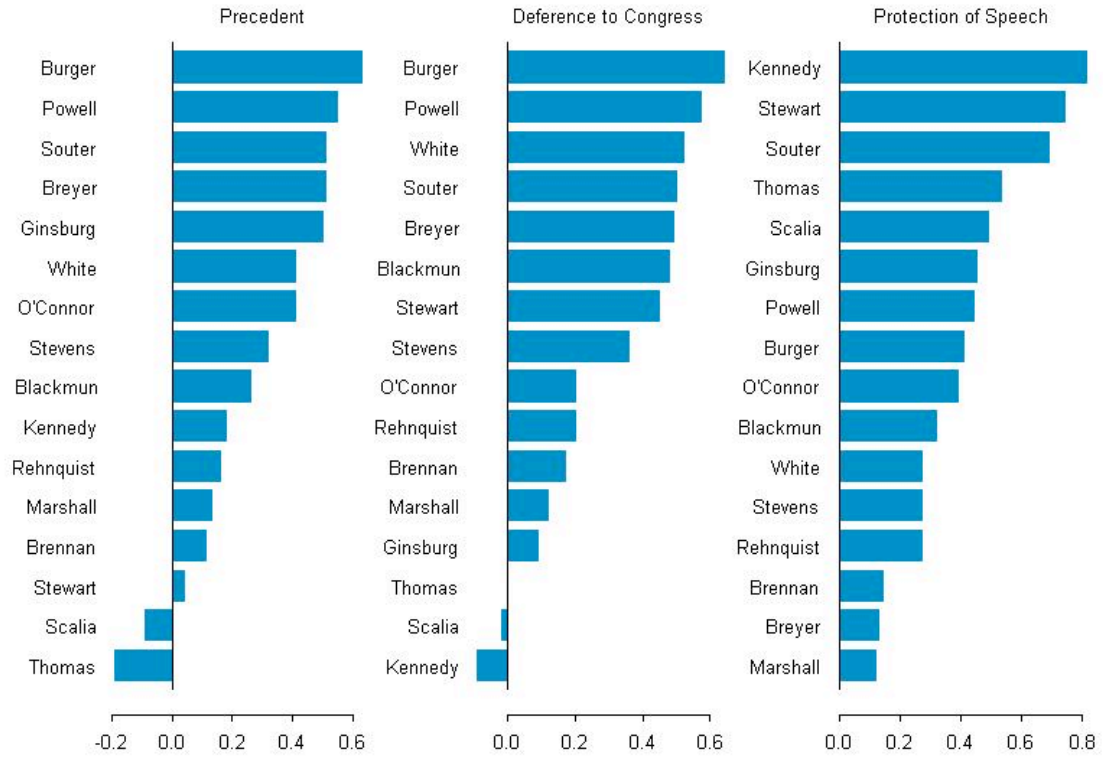


Table 1**Raw Estimates of Effect of Legal Variables**

Justice	Legal measure		
	Precedent (π)	Congress (δ)	Speech (σ)
Blackmun	0.40 [0.14, 0.67]	0.79 [0.58, 1.01]	0.51 [0.31, 0.70]
Brennan	0.42 [0.03, 0.81]	0.61 [0.34, 0.87]	0.53 [0.28, 0.76]
Breyer	0.92 [0.60, 1.23]	0.88 [0.54, 1.22]	0.23 [-0.11, 0.561]
Burger	1.15 [0.73, 1.57]	1.18 [0.82, 1.55]	0.67 [0.38, 0.93]
Ginsburg	1.00 [0.68, 1.31]	0.17 [-0.13, 0.50]	0.89 [0.60, 1.18]
Kennedy	0.29 [0.08, 0.48]	-0.14 [-0.38, 0.09]	1.67 [1.45, 1.89]
Marshall	0.62 [0.23, 0.98]	0.59 [0.29, 0.87]	0.57 [0.31, 0.81]
O'Connor	0.64 [0.45, 0.82]	0.31 [0.09, 0.53]	0.65 [0.47, 0.83]
Powell	0.84 [0.44, 1.21]	0.87 [0.57, 1.18]	0.65 [0.40, 0.89]
Rehnquist	0.37 [0.15, 0.57]	0.48 [0.25, 0.72]	0.63 [0.44, 0.82]
Scalia	-0.19 [-0.40, 0.02]	-0.05 [-0.30, 0.19]	1.09 [0.88, 1.28]
Souter	0.82 [0.59, 1.04]	0.80 [0.50, 1.09]	1.22 [0.94, 1.47]
Stevens	0.60 [0.36, 0.82]	0.68 [0.50, 0.86]	0.49 [0.31, 0.66]
Stewart	0.06 [-0.73, 0.74]	0.66 [0.26, 1.04]	1.23 [0.89, 1.55]
Thomas	-0.44 [-0.66, -0.22]	0.004 [-0.29, 0.30]	1.27 [1.00, 1.52]
White	0.60 [0.34, 0.87]	0.80 [0.54, 1.03]	0.39 [0.19, 0.58]

95 percent Bayesian confidence intervals are in brackets

Table 2

Raw Estimates of Effect of Legal Variables When Controlling for Party Control

Justice	Legal measure			Separation of powers	
	Precedent (π)	Congress (δ)	Speech (σ)	Deference interaction	Unified government
Blackmun	0.43 [0.17, 0.67]	1.59 [1.14, 1.99]	0.52 [0.34, 0.71]	0.57 [0.16, 1.01]	0.79 [0.48, 1.09]
