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The Sword, the Purse and the Gavel: Institutional Influences on the Behavior of Supreme Court Justices

Hemant Sharma
University of Tennessee - Knoxville

To the Graduate Council:

I am submitting herewith a dissertation written by Hemant Sharma entitled "The Sword, the Purse and the Gavel: Institutional Influences on the Behavior of Supreme Court Justices." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

John Scheb, Major Professor

We have read this dissertation and recommend its acceptance:

Otis Stephens, Michael Fitzgerald, David Houston, James Bemiller

Accepted for the Council:
Dixie L. Thompson

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

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"*The Sword, the Purse, and the Gavel*:"

INSTITUTIONAL INFLUENCES ON THE BEHAVIOR OF SUPREME COURT JUSTICES

A Dissertation
Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Hemant Sharma
August 2009

Dedication

To my parents, Ganga Sharma and Sharda Sharma. From an early age, I learned the meaning of hard work and discipline simply by watching them. To arrive in this country with virtually nothing and to emerge as successful physicians is an achievement that I can never hope to match. Their support through all of my pursuits, whether athletic or academic, has been unwavering and will forever be appreciated.

To my brother, whose work ethic matches that of my parents, and whose selfless nature has allowed him to have a positive impact on the lives of many.

To Lydia Fakundiny, erstwhile Professor of English at Cornell University, whose approach to academics was akin to that of a demanding sports coach. She challenged me to make the most of my intellectual abilities, and revealed the joy that could accompany the art of tinkering with words and composing an essay. Her influence is evident in every sentence that I craft.

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Specifically, as the process of crafting and refining this dissertation has unfolded, I have come to realize that Dr. Houston is as an invaluable resource for the creation of any research design. His vast understanding of statistical tools has been a tremendous reserve from which to draw upon, and he has the unique gift of being able to distill complex ideas into a palatable form that even a mathematical novice can comprehend.

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Three other faculty members at the University of Tennessee have proved to be equally valuable members of my dissertation committee. The first is Dr. Michael Fitzgerald, who has a unique ability to relate with students of any background, and his accessibility, lively personality, and capacity to converse over a panoply of matters has made his office an inviting place to visit for two decades of political science students at the University of Tennessee. His patently obvious love of teaching—and his passion for influencing the lives of the "men and women of the Orange and White"—will forever inspire me.

Dr. Otis Stephens has served as a source of inspiration not only to myself, but to the entire academic community at the University of Tennessee. His sharp legal mind, exceptional memory, and meticulous attention to those details essential for crafting forceful written analysis have made him a tremendous intellectual resource for a generation of law school students and political science students alike. He is a truly remarkable person, and it has been a sincere pleasure working under his guidance.

James Bemiller has been a refreshing and energizing addition to this dissertation committee. His background as a lawyer and his keen understanding of the legal system, coupled with his background as a world-class track coach, has enabled him to offer cogent insights regarding the findings presented herein and to provide a consistent source of motivation. He is a gifted teacher who has a wealth of knowledge on a diversity of subjects, and he is always willing to take time out of his busy schedule to spend extra moments with students who request his assistance.

Thanks also to Dr. Robert Gorman, former Director of Graduate Studies for the Political Science Department at the University of Tennessee. It was his influence that drew me into the

PhD program, and his guidance served me well as I meandered through its minefield of requirements. His tenacious personality served as a driving force in my progress through the program. He remains the best lecturer that I have ever seen, and will always be considered a mentor and a friend.

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Abstract

An inherent contradiction exists between two fundamental principles embedded in American political philosophy: the notion of "checks and balances" and the idea of an "independent judiciary." After all, a truly "independent" branch of government would be immune to the influences, or "checks," of external institutions. This dissertation addresses that juxtaposition through a two part analysis of Supreme Court decision-making.

The first part uses multivariate regression to illustrate that justices confirmed under conditions of divided government are more moderate in their voting behavior than justices confirmed under conditions of unified government. Ancillary findings also reveal that justices who receive more votes during their Senate confirmation hearings will be more moderate in their voting behavior and that justices appointed by presidents with higher *Gallup Approval Ratings* tend to be more "extreme" in their voting behavior. Overall, the confirmation process appears to offer an avenue through which the executive and legislative branches can "check and balance" the voting outputs of the Supreme Court.

The second part of this dissertation assesses the degree to which justices remain independent from the influences of the "political" branches once they begin serving on the Court. Time series regression models indicate that Supreme Court justices are likely to vary their voting behavior in *civil rights and civil liberties* cases based on which party controls the White House at the time a vote is being cast. Evidence also shows that justices are likely to vary their voting behavior in *economic cases* based on which party is strongest in Congress. Beyond that, findings also suggest that justices exhibit differences in voting behavior while the appointing president is in office, and, surprisingly, that justices seem to grow more liberal in their voting behavior over time. Collectively, this information indicates that there are certain situations (such as case issues or time periods in a justice's tenure) in which Supreme Court justices are not entirely "independent" in their behavior. For those who cherish the ideal of judicial independence, this may be a deleterious development; conversely, for those who deride the expansive role that the Supreme Court may have taken in contemporary society, the implication of a link between democratic processes and voting outputs may be a sanguine pronouncement.

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Chapter 1: Introduction and Explication of Research Design

Section 1.1: Fundamental Research Questions

Over two hundred years ago, our Founders wrestled with a number of dilemmas as they sculpted the framework of a fledgling government. In particular, many quandaries involved the nature of how power should be distributed among the different branches of government. A direct example, in fact, can be revealed by juxtaposing the following statements from *The Federalist*:

> "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments" (James Madison, Title of *Federalist #51*).

> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution" (Alexander Hamilton, *Federalist #78*).

Embedded in these statements, we can find two principles associated with our nation's founding—and one inherent contradiction. After all, it is difficult for the judicial branch to be "checked and balanced" by the other branches of government, as Madison implies, and yet simultaneously remain "independent," as Hamilton suggests. If one were to extrapolate this observation into a rudimentary research question, it might read as follows: Do actors in the other two branches of government have an impact on the voting behavior of actors in the judicial branch? Perhaps the easiest way to narrow the scope of this question is to focus on the ways that changes in the executive and legislative branches precipitate shifts in the voting behavior of Supreme Court justices. In a more specific sense, then, one might wish to investigate this query:

<u>General Research Question</u>: Do democratic processes—those that are driven by elected officials who are, in theory, responsive to a diversity of interests in society—have an impact on the policy outputs of the Supreme Court?

A key assumption underlying an investigation of this question, it follows, is that the individual votes of Supreme Court justices will ultimately aggregate to the "policy outputs" of

the Court. This supposition is compatible with other scholarship in the sub-field of judicial politics (see particularly Baum, 1994; Hagle, 1993; and Hensley and Smith, 1995), and will allow this dissertation to address the aforementioned question in two parts. The first part will concern itself with the appointment and confirmation process, and the second will concern itself with the voting behavior of a justice after he or she has ascended to the Court.

As for the first part, one can look to the Constitution of the United States as a starting point, for that document mandates a very specific "check and balance" on the judicial branch: appointments to the Supreme Court shall be made by the president with the "advice and consent" of the Senate. However, little empirical work has been done to assess whether the nature of the confirmation process actually influences the long-term voting outputs of the Supreme Court. One potential avenue for doing so lies in assessing how changes in the governmental actors who partake in the confirmation process translate into changes in the Supreme Court's voting pattern. For example, even a cursory analysis of voting patterns would illustrate that justices who are appointed by Democrats cast votes that are more liberal than justices appointed by Republicans—and would show that changes in the executive branch can translate into changes in the Supreme Court's voting patterns. Along these lines, this dissertation will investigate a more sophisticated research question:

<u>Specific Research Question 1</u>): Does divided party government result in the confirmation of justices whose voting behavior differs from that of justices confirmed by unified party government?

Beyond the confirmation process, this dissertation will also address influences from the other branches of government that may be relevant *after* a justice is appointed and confirmed. In fact, one might submit that Alexander Hamilton's concern for an "independent judiciary" was

restricted to the behavior of justices subsequent to their appointment, for in *Federalist #78* he delineates "permanent tenure" as a safeguard against interference from other governmental actors. However, his treatise also highlights the Court's dependence on the executive's "sword" and the legislature's "purse" to implement its decisions. This discrepancy indicates that there may be moments when justices consider how the other branches will react to their opinions. Accordingly, it is worthwhile to make an empirical assessment of the following research questions:

Specific Research Question 2): Does the voting behavior of individual Supreme Court justices vary as the composition of Congress and the White House changes?

Specific Research Question 3): Does the voting behavior of individual Supreme Court justices vary after the appointing president leaves office?

The bifurcation of the three research questions into two broad sections (pre-confirmation and post-confirmation) will allow for a unique analysis of influences on the Supreme Court. Collectively, the two broad sections of this dissertation may demonstrate that the confirmation process provides the "check and balance" with which Madison was concerned and may also show that justices seem to remain "independent" from other governmental actors once they begin serving on the Court. That, it follows, will be the expected findings.

Section 1.2: Theoretical Importance of this Inquiry

For a political scientist, the importance of investigating the research questions outlined above is implicit in the following statement:

> Given the often critical role judges play in our constitutional, political, and social lives, it is axiomatic that we need to better understand how and why judges reach the decisions they do in the course of discharging their judicial roles (Heise, 2006, 848).

In a more specific sense, the type of inquiry conducted herein is important for the discipline of political science because if elected officials have no influence on the policy outputs of the Supreme Court, then the fundamental doctrines on which this country was founded—particularly, the basic tenets of checks and balances and representative democracy—are indeed being compromised. At the same time, if justices are entirely subservient to the whims of elected officials even after they ascend to the bench, they may not offer an appropriate "check" on the other branches. Therefore, it is important to undertake an assessment of the degree to which the courts are influenced by the legislative and executive branches, as well as when and under what conditions such influence is most pervasive, because such information could be helpful in both explaining and predicting the voting behavior of Supreme Court justices. And, the goal of any science, including political science, is to engage in controlled experimentation, or observation, for the purpose of locating testable, falsifiable relationships among phenomena (such as actors in the different branches of government)—and to then explain why those relationships exist and how they can be used to predict future patterns of relations among similar phenomena.[1] In his opinion for *Daubert v. Merrell Dow* (509 U.S. 579, 1993), Justice Blackmun offers an effective summary of this idea when he notes that:

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge… will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'… See also C. Hempel, *Philosophy of Natural Science*, (1966, p. 49) [and] Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (1989, p. 37).
> (opinion excerpt as quoted by Segal and Spaeth, 2002, 47).

[1] This definition is an original construct, but is derived from ideas implied in James Feibelman's "*A Set of Postulates and a Definition for Science*" and Richard Purtill's "*The Purpose of Science*" (Feibelman, 1948, 38 and Purtill, 1970, 305), as well as from general theories advanced in Abraham Kaplan's *The Conduct of Inquiry* (1964).

In keeping with the ideas purported in Blackmun's opinion, this dissertation will generate testable predictions from the aforementioned research questions. The following sections of this chapter will offer specific instructions as to how this will be accomplished.

Section 1.3: Data Source / Unit of Analysis

The primary source of data for testing hypotheses will be the *Spaeth Supreme Court Database,* which was generated by Harold Spaeth and updated in conjunction with the *Sidney Ulmer Project*. Two forms of the database will be used. A *Vinson-Warren* database contains information derived from the 1946 through 1968 Supreme Court terms, while an *ALLCOURT* database contains information from the 1953 through 2007 terms. The *Vinson-Warren* database will be used to collect data that covers the 1946 through 1952 terms, while the *ALLCOURT* database will be used to collect data from the 1953 through 2007 terms. Because the format of both databases is identical, the data can be efficiently merged. Taken together, then, these databases offer a catalog of every Supreme Court case for which a written opinion was issued between 1946 and 2007.[2]

[2] It is important to note that the current SPSS version of the *Vinson-Warren* database that is offered online as a part of the *Sidney Ulmer Project* contains a critical error. The "conservative" and "liberal" labels for each justice's final vote are in the wrong places—that is, the "liberal" votes are labeled as "conservative" and vice versa. This error can be recognized by viewing the cases that are in common between the *Vinson-Warren* database and the *ALLCOURT* database, an act which makes it apparent that a transcription error has occurred. (Beyond that, justices whose voting patterns are recognizably liberal, such as Earl Warren, have an inordinately high number of conservative votes in the *Vinson-Warren* database. The figures corresponding to liberal and conservative votes for individual justices listed in both databases (including those for Justice Warren) match appropriately once the labels are switched). Sara Benesh notes that this *Vinson-Warren* database was updated in 2002 to analyze a "justice vote as the unit of analysis rather than case citation and docket," and given that its SPSS format has not been updated since that time, any studies that have used this information in the last seven years might require reevaluation (Benesh, 2002, 6). Furthermore, given that the oft-used Martin-Quinn scores (or "ideal points") are derived from the *Vinson-Warren* and *ALLCOURT* databases, Martin-Quinn scores may require reevaluation, given that these ideal points date to 1937. In addition, the creators of Martin-Quinn scores offer no specifics as to how the gap between 1937 and 1945 is filled—for the *Vinson-Warren* database only codes cases beginning with the 1946 term. These problems precluded the use of Martin-Quinn scores herein, along with the fact that they "keep track of only one thing: whether a justice voted to affirm or reverse in a case," and do not "pay attention to what the case was about" (Farnsworth, 2007, 144).

For the purposes of this dissertation, in which the unit of analysis is the votes of individual justices, the most relevant variables are the ones that measure the ideological direction of each vote cast by each justice in each case (coded as "liberal" or "conservative").[3] This information will allow for the creation of "conservative-liberal" scores that can be attributed to each Supreme Court justice for every term.[4] In addition, another important feature of the database is that it classifies each individual case into one of thirteen broad "issue areas." Herein, these categories will be further collapsed into two groups: civil rights/civil liberties issues (or social issues) and economic issues.[5] The importance of using the issue groups lies in the fact that changes in voting patterns over the course of a justice's career are often the result of changes in the types of cases that come before the Court (Arledge and Heck, 1992, 763; Baum, 1992, 5; Brenner, 1983, 327). For example, a study from Richard Pacelle (1991) indicates that "the proportion of decisions dealing with civil liberties grew from 8% of the [Supreme Court's] agenda in the 1933-1937 terms to 59% in the 1968-1972 terms… [while] cases involving economic disputes and federal taxation dropped five-fold over the same time periods [33% to 6%]" (Baum, 2008, 161). This fact is especially germane because some justices have exhibited different assessments of

[3] *Defining Liberal/Conservative*: Spaeth defined "liberal" votes as those which are "pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, [pro-Native American], and anti-government in due process and privacy [cases]" (Hensley and Smith, 1995, 842). "Liberal" votes would also include pro-affirmative action, pro-neutrality in religion cases, and pro-disclosure decisions; they also include those that expand the powers of government to regulate matters related to the economy, and are anti-business, pro-competition, pro-debtor, and pro-liability (*Codebook*, 70-71). "Conservative" votes are, as Hensley and Smith say, "the opposite" of these criteria, in the sense that they are anti-accused, pro-government in civil rights and criminal procedure cases, anti-judicial activism, and pro-business (Hensley and Smith, 1995, 842). Such definitions have high "category reliability" (Asher, 1984, 15) in the sense that they are widely accepted throughout the field of political science. Segal and Spaeth have also taken steps to ensure "observer reliability" and "inter-subjective reliability" (McGaw, 1976, 217) by having multiple agents verify the coding procedures (see *Codebook*, 1-5).

[4] These scores will be created by simply dividing conservative votes in a term by the total votes cast in that term.

[5] The "social issues" category will be created by collapsing the following categories from the Spaeth databases: "Civil Rights," "Due Process," "Criminal Procedure," "Privacy," and "First Amendment." The "economic issues" category will be created by collapsing the following categories: "Economic Activity," "Federal Taxation," and "Unions." ("Unions," said Justice Hughes in *Jones v. Laughlin* (301 U.S. 1, 1937), are in the "stream" of economics; hence the inclusion of those cases in this category).

social and economic matters. Justice Goldberg, for instance, was extremely liberal in social matters, but "tended to side with those who favored governmental regulatory powers when it came to interpreting certain aspects of antitrust legislation" (Abraham, 2008, 226). Therefore, the analysis of voting scores offered herein will be broken into issue-specific categories, which will help to control for changes in the matters that come before the Court[6] and differences in the ways that individual justices approach diverse types of cases.

At this juncture, it is important to note that Carolyn Shapiro has recently criticized the methodology employed by Spaeth in assigning cases to issues categories. Shapiro suggests that cases are assigned more on the basis of "public policy context" than "legal doctrine" (Shapiro, 2009, 1). To clarify this assertion, she suggests that *Schenck v. Pro-Choice Network of Western New York* (519 U.S. 357, 1997) is miscoded as an abortion, or privacy, case when it should be listed as a First Amendment case (Shapiro, 2009, 5). However, the two categories used in this dissertation are broad enough to avoid concerns over such minute distinctions, and are still narrow enough to provide an avenue for assessing voting behavior independent of changes in the issues that come before the Supreme Court. For example, the case that Shapiro references would fall into my "social issues" category regardless of whether it was viewed as an abortion case or a privacy case.

Finally, it is worth mentioning that the statistical models created herein will analyze both unanimous and non-unanimous cases. Brenner and Arrington have noted that even "unanimity reflects the application of justices' attitudes to the stimuli of particular cases" (Brenner and Arrington, 1987, 82; Baum, 1997, 77). In addition, Segal and Spaeth have suggested that "unanimous decisions also represent the ideological make-up of the court in question" (Segal and

[6] This could, of course, be written as follows: "matters that the Court *chooses* to decide."

Spaeth, 1989, 105; see also Richardson and Scheb, 1993, 462)—even though their seminal works, *Supreme Court and the Attitudinal Model* (1993) and *Supreme Court and the Attitudinal Model Revisited* (2002), focus exclusively on the explanation of non-unanimous decisions. Perhaps this is why Sara Benesh offers the following declaration: "The [attitudinal] model doesn't explain unanimous cases" (Benesh, 2004, 124). The models offered herein, however, will include unanimous decisions in their respective analyses in the hope of offering a more complete depiction of the factors that explain judicial decision-making.

Ultimately, the use of the *ALLCOURT* database in conjunction with the *Vinson-Warren* database will facilitate an examination of the voting behavior of 31 Supreme Court justices across different issues and in both unanimous and non-unanimous cases. Although some justices included in the database began their tenure on the Court prior to 1946, I have chosen to restrict this inquiry to those justices for whom at least 70% of total terms-served appear in the *Vinson-Warren* and *ALLCOURT* databases. This will include the 26 justices who began their service during or after the Vinson Court first convened in 1946; complete data is available for the entire service of these justices. In addition, Justices Black, Burton, Douglas, Frankfurter, and Jackson—who began their respective tenure prior to 1946, but for whom a sufficient sample of information is available in the databases—will also be included in this inquiry. As the literature review will demonstrate, this sample of 31 justices will represent a larger sample size than that used in almost all prior research on Supreme Court decision-making.

Section 1.4: Overall Structure of this Dissertation

This dissertation will attempt to further the goals of political science by assessing previous research into the behavior of Supreme Court justices, and by subsequently offering new

empirical techniques for filling existent voids in said literature. Five chapters will be used in this process. Chapter 2 will offer a succinct overview of literature in the field of public law, including a description of the major theories that scholars have generated to explain the voting behavior of Supreme Court justices. The third chapter will analyze how the confirmation process is related to the voting patterns of Supreme Court justices. The fourth chapter will move beyond the confirmation process, and will assess the relationship between changes in the legislative/executive branches and variation in the voting behavior of individual justices. The fifth chapter will build upon this work and will assess whether shifts in voting behavior are apparent after the appointing president leaves office. A sixth, and final, chapter will then attempt to combine the findings of the previous sections into a comprehensive model for explaining and predicting judicial behavior, and will discuss the positive and negative aspects associated with any attempt to generate such an all-encompassing representation. The final chapter will also distill the importance of the statistically significant and statistically insignificant findings from the models offered in the preceding chapters. I will now offer a brief explanation of the overall structure of each chapter.

Section 1.4.i: "Chapter 2: Brief Overview of Judicial Behavior Literature"

The study of judicial behavior has evolved through a number of identifiable phases—each with its own theory on how judicial decision-making occurs. The second chapter of this dissertation will offer a detailed description of the major theories that have sought to explain the behavior of Supreme Court justices.

As a starting point, early research into judicial behavior was described under the rubric of the "legal model." In general terms, it portrayed judges as conduits that mechanically applied the law to factual situations. By the 1950s, however, this idea had relented to the tenets of legal

realism, or legal behavioralism (Johnson and Reynolds, 2005, 40-42), which focused on the actions of judges as individuals, and posed the following research question:

> *"Are there factors outside of legal precedent that influence judicial decisions?"*
> (Johnson and Reynolds, 2005, 13)

Much of the literature spawned by this query has been concerned with interplay between the policy preferences (or attitudes) of justices and their voting behavior. C. Herman Pritchett, Glendon Schubert, David Rohde and Harold Spaeth were among the pioneers in fostering this type of research (see Maveety, 2004, 53-56), and a review of their scholarship will include discussion of the "attitudinal model," which one observer has called the "dominant research paradigm of judicial behavior for many decades" (Edwards, 2003, 6). The modern incarnation of the attitudinal model was crystallized in Segal and Spaeth's 1993 book *The Supreme Court and the Attitudinal Model* and its 2002 companion *The Supreme Court and the Attitudinal Model Revisited*. As Hagle and Spaeth note in their discussion of the former, the "fundamental assumption of the attitudinal model is that the justices' votes depend on their attitudes and policy preferences"—and nothing else (Hagle and Spaeth, 1991, 119).

The literature review offered in chapter 2 will reveal limitations of the attitudinal model, including the fact that it fails to consider the context in which judges operate and the manner in which this context can influence decision-making. These limitations have helped to advance a variety of diverse approaches for examining judicial behavior, many of which attempt to locate *where* influences on judicial preferences originate. For example, many scholars have begun to scrutinize the relationship of the courts to the other branches of government—a movement that has evolved into an approach called "New Institutionalism." The literature review will offer

more details about this evolution, but in short, this theoretical approach to judicial decision-making has been concerned with the following research question:

> *"Are judges subject to influence by other government actors?"*
> (Johnson and Reynolds, 2005, 13)

In brief terms, New Institutionalism has been defined as "the analysis of judicial politics that stresses the interactive and interdependent nature of judicial decision-making" (Maveety and Maltese, 2004, 232), or what Rogers Smith calls "analysis of… courts as part of broader political processes" (Smith, 1988, 89). More specifically, this domain of judicial politics is concerned with how courts, and individual judges, are influenced by the other branches of government; for that reason, the research offered in this dissertation can be categorized under the auspices of New Institutionalism.

Overall, New Institutionalism assesses how "choices are structured by the institutional setting in which they are made" (Epstein and Knight, 2000, 626). This dissertation is an extension of New Institutionalist research into judicial politics because the third chapter will assess how the legislative and executive branches influence the judicial branch via the confirmation process; beyond that, the fourth and fifth chapters will examine the New Institutionalist supposition that justices might subvert their own policy preferences in anticipation of responses from the other two branches—the two branches that, as Alexander Hamilton observed, carry the "sword" and "the purse" (*Federalist #78*). Ultimately, as the literature review will demonstrate, the primary deficiency with current New Institutionalist research lies in the lack of empirical tests of its theories. Subsequent chapters in this dissertation will attempt to fill that void.

Section 1.4.ii: "Chapter 3: The Confirmation Process"

The third chapter will empirically assess the relationship between the confirmation process and the voting behavior of Supreme Court justices. Judicial policy making is considered "undemocratic" to some because justices are not required to be responsive to the diversity of influences that are represented in society at large (see, in particular, Gregory Casey's classic criticism in "The Supreme Court and Myth," 1974, 387). In reality, however, the assertion that judicial behavior in our society today is "undemocratic" is tantamount to a declaration that the confirmation process is irrelevant. More precisely, such censure also dismisses the potential for divided party government to produce justices that behave differently than those produced by unified party government. In particular, it logically follows that if the confirmation process is indeed irrelevant, unified party government should produce justices who behave similarly to those produced by divided party government. The third chapter will empirically analyze this concept.[7]

Previous research into the confirmation process has been of a largely qualitative, anecdotal nature (Carter, 1994; Yaloff, 1999; Wrightsman, 2006; Eisgruber, 2007; Abraham, 2008). In a 1993 article, though, Richardson and Scheb tested the relationship between divided party government and the voting behavior of Supreme Court justices. They found statistically significant evidence that Supreme Court justices who are nominated and confirmed during periods of divided party government cast more moderate votes than those appointed during periods of unified party government. Unfortunately, a small sample size, which resulted from the paucity of data available about Supreme Court decision-making in 1993, limited the scope of

[7] A recent statement from George Will, who declared that, "Divided party government compels compromises that curb each party's excesses" may add further theoretical support for this inquiry, and may offer an ancillary hypothesis whose validity will be assessed herein (*Washington Post*, September 18, 2008, page A21).

their findings. (In fact, that dearth of available data is a primary reason why their work has not yet been replicated). Over the last seven years, though, with the expansion of Spaeth's *ALLCOURT* and *Vinson-Warren* databases, a larger sample of data related to Supreme Court decision-making is now available. As a result, a unique opportunity exists to reassess Richardson and Scheb's 1993 findings regarding this query:

Does divided party government result in the confirmation of justices whose voting behavior differs from justices confirmed by unified party government?

I will answer this question herein by using the same statistical tool that Richardson and Scheb used (ordinary least squares (OLS) regression), but I will also include several new independent variables to broaden the scope of their work. Specifically, these new variables will be crafted to assess not only the inter-branch conflict (i.e., legislative vs. executive) that is inherent in any definition of "divided government," but to also asses *intra*-branch conflict, such as confirmation votes in a closely-divided senate and judicial appointments during periods of low presidential approval ratings. Ultimately, by operationalizing these ideas, I will be offering an expanded construction of the concept of "divided government."

Initially, this dissertation will commence with a reexamination of Richardson and Scheb's principal hypothesis.[8]

Hypothesis #1: Justices appointed under conditions of divided government will be more moderate in their voting behavior than those appointed under conditions of unified government.

Individual voting scores derived from the Spaeth databases will be especially useful in assessing this hypothesis, for individual scores can be generated by taking the total number of conservative votes for a justice's entire tenure and dividing that by the total number of votes cast.

[8] The specific wording employed by the hypotheses offered in this opening chapter will be adjusted slightly during subsequent chapters; further, the order in which certain hypotheses are addressed in Chapter 3 will also be altered.

This value can then be subtracted from a mid-point of 50% (where 50% would indicate a completely moderate justice) in order to delineate how "extreme" a justice's voting pattern is—regardless of whether he or she tends to vote in a conservative or liberal pattern. By taking the absolute value of the conservative voting score for a justice's entire tenure subtracted from 50%, then, one obtains a dependent variable that can be used to measure the relationship between divided party government and the voting outputs of individual justices. Richardson and Scheb call this value an "extreme" score (Richardson and Scheb, 1993, 462).

Although Richardson and Scheb offer analysis of "extreme" scores for civil rights and civil liberties cases, I will also offer a model that encompasses economic matters. Beyond that, I will examine a new hypothesis related to the idea that "division" can persist within a particular branch itself. For example, a 51-49 party-line split in the Senate seems likely to offer the potential for confirming a different type of justice than, say, a filibuster-proof 67-32 majority might offer. As a result, a portion of this study will attempt to correlate Senate confirmation votes with the subsequent voting behavior of Supreme Court justices. This analysis will address the following research question:

Does a justice who is confirmed by a wider margin in the Senate exhibit signs of being more ideologically moderate?

A tentative hypothesis derived from this query might read as follows:

Hypothesis #2: A Supreme Court nominee who is confirmed by a wide margin in the Senate is more likely to exhibit an ideologically moderate voting record on the Court than a justice who is confirmed by a narrow margin in the Senate.

The theoretical basis for this hypothesis is that a closely divided Senate, one in which the potential for a filibuster exists, would 1) prevent an ideologically extreme nominee from being confirmed, or 2) prevent a president from even nominating an ideologically extreme candidate in

the first place. From a methodological standpoint, hypothesis #2 extends the scope of Richardson and Scheb's work because a continuous variable can now be used to represent an aspect of divided government—a fact which may allow a multivariate regression model to assess the relative strengths of the different branches when it comes to confirming justices. (The dependent variable for studying hypothesis #2 will remain a justice's "extreme" score for his or her entire tenure on the bench).

Along these lines, and in keeping with the expanded conceptualization of "division in government," it is also worth exploring whether a President that perceives himself as having a "mandate" from the American people, in the form of high public approval ratings, might be more likely to appoint an ideologically extreme justice to the Court. As a result, this study will assess whether Gallup approval ratings for the president (measured at the time of a Supreme Court justice's confirmation vote) have any explanatory power when it comes to the subsequent voting behavior of Supreme Court justices.

Previous New Institutionalist research has examined executive-judicial relations in the context of whether Republican presidents are more likely to appoint justices that vote in a conservative manner—or whether Democratic presidents appoint justices that vote in a liberal fashion (Scheb and Richardson (1993, 462) denote the following as sources for this assertion: Baum, 1992; Schubert, 1970; Abraham, 1974; Goldman, 1985; Tribe, 1985; Ackerman, 1988; Bonner, 1989; Segal and Cover, 1989; Baum, 1992; Kahn, 1992). This final chapter of this dissertation will offer some information related to this matter; however, the finding that Republican presidents appoint conservative justices (and that Democrats appoint liberal justices)

does little to advance the state of theory in the field of judicial politics. In this dissertation, a more sophisticated research question will attempt to discern the following:

Is a president with a higher approval rating more likely to appoint a justice that is ideologically extreme than a president with a lower approval rating?

A basic hypothesis designed to address this question might read as follows:

Hypothesis #3: A president with a higher approval rating is more likely to appoint a justice who exhibits an ideologically extreme voting pattern on the Supreme Court than a president with a lower approval rating.

For this hypothesis, the dependent variable will remain the "extreme" score, while Gallup approval ratings for the appointing president at the time of a confirmation vote will be incorporated among an array of independent variables. The expected finding would be that presidents with lower approval ratings, after controlling for the presence or absence of divided government, will appoint justices who subsequently exhibit more moderate voting patterns than those appointed by presidents with higher approval ratings.

Finally, the scope of inquiry related to hypothesis #2 and hypothesis #3 can be expanded by assessing the number of seats that are controlled by each political party at the time of a confirmation vote—in keeping with the notion that intra-branch division may have a moderating effect. A hypothesis related to this idea is as follows:

Hypothesis #4: As the number of Senate seats controlled by the majority party increases, the "extreme" score of a justice confirmed by that Senate will also increase, even after controlling for the presence of divided government and a president's approval rating.

Toward the end of Chapter 3, this hypothesis will be tested in a model along with variables related to the other three hypotheses in the hope of achieving a comprehensive portrait of the confirmation process and its impact on subsequent Supreme Court voting patterns.

Section 1.4.iii: "Chapter 4: Post-Confirmation: Judicial Behavior and Institutions"

Next, Chapter 4 will shift the focus of this dissertation to behavior exhibited by individual justices *after* they have been confirmed to the Court. Specifically, this chapter will examine whether the voting patterns of individual Supreme Court justices vary as changes occur in the organization of Congress and the White House. The basic research question involved here is:

Does the voting behavior of an individual Supreme Court justice vary as the party controlling Congress and the party controlling the White House changes?

Some New Institutionalist scholars have offered a theoretical justification for such variation. For example, Walter Murphy notes that, "[Justices] may be willing to modulate their views to avoid an extreme reaction from Congress and the president [because] justices would rather hand down a ruling that comes close to, but may not exactly reflect their preferences, than see Congress completely reverse the decision in the long run" (Epstein and Knight, 2004, 204).[9] Empirical examination of this matter, though, has been riddled with methodological flaws.

Previous research along these lines includes that from Brian Marks (1988), Gely and Spiller (1990), Ferejohn and Shipan (1990), Eskridge (1991), and Spiller and Gely (1992). These studies, however, are limited in their external validity because they focus on individual case decisions (such as *Grove City v. Bell*) in an attempt to locate legislative conditions under which said decisions are upheld, and conditions under which they are reversed. Two recent examples of New Institutionalist work attempt to use a game theoretic approach to offer a broader view of the relationship between legislative and judicial bodies. Vanberg's "Legislative-Judicial Relations: A Game Theoretic Approach" (2001) offers a formal model to illustrate "legislative

[9] This might be because, as James notes, "Lacking the means to enforce decisions, the Court must rely on the other branches" (James, 1968, 181) which, in turn, can rewrite legislation or withhold funding needed to enforce judicial decrees. Spriggs and Hansford also observe that, "[While] the Court makes decisions and writes opinions, it must also anticipate… possible Congressional and Presidential responses," since those reactions play a role in defining how judicial rulings are translated into policy outcomes (Spriggs and Hansford, 2001, 1096).

responses to judicial rulings, and the impact that anticipation of such reaction can have on judicial behavior" (Vanberg, 2001, 346). The problem with this model, for our purposes, is that it applies to foreign courts. Elsewhere, Rogers' "A Signaling Game of Legislative-Judicial Interaction" (2001) offers a game-theoretic model which highlights the "informational advantage that judges have over legislators" (Rogers, 1988, 87) because judges can see the impact of a law in action—a fact which may make Congress "tolerate" statutory reversal in some cases; beyond that, if a justice can anticipate such a possibility, he or she may minimize concern for Congressional response and be more likely to follow their own policy preferences (Rogers, 1988, 89). Therefore, Rogers' piece offers an idea which contradicts the New Institutionalist perspective that justices might adjust their voting behavior based on the ideological composition of Congress. Chapter 4 of this dissertation will empirically address this discrepancy.

Beyond that, Chapter 4 will offer methods that have not been emphasized in previous New Institutionalist research. In fact, as the literature review will demonstrate, the collective limitation of the aforementioned scholarship, including the game theory analysis, is rooted in a focus on the Court as a whole—as opposed to a focus on the voting behavior of individual justices; consequently, because this aforementioned work assesses whether the entire Court moves in response to shifts in Congress, said work is unable to control for variation that may ensue as a result of changes in the Court's arrangement and is more likely to account for change that occurs after a temporal delay of several years. This dissertation will address changes in voting behavior that are related to the composition of Congress and the White House at the time when an individual justice is casting votes.

A model offered by Jeffrey Segal in "Supreme Court Deference to Congress," which appeared in Clayton and Gilman's *Supreme Court Decision-Making: New Institutionalist Approaches*, is one of the few that attempt to address this matter. Segal generates predictions for how justices should vote based on the partisan composition of Congress and the White House at different points in history, and then denotes deviations in "expected behavior" among individual justices by using a difference-of-means *t*-test (Clayton and Gillman, 1999, 237). He ultimately finds no significant variance in voting behavior based on changes in the composition of Congress. However, his model is limited by its less-than-precise definition of "expected shifts," its circular use of prior voting behavior as an indicator for defining "expected behavior," and its reliance on a relatively rudimentary statistical tool (a difference-of-means *t*-test). Perhaps these factors collectively explain why Segal concludes his work with the notation that "the door is wide open for appropriate alternative designs" (Clayton and Gillman, 1999, 253).

This dissertation will accept that challenge, and will offer three different designs which can be used to correlate changes in the voting patterns of individual justices with changes in the other branches of government. First, to continue the use of "extreme" scores as a dependent variable, an ANOVA table and an OLS regression model will be generated to measure changes in "extreme" scores when justices are confronted with either ideological "support" or ideological "opposition" from the executive and legislative branches. A hypothesis related to this issue will read as follows:

Hypothesis #5: As a justice serves more terms with "unified support" from the other branches of government, his or her "extreme" score will increase; conversely, as a justice serves more terms with "unified opposition" from the other branches of government, his or her "extreme" score will decrease.

Subsequent to analysis of this hypothesis, the dependent variable will be changed to examine conservative voting scores by year; again, these values will be measured as the percent of total votes cast in a term that are classified as "conservative" in the Spaeth databases. This will afford the opportunity to examine changes in voting behavior as the party composition of the House and the Senate change on a term-by-term basis. For such an inquiry, the use of "extreme" scores would be problematic, for if a justice shifted his or her voting behavior from a moderately conservative stance to a moderately liberal stance, the "extreme" score, which only measures distance from a 50% baseline liberal/conservative score (and is useful when calculating a "career" total), would fail to account for such yearly shifts. With conservative scores as a dependent variable, a panel dataset will be created with variables that match year-by-year voting scores for each justice with measures for the party that controls Congress and the White House. This will lay the framework for a generalized least squares (GLS) random-effects time series model. A pair of rudimentary hypotheses to be tested with this research design will tentatively read as follows (hypotheses will be refined in Chapter 4):

Hypothesis #6: The voting behavior of a Supreme Court justice will vary in relation to changes in the partisan composition of Congress.

Hypothesis #7: The voting behavior of a Supreme Court justice will vary in relation to changes in the partisan composition of the White House.

If analysis of these hypotheses can demonstrate that the voting behavior of Supreme Court justices does vacillate as the arrangement of the other branches changes, then the notion of an independent judiciary might be called in question. Of course, changes in public mood and, in turn, electoral turnover, may help to drive such vicissitudes; however, Erickson et al. suggest that such changes should occur at a delay (Erickson et al., 2002, 310; see also Mishler and Sheehan,

1993, 96)—perhaps as new justices are appointed to the Court. The time series regression model used herein, though, is designed to determine if changes in voting behavior can be directly attributed to the composition of the other branches in a given term and to assess, for example, whether conservative justices are more conservative or less conservative when Republicans control Congress and the White House. Along these lines, it will be interesting to see if decisions related to social concerns (which often deal with constitutional issues over which the Supreme Court is supposed to have the "final say") present different findings than decisions related to economic concerns.

In the end, sharp fluctuations in the behavior of justices relative to changes the other branches of government could render cause for concern—especially if one is tethered to values embraced in Alexander Hamilton's *Federalist #78*, which extols the virtues of an independent judiciary. On the other hand, if the regression model shows little variation coinciding with partisan shifts, then one might submit that the judiciary has managed to insulate itself from political wrangling that pervades the other branches—at least, of course, *after* the confirmation process has played itself out.

