

# Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior

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*This paper examines the struggle between the legislative and judicial branches by focusing specifically on congressional influences on the behavior of federal judges. We argue that Congress may constrain individual judicial behavior by passing statutes containing detailed language. To test this thesis we borrow from the bureaucratic politics literature to introduce and test a new measure of statutory constraint. Using data from the U.S. Courts of Appeals we find that appellate court behavior is constrained significantly by statutory language, although this constraint is asymmetric across ideology. We discover substantial differences between Democratic and Republican appointees both in terms of statutory constraint and ideological voting. The data indicate judges appointed by Democratic presidents are constrained by statutory language in criminal cases. Similarly, Republican appointees are constrained by statutes in civil rights cases. Yet, neither Democrats nor Republicans are constrained in economic cases.*

In the American separation-of-powers system, the courts rely on the power of judicial review to provide a check on Congress. Recently, this has caused significant tension between the judicial and legislative branches, prompting some members of Congress to voice their frustration over what they perceive as an unaccountable federal judiciary.<sup>1</sup> Yet, these statements beg the question can lawmakers make the courts more accountable? Stated another way, can Congress influence the courts' behavior and if so, what mechanisms does it use to ensure that judicial decisions are consistent with congressional preferences? To date, the empirical literature has focused primarily on the nomination process (Allison 1996; Barrow, Zuk, and Gryski 1996; Goldman 1997; Moraski and Shipan 1999; Segal, Cameron, and Cover 1992) or congressional overrides of judicial decisions (Eskridge 1991a, 1991b; Henschen 1983; Hettinger and Zorn 1999; Segal 1997, 1998; Stumpf 1965). Yet, these two aspects involve only a fraction of the interactions between the two branches. Most exchanges between Congress and the judiciary occur after confirmation of judges and

before attempts at overrides; namely, over the interpretation of statutes by courts.

Yet, statutes have received relatively little attention in the empirical judicial literature, mostly because only rough measures (such as dummy variables) have been available to test their impact. This is unfortunate since theoretically statutes are extremely important because *they represent the primary opportunity Congress has to ensure that those individuals who interpret or implement the law (e.g., judges and bureaucrats) will follow congressional preferences*. Hence, in those cases where Congress has clear policy preferences it can write legislation that encourages judges to strictly interpret the plain meaning of the law, a goal consistent with the legal model of judicial decision making. If Congress does not write clear legislation, then it leaves open the possibility that judges will make decisions based on their own policy preferences in accord with the tenets of the attitudinal model.

While the potential impact of statutes is important, past research primarily concentrated on whether Congress relies on legislation to constrain

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<sup>1</sup>See official comments by Representative Joe Pitts (R-PA) April 5, 2005, 151 Congressional Record, House 1738; and comments by Representative Tom DeLay (R-TX) quoted in "Republican Lawmakers Fire Back at Judiciary" by Sheryl Gay Stolberg, *The New York Times*, July 1, 2005.

bureaucratic behavior (see Huber and Shipan 2002). We do not know, however, if statutory constraint has any impact on judges. Clearly, judges work in a much different institutional environment than bureaucrats. Thus, statutory constraint may have a lesser, or even no, effect on them. Still, given the theoretical importance of statutory constraint, we believe that the potential impact on courts presents an interesting empirical question. We therefore inquire whether judges are constrained by legislation similar to bureaucrats and, if so, how this constraint affects judicial decision making?

Our research addresses these questions by examining the language of legislation as a congressional influence on judicial behavior. We posit that Congress may constrain the courts by passing statutes containing detailed language, which limits judicial discretion. Using data from the U.S. Courts of Appeals, we employ a new continuous measure to examine the relationship between statutory constraint and judicial preferences. Our findings indicate that Congress successfully constrains appellate court behavior through statutory language, although the constraint is asymmetric across individual ideology and issue area. These results demonstrate the necessity of including statutory influences in models of judicial behavior. By including an appropriate measure of statutory constraint, our results illustrate an important theoretical dynamic between the ideological preferences of judges and their ability to enact these preferences into law.