Brennan	0.44 [0.06, 0.81]	1.13 [0.77, 1.46]	0.59 [0.32, 0.82]	0.33 [-0.13, 0.80]	1.23 [0.86, 1.57]
Breyer	0.98 [0.67, 1.29]	0.96 [0.62, 1.27]	0.20 [-0.12, 0.522]	- -	-0.05 [-0.43, 0.36]
Burger	1.19 [0.77, 1.63]	1.41 [1.03, 1.83]	0.71 [0.47, 0.94]	-0.20 [-0.81, 0.38]	0.25 [-0.10, 0.61]
Ginsburg	1.09 [0.74, 1.4]	0.18 [-0.23, 0.58]	0.91 [0.61, 1.19]	0.05 [-0.32, 0.46]	0.13 [-0.19, 0.42]
Kennedy	0.34 [0.12, 0.54]	-0.06 [-0.32, 0.20]	1.71 [1.48, 1.92]	0.04 [-0.22, 0.28]	0.46 [0.27, 0.65]
Marshall	0.62 [0.29, 0.91]	1.04 [0.67, 1.42]	0.60 [0.34, 0.82]	0.39 [-0.07, 0.85]	1.06 [0.68, 1.37]
O'Connor	0.67 [0.47, 0.86]	0.39 [0.18, 0.61]	0.68 [0.48, 0.88]	0.25 [0.007, 0.49]	0.23 [0.02, 0.44]
Powell	0.91 [0.51, 1.26]	0.90 [0.53, 1.28]	0.71 [0.48, 0.93]	-1.06 [-1.60, -0.48]	0.54 [0.19, 0.88]
Rehnquist	0.35 [0.13, 0.57]	0.53 [0.31, 0.75]	0.63 [0.42, 0.83]	0.21 [-0.04, 0.46]	-0.36 [-0.62, -0.10]
Scalia	-0.24 [-0.44, -0.00]	-0.04 [-0.29, 0.21]	1.13 [0.91, 1.34]	0.23 [-0.05, 0.50]	0.21 [-0.03, 0.46]
Souter	0.93 [0.68, 1.17]	0.95 [0.62, 1.28]	1.23 [0.96, 1.52]	-0.10 [-0.45, 0.23]	0.61 [0.36, 0.85]
Stevens	0.70 [0.47, 0.91]	0.79 [0.62, 0.97]	0.49 [0.33, 0.64]	-0.08 [-0.30, 0.12]	0.42 [0.18, 0.63]
Stewart	0.07 [-0.80, 0.87]	0.93 [0.52, 1.34]	1.40 [1.03, 1.78]	- -	0.60 [0.22, 0.98]
Thomas	-0.44 [-0.64, -0.21]	0.095 [-0.26, 0.48]	1.28 [0.98, 1.58]	-0.10 [-0.43, 0.25]	0.36 [0.09, 0.61]
White	0.65 [0.39, 0.94]	1.26 [0.89, 1.69]	0.41 [0.20, 0.60]	0.06 [-0.41, 0.51]	0.60 [0.40, 0.79]