Section 1.4.iv: "Chapter 5: Interplay Between the Executive Branch and Individual Supreme Court Justices"

The fifth chapter will extend the examination of the post-confirmation behavior of Supreme Court justices. It will do so by examining whether the voting behavior of individual justices changes in a statistically significant fashion after the appointing president has left office. This inquiry will proceed by expanding upon some specific research problems that other scholars have investigated. For example, a theory known as "acclimation effect," or "freshman effect," has precipitated assessments of whether justices behave differently at various time intervals in

their respective tenure. A common research question posed within the infrastructure of said theory might read as follows:

Does the voting behavior of a Supreme Court justice vary over time?

Research into this question has produced some support for the existence of such variation (or at the very least, has failed to falsify its presence). However, prior scholarship under the aegis of "freshman effect" literature has been plagued by a very specific inconsistency: the failure to standardize a set period of time to use as the "acclimation period." For example, some scholars claim that it takes one year for a justice to become "acclimated" to his or her role as a justice (Brenner and Hagle, 1996), and as a result, that differences in voting behavior during that year and subsequent years will be apparent. Other scholars, however, have set the "acclimation" period at anywhere from one to five years (Brenner, 1983; Hagle, 1993; Heck and Hall, 1981).

This lack of consistency, even among the same scholars in different works of their own, has abrogated any possibility for the "acclimation effect" to offer a generalizable theory about why a justice might behave differently early in his or her tenure. This dissertation will offer an alternative research design that strives to rectify the aforementioned problem. It will do so by forging a link between New Institutionalist and "acclimation effect" research. In fact, at this point in time, the future of inquiry into judicial behavior seems to lie in the ability of scholars to fashion a creative connection between two or more existing approaches—in the hope of offering a unique rendition of the factors that may influence the conduct of judicial actors. The fifth chapter attempts to offer just such an amalgamation, a blended approach to the study of judicial politics that I will classify under the heading of "allegiance effect."

Essentially, my "allegiance effect" is an attempt to unite the theories—and, in turn, the research questions—offered by New Institutionalists (who might be concerned with the relationship between justices and appointing presidents) and "freshman effect" theorists (who might be concerned with variation in voting patterns over time) into a more specific query:

Does the voting behavior of a Supreme Court justice vary after the appointing president leaves office?

As is the case for many research questions, mine has its genesis in an inconsistency that pervades prior research in a particular field of study. I will attempt to overcome that discrepancy by offering what acclimation scholars before me have not: a set time frame for the so-called "acclimation period." Specifically, I will use the term of the appointing president as the length of the "acclimation phase." From a theoretical standpoint, then, the fifth chapter will explore the issue of whether Supreme Court justices will, during their incipient moments on the Court, hold some semblance of loyalty to the appointing president. This allegiance, it follows, will manifest itself in the voting behavior of justices during the time period that the appointing president remains in office. Subsequent to the appointing president's departure, however, discernable differences in said voting behavior should, according to this "allegiance theory," become apparent. Because a reason is now being offered for why the so-called "acclimation period" is a certain length, this new theory could eventually help to explain why justices vote in a particular fashion at a given point in time—and why they vote in a divergent fashion at a different point in time. A rudimentary hypothesis derived from this theory might read as follows:

Hypothesis #8: After the appointing president leaves office, a statistically significant shift in the voting behavior of a Supreme Court justice will be discernable.

Previous analysis of the post-confirmation relationship between the executive branch and the judicial branch has focused almost exclusively on the Supreme Court's expansion or constriction of presidential power (Pritchett, 1949; Schubert, 1950; Schubert, 1953; Tanenhaus, 1956; Silverstein and Ginsberg, 1987; Yates and Whitford, 1998); it has been less concerned with the relationship between the executive branch and individual justices when it comes to the ideological direction of votes.

The work offered herein will provide quantitative research that examines the behavior of a sample of justices as it relates to changes in the executive branch. This will be done in two ways. First, voting scores from the time period that a justice serves with the appointing president in office will be compared with voting scores from terms subsequent to the president's departure. This comparison will initially be achieved with a difference-of-means *t*-test, which has been the standard technique used in "freshman effect" literature (see Hagle, 1993). Beyond that, a more sophisticated research design will also be implemented. Specifically, a panel dataset will be used to generate a GLS, random-effects time series regression model. This model will use the conservative voting score for each individual justice, for each term, as a dependent variable; it will also use an independent variable for which terms served with an appointing president will be coded as "1" and remaining terms will be coded as "0"—thereby offering a dummy variable which can be used to test for the presence of an "allegiance effect." Breaking the analysis into the aforementioned "social" and "economic" categories will also help to control for plausible alternative explanations for variation in voting behavior over time.[10]

[10] Justices Black, Douglas, Frankfurter, and Jackson will not be included in this portion of the analysis, because available databases do not incorporate data from their earliest terms, nor will justices who served under only one president.

In addition to using these primary techniques, this research design will also attempt to assess whether certain types of justices are more likely to exhibit variation in voting behavior after the appointing president leaves office. A logistic regression model will be used to accomplish this objective. The dependent variable will be the presence or absence of an allegiance effect (coded "1" or "0"), as determined by the aforementioned difference-of-means *t*-test. Independent variables will attempt to differentiate among justices based on a variety of background characteristics, including whether a justice had prior judicial experience, whether a justice was chosen after another nominee was rejected by the Senate, whether a justice was appointed by a Democrat or a Republican, whether a justice was Chief Justice, and whether a justice had previous experience as an elected political official. This type of analysis could help to produce a distinctive typology for explaining the conduct of certain classifications of justices, and could help to offer predictions for the behavior that fledgling justices (such as the newly-appointed Alito and Roberts) will exhibit after their appointing presidents leave office.[11]

Section 1.4.v: "Chapter 6; Toward a Comprehensive Model of Judicial Decision-Making / Concluding Remarks"

The final chapter will commence with an explication of a 1963 Theodore Becker lamentation that "judicial behavioralism generally has not begun to consider the Court as a court." Few scholars, he said, "have viewed the judicial decision-making process in its uniqueness," adding that "most have treated it no differently from any other decision-making process, e.g., from the street corner gang to the Congress" (Becker, 1963, 264). Today, we are certainly closer to having a more comprehensive portrait of judicial decision-making than we were at the time of

[11] Future research might wish to add an ancillary component to this analysis by recognizing whether certain combinations of characteristics could help to explain the voting behavior of those justices who significantly deviate from the expectations of appointing presidents (e.g., justices appointed by Republicans that ultimately exhibit liberal voting patterns).

Becker's declaration. The biggest reason for this is that more of the variables associated with the process of Supreme Court decision-making have been identified and empirically studied. Of course, as Segal and Spaeth note, "A model is a *simplified* representation of reality" (Segal and Spaeth, 2002, 44) designed to "explain and predict behavior" (Segal and Spaeth, 2002, 46, emphasis added). And, by adding the disclaimer that when a model "explains everything" it actually "explains nothing" (Segal and Spaeth, 2002, 86), they seem to indicate that one should not strive for a single model that incorporates all of the information that could be brought to bear on the matter of judicial behavior. What one should aspire to create, though, is a model that contains "variables [that] explain a high percentage of the behavior in question" (Segal and Spaeth, 2002, 46). To this end, the final chapter will offer a technique for combining the information analyzed in previous chapters into a comprehensive, yet parsimonious, model.

Specifically, I will suggest using the individual, year-by-year, conservative/liberal voting records of a sample of Supreme Court justices as a dependent variable. This would be easy to quantify for a wide cross-section of justices, and analyzing liberal and conservative voting patterns can have valuable explanatory and predictive power, for voting patterns represent the most visible outcome of the judicial decision-making process and offer an indication of the direction in which justices are shaping policy. Further, I will suggest studying variation in this dependent variable through the use of a GLS, random-effects time series model. Independent variables will involve a combination of the different variables offered at various points in this dissertation. This will make it possible to track whether voting behavior can be explained by pre-confirmation factors, such as the party of the appointing president, the composition of the confirming Senate, and the presence or absence of divided government—and by post-

confirmation factors, such as the length of a justice's "allegiance period" and the percentage of a justice's tenure that is served with an ideologically-compatible Congress or White House. The comprehensive model will also control for other variables that literature has described as influences on liberal and conservative voting behavior, such as age at time of appointment, prior judicial experience, political experience, and total terms served (Ulmer, 1973, 623; Aliotta, 1988, 278; Hagle, 1993, 1144).[12] Collectively, this will allow for the incorporation of attitudinal, "acclimation," and New Institutionalist concerns into one model.

Ultimately, the overall importance of generating such a model, and for explaining and predicting judicial behavior, is implicit in James Spriggs and Thomas Hansford's assertion that Supreme Court decisions "fundamentally affect the allocation of resources in society" (Spriggs and Hansford, 2006, 133), and in the Michael Heise passage invoked earlier (see page 3). The final chapter will attempt to consolidate efforts to explain and predict the behavior of Supreme Court justices, perhaps the most relevant judicial actors referenced in Heise's statement (at least in terms of having an impact on national policy making). In addition, the final chapter will distill pertinent findings from various statistical models presented herein and will expound upon the relevance of both significant and insignificant findings. Finally, it will delineate the theoretical and methodological limitations of this work (including the small sample size relative to other work in the discipline of political science), and will offer suggestions for future research in the sub-field of judicial politics (including expansion of the Spaeth databases and the search for more independent and dependent variables related to the process of judicial decision-making).

[12] Lee Epstein et al. have compiled a dataset that tracks these variables. See *U.S. Supreme Court Justices Database* in "References" section.

More specifically, the final chapter will demonstrate that the theory underlying this research can ultimately be used to assess the extent (however large or small) to which democratically-elected actors in the executive and legislative branches can shape judicial outputs via the confirmation process—as well as how individual citizens can influence this process through their voting choices. Further, this research can also be used to illustrate the degree to which justices are loyal to the mores of an appointing president or a partisan Congress, and might help to appraise whether the notion of an "independent judiciary," a sacred idea rooted in our nation's founding (see Alexander Hamilton's *Federalist #78*), is in fact apparent in our society today.

Chapter 2: The Evolution of Public Law Literature: Theories of Judicial Decision-Making

Section 2.1: Overview of the Four Major Theories of Supreme Court Decision-Making

The early work of John Burgess, whom Nancy Maveety refers to as "the father of American political science" (Maveety, 2004, 1), seems to indicate that the study of judicial politics was a central concern for political scientists during the discipline's incipient moments. In 1890, as political science became an organized field of scholarly inquiry in the United States, Burgess penned an article, entitled "Political Science and Comparative Constitutional Law," which helped to define the task of scholars concerned with the judicial branch. Within his text, Burgess differentiated "constitutional law," which dealt with the "rules of the game," from what we might call "public law," which focused on the behavior of judicial actors, particularly in terms of their relationship to "legislation and policies of particular administrations" (Maveety, 2004, 6, quoting Somit and Tanenhaus, 1982, 31). This early concern with judicial actors is implicit in Elliot Slotnick's observation that "within political science, we (the law and courts field) predate most other areas of study" (Slotnick, as quoted in Maveety, 2004, 6).

Since the time of Burgess' article, and Slotnick's era of concern, the field of public law has evolved through a number of distinct and overlapping phases that have built upon each other in some regards, yet simultaneously meandered into new intellectual terrain. In terms of identifying a consistent thread that could be woven through these periods, Maveety says that, "The field of public law, [from its earliest moments until] now, aspired to both the scientific analysis and the legally informed study of law and courts" (Maveety, 2004, 3). While some theories of judicial decision-making have focused more on the "legally informed" aspect of her statement, and less on "scientific analysis," public law scholarship in general has attempted to

explain and predict the behavior of judicial actors—including (and often, especially) Supreme Court justices. Ostensibly, four major theories of judicial decision-making have emerged from this line of research.

The first of these theories focuses on the legal constraints, such as statutory provisions and relevant precedents, which guide the behavior of judges; scholarship related to these concerns is often referred under the aegis of the "legal model." A second theory, called the "attitudinal model," essentially ignores legal matters and instead focuses on how the attitudes and policy preferences of judges impact their voting behavior. Still other realms of judicial scholarship amble into the territory of strategic interaction among the justices, and are referred to as "rational choice" accounts. Finally, when strategic behavior is analyzed in terms of interplay with other governmental actors, such analysis is often said to represent "New Institutionalist" research. This dissertation will strive to add to the body of public law literature that has emerged from these four theories. Components of each will be addressed in subsequent chapters, and collectively, they will be used to cement the theoretical foundation of an innovative series of empirical assessments that examine the voting patterns of Supreme Court justices.

As Segal and Spaeth note in their landmark explication of the attitudinal model, a model is a "simplified representation of reality" that aims to explain and predict behavior (Segal and Spaeth, 2002, 45). In keeping with this assertion, the ultimate aim of this dissertation will be to distill efforts to explain and predict the behavior of Supreme Court justices into a series of comprehensive, yet parsimonious, statistical models. In order to facilitate this process, I must

first describe, compare, and contrast the four major theories[13] of judicial decision-making. That will be the purpose of this chapter.

Each section in this chapter will begin with a general overview of the basic principles of a particular theory related to Supreme Court decision-making and will summarize recent scholarship in that domain. Subsequently, each individual section will also offer an account of the historical development of literature within that particular theory, with emphasis on seminal works. Later in this dissertation, chapters 3, 4, and 5 will combine the basic tenets of these theories in order to devise independent and dependent variables related to testable hypotheses about the voting behavior of Supreme Court justices.

Section 2.2: The Legal "Model"

Section 2.2.i: Basic Tenets of the Legal "Model"

Early research (circa. 1900-1940) into judicial behavior was classified under the rubric of the "legal model." In essence, it portrayed judges as conduits that logically and dispassionately applied the law, as if they were "mere instruments of the law," to quote Charles Grove Haines from his classic 1908 elucidation of the legal model (Haines, 1908, 221). In the words of Glendon Schubert, for such "traditionalists," the actions of judges were "described exclusively on the basis of… legal parameters" (Segal, 2004, 78), a theory that Sidney Ulmer called "slot machine jurisprudence," because it suggested that "judges read the law and applied it [in a mechanical fashion]" (Ulmer, 1974, 376). Wrightsman effectively consolidates these ideas by

[13] Although students of judicial politics will often hear these four ideas referred to as "models" (such as the attitudinal "model"), they are better described by the term "theory," for "a theory" refers to a generalization about how phenomena behave, whereas a model involves the specific, empirical testing of falsifiable hypotheses that are derived from a theory. (These distinctions are drawn from the work of Asher, 1984, Chapter 1; Friedman, 1953, 34; Segal and Spaeth, 2002, 45; and Hammond et al., 2005, 53). Within this dissertation, although the terms "model" and "theory" may be used interchangeably in referencing the work of others (for the sake of offering clarity), the distinction between the two will be clearly delineated by the final chapter.

suggesting that the legal model implies that judges "interpret the law rather than create the law" (Wrightsman, 2006, 111). In short, the legal model portrays judges as "value free technicians who do no more than discover the law" (Maveety, 2004, 2, quoting Murphy and Tanenhaus, 1972, 13). The implication of these ideas for judicial behavior is distilled in Lawrence Baum's *Judges and Their Audiences*, where he says that, "In a pure legal model, judges want only to interpret the law as well as possible" (Baum, 2004b, 5). Notably absent from these portrayals is any influence of politics or value judgments. Rogat expounds upon this thought when he notes that the legal model implies that, "The judge's techniques [are] socially neutral, his private views irrelevant; judging [is] more like finding than making, a matter of necessity rather than choice" (Segal and Spaeth, 2002, 87, quoting Yosal Rogat from "Legal Realism," which is in Paul Edwards' *The Encyclopedia of Philosophy* (1972)).

More "lenient" interpretations of the legal model suggest that "the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent" (Segal and Spaeth, 2002, 48). This statement implies that judicial behavior can be explained with painstaking examination of relevant documents or statutes. More specifically, one might infer that "the legal model proposes that judges consider what past decisions are relevant to the issue at hand, extract the direction of their conclusions, and use legal reasoning to form their judgments" (Wrightsman, 2006, 20). Of course, the primary criticism of such an idea is that "if all justices followed the legal model absolutely [assuming this is possible], it could be argued that uniformity of opinion would occur" (Wrightsman, 2006, 20). Furthermore, the "plain meaning" of statutes, constitutional phrases, and even notions such as "original intent" or "legislative intent" can be ambiguous. In addition,

precedent can normally be found to justify both sides of an argument, or, since it is a rare occurrence that the facts of two cases will match exactly, it may be easy for a justice to ignore extant precedent by "distinguishing" facts between cases. Beyond that, there may be disagreement over what the core holding of a precedent actually represents (Segal and Spaeth, 2002, 54-84). In sum, "Justices [can] rather easily avoid supporting precedents with which they disagree" (Segal and Spaeth, 2002, 310).

Consequently, if critical components of the legal model's depiction of judicial decision-making "can support either side of any given dispute that comes before the Court," then one cannot submit that the legal model meets any scientific standard of explanation (Segal and Spaeth, 2002, 86). After all, the aforementioned description of precedent cannot be seen as a "restriction" on judicial choices. This leads Segal and Spaeth to their chief criticism: the legal model does not offer falsifiable hypotheses, which are a necessity for extrapolating scientific conclusions that explain behavior (Segal and Spaeth, 2002, 46).

Section 2.2.ii: Modern Manifestations of the Legal "Model"

As the behavioral movement of the 1950s emerged, flaws in the classic, or "traditional," legal model were more readily exposed, and its line of research ceded to studies that were designed to examine how the ideologies and social backgrounds of individual judges affected their decision-making. (These were the earliest stages of the attitudinal model). Even so, a "modern" version of the legal model has survived the behavioral movement. According to Segal and Spaeth, this current version of the "legal model" has focused primarily on the notion that "the Supreme Court decides disputes before it in light of the facts of the case vis-à-vis precedent" (Segal and Spaeth, 2002, 64), or what they call "adherence to what has been decided" (Segal and Spaeth, 1993, 44). As Brisbin notes, precedent is the "linchpin of the legal model [in its modern form]" (Brisbin,

1996, 1005). These ideas were prevalent as a component of the "legal model" in its pre-1950 form, but in recent years, some scholars have attempted to derive empirical tests of those concepts in spite of the fact that, as Flango and Ducat observe, "precedents are conflicting" (Flango and Ducat, 1977, 42) and can therefore be utilized with some level of pliability by both sides in a dispute. Examples of empirical studies of precedent conformance come from Segal and Spaeth, who, in a 1996 article entitled "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices," and a subsequent 1999 book entitled *Majority Rule or Minority Will*, discern that Supreme Court justices are "overwhelmingly [not influenced by] landmark precedents with which they disagree" (Segal and Spaeth, 1996, 3; Segal and Spaeth, 1999, 8). In addition, in 2001, Spriggs and Hansford also found that "ideological incongruence between a precedent and a subsequent Court increases the chances of it being overruled" (Spriggs and Hansford, 2001, 1091), which highlights the priority that ideology seems to have over precedent.

In one of the other modern assessments of the legal model, "The Norms of Stare Decisis" (1996), Epstein and Knight examine the effect of precedent on Supreme Court decision-making. Instead of using voting records as dependent variables, they assess the nuances related to the process of forming judicial decisions, such as "attorneys' use of precedent in written briefs, justices' appeals to precedent during conference discussion, invocation of precedent in written opinions and the Court's alteration of stare decisis" (Knight and Epstein, 1996, 1018). They claim that their findings indicate "the existence of a norm favoring respect for precedent," though they admit to providing no definitive evidence of a precedential effect on decision-making as manifested in the final vote; they merely point out references to precedent in court

documents. Ultimately, they submit that a purely attitudinal explanation (which says the precedent is not at all important to justices) cannot account for justices' repeated invocation of precedent in deliberations and in written opinion. They suggest that this behavior is "consistent with a belief that a norm favoring precedent is a fundamental feature of the general conception of the function of the Supreme Court" (Knight and Epstein, 1996, 1029). Therefore, they suggest that there are factors besides preferences which drive the judicial decision-making process. The flaw with this work, though, is that it fails to empirically demonstrate that precedent has a discernable impact on that process of judicial deliberation; the authors merely show that precedent is invoked at certain junctures without offering a causal link between those invocations and a subsequent decision at the culmination of the process.

Knight and Epstein's study is the most recent in a line of scholarship that falls under the rubric of "role theory," which could be described as a contemporary extension of the legal model.[14] The "role hypothesis," as Epstein and Knight call it, is a reference to the fact that

[14] In 1968, Dorothy James offered one of the first forms of "role theory" analysis when she attempted to discern how perceptions of concepts like "adhering to precedent" or "the nature of judicial activism" affected the behavior of judges (James, 1968, 164). In the same year, Grossman hypothesized that role theory might even help to explain why certain justices voted together in blocs—with an emphasis on finding common role perceptions that explained "why they voted together" (Ulmer, 1974, 381). Ten years later, Gibson took this research a step further, and actually attempted to analyze the interplay between role perceptions and the policy preferences that were emphasized by attitudinalists (Gibson, 1978). Subsequently, Scheb, Ungs, and Hayes declared that, "Role orientations are thought to influence judicial behavior by filtering the overtly political factors (policy preferences, partisan influences, etc.) that judges permit to affect their decisions" (Scheb, Ungs, and Hayes, 1989, 427). They assessed this idea by examining questionnaires submitted to appellate judges in Florida. Through ANOVA tables, the authors found that judges with "activist role orientations" were more likely to "permit political attitudes [to influence] judicial decision-making" (Scheb, Ungs, and Hayes, 1989, 434). Scheb, Bowen, and Anderson built upon this work in 1991 with one of the most comprehensive role theory studies to date. They asked appellate judges in 48 states how they felt about over 25 different "suggestions" (such as "feelings about what role a justice should play in interpreting the Constitution") and ranked responses on an "intensity scale." This information was used to ascertain myriad dimensions of how federal judge's perceived their roles. The authors then used a regression model to test the influence of these perceptions on judicial outcomes and found that the role perceptions did in fact play a part in explaining decisions, even after controlling for policy preferences (Scheb, Bowen, and Anderson, 1991, 3). This suggests that there may be influences on judicial behavior other than "attitudes." The key to Scheb et al.'s research was the ability to generate a variety of indicators to use in defining the concept of "role perceptions." Their success in doing so was predicated on interviews with federal judges about how they perceived themselves. The difficulty

"judges' normative beliefs about what they are expected to do either act as a constraint on judicial attitudes or directly affect judicial behavior" (Epstein and Knight, 2004, 206). In the end, research driven by this idea does not necessarily negate the principles associated with the attitudinal model, but it does offer ways to assess whether other factors may interact with, or constrain, policy preferences. However, while the studies mentioned above present techniques to test for adherence to precedent, no falsifiable evidence to back the assertion that precedent impacts judicial decision-making is readily apparent.

Spriggs and Hansford attempt to offer an amalgam of the legal model and the attitudinal model in *The Politics of Precedent on the Supreme Court* (2006), where they suggest that, in certain cases, precedent can serve as a constraint on the policy preferences of Supreme Court justices, even if said precedents do not alter preferences in their entirety (Spriggs and Hansford, 2006, 130-132).[15] Richards and Kritzer also attempt to derive a "middle ground" between the legal model and the attitudinal model by suggesting that "jurisprudential regimes," or "legal frameworks that guide future decision-making" (such as the notion of "strict scrutiny"), help to mitigate the role that policy preferences play in judicial decision-making (Richards and Kritzer, 2002, 306). These "frameworks" differ from precedent in that the former are said to be a better guide for "how to treat like cases consistently" (Richards and Kritzer, 2002, 316). Richards and

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for replicating this work at the level of the Supreme Court, then, lies in the problem of accessibility—but this research may lay the groundwork for future scholarship, perhaps work that gleans relevant "role" information from the texts of confirmation hearings. Of course, one must also note that there are differences in the "role perceptions" of federal judges and Supreme Court justices, most notably because the latter cannot be overruled by a higher court and may thus view factors like precedent through a different lens.

[15] Specifically, Spriggs and Hansford use a regression model to illustrate that the "vitality" of a precedent, which is a measure that captures the difference between positive and negative interpretations of a precedent in written opinions subsequent to its articulation, can serve as a constraint on ideology—in that a justice may temper his or her preferences in the face of an especially "vital" precedent, but will be more likely to overrule an ideologically incongruent precedent if it also lacks "vitality" (Spriggs and Hansford, 2006, 97-100). However, a study that focuses on the "overruling" of precedent cannot account for instances where precedent is distinguished or ignored.

Kritzer offer this idea while simultaneously levying a criticism of the attitudinal model, suggesting that it is "tautological," in the sense that "attitudes drive decisions because every decision is made on the basis of attitudes" (Richards and Kritzer, 2002, 307). By analyzing voting patterns before and after the articulation of such "legal frameworks," they move beyond the flaws of the legal model by offering a testable theory to empirically demonstrate that the voting behavior of some justices is different after such "legal frameworks" are cultivated. They do, however, imply that both ideological preferences *and* "legal frameworks" can be used together to help explain and predict Supreme Court decision-making (Richards and Kritzer, 2002, 315). In essence, they submit that attitudes matter but are constrained by certain informal guidelines. Even so, empirical proof that judicial choices are driven solely by precedents or constitutional provisions is difficult to find—even in these modern tests. Therefore, it appears as though the basic fundamentals of the "traditional" legal model are of little use to scholars of judicial politics today—although there does seem to be some evidence that factors apart from attitudes might play a role in judicial decision-making.

Section 2.3: The Attitudinal "Model"

Section 2.3.i: Basic Tenets of the Attitudinal "Model"

Perhaps the aforementioned flaws in "traditional" legal model explain why, as the behavioral movement emerged in political science, the "attitudinal model" replaced the legal model as the "dominant research paradigm of judicial behavior for many decades" (Edwards, 2003, 6). The modern incarnation of the attitudinal model is crystallized in Segal and Spaeth's 1993 book *The Supreme Court and the Attitudinal Model* and its 2002 companion *The Supreme Court and the Attitudinal Model Revisited*. As Hagle and Spaeth note in an article that preceded the publication

of the first book, the "fundamental assumption of the attitudinal model is that the justices' votes depend on their attitudes and policy preferences," and nothing else (Hagle and Spaeth, 1991, 119). The key difference between this theory and the legal model, according to Pritchett, is that to the attitudinalist, "justices are simply motivated by their preferences, with rules such as precedent nothing more than smokescreens behind which to hide attitudes and values" (Epstein and Knight, 2004, 203) or mediums to "cloak policy preferences with legal doctrines" (Segal and Spaeth, 1996b, 1075).[16]

In analyzing the impact of attitudes on vote choices in their two landmark books, Segal and Spaeth use voting scores (i.e., if a justice casts a conservative vote in 78% of cases in a term, his or her voting score is 78% conservative) as a dependent variable. They then test this dependent variable's relationship with "measures of the attitudes or values of justices." These "independent measures" are derived from perceptions of a justice's ideology as depicted in newspaper editorials that discussed his or her confirmation hearing—a technique attributed to Segal and Cover (Segal and Spaeth, 2002, 320-321; Segal and Cover, 1989; and Segal, Epstein, Cameron and Spaeth, 1995 (who update this technique by adding "more diverse" sources)).[17] Ultimately, Segal and Spaeth find a high correlation between their "independent measures" and the voting patterns of justices (Segal and Spaeth, 2002, 323), which leads them to the milestone declaration that attitudes (or preferences) drive vote choices. And, to clearly differentiate the attitudinal

[16] Corley et. al. have suggested that Supreme Court justices have even become more likely to use references to the *Federalist Papers* to disguise their policy preferences, as they note a 400% increase in such citations since 1960, yet no indication that decisions in such cases are driven by anything but policy preferences—as both sides in disputes are often citing these documents (Corley et al., 2005, 323, 336).

[17] The creation of these "independent measures" was critical to the development of the attitudinal model, for previous research had used prior voting patterns to discern a measure of ideology and then correlated that with more recent voting behavior to suggest a link between preferences and voting behavior. In short, votes explained votes—a true tautology. Other early "attitudinal" work used "social background characteristics," like religion, party identification or appointing president's party as independent variables (see Aliotta, 1988).

model from the legal model—specifically as it pertains to Supreme Court decision-making—Segal and Spaeth note that "legal goals have no impact in the [Supreme] Court because the cases that the Court chooses to hear tender plausible legal arguments on both sides" (Segal and Spaeth, 1993, 70, as quoted in Baum, 1997, 64).

Section 2.3.ii: Evolution of the Attitudinal "Model"

To offer a more complete portrait of the attitudinal model, and to credit those scholars whose intellectual pursuits engendered its development and laid a foundation upon which Segal and Spaeth built, it is worth tracing the path which the attitudinal model followed as it evolved into its modern form. As a starting point, Segal and Spaeth themselves have suggested that the attitudinal model has its roots in the "legal realist" movement of the 1920s. They credit Jerome Frank and Karl Llewellyn as the leaders of this movement. For Llewellyn, legal realism was grounded in ideas of a "law [that] is in flux, of moving law, and of judicial creation of law" (Segal and Spaeth, 2002, 87, quoting Llewellyn from "Some Realism about Realism—Responding to Dean Pound" (Llewellyn, 1931, 1237)). Maveety, in her compilation *The Pioneers of Judicial Behavior*, adds that another "pioneer" in fostering the development of attitudinal theories was Charles Grove Haines, who she says provided the "origins" of attitudinalism in a 1922 study of judicial behavior that was published in the *Illinois Law Review*, a study which was one of the first to use mathematical methods to study judicial behavior (Maveety, 2004, 8). In making this assertion, Maveety highlights an important distinction between the attitudinal model and the legal model: an emphasis on quantitative assessments of behavior.

Attitudinal theories moved forward from their "legal realism" roots when C. Herman Pritchett offered a 1941 *American Political Science Review* article in which he observed that, "Judges are

influenced by their own biases and philosophies, which to a large degree predetermine the positions they will take on a given question. Private attitudes, in other words, become public law" (as quoted in Epstein and Segal, 2005, 3). Hammond et al. note that Pritchett's subsequent 1948 book, *The Roosevelt Court: A Study in Judicial Politics and Values*, was perhaps the original incantation of an "attitudinal model," in the sense that it was the "first to systematically examine by quantitative methods the extent to which a justice's 'liberalism' or 'conservatism' could explain his or her choices and decisions" (Hammond et al., 2005, 1). Specifically, Pritchett showed that "certain pairs of justices consistently voted the same way, whereas other pairs of justices consistently voted in opposite ways. [He] concluded that justices are 'motivated by their own preferences'" (Pritchett, 1949, xii, as analyzed in Wrightsman, 2006, 124). Baum describes the crux of Pritchett's work by noting how it implied that "the justices' positions could be explained primarily by their personal attitudes" (Baum, 2004, 59). In reality, then, C. Herman Pritchett should be considered the "father" of the modern attitudinal model, for he expressed the notion that attitudes drive judicial decision-making *and* he attempted to back this assertion with quantitative evidence such as "bloc analysis" (which examined how often certain groups of justices voted together).

Of course, one must mention that this scholarship arose out of the behavioral movement of the late 1940s, with its emphasis on "individual acts or levels of behavior rather than on institutions" (Clayton and Gillman, 1999, 23). In fact, according to Maltzman et al., "In many respects, the attitudinal approach is the culmination of the behavioral revolution as applied to the study of politics," for the behavioral approach ushered in the scientific, quantitative study of individual political actors (Maltzman et al., 2000, 11). To specifically delineate what this means,

Segal and Spaeth add that behavioralism was based on the following ideas: "1. Political science can ultimately be a science of explanation and prediction. 2. Political science should concern itself primarily, if not exclusively, with phenomena that can actually be observed. 3. Data should be quantified and 'findings' based upon quantifiable data. 4. Research should be theory oriented and theory directed" (Segal and Spaeth, 2002, 89, quoting Somit and Tanenhaus from *The Development of Political Science*, 1967, 177-78; see also Segal, 2004, 80). Pritchett's work, then, laid a foundation for examining judicial behavior with these basic behavioralist tenets as a launching point.

From that juncture, it was Sidney Ulmer who continued this line of work with a series of articles in the 1960s, including "The Analysis of Behavior Patterns in the United States Supreme Court" (Ulmer, 1962). His notable contribution in these works was the addition of factor analysis to the bloc analysis favored by Pritchett. Ulmer's work was supplemented by one of his contemporaries, Glendon Schubert. Schubert's books, *Quantitative Analysis of Judicial Behavior* (1959), *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963* (1965), and *The Judicial Mind Revisited* (1974), diversified the line of attitudinal inquiry by offering psychological explanations that could be used to demonstrate the "predictability of particular justices" in terms of their voting behavior (Wrightsman, 2006, 124). Others have noted that Schubert shared Pritchett's objective of demonstrating that "present justices are motivated by their own preferences" (Hammond et al., 2005, 30, drawing from Schubert, 1965, 5-6). Even so, Sarah Benesh refers to Schubert (and not Pritchett) as the "father of the attitudinal model" (Benesh, 2004, 116), largely because Schubert relied on the work of psychologist Clyde Coombs to provide a theoretical grounding for behavior implied by the

attitudinal theory. Beyond that, Schubert used more advanced statistical methods than his predecessors, such as the implementation of scaling techniques to see if justices could be "ordered" based on their preferences (Segal, 2004, 81). He also linked various techniques together to illustrate that certain case facts were likely to lead to certain types of voting behavior based on a justice's values toward specific stimuli (Segal and Spaeth, 2002, 89-90); in simpler terms, then, "right to counsel decisions were [based on the justice's] attitudes toward the right to counsel" (Segal, 2004, 81). Overall, this blend of theoretical and statistical advances makes Schubert an important figure in the growth of the attitudinal model.

In 1965, an equally important figure, Harold Spaeth, cemented the underlying theory of the attitudinal model when he offered *An Introduction to Supreme Court Decision-Making*, a work in which a litany of reasons were offered to explain why the attitudinal model was a feasible explanation for the behavior of Supreme Court justices. Specifically, Spaeth suggested that, "[Supreme Court] justices are freer than other political actors to base their decisions solely upon personal policy preferences," primarily because of the protection afforded by life tenure and the fact that no higher court could overrule their decisions (Benesh, 2004, 118). In 1972, Spaeth, whom Benesh describes as the attitudinal model's "dutiful son" (Benesh, 2004, 116), penned a follow-up book entitled *An Introduction to Supreme Court Decision-Making: Revised Edition*. Within its text, he took the important step of providing an actual definition for an attitude: "[a] relatively enduring interrelated set of beliefs about an object or situation" (Segal and Spaeth, 2002, 91). Building off this definition, in a 1975 article entitled "The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision-Making," Spaeth, with the assistance of David Peterson, went on to show that individual Supreme Court cases could be grouped into

issue areas (e.g., criminal procedure); within these areas, they suggested, attitudes could be said to explain a justice's behavior (Segal and Spaeth, 2002, 91)—and with that assertion, a major advance in the development of the attitudinal model was proffered.

During the 1970s, though, equally important work was being prepared by Beverly Blair Cook, an individual who must also be seen as a key figure in the progression of the attitudinal model. Her 1971 work "The Socialization of New Federal Judges," published in *Washington Law Quarterly*, and her 1973 article "Sentencing Behavior of Federal Judges," published in *University of Cincinnati Law Review*, discuss how the "socialization" and the "life experiences" (e.g., "local culture") of judges shaped their behavior. In short, she attempted to delineate from where the attitudes that drove policy preferences were derived in the first place (Epstein and Mather, 2004, 176-178).

For Segal, it was around this time period (the mid-1970s) that the "major theoretical advance to the attitudinal model" arrived (Segal, 2004, 87). Specifically, the 1976 publication of *Supreme Court Decision-Making* by David Rohde and Harold Spaeth helped to demonstrate "why [Supreme Court] justices are able to engage in attitudinal behavior" (Segal and Spaeth, 2002, 92). In that work, Rohde and Spaeth added an economic component to the line of attitudinal research by suggesting that "[Supreme Court] decisions depended on goals, rules, and situations" (Rohde and Spaeth, 1976, 71, as quoted in Segal and Spaeth, 2002, 92; see also Segal, 2004, 87). More precisely, they focused on the fact that justices had policy goals. They also noted that the "rules" of the Court allowed its justices to pursue these goals without significant constraints; those "rules," as intimated earlier, included the aforementioned life tenure, the lack of electoral accountability, the ability to control its own docket, and the lack of a higher court to

overrule decisions (Segal and Spaeth, 2002, 92). In a sense, Rohde and Spaeth were portraying Supreme Court justices as rational actors, but unlike more recent rational choice applications to judicial behavior (as Section 2.4 will illustrate), Rohde and Spaeth implied that the only true rational choice for a Supreme Court justice was to let his or her attitudes guide vote choices, an idea evident in their declaration that Supreme Court justices were free to "base their decisions solely upon personal policy preference" (Rohde and Spaeth, 1976, 72; Wrightsman, 2006, 124). So, while early attitudinal literature focused on things like voting blocs or background characteristics, the newer approaches ushered in by Rohde and Spaeth focused more narrowly on the impact that preferences had on the individual voting behavior of justices.

While this focus on the individual justice was an important development, because statistical tools like scaling techniques and bloc analysis used past votes to explain future votes, it wasn't until the 1980s that the so-called "problem of circularity" was resolved. Therefore, the key advance in the attitudinal model, for this writer, arrived with the development of independent, a priori, measures of ideology. Many credit Segal and Cover for taking this important step by generating measures of ideological values for Supreme Court justices that were based on editorials penned in many of the nation's leading newspapers. In Segal and Cover's 1989 study, words that described justices in these editorials were used to create an index that rated those justices on a liberal-conservative continuum. For 18 justices, these values were then correlated with actual votes in Supreme Court cases (which were coded as liberal or conservative) and found to match at a high correlation rate of .80 (Segal and Cover, 1989, 565, as discussed in Wrightsman, 2006, 125).