### **Previous Research on Legislative-Judicial Interactions**

Congress possesses relatively few tools to control the behavior of Article III judges. For example, Congress cannot revoke the lifetime tenure of judges, nor reduce their salaries, and after confirmation by the Senate, judges can be removed from office only through impeachment. Though Congress can create new layers of courts and eliminate lower courts or change their size and composition, it rarely does so.<sup>2</sup> Thus, it is easy to caricature members of Congress as having no more than the rhetorical ability to rail against judges they consider too liberal or conservative. In so doing, however, we ignore another possibility: that Congress can influence the courts through the laws it passes. A

<sup>2</sup>Congress can also restrict or remove the jurisdiction of federal courts to review statutes (e.g., the Defense of Marriage Act). While we acknowledge this ability, examining the specific impact of this endeavor is beyond the scope of this analysis.

focus on nominations, impeachments, or oversight hearings suggests that Congress only possesses the potential for short-term influence over the courts. Yet, by enacting policy preferences into law, Congress has a palpable tool of political influence, one that can exhibit a continuing impact over a period of many decades. This is particularly important for legislators who wish to leave a legacy or perpetuate their policy preferences over the long term.

Previous research has not ignored the influence of legislative-judicial interactions. Rather, this research has been conducted in two separate and almost distinct literatures. Some scholars have approached their research more from the legislative side, often relying on separation-of-powers (SOP) models to test various hypotheses (Eskridge 1991a, 1991b; Ferejohn and Weingast 1992; McNollgast 1995; Shepsle 1992). These models begin with the assumption that both institutions possess policy preferences and seek to enact outcomes as close to those preferences as possible.<sup>3</sup> The powerful insights generated by SOP models allow researchers to determine the extent to which policy outcomes reflect the competing preferences of various institutions.

Yet, there remains one area that SOP models neglect, and that is the specificity with which legislative policy outcomes are dictated. Though “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). By initially modeling legislative policy outcomes as status quo points—and examining the proximity of these points to the ideal points of the courts and subsequent congresses—SOP models overlook the fact that policy outcomes are arrived at through a myriad of statutory details. These details may describe policy outcomes in vague terms, leaving the 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. Consequently, the status quo for SOP models may be conceptualized better as a distribution (rather than a single point), representing congressional intent to

<sup>3</sup>From here the models diverge along many aspects: whether to model the legislature as a single chamber or bicamerally; whether to include gatekeeping committee preferences or multiple veto points (such as the President); whether to model policy preferences unidimensionally or multidimensionally; whether to include uncertainty or model the game with perfect information; and, whether to include transaction costs for the various actors (see Segal 1997, 1998).

confine or relax statutory controls on judicial decision making. It is therefore necessary to consider Congress's ability to limit judicial discretion (whether done intentionally or not) or provide courts with a broad pallet upon which to render decisions.

This is a particularly important point because judicial scholars often examine legislative-judicial interactions as a dynamic conflict between the legal model and the attitudinal model (Segal 1997, 1998; Segal and Spaeth 2002; Spaeth and Segal 1999). For example, Rowland and Carp (1980) hypothesize a tradeoff between judicial attitudes and legal constraints. They find that when Supreme Court rulings contained high levels of ambiguity (i.e., low constraint), lower court judges encountered more discretion in which to rule ideologically. However, when the Supreme Court issued decisions with little ambiguity (i.e., more constraint), the lower courts were less able to render decisions according to their ideological preferences. Their model therefore suggests that the level of individual discretion is an important factor. Yet, many scholars who attempt to employ concepts such as plain meaning, legislative intent, and precedent encounter difficulty in providing empirical evidence to demonstrate these influences on judicial behavior.<sup>4</sup> While these analyses offer important insights to our understanding of the judiciary, one common limitation is the operationalization of the legal model. As Songer and Haire acknowledge, "few studies have been undertaken by empirically oriented scholars to examine the effects of traditional legal concepts on case outcomes or judicial votes" (1992, 979).

Admittedly, empirically operationalizing the legal model is extremely difficult (Brisbin 1996). Scholars often employ strategies that examine progeny cases from landmark decisions (Knight and Epstein 1996; Segal and Spaeth 1996; Songer and Lindquist 1996; Songer and Sheehan 1990) or rely on a series of dummy variables to capture specific case facts or aspects of legal doctrine (George and Epstein 1992; Segal 1984; 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 constraints judges encounter when adjudicating disputes. Finding an appropriate measure is difficult, however. Currently, the judicial literature relies on rough proxy measures, though recent research in the

bureaucracy literature raises interesting possibilities. Our analysis attempts to fill this gap by adapting, from the bureaucratic politics literature, an easily constructed measure of constraint that is based on details included within congressional statutes.