95 percent Bayesian confidence intervals are in brackets

Appendix I

Valence model derivation

$$U_{iv}^C = -(\theta_{iv} - \gamma_v^C)^2 + \delta_i Law_v^C + \varepsilon_{iv}$$
$$U_{iv}^L = -(\theta_{iv} - \gamma_v^L)^2 + \delta_i Law_v^L + \varepsilon_{iv}$$

where γ_v^C is the location of conservative outcome and Law_v^C is the position of conservative outcome on the valence dimension. Then,

$$\begin{aligned} \Pr(\text{vote conservative}) &= \Phi\left[2(\gamma_v^C - \gamma_v^L)(\theta_{iv} - \frac{\gamma_v^C + \gamma_v^L}{2}) + \delta_i (Law_v^C - Law_v^L)\right] \\ &= \Phi[\alpha_v (\theta_{iv} - \kappa_v) + \delta_i Law_v] \end{aligned}$$

We can derive the same model with following different assumptions as well:

- allowing utility to be quadratic in distance on valence dimension as long as Law is a dichotomous variable.
- assuming ideal point for justice i is greater than or equal to value of Law variable for all alternatives and that utility is linear in distance between law ideal of justice and law location.

Identification of model

First, we show that the weight on law is not identified even with discrimination parameters and heterogeneous weights on law by justices.

$$\begin{aligned} \Pr(\text{vote conservative}) &= \Phi[\alpha_v (\theta_i - \kappa_v) + \delta_i Law_v] \\ &= \Phi[\alpha_v \theta_i - \alpha_v \kappa_v + \delta_i Law_v] \end{aligned}$$

Add and subtract $\bar{\delta} Law_v$ and re-group:

$$\begin{aligned}\Pr(\text{vote conservative}) &= \Phi[\alpha_v \theta_i - \alpha_v \kappa_v + \delta_i \text{Law}_v + \bar{\delta} \text{Law}_v - \bar{\delta} \text{Law}_v] \\ &= \Phi[\alpha_v \theta_i - \alpha_v \kappa_v + (\delta_i - \bar{\delta}) \text{Law}_v + \bar{\delta} \text{Law}_v]\end{aligned}$$

Let $\tilde{\kappa}_v = \kappa_v + \frac{\bar{\delta} \text{Law}_v}{\alpha_v}$ and $\tilde{\delta}_i = (\delta_i - \bar{\delta})$, then

$$\Pr(\text{vote conservative}) = \Phi[\alpha_v (\theta_{iv} - \tilde{\kappa}_v) + \tilde{\delta}_i \text{Law}_v]$$

Because we can get the same likelihood with these two different formulations, the model is unidentified. In the first, the cut-point is contains no legal elements and the estimated δ is the weight on the law variable; in the second formulation, the cut-point contains the average weight on the law and the estimated δ is deviated from the mean weight on law.

Second, the weight on law is identified by setting $\delta = 0$ for some observations within the sample (in our case, the members of Congress and Presidents). To see this, note that the only way in to recover the same contribution to the likelihood for all observations with the reparameterized coefficients is for the coefficient on Law_v to be the true coefficient minus $\bar{\delta}$. However, if we impose $\delta_i=0$ on the estimation, then this reparameterization is not available and only the first works, which is the parameterization consistent with our model.