Although this technique was critical for the attitudinal model to achieve widespread credibility, in reality, I would submit that it is David Danelski who deserves credit for being among the first to address the problem of circularity in the attitudinal model. Specifically, in a 1966 article entitled "Values as Variables in Judicial Decision-Making: Notes Toward a Theory," which appeared in *Vanderbilt Law Review*, he used analysis of public speeches to derive a "measure of attitudes independent of the justices' votes" (Danelski, 1966, 721-740; Walker, 2004, 263). This content analysis was then used to predict differences in voting behavior between Justice Butler and Justice Brandeis in economic cases during the 1935 and 1936 terms (Walker, 2004, 263).

Whether one credits Danelski or Segal and Cover for isolating "external" measures of attitudes, in 1993, Segal and Spaeth built upon much of the aforementioned research and offered the seminal work in the development of the attitudinal model: *Supreme Court and the Attitudinal Model*. In this book, they succinctly distilled the essence of their model by suggesting that judge's decisions are "based on the facts of the case in light of the ideological attitudes and values of the justices" (Segal and Spaeth, 1993, 32). They updated this book in 2002 with the publication of *Supreme Court and the Attitudinal Model Revisited*.

In sum, their version of the attitudinal model suggested that, "The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, 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; Segal and Spaeth, 2002, 86). Their empirical tests of the attitudinal model used Segal-Cover scores to create an "exogenous" measure of policy preferences, or attitudes. These measures

were then compared to the civil rights and civil liberties "voting scores" of individual justices for cases between 1953 and 1999. This comparison yielded a correlation level at .76 with an R-squared of .57 (Segal and Spaeth, 323, 2002). Clayton summarized this research by observing that, "Analyzing Supreme Court decisions over a thirty-year period, Segal and Spaeth found that justice's votes within a particular issue or policy domains approximate a 'unidimensional structure' (that is, justices voting patterns remain stable over time), and that justices voting preferences correspond closely to their *a priori* policy preferences" (Clayton and Gilman, 1999, 24, as quoted in Wrightsman, 2006, 120). In other words, the attitudinal model implied that "votes reflect a long history in the individual's development of a specific ideological perspective" (Wrightsman, 2006, 120), and therefore, other factors, such as law and precedent (or even the strategic considerations that will be discussed in subsequent sections) were irrelevant to the attitudinal scholar—whether he or she toiled in the era of Llewellyn, the era of Pritchett, the era of Schubert, or the era of Segal and Spaeth.

Section 2.3.iii: Strengths and Weaknesses of the Attitudinal "Model"

There are several institutional factors (or norms) that favor the attitudinal model's application to the Supreme Court—as the previous section has highlighted. To summarize, Supreme Court justices cannot be overruled, they decide difficult cases for which precedent can be cited on both sides, they have life tenure, and they don't seek higher office (Wrightsman, 2006, 124; Rohde and Spaeth, 1976; Segal and Spaeth, 1993; Segal and Spaeth, 2002). The model's strengths also include the fact that it offers testable propositions of its general theory.

Some of its limitations, though, are outlined by Hammond et al., who note that a flaw with the attitudinal model is that it ignores the earlier stages of decision-making, and may only be "relevant to the final vote" (Hammond et al., 2005, 47). Epstein and Knight add that the

attitudinal model "does not contemplate strategic interaction over votes" (Epstein and Knight, 1998, 57, as quoted in Hammond et al., 2005, 50). Ultimately, Hammond points out that the final vote is actually "a vote about an opinion—a majority opinion, a special concurrence, [or] a dissenting opinion—written by one or more of the justices" (Hammond et al., 2005, 50). As a result, they find it "difficult to avoid the conclusion that the justice's final votes may not be accurate indicators of their true preferences" (Hammond et al., 2005, 50). However, one must note that Hammond et al. do concede that chapters 6-9 of *Supreme Court and the Attitudinal Model Revisited* indicate that justices could act strategically during the certiorari process. In fact, Segal and Spaeth themselves are quick to point out that the purest form of the attitudinal model only holds in one situation: the final vote (Segal and Spaeth, 2002, 96).

Even so, Hammond et al. persist in suggesting that "certainly, justices engage in strategic behavior in certiorari voting, and just as certainly, opinion assigners pay careful attention to ideological proclivities when handing out assignments," adding that "nothing in the attitudinal model, which was developed explicitly to explain the decision on the merits, [indicates that] these factors [are] to be sole explanations of the justice's behavior at other stages" (Hammond et al., 2005, 52; see also Segal and Spaeth's symposium paper: *Supreme Court and the Attitudinal Model*, 1994). The attitudinal model's inability to explain such "early" behavior and its narrow focus on the final vote choice, then, represent some of its primary flaws. Accordingly, this dissertation will attempt to incorporate, as independent variables, those factors that might influence behavior leading up to the final vote (even though the final vote will remain the key dependent variable in this study).

Benesh also succinctly points out another deficiency when she notes that the attitudinal model "doesn't explain unanimous cases" (Benesh, 2004, 124). After all, unanimous cases would imply ideological congruity among actors that have disparate ideological proclivities (as indicated by the exogenous measures extolled by attitudinal proponents). For this reason, all statistical models created herein will examine both unanimous and non-unanimous case, in the hope of offering a more comprehensive depiction of Supreme Court decision-making.

More flaws with the attitudinal model are delineated by Clayton, who attacks the underlying methodology used in the formation of Segal-Cover scores. "Newspaper editorials," he says, "provide only indirect measures of a justice's personal policy preferences" (Clayton, 1999, 25), and thus, might not serve as adequate a priori measures of preference. Even if one grants that these subjective measures are accurate, Clayton notes that the attitudinal model would still lead the discipline of political science to a point at which "judicial politics is thus reduced to describing how the a priori policy preferences of individual justices produce particular decisional outcomes on the Court" (Clayton, 1999, 29). The use of multivariate and time series regression, though, (techniques which will be utilized herein), could help to allay some of Clayton's fears by providing a more sophisticated statistical analysis of myriad factors that can play a role in influencing voting behavior; such tools would represent an advance over the correlation data prominent in Segal-Cover score analysis.

However, this dissertation will adhere to Segal's assertion that "no serious scholar of the judiciary [now] denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges' ideology" (Segal, 1999, 237). Of course, his inclusion of the modifier "partially" may provide an opening for other theories to propose alternative

elucidations of judicial decision-making. Such alternatives may hold the key to offering scholars of judicial politics a wider array of independent variables to include in regression models that are designed to explain voting behavior. This idea derives intellectual traction from the fact that even two of the attitudinal model's biggest proponents are forced to concede that "the attitudinal model fails to consider internal and external influences on the Court" (Segal and Cover, 1989, 562); this dissertation, on the other hand, will speak to just such influences (particularly the "external" ones).

Section 2.4: Rational Choice (or Strategic) Theories of Judicial Decision-Making

Section 2.4.i: Basic Tenets of Rational Choice Theories

Perhaps a seminal work in precipitating research into those "other internal and external influences" was J. Woodford Howard's 1968 article "On the Fluidity of Judicial Choice." "Fluidity," he implied, incorporated the fact that judges can, and do, change their votes at various points during the decision-making process—from certiorari votes to initial conference votes to final votes (Maveety and Maltese, 2004, 232). For Howard, such changes meant that justices could not be described as actors who merely voted based on their attitudes, for if the process were that simplistic, vote shifting would not occur. The underlying implication, then, was that the flexible nature of voting behavior implied that it was driven by factors besides attitudes (because attitudes should not be subject to such capricious vicissitudes).

Hagle and Spaeth answer this criticism of the attitudinal model in a 1991 article (Hagle and Spaeth, 1991, 126), and Segal and Spaeth do the same in their 2002 book. In sum, both pairs suggest that fluctuation between conference votes and final votes is not extremely prevalent, with the latter offering empirical evidence from a roughly 40-year sample of cases (Segal and Spaeth,

2004, 285).[18] Even so, some vacillation is apparent in Segal and Spaeth's discussion, and their response notwithstanding, scholars have used "fluidity" as an impetus to generate other theories about the nature of Supreme Court decision-making—including ones that examine the strategic dynamics of group interaction (see Maveety and Maltese, 2004, 230).

Rational choice theory is one of these approaches. Its principles have sprung from economic theories which suggest that actors are "able to order their alternative goals" (Segal and Spaeth, 2002, 97), that they will then make choices to achieve those goals, and that those choices will depend upon the actions of others (Epstein and Knight, 2004, 200). The rational choice dimension of judicial analysis is succinctly summarized in Lawrence Baum's article "What Judges Want," where he notes that "judges hold a multiplicity of goals that are potentially relevant to their behavior" (Baum, 1994, 760). These goals, as Gibson states, "can lead to bargaining and interaction [among the justices]" (Gibson, 1983, 30).[19] Further, in assessing the rational choice work of Danelski, Walker crystallizes the basic tenets of this concept by noting that "individual [justices] cannot achieve their… policy goals by acting alone" (Walker, 2004, 252). Therefore, the collective statements of these rational choice theorists seem to indicate that justices must find ways to act strategically in order to have their preferred outcomes become manifest in society at large.

As a result, it is important to consider Wrightsman's assertion that "central to the rational choice model is the phenomenon of 'strategic voting,'" a phenomenon which can be defined as

[18] They provide their own statistical assessment of the Burger Court (1969-1985), and then rely on the work of Saul Brenner for analysis of earlier terms; the two works which are highlighted are Brenner's "Fluidity on the Supreme Court, 1956-1967" (1982) and his later article, "Ideological Voting on the Vinson Court: A Comparison of the Original Vote on the Merits with the Final Votes" (1989).

[19] Along these lines, Ulmer was one of the first to incorporate the fact that "individuals clearly behaved differently in group settings than on their own" as a relevant factor in the analysis of judicial decision-making (Bradley, 2004, 105).

voting which is not necessarily motivated by policy preferences, but rather, is "congruent with the achievement of long-term goals," such as seeing a judicial decree implemented "in a fashion that comes closest to a justice's desired result" (Wrightsman, 2006, 132). In essence, the differences between this idea and those espoused by the attitudinal model are significant, yet not absolute—in the sense that rational choice theories may be compatible with the attitudinal model in certain situations. For example, while conceding that justices at the level of the Supreme Court are at least "partially motivated" by a priori attitudes (as the attitudinal model would posit), Wrightsman adds that "votes are behavior, and any complex behavior has many causes, many of them extending beyond attitudes, values, and ideology" (Wrightsman, 2006, 131). Hammond et al. even state that the rational choice model concedes the basic attitudinalist tenet that "justices are usually described as having preexisting preferences over particular legal policies;" however, they add that a justice goes about "pursuing his or her most preferred policy by making particular kinds of choices" (Hammond et al., 2005, 11). The implication here is that attitudes do drive behavior—but in more complicated ways than the attitudinal model intimates.

In *The Puzzle of Judicial Behavior*, Lawrence Baum adds that the attitudinal model is limited in its depiction of justices as "single-minded," an emphasis which he criticizes for its failure to take into account a justice "deviating from those preferences for strategic reasons" (Baum, 1997, 25; also in Wrightsman, 2006, 134). Herein lies a key precept of the rational choice model of judicial decision-making: sometimes a justice may vote in a manner inconsistent with his or her attitudes (or policy preferences) in the hope of achieving some broader objective (often related to opinion language or policy implementation).

In terms of crystallizing and empirically testing this idea, the seminal modern texts in the domain of rational choice theory and judicial behavior are Lee Epstein and Jack Knight's *The Choices Justices Make* (1998) and Forrest Maltzman, James Spriggs, and Paul Wahlbeck's *Crafting Law on the Supreme Court* (2000). These books, and articles spawned from them, have illustrated a number of diverse factors that may influence Supreme Court decision-making. For example, Maltzman et al. note that, "Supreme Court decisions are crafted in a collaborative environment among the justices, and thus justices act strategically to get opinions that… closely mirror their policy expectations" (Maltzman et al., 2000, 93). The words "closely mirror," of course, seem to indicate that justices will not always vote their *exact* preferences.

By examining such strategic behavior, scholars have found that, under certain conditions, a justice may "pass" during a conference vote to see how others will vote (Johnson, Spriggs, and Wahlbeck, 2005, 349)—perhaps to gain relevant information needed for making a rational choice regarding policy objectives.[20] Other scholars have also demonstrated that judges will use responses to circulating opinion drafts, coupled with threats not to join a majority coalition, as a means to alter the language (and policy implications) of a written opinion (Spriggs, Maltzman, and Wahlbeck, 1999, 485). Some scholars have even assessed the matter of "voting for damage control," which involves subverting one's true preferences for the chance to join a majority and thereby influence the way an opinion is worded (Arrington and Brenner, 2004, 565).

An article from Bonneau et al. in the October 2007 *American Journal of Political Science* combined many such examples in a search to understand "how and why the Court selects the

[20] It is important to note that from a rational choice perspective—a justice's choices are dependent upon "perfect and complete information" (Epstein and Knight, 2000, 650), particularly "expectations about the choices of other actors" (Epstein and Knight, 2004, 200).

content of its opinions" (Bonneau et al., 2007, 904). Bonneau et al. use a game theoretic model to show that it "matters who writes the opinion" and that the ideology of an opinion involves a compromise between the "author's ideal point and the ideal point of the median justice [in the winning coalition]" (Bonneau et al., 2007, 904). In addition, other rational choice research examines the use of "strategic" certiorari votes by justices who simply want to prevent certain issues from reaching the Court in the first place—out of fear that an opinion contrary to their policy preferences may result (Silverstein and Ginsberg, 1987, 373). Again, policy preferences are not absent from the discussions offered herein, but they are modified through their interplay with other variables that are emphasized by the rational choice scholar.

Ultimately, a rational-choice theorist would stress the fact that "the opinion sets policy" and would imply that a justice will attempt to exert an influence on, or to directly control, the opinion-writing process (Spriggs, Maltzman and Wahlbeck, 1999, 503). At this point, it is also important to mention that, in order to move beyond analysis of the final vote, rational choice scholars have been forced to use new "tools" to help them examine the "Court as a court" (Becker, 1963, 266). These include the "use of justice's docket books and private papers" as well as the examination of draft opinions (Maveety and Maltese, 2004, 231). Alpheus Thomas Mason actually found value in the use of the "dissenting opinion as an educational tool" (Davis, 2004, 320). Perhaps this is because, as Kritzer notes, "What justices say in their opinions is more likely to be important in the long run than… who wins or loses the case" (Kritzer, 2004, 407).

Overall, rational choice models do not obviate the basic findings and principles of the attitudinal model; the former merely allow for the consideration of a more diverse set of goals

than simply voting one's preferences. While this has allowed rational choice theory to spawn a variety of models for assessing the behavior of Supreme Court justices (including qualitative assessments), the use of the plural rational choice "models" tells us that it has not offered a unified, parsimonious paradigm. Nevertheless, it has identified a number of factors other than attitudes that may be relevant for analyzing Supreme Court decision-making. It is up to future research to find a way to consolidate these findings.

Section 2.4.ii: Evolution of Rational Choice Literature

In order to ascertain a clearer understanding of where future rational choice judicial research is heading, it may be useful to assess the evolution of this type of scholarship. In terms of general political science literature, classic rational choice texts are Anthony Downs' *An Economic Theory of Democracy* (1957) and William Riker's *The Theory of Political Coalitions* (1967) (Epstein and Knight, 2004, 205). While multiple definitions of rational choice theory may pervade the social sciences today, in short, it is an economic concept applied to the behavior of human beings. Specifically, rational choice theory attempts to explain the behavior of political actors through a model known as "economic man" (Ostrom and Ostrom, 1971, 209). Essentially, this theory operates on the following assumptions: individuals are self-interested; they can rank all known alternatives available to them in a given situation; they can choose the best alternative for their interests (which means that they are utility-maximizers); and, their individual behavior will aggregate to collective action (Ostrom and Ostrom, 1971, 205) (with the last idea described elsewhere as "methodological individualism" (Fredrickson and Smith, 2003, 187)).

According to Epstein and Knight, if these components of rational choice theory were made specific to the behavior of justices, they might read as follows: Supreme Court justices are policy

oriented; they act strategically to further their own goals; they can have multiple goals (which is a clear break from the attitudinal model); and, their interactions are structured by institutions (Epstein and Knight, 2004, 200-204). Embedded in these statements are two possible "frames" for rational behavior: the first is interaction with other justices sitting on the Court, and the second is interaction with actors in the other institutions that are responsible for implementing judicial decisions (e.g., the president or legislators). Ultimately, it seems as if the majority of rational choice scholarship has been concerned with the former, while the latter has formed the crux of New Institutionalist literature; the former will be discussed in this section, while the latter will be discussed in the subsequent section (Section 2.5).

Walter Murphy's 1964 book *Elements of Judicial Strategy* is widely regarded as a critical text in the genesis of rational choice literature as it applies to judicial behavior (Epstein and Knight, 2004, 205). However, without detracting from the importance of this work, it is imperative to note that at least one scholar has suggested that Charles Beard's *An Economic Interpretation of the Constitution* (1913), which "portrayed both the Framers and subsequent judges as consciously using judicial review as a device to secure economic privileges for the propertied class," was actually the first work to address the notion of strategic behavior on the part of justices (Clayton, 2004, 306). Beyond that, two judicial articles that preceded Murphy's text could be said to contain elements of rational choice theory. Specifically, a 1960 conference paper from David Danelski examined the role that the Chief Justice could play in influencing the vote choices of other justices, and a 1963 article from Tanenhaus et al., entitled "The Supreme Court's Certiorari Jurisdiction: Cue Theory," examined what factors lead justices to grant certiorari in the first place (see Carp, 2004, 148 for further discussion of these early works).

Nevertheless, it was Murphy's 1964 text that crystallized the basic principles that would come to define rational choice theories of judicial decision-making. In simplistic terms, according to Murphy, "Justices were political beings, they have public policy goals, they want to see certain policies established or affirmed, and they act to achieve these goals" (as quoted in Wrightsman, 2006, 135). Murphy backed these assertions with anecdotal evidence, but no substantive research or quantitative models. According to Hammond et al., the "central purpose" of Murphy's book was merely to address the following question: "How can a justice of the Supreme Court most efficiently utilize his resources, official and personal, to achieve a particular set of policy objectives?" (Hammond et al., 2005, 29, as derived from Murphy, 1964, 3-4). In approaching this query, Murphy used Court records and the justices' personal papers to evaluate the dynamics that molded vote choices from the certiorari vote through judicial conferences to the final culmination of a written opinion—essentially to highlight the fact that a variety of influences played a role in a justice's arrival at the ultimate destination: a final vote.

Even so, as proponents of the attitudinal model began to churn its quantitative research during the 1970s and 1980s, some have suggested that the "strategic" accounts of Murphy, Howard and others were "essentially set aside" (Wrightsman, 2006, 135; Clayton and Gillman, 1999, 282), perhaps because of the paucity of empirical evidence derived from them. However, there were isolated attempts to keep this line of inquiry alive. For example, two articles from David Rohde in 1972 offered quantitative approaches to studying rational choice theory. In "Policy Goals and Opinion Coalitions on the Supreme Court," Rohde, by drawing on Luce and Raiffa's *Games and Decisions* (a 1957 primer on game theory), used scaling techniques—the preferred tool of many early attitudinal scholars—to assess conditions that led to minimum winning coalitions (or 5-4

decisions) (Hammond et al., 2005, 55). Further, in a subsequent 1972 article, "Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court," Rohde used scaling techniques to analyze whether justices assigned opinions to those ideologically closest to themselves (Brenner, 2004, 270-283). Rohde was not entirely alone in examining these concerns during the 1970s, as Sidney Ulmer's 1979 article "Researching the Supreme Court in a Democratic Pluralist Society" also emphasized the need for researchers to look beyond the final decision (Bradley, 2004, 111). Even so, a discernable "drought" in judicially-based rational choice literature is evident during the ensuing twenty years following the publication of this piece.

Eventually, it was Lee Epstein and Jack Knight's 1998 book, *The Choices Justices Make*, which proved to be a landmark volume for resuscitating the application of rational choice theory to judicial behavior. This work focused on the fact that:

> [Supreme Court justices] are not unsophisticated characters who make choices solely on their own political preferences. Instead, justices are strategic actors who realize that their ability to achieve their goals is dependent upon a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act. In other words, [their] choices can best be explained as strategic behavior, not solely as responses to either personal ideology or apolitical jurisprudence…. The law, as it is generated by the Supreme Court, is a long-term product of short-term strategic decision-making (Epstein and Knight, 1998, xiii, also quoted in Wrightsman, 2006, 135).

Within this statement, Epstein and Knight delineate the key tenets of their rational choice purview: justices make choices to achieve certain goals; justices act strategically in that their choices depend upon what they expect other actors to do; these choices are constrained by the institutional setting in which they are made (Epstein and Knight, 1998, 10-11; Wrightsman, 2006, 136). Ultimately, Epstein and Knight delineate the scope of these choices when they

imply that "justices have to be strategically rational in all aspects of the Court's decision-making process [from the grant of certiorari to the assignment of opinions to coalition formation to the final vote] if they are going to pursue their most-preferred policies" (Hammond et al., 2005, 58).

In their 1998 book, Epstein and Knight are, for the most part, content to offer theories and analysis of individual case studies—but they do provide some quantitative work to back their assertions. This includes, for example, a table entitled "Changes in Select Landmark Cases," which cites justice preferences in three categories: "First Draft," "Reaction to First Draft," and "Published Opinion." This table is designed to highlight the fact that justices will shift their preferences at different stages of deliberation (Epstein and Knight, 1998, 100-105). Another example of Epstein and Knight's empirical work is a table which illustrates the probability of a particular justice being assigned a majority opinion, based on final vote count (Epstein and Knight, 1998, 129). Their sources for the information contained in these tables include analysis of the Court's public records and the voting records of individual justices (Wrightsman, 2006, 137), as well as assignment sheets, docket sheets, circulation records and, most notably, private papers donated by Justices William Douglas, Thurgood Marshall, Lewis Powell, and William Brennan (Maltzman et al., 2000, 26). It is important to note, though, that the few statistical examples which are offered in *The Choices Justices Make* are themselves specific to cases that occurred during the Burger Court, and thus have limited external validity.

However, in spite of their small quantity of empirical findings, Epstein and Knight's conceptual declarations are noteworthy for cementing the foundation of future empirical research in rational choice judicial literature. Further, it is important to remember that they were essentially reviving an inert theory in judicial politics, one that had been dormant for nearly

twenty years. Perhaps this is why the opening declaration to their work suggests that, "The primary purpose of our book is to develop a conception of judicial decision-making" (Epstein and Knight, 1998, xiv), a statement they later amend with the caveat that theirs is not "a book… about complete explanations" (Epstein and Knight, 1998, 18). Epstein and Knight also note that, "This book marks a beginning, not the end" (Epstein and Knight, 1998, 184) and they express satisfaction in having demonstrated that, "Strategic rationality is a plausible approach to study the range of judicial choices" (Epstein and Knight, 1998, 182).

In short, the most important idea that arises from this book is nestled in the following statement: "Strategic decision-making is about *interdependent choice*; an individual's action is, in part, a function of her expectations about the actions of others" (Epstein and Knight, 1998, 12). Those "others" could refer to both other members of the Court or to other actors in government (although, as mentioned earlier, rational choice accounts generally focus on the former, while New Institutionalist accounts focus on the latter). Ultimately, in either case, a "strategic" justice must engage in "forward thinking," in the sense that he or she must "pay some heed to the preferences of others and the actions they expect others to take" (Epstein and Knight, 1998, 79). That is the essence of Epstein and Knight's message in *The Choices Justices Make*.

In *Crafting Law on the Supreme Court* (2000), Maltzman, Spriggs and Wahlbeck expound upon the work of Epstein and Knight. To highlight what "strategic behavior" in the context of judicial politics means to them, they open with a discussion of *Pennsylvania v. Muniz* (496 U.S. 582, 1990), in which the Court ruled that even though a drunk driving suspect had not been given his Miranda Rights prior to interrogation, prosecutors could still present, at trial, a videotape that showed him speaking incoherently during questioning. The Court held that this type of evidence

was akin to physical evidence, such as blood at a crime scene, rather than a self-incriminatory statement that deserved protection under the Fifth Amendment. In effect, this was described as a "routine booking question exception" to the Miranda Rights. The unexpected occurrence for many Court observers was that the opinion in this case was written by the liberal Justice Brennan, who had supported the government in only 28% of Miranda-based cases during his long tenure on the Court. He explained this decision by saying that, "I made the strategic judgment to concede the existence of an exception, but to use my control over the opinion to define the exception as narrowly as possible." He added that, "If Sandra had gotten her hands on the issue, who knows what would have been left of Miranda (Maltzman et al., 2000, 3-4; Wrightsman, 2006, 137).

Essentially, in this case, Brennan was acting in line with the following principle: Justices are likely to support a "ruling that comes close to their preferences than to see their colleagues [or actors in other branches of government] take positions that move policy well away from their ideal [position]" (Wrightsman, 2006, 153-154, paraphrasing Epstein and Knight, 1998, 13). The underlying theory here (one that I will use in forming statistical models later in this dissertation) is that "a justice must respond to constraints placed [upon] him or her" (Maltzman et al., 2000, 153).

Maltzman et al. address this idea by examining conference papers, private papers, and docket notes from the Burger Court (as Epstein and Knight did in *The Choices Justices Make*). Their descriptive analysis of this information leads them to assert findings like the following: "Court opinions matter," largely because they create "expectations about future Court behavior and sanctions for noncompliance," and thereby "have implications for the behavior of private parties

and decision makers in all three branches of government" (Maltzman et al., 2000, 5). This focus on the opinion is an important component of rational choice literature in the field of judicial politics, a fact which Rohde and Spaeth denoted two decades earlier when they declared that, "The Opinion of the Court is the core of the policy making power of the Supreme Court" (Rohde and Spaeth, 1976, 172). In *Crafting Law on the Supreme Court*, the authors extend the concern for written opinions by attempting to offer explanations that are applicable to all four stages of the decision-making process on the Supreme Court: opinion assignment, strategic responses to the first draft, "accommodation" of other justices' views, and "coalition formation" among justices (Maltzman et al., 2000, vii).

Unfortunately, in terms of deriving findings with any significant level of external validity, their work is limited in that it addresses singular cases, and beyond that, it is difficult for any scholar examining these stages of decision-making to generate variables that accurately quantify actions like "accommodation" or "bargaining." Those are not easily-coded variables like "Chief Justice" or "Democratic appointee" (Maltzman et al., 2000, 154)—and as a result, it is difficult to make findings from Maltzman et al.'s "four-stage decision process" applicable to a wider range of situations.

Nevertheless, Maltzman et al. are able to find statistical evidence that a Chief Justice is more likely to assign a case opinion to a distant ideological counterpart as the size of the initial majority coalition in a conference vote gets smaller (Maltzman et al., 2000, 36). They also note that the smaller the concurrence at conference, the more likely it is that a justice will circulate a "wait statement," dissent, or concurrence (Maltzman et al., 2000, 73). In addition, they determine that opinion writers working on behalf of small coalitions will be more likely to

accommodate suggestions from colleagues (Maltzman et al., 2000, 101). Finally, they demonstrate that a justice will be more willing to join the majority if he or she is ideologically closer to the opinion author—with controls for political salience, caseload, proximity to the end of the court's term, and years of tenure included in this study (Maltzman et al., 2000, 133).

The authors describe these findings as noteworthy because their information paints a portrait of justices who are "not deterministically responding to psychological or sociological forces" (Maltzman et al., 2000, 13); in other words, justices are not just voting their attitudes, nor are they simply following precedent. However, the authors do concede that justices ultimately "prefer opinions that reflect their policy preferences" (Maltzman et al., 2000, 17). In fact, in attempting to relate their ideas to those of the attitudinal model, Maltzman et al. suggest that "preferences influence the choices justices make as the Court crafts its opinions," but add that "preferences are not omnipotent" (Maltzman et al., 2000, 151). On the whole, then, they do not negate the underlying principles of the attitudinal model—and they even note that Spaeth himself has admitted that non-attitudinal variables may play a role in opinion assignment and opinion writing (Maltzman et al., 2000, 151). Maltzman et al. would add that, "A strategic justice is one who pursues his or her policy preferences within the constraints determined by the interdependent nature of decision-making on the bench" (Maltzman et al., 2000, 18). Therefore, the rational choice approach can be seen as merely delineating parameters within which the attitudes of a policy-seeking justice are limited, but not vitiated. At the same time, rational choice accounts travel beyond the boundaries of the attitudinal model in the sense that the former take into account the shifting of preferences that may occur during the process of judicial decision-making (Maltzman et al., 1999, 59).

Section 2.4.iii: Criticisms of Rational Choice Theories as Applied to Judicial Politics

Subsequent to the publication of *Crafting the Law*, though, there has been a gap in rational choice literature related to judicial politics. Hammond et al. view their book, *Strategic Behavior and Policy Choice on the Supreme Court* (2005), as a continuation of the line of research spawned by *The Choices Justices Make* (1998) and *Crafting the Law* (2000). Hammond et al. note that Epstein and Knight (1998) provide a theoretical justification for why strategic behavior occurs within the Court, and that Maltzman et al. (2000) go a step further by offering some empirical tests of hypotheses derived from those theories (Hammond et al., 2005, 60). Hammond et al.'s contribution, then, is the creation of a formal model which accounts for strategic behavior through all stages of decision-making: the grant of certiorari, the conference vote, opinion assignment, coalition formation, and the final vote (Hammond et al., 2005, 231-237). However, while they offer the framework of such a model, they do not provide any empirical tests of it. Further, all three works mentioned in this paragraph are concerned exclusively with the internal dynamics of the Court, and the use of formal models is likely to further narrow the focus to individual cases, or lines of cases—which is perhaps why Epstein and Knight suggest that "strategic behavior is a broader and more extensive phenomenon than what can be captured by formal equilibrium analysis" (Epstein and Knight, 1998, 186; Hammond et al., 2005, 58).

Future analysis, then, will need to locate appropriate statistical tools for capturing strategic behavior among the justices, and will also need to generate appropriate variables for conceptualizing complex notions, like the aforementioned "bargaining," "passing," and "accommodating," that rational choice scholars have come to describe as inherent to the process of Supreme Court decision-making. The subsequent section will discuss strategic behavior

between justices and actors in the other branches of government, and will reveal that the creation of variables which account for that type of interaction may be an easier task. Of course, it is important to note that the New Institutionalist scholarship that will be discussed therein has flourished from the ideological roots cultivated by rational choice theorists.

Section 2.5: New Institutionalism and Judicial Politics

Section 2.5.i: Basic Tenets of New Institutionalism

In keeping with the fact that the attitudinal model has emerged as a dominant theory in the study of judicial decision-making, it seems as though proponents of the other theories seem compelled to define their views in relation to the attitudinal model. This is apparent in Andrew Martin's attempt to describe New Institutionalism by suggesting that, "The attitudinal model… seems incomplete and is at odds with the notion that the Court operates within an interinstitutional context…. If justices are truly interested in policy, they should anticipate reactions to their decisions by the 'political' branches of government" (Martin, 2006, 4-5). In addition, it must be pointed out that the term "institutions" refers, according to Epstein and Knight, to those things that "structure social interactions in particular ways" (Epstein and Knight, 1998, 17).

In light of this information, the following quote from Epstein and Knight is particularly germane:

> If the objective of justices is to see their favored policies become the ultimate law of the land, then they must take into account the preferences of other major actors and the actions they expect them to take. If they do not, they risk seeing massive noncompliance with their rulings, meaning that their policy fails to take on the force of law; or having Congress replace their most favored position with their least; or other forms of retaliation, such as removing the Court's jurisdiction to hear cases; keeping judicial salaries constant, and impeaching justices (Epstein and Knight, 1998, 82).

Epstein and Knight, and Maltzman et al., have discussed these ideas as they relate to intra-Court behavior, but it is the New Institutionalists who have addressed, in detail, the issue of how the Court (and individual justices) interact with the other branches of government. In some sense, then, this concept of New Institutionalism overlaps with rational choice theory—in that justices are making strategic choices, but it also widens the scope of its inquiry to include interaction among justices and other political actors; this extension is broad enough to warrant consideration under the aegis of its own heading: New Institutionalism.

Succinctly, New Institutionalism has been described as "the analysis of judicial politics that stresses the interactive and interdependent nature of judicial decision-making" (Maveety and Maltese, 2004, 232), or what Rogers Smith calls the "analysis of… courts as part of broader political processes" (Smith, 1988, 89). Overall, New Institutionalism assesses how "choices are structured by the institutional setting in which they are made" (Epstein and Knight, 200, 626). For example, in his 1964 work *Elements of Judicial Strategy*, Walter Murphy noted that, "[Justices] may be willing to modulate their views [or policy preferences] to avoid an extreme reaction from Congress and the president [because] justices would rather hand down a ruling that comes close to, but may not exactly reflect their preferences, than see Congress completely reverse the decision in the long run" (Epstein and Knight, 2004, 204).

Brian Marks (1988) "separation of powers model," which analyzed interplay between the policy preferences of actors in the different branches of government as they concerned reactions to the Supreme Court's decision in *Grove City v. Bell* (465 U.S. 555, 1984), offers one of the first empirical tests of this idea, and attempts to describe the conditions which prevented the *Grove City* ruling from being overturned by Congress until 1987 (Segal and Spaeth, 2002, 103).

However, this type of scholarship is limited in its external validity in that it focuses on only one case; and, unfortunately, much of the empirical research under the rubric of New Institutionalism that deals with Congressional reaction to judicial decisions is plagued by this shortcoming. Chapter 4 will address some of these examples in greater detail.

Of course, Congress is not the only institution with which justices must be concerned. Yates, for one, examines interaction with another major institution in "Presidential Bureaucratic Power and Supreme Court Justice Voting" (1999). In this work, he uses a justice's vote as the dependent variable and a president's approval ratings (a proxy for potential "loyalty" to a president) as an independent variable (Yates, 1999, 352-354). His research finds that presidential approval is statistically significant when it comes to predicting a justice's votes to favor agency action (Yates, 1999, 357)—a sign that justices may be responsive to influences from other actors.

At this point, it is important to point out the fact that New Institutionalist literature is not limited to executive-judicial or legislative-judicial influences, as it also concerned with changes in the Court's composition, for the Court itself can be considered an "institution;" and, as Baum notes, "membership change is the primary source of voting change overall" (Baum, 1992, 3; see also Hensley and Smith, 1995, 837)—perhaps because it brings actors with new ideologies onto the Court, and perhaps because it impacts the nature of strategic relationships that have already been fostered.

Beyond that, New Institutionalism is not exclusively focused on the so-called tangible institutions like Congress, the Presidency, or the Supreme Court; it is also concerned with how "informal norms, myths, and background patterns" (Clayton, 2004, 308)—including interest

groups (Segal and Spaeth, 1993, 240) and even public opinion (Casper, 1976 and Funston, 1975)—may affect judges. To date, empirical studies of the influence of interest groups on Supreme Court decision-making have been scant, as many scholars have focused their research on the impact of interest groups on the confirmation process (see Caldeira and Wright, 1998). However, Songer et al. have investigated the role that amici can play in judicial decisions (although without significant findings about how amici might influence an individual justice) (Songer et al., 2000). Finally, Mondak and Smithey have examined the interplay between judicial voting patterns and public opinion; their research finds that "Court decisions are most often consistent with public preferences" (Mondak and Smithey, 1997, 1120), and Mishler and Sheehan use multivariate regression to show that "since 1956 the Court has been highly responsive to [public] opinion" (Mishler and Sheehan, 1993, 97), in the sense that the Court's liberal-conservative voting pattern tends to mirror society's liberal-conservative views after a "moderate lag" (Mishler and Sheehan, 1993, 96).[21] Other studies have incorporated an even broader definition of institutions.[22]

[21] This is probably a result of the fact that justices are appointed and confirmed by elected officials, whose policy preferences are likely to be in line with those of the people who elected them. The "lag" would result from the time it takes for openings to arise and for confirmations to occur. Richardson and Scheb's "Divided Government and the Supreme Court" offers evidence that justices confirmed under conditions of divided government tend to have more moderate voting records than those confirmed under conditions of unified government (Richardson and Scheb, 466, 1993). This may suggest that democratic processes do in fact impact the voting outputs of the Supreme Court—even if that impact occurs gradually. Their findings are reinforced in Krehbiel's 2007 article "Supreme Court Appointments as a Move-the–Median Game," where changes in the Court's median ideology that result from appointments are shown to occur "incrementally" (Krehbiel, 2007, 231).

[22] Elsewhere, in "Signals from the Tenth Justice," Bailey et al. examine the "political role of the solicitor general," whose position may provide "information to justices about the potential ideological impact of a case" (Bailey et al., 2005, 72); they find a correlation between the position of the Solicitor General and the final decision of the Court. Nonetheless, they do admit that it is difficult to establish a causal link because of the potential for an independently-existing "ideological congruence" (Bailey et al., 2005, 78), a fact which may make their model better at prediction than explanation. Another interaction between justices and political actors is explored in "The Influence of Oral Arguments on the U.S. Supreme Court," where the quality of the oral arguments from attorneys is factored into a regression model that highlights the importance of the "process of decision-making," something which the authors say is ignored by attitudinalists (Johnson et al., 2006, 112). However, this article generates a subjective rating system to evaluate the quality of oral arguments, which may limit its ability to accurately assess the interplay

The fundamental difference between many of these New Institutionalist studies and the attitudinal and rational choice models is that New Institutionalism is often focused on the voting patterns of the Court as a whole, while the latter two focus more on the behavior of individual justices; specifically, attitudinal models examine voting patterns over the course of entire terms or entire careers, and rational choice studies normally evaluate behavior (including opinion writing) in specific cases. This dissertation will attempt to offer a series of innovative New Institutionalist models which assess the responses of *individual* justices to changes in the composition of the other branches of government on a term-by-term basis (and not at the time lag implicit in the work of Mondak and Smithey or Mishler and Sheehan; and not in one particular case, as in the work of Marks; and not in a limited category of cases, as in the work of Yates). In addition, this dissertation will be concerned primarily with the institutions of Congress and the Presidency, and will leave appraisals of "institutions" like public opinion or interest groups for other scholars.