## Statutory Constraint

We argue that Congress potentially has the ability to affect judicial behavior through the legislation it passes. In a recent study of the bureaucracy, Huber and Shipan argue that ". . . 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" (2002, 31).<sup>5</sup> 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. They posit that legislators will try to limit discretion in areas where they want the law implemented according to their own policy preferences and provide broader discretion to bureaucrats in other areas. We argue that levels of discretion within statutes can exert a similar influence on judges. If, as the legal model articulates, judges are constrained by the plain meaning of the statute, then laws with more specific language will provide less discretion, thereby constraining judges from employing their ideological attitudes when making decisions. In contrast, broadly written statutes or those containing vague language provide judges with greater latitude to rule attitudinally. Thus, while we do not argue that bureaucrats and judges are alike, we do argue that the level of discretion found within congressional statutes may exert similar influences across both sets of actors.

<sup>4</sup>From here scholars diverge along several aspects such as the extent to which judges act strategically; whether the structure of the judicial hierarchy influences decision making; and the impact of past case law to the decision calculus (see Baum 1997).

<sup>5</sup>For an examination of the determinants of legislative delegation also see Bawn (1995) and Epstein and O'Halloran (1996, 1999).

Therefore, since Congress cannot develop perfect enforcement mechanisms over judges (i.e., limited threat of impeachment cannot revoke life tenure or reduce salary of judges), “the incentives to design control mechanisms *ex ante* are heightened” (Shipan 1997, 9). We recognize that while legislative activity, in general, is not driven by precise calculations over manipulating lower courts, “some legislation and legislative history is created with an eye toward judicial consumption” (Katzmann 1992, 668). Thus, whether Congress deliberately seeks to constrain judicial behavior in some instances or simply wishes to preserve its policy preferences from additional manipulation by subsequent implementers or interpreters, the end result is that legislators have the ability to dictate the level of discretion provided to those who implement and interpret the statutes. Statutes containing detailed language which may be aimed initially at bureaucrats can also limit judicial discretion. Once passed, they can potentially influence future judges, as well as ones currently on the bench, and set the nation’s policy for an extended period of time. With this promise of a possible enduring impact, drafting legislation potentially becomes a palpable tool of Congressional influence.

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

In a similar vein, we conducted a series of validity tests to determine whether longer statutes contained more detailed language that might limit the discretion of judges.<sup>6</sup> For each issue area we content analyzed a

sample of statutes: some with shorter word lengths, some with lengths near the overall mean for that issue, and some with longer word lengths. We discovered that statutes with higher word counts contained more references to previous legislation or court decisions, along with more detailed descriptions of how these statutes and decisions relate to particular intended outcomes or interpretations.<sup>7</sup>

For example, the statutes 21 USC 846 and 18 USC 2510 describe particular criminal activities, but do so with different degrees of specificity. The former contains 246 sections and over 300,000 words, while the latter contains 26 sections with approximately 26,000 words. This variation in overall length and number of sections directly affects the degree of detail included in the statute. Each contains references to other statutes and previous court cases (to help provide contextual information to the interpreter), though the number of references is vastly different between the two statutes. While 18 USC 2510 includes 346 references to court cases, 21 USC 846 contains approximately 2,500 references to court cases. Additionally, both statutes provide descriptions of the various activities deemed criminal by Congress and definitions of various technical terms; yet, the descriptions and definitions included in 21 USC 846 are substantially more complete and thorough than those in 18 USC 2510. Consequently, the reader has a better understanding of the intent of Congress (including the desired outcomes of the legislators) in the former statute than the latter.<sup>8</sup>

As noted earlier, if judges are affected by statutes, we would expect more ambiguous statutory language to provide more discretion to alter policy according to their ideological preferences. Such a statement is not new to scholars of the judiciary, who have consistently agreed that in times of high ambiguity, judges will be freer to make decisions based on their own preferences

natural logs (for reasons explained below) indicates the following: Criminal Statutes (mean = 10.64; s.d. = 1.47; min = 5.96; max = 12.64), Civil Liberties Statutes (mean = 11.21; s.d. = 1.98; min = 6.52; max = 14.07), and Economic Statutes (mean = 10.31; s.d. = 1.71; min = 4.34; max = 14.07).

<sup>7</sup>We also recognize that judges may be called upon to examine only a specific section of a statute, rather than the entire law. However, in these situations we contend that judges will also reference the remaining portions of the bill in order to obtain contextual information on the intended effect or purpose of the legislation passed by Congress. Therefore, relying on the overall word count of the statute as a measure of constraint does not systematically bias our analysis of judicial behavior.

<sup>8</sup>For additional information on the validity checks, please see Appendix A available online at <http://www.journalofpolitics.org>.

<sup>6</sup>We inspected the descriptive statistics for statute length and discovered no systematic variation across issue areas. Examining the

(Rowland and Carp 1980).<sup>9</sup> We therefore hypothesize that higher degrees of statutory constraint will lead to lower levels of judicial discretion. Consequently, this means that increased statutory constraint limits judges' abilities to employ their ideological preferences when adjudicating disputes.

Yet, it would be too simplistic to claim that statutory constraint should affect all judges in a similar fashion across all issue areas. Such a statement implicitly assumes that members of Congress seek to limit the discretion of all judges, regardless of ideological preferences, consequently ignoring potential motivations of the legislature over policy outcomes. Stated another way, we should not expect a conservative congress to pass conservative legislation aimed at constraining conservative judges. Rather, if an effect exists, we should observe the conservative legislation constraining liberal judges (and vice versa for liberal legislation to constrain conservative judges).

While precisely measuring the policy motivations of Congress is beyond the scope of this particular paper, we can deduce general hypotheses about statutory constraint 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 state over individuals and outlining the various options of punishment for individual transgressions. Consequently, if federal 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 state authority, and also impose more lenient punishments) would be most constrained. This is particularly evident in the debate over the federal sentencing guidelines, which explicitly limit judicial discretion by prescribing mandatory minimum sentences for convicted felons. Therefore, our first hypothesis states:

*H1: In the area of criminal law, if federal statutes affect levels of judicial discretion, as statutory constraint increases we expect liberal judges to have less discretion to vote ideologically.*

Second, civil liberties law operates in a different manner than criminal law. In this area, congressional statutes tend to prescribe more liberal outcomes by specifying the rights of individuals that cannot be usurped by state 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.

<sup>9</sup>Similar effects are demonstrated by Songer, Segal, and Cameron (1994) in their examination of appellate judges and the ability of these judges to "shirk" in relation to the Supreme Court.

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). Therefore, our second hypothesis states:

*H2: In the area of civil liberties, if federal statutes affect levels of judicial discretion, as statutory constraint increases we expect conservative judges to have less discretion to vote ideologically.*

Finally, with regard to economic legislation we argue that statutory constraint over federal judges will be minimal, and possibly nonexistent; primarily because of the influence exerted by the bureaucracy on areas of economic policy. When judges review economic disputes, not only must they consider the policy prescriptions implied by the federal statutes, but they must 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 constraint. 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 constraint on judicial discretion to be less evident. Thus, our third hypothesis states:

*H3: In economic cases we do not expect a relationship to exist between statutory constraint and judicial discretion.*

## Research Design and Methodology

To examine the impact of statutory constraint on judicial behavior we rely on data from the U.S. Courts of Appeals Database, compiled by Donald R. Songer.<sup>10</sup> Though the original data contain a random sample<sup>11</sup> of cases from 1925 to 1996, we limit our analysis to those cases that include the interpretation of a

<sup>10</sup>The Songer database is archived at the S. Sidney Ulmer Project for Research in Law and Judicial Politics at the University of Kentucky (<http://www.as.uky.edu/polisci/ulmerproject>). We believe the appellate courts provide a better test of constraint than the Supreme Court because they do not possess discretionary control over their dockets and therefore cannot avoid cases where substantial constraint may exist.

<sup>11</sup>Technically, the Songer database is a stratified random sample, stratified across circuits by year, and random within each circuit year.

congressional statute.<sup>12</sup> Consequently, we analyze 2,908 cases from 1961 to 1996. Since we are interested in the behavior of individual judges, we transpose the data to make our unit of analysis focus on individual judges which subsequently changes the number of observations to 8,298 judge votes.

The dependent variable for the analysis is whether the judge voted in an unconstrained or sincere manner.<sup>13</sup> We code the variable “1” if a judge appointed by a Democratic president casts a liberal vote and “0” if that judge votes conservatively. Similarly, the variable is coded “1” if a judge appointed by a Republican president votes conservatively and “0” if that judge casts a liberal vote.<sup>14</sup> 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 8,298 judge vote observations all include an identifiable ideological directionality.

Theoretically, our independent variable of primary interest is *Statutory Constraint*. Following the Huber and Shipan methodology, we examine the length of congressional statutes. To measure the length we relied on information in the Songer database to identify the statute in question<sup>15</sup> and subsequently employed *Lexis-Nexis*<sup>TM</sup> and the “word count” feature in Microsoft Word. 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.<sup>16</sup> Consequently, since 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 Constraint*. 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.

One caveat is worth mentioning here. Initially, it is not clear whether the Huber and Shipan measure is applicable to judicial voting for several reasons. First, they analyzed Medicaid statutes and the measure may not be suitable for other legislation. Second, Huber and Shipan use the measure as their dependent variable, whereas we employ the measure as an independent variable. Finally, the number of words in legislation may be more applicable to bureaucratic constraint than judicial constraint because judges often examine only specific portions of laws. Hence, while the measure offers intriguing possibilities for moving beyond dummy variables to more continuous measures of the legal model, it is indeed an empirical question whether it is appropriate in the judicial setting. We therefore provide a first test of that empirical question in this analysis.