Ultimately, neither New Institutionalism nor rational choice models purport to void the suppositions of the attitudinal model; they merely offer additional factors that may mitigate or exacerbate the extent to which policy preferences can impact Supreme Court decision-making in specific situations. Baum discusses the value of New Institutionalist concerns when he states that justices have a "motivation to achieve the most desirable results in their own Court and in government as a whole" (Baum, 1997, 90). Elsewhere, Clayton also suggests that "legal institutions are part of a broader political system" (Clayton and Gillman, 1999, 16)—a further

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between the argument and an eventual justice's vote. Finally, in "How Political Parties Can Use the Courts to Advance Their Agendas" (2002), Gillman offers a potential framework for future research into relations between political parties and the Court; the problem (for this chapter) is that Gillman's work deals solely with federal courts between the years 1875 and 1891.

indication of the need for Supreme Court justices to remain cognizant of the preferences of other political actors when those justices seek the optimal fashion for pursuing their own policy objectives. This idea is implicit in one of the opening statements to a major work in New Institutional judicial scholarship, Clayton and Gillman's *Supreme Court Decision-Making: New Institutionalist Perspectives*, which presents this assertion: "Institutional settings are an omnipresent feature of… attempts to pursue a preferred course of action…. This is just another way of saying that different contexts make it more or less possible for individuals to act on a different set of beliefs" (Clayton and Gillman, 1999, 3). Consideration of those "contexts" will be an integral part of this dissertation.

Section 2.5.ii: Evolution of New Institutionalist Literature

Before delving into the evolution of New Institutionalist literature, it is necessary to distinguish its basic principles from those of Old Institutionalism. Old Institutionalism was primarily focused on "tangible" items like judicial doctrines, a Constitution, and statutes (similar to scholarship associated with the legal model) (Maveety, 2004, Chapter 1). In addition, Old Institutionalism "historically focused on qualitative, or historical and interpretive accounts, and not quantitative techniques" (Clayton, 1999, 28). New Institutionalism differs from Old Institutionalism, though, in that the former allows for a greater degree of individual choice on the part of human beings (Smith, 1988, 100; Gilman, 1999, 34), and makes more of an attempt (in certain cases) to examine these choices through quantitative techniques.

Edward Corwin was a prominent Old Institutionalist in that he examined the "historical-institutional context of judicial decision-making," or the way in which history and historic documents affected judicial behavior—although he lamented the difficulty of "experimentation," noting that scientific research into matters of human behavior represented an arduous task

(Clayton, 2004, 307). This marks an example of Old Institutionalism in that he focused on the Court's role as defined narrowly by the Constitution, or its ability to "make policy with respect to a specific set of issues" (in particular, the "cases and controversies" mentioned in Article III) (Gillman, 2004, 340). Further, his reservations about the difficulty of "scientific research" also place his work squarely within the boundaries of Old Institutionalism, which rarely offered empirical assessments of its theories.

All in all, though, both Old and New Institutionalism are linked by the belief that "political science ought to care deeply about the real political world of which it is [a] part" (Clayton, 2004, 309, drawing on Corwin's 1929 *American Political Science Review* article "The Democratic Dogma and the Future of Political Science" (see Corwin, 1929, 591)). However, for Corwin and other Old Institutionalists, this meant focusing on "what made the Court unique… rather than what made the Court [a] political institution within the American scheme of governance" (Kritzer, 2004, 388, 390). As a result, the task of wrestling with connections between the judicial branch and the other branches of government was left for *New* Institutionalists.

Cushman's classic 1925 textbook *Leading Constitutional Decisions* may have been a precursor to the New Institutionalist movement, for in that work, Cushman offered a suggestion which runs counter to that offered by Corwin. "The Supreme Court," says Cushman, "does not do its work in a vacuum…. Its decisions can be understood in their full significance only when viewed against the background of history, politics, economics and personality surrounding them and out of which they grew" (Cushman, 1925, iii, as quoted in Clayton, 2004, 305). Cushman was not alone in presaging the future of institutional work. Another early institutionalist was Alpheus Thomas Mason, who was known for composing detailed biographies of justices,

including ones of Justices Louis Brandeis, Harlan Fiske Stone, and William Howard Taft. In his books, Mason "explored the connection between the Courts and the other institutions of the federal government" (Davis, 2004, 319). Although Mason's scholarship was descriptive in nature, Davis suggests that it offered "a foundation on which the [New Institutionalist] scholars have built" (Davis, 2004, 319).

In time, Robert G. McCloskey's 1956 article, "The Supreme Court Finds a Role" (*Virginia Law Review*), highlighted the fact that the "point of departure for any understanding of [the Supreme Court] was the particular role that the [Court] played in the political system" (Gillman, 2004, 339). In so doing, McCloskey offered a harbinger of New Institutionalism because, as Gillman notes, "Like most judicial scholars who lived through the New Deal battles, [McCloskey] was also extremely mindful of… the Supreme Court's potential vulnerability to the other branches' reactions when those institutions felt the Court was overreaching" (Gillman, 2004, 345). By the year 2000, when he wrote *The American Supreme Court*, McCloskey indicated that he was in fact a full-fledged New Institutionalist when he declared that judges had "begun to learn the arts of judicial governance: the necessity to avoid, if possible, head-on-collisions with the dominant political forces of the moment" (McCloskey, 2000, 34; Gillman, 2004, 345).

In addition to McCloskey's work, Robert Dahl's "Decision-Making in a Democracy" (1957), which "argued that the Court rarely exercises the power of judicial review in a way that is contrary to the interests of the governing coalition in the national political system" (Gilman, 1999, 35), might also be seen as an early precursor of New Institutionalism. Further, Murphy's *Elements of Judicial Strategy* (1964), although often referred to as a classic text among rational

choice depictions of judicial politics, also emphasized the New Institutionalist concern with "how larger structures of political and social power conditioned the ability of individual judges to affect social policy;" judges who "wished to see their policy preferences enacted," he realized, "had to make strategic calculations about the views of other colleagues on the bench, legislators, administrators, future litigants, interest groups, and other political actors" (Clayton and Gillman, 1999, 23). Murphy also composed a precursor to *Elements of Judicial* Strategy, which was titled *Congress and the Courts* (1962). Therein, he expressed his concern with Supreme Court justices "keeping their eyes on Congress to come as close to attaining their policy goals [as possible]" (Epstein and Knight, 2004, 212); he also listed potential "weapons" that Congress could use to influence Supreme Court decision-making—including limits on salary increases, legislative overrides, and impeachment (Epstein and Knight, 2004, 215).

Martin Shapiro, a contemporary of Murphy, also produced work that foreshadowed New Institutionalism—specifically, a 1964 book entitled *Law and Politics in the Supreme Court* (Kritzer, 2004, 387). In that text, Shapiro articulated what Kritzer calls a "principal-agent" model, one which suggested that the Supreme Court "must be attuned to what those it seeks to influence or direct will in fact do (Shapiro, 1964, 24; Kritzer, 2004, 390). Implicit in his work is a consideration of opinion content, which serves to guide "agents" of the Court, whether they are actors in lower courts, actors in the executive branch, or actors in the legislative branch (Kritzer, 2004, 391). Kritzer adds that "[Martin Shapiro] would acknowledge the importance of the justice's policy preferences" (Kritzer, 2004, 406), as if to say he would find New Institutionalism compatible with the attitudinal model.

The reason that Shapiro's early work (like that of his contemporaries) is merely considered an inchoate precursor to New Institutionalism is that it did little in the way of assembling data, and instead relied on case studies of individual opinions (Kritzer, 2004, 387, 408). Specifically, he looked at opinions from five major areas (labor law, federal tax policy, representation, antitrust law, and review of congressional investigations) (Kritzer, 2004, 393) and then focused on "how the Court's decisions influenced other actors in the political process" (Kritzer, 2004, 393). Eventually, this concern with a link between Courts and political processes, when coupled with advanced statistical techniques, would establish the core principles of New Institutionalist research.

A key step in this progression was Beverley Blair Cook's 1977 *American Journal of Political Science* article "Public Opinion and Federal Judicial Policy," which specifically declared that "comparisons of political authorities in the three branches can be empirically… based," and thus, was a true forerunner of statistical work by New Institutionalists (Cook, 1977, 593, as quoted in Epstein and Mather, 2004, 179). Further, Ulmer's 1979 article, "Researching the Supreme Court in a Democratic Pluralist System," was also "interested in developing a better appraisal of the Court's role in the judicial system" (Bradley, 2004, 111) and although it offered no empirical techniques for doing so, it echoed tenets that would later resonate with New Institutionalism.

Ultimately, Gillman notes that, "In political science, a shift to the true 'New Institutionalism' was marked by James G. March and Johan P. Olsen's 1984 work 'The New Institutionalism: Organizational Factors in Political Life'" (Gillman, 1999, 30). In this essay, the authors criticized the behavioralist idea that the "intent of actions is found in their outcomes" and called for a "renewed appreciation" of the role that institutions play in individual decision-making

(March and Olsen, 1984, 741; see also Gilman, 1999, 30). Two major components of New Institutionalism, as defined by March and Olsen, included the following ideas: first, "institutional arrangements and social processes are profoundly important in understanding political phenomena… [and] actors both shape and are shaped by those structures;" second, "[New Institutionalism] denies that the behavior of political actors can be explained solely with reference to instrumentalist rational self-interest" (Davis, 2004, 318). This view did accept the notion that "all political behavior must be explained with some reference to values, attitudes and personalities," but behooved scholars to look beyond those items for a wider array of factors that may impact judicial behavior (Davis, 2004, 322). In reality, these concepts were not significantly different from those that were articulated by Shapiro and many of his contemporaries—except for the fact that March and Olsen specifically used the term "New Institutionalism."

Rogers Smith's 1988 article "Political Jurisprudence, the New Institutionalism, and the Future of Public Law" brought March and Olsen's ideas more specifically into the domain of judicial politics (Gilman, 1999, 30-31). Institutions, Smith felt, shaped the behavior of legal actors (Smith, 1988, 95; Gilman, 1999, 31); as a result, he called for a unification of the behavioralist concern with empirical methods (as opposed to mere description) and a more inclusive conjunction of politics and law (Gilman, 1999, 31, 34). Even so, Smith did not offer any empirical tests of New Institutionalist principles; rather, that type of work would arrive in another 1988 article, one from Brian Marks. Subsequent empirical work from Ferejohn and Shipan (1990), Gely and Spiller (1990) and Segal (1997) would follow soon after. Chapter 4 will expound upon these tests of New Institutionalist doctrines.

From a theoretical standpoint, Lawrence Baum's recent work has highlighted the basic tenets of New Institutionalism though statements like the following: "Most studies that posit strategic behavior by justices assume that this behavior is aimed at advancing policy goals" (Baum, 1997, 26). And, along the lines of the Brennan/O'Connor "Miranda Rights" example that was cited earlier, Baum observes that the "positions [that justices] take may be different from the positions they most prefer" (Baum, 1997, 90). After all, he says, "If judges care about the content of legal policy, then it seems short-sighted or naïve for them simply to vote for the alternative that they most prefer in itself. Rather, they should focus on the ultimate consequences of their choices and act to make those consequences as consistent with their preferences as possible" (Baum, 2004, *Audiences,* 14). Chapter 4 of this dissertation will offer its own statistical assessment of this New Institutionalist idea.

Kenneth Shepsle expresses the importance of that type of assessment when he states that behavioralists, in their search for empirical inspections of the individual, have "abandoned the study of institutions, treating them as if they were empty shells to be filled by individual roles, statuses and values" (Maltzman et al., 1999, 44). Maltzman et al. actually point out that New Institutionalism is rooted in pre-behavioralist political science, in the sense that it is a "backlash against the [idea] that human behavior is predetermined" (Maltzman, et al., 1999, 46). However, finding a way to link the theories of New Institutionalism with behavioralism's dual concern for individual behavior and empirical assessment is a critical step for judicial scholars, and a step that will be taken herein.

Before moving on, though, it is important to note that, conceptually, all of the aforementioned works have lead us to Clayton and Gillman and their seminal New Institutionalist book, *Supreme*

Court Decision-Making: New Institutionalist Approaches, which is a collection of independent works from a number of key figures who asses the relationship between the judicial branch and institutions like the legislative and executive branches. For example, Hall and Brace offer an article in which they suggest that, "The attitudinal model treats the Supreme Court as an autonomous institution, whereas the [New Institutionalist] model emphasizes that outside forces, especially Congress and the public, are always a consideration in the votes of justices (Wrightsman, 2006, 132; adapted from a Hall and Brace article found in Clayton and Gillman, 1999, 281). Even so, New Institutionalism is still compatible with the attitudinal model, as Maltzman et al. recognize in their assertion that, "It is important to note that… strategic justices will not necessarily act insincerely. If the political context favors the justice's preferred course of action, a strategic justice's behavior will be the same as it would be without constraints" (Maltzman et al., 1999, 47). "Institutions," they add, "mediate between preferences and outcomes by affecting the justices' beliefs about the consequences of their actions" (Maltzman et al., 1999, 47). However, the use of the word "mediate," instead of the word "alter," is of paramount importance, for it illuminates the fact that institutions are likely to generate subtle shifts in pre-existing attitudes. After all, for a Supreme Court justice, a Court opinion is a "means to end," where the "end" requires implementation by other governmental actors (Hammond et al., 2005, 50).

Section 2.5.iii: Criticisms of New Institutionalist Research

The primary criticism of New Institutionalism involves the notion that it is hard for justices to anticipate the actions of other political actors, and therefore, it might make little sense for justices to consider the preferences of those actors (Segal, 1999, 240; Maltzman et al., 1999, 50). This matter will be addressed in detail in Chapter 4, but for now, it is worth pointing out that

Maltzman et al. note that, "Even if justices recognize the difficulty in anticipating Congressional response, we would be reluctant to use this finding as grounds for rejecting… strategic [considerations]" (Maltzman et al., 1999, 49). This notion of information asymmetry—or a gap between justices' ideals and their ability to predict the behavior of other governmental actors—will also be addressed in Chapter 4.

However, another problem which plagues much New Institutionalist scholarship, and an obstacle that will not be accounted for in this dissertation (which focuses on the final votes of individual justices), is that strategic behavior may not always be discernable in final votes, but may occur in certiorari votes or in bargaining for opinion control (Maltzman, 1999, 50). It will be left to future research to link the work offered herein with such considerations.

Ultimately, Segal and Spaeth's most pertinent criticism of New Institutionalism is that many of its empirical offspring have studied individual cases or lines of cases. The most prominent among these was Marks' aforementioned 1988 assessment of *Grove City v. Bell* (465 U.S. 555, 1984). The problem with addressing only one case line, though, is that external validity is limited because one case, or one line of cases, may do little to offer findings that can be generalized beyond those instances. As Segal and Spaeth note, "While the detailed study of a single event may provide a useful description of events, it does not and cannot explain action independent of that event with any degree of confidence" (Segal and Spaeth, 2002, 45).

That is where this dissertation comes into play. It will build upon the assumption "that judges seek only to achieve good legal policy" (Baum, 2004b, 19); in that regard, some element of the attitudinal model pervades this entire dissertation. Beyond that, though, this work will then address components of the other theories discussed in this chapter, in an attempt to formulate a

more comprehensive portrait of judicial decision-making. Specifically, Chapter 3 is primarily an extension of New Institutionalist research in the sense that it examines the impact of the legislative and executive branches on the long-term voting outputs of the Supreme Court. Chapter 4 is a detailed assessment of the New Institutionalist supposition that justices may alter their behavior out of concern for potential responses that the other branches may employ. Next, Chapter 5 involves a blend of rational choice and New Institutionalist principles, for it examines the potential for strategic behavior that results from interaction between individual justices and their appointing presidents. Finally, the concluding chapter will combine many of the tenets embedded in the four major theories referenced in this literature review, and will fuse them into a comprehensive model that helps to explain and predict the voting behavior of individual Supreme Court justices.

Chapter 3: The Relationship Between Divided Government and the Voting Patterns of Supreme Court Justices

Section 3.1: Introduction to the Confirmation Process

During our nation's incipient moments, Alexander Hamilton adumbrated that the judiciary would ultimately prove to be the United States' "least dangerous branch" of government (*Federalist #78*). However, Justice John Marshall's 1803 elucidation of "judicial review" provided a harbinger of the judiciary's potential to become more than an impotent bystander in the context of our nation's policy making infrastructure. In fact, as the decades passed, and as decisions like *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade* were announced, many observers began to offer pejorative depictions of judicial behavior. Political scientist Gregory Casey, for one, derided the "non-democratic expansion" of judicial review (Casey, 1974, 387).

Essentially, such criticism is rooted in a normative belief that judges, as unelected officials, should not be usurping policy making functions that are better suited for democratically-elected legislators. Implicit in such censure, though, is a renunciation of the process through which judges ascend to our highest Court. After all, judges are appointed by a democratically-elected official and are confirmed by a group of democratically-elected representatives. Therefore, if one is to suggest that justices have assumed an "undemocratic" role in our nation's government, then one is effectively obviating the possibility for these elected officials to influence, even from an ex-ante standpoint, the voting outputs of Supreme Court justices. This chapter will empirically assess the relationship between the confirmation process and the voting behavior of Supreme Court justices. Ultimately, such a study is important for the discipline of political

science because if elected officials have no influence on the policy outputs of the Supreme Court, then the fundamental doctrines on which this country was founded—particularly, the basic tenets of checks and balances and representative democracy—are in peril.

Briefly, the assertion that judicial behavior in our society today is "undemocratic" is tantamount to a declaration that the confirmation process is irrelevant. Beyond that, such censure also dismisses the potential for divided party government to confirm justices that behave differently than those confirmed by unified party government. More specifically, then, if the confirmation process is indeed irrelevant, unified party government should produce justices who behave similarly to those produced by divided party government. In a 1993 article, Richardson and Scheb empirically tested this supposition. They found statistically significant evidence that Supreme Court justices who are nominated and confirmed during periods of divided party government cast more moderate votes than those appointed during periods of unified party government. Unfortunately, a small sample size, which resulted from the paucity of data available about Supreme Court decision-making in 1993, prevented their research from deriving many noteworthy findings. (Additionally, an equally important limitation to their work was that it offered a narrow definition of divided government—one that failed to incorporate a broad array of continuous, independent variables). Over the last several years, though, with the expansion of Spaeth's *ALLCOURT* and *Vinson-Warren* databases, a larger sample of data related to Supreme Court decision-making is now available. As a result, a unique opportunity exists to reassess Richardson and Scheb's 1993 findings; in this chapter, updated data, and a wider array of independent variables, will be used address the following research question:

Do democratic processes—those that are driven by elected officials who are, in theory, responsive to a diversity of interests in society—have an impact on the policy outputs of the Supreme Court?

A key assumption underlying this investigation, then, is that the individual votes of Supreme Court justices will aggregate to the "policy outputs" of the Court. This supposition is compatible with other scholarship in the sub-field of judicial politics. For example, "students of judicial behavior," says Lawrence Baum, "generally focus on individual judges, building explanations of collective choices from the individual level" (Baum 1997, 7). Harold Spaeth also sees "individuals as the analytical building blocks of [judicial scholarship]" (Maltzman et al., 2000, 12; see also Hagle, 1993; Hensley, 1995).[23] Consequently, if we accept this assumption, the aforementioned research question can be consolidated into the following form:

Does divided party government result in the confirmation of justices whose voting behavior differs from justices confirmed by unified party government?

That is the research question posed by Richardson and Scheb in their seminal study. I will answer it herein by using the same statistical tool that they used (OLS regression), but I will also include a number of new independent variables to broaden the scope of their work. Specifically, these new variables are designed to assess not only the inter-branch conflict (e.g., legislative vs. executive) that is inherent in any definition of "divided government," but also to asses *intra*-branch conflict—such as confirmation votes in a closely-divided senate and judicial appointments during periods of low presidential approval ratings. By operationalizing these ideas, I will be offering an expanded construction of the concept of "divided government."

In Section 3.2 (Literature Review), I will provide a theoretical justification for this expanded construction by offering a cursory review of literature that has addressed the interplay between

[23] In addition, the theory underlying this study assumes that those justices who vote more moderately will be less likely to be straying from "democratic" sentiments.

divided government and judicial behavior; furthermore, the literature review will crystallize the overall importance of this inquiry. In Section 3.3 (Data and Methods), concepts will be defined and their indicators will be measured. Section 3.4 (Findings) will then provide statistical tests that assess relationships between these indicators. Finally, in Sections 3.5 and 3.6, I will offer concluding remarks and suggestions for future research.

Section 3.2: Literature Review

Section 3.2.i: Theoretical Limitations of Prior "New Institutionalist" Research

In a general sense, because this study assesses interaction among the executive, legislative and judicial branches, it could be said to fall under the rubric of New Institutionalist research. Even so, there is a critical difference between this study and other New Institutionalist judicial research: previous New Institutionalist scholarship has focused almost exclusively on the impact that Congress and the President can have *after* a Supreme Court justice has ascended to his or her post. The most common manifestation of this idea is illustrated in Spriggs and Hansford's observation that "when the Court makes decisions and writes opinions, it must also anticipate… possible Congressional and presidential responses" (Spriggs and Hansford, 2001, 1096). Along these lines, as demonstrated in Chapter 2, many New Institutionalist studies have focused on the fact that "[justices] would rather hand down a ruling that comes close to, but may not exactly reflect, their preferences [instead of seeing] Congress completely reverse the decision in the long run" (Epstein and Knight, 2004, 204). While such statements highlight post-confirmation influences on judicial behavior, ex-ante (or pre-confirmation) influences might prove to be just as significant—even if the latter have not been extensively scrutinized in New Institutionalist literature.

Section 3.2.ii: Techniques Employed in Prior Research Into Divided Government and the Supreme Court

For the most part, that research which has focused on the confirmation process has concerned itself with descriptive case studies. In fact, Mark Silverstein explicitly states that, "The principal genre for the study of judicial confirmations has been the case study" (Silverstein, 1994, 5), a technique which he says is limited in that it focuses "too narrowly" on a "single nomination" (Silverstein, 1994, 6). Case studies can prove useful for identifying independent variables to be used in a multivariate regression model, but on their own, they do not offer findings which can be extrapolated to broader contexts. Examples of prominent case studies related to the confirmation process include David Danelski's *A Supreme Court Justice is Appointed* (1964), which was an examination of the myriad factors that could have explained the 1922 nomination of Pierce Butler, a Roman Catholic Democrat with no political experience who was appointed to the Court by a Republican president. "No single actor," concluded Danelski, "can determine the outcome" of the confirmation process (Walker, 2004, 257).

Abraham (2008), Eisgruber (2007), Comiskey (2004), Epstein and Segal (2005), Yaloff (1999), Carter (1994), and even Silverstein (1994) (in spite of his aforementioned warning) have also offered a series of descriptive accounts of controversial nominations to the Supreme Court—with occasional reference to rudimentary statistical findings. For instance, Epstein and Segal's work notes that, throughout the history of the Supreme Court, the Senate has confirmed just 59% of nominations made under conditions of divided government (23 of 39), and 90% of nominations made under conditions of unified government (99 of 110) (Epstein and Segal, 2005, 107—updated to include Alito and Roberts).

Beyond such observances, there have been more detailed empirical studies of the confirmation process. For example, John M. de Figueiredo and Emerson Tiller demonstrate the lower federal courts are more likely to be expanded during periods of unified government—which is logical in that the majority party will want to create more openings that it can then fill with ideologically compatible judges. For de Figueiredo and Tiller, the effects of unified government are "the equivalent of an additional 6,500 cases in the circuits [as far as workload is concerned] in terms of predicting an expansion" (de Figueiredo and Tiller, 1996, 459-460; Epstein and Segal, 2005, 43). Epstein and Segal interpret this work to mean that "unified government increases the likelihood of an appellate bench expansion by over 50%, even after accounting for the judiciary's workload" (Epstein and Segal, 2005, 43).

In terms of the confirmation process itself, a landmark empirical assessment comes from Cameron, Cover and Segal (1990). Their unit of analysis, though, is the votes of senators, and the study attempts to explain what factors make a vote in favor of confirmation more likely. Their significant findings indicate that when presidents are not in an election year, have a Senate controlled by the same party, and nominate an ideologically moderate candidate (as measured via Segal-Cover scores), "lopsided, consensual" confirmation votes occur (Cameron, Cover and Segal, 1990, 532). Segal and Spaeth also offer their own work to assess what factors influence the likelihood of a justice being confirmed by the Senate, and find that where the dependent variable is "confirmed or not," divided government decreases by .42 the probability of confirmation (as of 2002) (Segal and Spaeth, 2002, 202). More recently, Epstein, Lindstadt, Segal, and Westerland update the work of Cameron, Cover, and Segal and find comparable results, adding that "ideology is of paramount concern to senators" (Epstein, Lindstadt et al.,

2006, 296). Finally, a study from Moraski and Shipan offers a formal model that can be used to predict the ideology of Supreme Court nominees (as measured by Segal-Cover scores) based on "regime" characteristics (such as the Court's median and the Senate's median) (Moraski and Shipan, 1999, 1081-1083). The key difference between the work mentioned in this paragraph and that offered in this dissertation, though, is that this dissertation will look beyond whether justices are confirmed or not, and will instead assess the long-term voting behavior of justices confirmed under different political circumstances. A more recent study from Krehbiel (2007) does use formal models to analyze shifts in the Court's median as a result of presidential appointments, yet Krehbiel's work focuses on changes in the voting patterns of the Court as a whole, and not on the voting patterns of individual justices.

To date, only one major study has attempted to examine ex-ante influences on judicial behavior in terms of their relevance for assessing subsequent judicial behavior: Richardson and Scheb's 1993 article "Divided Government and the Supreme Court." One reason that research into this matter has been scant is that widespread data regarding the liberal and conservative voting scores of Supreme Court justices was largely unavailable until 1993. In that year, Spaeth's *United States Supreme Court Database* was released.[24] This resource coded the votes of individual justices for all cases from 1953 to 1989. With this information in hand, Richardson and Scheb went on to hypothesize that those justices appointed under conditions of divided government would be more moderate in their voting behavior than those appointed under conditions of unified government.

[24] The database was updated into the *ALLCOURT* and *Vinson-Warren* formats as a part of the Sydney Ulmer Project in 2002.

From a theoretical standpoint, Richardson and Scheb denote two avenues through which divided party government can influence the judicial appointment process. First, the Senate is "likely to reject a candidate nominated by a president of the opposing party if the candidate is perceived as too extreme ideologically" (Richardson and Scheb, 1993, 460). As an example, they point to the 1987 nomination of Robert Bork, when a Republican president saw his nominee rejected by a Democratically-controlled Senate. In addition to such a scenario, Richardson and Scheb also suggest that the "prospect of a humiliating rejection might induce a cautious president to nominate a more moderate candidate… in order to win confirmation" (Richardson and Scheb, 1993, 460). Evidence has surfaced that such concerns may have been a driving force behind some of President Nixon's appointments (Abraham, 2008, 228-230). Of course, the underlying premise at work here is that the president may be forced to nominate a more moderate candidate when facing a hostile Senate—what Alexander Hamilton called the "silent operation" of the Senate's "advice and consent" (Epstein and Segal, 2005, 21).

To empirically asses these ideas, Richardson and Scheb commence by generating a conservative score for each justice. This is derived by dividing the number of conservative votes[25] cast by the justice by the total number of votes cast by that justice.[26] Subsequently, using the assumption that a 50% split between conservative and liberal votes (or a 50% "conservative score") indicates a perfectly moderate justice, a variable called "extreme" is created. "Extreme" represents the absolute value of the raw difference between the justice's conservative score and 50%. For example, if Justice Scalia has a 74% conservative score, his "extreme" score would be

[25] This refers to conservative votes as defined in the Spaeth databases.

[26] Scores were created for a justice's entire career on the Court. Unanimous and non-unanimous cases were included because both types address the "ideological makeup of [justices]" (Richardson and Scheb, 1993, 462); per curiam opinions, memorandums and decrees were excluded because they did not necessarily offer information about the votes of individual justices.

.74 - .50, or .24; along the same lines, if Earl Warren had a conservative score of 18%, his "extreme" score would the absolute value of .50 – .18, or .32 (Richardson and Scheb, 1993, 462). Therefore, both conservative and liberal justices can be analyzed with a consistent measure.

Richardson and Scheb begin their analysis of the "extreme" scores by using a *t*-test to compare the voting scores of justices appointed under conditions of divided government with those appointed under conditions of unified government. They find that justices appointed under conditions of divided government are slightly more moderate—but *t*-tests are not significant. In the search for more robust findings, Richardson and Scheb abandon the admittedly "crude" *t*-test and turn to multivariate regression. In their regression model, the aforementioned "extreme" figure is used as the dependent variable. The key independent variable in the regression equation (DIVGOVT) is dichotomous; it classifies each justice as the product of a "unified" (coded as "0") or "divided" (coded as "1") government, in terms of composition at the time of confirmation (Richardson and Scheb, 1993, 464).

As a control variable, Richardson and Scheb include tenure length—in response to the concern that justices may grow more extreme over time; this was a continuous variable that represented the number of terms that a justice had served on the Supreme Court. They also add a dichotomous control variable that captures whether a justice was appointed before or after 1968 ("0"=before, "1"= during or after). This year is identified because, according to Richardson and Scheb, it represents a point after which judicial appointments became "significantly more politicized" (Richardson and Scheb, 1993, 468)—a fact which Baum interprets as creating "an incentive to choose people who seem more ideologically moderate" (Baum, 2008, 50), but which Richardson and Scheb suggest would lead to more "extreme" justices being appointed

(Richardson and Scheb, 1993, 468). Together, these variables yield the following regression equation (Richardson and Scheb, 1993, 464):

"Extreme" = a + Bi (DIVGOVT) + Bii (1968) + Biii (Justice experience) + u[27]

The findings from Richardson and Scheb's research reveal a regression coefficient of -2.207 for the primary independent variable, "DIVGOVT." This indicates that justices appointed under conditions of divided government have an "extreme" score that is 2.207 points lower than their "unified" counterparts; that figure is found to be statistically significant at the .017 probability level. The adjusted R-squared value is .671 and the F-ratio indicates that the overall explanatory power of the model is significant at less than the .01 probability level (Richardson and Scheb, 1993, 466). It will be interesting to note whether a similar model, with additional independent variables and a new set of data, will tender significant results in this dissertation.[28]

Section 3.2.iii: Ways to Improve Upon Prior Research Concerning Divided Government and the Supreme Court

The theoretical underpinnings of Richardson and Scheb's work are still valid, and they became particularly salient as a result of last November's election, with Democrats gaining unified control of major institutions. Accordingly, the time has arrived for this study to be updated, especially in light of Richardson and Scheb's closing lament that "the moderating effect of divided government may be diminishing over time," an idiosyncratic development that they attribute to the increased politicization associated with the judicial appointment process (Richardson and Scheb, 1993, 468).

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[27] A time-series regression component ("Extreme t-1") was also included. In light of the fact that this study attempts to analyze the cumulative voting behavior for a justice's entire tenure, I would suggest that the use of a lag variable is unnecessary.

[28] The variable for 1968 yields a positive coefficient that is significant at the .013 level, which indicates that the post-1968 justices in Richardson and Scheb's sample are more "extreme" in their voting behavior (Richardson and Scheb, 1993, 466).

This chapter will reassess their work while incorporating a larger sample size. To be more specific, at the time of Richardson and Scheb's study, the Spaeth database addressed cases between 1954 and 1989. The updated versions now contain information about cases from 1946 to 2007—a twenty-six year increase. Further, Richardson and Scheb restricted their analysis to cases that dealt with civil rights and liberties. However, as Bowen and Scheb declared in a subsequent study on judicial behavior, "A more definitive [examination] should look at all plenary decisions, not merely civil liberties cases" (Bowen and Scheb, 1993, 6). In addition to incorporating a wider chronological sample of cases, then, this chapter will also examine a broader array of issue areas. Specifically, all cases labeled as "civil rights and civil liberties cases" will be analyzed in one regression model, and all cases labeled as "economic cases" will be analyzed in a separate model.

Finally, as alluded to earlier, this chapter will also offer a more comprehensive assessment of the concept of "divided government." Simply defining the term as a division in party control between the White House and the Senate is incomplete; divided party control of those two branches is merely one component of "divided government." For example, the relative strength of the White House, which may be assessed through the use of Gallup presidential approval ratings at the time of confirmation, could be relevant to the nature of divided government. Beyond that, the number of Senate seats controlled by the majority party—and, conceivably, the number of votes received by a justice—could serve as indicators of how ideologically extreme a candidate will be. As a result, by examining other factors that may play a role in the confirmation of ideologically extreme justices, and by generating more independent variables to

conceptualize the notion of divided government, this study will extend the breadth of Richardson and Scheb's investigation.

Section 3.2.iv: The Three "New" Independent Variables

In addition to the key variable analyzed in Richardson and Scheb's work (the presence or absence of divided government), the following independent variables will be examined herein:

Presidential Approval Rating: The theoretical justification for using "presidential approval rating" as an independent variable is that a popular president may have the political capital needed to sway senators toward supporting his nominee. As Eisgruber notes, "A powerful and popular president may be able to push through his preferred candidate without regard to what opposition senators think" (Eisgruber, 2007, 15). Epstein and Segal offer a tepid interpretation of this idea when they note that, "One would assume that higher approval ratings would serve [the President] well with an electorally-minded Senate" (Epstein and Segal, 2005, 108). However, President Nixon was at the "height of his popularity" (roughly 65% approval rating) when G. Harrold Carswell and Clement Haynsworth were rejected by the Senate, and President Johnson's approval was only 39% when Thurgood Marshall was confirmed (see Segal and Spaeth, 2002, 213). Even so, Epstein and Segal offer empirical evidence that, overall, presidents with high approval ratings (above 70%) are able to secure 98% of senate votes for their nominees, while presidents with approval ratings lower than 50% are able to secure, on average, less than 80% (Epstein and Segal, 2005, 108; see also Segal and Spaeth, 2002, 209). Of course, this information does little to tell us about the behavior of these justices once they are on the bench.

The same flaw can be attributed to the work of Cameron, Cover, and Segal (1990), which finds that when a "strong" president nominates an ideologically moderate candidate,

confirmation is more likely than when an "unpopular" president appoints an ideologically extreme candidate (Silverstein, 1994, 5). Abraham offers a case study to illustrate this idea when he notes that, "Weakened by the Iran-Contra scandal and economic concerns prompted by the Wall Street crash in fall of 1987, Reagan's leadership was under fire at home and abroad, and that turn of events arguably contributed to Bork's defeat" (Abraham, 2008, 282). In addition, Toobin refers to the fact that "[President George W.] Bush failed to see that Iraq and Katrina had crippled his influence in Congress… [and as a result,] the nomination of [Harriet] Miers reflected Bush's arrogance, his sense that vouching for his personal lawyer would be all that was necessary to bring the Senate along" (Toobin, 2007, 292). Furthermore, Johnson and Roberts offer a study which indicates that president's with lower approval ratings are more likely to make public statements supporting their nominees to the Supreme Court, as if "very popular presidents do not need to expend as much capital to secure confirmation for their preferred nominee" (Johnson and Roberts, 2004, 677).

In spite of these suggestions, Segal and Spaeth propose that "no one-to-one relationship between presidential approval and confirmation approval exists" (Segal and Spaeth, 2002, 213).[29] This chapter will attempt to offer empirical evidence of such a relationship, thereby buttressing theories intimated in the aforementioned case study examples. More specifically, this study will attempt to discern whether a link exists between a president's approval rating and the "extreme" scores of a justice appointed by that president. The measure used for the "presidential approval" variable will be the Gallup poll measurement for the question "Do you approve or

[29] Segal and Spaeth do draw a distinction between elected (86% success) and "successor" presidents (53% success) in seeing nominees through to confirmation (Segal and Spaeth, 2002, 201).

disapprove of the way [that the current president] is handling his job?" as measured on the date closest to the confirmation vote of a nominee (see Moraski and Shipan, 1999, 1089).

Percentage of Total Votes Received by the Senate: This variable will measure the total number of favorable votes that a nominee receives from the United States Senate divided by the total number of votes that could have been received (total is listed as 100 senators after 1959 and 96 senators from 1946-1958, before Alaska and Hawaii were admitted to the union). The rationale for its inclusion is that a candidate confirmed by a wide margin should ultimately exhibit a more moderate voting pattern than a justice confirmed by a narrow margin. Specific support for this idea comes from Segal and Spaeth, who note that, "Overall, senators voted almost 98 percent of the time for nominees who were ideologically close to them, 83 percent of the time for nominees who were of moderate distance, and but 57 percent of the time for nominees who were ideologically distant"—when comparing Segal-Cover scores for justices against "ideal points" for senators (Segal and Spaeth, 2002, 108). This finding leads them to conclude that, "Senators' votes greatly depend on the ideological distance between senators and nominees" (Segal and Spaeth, 2002, 222). However, the word "perceived" should precede "ideological distance," for senators cannot know for certain whether a potential justice will actually vote in a particular fashion once confirmed. While Segal and Spaeth's findings may tell us something about whether or not a justice will be confirmed, then, their study does not indicate anything about the future voting behavior of a justice. This chapter will concern itself with the latter.

Number of Seats Controlled By the Majority Party: A continuous variable will also be included to address the issue of "intra-branch" conflict, which must be seen as an essential component of any definition of the term "divided government." More precisely, a filibuster-proof majority

may enable a president of the same party to nominate a more ideologically extreme candidate; conversely, such a majority may preclude the nomination of anyone but a moderate justice for a president of the opposing party. The measure included for this independent variable will be created by dividing total seats controlled by the majority by the total number of seats available. Again, this will allow for consistency between pre- and post-1959 measurements, and it will also allow independent senators to be accounted for by the variable.[30]

Section 3.2.v: Other Factors Which Will Be Used Herein as Control Variables

Tenure-length: The total number of terms served on the Supreme Court, which was significant at the .06 level in Richardson and Scheb's study, will be included in my regression model—largely because of its potential link with "maturation," which refers to the possibility that justices become more conservative, or even more extreme, over time (Cook and Campbell, 1981, 52). In fact, Richardson and Scheb found that "extreme" scores increased, on average, by .09 points with each term served (Richardson and Scheb, 1993, 467).