While the concept of statutory constraint 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). Since this theory was initially developed for the U.S. Supreme Court, and because of its unique institutional characteristics, several refined measures of ideology exist (Martin and Quinn 2002; Segal and Cover 1989). Unfortunately, comparable measures of ideology for appellate judges are not as refined. Yet, several scholars demonstrate the validity of the ideological preferences of an appellate judge’s appointing president as a reliable surrogate for judicial ideology.<sup>17</sup> However, Giles, Hettinger, and Peppers (2001) discover that the presence of senatorial courtesy can also affect the ideological tendencies of appellate judges. Thus, we rely on their empirical measure of ideological preferences in our variable *Individual Ideology*. These scores represent a continuous measure of ideology and, as the authors demonstrate in their article, substituting the appropriate score—based on a judge’s

<sup>12</sup>We also exclude cases before 1961 because the Songer database reduces the random sample to 15 cases per circuit per year from 1925 to 1960, and we wish to keep the sample size consistent throughout our analysis.

<sup>13</sup>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.

<sup>14</sup>The directionality of each judge vote is recorded in the Appeals Court Database and follows a specific coding scheme determined by Songer and stated explicitly in the documentation.

<sup>15</sup>To identify the relevant statute, we relied on the USC1 variable in the Songer database, which records the section of the U.S. Code most frequently cited in a case’s head notes. Relying on this variable ensures we capture those cases where the appellate courts interpret a federal statute (where the FEDLAW variable is recorded) as well as those cases where the courts examine the constitutionality of a statute (where the CONST variable is recorded). We acknowledge that our procedure may include references to statutes that are not necessarily interpreted by the courts. However, inclusion of these potentially irrelevant statutes should hinder our ability to discover significant levels of constraint, thus providing a more conservative test. This potential outcome is preferable to searching only on the FEDLAW variable, which risks excluding relevant statutes and consequently introduces substantial bias into the analysis.

<sup>16</sup>Examination of the descriptive statistics associated with the word count reveals that the mean number of words per statute equals 94,122 with a standard deviation of 107,238.

<sup>17</sup>See Pinello (1999) for a survey of research relying on this surrogate.

appointing president and confirming senator—offers a suitable surrogate for judicial ideology. Thus, judges appointed by more liberal presidents, from states with more liberal senators, will possess more liberal ideology scores and vice versa. Since our theory argues that statutory constraint will limit ideological influences over judicial behavior, we “fold” the Giles, Hettinger and Peppers measure into a continuum from the most moderate judges to the most extreme ideologues.<sup>18</sup> Consequently, we hypothesize that judges with strong ideological preferences will be more likely to render unconstrained or sincere decisions. A positive relationship should therefore exist between our variable *Individual Ideology* and the dependent variable.

In addition to the two primary independent variables, our model includes three other variables to control for various relevant factors. The first measures whether the appellate panel rendered a *Unanimous Decision*. Previous research on the Courts of Appeals reveals that several decisions from the appellate panels are unanimous (see Songer, Sheehan, and Haire 2000), as a result of various constraints placed upon the judges that limit their ability to vote ideologically. Therefore, if such additional constraints exist beyond those imposed by congressional statutes we would expect to see a negative relationship between this variable and the probability of casting a sincere vote. The second control variable, *Lower Court Congruence*, measures the case disposition by the court conducting the initial trial. The variable is coded “1” if the lower court rendered a decision in opposition to the appellate judge’s ideological preferences, “2” if the trial court rendered a mixed decision, and “3” if the directionality of the lower court decision is congruent with the appellate judge’s ideological preferences. Previous research indicates that appellate panels have a tendency to affirm District Court rulings than reverse (Songer and Sheehan 1992; Songer, Sheehan, and Haire 2000). Consequently, if this tendency exerts an additional constraint on appellate judges then we expect the relationship to be negative. However, if the directionality of the lower court decision reinforces the ideological voting of the appellate judge then we expect the relationship to be positive. The final control variable measures whether litigants bring a *Constitutional Challenge* to a congressional statute. If the constitutionality of a statute is challenged on appeal, then we expect judges to rely on this challenge as a justification for casting 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.

## Empirical Results

Since our dependent variable is dichotomous, we employ a series of probit models—across specific issue areas—to evaluate the empirical relationships.<sup>19</sup> The first table examines statutory constraint in criminal cases. Since our theory indicates that judges will respond differently to statutory constraint, based on issue area, we examine Democratic appointees and Republican appointees separately. The results are reported in Table 1.

Examining Table 1 reveals that Democratic appointees (reported in Model 1) respond differently to the various stimuli than their Republican colleagues (reported in Model 2). For instance, regarding the variable *Statutory Constraint* we see that its influence significantly predicts behavior for Democratic appointees but exerts no influence for Republicans. Since the coefficient is negative for Democrats, this indicates that as the level of statutory constraint increases (holding other influences constant) the likelihood of these judges casting sincere, or unconstrained, votes (i.e., liberal votes) decreases significantly. Thus, the data confirm our first hypothesis; more detailed statutory language provides a significant constraint on the ideological voting behavior of Democratic judicial appointees.

Examining the influence of *Individual Ideology* in criminal cases reveals a second difference between Democratic and Republican judges. The variable is not statistically significant for the former, but is significant and positive for the latter. Consequently, this finding reveals that the more ideological extreme Republican appointees are significantly more likely to render sincere decisions (i.e., cast conservative votes) than their Democratic colleagues.

In addition to these findings for our primary variables of interest, we also notice several differences between Democratic and Republican appointees across the control variables. First, if we examine the influence of *Unanimous Decisions*, the results in Table 1 reveal that the variable is significant for both

<sup>18</sup>The folding is accomplished simply by taking the absolute value of the Giles, Hettinger, and Peppers score for each individual judge.

<sup>19</sup>For an alternative specification, using the ideological directionality of the individual judge vote (i.e., liberal or conservative) as the dependent variable, please see Appendix B available online at <http://www.journalofpolitics.org>.

TABLE 1 Probit Analysis of Statutory Constraint in Criminal Cases

	Model 1 Democratic Appointees	Model 2 Republican Appointees
<b>Statutory Constraint</b>	-.104 (.047)**	-.023 (.037)
<b>Individual Ideology</b>	.121 (.394)	1.091 (.275)***
<b>Unanimous Decision</b>	-1.018 (.232)***	.732 (.165)***
<b>Lower Court Congruence</b>	.265 (.087)**	.273 (.072)***
<b>Constitutional Challenge</b>	-.041 (.142)	.448 (.119)***
<b>Constant</b>	.650 (.564)	.479 (.447)
N	607	991
Log Likelihood	-247.184	-413.119
Wald $\chi^2$	43.97	71.78
Prob > $\chi^2$	.000	.000
Pseudo R <sup>2</sup>	.090	.000
Null Model	16.5%	83.2%
Correctly Predicted	85.0%	84.2%

Dependent Variable: unconstrained or sincere vote (1), constrained vote (0).

Values represent parameter estimates with robust standard errors in parentheses.

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

sets of judges; however, the signs of the coefficients are opposite. The directionality is negative for Democratic judges, indicating that they are significantly less likely to cast sincere votes (i.e., more likely to cast conservative votes) when the appellate panel renders a unanimous decision. Conversely, Republican judges are significantly more likely to cast sincere votes in the presence of panel unanimity. Second, the variable *Lower Court Congruence* is significant and positive for both groups of judges, confirming our expectation that appellate judges will be more likely to render sincere votes when the lower court ruled in an ideologically similar (i.e., congruent) manner. Finally, the variable *Constitutional Challenge* is statistically significant only for Republican judges. The positive coefficient indicates that these judges are more likely to cast sincere votes when litigants raise constitutional objections in the dispute.

Since the results from criminal law cases are consistent with our first hypothesis on statutory constraint, we examine next our second hypothesis—whether Republican appointees are constrained in civil liberties cases. These results are reported in Table 2.

Model 3 examines Democratic judicial appointees and Model 4 focuses on Republican judicial appointees

for all civil liberties cases. The data reveal that neither group of judges is affected by *Statutory Constraint*; the coefficients in both models are not statistically significant. Yet, Republican appointees continue to render decisions according to their ideological preferences (similar to the result in criminal cases), as seen by a significant and positive coefficient for the variable *Individual Ideology*. Therefore, Republican judges possessing more extreme ideological preferences are significantly more likely to cast sincere votes (i.e., conservative votes) than their moderate colleagues. Additionally, Democratic judges are significantly less likely to cast sincere votes when the appellate panel renders a *Unanimous Decision*. Though Republican judges are not affected by the presence of a unanimous decision, they are affected significantly by *Lower Court Congruence*; when lower courts render conservative decisions Republican judges are more likely to cast sincere votes. Since this variable is not significant for Democratic judges, it indicates that these judges are not affected by the disposition of the trial court.