"*First Choice Candidate*:" Further (although it has not been assessed in previous literature), whether a justice was a "first-choice" selection, or was chosen after the rejection of a previous nominee, might explain a justice's ideological extremity score. The implication here is that the rejection of a president's "first-choice" justice might require "settling" on a more moderate "second choice." Between 1946 and 2007, the Senate formally rejected three nominations for the position of Associate Justice on the United States Supreme Court. After the retirement of Abe Fortas, Nixon nominees Clement Haynsworth and G. Harrold Carswell were both rejected by the Senate (in late 1969 and early 1970, respectively). Justice Harry Blackmun was eventually confirmed to replace Fortas, and was seen as a "compromise" in the sense that

[30] If an independent senator caucuses with one of the two major political parties, he or she will be counted as a member of that party.

President Nixon lamented that the Senate, as it was "presently constituted," would not confirm a conservative justice from the South (Yaloff, 1999, 112). Nearly two decades later, in 1987, President Reagan nominated Robert Bork to the seat vacated by the retirement of Lewis Powell, but a Senate vote of 58 to 42 terminated Bork's candidacy. That was followed by the ill-fated "near" nomination of Douglas Ginsburg, who withdrew himself from consideration after revelations surfaced that he had smoked marijuana with students while serving as a professor at Harvard Law School. Anthony Kennedy was eventually nominated and confirmed as Powell's successor. In lieu of this information, Blackmun and Powell are coded as "second choice" justices.

"Formal rejections" do not include the withdrawal of Harriet Miers, whom George W. Bush nominated to replace Sandra Day O'Connor in 2005. Miers would ultimately remove her name from consideration, and Samuel Alito was subsequently confirmed. As a result, Alito is also listed as a "second choice" candidate in this study. In addition, the formal rejections do not account for what occurred as President Nixon attempted to fill the seats vacated by the retirements of Hugo Black and John Harlan in 1971. The Nixon administration's top two choices were Mildred Lillie and Herschel Friday. When the *American Bar Association*, which held a prominent role in "prescreening" nominees at that time (a practice that was prevalent until the Reagan administration) offered less-than-favorable assessments of the potential nominees, the president "angrily withdrew" their names (Abraham, 2008, 15). Abraham adds that there is "little if any doubt that [President Nixon] wanted to send Lillie and Friday to the Court" (Abraham, 2008, 15). These withdrawals were followed by the nominations, and subsequent confirmations, of William Rehnquist and Lewis Powell. Wrightsman has suggested, though, that

Rehnquist was actually Nixon's "eighth choice." This may not be a far-fetched supposition, for Nixon had in fact referred to Rehnquist as "Renchburg" and "the guy dressed as a clown" after an earlier meeting (Wrightsman, 2006, 30, quoting J.W. Dean from *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (2001)). Ultimately, in this study, for the reasons outlined above, Blackmun, Rehnquist, Powell, Kennedy, and Alito are the five justices who will be coded as "second choice" justices, even though only two (Blackmun and Kennedy) followed nominees who were formally "rejected" by the Senate.

This study will not account for Lyndon Johnson's failed 1968 attempt to promote Associate Justice Abe Fortas as a successor to Chief Justice Earl Warren. At that time, amid accusations of impropriety and in the face of a hostile Senate, Justice Fortas requested that President Johnson withdraw his name, and ultimately no action was taken on Fortas or the nomination of Homer Thornberry, who was vying to fill the Fortas seat as an associate justice (Abraham, 2008, 227-228). Accounting for this matter would require listing the subsequent nominee, Warren Burger, as a "second choice" candidate—which would not be logical given that he was appointed by President Johnson's successor, Richard Nixon.

The "first choice" variable also does not account for situations where "the inclination of most presidents [is] to move toward the Senate" (Epstein and Segal, 2005, 78) by nominating a moderate candidate in the face of a hostile senate (perhaps eschewing a "first choice" in the process); that possibility will be accounted for with the use of the "divided government" variable. In addition, the "first choice" variable also does not account for situations where a president has difficulty convincing potential nominees to accept an appointment. For example, Toobin notes that Bill Clinton's first choice for his initial Supreme Court nominee was New

York Governor Mario Cuomo (who refused) (Toobin, 2007, 63); Toobin adds that Ruth Bader Ginsburg was arguably President Clinton's "seventh choice" (Toobin, 2007, 72). Nevertheless, such situations are difficult to interpret because no formal channels are available to demarcate a bifurcation between "first" and "second" choice candidates.

Chief Justice: The third control variable to be included is a dummy variable that captures whether a justice served as chief justice. Wrightsman notes that the two primary responsibilities of a chief justice are "chairing all conferences and oral arguments,[31] and if in the majority, deciding who drafts the majority opinion for the Court" (Wrightsman, 2006, 200). There are two opposing viewpoints regarding the impact that such a position may have on voting behavior. The first suggests that chief justices may be more "extreme" than their counterparts. After all, if their "power" can be used to sway the Court in their direction, a chief justice may be more inclined to take an extreme stance in his voting behavior. For example, in a 1975 article, "Chief Justice Warren: The Enigma of Leadership," which was published in *Yale Law Journal*, former Justice Abe Fortas suggested that, "Prestige… makes it possible for the Chief Justice to influence the output of the Court to a much greater degree than colleagues of equal or superior personal and professional caliber" (Wrightsman, 2006, 201).

Wrightsman extrapolates from this work to suggest that the chief justice "significantly influences the output and atmosphere of the Court" (Wrightsman, 2006, 201). In a 1960 *American Political Science Association* conference paper, entitled "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," Danelski was one of the first to make

[31] Having the ability to terminate an oral argument can be an important feature of being chief justice. It has been said that Chief Justice Charles Evans Hughes once called "time" on an attorney in the middle of the attorney uttering the word "if" (Wrightsman, 2006, 203, derived from D.M. O'Brien's *Storm Center: The Supreme Court in American Politics*, 5th ed.).

such a suggestion in writing. He noted that a primary goal for a Chief Justice is to garner "a majority vote for the chief justice's position" (Walker, 2004, 252, citing a Danelski conference paper). Baum offers an example to support this hypothesis when he observes that, "[Earl] Warren possessed excellent leadership skills.… He had a good sense of how to build majorities for his positions, and he was effective at persuasion: several of his colleagues told one observer 'how hard it had been to withstand the Chief Justice when he was able to operate in a one-on-one setting'" (Baum, 2008, 139). Cass Sunstein, University of Chicago Law Professor, offers another example when he suggests that Rehnquist "moved [the Court] dramatically in his preferred direction" (Wrightsman, 2006, 227). All of this information might imply that a Chief Justice will be more "extreme" than an associate justice—although Sue Davis observes that efforts to empirically support such a claim have been inconclusive (Clayton and Gillman, 1999, 138).

Conversely, a second school of thought suggests that a chief justice will be more moderate than his counterparts. The rationale behind such a supposition lies in the fact that "the chief must possess the ability to keep the peace among the several justices who are often divided along intellectual and personal lines" (Abraham, 2008, 324), or to "build a consensus" (Yaloff, 1999, 148). Wrightsman even notes that "in seeking to maintain an atmosphere of goodwill between participants, [the chief justice] must often take the lead in reducing tension… when conflict emerges" (Wrightsman, 2006, 225). This might imply that a chief justice would take more moderate stances than associate justices. Maltzman et al. go so far as to suggest that, "As head of the Court, a chief justice may feel greater pressure… to protect and enhance the Court's reputation by producing unanimous opinions, suppressing conflict, and otherwise facilitating

harmony" (Maltzman et al., 2000, 23; see also Brenner and Hagle, 1996; Ulmer, 1996; Danelski, 1968).

In the sample of justices analyzed herein, Fred Vinson, Earl Warren, Warren Burger, William Rehnquist, and John Roberts will be coded as Chief Justices. The example of Rehnquist offers an interesting case study in that he first served as an associate justice for 15 years before being elevated to Chief Justice, a position that he held for 19 years. For the purpose of parsimony in the models offered in the body of this work, he will be coded exclusively as a Chief Justice—and as the footnote below illustrates, this does not skew the results in any fashion.[32]

Held Elected Political Office: A dummy variable has also been created to capture whether a justice had previously held an elected political office. The rationale for using this variable is that those with previous political experience may arrive at the Court with a propensity for taking more ideologically extreme stances. Those in this sample of justices who held elected office include: Black (senator), Burton (senator), Minton (senator), Vinson (congressional representative), Warren (governor), and O'Connor (state legislator) (Baum, 2008, 50-51).

"*Cross-Party*" *Nominee*: Segal and Spaeth observe that 130 of 149 nominees to the Court have come from a president's party (Segal and Spaeth, 2002, 180, updated to include Roberts and

[32] In light of the fact that one of the control variables included herein assesses whether or not a justice served as a Chief Justice, the case of William Rehnquist, who served 15 terms as an Associate Justice and 19 terms as Chief Justice provides an interesting case. A *t*-test does reveal that Rehnquist's "extreme score" in civil rights and civil liberties cases was 4.9 points lower as Chief Justice (significant at the .01 level), but also suggests an insignificant difference (probability level of .798) between his economic "extreme" scores as an Associate Justice and as a Chief Justice. The real key is to see if the inclusion of Rehnquist-Associate and Rehnquist-Chief Justice as different entities will alter the findings for the first regression model offered herein. The major difference between the two is that "Rehnquist-Associate" is a divided government appointee, while "Rehnquist-Chief Justice" is a unified appointee—given that Reagan had the support of a Republican Congress when Rehnquist ascended to the Court's highest post. Even with the split Rehnquist variables included in the model, which affords a total sample size of 32, the "divided government" variable is statistically-significant at the .09 level for civil rights and civil liberties cases and at the .06 level for economic cases. This does not represent a significant difference from the findings that are reported in Table 3.1, which simply codes Rehnquist's entire tenure under the heading of a "Chief Justice."

Alito). Of those that are considered to be "cross-party" nominees, three cases appear in the sample of justices analyzed herein: Eisenhower's appointment of William Brennan (Eisenhower had "specifically asked aides to identify a Democratic nominee" (Eisgruber, 2007, 129)); Nixon's appointment of Lewis Powell as a part of his "southern strategy" (Yaloff, 1994, 104); and Truman's appointment of sitting Republican Senator Harold Burton (even if that was designed so that the Democratic governor of Ohio would choose a Democrat to replace Burton in the Senate (Abraham, 2007, 189)). These cases will be controlled for because "cross-party" nominees might be more moderate, or might be more likely to garner a higher percentage of votes from the Senate, than nominees from the president's own party.

Replaced a Justice With Similar Ideology: An independent variable which captures whether a nominee is replacing a justice of similar ideology will also be included. The reason for this is that, as Yaloff notes, the "attributes of the outgoing justice… may also influence expectations for a prospective replacement" (Yaloff, 1999, 5). As a result, a nominee's chances of accumulating votes from senators may be a function of "the perceived effect of a nomination on the ideological balance of the Court," a fact that may have played a (modest) role in Robert Bork's failure to gain confirmation as a replacement for the moderately conservative Lewis Powell (Comiskey, 2004, 45; Yaloff, 1999, 5). As another example, Yaloff offers the fact that Justice Scalia was replacing the conservative Justice Burger to explain why Scalia's confirmation went so smoothly, adding that "real battlelines are drawn… when a liberal justice [is going to be replaced by a conservative justice]" (Yaloff, 1999, 155). In support of this assertion, Krehbiel's formal model analysis demonstrates that "changes in the Court's median are confined to appointment years and... to appointments in which vacancies are distal [from the ideology of the appointing

president]" (Krehbiel, 2007, 236). Herein, this idea will be empirically addressed in an OLS regression model that focuses on whether justices that replace ideologically "distal" counterparts are more moderate than those that replace ideologically similar counterparts.

Table A.3 is included in Appendix A to illustrate how justices were coded for this variable. Essentially, if the president who appointed the departing and the incoming justice were from the same party, a justice was coded as "replacing same party," with the exception of certain anomalies—that is, justices whose observed voting behavior at the time they were leaving the Court was consistently accepted to fall in the opposite direction of his appointing president's party. Such special cases are denoted with an asterisk in the appendix. (No such judgments were made about *incoming* justices; for instance, Earl Warren is assumed to be a Republican, because during his confirmation process, no indication of extremely liberal tendencies was readily apparently, and thus, the confirmation battle proceeded under the assumption (erroneous, as it turns out) that he would *not* be as a liberal a justice as he was.

Years of Experience as a Federal Judge: This variable will capture the number of years that a justice serves as a federal judge before he or she is confirmed to the Supreme Court. Ultimately, this factor may have an effect on the number of favorable votes that a nominee receives in the Senate, so it will be used as a control variable in models that measure the impact of total favorable votes received. The reason that this variable is relevant becomes clear when one considers Baum's suggestion that "a prior judicial record helps presidents and their advisers to predict the positions that prospective nominees might take as justices" (Baum, 2008, 60). In speaking about the Bork nomination, for example, Silverstein observes that "opponents of the nomination set about to compile a collection of Bork's scholarly writings and his opinions while

a judge on the U.S. Court of Appeals," a collection that came to be known as the "Book of Bork" (Silverstein, 1994, 72). One can contrast this portrayal with the confirmation hearings of David Souter, who, because he had only spent three months on the U.S. Court of Appeals prior to his nomination, had "left almost no paper trail" (Silverstein, 1994, 98), and as a result, was what Abraham calls a "stealth nominee" (Abraham, 2008, 291). Therefore, it may be wise to include a control variable for the number of terms that a nominee has spent in the position of a federal appellate judge in any regression model that accounts for supporting votes received during a Senate confirmation hearing. This is especially true in light of Epstein, Knight, and Martin's assertion that federal judicial experience is becoming a "norm" among appointees to the Supreme Court—given that Rehnquist (1971) was the last confirmed justice without prior judicial experience (Epstein, Knight, and Martin, 2003, 906).

"Election Approaching:" This variable will be used to gauge whether an appointment occurs during the final year of a presidential term. The reason for this is implicit in Yaloff's statement that, "When a vacancy arises just before a pending presidential election, the president may be forced to nominate a noncontroversial moderate as a means of achieving the requisite support in the Senate" (Yaloff, 1999, 4). Baum also notes that, "Nominees who appear to be moderate might strengthen a president's support among undecided voters" (Baum, 2008, 41). Epstein and Segal even observe that a president in "the last year of his office [is likely to have] only a minimal influence over senators of either party" (Epstein and Segal, 2005, 108); they actually offer statistical evidence to back this assertion when they state that the Senate has confirmed only 56% of Supreme Court nominees in the fourth year of a president's term (14 of 25) versus 87% in the first three years (106 of 122) (Epstein and Segal, 2002, 201-202). (To update these

2005 figures, Alito would be added to the first group, while Roberts would be added to the second). Segal and Spaeth also found that an appointment in the fourth year of a presidency lowers by .34 the probability of a justice winning confirmation in the Senate (Segal and Spaeth, 2002, 201-202). For these reasons, an "election approaching" variable will be included herein, to assess whether a president is more likely to appoint an ideologically moderate justice if the appointment occurs in the last year of a presidential term. Justices Thomas, Kennedy, Stevens, Rehnquist, Powell, Brennan, and Stewart will be coded as "election approaching" nominees, for their confirmation votes occurred within one year of an upcoming presidential election.

Individual examples can also be used to highlight the value of including this measure as a control variable. For example, "[President Ford] may have shunned a controversial appointee, such as Robert Bork, to avoid having the Senate delay the confirmation until [after] the election year of 1976" (Abraham, 2008, 259)—instead opting for the moderate Justice Stevens. President Ford's personal papers indicate as much, for they reveal that Ford crossed Dallin Oaks name off his list of potential nominees and wrote a note in the margin of the paper which suggested that Oaks' ties to the Mormon church might result in a "confirmation fight" (Yaloff, 1999, 128).[33] The fact that Ford's approval rating was a low 41%, the fact that he was facing a hostile Senate in which the Democrats held a 24 seat advantage, and the fact that a liberal seat had been vacated on the Court could also have played a role in the choice of a moderate nominee (Segal and

[33] Other cases are also relevant. For instance, a pending election, coupled with a low approval rating, may also have doomed Lyndon Johnson's attempt to elevate Abe Fortas to the position of Chief Justice in 1968. Further, the nomination of Anthony Kennedy offers another germane example. With the 1988 election less than a year away, Senator Patrick Leahy, a Democrat from Vermont and a member of the Senate Judiciary Committee, declared that if the White House failed to provide a "readily acceptable" nominee on its third try (after Bork and Ginsburg), then there would be no opportunity for another nomination before the election (Yaloff, 1999, 164). Even Republican Senator Robert Dole implored President Reagan to "proceed with caution" prior to the nomination of the moderate Kennedy (Yaloff, 1999, 164).

Spaeth, 2002, 181-182). Consequently, the Ford nomination of Stevens is a salient example of the need to account for a number of the independent variables discussed herein.

Section 3.2.vi: A Key Variable That Will Not Be Considered Herein

The "Nixon" or "1968" Variable: In their work, Richardson and Scheb include a variable entitled "1968" to incorporate "the changing political environment of the Supreme Court since 1968" (Richardson and Scheb, 1993, 464), an environment which they contend became "significantly more politicized" after President Nixon "made the liberalism of the Warren Court a major campaign issue" and presaged an era in which presidents might be more likely to appoint ideologically extreme justices (Richardson and Scheb, 1993, 465). Other scholars have made similar claims; for instance, Powers and Rothman assert that, "Only in the last 50 years has the Court been so systematically involved with social, economic, and political questions central to the nation's order and well-being" (Powers and Rothman, 2002, 1). Silverstein broadens the scope of the "politicizing" of the confirmation process when he notes individual senators have become more "visible political actors" (Silverstein, 1994, 129) with the expansion of the "modern media" and, more specifically, the television broadcast of Supreme Court hearings (Silverstein, 1994, 145). Eisgruber and Comiskey also attempt to further this line of reasoning by pointing out that between 1896 and 1968, only one Supreme Court nominee was rejected by the Senate (Comiskey, 2004, 9; Eisgruber, 2007, 3).

However, from 1896 to 1946, only two nominations were made during periods of divided government (Comiskey, 2004, 17), one of which was rejected. Overall, between 1896 and 1946, opposing parties controlled the White House and the Senate for only two sessions of Congress. So, perhaps the "modern" wrangling that surrounds Supreme Court nominations can be attributed to a rise in the presence of divided government. In fact, despite the aforementioned

claims that the confirmation process has grown more truculent since 1968, an appraisal of the history of Supreme Court nominations seems to indicate that a "politicized environment" has almost always surrounded the nation's highest Court.

Comiskey, for instance, purports that the Senate has a "long tradition of opposing nominees for personal, regional, and political reasons" dating back to the rejection of a George Washington nominee, John Rutledge, in 1795 (Comiskey, 2004, 23). Further, although some have suggested that the process has become more contentious since hearings began to be televised in 1981 (Comiskey, 2004, 50; Yaloff, 1999, 15), that hypothesis does not abrogate the possibility that combative media campaigns were a part of the confirmation process prior to 1981. Comiskey himself observes that, subsequent to George Washington's nomination of John Rutledge for Chief Justice, "Partisan Federalist newspapers throughout the country, upset with Rutledge's vocal opposition to the Jay Treaty with Britain, questioned the nominee's sanity and his qualifications for the job" (Comiskey, 2004, 75). He goes on to quote John Anthony Maltese, who implies that John Rutledge was "Borked," a statement which aptly emphasizes the fact that fervent debate over Supreme Court nominees is not exclusive to the post-1968 or post-1981 era (Comiskey, 2004, 76).

Other examples abound. For instance, in 1811, Alexander Wolcott, nominated to the Supreme Court by James Madison, was "panned" in New England newspapers, one of which described Wolcott as "more fit to be arraigned at the bar than to sit as a judge" (Epstein and Segal, 2005, 93). Later, in 1881, a coalition of interest groups, including the National Grange and Anti-Monopoly League, "figured significantly in defeating Stanley Matthews' nomination to the Court" (Yaloff, 1999, 16). Further, in 1888, *The New York Times* reported that, "[The]

judiciary committee's treatment of Melville Fuller, whom Grover Cleveland had nominated as Chief Justice, began [with] a rousing search into all the dark abodes of scandal and tattle, to hunt for something against the character of the President's nominee" (Epstein and Segal, 2005, 91). *Harper's Weekly* added that, "Party spirit… sought every means to discredit [Fuller]" (Epstein and Segal, 2005, 91).

As for Justice Brandeis' confirmation in 1916, *The Wall Street Journal* declared that, "Where others were radical, he was rabid; where others were extreme, he was super extreme… The confirmation battle raged against a background of some of the ugliest charges ever levied against a distinguished servant. A former president even referred to him as 'an insidious devil'" (Epstein and Segal, 2005, 1). In providing another example, Comiskey notes that 1937 Roosevelt nominee Hugo Black was the subject of media reports detailing his membership in the KKK (Comiskey, 2004, 76). Even the 1967 campaign against Thurgood Marshall has been described by Stephen Carter as "openly racist" (Carter, 1994, 76)—and this was just one year before the alleged 1968 "shift" in the nature of the Supreme Court confirmation process that Richardson and Scheb suggest.

While it is true that senators became more visible as political figures subsequent to 1913, when they began to be directly elected, and while it is true that many confirmation hearings were not open to the public before 1967, closed door hearings (even among appointed senators) need not have been of an amicable tenor, for as Epstein and Segal note, "Political clashes over candidates for the Supreme Court are not a new phenomenon.… It would be a mistake to

conclude that politics, in the form of ideology and partisanship, plays a far greater role in the 2000s than it did in, say, the 1930s" (Epstein and Segal, 2005, 2).[34]

Yaloff actually feels that a tangible change in the nature of the confirmation process could have arrived with the Bork hearings, which he suggests may have resulted in George H.W. Bush and Bill Clinton subsequently selecting more moderate nominees "to avoid the embarrassment… of an ugly confirmation defeat" (Yaloff, 1999, 207). And, Eisgruber even states that the post-Nixon political climate favors moderate appointees, as if "moderation is a virtue," given the fact that opposition interest groups will mobilize resources against a polarizing nominee (Eisgruber, 2007, 14)—an idea implicit in Eisgruber's rumination that, "Never again will a nominee with an extreme or controversial judicial philosophy answer questions as candidly as Bork did [at his hearings]" (Eisgruber, 2007, 156). Perhaps future research should examine whether "Post-Bork" nominees are more moderate than their predecessors; this dissertation offers no such claim, and the small sample size of justices that have been confirmed after Bork's defeat make empirical assessments difficult at this time.[35]

Section 3.2.vii: Hypotheses Derived from the Literature Review

Initially, this study will commence with a reexamination of Richardson and Scheb's primary hypothesis:

Hypothesis #1: Justices appointed under conditions of divided government will be more moderate in their voting behavior than those appointed under conditions of unified government.

[34] Statistical evidence of the idea that the process has not confirmed more ideologically extreme justices since 1968 can be seen in the fact that if a "pre-/post-1968" variable ("0"=pre; "1"=during/post) is added for the full sample of justices used in the first regression model offered herein (Table 3.1), it yields a coefficient that is insignificant at the .914 probability level in civil rights and civil liberties cases, and actually yields a coefficient that suggests more moderate behavior among post-1968 appointees when it comes to economic cases.

[35] Epstein, Lindstadt et al., take a step in this direction when they address whether senators considered the ideology of nominees as a bigger factor in casting confirmation votes in the post-Bork era, but their findings suggest that "greater attention to ideology began not with [Bork] but with appointments to the Warren Court" (Epstein, Lindstadt et al., 2006, 395).

Along these lines, and in keeping with the expanded conceptualization of "division in government," it is worth exploring whether a president that perceives himself as having a "mandate" from the American people, in the form of high public approval ratings, might be more likely to appoint an ideologically extreme justice to the Court. As a result, this study will assess whether Gallup approval ratings for the president (measured at the time of a Supreme Court justice's confirmation vote) have any explanatory power when it comes to the subsequent voting behavior of Supreme Court justices. A tentative hypothesis related to this matter might read as follows:

Hypothesis #2: A president with a higher approval rating is more likely to appoint a justice who exhibits an ideologically extreme voting pattern on the Supreme Court than a president with a lower approval rating.

Subsequently, this chapter will then examine a new hypothesis related to the idea that "division" can persist within a particular branch itself. For example, a 51-49 party-line split in the Senate seems likely to offer the potential for confirming a different "type" of justice than a filibuster-proof 67-32 majority might offer. As a result, a portion of this study will attempt to correlate data from Senate confirmation votes with the subsequent voting behavior of Supreme Court justices. Briefly, this analysis will commence by addressing the following research question:

Does a justice who is confirmed by a narrow margin in the Senate exhibit signs of being more ideologically extreme?

A tentative hypothesis derived from this query might read as follows:

Hypothesis #3: A Supreme Court nominee who is confirmed by a wide margin in the Senate is more likely to exhibit an ideologically moderate voting record on the Court than a justice who is confirmed by a narrow margin in the Senate.

The theoretical basis for this hypothesis is that a closely divided Senate—one in which the potential for a filibuster exists—would 1) prevent an ideologically extreme nominee from being confirmed, or 2) prevent a president from even nominating an ideologically extreme candidate in the first place. The scope of the inquiry precipitated by hypothesis #3 can be expanded by assessing the number of seats controlled by each party at the time of a confirmation vote—in keeping with the notion that "intra-branch" division may have a moderating effect. A hypothesis related to this idea is as follows:

Hypothesis #4: As the number of Senate seats controlled by the majority party increases, the "extreme" score of a justice confirmed by the Senate will increase, even after controlling for the presence of divided government and presidential approval rating at the time of confirmation.

Ultimately hypotheses #2, #3, and #4 extend the scope of the aforementioned Richardson and Scheb article by offering a panoply of continuous variables which can be used to generate a more comprehensive depiction of "divided government."

Section 3.3: Data and Methods

Section 3.3.i: Data Source / Unit of Analysis

The primary sources of data for testing these four hypotheses are the Spaeth *ALLCOURT* and *Vinson-Warren* databases. These datasets are essentially a catalog of every Supreme Court case between the 1946 and 2007 terms for which a written opinion was issued. The unit of analysis for the data—and thus, for this study—is the votes of individual justices. Variables that are classified in the databases include the ideological direction of the votes cast by justices (coded as "liberal" or "conservative"), the issue areas that encompass specific cases (e.g., "civil liberties"), and the year in which a case was decided. Gallup poll data related to presidential approval will

also be utilized (and is discussed below). Overall, thirty-one Supreme Court justices—as opposed to the twenty-four utilized by Richardson and Scheb—will be examined herein.

Section 3.3.ii: Statistical Tools That Will Be Used Herein

This study will commence with the generation of "extreme" scores for each justice in the dataset. Subsequently, I will generate three separate multivariate OLS regression models to assess the four hypotheses listed above; Model 1 will evaluate hypotheses #1 and #2, and Model 2 will address hypothesis #3. Model 3 will incorporate elements of the first two models, and will also address hypothesis #4. For all of the regression models, I will employ the "extreme" score as a dependent variable; independent variables that will be considered are discussed below. In addition, because of the small sample sizes, Shapiro-Wilk and Shapiro-Francia tests will be used to assess the normality of the residuals for all models. Finally, variance inflation factor (VIF) scores that examine the possibility of co-linearity among the independent variables will also be offered. Each model will have two parts: one that covers voting behavior in civil rights and civil liberties cases and another that covers voting behavior in economic cases; this will facilitate a rudimentary control for changes in the types of cases that may come before the Court.

Section 3.3.iii: Independent Variables for Model 1

The first model will test hypotheses #1 and #2. The primary independent variable from Richardson and Scheb's study, "divided government" ("1"=divided, "0"=unified), will be retained; another primary independent variable that will be examined in this model is "presidential approval rating." Again, the theoretical underpinning for including this variable is that a president with a high approval rating may have the political capital to appoint a more ideologically extreme justice. The source for the approval data is Gallup's presidential approval poll, which has been taken at various intervals since 1937. The number incorporated for each

case herein is the percentage of surveyed respondents who "approve" of the president's performance *on the date when the confirmation vote for a justice nominated by that president takes place*.[36] Control variables for tenure length, "first choice" nominees, whether a justice served as a Chief Justice, and whether a justice previously held elected political office will be used in Model 1. Collectively, all of these variables will yield the following regression equation:

Y ("Extreme") = a + x1 (Divided Government/Unified Government) + x2 (Presidential approval rating at time of confirmation vote) +x3 (Tenure length, or total terms served on court) + x4 (1st choice / not) + x5 (Chief Justice / not) + x6 (Held elected political office / not) + u

The sample size for this model is 31 justices; this total includes 12 "divided" and 19 "unified" appointees, as well as 17 appointed by Republican presidents and 14 appointed by Democratic presidents.

Section 3.3.iv: Independent Variables for Model 2

A second regression model will then be used to test hypothesis #3. The dependent variable for this regression model will remain the "extreme" voting score. Three new independent variables will be added. The first represents "percent of senate votes" that a nominee receives at his or her confirmation hearing. This will be computed by dividing the total number of votes in favor of a nominee by the total number of votes that *could* have been cast. A percent is utilized instead of the raw margin between "yea" and "nay" votes for two reasons. First, the sample predates the existence of fifty states, and thus, the raw composition of the confirming senate varies for different justices. Second, a raw margin count would necessitate drawing different inferences about abstentions; in this case, a consistent inference is utilized: an abstention is simply counted as a vote against the candidate. Although Abraham notes that in some instances,

[36] A Gallup poll approval "number" covers a specific range of time (e.g., June 12-June 18), and whenever poll data are not available to cover the actual date of a confirmation, figures for the two closest dates are averaged.

a senator may simply be unable to attend a vote—as was the case during Justice O'Connor's 99-0 confirmation approval, when the 100th senator, Max Baucus (D-Mont.), a "strong supporter of the O'Connor nomination," was simply traveling (Abraham, 2008, 268)—a consistent rationale must be employed herein.

An additional independent variable will be used to measure whether a justice had previous experience as a federal judge prior to his or her ascension to the Supreme Court. Again, the rationale for including such a variable in this particular model stems from the fact that a justice's written record of previous opinions might enable senators to formulate a more comprehensive picture of a nominee's ideological disposition, and could thereby impact the number of votes that a nominee receives in a confirmation hearing. Specifically, the variable used will measure the "number of years of experience as a federal judge" prior to ascending to the Supreme Court.

The third new independent variable used in Model 2 will assess whether a justice was a "cross-party" nomination; it is included because "cross-party" nominees may have a better chance of culling votes from senators, and might be more moderate in their voting behavior than nominees from a president's own party. With these three new independent variables added to those from Model 1, Model 2 will offer the following regression equation:

Y ("Extreme") = a + x1 (Divided Government/Unified Government) + x2 (Presidential approval rating at time of confirmation vote) +x3 (Tenure length, or total terms served on court) + x4 (1st choice / not) + x5 (Chief Justice / not) + x6 (Held political office previously / not) + x7 (Percentage of total senators that vote to confirm) + x8 (Number of years of experience as a federal judge) + x9 ("Cross-party" nominee) + u

Because of the fact that ten justices who are included in Model 1 were confirmed via an unrecorded voice vote, they will not be included in Model 2.

Section 3.3.v: Independent Variables for Model 3

The third model will include the same variables from Model 2 plus three additional ones. The primary addition will quantify "the number of seats controlled by the majority party in the senate." This will allow for some assessment of divided government in terms of how fractured the Senate itself is. In addition to this variable, two dummy variables will be added. One will gauge whether a nominee was to replace a justice with a "similar ideology," and the other will capture whether an appointment took place in the final year of a presidential term. As discussed in the literature review, each of these circumstances may result in the confirmation of a more moderate justice. The inclusion of these variables will yield the following equation:

Y ("Extreme") = a + x1 (Divided/Unified Government) + x2 (Presidential approval rating at time of confirmation vote) +x3 (Tenure length, or total terms served on court) + x4 (1^{st} choice / not) + x5 (Chief Justice / not) + x6 (Held political office previously / not) + x7 (Percentage of total senators that vote to confirm) + x8 (Number of years of experience as a federal judge) + x9 ("Cross-party" nominee) + x10 ("Replaced justice of similar ideology") + x11 (Appointment in final year of a presidential term) + x12 (Number of senate seats controlled by majority party) + u

Section 3.4: Findings and Discussion

Section 3.4.i: Discussion of Model 1 Findings

To reiterate, the ultimate goal of this inquiry is to discern the impact that democratically-elected officials, whether they are presidents or senators, can have in influencing the policy outputs of the Supreme Court. Initial information derived from the first regression model is described in Table 3.1, and the relevance of the results is discussed below.

The primary objective of Table 3.1 is to assess hypotheses #1 and #2. Hypothesis #1 addresses the impact of divided government on the subsequent voting behavior of a Supreme Court nominee. Its null would read as follows:

Ho1: Justices appointed under conditions of divided government will NOT be more moderate in their voting behavior than those appointed under conditions of unified government.

Table 3. 1: The Relationship Between Divided Government and "Extreme" Voting Scores of Supreme Court Justices (OLS Regression)

Independent Variables	Dependent Variables	
	"Extreme" Score in Civil Rights and Civil Liberties Cases	"Extreme" Score in Economic Cases
Presence of Divided Government	-0.0805* (0.0443)	-0.0585* (0.0297)
Presidential Approval Rating at Time of Justice Confirmation	0.0019 (0.0018)	0.0004 (0.0012)
Total Terms Served on Supreme Court	0.0026 (0.0020)	0.0027** (0.0013)
"First Choice" Candidate	-0.0679 (0.0577)	0.0584 (0.0387)
Served as Chief Justice	0.0820 (0.0526)	0.0211 (0.0387)
Previously Held Elected Political Office	-0.0378 (0.0478)	0.0004 (0.0321)
Constant	0.1064 (0.1081)	0.0008 (0.0726)
Observations	31	31
R-squared	0.21	0.36
F-Ratio	1.04	2.23*
Mean VIF Score	1.21	1.21
Residual Kurtosis	2.36	2.51
Residual Skewness	0.393	0.394
Shapiro-Wilk (Probability)	0.952 (.175)	0.969 (.499)
Shapiro-Francia (Probability)	0.955 (.188)	0.975 (.584)

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

Table 3.1 yields a regression coefficient of -0.0805 for the primary independent variable "divided government," as measured for civil rights and civil liberties cases. This value is statistically significant at the .082 level. Given that previous judicial politics research has suggested that a probability level of .10 is suitable for delineating statistical significance in studies that involve Supreme Court justices (Brenner, 1983, 322)—because such studies invariably have a small sample size—this finding is statistically significant. Since the "extreme" scores are coded as proportions, this value indicates that, on average, in civil rights and civil liberties cases, justices appointed under conditions of divided government will exhibit an "extreme" voting score that is 8.05 points lower than that of justices appointed under conditions of unified government, while controlling for the president's approval rating at time of confirmation, the justice's tenure, whether the justice was a "first choice," whether the justice was a chief justice, and whether the justice had previously held elected office.

This finding is also replicated in the model concerning economic cases, which yields a coefficient of -0.0585, a value that is statistically significant at the .061 level. This indicates that, on average, in economic cases, justices appointed under conditions of divided government will exhibit an "extreme" voting score that is 5.85 points lower than that of justices appointed under conditions of unified government. Thus, from both models, one can suggest that null hypothesis #1 is rejected, and can surmise that justices appointed under conditions of divided government appear to be more moderate in their voting behavior than justices appointed under conditions of unified government. As for hypothesis #2, which assesses presidential approval ratings, findings are not significant. The null hypothesis for this matter read as follows:

Ho2: A president with a lower approval rating is NOT more likely to appoint an ideologically moderate justice than a president with a higher approval rating.

For the independent variable "presidential approval rating," the civil rights/civil liberties model shows a regression coefficient of .0019, which occurs at the .310 probability level and, therefore, is not statistically significant. The economics model offers a regression coefficient of .0004, which occurs at the .765 level. As a result, one must fail to reject the null hypothesis, and must conclude that presidential approval rating is not a significant predictor of how extreme a Supreme Court justice's voting behavior will be. None of the other variables included in the civil rights/civil liberties model are significant, but the "tenure" (or "total terms served") variable in the economics model yields a coefficient of .0027, which is significant at the .049 level. This suggests that, on average, for each additional term served, a justice's "extreme" score in economic cases is likely to be .27 points higher. This could be a spurious finding, given that a similar result is not evident in the civil rights/civil liberties model. Results from subsequent models will be needed before broad conclusions can be derived regarding this matter.

The first set of diagnostics performed on Model 1 is designed to assess the normality of the residuals. Kurtosis levels, skewness levels, and both Shapiro tests yield values that can lead one to conclude that the residuals are normally distributed for both the civil rights/civil liberties model and the economics model. A second set of diagnostics assesses the possibility that there is co-linearity among the independent variables. As seen in Table 3.1, the VIF test yields a low mean value of less than 1.5 for both the economic and the civil rights models. Consequently, one can feel comfortable that co-linearity is not a problem.

Section 3.4.ii: Discussion of Model 2 Findings

A second model is then used to test a null hypothesis related to the number of confirmation votes received by a nominee. An OLS regression model related to this inquiry yields the information offered in Table 3.2, and will be used to address the following null hypothesis:

Table 3. 2: The Relationship Between Votes Received During Senate Confirmation and "Extreme" Voting Scores of Supreme Court Justices

Independent Variables	Dependent Variables	
	"Extreme" Score in Civil Rights and Civil Liberties Cases	"Extreme" Score in Economic Cases
Favorable Votes Received in Senate Confirmation (measured as a % of available votes)	-0.0028* (0.0014)	-0.0017* (0.0010)
Presence of Divided Government	-0.1386** (0.0511)	-0.0738* (0.0354)
Presidential Approval Rating at Time of Confirmation	0.0042 (0.0027)	-0.0000 (0.0018)
Total Terms Served on Supreme Court	0.0063** (0.0027)	0.0045* (0.0019)
"First Choice" Candidate	-0.0674 (0.0560)	0.0538 (0.0388)
Served as Chief Justice	0.1120* (0.0581)	-0.0156 (0.0402)
Previously Held Elected Political Office	-0.0493 (0.0527)	-0.0211 (0.0365)
Number of Years of Experience as a Federal Judge	0.0019 (0.0052)	-0.0001 (0.0036)
"Cross-Party" Appointment	0.1362 (0.1184)	0.0539 (0.0820)
Constant	0.1462 (0.1844)	0.1369 (0.1278)
Observations	21	21
R-squared	0.64	0.68
F-Ratio	2.14	2.55*
Mean VIF Scores	1.65	1.65
Residual Kurtosis	2.39	2.32
Residual Skewness	0.493	0.158
Shapiro-Wilk (Probability)	0.951 (.351)	0.976 (.850)
Shapiro-Francia (Probability)	0.958 (.409)	0.978 (.822)

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

Ho3: A Supreme Court nominee who is confirmed by a wide margin in the Senate is NOT more likely to be ideologically moderate than a justice who is confirmed by a narrow margin.

The primary independent variable for Model 2 is "favorable Senate votes received by a nominee." For civil rights and civil liberties cases, it yields a regression coefficient of -0.0028, which is statistically significant at the .088 probability level. Specifically, on average, for every one percentage point increase in favorable Senate votes received (out of total votes available), a justice's "extreme" score decreases by 0.28 points, when controlling for divided government, presidential approval rating at the time of confirmation, total terms served on the Supreme Court, "first choice" status, whether a justice was a chief justice, whether a justice had previously held political office, the number of years that a justice served as a federal judge before ascending to the Supreme Court, and whether a justice was a "cross-party" nominee.

The economic portion of the model yields a coefficient of -0.0017 for the variable "favorable votes received," a value which is statistically significant at the .08 level. Specifically, on average, for every one percentage point increase in favorable Senate votes received, a justice's "extreme" score in economic cases will decrease by .17 points, when controlling for the other variables in the model. As a result, for both sets of cases, one would reject the null hypothesis and suggest that the number of favorable Senate votes received by a Supreme Court nominee is a significant predictor of that justice's "extreme" voting score once he or she ascends to the bench. Intuitively, this seems logical because a justice confirmed by a wide margin is one who generates little controversy, and thus, would be likely to hold moderate political views. After all, as Baum notes, "Extremists are more distant ideologically from the average senator" (Baum, 2008, 44).

In addition, it is important to note that "divided government" remains a statistically significant variable in both versions of Table 3.2 (coefficient of -.1386, significant at a

probability level of .025, for civil rights and civil liberties cases; coefficient of -.0738, significant at a probability level of .057, for economic cases). Furthermore, "presidential approval rating" continues to be insignificant (probability of level of .166 in civil rights and civil liberties cases, and .961 in economic cases). Previous assessments of hypotheses #1 and #2, then, appear to be accurate: Justices confirmed under conditions of divided government tend to be more moderate, and presidential approval rating at the time of confirmation does not appear to have any relationship to how ideologically extreme a Supreme Court justice's voting behavior will be.

Finally, just as it was in Table 3.1, "tenure length" is statistically significant (at the .025 level) when it comes to economic cases in Table 3.2; additionally, tenure length is also significant at the .058 level for the civil rights and civil liberties cases. Consequently, some evidence that justices may become more extreme over time seems to emerge with this model, although a time series model (which will be offered in the following chapter) will be needed to address this idea more specifically. The only other variable that is statistically significant in Model 2 is the variable "Chief Justice" in the civil rights and civil liberties section; it yields a coefficient of .1076, which is significant at the .094 probability level. This suggests that the Chief Justices in this sample (Warren, Burger, Rehnquist, and Roberts) have "extreme" scores that are 10.7 points higher, on average, than the Associate Justices in this sample—when it comes to voting behavior in civil rights and civil liberties cases. This variable was not statistically significant for the economic cases. No other independent variables were significant in Model 2. Kurtosis, skewness and Shapiro tests for Model 2 are all within an acceptable range; this suggests that the residuals are normally distributed. Further, no evidence of co-linearity is found.

Section 3.4.iii: Discussion of Model 3 Findings

The key independent variable which is added to Model 2 to give us Model 3 is the "percentage of total Senate seats controlled by the majority party." This will expand the scope of the term "divided government" by accounting for division within the Senate itself. The null hypothesis in this case would read as follows:

Ho4: As the number of seats controlled by the majority party increases, the "extreme" score of a justice confirmed by that senate will NOT increase, even after controlling for the presence of divided government.

Results from the OLS regression model used to test this hypothesis are revealed in Table 3.3. In civil rights and civil liberties cases, seven of the variables in this model are statistically significant—five at or below the .01 probability level; however, the inclusion of the additional control variables in this model renders the economics model virtually irrelevant, with only tenure remaining statistically significant. This discussion, then, will be centered around civil rights and civil liberties cases.

The key independent variable in this model yields a coefficient of .0028, which is statistically significant at the .01 level; specifically, for each percentage point increase in Senate seats controlled by the majority party at the time of confirmation, the "extreme" score of a Supreme Court justice rises by .28 points, while controlling for the other variables in the model. Therefore, one would reject null hypothesis #4 as it applies to civil rights and civil liberties cases. Again, this is probably a result of the fact that a robust majority can invoke cloture, and thereby eliminate even the threat that a filibuster could jeopardize the appointment of an ideologically extreme candidate. Beyond that, this finding may be indicative of the fact that some of the most ideologically extreme justices in the sample were confirmed during the New Deal era (including Justices Douglas and Black), when Democrats controlled up to 77 seats.

Table 3. 3: Factors That Explain "Extreme" Voting Scores of Supreme Court Justices

Independent Variables	Dependent Variables
	"Extreme" Score in Civil Rights and Civil Liberties Cases
Number of Senate Seats Controlled by Majority Party (Measured as Percent of Total Seats)	0.0028*** (0.0009)
Favorable Votes Received in Senate Confirmation (measured as % of available votes)	-0.0040*** (0.0011)
Presence of Divided Government	-0.2218*** (0.0615)
Presidential Approval Rating at Time of Justice Confirmation	0.0084*** (0.0023)
Total Terms Served on Supreme Court	0.0079** (0.0019)
"First Choice" Candidate	-0.0379 (0.0384)
Served as Chief Justice	0.0654 (0.0462)
Previously Held Elected Political Office	-0.0135 (0.0400)
Number of Years of Experience as a Federal Judge	0.0035 (0.0036)
"Cross-Party Appointment"	0.1908** (0.0817)
Replaced Justice of "Similar Ideology"	0.0743* (.0362)
Appointment in final year of a presidential term	0.0977 (0.0548)
Constant	-0.1990 (0.1618)
Observations	21
R-squared	0.88
Adjusted R-squared	0.71
F-Ratio	5.02***
Mean VIF Score	2.58
Residual Kurtosis	3.18
Residual Skewness	0.219
Shapiro-Wilk (Probability)	0.985 (.978)
Shapiro-Francia (Probability)	0.977 (.811)

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

"Divided government" remains statistically significant in Table 3.3, yielding a coefficient of -22.18, which is significant at the .007 level. In addition, "favorable votes received by the Senate" is again significant, this time at the .005 level, with the coefficient of -0.004 moving in the expected (moderating) direction. So, for each additional vote that a nominee receives, his or her "extreme" score will decrease by .40 points. The real surprise in this model, though, is that "presidential approval rating" is statistically significant, yielding a coefficient of .0084, which is significant at the .006 level. This suggests that for each additional point increase in the appointing president's approval rating, a justice's "extreme" score will increase by .84 points in civil rights and civil liberties cases, while controlling for the other variables in the model. However, it is worth noting that presidential approval was not significant in Table 3.1 or Table 3.2; therefore, we must take great care before extrapolating broad conclusions from this information, for these effects may be endemic to the unique nature of this sub-sample (which does not include justices confirmed by voice votes). On the other hand, the inclusion of new control variables (such as "majority seats controlled") may have helped to illuminate the relative value of the now-significant variable. Future research will have to discern which is more plausible.

In addition, "tenure" remains significant in Model 3, with a coefficient of .0079, which occurs at a probability level of .003. Once again, it seems as though justices become more extreme in their voting behavior with each additional term served. Beyond that, justices who replaced others of "similar ideology" were also more "extreme" than those who replaced justices of a divergent ideology. Specifically, on average, the former were 7.43 points more "extreme," a finding which was significant at the .074 level. This is an expected finding, as it seems likely

that confirmation hearings would be more quarrelsome when a change could alter the overall ideological balance of the Court. Finally, the model suggests that "cross-party" nominees hold "extreme" scores that are, on average, 19.08 points higher than their counterparts, a value significant at the .048 level. This was not an expected outcome, as the variable was only included as a control for the number of favorable votes received from the Senate. It is likely that this finding is simply a quirk specific to the sample, which contains only three justices that fit the description of "cross-party" nominees. Diagnostics for Model 3 do not indicate any potential problems with the residuals or with co-linearity among independent variables.

Of course, it is important to note that the robust findings offered in Table 3.3 are reserved for civil rights and civil liberties. Ultimately, this may reflect the difference between civil rights and civil liberties cases in comparison to economic cases, in the sense that the former may be more salient in the public purview and as a result, a justice's perceived positions on social issues may be more relevant to the presidents and senators who are responsible for appointing and confirming justices to our nation's highest Court.

Section 3.5: Other Factors That Could Influence the Appointment and Confirmation Process (But Which Are Not Captured in the Models Offered Herein)

In explaining the results offered in Section 3.4, which do indicate that unified government is strongly associated with the confirmation of ideologically extreme justices, it is important to note that there may be other reasons besides ideological compatibility (or ideological extremism) that could motivate a president's choice of nominee to the Supreme Court. Abraham, in fact, notes that "real ideological compatibility" is only one of four primary reasons for a nomination; the others include "objective merit, personal friendships, and representativeness" (Abraham, 2008,

2). For example, Abraham suggests that President Eisenhower nominated Earl Warren largely as a reward for "swinging all but eight of California's 70-member delegation at the [1952 Republican] Nominating Convention to Eisenhower rather than to Senator Robert A. Taft" (Abraham, 2008, 200).[37] In fact, in December 1952, Eisenhower actually telephoned Warren from his transition headquarters to offer a "personal promise" that Warren would be appointed to "the first vacancy on the Supreme Court" (Yaloff, 1999, 46). Furthermore, Eisenhower listed "the absence of extreme views" as one of his criteria for selecting a nominee (Abraham, 2008, 199)—although he could not have foreshadowed the unexpected direction, and the unexpected extremity, of Warren's voting behavior.

During an ensuing appointment, Eisenhower considered the "political wisdom of designating, especially in an election year, a Democrat who also happened to be a Roman Catholic" (Abraham, 2008, 208). Ultimately, the number of individuals that Eisenhower's Attorney General, Herbert Brownell, was able to locate to fit the profile of a justice who had appellate court experience and was also a Roman Catholic Democrat yielded a "slim pool indeed," perhaps only three justices (Yaloff, 1999, 59; Wrightsman, 2006, 36). This resulted in a search process that "did not explore in… detail" how compatible the respective "judicial philosophies" of these justices would be with President Eisenhower's "moderate Conservative" ideology (Wrightsman, 2006, 36). However, after his victory in the 1956 election, Eisenhower focused more on a prospective candidate's conservative ideology, and found Potter Stewart (Yaloff, 1999, 61). In addition, subsequent nominee Charles Whittaker's "posture on the Court was [described as]

[37] In some cases, a President may not actively try to appoint a friend, but could be influenced to choose the friend of a political ally. For example, as Yaloff states, Attorney General Herbert Brownwell "made good on his promise to a friend" by pointing President Eisenhower in the direction of John Harlan (Yaloff, 1999, 54-55).

moderately conservative and fully in line with the president's expectations" (Abraham, 2008, 212). Of course, if Eisenhower had been searching for a "moderate conservative," his goal would not have been to nominate the most ideologically extreme candidate that he could find. Therefore, in all four cases, considerations beyond a prospective nominee's ideological extremity may have driven Eisenhower's selections; such factors might be missed by the regression models offered herein (although the "cross-party" considerations related to Brennan's nomination are accounted for).

Other presidents may have also used a Supreme Court nomination as a vehicle for winning the support of key constituencies. For example, President Nixon may have nominated Lewis Powell as a part of his "southern strategy" (Yaloff, 1999, 90). Additionally, President Reagan stated that "one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find, one who meets the high standards I will demand for all my appointments" (Abraham, 2008, 265), even though, as Congressman Morris K. Udall of Arizona said, "[Sandra Day O'Connor is] about as moderate a Republican you'll ever find being appointed by Reagan" (Abraham, 2008, 267). Elsewhere, President George H.W. Bush seems to have considered the midterm elections of 1990 before nominating David Souter; as Abraham notes, Bush wanted to avoid selecting an individual who would "trigger sustained ideological conflict on the eve of the 1990 midterm elections" (Abraham, 2008, 290).

Subsequently, President Clinton may have chosen the "moderately liberal" Ruth Bader Ginsburg (Abraham, 2008, 305) because he "feared that a contentious hearing would impact negatively on the impending 1994 [mid-term elections]" (Abraham, 2008, 310). Overall, Clinton had to "weigh the effect a controversial nominee might have on his ambitious legislative agenda"

(Yaloff, 1999, 196) because there was "far too much at stake for Clinton and the Democrats to take… a bold and daring approach to the selection process" (Yaloff, 1999, 205). Baum echoes this idea by noting that, "Clinton gave greater weight than most other presidents to the goal of avoiding confirmation battles" (Baum, 2008, 47). Toobin actually suggests that Justice Ginsburg's ideology "reflected, with great precision, the moderate-to-liberal politics of the president who chose her" (Toobin, 2007, 73)—which may indicate that even with the support of the Senate, a president may not always look to appoint the most ideologically extreme candidate possible. Furthermore, even if a president wishes to nominate such an individual, it may be difficult to discern exactly what a candidate's ideology is, or what issues will be salient in years to come (Comiskey, 2004, 153). For Yaloff, information asymmetry—perhaps created by the way that staffs are structured or by the influence that staffers wield in the appointment process (such as Brownell's clout in the appointment of Justice Harlan) (Yaloff, 1999, 54-55, 183)—can make it difficult for a president to fully understand the ideological proclivities of a nominee.

In some cases, ideological tendencies may even been wholly irrelevant, for some presidents have simply used the appointment power to reward loyal supporters (as Eisenhower did with Warren). For instance, President Truman nominated "trusted political allies" Tom Clark and Sherman Minton (Eisgruber, 2007, 125), with Truman aide Donald S. Dawson later declaring that Clark's appointment was "purely personal" (Yaloff, 1999, 37). In addition, Lyndon Johnson is often said to have rewarded Abe Fortas with a nomination to the Supreme Court as a form of "remuneration" for legal work that helped Johnson withstand a challenge to a disputed primary victory in the 1948 Texas Senate election (Abraham, 2008, 225).

Concisely, then, there may be plenty of reasons why a president, even with support from a "friendly" Senate, might wish to nominate an ideologically moderate candidate. The models enclosed herein have attempted to control for as many factors as possible, but the reality of the confirmation process is that it is complex. Therefore, crafting predictions about judicial behavior based on the political environment in which a justice is confirmed is indeed a difficult task. The information enclosed within this text has attempted to offer a comprehensive effort to distill this byzantine reality into three relatively complete, yet (somewhat) parsimonious models. Finally, in spite of all the plausible alternative explanations offered in this section, it is worth noting that, according to Tables 3.1, 3.2, and 3.3, presidents who have ideological support from the Senate have been able to place justices that are more ideologically extreme on the Supreme Court than presidents who lack such support.

Section 3.6: Conclusions / Suggestions for Future Research

Article II, Section 2 of the Constitution states that, "The President shall nominate and by and with the advice and consent of the senate shall appoint [justices to the Supreme Court]." This study attempts to placate concerns that, in spite of this two-pronged constitutional guarantee, Supreme Court justices generate policy without any direct influence from elected officials—the individuals who are charged with remaining responsive to a diversity of interests in society at large. If it were true, that supposition might cast doubt on whether the ideals upon which our nation was founded, basic tenets like the use of representative democracy to form policy, are in fact operating in our society today.

Prior research has examined this matter by assessing the impact of divided government on the behavior of Supreme Court justices. This study extends the scope of that scholarship by

invoking a larger sample size and a broader definition of the term "divided government." Ultimately, the results of this study offer evidence that should mollify outrage over the so-called "undemocratic" expansion of judicial review (Casey, 1974, 384). Empirical evidence clearly shows that "divided government" (government that is the product of democratic vote choices made by individual citizens) does have an impact on the subsequent policy outputs of Supreme Court justices (assuming that vote choices from individual justices aggregate to form "judicial policy"). Specifically, the independent variable "divided government" is statistically significant in all models presented herein. This seems intuitive, for as Watson and Stookey observe, "In periods of considerable consensus in the country, the executive and legislative branches tend to reflect the consensus by being controlled by the same political party and ideological view [and therefore] presidential nominees are more readily accepted by the Senate" (Comiskey, 2004, 183). Alternatively, in more contentious political climates, as Silverstein notes, "[The] modern liberal-democratic state seeks to achieve rough consensus on its most pressing and divisive issues" (Silverstein, 1994, 164)—which may explain the confirmation of more moderate justices during periods of divided government.

The number of favorable votes received from the Senate is also significant in the two models in which it is tested. This is also an expected finding, in light of the fact that moderate justices are likely to garner support from a wider array of Senators. Beyond that, the composition of the Senate itself—in terms of how ideologically polarized it is—also appears to have an impact on the type of nominee that gets confirmed to sit on our nation's highest Court, at least in civil rights and civil liberties cases (as Table 3.3 indicates). Finally, tenure length is significant in a

positive direction in 4 of the 5 regression models presented, and seems to indicate that justices tend to vote in a more extreme fashion with each additional term that they serve on the Court.

Of course, it is important to clarify that while the regression models offered herein may provide high predictive value (perhaps when it comes to forecasting the behavior of recent "unified" appointments like Alito and Roberts or when it comes to forecasting the behavior of justices confirmed by a wide margin in the Senate), no causal mechanism is suggested within the models themselves. In other words, I am not claiming that a justice will, for example, consciously process the fact that he or she is a "divided government confirmation" and thus cast more moderate votes once on the Court. However, when it comes to the results offered in this chapter, there may be an underlying causal mechanism operating on a different level—in the sense that the conditions which precipitate divided government in the first place could cause the Supreme Court to generate outputs which are more moderate.[38] As a result, the models offered herein can help to predict how justices will behave after confirmation, and in the process, can illustrate what types of political conditions (conditions that can be manipulated by the voting patterns of individual citizens) serve to explain the long term policy outputs of the Supreme Court (as those outputs are aggregated from the individual behavior of justices appointed by the president and confirmed by the Senate).

Consequently, from a theoretical standpoint, this study indirectly highlights the value that split-ticket voting can play if an individual voter wishes to play a part in constraining the "policy making" tendencies of the Supreme Court. After all, split-ticket voting is ostensibly what precipitates divided government—a form of government which, as this study has demonstrated,

[38] The three key components of John Stuart Mill's conception of causality—temporal precedence, covariation, and the control of plausible alternatives (Cook and Campbell, 1981, 11-13)—have been established in that regard.

is likely to result in moderate policy outputs from individual Supreme Court justices. Therefore, according to the results offered in the chapter, our constitutional design, which mandates that all presidential nominations be sent to the Senate for "advice and consent" (see Article II), has effectively ensured the persistence of an ex-ante "check" on the nation's highest Court.

While making that claim, this study has increased the sample size offered in previous assessments of Supreme Court decision-making; however, the small "n" utilized herein remains a significant limitation—especially when it comes to Table 3.2 and Table 3.3 (for which "voice votes" reduce the sample size). As a result, further extension of the Spaeth databases is recommended, for that would make an inquiry of this nature more comprehensive. In addition, if data concerning the specific tally from "voice votes" can be located, that would also make this study more complete by balancing the sample sizes in the models offered herein. Beyond that, as the overall sample size increases, samples of specific control variables (for things like "lame duck" presidents, Chief Justices, and "first-choice" appointments) could also become larger and more meaningful.

Future research might also consider methodological improvements on the models included herein. Specifically, the estimation method utilized is most limited when it comes to controlling for the interplay between tenure and "extreme" scores. Time series regression might be a better option, for it will allow a more lucid analysis of variation in voting behavior on a year-by-year basis. Lastly, future research might strive to generate a more comprehensive regression model by combining the ex-ante *and* ex-post aspects of New Institutionalist research—perhaps to discern whether justices appointed by unified government are more "extreme" when conditions of unified government persist (or disappear) during the course of their respective tenures. In

particular, such research could link variation in voting behavior while a justice is sitting on the Court with changes in the party that controls the White House and changes in the party that controls the Senate. When combined with research that assesses the impact of the confirmation process on voting behavior, such information could offer a comprehensive model that illustrates interplay among the three branches of government—and could cement the noteworthy suggestion intimated herein: that democratic processes do, in keeping with our Founders predilection for concepts like checks and balances and representative government, play a role in influencing the policy outputs of the Supreme Court.

Chapter 4: The Notion of An Independent Judiciary: Quixotic Ideal or Empirical Reality? A Statistical Assessment

Section 4.1: Introduction to "Separation of Powers" Literature

"The Supreme Court does not do its work in a vacuum."
Robert Eugene Cushman (1925)[39]

"When it comes to making decisions, the justices must be attentive to the preferences of the other institutions and the actions they expect them to take if they want to generate enduring policy."
(Epstein and Knight, 1998, 139)

"The hard fact is that sometimes we must make decisions we do not like."
Justice Anthony Kennedy (Toobin, 2007, 53)

Collectively, these three statements illuminate the underpinnings of so-called "separation of powers" literature, as it applies to Supreme Court decision-making. Ostensibly, "separation of powers" literature is concerned with assessing the extent to which judicial decisions are influenced by the legislative and executive branches. This chapter will build upon extant research in this area, and will offer an innovative statistical approach for examining the notion of whether the Supreme Court is in fact influenced by the other branches of government, or whether it remains the "independent" institution that Alexander Hamilton presaged it to be.

This inquiry will proceed through six phases. First, an examination of why an independent judiciary was valued so highly by the Founders will be offered. Second, theories will be provided as to why Supreme Court justices might need to be mindful of—and thus, not necessarily independent from—actors in the other branches of government; next, key assumptions of these theories will be discussed in a subsequent section. Fourth, an examination of previous empirical assessments of the relationship between the Supreme Court and the

[39] See Clayton and Gillman (1999, p. 20) for further discussion of Cushman's work.

legislative and executive branches will be offered. Fifth, criticisms of "separation of powers" literature (and responses to said criticisms) will be provided. Finally, an innovative research design will be offered to assess the degree to which the Supreme Court is independent of, or dependent upon, the executive and legislative branches.

Section 4.2: Why an Independent Judiciary Was Considered Essential for the Founders

In *Federalist #78*, Alexander Hamilton suggested that, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution," largely because "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments" (Geyh, 2006, 39). However, not all of the Founders offered support for this declaration. For example, papers written under the pseudonym *Brutus* noted that, "In the minds of the Antifederalists, an insufficiently accountable federal judiciary would… usurp the role of Congress" (Geyh, 2006, 39-40). Geyh uses the aforementioned statements as the basis for declaring that, "The ratification debate thus reflects an appreciation for the tension and balance the Constitution creates between accountability and independence" (Geyh, 2006, 41).

Although there may have been "tension" surrounding the idea of an independent judiciary, the ideas of those who supported such independence are adequately consolidated in Peter Shane's statement that, "Independence sufficient to render judicial review meaningful is a corollary requirement of republican constitutional order" (Geyh, 2006, 259). Justice Rehnquist also called judicial independence "one of the crown jewels of our system of government" (Geyh, 2006, 8). Perhaps this is why specific protections were included in the Constitution to assure that judges would remain somewhat shielded from the other branches. For example, as Geyh notes, "Individual judges insulated by tenure and salary protections would [be likely to] resist

unauthorized political branch incursion upon the structural independence of the judicial branch" (Geyh, 2006, 42-43). Baum has also stated that a "lack of electoral accountability and a lack of ambition for higher office" (Baum, 1997, 35) provide a buffer between justices and ideological pressure that may stem from the public or the other branches of government. Segal and Spaeth have added that the inclusion of such protections within our constitutional design indicates that "the framers were most concerned about the exercise of legislative power… [and they] were more concerned lest the judges become subservient to the other branches" (Segal and Spaeth, 2002, 18-19). Therefore, one can easily infer that, from our nation's earliest moments, steps were taken to ensure that judges could in fact remain independent of the other branches.

At this point, though, before examining whether justices have in fact remained "independent" since this constitutional design was crafted, it is necessary to offer a rudimentary definition of the term "independence," simply to provide a starting point from which this inquiry can proceed. A routine source of such a definition could be a standard *Merriam-Webster Dictionary*, which suggests that independence is defined as "not looking to others for one's opinions or for guidance in conduct" (see *Merriam-Webster Online Dictionary*). As a result, this inquiry could be said to concern itself with locating whether or not there is any evidence that Supreme Court justices "look to others," such as congressmen or presidents, for "guidance" in how to make their individual vote choices. While it may seem sophomoric to use such an elementary source to define a critical term during the course of a dissertation, one could take note of the fact that Sandra Day O'Connor's opinion for *Smith v. United States* (508 U.S. 223, 1993) makes explicit use of the *Merriam-Webster Dictionary* to offer a definition of the phrase "to use," in the hope of

illuminating whether a machine gun was "used" in the commission of a drug crime that offered the genesis of the controversy at hand (*Courts, Judges, and Politics*, 2002, 493).

In addition to offering such a definition of the term "independent," another necessary step in this chapter's analysis involves the delineation of reasons why a justice might wish to consider the preferences of other political actors when formulating vote choices—or why justices might wish to eschew principles of independent behavior when reaching their decisions; this will be accomplished in Section 4.3.

Section 4.3: Why External Influences Might Matter to a Supreme Court Justice

The literature review (Chapter 2) has laid a theoretical foundation that is capable of explaining why individual Supreme Court justices might consider the potential reactions of other governmental actors before deciding how to rule in a given controversy. Rational choice interpretations, for instance, have offered the idea that justices select from available options "in ways that maximize the achievement of their goals" (Baum, 1997, 133). Along those lines, it is important to consider the fact that "the Court's ultimate impact on society depends on the actions of people in and out of government" (Baum, 2008, 188). New Institutionalism has made it clear that the "people" referred to in that statement include actors in the major institutions of government—specifically, congressmen and the president. In addition, even proponents of the attitudinal model have noted that the separation of powers system "may be a constraint on justices acting on their personal preferences" (Epstein and Knight, 1998, 150). Ultimately, there are a number of theoretical reasons why a strategic justice might consider the preferences of the other branches of government. The purpose of this section is to provide examples of the ways in

which Congress and the president can impact the judicial branch, and to provide specific examples of occasions where these influences have been evident.

In *Federalist #78*, Alexander Hamilton offered his perspective on interplay among the three branches when he observed that:

> The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rule by which the duties and rights of every citizen are to be regulated (as quoted in Powers and Rothman, 2002, 3).

The principles that arise from this declaration, then, include the ideas that the judicial branch is dependent on the executive branch to enforce its decrees, and on the legislative branch to offer the funding requisite for said enforcement.

Beyond the monetary controls referenced in Hamilton's *Federalist #78* declaration, the primary method through which Congress can affect judicial decision-making is via its power to pass legislation that overrides a judicial decree. Baum adds that Supreme Court decisions that interpret federal statutes are "more vulnerable" because Congress can override such decisions simply by passing a new statute (Baum, 2008, 147). As a result, justices might want to interpret a statute in the fashion closest to (even if it doesn't exactly match) their ideological preferences—in order to ensure that a Congressional override does not occur. Prominent examples of legislative overrides include the Religious Freedom Restoration Act, which was crafted to overturn the standard of First Amendment free exercise interpretation that was expressed in *Employment Division v. Smith* (494 U.S. 872, 1990) (Epstein and Knight, 1998, 142), and the Civil Rights Act of 1991, which overrode several "highly charged" Supreme Court decisions released in 1989 (Segal and Spaeth, 2002, 4).

Other examples appear in Georg Vanberg's "John Marshall Has Made His Decision," a work whose title is derived from a quote attributed to Andrew Jackson in which the former President concludes by saying, "Now let him [Marshall] enforce it." This statement was a response to the Supreme Court's decision in *Worcester v. Georgia* (31 U.S. 515, 1832) and highlights the potential for non-compliance when the executive branch disagrees with a judicial ruling. Along these lines, Vanberg cites *INS v. Chadha* (462 U.S. 919, 1983), a case where Congress has essentially ignored the Court's declaration that legislative vetoes are unconstitutional and "has passed [hundreds of] new laws containing legislative vetoes since *Chadha*" (Epstein and Knight, 1998, 145).

Besides focusing on outright overrides, some scholars have also noted that Congressional and executive preferences can have an almost preemptive impact—forcing justices to alter a decision's ideology or scope. Beyond merely reacting to the judiciary's decisions, "institutions," says Clayton, can actually structure outcomes by affecting an actor's beliefs—in the sense that "institutions… shape preferences and values" (Maltzman et al., 1999, 59). The implication here is that the political composition of institutions could lead justices to make a priori adjustments in their preferred policy objectives. Gillman conceptualizes this idea in his statement that, "Institutional settings establish bargaining situations," or what Philip Ethington and Eileen McDonough call "parameters of choice" (Gillman, 1999, 68).

Examples of preemptive behavior could include the fact that John Marshall may have shifted his ruling in *Marbury v. Madison* (5 U.S. 137, 1803) to account for the possibility of noncompliance from President Madison. Another oft-cited example is that of *Ex Parte McCardle* (74 U.S. 506, 1869), where the Supreme Court acquiesced to a Congressional act

which limited the Court's jurisdiction to hear appeals in habeas corpus actions (Baum, 2008, 209; Epstein and Knight, 1998, 151; Vanberg, 2006, 71). Eskridge also notes that, "A number of Burger Court decisions in the late 1970s relied on the Court's perception of legislative preferences to reach results that appeared more liberal than the Court's own preferences" (Eskridge, 1991a, 651)—although no empirical evidence is cited to back this assertion.

Constitutional decisions are also not completely impervious to being overruled, for Congress can propose constitutional amendments that affect judicial decrees. On four occasions, amendments to the Constitution have been passed that, in essence, reverse a judicial decision. The first was the 11th Amendment, passed in 1798, which overturned *Chisholm v. Georgia* (2 U.S. 419, 1793), a decision which allowed federal courts to hear suits against a state by citizens of another state. Later, the 14th Amendment, which was passed in 1868, obviated the 1857 holding in *Dred Scott v. Sanford* (60 U.S. 393, 1857), a decision that stated that a black person was not an American citizen. The third instance involved the 16th Amendment, passed in 1913, which invalidated a number of 1895 rulings that declared a federal income tax to be unconstitutional. Finally, the 26th Amendment, passed in 1971, overturned the ruling in *Oregon v. Mitchell* (400 U.S. 112, 1970), a case which stated that Congress could not mandate that states allow 18 year-olds to vote (Comiskey, 2004, 30). Beyond these examples, Andrew Martin has even suggested that Congress is capable of overturning constitutional decisions through legislation, or at the very least, influencing judicial decrees in constitutional matters without the overt use of amendments (more on this later) (Martin, 2006, 3).

In addition to overrides through legislation or constitutional amendment, there are ancillary ways in which courts are reliant on the other branches. Specifically, courts are "dependent on

Congress for their annual budget, subject matter jurisdiction, salaries… [and] administrative and rule-making authority" (Geyh, 2006, 6-7). In *The Supreme Court*, Baum offers examples of how these factors have been evident in practice. For example, Baum observes that, in 1964, Congress "singled out the justices [of the Supreme Court] by increasing their salaries by $3,000 less than those of other federal judges" (Baum, 2008, 209). A year later, Congress refused to restore that sum, and during debate in the House of Representatives, Bob Dole actually proclaimed that such a pay increase would have to be "contingent on the Court's reversing a legislative redistricting decision that he disliked" (Baum, 2008, 209).

Moreover, beyond discussing matters related to salary considerations, Baum adds that, in 2004, "The House passed bills to eliminate the jurisdiction of all federal courts over issues involving the Pledge of Allegiance or the Defense of Marriage Act," although neither passed the Senate (Baum, 2008, 209). More recently, in 2005, Congress actually did limit federal court jurisdiction to "hear habeas corpus cases brought by prisoners at Guantanamo Bay" (Baum, 2008, 209). Furthermore, "a Republican member of the House introduced an amendment that would reduce the Court's budget by 1.5 million to express his unhappiness with its *Kelo* decision on eminent domain" (Baum, 2008, 209). Finally, the specter of impeachment may also loom over judicial decisions; although only one Supreme Court justice has been impeached (Samuel Chase), as recently as 2005, Senator Tom Colburn (R-Ok) actually discussed "mass impeachments" of federal judges with whom he disagreed, including Justices Breyer, Kennedy, Ginsburg and Souter (Baum, 2008, 210). Ultimately, as Baum notes, "Because of [Congress'] array of powers, the justices have reason to think about congressional reactions to their decisions" (Baum, 2008, 146).

To further complicate matters, justices also need to consider the president's views, in the sense that a president can have an impact on the way that judicial decisions are implemented. Specifically, Eskridge highlights the fact that presidents can offer "interpretations of statutes" and guide "agency rulemaking" to impact the execution of judicial decrees (Eskridge, 1991b, 416-417). As an example, Baum cites President Bush's "broad reading" of the legislation that overrode *Rasul v. Bush* (542 U.S. 466, 2004). When signing the law, President Bush declared his "view that the law's prohibition of habeas corpus challenges to the detention of suspected terrorists at Guantanamo Bay applied to pending lawsuits as well as future ones" (Baum, 2008, 211). (The Court would subsequently reject this interpretation in *Hamdan v. Rumsfeld* (548 U.S. 557, 2006)). In addition to such interpretive statements, the executive branch may order an official (e.g., the Attorney General) not to enforce a particular ruling (see Martin, 2006, 3), and could even alter budgets that are relevant to the discharge of decisions.

As an example which illustrates the interactive nature of policy implementation that is implied in the preceding paragraphs, Baum notes that, "The major impetus for… change" in the wake of the Supreme Court's decision in *Brown v. Board of Education* (347 U.S. 483, 1954) was The Civil Rights Act of 1964, which "allowed federal funds to be withheld from institutions that practiced racial discrimination… and allowed the Justice Department to bring desegregation suits where local residents were unable to do so" (Baum, 2008, 193). One might also add the observation that executive action taken by President Eisenhower in Arkansas and President Kennedy at the University of Mississippi played a role in *Brown*'s implementation, as well.

Therefore, this section has provided theoretical justifications for—and real world examples of—reasons why Supreme Court justices would want to remain cognizant of the preferences of

other governmental actors and, perhaps, even alter their voting behavior in light of such information. However, these justifications rest upon the assumption that individual justices are indeed aware of the preferences of other actors.

Section 4.4: An Important Assumption in "Separation of Powers" Literature

Ultimately, a critical component of almost any New Institutional assessment of judicial behavior is the assumption that justices have knowledge about the preferences of other governmental actors. Segal and Spaeth delineate this fact as a significant shortcoming in "separation of powers" literature (Segal and Spaeth, 2002, 106). However, Epstein and Knight would respond by saying, "That is not to say that justices must know with certainty where Congress or the president stand on particular issues, but that they need to be able to make some calculation about the nature of the political context in which they are operating" (Epstein and Knight, 1998, 145). This declaration leads, in turn, to a correlated query: "Where do justices obtain the information necessary to formulate such beliefs?"

Epstein and Knight's first response to this question is a simplistic one, for they highlight television and print media as mediums through which justices can ascertain the preferences of other actors (Epstein and Knight, 1998, 145). Although this may seem like a facile observation, in their examination of the private papers of Justices Thurgood Marshall, William Brennan and Lewis Powell, Epstein and Knight "came across many clippings of newspaper stories and editorials about specific cases," even some that were "awaiting action" by the Court (Epstein and Knight, 1998, 145).

Other sources of information include the briefs of parties and amici curiae. Along these lines, Epstein and Knight cite the example of an amicus brief submitted in *United States v. Leon*; the

brief stated that, "Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and this view is concurred in by the current President [Reagan] and a number of members of Congress" (Epstein and Knight, 1998, 146). Beyond case study analysis, Epstein and Knight also scrutinize a random sample of 50 Supreme Court decisions from the 1990 term and determine that "justices [could] readily obtain information on the preferences of the institutions of the federal government and of the states [from lawyer's briefs]" (Epstein and Knight, 1998, 146). They add that "the majority of briefs in non-constitutional and constitutional cases attempt to define the preferences of other political actors;" precise figures were 81% of briefs in non-constitutional cases and 75% of briefs in constitutional cases, respectively (Epstein and Knight, 1998, 146-147).

Epstein and Knight also examine Justice Brennan's conference papers from 155 cases in the 1983 term and note that, "In more than half the cases, at least one justice explicitly stated her beliefs about the preferences/likely actions of other government actors [during conference discussions]." The exact figure was 70% in non-constitutional cases, and "about 60% in constitutional cases if we eliminate criminal cases from consideration [in light of the fact that] the government's preferences [in criminal cases] are typically against the accused" and thus, are generally known. (The figure becomes 46% in constitutional cases if criminal cases are included in the analysis) (Epstein and Knight, 1998, 148-150). Epstein, Knight, and Martin have also used private papers to show that lawyers discuss information about the other branches of government in over 75 percent of cases (Martin, 2006, 6).[40] Therefore, some empirical evidence

[40] The original article from Lee Epstein, Jack Knight, and Andrew Martin is entitled "Dahl Symposium: The Supreme Court as a *Strategic* National Policymaker," and appeared in *Emory Law Journal* in 2001; see pp. 583-611.

does suggest that justices have access to relevant information about the preferences of other political actors.[41]

Beyond that, anecdotal evidence can be used to suggest that informal relationships often exist between Supreme Court justices and presidents. For example, in their Pulitzer Prize-winning biography of Robert Oppenheimer, Kai Bird and Martin Sherwin note that Justice Felix Frankfurter was an "intimate" contact of President Roosevelt, even when it came to discussing matters concerning the "the making of the atomic bomb" (Bird and Sherwin, 2005, 269). Henry Abraham also refers to Justice Tom Clark as a "confidant" of President Truman (Abraham, 2008, 188). (Even though Truman did once declare that Clark was "my biggest mistake," Abraham implies that this statement was "more the result of a sudden outburst than a reflection of a lifelong conviction" (Abraham, 2008, 193)). In addition, Abraham notes that President Kennedy was "comfortable… personally [and] professionally" with Justices Byron White and Arthur Goldberg (Abraham, 2008, 216). Abraham even states that President Lyndon Johnson and Justice Abe Fortas were "the closest of friends," adding that President Johnson "often leaned heavily for advice and counsel on Fortas" (Abraham, 2008, 225). Finally, Wrightsman says that Chief Justice Burger had "'back-channel' communication with President Nixon" (Wrightsman, 2006, 390). It seems logical to infer, then, that such informal relationships could serve as viable sources of information for Supreme Court justices who might be interested in discerning the policy preferences of the executive branch.