Initially, the results from Models 3 and 4 appear to refute our hypothesis that Republican judicial appointees will be affected significantly by congressional statutes. However, these models examined *all civil liberties* cases; it is possible that Republican judges do not

TABLE 2 Probit Analysis of Statutory Constraint in Civil Liberties Cases

	Model 3 Democratic Appointees	Model 4 Republican Appointees	Model 5 Republicans in Discrimination Cases Only
Statutory Constraint	.018 (.030)	-.003 (.026)	-.067 (.034)*
Individual Ideology	.198 (.362)	1.020 (.275)***	.861 (.352)*
Unanimous Decision	-.596 (.179)**	-.075 (.156)	-.030 (.207)
Lower Court Congruence	.080 (.070)	.171 (.059)**	.295 (.076)***
Constitutional Challenge	-.372 (.159)*	.203 (.123)	.401 (.185)*
Constant	-.018 (.418)	.372 (.331)	1.216 (.439)
N	479	672	428
Log Likelihood	-318.492	-428.770	-270.385
Wald $\chi^2$	18.31	24.03	26.45
Prob > $\chi^2$	.003	.000	.000
Pseudo R <sup>2</sup>	.029	.027	.048
Null Model	43.4%	62.5%	62.1%
Correctly Predicted	60.8%	63.5%	63.8%

Dependent Variable: unconstrained or sincere vote (1), constrained vote (0).

Values represent parameter estimates with robust standard errors in parentheses.

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

respond to all civil liberties statutes in a similar fashion. Our earlier examples of the Civil Rights Act (1964) or the Voting Rights Act (1965) involve language to combat discrimination. Yet, other civil liberties statutes limit access to abortions or place restrictions on individual expression. Hence, there is no reason to believe that Republican judges would be constrained by the latter types of statutes. We therefore reestimate the model and focus *only on cases involving discrimination issues*.<sup>20</sup> These results are presented in Model 5 (the final column of Table 2).

Once we eliminate other civil liberties issues and only focus on discrimination cases, we see a noticeable difference in the statistical results. According to Model 5, the variable *Statutory Constraint* is statistically significant and negative, indicating that Republican judicial appointees are less likely to cast sincere votes when confronted with detailed statutory language in discrimination cases. Additionally, though these judges continue to cast votes according to their ideological preferences, the influence of the variable *Individual*

*Ideology* decreases in this subset of cases. In Model 4, this variable was significant at the .001 level. Now, it barely attains significance at the .05 level. Thus, the results support our second hypothesis—in discrimination cases Republican judges are significantly constrained by the language of congressional statutes.

Finally, in Table 3 we examine economic statutes. We hypothesize that neither Democratic nor Republican judicial appointees will be constrained by the language of congressional statutes. The results from Models 6 and 7 confirm this hypothesis. In neither model is the coefficient for the variable *Statutory Constraint* statistically significant. Additionally, the variable *Individual Ideology* is significant and positive only for Republican appointees, indicating that judges with more extreme ideological preferences are more likely to cast sincere votes than their moderate colleagues. The results in Table 3 also reveal that Republican judges are significantly constrained (i.e., less likely to cast sincere votes) in the presence of a *Unanimous Decision*. The variable *Lower Court Congruence* is significant and positive for both sets of judges; confirming our expectation that appellate judges are more likely to cast sincere votes when the ideological direction of the lower court decision conforms to the

<sup>20</sup>In the Songer data set, these cases are identified by the issue codes 210–299. Note, that these do not include discrimination against homosexuals because those cases are coded under the Privacy category.

TABLE 3 Probit Analysis of Statutory Constraint in Economic Cases

	Model 6 Democratic Appointees	Model 7 Republican Appointees
<b>Statutory Constraint</b>	-.017 (.021)	.028 (.017)
<b>Individual Ideology</b>	-.370 (.229)	.351 (.159)*
<b>Unanimous Decision</b>	-.226 (.119)	-.199 (.108)*
<b>Lower Court Congruence</b>	.369 (.039)***	.446 (.031)***
<b>Constitutional Challenge</b>	.292 (.153)*	-.398 (.110)**
<b>Constant</b>	-.327 (.258)	.791 (.220)
N	1,316	1,955
Log Likelihood	-849.120	-1,228.915
Wald $\chi^2$	111.43	238.36
Prob > $\chi^2$	.000	.000
Pseudo R <sup>2</sup>	.064	.092
Null Model	54.6%	52.4%
Correctly Predicted	64.1%	66.0%

Dependent Variable: unconstrained or sincere vote (1), constrained vote (0).