[41] However, the significance of Epstein and Knight's reference to amici as sources of information is mitigated by Heberlig and Spill's finding that Congressmen lose more than half the time that they are involved as amici (Heberlig and Spill, 2000, 189; Segal and Spaeth, 2002, 348).

In order to extend this line of research, the next logical question to ask is: "Do [justices] attempt to take advantage of their beliefs about those preferences… when making choices?" (Epstein and Knight, 1998, 147). Epstein and Knight suggest that justices do, largely because "Congress could replace [a justice's] most preferred position with their least… in which case [a justice's preferred] policy fails to take on the force of law" (Epstein and Knight, 1998, 15). Epstein and Knight attempt to offer evidence in support of this idea by noting references to the perceived preferences of other governmental actors in written Supreme Court opinions, such as the *Gregg v. Georgia* (428 U.S. 153, 1976) allusion to "35 states having enacting new statutes that provide for the death penalty;" this idea may have been a component of the rationale for restoring use of the death penalty after it had been halted in *Furman v. Georgia* (408 U.S. 238, 1972) (Epstein and Knight, 1998, 148). However, such a limited focus on one case makes extrapolating broad suppositions with external validity a difficult task—in the sense that there is no data offered. The subsequent section will address the strengths and weaknesses of those works that have actually attempted to provide that type of empirical support.

Section 4.5: Previous Empirical Assessments of "Separation of Powers" Theory

The line of research that concerns itself with empirical tests of institutional influences on the Court is known as "separation of powers" literature. Segal and Spaeth define "separation of powers" models as those which "examine the degree to which the courts must defer to legislative majorities in order to prevent overrides that result in policy worse than what the [justices] might have achieved through more sophisticated behavior" (Segal and Spaeth, 2002, 103). Before delving into a review of "separation of powers" models, though, it is important to distinguish a sub-set of this literature.

Robert Dahl, in "Decision-Making in a Democracy," suggests that, "The policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States," although Baum does imply that there is a "time lag" inherent in the phrase "long out of line" (Baum, 2008, 182). This lag persists because "presidents have differing opportunities to make appointments" that would keep the Court "in line with [dominant] policy views" (Baum, 2008, 182). As a result, this concept is not necessarily relevant to my discussion of judicial independence as it concerns the behavior of individual justices at a specific point in time, because Dahl's work addresses the matter of how public opinion and subsequent changes in Congress and the White House impact the long-term voting outputs of the Court as a whole.

Elsewhere, Mondak and Smithey are among those who have also empirically examined Dahl's thesis about the interplay between judicial voting patterns and public opinion. Their research finds that "Court decisions are most often consistent with public preferences" (Mondak and Smithey, 1997, 1120), and Mishler and Sheehan use multivariate regression to show that "since 1956 the Court has been highly responsive to [public] opinion" (Mishler and Sheehan, 1993, 97)—in the sense that the Court's liberal-conservative voting pattern tends to mirror society's "ideological tenor" as measured in public opinion polls. The key to this study, though, is that such congruence occurs after a "moderate lag" of five years (Mishler and Sheehan, 1993, 87, 96; see also Segal and Spaeth, 2002, 427).[42] The Court, then, takes a bit of time to "catch

[42] This is probably a result of the fact that judges are appointed and confirmed by elected officials, whose policy preferences are likely to be consistent with those of the people who elected them. The "lag" would result from the time it takes for openings to arise and for confirmation to occur. As mentioned in Chapter 3, Richardson and Scheb's "Divided Government and the Supreme Court" offers evidence that justices confirmed under conditions of divided government tend to have more moderate voting records than those confirmed under conditions of unified government (Richardson and Scheb, 458, 1993). This may suggest that democratic processes do in fact impact the voting outputs of the Supreme Court—even if that impact occurs gradually. Their findings are reinforced in

up" to public opinion (Erickson et al., 2002, 310)—indicating that popular sentiment is not directly mirrored in judicial decision-making, which is probably a sanguine finding, since our Founders envisioned a judiciary that would maintain a level of independence from the other branches (Hamilton, *Federalist #78*),[43] and the constitutional provision of life tenure for federal judges was designed to protect said judges from the whims of popular masses.

Christopher Zorn extends this line of inquiry when he notes that the Supreme Court is "subject to the prevailing political environments [over time]" (Zorn, 2006, 65). By examining Supreme Court nullification of congressional statutes between 1789 and 1988, Zorn finds that "[They are] are positively related to large shifts in congressional preferences" (Zorn, 2006, 66); specifically, he observes that "higher levels of nullifications follow dramatic shifts in the partisan makeup of the Congress. For example, a 15 percent increase in congressional turnover… is associated with an average increase in the expected number of nullifications of 0.5" (Zorn, 2006, 65-66). Congressional "turnover," it seems, highlights a gap between the government that enacted a law and the "present" one.

However, it is precisely the time lag evident in the work of Mishler and Sheehan, Erickson et al., and Zorn—coupled with their focus on the Court as a whole—that makes it hard for their respective works to discern whether changes in the Court's composition are the driving force behind changes in the Court's outputs, or if actual shifts in the voting behavior of individual

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Krehbiel's 2007 article "Supreme Court Appointments as a Move-the-Median Game," where changes that result from appointments are shown to occur "incrementally" (Krehbiel, 2007, 231) and to slowly move the "median" position of the Court. However, these studies do little to explain how institutions affect individual vote choices while a justice is actually serving on the Court.

[43] Lastly, we should point out that some policy, perhaps South Dakota's recent ban on abortion, may arise on the basis of assumptions about what changes in the Court's composition might mean (Norrander, 2007, 156). (In that particular case, though, public opinion, as expressed through referenda, eventually quashed this type of policy activity). Legislators, it seems, must also make "dynamic interpretations" about whether laws will be upheld or struck down by the courts. In turn, as Erickson et al. note, "Justices must consider the possibility that their decisions will be overridden or indifferently enforced" (Erickson et al., 2002, 311).

justices are occurring. Given that it takes time for public preferences to translate into changes in the presidency and in the composition of the Senate (and in light of the fact that the judicial openings occur sporadically), one would expect there to be a "lag" before public opinion is manifest in the Court's decisions. This type of research, though, does little to highlight whether individual justices themselves are altering their voting behavior in response to the "current" composition of the other branches—and that is the primary ambition of this chapter.

Brian Marks actually offered one of the first thorough assessments of this type of "current" "separation of powers" analysis in his 1988 article "A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell*." Marks' article explains Congressional conditions that, the author claims, prevented the 1984 decision in *Grove City v. Bell* (465 U.S. 555, 1984) from being overturned until 1988. He propounds the idea that the Court will "construe legislation as close to its ideal point as possible [so as to avoid] getting overturned by Congress" (Segal and Spaeth, 2002, 105). The chief limitation of this work, though, is that it deals with only one case and treats the Court as an entire body, without assessing the behavior of individual justices. In fact, when "separation of powers" literature uses formal models, it is often concerned solely with how the Court as a whole behaves over the course of a specific line of cases, as if rulings are the product of equilibrium among the branches of government (Hammond et al., 2005, 58; Epstein and Knight, 1998, 186). Lost in such analysis, then, is the behavior of individual justices.

A similar example comes from Spiller and Gely (1992), who examine Supreme Court decisions addressing the National Labor Relations Act. They suggest that, between 1949 and 1988, congressional ideology—as measured by *Americans for Democratic Action* (ADA)

scores—"affects the probability of a pro-union decision [by the Supreme Court];" more specifically, they suggest that a "ten-point increase in the ADA rating of the relevant [members] of Congress… increases the probability of a pro-union decision by approximately eight percentage points" (Spiller and Gely, 1992, 463). Even though Segal proclaims that this work is the "clearest support for the separation-of-powers model" (Segal, 1997, 34), the limitation here, again, is the focus on a single line of cases and the emphasis on the Court as a whole. Therefore, the same issues that plague the work of Brian Marks preclude Spiller and Gely from offering a comprehensive explanation of the voting behavior of individual justices.

In 1991, Eskridge offered an important innovation when he moved beyond case-line analysis and provided a more widespread study that examined Congressional overrides of judicial decisions. Epstein and Knight comment that Eskridge's work illustrates why the "intent of the enacting Congress is far less important to policy-preference maximizing justices than are the preferences and likely actions of the 'current' Congress" (Epstein and Knight, 2004, 214).[44] This is a vital realization that distinguishes the research that will be offered later in this chapter from the articles referenced earlier in this section, for my research design will focus on how an individual justice reacts to the other branches of government *as those branches are constituted at the moment of a judicial decision*.

In terms of his specific findings, Eskridge observes that, throughout a thirty-year sample, an average of more than ten statutory decisions were overturned in part, or altogether, in each two-year term of Congress. Overall, of the Court's statutory decisions during the 1978-1989 terms, Congress had overridden more than 5% by 1996 (Baum, 2008, 204, updating Eskridge, 1991b,

[44] This idea is similar to Zorn's suggestion that, "The influence of [judicial] tenure can be thought of as a result of the separation between the political coalition responsible for the appointment of a particular justice and the current coalition" (Zorn, 2006, 63).

338). This lends credence to the idea that Congress does in fact respond to the actions of the judicial branch. Of course, while Eskridge offers evidence of Congressional responses, his work does not provide any evidence related to judicial behavior.

Other "separation of powers" literature that makes the transition from focusing on Congressional overrides themselves to the behavior of justices comes from Spriggs and Hansford, who claim that the composition of Congress has no bearing on whether the Court overturns precedent (Spriggs and Hansford, 2001, 1107; Segal and Spaeth, 2002, 348). Similar scholarship also comes from Vanberg, who found that courts of last resort in Germany were subject to legislative constraints—a finding that has little import for the American system of government in light of the lack of life tenure for justices in Germany, although Vanberg's Bayesian techniques may be useful for future research (Vanberg, 2001, 348).

Ultimately, as one can infer from these examples, Maltzman et al. note that many "separation of powers" models are a clear break from the traditions of the behavioral revolution. After all, instead of starting with the individual as the unit of analysis, "separation of powers" models assume that it is institutional structures that are given prominence (Maltzman et al., 1999, 49). Further, when the scope of "separation of powers" literature drifts away from a focus on the individual in favor of examining the Court as a whole, a major shortcoming in extant New Institutionalist literature—when it comes to explaining and predicting the behavior of individual justices—becomes apparent. The research design offered in this chapter will attempt to rectify that flaw.

Segal actually attempted to address this problem when he offered a landmark study in 1997 with the publication of "Separation of Powers Games in the Positive Theory of Congress and

Courts." The findings from this work were also included in a revised form in *Supreme Court and the Attitudinal Model Revisited* (2002). Essentially, the purpose of these studies was to "undertake an examination of whether the voting patterns of the justices of the Supreme Court change as the political environment changes" (Segal and Spaeth, 2002, 341). This is similar, from a theoretical standpoint, to the work that will be offered herein.

Specifically, Segal uses liberal vote scores as a dependent variable and "calculates potential constraints on each justice based on the relationship between their own positions and the set of positions that would withstand efforts at congressional override" (Baum, 1997, 121). Statutory decisions in civil liberties cases from 1946-1992 are examined. In the 1997 study, Segal uses maximum likelihood estimates and finds little evidence to suggest that congressional constraints have any influence on justice behavior (Segal, 1997, 42-43). The 2002 version of this study proceeds by placing all justices and congressmen on a scale combining ADA scores with liberal voting scores for justices in civil rights and civil liberties cases. The author then predicts which decisions in a Court term ought to be irreversible based on where the justices fell on this scale in comparison to Congressmen. A regression model is subsequently constructed with liberal voting scores as a dependent variable, and different "regimes," or conditions of government, as independent variables.[45] His key independent variable involves a test for "equilibrium," or evidence that justices attempt to vote within a set of "irreversible" points (Segal and Spaeth, 2002, 342). However, the results, he says, "are no more favorable to the separation of powers models [than previous scholarship in this domain]" (Segal and Spaeth, 2002, 346), even after controlling for a justice's preferences (or ideology) (Segal and Spaeth, 2002, 345-346), and even

[45] Segal actually provides two models, one where "conditions of government" are defined by the party in control of Congress, and another which focuses on the control of key committees in Congress.

with the subsequent addition of presidential "ideal" scores to account for the veto power (Segal and Spaeth, 2002, 353).[46] (Segal and Spaeth do suggest that such an influence might exist in a context without life tenure for justices or without a constitutional court (Segal and Spaeth, 2002, 349-350)). A problem with this work, however, is that liberal/conservative scores are used to define "preferences" and to place justices into "regimes" in which they might be "constrained," as seen in the regression equation that is used (Segal and Spaeth, 2002, 342):

Y (Liberal voting score) = a + x1 (Preferences) + x2 (Regime type) + x3 (Equilibrium) + u

Therefore, the voting behavior that the authors are attempting to explain is actually playing a role in defining two of the parameters ("preferences" and "equilibrium") by which they are explained.

In Clayton and Gillman's 1999 book, Segal offers another test of how the votes of Supreme Court justices change as "the political environment changes" (Segal, 1999, 244)—and this model suffers from a similar flaw. In that 1999 piece, Segal begins by defining eras between 1947 and 1993 based on the composition of the White House, the House of Representatives and the Senate. He then links a "predicted shift" in the voting behavior of Supreme Court justices to each era. For example, the period of 1961-1968, where Democrats controlled all three institutions, is linked with an expected liberal shift.[47]

After defining regimes,[48] Segal then labels justices as "liberal, moderate liberal, moderate, moderate conservative, or conservative" based on their career voting scores. Subsequently, he

[46] With no significant results on "equilibrium" variables in any of the variations of this model (the 1997 or 2002 version), Segal and Spaeth conclude that that no evidence of institutional influences on judicial decisions is apparent (Segal and Spaeth, 2002, 346-353).

[47] He does point out that committee and leadership positions are not accounted for, something which he says is reasonable provided that "the committees are not made up of preference outliers or through institutional procedures such as discharge petitions and amendments, the Judiciary committees and party leaders cannot in fact act as independent agenda setters" (Segal, 1999, 246).

[48] In terms of the White House, his expectations are that the presidency is seen as a weaker influence than Congress. So, for example, even situations such as a Republican White House and Democratic control of both houses of

analyzes each justice's liberal voting scores during each of the pre-determined "eras," and then uses a difference-of-means *t*-test to search for variance between the scores from a particular era and the scores for a justice's overall career (Segal, 1999, 249). However, the chief flaw here is that the voting score during a given era is also a component of the overall score to which it is being compared, and will therefore influence the value of Segal's baseline measurement. This makes it impossible to discern whether changes in Congress are actually having an independent effect on the voting behavior of a justice. Further, although Segal does break the analysis into economic and civil liberties cases, no other controls for factors that influence conservative voting scores, or factors related to change over time, can be instituted with a rudimentary *t*-test.

Segal ultimately cites limited findings of shifts in the voting behavior of Supreme Court justices in response to regime changes,[49] and concludes that, "The federal courts were designed to be independent; we should not be surprised that they actually are capable of being independent" (Segal, 1999, 252). Even so, he ends his work with the recognition that, "As [this paper] represents just a small subset of the ways in which these models can be tested, the door is wide open for those with appropriate alternative designs" (Segal, 1999, 253). This dissertation will offer just such an "alternative design," one that is crafted to examine the behavior of Supreme Court justices in the face of institutional constraints by using statistical tools that

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Congress yield a predicted "liberal shift" (1987-1992) (Segal, 1999, 245). In particular, Republican control of the White House and Democratic control of both houses in Congress would "constrain" liberal justices, and shift them to a more conservative score, but would not constrain moderate liberals or moderates. On the other hand, unified Democratic control would "constrain" moderates, moderate conservatives, and conservatives—shifting their scores in a liberal direction (Segal, 1999, 247-248)—but "not all shifts in the political environment should result in change for all justices" (Segal, 1999, 247).

[49] In the end, Segal's study found only isolated evidence of shifts in voting behavior based on regime changes. Specifically, in the economic cases, out of 46 situations, only four shifts in the "expected direction" were found, while two shifts in the "opposite direction" occurred (Segal, 1999, 251). In the civil liberties cases, out of 56 observations, six shifts in the "expected direction" were observed, as were six shifts in the "opposite direction" (Segal, 1999, 251).

address the circularity problem that pervades Segal's work. The "alternative design" offered herein will also take measures to examine the voting behavior of *individual justices* (unlike the line of "separation of powers" literature offered by Marks (1988), Spiller and Gely (1992), Vanberg (2001), and Krehbiel (2007)).

Before concluding this literature review, though, it is important to point out that other studies have wrestled with the nature of which statistical tools to use in "separation of powers" studies, and this paragraph will delineate their suggestions (whether overtly stated, or implied). First, the work of Bergara, Richman, and Spiller (2004), which assesses how the Court as a whole shifts under certain conditions, emphasizes the fact that OLS regression is "an inappropriate method for testing for strategic behavior" because it "presumes that the three potentially relevant political players… all simultaneously influence the Court's outcomes" (Bergara, Richman, and Spiller, 2004, 260-261). Elsewhere, Hansford and Damore use a logistic regression model (where the act of casting a liberal vote is the dependent variable and factors such as a "conservative Congress" and "overrides in a term" are independent variables); their results indicate that "justices may… factor in congressional preferences when there have been more recent overrides," but they add that "much of the time justices are relatively unconstrained by the preferences of Congress" (Hansford and Damore, 2000, 504-505).[50] Sala and Spriggs also employ logistic regression in an attempt to correlate justices' votes to overturn federal statutes with the composition of Congress and the White House from 1946-1999, with no significant findings (Sala and Spriggs, 2004, 205-206). While the use of logistic regression is a methodological advance over difference-of-means *t*-tests, time series regression would go a step further, a fact implied when Sala and Spriggs conclude their work with a call for "more

[50] The time period covered in their study was 1963-1995, whereas the time period covered herein is 1946-2007.

sophisticated models" (Sala and Spriggs, 2004, 205). This chapter will offer just such a time series regression model, the technique which has been notably absent from previous "separation of powers" literature.

Section 4.6: Criticisms of "Separation of Powers" Literature

Prior to offering my own statistical models, I will take a moment to address criticisms of the underlying theories associated with "separation of powers" literature, as those criticisms will have implications for the research design. As one would expect, Segal and Spaeth, in keeping with their fervent support of the attitudinal model, have been outspoken critics of "separation of powers" research. In fact, a common criticism comes from Segal in a 1999 article, "Supreme Court Deference to Congress," where he notes that, "If [Justices'] preferences can rarely be overturned by Congress and if they only have vague notions as to when overrides might occur, sincere voting may readily dominate purportedly sophisticated voting" (Segal, 1999, 240). Others have suggested that it is difficult to predict when Congress may overturn a decision, and, further, that such overrides occur with limited frequency. Ignagni and Meernik, for instance, attempt to analyze the conditions under which Congress will overturn judicial decisions, but they ultimately conclude that, "Congress… is most likely not to take any decision reversal action," even after controlling for "electoral considerations of public opinion and interest group pressure [as well as] the age of the legislation" (Ignagni and Meernik, 1994, 353).

A response to this declaration might come from Eskridge's study, which demonstrates that overrides are not necessarily all that uncommon (Eskridge, 1991b, 334). According to Epstein and Knight, though, "The more general reason to believe that the legislature will (override) in the future… may be enough to cause [justices] to, at the very least, pay some attention to [the

legislature's] preferences" (Epstein and Knight, 1998, 142). Empirical support for this assertion comes from Pickerill, who finds that between 1954 and 1997, after the Court struck down federal statutes, roughly 50% of the time, Congress "acted to restore at least a portion of the policy that the Court had invalidated" (Baum, 2008, 205, referencing *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*, by J. Mitchell Pickerill (2004)—a book which examines Congressional responses to, and anticipation of, judicial review). Therefore, there is statistical evidence that Congress will, under certain conditions, act to overturn judicial decisions—a fact which lends credence to the idea that a justice should consider taking heed of Congressional preferences.

In *Supreme Court and the Attitudinal Model*, Segal and Spaeth also offer a list of what they consider to be the primary limitations of "separation of powers" scholarship (see also Segal, 1997, 31-32). First, they suggest that it assumes that justices have "perfect and complete information" about Congressional preferences, as well as an understanding of "transaction costs for producing overrides" (Segal and Spaeth, 2002, 106). Baum also highlights "imperfections in judges' ability to predict the behavior of other institutions" (Baum, 1997, 103, 122). The scholarship from Epstein and Knight that is offered in Section 4.4, though, should alleviate some of these fears, because it illustrates mediums through which the preferences of other actors can be transmitted to justices.

Segal and Spaeth's second criticism of separation of powers literature addresses the fact that "in many cases" the Court can shift from statutory interpretation to constitutional interpretation, perhaps "reframing" the core issue of the case to make it fall into the domain over which the Court's rulings are thought to be final (Segal and Spaeth, 2002, 106-107). However, in

Institutional Games and the U.S. Supreme Court, during his article "Statutory Battles and Constitutional Wars: Congress and the Supreme Court," Andrew Martin declares that, "The standard claim is that if justices do vote strategically, they are most likely to do so when interpreting statutes. This paper challenges that view… strategic judicial behavior occurs in constitutional cases" (Martin, 2006, 3). Ultimately, he suggests that even though constitutional amendments that overturn judicial decrees are rare, "justices are strategic actors who respond to their decision contexts" and may consider factors related to the implementation of such decisions, particularly as they relate to the executive branch (Martin, 2006, 19). Therefore, in addition to statutory cases (which are the only cases considered in much of Segal's "separation of powers" research) constitutional cases require careful observation as well.

As a third criticism, Segal and Spaeth suggest that congressional median "ideal points" (which are often used as an independent variable in "separation of powers" models) are meaningless if legislation is "bottled up" by committee chairs (Segal and Spaeth, 2002, 108). This is an important concern, and "separation of powers" scholarship does in fact hinge on the supposition that the ideologies of relevant committee chairs will be consistent with those of the majority coalition. This chapter will not offer controls for committee chairmanships, and will instead operate on the assumption that its research design effectively measures the ideological composition of Congress as a whole. (Future research may wish to address this matter more thoroughly).

A fourth criticism from Segal and Spaeth is that "separation of powers" models invariably give Congress "the last move," and disregard the possibility that the courts can reinterpret congressional responses (Segal and Spaeth, 2002, 108). For example, Segal and Spaeth note that

the Court responded to the 16th Amendment (which overrode one of its decisions and enacted an income tax) by actually suggesting that the amendment did not apply to the salaries of federal judges (Segal and Spaeth, 2002, 6). Therefore, they conclude that "the Court is free to construe any amendment… as it sees fit" (Segal and Spaeth, 2002, 5). However, they fail to add that Congress and the executive branch are equally free to re-construe subsequent judicial interpretations—as responses to *Rasul v. Bush* (542 U.S. 466, 2004) have shown. In reality, legislation represents an ongoing, dynamic process among the different branches of government. As a result, time series regression models that isolate year-by-year changes in voting behavior, and correlate those changes with shifts in institutional control, might help to offer a more complete picture of the policy process—and would still offer *multiple* actors a so-called "last word," in keeping with Segal and Spaeth's fourth concern.

Fifth on their list is the idea that "the separation of powers literature treats judicial preferences as if they were exogenously determined" (Segal and Spaeth, 2002, 109). However, if a time series model treats liberal and conservative voting scores from individual years as a dependent variable, no determinations are made about what these year-by-year scores ought to be; as a result, such a regression model would simply be analyzing what factors explain variation in those year-by-year scores without making a priori "determinations" about from where they emanate.

Sixth, Segal and Spaeth suggest that it is unlikely that the President and Senate would "consistently nominate and approve people who are well to the left or right of their preferences" (Segal and Spaeth, 2002, 109). Ultimately, this criticism addresses "time-lag" changes that occur largely as a result of shifts in the Court's composition, and does little to address the

behavior of individual Supreme Court justices at the particular time that they cast a vote; consequently, it is actually irrelevant to "separation of powers" literature.

Finally, beyond these concerns expressed by Segal and Spaeth, Schwartz et al. point out that some issues may be seen as more "salient" to Congress than others (Schwartz et al., 1994, 55) and that "writing [within] specific pieces of legislation [may] provide a signal [to the Court that Congress] has strong preferences about [certain] policies;" this, in turn, could imply that Congress might have a low "cost of reversing" a judicial decision in specific situations (Schwartz et al., 1994, 71). While this may be true in certain isolated cases, widespread examination of such individual instances is difficult to achieve, and a limited focus on particular decisions will sacrifice external validity. To maximize the value of a research design, then, a broad cross-section of cases must be included.

Ultimately, it seems as though many of the most pointed criticisms delineated in this section have more to do with flaws in the choice of statistical techniques than with defects in the underlying theories associated with "separation of powers" literature. These flaws include the use of formal models that only examine the Court as a whole, the circular use of voting scores as a measure of preference, and the lack of appropriate control variables to account for alternative explanations of change over time. This dissertation will attempt to formulate a research design that rectifies these methodological deficiencies.

Section 4.7: Data and Methods for Assessing the Notion of "Judicial Independence"

The primary data source for this study will be the voting scores for individual Supreme Court justices as derived from the Spaeth databases. Specifically, in keeping with Andrew Martin's suggestion, both statutory and constitutional cases are assessed (Martin, 2006, 3). (Sala and

Spriggs also highlight the importance of not ignoring "constitutional" rulings when testing a "separation of powers" model (Sala and Spriggs, 2004, 202)). And, as with models offered earlier, assessments will be broken into civil rights/civil liberties cases and economic cases. Furthermore, the "separation of powers" research offered herein will be broken into two sections. The first section will address variation in the aforementioned "extreme" scores, while the second section will address year-by-year variation in conservative voting scores. Key independent variables will focus on the party in control of Congress and the party in control of the White House, and will concede Segal and Spaeth's assumption that "agenda setters [in committees] act as relatively faithful agents of their party caucus" (Segal and Spaeth, 2002, 341).

The first hypothesis presented in this chapter will address whether justices become more or less "extreme" when faced with either "unified support" or "unified opposition" from the other branches. This may offer some insight into J. Woodford Howard's suggestion that judicial behavior may be "strategic **and** sincere," particularly in the sense that "ideology may be inflated or deflated as a result of group interaction" (Howard, 1968, 49-50; Maveety and Maltese, 2004, 241) (bold added). A basic hypothesis related to this idea will read as follows:

Hypothesis #5: A justice's "extreme" score is likely to increase when he or she is faced with "unified support" from the other branches of government and decrease when he or she is faced with "unified opposition."

For this inquiry, "unified government" will be defined as an environment in which the House, Senate and White House are all controlled by the same party.[51] If any of the three is controlled by a different party, divided government will be said to exist. Furthermore, "unified support"

[51] This differs from the definition of "unified government" employed in Chapter 3. In that chapter, "unified government" was identified when the White House and Senate were controlled by the same party. On the other hand, "divided government" existed when the two were controlled by different parties. The House of Representatives did not play a role in this part of the analysis (since it has no bearing on the confirmation process)—but it will be considered within the context of Chapter 5.

will be in effect when the party of the appointing president matches the party that controls the House, Senate, and White House; "unified opposition" will be in effect when the party of the appointing president conflicts with the party that controls the House, Senate, and White House. (An exception to this rule will be crafted for Earl Warren, who will be treated as if he were appointed by a Democrat).

To begin, an ANOVA table will be generated to compare the mean "extreme" scores for each individual justice under conditions of unified support, unified opposition and divided government. An ANOVA F-Score will be used to test for statistically significant differences among the means. Separate tables will be created for civil rights/civil liberties and economic cases. A total numbers of justices who demonstrate a statistically significant difference will be reported.

Next, to offer a more sophisticated statistical tool, a multivariate regression model will be created to test hypothesis #5. The dependent variable will be a justice's career "extreme" score. The primary independent variable will be the percentage of total terms served by a justice in which he or she has unified support from the other institutions of government. Control variables for factors that might influence "extreme" scores will be utilized—including measures of presidential approval rating at the time of appointment, tenure length, whether a candidate was a "first choice," whether a candidate was a Chief Justice, and whether a candidate previously held elected political office.[52] An equation for this model will read as follows:

[52] "Divided government" is not included as an independent variable because of the potential for co-linearity with the variable that measures "percentage of terms facing unified opposition/support."

Y ("Extreme") = a + x1 (Percentage of terms with "unified support") + x2 (Presidential approval rating at time of confirmation vote) +x3 (Tenure length, or total terms served on Court) + x4 (1^{st} choice or not) + x5 (Chief Justice or not) + x6 (Held elected political office prior to ascending to Court or did not) + u

Another regression model will be created to measure the impact of the percentage of terms facing unified *opposition*. Its equation will be identical to the one listed above except that the first variable will measure "percentage of terms facing 'unified opposition.'"

After these equations are examined, the focus of the analysis will shift to changes in conservative voting scores. Specifically, a research design will address whether conservative voting scores vary in relation to changes in Congress and the White House. For this assessment, a panel dataset is constructed for use in GLS, random-effects time series regression models. A year-by-year tally of conservative voting scores will be created for each of the 31 justices analyzed herein, and will serve as a dependent variable. These scores will be matched alongside a continuous variable that measures the margin between Democrats and Republicans in the House of Representatives and another variable that measures the margin between Democrats and Republicans in the Senate. A dummy variable, coded as "1" (Democrat) or "0" (Republican), will also encompass which party controls the White House in a given year. In listing these variables, I was careful to match a Court term, which runs from October to June, with the appropriate term of Congress. Further, White House control during the year of a presidential election was coded in favor of the party winning the election, since the majority of Court decisions would be released after the January 20^{th} inauguration. An example of the panel data format is shown in Figure 4.1:

Justice	Term of Court (Year)	PresParty	HouseDemocMargin	SenateDemocMargin
Alito1				
Alito 2				
Rehnquist 1				
Rehnquist 2				
Rehnquist 3				
Powell 1				

Figure 4.1: Mock Panel Dataset To Be Used in GLS, Random-Effects Time Series Model

Ultimately, the information placed in this panel dataset will be used to generate a GLS, random-effects time series regression model that tests the following hypotheses:

Hypothesis #6: A justice's conservative voting score will decrease as the total number of House and Senate seats held by the Democratic Party increases, while controlling for the party that holds the White House.

Hypothesis #7: A justice's conservative voting score will decrease when the White House is held by the Democratic Party, while controlling for the number of House and Senate seats held by the Democratic Party.

Two sets of time series regression models will be used to test these hypotheses. The dependent variable for both sets will be a justice's conservative voting score. The reason for using this measure instead of the "extreme" score is that a shift in voting behavior over time might result in a hypothetical justice who is "extremely liberal" moving to a position where he or she is "moderately conservative." The "extreme" score itself cannot account for shifts in the direction of ideology; hence the need for a more precise measurement of change over time—and the use of conservative voting scores.

Independent variables will be used to capture the identity of the party controlling the White House (coded "1" for Democrats, "0" for Republicans), to measure the margin between Democrats and Republicans in the House of Representatives, and to measure the same margin in

the Senate (whether in the form of a positive or a negative integer). Control variables are included for whether a justice previously held elected office as a Democrat, for whether a justice was a "cross-party" nominee, and for the party of the appointing president—since any of these factors could impact conservative voting scores. Separate models will be generated for civil rights/civil liberties and economic cases. The regression equation will read as follows:

Y (Conservative voting scores by year) = a + x1 (Party controlling the White House during a specific year) + x2 (Democratic margin in the Senate during a specific year) + x3 (Democratic margin in the House of Representatives during a specific year) + x4 (Justice previously held elected office as a Democrat) + x5 ("Cross-party" nominee) + x6 (Party of appointing president) + u

Subsequently (for reasons that will be explained after the results derived from this equation are offered), a second set of models will be created in which the "House Democratic Margin" and "Senate Democratic Margin" are combined into an interactive term. This measure will be generated by dividing the margin between Democrats and Republicans in the House of Representatives by 435 and dividing the margin between Democrats and Republicans in the Senate by 100 (or 96, if that was the total number of Senators serving in a given term). This will standardize the variables in light of the different weight that one vote would carry in each body. These two measures will then be averaged to craft a total measure of Democratic strength in Congress as a whole. Previous literature has used the ADA score of the median justice in each house for this purpose (see Gely and Spiller, 1992, 466). However, Sala and Spriggs highlight the difficulty of locating consistent, comparable ideal points for the President, Supreme Court justices, and Congressmen (Sala and Spriggs, 2004, 205). As such, this variable is created herein for use as an admittedly rudimentary alternative to ideal points. The regression equation for the time series model that is created with this measure will be as follows:

Y (Conservative scores by year) = a + x1 (Party controlling the White House during a specific year) + x2 (Measure of combined "Democratic Strength" in the House of Representatives and the Senate during a specific year) + x3 (Justice previously held elected office as a Democrat) + x4 ("Cross-party" nominee) + x5 (Party of appointing president) + u

Again, separate models will be created for civil rights/civil liberties and economic issues. Overall, 31 justices, with 540 term observations, will be examined in the two sets of time series models described above. (A set of alternative research designs that use linear regression to examine the behavior of each justice on an individual basis is provided in Appendix B).

Section 4.8: Findings and Discussion

Section 4.8.i: Analysis of ANOVA Tables for Examining "Extreme" Scores

The ANOVA tables offered in Table 4.1 and Table 4.2 are used to address a null hypothesis which reads as follows:

Ho5: A justice's extreme score is NOT likely to increase when he or she has "unified support" from the other branches of government and is NOT likely to decrease when he or she is faced with "unified opposition" from the other branches of government.

Ultimately, in civil rights/civil liberties cases, only six justices exhibit a statistically significant variation in "extreme" scores based on changes in the composition of the House, Senate, and White House; those six justices are Alito, Fortas, Harlan, Rehnquist, Stevens and White. In economic cases, six justices also exhibit a significant statistical difference in "extreme" scores; those justices are Blackmun, Clark, Fortas, Minton, Warren and White. So, in both models, only a small percentage of justices exhibit any significant variation in their "extreme" scores depending on the conditions they face in the other branches of government. As a result, based on the ANOVA models, one would fail to reject null hypothesis #5. However, an ANOVA table cannot control for other factors that might influence variation in "extreme" voting scores, so the use of a multivariate regression model would represent a worthwhile statistical advance.

Table 4. 1: ANOVA of "Extreme" Scores in Civil Rights and Civil Liberties Cases

Justice	Unified Support	Unified Opposition	Divided Government	ANOVA F-Score Probability Level
Alito	11.90 (1)	N/A	22.07 (2)	.07*
Black	24.27 (12)	26.97 (4)	27.66 (9)	.852
Blackmun	16.48 (2)	12.01 (4)	10.4 (18)	.494
Brennan	N/A	26.67 (12)	24.78 (22)	.410
Breyer	N/A	8.13 (4)	8.01 (10)	.978
Burger	N/A	26.84 (4)	26.03 (13)	.807
Burton	62.45 (4)	66.14 (2)	62.3 (6)	.772
Clark	12.15 (10)	17.75 (2)	11.8 (6)	.479
Douglas	34.85 (12)	30.67 (2)	34.82 (15)	.895
Frankfurter	8.01 (6)	17.78 (2)	13.09 (8)	.286
Fortas	28.37 (3)	N/A	14.4 (1)	.079*
Ginsburg	8.59 (1)	14.93 (4)	9.80 (10)	.457
Harlan	3.85 (3)	13.55 (8)	5.94 (5)	.062*
Jackson	13.01 (4)	15.1 (2)	5.46 (2)	.179
Kennedy	15.43 (4)	17.74 (2)	19.60 (15)	.717
Marshall	28.50 (5)	N/A	25.66 (19)	.388
Minton	20.34 (3)	15.52 (2)	19.31 (2)	.901
O'Connor	13.97 (3)	16.39 (2)	22.05 (19)	.223
Powell	N/A	20.35 (4)	20.10 (12)	.942
Rehnquist	25.60 (3)	34.55 (6)	32.24 (25)	.089*
Roberts	15.67 (1)	N/A	18.52 (2)	.395
Scalia	26.89 (4)	26.25 (2)	28.72 (16)	.825
Souter	14.93 (4)	6.38 (2)	11.90 (12)	.534
Stevens	20.00 (4)	4.55 (6)	12.78 (23)	.028**
Stewart	N/A	9.14 (12)	7.67 (11)	.605
Thomas	30.96 (4)	27.30 (2)	28.99 (11)	.779
Vinson	17.43 (4)	25.68 (1)	18.29 (2)	.637
Warren	28.45 (8)	19.23 (1)	23.99 (7)	.508
White	9.24 (11)	N/A	19.47 (20)	.002***
Whittaker	N/A	9.52 (2)	6.72 (4)	.667

Total terms in parentheses; *** $p<0.01$; ** $p<0.05$; * $p<0.1$

Table 4. 2: ANOVA of "Extreme" Scores in Economic Cases

Justice	Unified Support	Unified Opposition	Divided Government	ANOVA F-Score Probability Level
Alito	5.56 (1)	N/A	8.87 (2)	.864
Black	26.26 (12)	29.84 (4)	33.48 (9)	.191
Blackmun	22.53 (2)	6.87 (4)	8.95 (18)	.098*
Brennan	N/A	21.1 (12)	18.5 (22)	.404
Breyer	N/A	8.76 (4)	13.06 (10)	.547
Burger	N/A	11.3 (4)	8.17 (13)	.358
Burton	47.56 (4)	48.52 (2)	43.11 (6)	.733
Clark	22.11 (10)	2.74 (2)	23.50 (6)	.035**
Douglas	20.33 (12)	15.34 (2)	25.67 (15)	.161
Frankfurter	9.68 (6)	19.26 (2)	9.96 (8)	.312
Fortas	10.78 (3)	N/A	25.0 (1)	.029**
Ginsburg	16.67 (1)	11.72 (4)	11.21 (10)	.880
Harlan	5.02 (3)	7.71 (8)	6.06 (5)	.548
Jackson	11.51 (4)	14.17 (2)	9.97 (2)	.818
Kennedy	13.67 (4)	7.58 (2)	7.61 (15)	.367
Marshall	15.62 (5)	N/A	14.80 (19)	.874
Minton	9.91 (3)	4.03 (2)	23.8 (2)	.09*
O'Connor	6.02 (3)	7.82 (2)	9.89 (19)	.684
Powell	N/A	10.87 (4)	8.54 (12)	.564
Rehnquist	16.19 (3)	11.93 (6)	8.40 (25)	.146
Roberts	5.56 (1)	N/A	14.17 (2)	.550
Scalia	17.07 (4)	10.60 (2)	10.26 (16)	.419
Souter	8.39 (4)	24.24 (2)	10.70 (12)	.141
Stevens	7.79 (4)	14.51 (6)	13.20 (23)	.488
Stewart	N/A	8.01 (12)	7.27 (11)	.745
Thomas	7.54 (4)	12.12 (2)	12.67 (11)	.593
Vinson	8.14 (4)	0.79 (1)	14.04 (2)	.329
Warren	25.58 (8)	2.78 (1)	34.99 (7)	.0001***
White	18.89 (11)	N/A	7.15 (20)	.0009***
Whittaker	N/A	7.29 (2)	6.65 (4)	.876

Total terms in parentheses; *** $p<0.01$; ** $p<0.05$; * $p<0.1$

Section 4.8.ii: OLS Regression Models for Assessing "Extreme" Scores

The first such model assesses the relationship between "extreme" scores and the percentage of a justice's total terms served that are spent facing unified opposition from other branches, and appears in Table 4.3. As one might expect, when the number of terms facing such opposition increases, the "extreme" score seems to get lower. Specifically, on average, for each additional term served facing unified opposition from the House, Senate and White House, a justice's "extreme" scores will drop by .33 points in civil rights and civil liberties cases (a value significant at the .20 level) and will drop by .21 points in economic cases (a value significant at the .033 level).