Values represent parameter estimates with robust standard errors in parentheses.

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

individual appellate judge's preferences. Finally, the variable *Constitutional Challenge* is significant in both Model 6 and Model 7, although the signs of the coefficients are opposite. This indicates that Democratic judges are more likely to cast sincere votes when they encounter a constitutional challenge, while their Republican colleagues are significantly less likely to cast sincere votes.

Our combined findings suggest a theoretically important way of thinking about judicial decision making. Not only is there a tradeoff between constraint and ideology, as Rowland and Carp (1980) hypothesize, but there is also a differential impact of constraint, one that is affected by certain nonideological factors. Constraint does not operate symmetrically across all judges; rather, specific judges encounter differing levels of discretion depending on the issue area. Thus, our results suggest a much more dynamic relationship between legal factors and ideology than past research has been able to empirically identify. We demonstrate that without understanding how judges react to statutory constraint it is difficult to truly understand how they employ their political attitudes in the decision calculus. The task of future research then will be to include additional measures of legal constraint (such as precedent) into a model.

## Conclusions

The tension between Congress and the courts caused by the "continuing colloquy" (Paschal 1992) over the meaning of the rule of law has profound implications for democratic theory since each institution affects social policy largely through the statutory medium (creating statutes for Congress and interpreting statutes for the courts). While scholars have examined whether courts rule against congressional preferences, there has been little focus whether legislators can constrain the courts. Our findings demonstrate that members of Congress possess more than a rhetorical ability to rail against judges on the floor of the House or Senate. They can constrain judicial decision making over the long term by enacting detailed legislation. Whether this result occurs because of an intentional objective or an unintended outcome, the final product is that Congress possesses an ability to limit judicial discretion through statutory language.

This is extremely important because many past studies of the "legal model" have been criticized for being straw men, designed to capture basic influences through imprecise measurements. Continuous and more dynamic measures of legal factors are required

to test accurately and rigorously the exact relationship between these aspects and ideological preferences. Our analysis presents an important initial step in depicting this vibrant relationship, and the conclusions we offer should assist future studies in determining which factors constrain judicial behavior and which provide greater judicial discretion.

In sum, we first answer the question whether Congress can constrain the judiciary and discover that the influence is significant. The measure of statutory constraint reveals that more detailed language (resulting in statutes with higher word counts) in legislation significantly limits the discretion afforded to appellate judges to rule according to their ideological preferences. Thus, Congress can operate as a viable principal to federal judges if the legislators decide to craft unambiguous statutes.

Second, our successful testing of the statutory constraint measure is the first evidence that this continuous measure is applicable to judicial settings. More research is needed to determine if it is generalizable across a variety of situations, including state legislatures and parliamentary democracies. Given our finding that more continuous measures of statutory constraint can be applied to the federal judiciary, this suggests that subsequent research can develop more dynamic measures of other factors that advocates of the legal model suggest constrain judicial decision making (e.g., measures of legal precedent). Additionally, future research should examine how statutory constraints interact with influences from court precedents. This is essential to determine precise effects of the legal model on judicial behavior.

Finally, our analysis suggests new theoretical ways to conceptualize judicial decision making. Not only is there evidence that different types of judges rely on different factors when rendering decisions, we also demonstrate the relationship between ideological attitudes and legal mechanisms, as well as the differential impact of the legal mechanisms themselves. Theoretically, this opens the door for a much more dynamic (and potentially interesting) model of judicial behavior. If everything else is held equal, judges will render decisions according to their ideological preferences. Yet, all things are not equal and the presence of legal factors, such as statutory constraint, limits the ability of some judges to rule ideologically. However, the story does not end here. In cases where legal factors constrain judges, they may search for additional non-ideological factors (e.g., lower court decisions) in an attempt to mitigate the apparent constraints. Based on this dynamic interaction between political attitudes and statutory constraint, one should not think of the

legal model as a set of forces that operate equally to contradict ideological influences. Consequently, a more complete model of judicial decision making should include measures of both political preferences and constraints, as well as account for the differential impact of these measures.

These findings are of extraordinary importance for understanding the nature of American politics. They suggest that courts are not completely autonomous actors; while judges have considerable authority to interpret the law, they must do so within certain legal boundaries. These boundaries also limit the potential influence of ideological preferences on judicial behavior. In short, the battle between legal and ideological factors is much more interesting, we think, than past research has been able to capture. This dynamic relationship involves a variety of aspects, many of which conflict with each other, which judges must balance against their ideological preferences when adjudicating disputes.

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