Two other variables in the economics model also offer significant results. Tenure yields a coefficient of .0023, which is significant at the .079 level and "first choice" shows a coefficient of .089, which is significant at the .018 level. Therefore, in economic cases, for each additional term served, justices become, on average, .23 points more "extreme;" this matter will be addressed further in Chapter 6. In addition, "first choice" nominees end up having "extreme" scores that are 8.9 points higher than their counterparts in economic cases; this is consistent with the idea that a president's first choice is likely to be more "extreme" than a nominee who follows the rejection of another candidate. Neither of these variables, however, is statistically significant for civil rights and civil liberties cases, which limits the external validity of the findings. One potential explanation for this difference could lie in the fact that there may be a greater degree of volatility in the voting behavior of a Supreme Court justice when it comes to civil rights and civil liberties cases—in the sense that a justice may alter the direction (or "extremity") of their voting behavior based on which particular social issues are most prominent in a particular era.

Table 4. 3: The Relationship Between Terms Served Facing "Unified Opposition" From Other Branches and the "Extreme" Voting Scores of Supreme Court Justices (OLS Regression)

Independent Variables	Dependent Variables	
	"Extreme" Score in Civil Rights and Civil Liberties Cases	"Extreme" Score in Economic Cases
% of Terms Facing a Senate, House, and White House of **Opposing** Party	-0.3309** (0.1330)	-0.2080** (0.0918)
Presidential Approval Rating at Time of Justice Confirmation	0.0014 (0.0017)	-0.00004 (0.0012)
Total Terms Served on Supreme Court	0.0020 (0.0018)	0.0023* (0.0013)
"First Choice" Candidate	-0.0250 (0.0510)	0.0892*** (0.0352)
Served as Chief Justice	0.0537 (0.0502)	0.0022 (0.0347)
Previously Held Elected Political Office	0.0004 (0.0447)	0.0264 (0.0309)
Constant	0.1304 (0.1035)	0.0153 (0.0714)
Observations	31	31
R-squared	0.28	0.39
F-Ratio	1.57	2.51**
Mean VIF Score	1.10	1.10
Residual Kurtosis	2.24	2.54
Residual Skewness	-0.013	0.404
Shapiro-Wilk (Probability)	0.978 (.753)	0.967 (.452)
Shapiro-Francia (Probability)	0.985 (.882)	0.974 (.544)

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

A second, similar, model shifts the analysis away from unified opposition and instead assesses the relationship between "extreme" scores and the percentage of a justice's total terms served that are spent with unified *support* from other branches. One would hypothesize that a justice might feel greater "freedom" to express his or her preferred policy preferences when the other branches of government are likely to offer unified support for those preferences. The results from the regression model that addresses this idea are offered in Table 4.4. As one might expect after observing the results in Table 4.3, which showed that "extreme" scores get lower with additional terms facing unified opposition, Table 4.4 demonstrates that as the number of terms served with unified support increases, a justice's "extreme" score seems to get higher.

Specifically, on average, for each additional term served with unified support from the House, Senate and White House, a justice's "extreme" scores will increase by .20 points in civil rights/civil liberties cases (significant at the .027 level) and .19 points in economic cases (significant at the .001 level). Tenure is once again significant in this model, in both economic cases (coefficient of .0037, significant at the .004 level) and civil rights and civil liberties cases (coefficient of .0034, significant at the .10 level). In addition, "first choice" is again significant in the economics model (coefficient of .064, significant at the .048 level). The findings from Table 4.4, it follows, offer results similar to those from Table 4.3. Ultimately, it seems as though justices adjust the level of "extremity" with which they express their preferences based on the composition of the other branches of government. Beyond that, Table 4.3 and Table 4.4 both offer evidence that justices become more "extreme" the longer that they serve on the Court, and that justices who are confirmed to the Court after the rejection of another nominee are actually less "extreme" in their voting behavior than the so-called "first-choice" confirmations. Overall,

Table 4. 4: The Relationship Between Terms Served With "Unified Support" From Other Branches and the "Extreme" Voting Scores of Supreme Court Justices (OLS Regression)

Independent Variables	Dependent Variables	
	"EXTREME" Score in Civil Rights and Civil Liberties Cases	"EXTREME" Score in Economic Cases
% of Terms Facing a Senate, House, and White House of **Same** Party	0.1960** (0.0835)	0.1923*** (0.0490)
Presidential Approval Rating at Time of Justice Confirmation	0.0006 (0.0017)	-0.0007 (0.0010)
Total Terms Served on Supreme Court	0.0034* (0.0020)	0.0037*** (0.0012)
"First Choice" Candidate	-0.0522 (0.0525)	0.0640** (0.0308)
Chief Justice	0.0712 (0.0503)	0.0131 (0.0295)
Previously Held Elected Political Office	-0.0270 (0.0449)	0.0058 (0.0263)
Constant	0.0688 (0.1048)	-0.0345 (0.0615)
Observations	31	31
R-squared	0.27	0.55
F-Ratio	1.44	4.81***
Mean VIF Score	1.17	1.18
Residual Kurtosis	1.88	2.60
Residual Skewness	-0.106	0.463
Shapiro-Wilk (Probability)	0.955 (.216)	0.963 (.354)
Shapiro-Francia (Probability)	0.969 (.416)	0.968 (.395)

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

convincing support from Table 4.3 and Table 4.4, then, mandates a rejection of the null for hypothesis #5, for it appears as though a justice's "extreme" score is likely to increase when he or she has unified support from the other branches of government and is likely decrease when he or she is faced with unified opposition.

Section 4.8.iii: Discussion of Time Series Regression Models

At this point, my analysis shifts from "extreme" scores to conservative scores (which are calculated by dividing conservative votes, as coded by the Spaeth database, by the total number of votes cast in a given term). The reason for the shift to the conservative scores is that a more lucid portrait of judicial decision-making can be achieved if one matches year-by-year voting scores with changes in Congress via a time series regression model. If "extreme" scores are used in such a year-by-year analysis (instead of as "career" scores, as they have been used earlier in this dissertation), it may become difficult to discern if a justice's voting behavior is "extreme" in a liberal direction one year, and "extreme" in a conservative direction another year. Therefore, conservative scores are used as the dependent variable in the upcoming GLS, random-effects time series models. These models are then used to assess the following null hypotheses:

Ho6: A justice's conservative voting score will NOT decrease in relation to the total number of House and Senate seats held by the Democratic Party, while controlling for the party that holds the White House.

Ho7: A justice's conservative voting score will NOT decrease when the White House is held by Democrats, while controlling for the number of House and Senate seats that are held by Democrats.

Table 4.5 offers results from the regression analysis. As a starting point, it is worth mentioning that, as one would expect, those candidates appointed by Democratic presidents have conservative voting scores in civil rights and civil liberties cases that are, on average, 15.06

Table 4. 5: Institutional Influences on Conservative Voting Scores of Supreme Court Justices (GLS, Random-Effects Time Series Regression)

Independent Variables	Dependent Variables	
	Conservative Score in Civil Rights and Civil Liberties Cases	Conservative Score in Economic Cases
Justice Was Appointed by a Democrat	-0.1506*** (0.0582)	-0.0786*** (0.0274)
Justice was a "Cross-Party" Nominee	-0.0337 (0.0955)	-0.0401 (0.0440)
Justice Held Elected Political Office as a Democrat Before Ascending to Supreme Court	-0.0269 (0.0868)	-0.1426*** (0.0410)
Numbers of Terms Served on the Supreme Court by a Justice	-0.0028*** (0.0006)	-0.0019*** (0.0007)
Party of the President by Term	-0.0099 (0.0098)	0.0162 (0.0101)
Margin Between Democrats and Republicans in the House of Representatives by Term	0.0006*** (0.0001)	0.0001 (0.0001)
Margin Between Democrats and Republicans in the Senate by Term	-0.0024*** (0.0006)	-0.0024*** (0.0006)
Constant	0.6226*** (0.0413)	0.5287*** (0.0214)
Observations (Court terms)	540	540
Number of justices	31	31
Wald Chi-Squared	50.51***	60.80***
R-Squared	0.24	0.51

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

points lower than those appointed by Republicans (significant at the .01 level) after controlling for the other variables in the model. In economic cases, Democratic appointees have conservative voting scores that are, on average, 7.86 points lower than those appointed by Republicans (significant at the .004 level). In addition, the number of terms served is statistically significant in both categories. For each additional term served, in fact, justices actually become more *liberal* by .28 points per term in civil rights/civil liberties cases (significant at less than the .000 level) and by .19 points in economic cases (significant at the .003 level). This finding is contrary to theories about "maturation"—which have implied that justices become more conservative with time (Cook and Campbell, 1981, 50-52)—and seems to offer a noteworthy discovery that future research should reexamine. Another control variable returns a statistically significant finding in the economics model, as those who had previously held elected office as a member of the Democratic Party have, on average, conservative voting scores that are 14.26 points lower than all other justices (significant at the .001 level), perhaps an indication that those who were formerly elected officials may bring a more partisan ideology with them to the Court. (This variable is not significant in civil rights and civil liberties cases, though).

In terms of the primary variables related to the institutional influences on a justice while he or she is sitting on the Court, the party of the president in power does not appear to have a significant influence on the vote choices of Supreme Court justices in either civil rights/civil liberties cases or economic cases. However, in civil rights and civil liberties cases, variables that measure the level of Democratic control in the House and in the Senate are both significant at less than the .000 level. The vexing part of these findings, though, is that the coefficients for both the House margin and the Senate margin are statistically significant—but in different

directions. Specifically, for each additional seat controlled by the Democrats in the Senate, conservative vote scores for Supreme Court justices get lower by .24 points. This is compatible with "separation of powers" theory in the sense that the behavior of justices is consistent with avoiding the possibility of an override—at least as far as the Senate goes. However, the model also tells us that for each additional seat controlled by the Democrats in the House of Representatives, conservative scores will actually rise by .06 points. This movement is in an unexpected direction, because if justices were altering their policy preferences in relation to the composition of the House, perhaps in order to avoid overrides, those justices would not be voting in a more conservative fashion as the number of Democrats increased.

The coefficients for these variables in the economics model yield similar outcomes. First, for each additional seat controlled by the Democrats in the Senate, the conservative score of an individual justice will drop, on average, by .24 points (significant at less than the .000 level)—the exact same coefficient as in civil rights/civil liberties cases. However, the coefficient for the variable which measures Democratic seats in the House of Representatives is not statistically significant for economic cases. So, while the *Senate* variable yields statistically significant results in the expected direction for both civil rights/civil liberties cases and economic cases, the *House of Representatives* variable yields a significant result in an *unexpected* direction in civil rights/civil liberties cases and an insignificant return in economic cases.

There are three possible explanations that one might consider in trying to rationalize these results. First, it may be the case that the Senate is the more visible of the two houses, and that the policy preferences of senators are more accessible for Supreme Court justices to understand. As a result, justices may be likely to adjust their voting patterns based on what they discern the

Senate's ideological position to be. In reality, this may be sufficient to protect the core of a judicial ruling, because it would take the consent of both houses of Congress to overturn a judicial decree. Second, there is the possibility that conservative Democrats are more likely to be situated in the House of Representatives, especially since this sample includes the decades of the 1950s and the 1960s. Lastly, it could also be feasible that the interactive impact of the two houses might be more important than the influence of either individually. Consequently, a second model is created in which an interactive term is derived by dividing the Democratic Senate margin by 100 (or 96 in the terms prior to 1961) and by dividing the Democratic House margin by 435; those two measures are then averaged and included as a single independent variable in the new regression model. The results are offered in Table 4.6.

The first variable of interest in Table 4.6 indicates that the party of the appointing president is once again a significant predictor of a justice's conservative voting score, as one might expect. Specifically, in civil rights/civil liberties cases, on average, those appointed by Democrats have conservative voting scores which are 15.75 points lower than those of Republican appointees, after controlling for the other variables in the model; this finding is significant at the .01 level. In economic cases, on average, those justices appointed by Democrats have conservative voting scores that are 8.19 points lower than those of Republican appointees when controlling for the same variables; this finding is significant at the .008 level. In addition, those who had previously held elected office as a member of the Democratic Party exhibit conservative scores in economic cases that are 14.30 points lower than those of other justices; this finding is significant at the .002 level—although the same variable is not significant in civil rights/civil liberties cases. Tenure is

Table 4. 6: Institutional Influences on Conservative Voting Scores of Supreme Court Justices; Part 2 (GLS, Random-Effects Time Series Regression)

Independent Variables	Dependent Variables	
	Conservative Score in Civil Rights and Civil Liberties Cases	Conservative Score in Economic Cases
Justice Was Appointed by a Democrat	-0.1575*** (0.0653)	-0.0819*** (0.0308)
Justice Was a "Cross-party" Appointee	-0.0241 (0.1073)	-0.0351 (0.0497)
Justice Held Elected Political Office as a Democrat Before Ascending to Supreme Court	-0.0283 (0.0975)	-0.1430*** (0.0460)
Numbers of Terms Served on the Supreme Court by a Justice	-0.0028*** (0.0007)	-0.0018*** (0.0007)
Party of the President by Term	-0.0211** (0.0096)	0.0097 (0.0098)
Measure of the Democratic Party's Strength in Congress by Term	0.0045 (0.0450)	-0.2203*** (0.0449)
Constant	0.6381*** (0.0460)	0.5367*** (0.0232)
Observations (Court terms)	540	540
Number of justices	31	31
Wald Chi-Squared	27.85***	47.85***
R-Squared	0.19	0.49

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

again statistically significant in both case categories, with coefficients suggesting that justices become .28 points more liberal in civil rights/civil liberties cases with each term that they serve (significant at less than the .000 level) and .18 points more liberal in economic cases with each term that they serve (significant at the .006 level). These findings are similar to those from Table 4.5.

As for the major institutional variables employed herein, some interesting outcomes appear in Table 4.6. First, for the civil rights and civil liberties model, when the White House is controlled by a Democratic president, on average, the conservative voting scores of individual Supreme Court justices are 2.11 points lower than when Republicans control the White House, a finding which is significant at the .027 level. This is in line with Andrew Martin's suggestion that Supreme Court justices might follow the lead of the president in constitutional cases (Martin, 2006, 3). However, the newly-included independent variable, which distills the relative "strength of Democrats in the House and the Senate," presents an insignificant finding for civil rights and civil liberties cases. Perhaps these results have something to do with the fact that many social issues rely on the executive branch for implementation—with visions of President Eisenhower sending troops to Arkansas and President Kennedy sending troops to Mississippi in the wake of *Brown v. Board of Education* (347 U.S. 483, 1954) serving as appropriate images. Further, since many social issues are related to constitutional considerations, Congress may have difficulty overturning them—which could shift the focus of Supreme Court justices toward the White House.

For economic cases, Table 4.6 indicates that when the White House is controlled by a Democratic president, there is no statistically significant variation in the voting behavior of

Supreme Court justices; that effect seems to be limited to civil rights and civil liberties cases. However, the combined measure of the relative "strength of Democrats in the House and Senate" does in fact yield a highly significant finding for economic cases. The direction of the coefficient is negative, and indicates that, on average, for each additional point increase in Democratic control over the two houses of Congress, conservative scores will decrease by .22 points—a finding which is significant at less than the .0000 level. This finding is compatible with the expected result, in the sense that one would hypothesize that the voting patterns of justices would become more liberal in the face of a liberal Congress in order to minimize the threat of legislative override.

So, ultimately, for hypothesis #7, which addresses changes in voting behavior relative to changes in Congress, one would have to reject the null for *economic* cases, but not for *civil rights and civil liberties* cases; yet, for null hypothesis #8, which deals with party control of the White House, one would have to reject the null for *civil rights and civil liberties* cases, yet fail to reject the null for *economic* cases. In making sense of these results, it may help to draw upon Sala and Spriggs' assertion in "Designing Tests of the Supreme Court and the Separation of Powers," where they note that such "tests" should examine the "strategic conjecture that justices anticipate the policy consequences of their actions" and adjust their voting behavior accordingly (Sala and Spriggs, 2004, 197). Table 4.6 suggests that justices do alter their voting behavior in economic cases in relation changes in the composition of Congress (but not in relation to changes in the party controlling the White House); conversely, justices seem to alter their voting behavior in civil rights and civil liberties cases in relation to changes in the composition of the White House (but not in response to changes in the composition of Congress).

While this may appear to be an anomalous finding, an explanation may be embedded within the text of a decades-old Supreme Court opinion. Specifically, one could attribute the findings in Table 4.6 to factors mentioned in Harlan Fiske Stone's famous "Footnote Four" in the *Carolene Products* opinion of 1938 (*United States v. Carolene Products Co.*, 304 U.S. 144, 1938). Eisgruber contends that this footnote:

> reflected a particular view of what [justices] could contribute to the American system of government. They were not competent architects of economic regulation, and so they should not be second-guessing the constitutionality of legislation in that domain. If people had a complaint about economic regulation, they should take that complaint to their legislators. By contrast, courts might provide a useful check upon the temptation to invade certain personal liberties that were fundamental to human freedom (Eisgruber, 1997, 102; see also Baum, 2008, 174).

If we use this idea as a starting point, we can begin to understand why Model 4.6 provides evidence that individual justices are deferring to Congress on economic matters—and becoming more liberal in this issue area whenever Congress becomes more liberal. Furthermore, we can also begin to see why there is no similar correlation in civil rights and civil liberties cases—areas where justices might feel compelled to act more independently of Congress, but where the executive branch's compliance may be crucial for the enforcement of judicial edicts related to "personal liberties."

Section 4.9: Concluding Thoughts for Chapter 4

Overall, there is some evidence offered herein to suggest that, in certain types of cases, Supreme Court justices may in fact alter their voting preferences as a result of the political composition of the other branches of government. Of course, the flaw with this work is that there is no way to entirely distinguish between voting that is preference-driven and voting that is strategic. The best we can hope to accomplish is to design a test that analyzes variation in voting

behavior as it correlates with changes in the other branches, while controlling for as many plausible alternatives as possible.

The first such test offered in this chapter examines voting scores when justices face opposition from the House, Senate, and White House, and a second model examines voting behavior when they have support from all three of those institutions. Ultimately, highly-significant results indicate that justices' voting scores are more "extreme" under conditions of "unified support" and more moderate under conditions of "unified opposition." This seems to be consistent with the fact that a justice would want to avoid seeing judicial decrees overturned by a hostile Congress and White House, but might also feel greater freedom to express their preferences more strongly when those branches are controlled by ideologically compatible actors. Of course, this finding does not completely undermine the basic tenets of the attitudinal model, because justices continue to follow their preferences (and are still driven by ideology) when they vote. The degree to which they express those preferences, though, is what appears to vary. This finding also lends support for rational choice and New Institutionalist interpretations, because it seems as though justices are cognizant of the impact that the other branches can have on their decisions and respond by making subtle, strategic adjustments in their voting behavior.

The second portion of this research design shifts to an analysis of conservative voting scores for individual justices, to assess how those change as the composition of Congress and the White House change. The random-effects time series model that is offered to address this matter represents an advance over techniques used in previous literature for a number of reasons. First, individual justices are examined (as opposed to the focus on the Court as a whole that is prevalent in many game-theoretic "separation of powers" models). Beyond that, a variety of

cases (e.g., unanimous and non-unanimous, as well as constitutional and statutory) are assessed over an extended period of time (1946-2007). Next, no expectations are placed on how justices ought to behave—that is, their voting scores are not used to place them into categories of "expected behavior;" rather, the dependent variable (conservative voting scores by Court term) is examined in relation to changes in Congress without any presuppositions built into the research design regarding which "regimes" should cause a shift in behavior. (Finally, care has been taken to match the Court term (which extends from October to April) with the appropriate session of Congress and the White House).[53]

In terms of results, the finding that the party of the president in office may be correlated with voting behavior in civil rights and civil liberties cases is consistent with the fact that the executive branch and its administrative agencies play a large role in enforcing civil rights and civil liberties decisions. In addition, the president may have an agenda-setting role in how other governmental actors, and perhaps the American public, react to such decisions. Beyond that, it is important to note that a president is likely to appoint justices whose views are in line with his own on especially salient social issues; while the time period that each justice spends on the bench with his or her appointing president in office may vary, such conditions do form a substantial part of the panel data sample utilized herein—and may have contributed to the overall results. (The following chapter will address this matter more fully).

Furthermore, the fact that a measure of the overall Democratic ideology in Congress is correlated with justice voting behavior in economic cases, but not in civil rights and civil

[53] Again, if the White House changes parties in November, the term is coded for the incoming president's party—in light of the fact that most Supreme Court decisions are handed down after the January 20th inauguration. (In addition, justices will know by the first Tuesday in November (normally) what president might play a role in implementing judicial decrees for the following four years).

liberties cases, is striking. This seems to indicate that individual justices will defer to Congress on economic matters, but are more likely to be tethered to the mores of the president on social matters. As mentioned above, this idea is presaged in Justice Stone's *Carolene Products* footnote.

Lastly, it is worth pointing out that the time series models offer the incidental—but noteworthy—finding that justices seem to become more liberal over time (which is an unexpected result). No clear cut rationalization for this outcome is readily apparent, but the fact that society itself has grown more liberal from 1946 to 2007 may serve as an elementary explanation. This matter will be addressed in more detail in the final chapter.

Ultimately, the results uncovered in this chapter do not definitively support or contradict the notion of an independent judiciary. Overall, there seem to be certain circumstances (e.g., particular types of cases) where the Court may follow the lead of Congress (economic matters) or the lead of the White House (civil rights/civil liberties cases), but there is no evidence that justices are drastically altering their overall preferences based on the composition of the other branches of government. This is evident in the fact that Democratic appointees are consistently more liberal than Republican appointees in all of the models presented herein, even when controlling for changes in the other branches of government. However, one cannot ignore the statistically significant findings offered in Table 4.6, which suggest that there is some relationship between changes in Congress and the White House and changes in the voting behavior of individual Supreme Court justices *in certain issue areas*. Therefore, it may be the case that, in specific situations, Supreme Court justices are rational actors who adroitly alter the nature of their vote choices. This chapter has demonstrated in what specific issue categories, and

in response to what branches of government, this phenomenon may manifest itself. The subsequent chapter will attempt to discern if there are certain *time periods* during a justice's tenure when judicial independence is more likely to be explicitly palpable or deftly compromised.

Chapter 5: Supreme Court Justices and Loyalty to an Appointing President: An Institutional Perspective on the "Acclimation Effect"

Section 5.1: Statement of a Research Problem / Definition of a Research Question

As discussed in Chapter 2, the study of judicial decision-making has evolved through a number of identifiable phases. To review, early research (circa. 1900-1920), has been classified under the rubric of the "legalism model;" ostensibly, it portrayed judges as conduits that logically and mechanically applied the law (Maveety, 2004, 3). By the 1950s, this notion had given way to the tenets of legal realism, or legal behavioralism (Maveety, 2004, 5), which focused on the actions of judges as individuals—essentially by posing the following research question:

Are there factors outside of legal precedent that influence judicial decisions?

Much of the scholarship spawned by this query has been concerned with the interplay between the policy preferences of justices and their voting behavior, and has fallen under the heading of the "attitudinal model." However, after political scientist Theodore Becker lamented that judicial behavioralists were not considering influences on decision-making that were specific to the judicial system, and were instead treating the study of judges as tantamount to the study of "street-corner gang members" (in the sense that preferences drove behavior and nothing else mattered)—a variety of diverse approaches for examining judicial behavior arose (Becker, 1963, 264). For example, many scholars began to scrutinize the relationship of the courts to other branches of government, a movement known as New Institutionalism (Epstein and Knight, 2004, 204). Succinctly, this theoretical approach to judicial decision-making is concerned with the following question:

Are judges subject to influence by other governmental actors?

Other judicial scholars have even examined more specific research problems. For example, a theory known as "acclimation effect," or "freshmen effect," has precipitated inquiry into whether justices behave differently at various time intervals in their respective tenures. A common research question posed within the infrastructure of said theory might read as follows:

Does the voting behavior of a Supreme Court justice vary over time?

Assessments of this question have produced some support for the existence of such variation (or at the very least, have failed to falsify its presence). However, prior scholarship under the aegis of "acclimation effect" has been plagued by a very specific inconsistency: the failure to standardize a set period of time to use as the "acclimation period." For example, some scholars claim that it takes one year for a justice to become "acclimated" to his or her role (Brenner and Hagle, 1996), and as a result, differences in voting behavior between that year and subsequent years will be apparent. Other scholars, however, have set the "acclimation" period at anywhere from one to five years (Brenner, 1983; Hagle, 1993; Heck and Hall, 1981). This lack of standardization, even among the same scholars in different works of their own, has abrogated any possibility for the "acclimation effect" to offer a generalizable theory about why justices behave differently early in their tenures. This chapter will offer an alternative that rectifies the aforementioned problem; it will do so by linking two of the questions listed above, and by forging a bond between "institutional" and "acclimation effect" research.

In fact, at this point in time, the future of inquiry into judicial behavior seems to lie in the ability of scholars to fashion a creative connection between two or more existing approaches—in the hope of offering a unique rendition of the factors that may influence the conduct of judges.

This chapter attempts to offer just such an amalgamation, a blended approach to the study of judicial politics that I will classify under the heading of "allegiance effect." Essentially, my "allegiance effect" is an attempt to unite the theories—and, in turn, the research questions—offered by "institutionalists" (who might be concerned with the relationship between justices and appointing presidents) and "acclimation" theorists (who might be concerned with variation in voting patterns over time) into a more specific query:

Does the voting behavior of a Supreme Court justice vary after the appointing president leaves office?

As is the case for many research questions, mine has its genesis in an "inconsistency" that pervades prior research in a particular field of study. I will resolve that discrepancy by offering what acclimation scholars before me have not: a set time frame for the so-called "acclimation period." Specifically, I will use the term of the appointing president. From a theoretical standpoint, then, this chapter will explore the issue of whether Supreme Court justices will, during their initial moments on the Court, hold some semblance of loyalty to the appointing president. Such allegiance, it follows, will manifest itself in the voting behavior of justices during the time period that the appointing president remains in office. Subsequent to the appointing president's departure, however, discernable differences in said voting behavior should, according to this "allegiance theory," become apparent. Because a reason is now being offered for why the previously-known "acclimation period" is a certain length, this new theory could eventually help to explain why justices vote in a particular fashion at a given point in time—and why they vote in a different fashion at other points in time.

Beyond that, this research design will also attempt to assess whether certain types of justices (e.g., those without prior judicial experience, those appointed by Democrats, or those appointed

to be Chief Justice) are more likely to exhibit variation in voting behavior after the appointing president leaves office. This type of analysis could generate a distinctive typology for explaining the conduct of certain classifications of justices and could help to offer predictions for the behavior that fledgling justices (such as the recently-appointed Justice Alito and Justice Roberts) will exhibit after their appointing presidents leave office.

Ultimately, the overall importance of explaining and predicting judicial behavior is implicit in the Michael Heise passage invoked at the beginning of this dissertation (page 3). More specifically, though, the theory underlying research offered in this chapter could eventually be used to assess the extent to which justices are tethered to the mores of an appointing president, and might help to appraise whether the notion of an "independent judiciary," an idea embedded in our nation's founding, is in fact evident in our society today. Before extrapolating such broad conclusions, however, I must clarify the ideological foundation for the phenomenon that I will refer to as the "allegiance effect." A cursory overview of prior research in the field of judicial politics will facilitate such clarification.

Section 5.2: Literature Review

Essentially, my "allegiance effect" theory is a blend of three prior approaches to the study of judicial behavior. These are, in the order that they will be addressed: "acclimation" theory, New Institutionalism, and rational choice theory. A brief review of the literature in each of these dimensions will follow.

Section 5.2.i: "Acclimation Theory" and the "Allegiance Effect"

Overall, my "allegiance effect" closely resembles previous scholarship that falls under the heading of "acclimation theory," or "freshman effect." Timothy Hagle's "'Freshman Effects' for

Supreme Court Justices" (1993) succinctly summarizes this research. He distills its essence by declaring that justices are often said to behave differently early in their terms, as if they were undergoing a sort "acclimation" phase. Three explanations for such a phase, Hagle observes, are evident in "acclimation" literature: 1) an "initial [sense of] bewilderment or disorientation" on the part of a justice; 2) the "assignment of a lower than average number of [written] opinions;" 3) "an initial tendency on the part of the new justice to join a moderate [voting bloc]" (Hagle, 1993, 1142).

The first idea has gained little support among political scientists—in spite of a declaration from Justice Clarence Thomas that, "In your first five years, you wonder how you got there" (Wrightsman, 2006, 99); in effect, it would require a grand inferential leap to suggest that a Supreme Court appointee, who is most likely the product of an elite educational environment (and usually experienced as an appellate judge and/or a practicing attorney) would be "bewildered" at the prospect of continuing his or her trade at a new, albeit unique, level. J. Woodford Howard offered some anecdotal evidence of such "bewilderment" in his 1968 analysis of Justice Frank Murphy (Howard, 1968, 45-46; Bowen and Scheb, 1993, 1), but this concept is impossible to verify through empirical testing. For that reason, Hagle's first component of "acclimation theory" will play no part in my "allegiance theory."

Other studies have concerned themselves with the second criterion: discerning differences in opinion writing between newcomer justices and established justices (Brenner and Hagle, 1996; Scheb and Ailshie, 1985). For the most part, though, no significant differences have been reported between "new" and "experienced" justices when it comes to opinion writing, debunking any notion of an "acclimation effect" when it comes to these tasks. The importance of this

second criterion is further minimized when one considers that opinion assignment is "out of the direct control of the new justice" (Hagle, 1993, 1144) (although Justice Roberts' appointment as Chief Justice does present a confounding variable in that regard). Beyond that, although a new justice can control the number of concurring and dissenting opinions that he or she writes, Howard seems to imply that the litmus test of an "acclimation effect" lies in determining how "unstable attitudes [that may be] present during an 'acclimation' period affect a justice's voting behavior"[54] (Hagle, 1993, 1144, referencing Howard, 1968, 45).

My research will not pass judgment on the value of studying opinion writing trends, but in keeping with the goal of assessing interplay between the executive branch and Supreme Court justices, my "allegiance effect" is more concerned with the category of research hinted at in the above quotation from Howard: the impact that being "new" to the Court has on *voting behavior*. This third indication of a perceived "freshman effect" was initially explored in Eloise Snyder's "The Supreme Court as a Small Group," which precipitated the lion's share of literature in this area. Snyder offered evidence that justices will avoid alignments with established voting blocs during their "early" years on the Court, and will instead be likely to join moderate "cliques" (Snyder, 1958). However, some well-documented methodological flaws may have undermined her research—including her inadequate definition of the concept "clique," which allowed for a single justice to count as a "voting bloc" (Arledge and Heck, 1992, 762). In fact, Arledge and Heck declare that Snyder's findings have been empirically falsified by other bloc analysis research, including that of Heck and Hall, 1981; Scheb and Ailshie, 1985; Rubin and Melone, 1988; and Melone, 1990 (see Arledge and Heck, 1992, 762). (Bowen and Scheb's

[54] On its own, the term "behavior" can be broadly construed to incorporate actions like opinion writing; that type of "behavior," though, will not be the focus of this inquiry.

comprehensive (1993) study of voting bloc formation among freshman justices from 1921-1990 can also be added to this list). Nevertheless, Snyder's basic suggestion that justices enter the court without a "fixed liberal or conservative viewpoint" can be used to stimulate research which examines the ideological direction of the votes cast by "new" justices (even if that research is not centered around bloc formation) (Snyder, 1958, 237). This type of scholarship will be offered herein.

There are two schools of thought as to why a justice's "early voting" would differ from his or her "later" voting. The first suggests that early in a justice's tenure, his or her voting patterns may mimic those of another justice on the Court. This idea is expressed in Walter Murphy's 1964 book *Elements of Judicial Strategy,* where he notes that, once on the Court, "The freshman justice… moves into a strange and shadowy world. An occasional helping hand—a word of advice [from a fellow justice] can be helpful" (Murphy, 1964, 50, as quoted in Wrightsman, 2006, 97). Wrightsman interprets this to mean that a "'freshman effect' proposes that, in learning the rules of the game, new justices initially rely on the opinions of others on the Court, and even emulate them" (Wrightsman, 2006, 97). Of course, by extension, one might suggest that such "assistance" could just as likely come from the appointing president. Actual contact between an appointing president and a Supreme Court justice would not be unprecedented, for as Wrightsman notes, "While on the bench, Abe Fortas would call up President Johnson to relay [or perhaps receive] advice... [and] Chief Justice Burger had 'back-channel' communication with President Nixon" (Wrightsman, 2006, 390). Perhaps examples like these could prompt a scholar to wonder "whether either partisan attachment or a sense of personal obligation to an appointing president does not sometimes operate to influence the behavior of Supreme Court justices"

(Scigliano, 1971, 148). Along these lines, Scigliano quotes Charles Pinckney's words from a senate debate in 1800:

> [Justices] are appointed by the president, and if the moment after they receive their commissions, they were really so independent as to be completely out of his reach—that no hope of additional favor, no attempt to caress could be reasonably expected to influence their opinions, yet it is impossible for them ever to forget from whom they have received their present elevation (Scigliano, 1971, 152).

In a general sense, this chapter will provide an empirical assessment of this more than 200 year-old declaration.

Beyond focusing on the matter of emulating another's views, a second school of thought is evident in the work of Howard in "On the Fluidity of Judicial Choice" (1968). He seems to imply that the matter of "imitation" was not as relevant as voting instability, in the sense that "unstable attitudes that seem to have resulted from the process of assimilation to the Court" would be manifest early in a justice's tenure (Howard, 1968, 45). He adds that, "It is not uncommon for a new justice to undergo a period of adjustment, often about three years in duration, before his voting behavior stabilizes into observable, not to mention predictable, patterns" (Howard, 1968, 45; Wrightsman, 2006, 99). In short, Howard does not impute changes in voting behavior to an attempt to emulate another justice—or to an attempt to please an appointing president. In fact, he actually offers no rationale for why there may be differences between "early" voting behavior and "later" voting behavior, but merely suggests that it is likely for the conduct of an individual justice to vary at different points in time.

Brenner (1983) was one of the first to actually engage in statistical analysis of liberal and conservative scores for justices during their incipient moments on the Court. He uses a sample of first-term justices from 1946-1977 to test Sidney Ulmer's proposition that the "ideology of

new justices is not "fully developed," or is not "held with conviction" (Brenner, 1983, 322). Brenner does so by comparing the ideological scores of freshman justices against those of experienced justices serving on the same Court—to see if the former are more moderate; ultimately, he does not find strong supporting evidence for his hypothesis (Brenner, 1983, 322).

The flaw with Brenner's work is that it compares new justices with experienced justices *on the same Court*. Hagle corrects this flaw in a 1993 study in which he compares each justice's voting behavior during the "acclimation period" with the *same* justice's voting pattern in remaining terms. This allows Hagle to discern actual changes in the voting behavior of individual justices. Nine of the thirteen justices that he examines are said to exhibit an "acclimation effect"—in the sense that their "early" voting differs from their "later" voting, according to difference-of-means *t*-tests (Hagle, 1993, 1147). However, Hagle (1993) separates cases from each court term into pre-determined "issue areas;" if a justice exhibits variation between his "early" and "later" voting in just *one* of those areas, Hagle declares an "acclimation effect" to be present. As Section 5.3 of this chapter will illustrate, I will strive for a more exacting standard before professing an "allegiance effect" to be present—and I will also attempt to control for plausible alternatives that cause variation in voting behavior (something which Hagle does not do).

His methodological flaws notwithstanding, from a broader perspective, Hagle's work is of relevance here. Specifically, in analyzing Howard, he notes that, "The theoretical basis of an 'acclimation effect' is that a justice's observed behavior *changes* in some way…. 'An assumption underlying [this idea] is that a justice's attitudes are *temporarily* unstable'" (Hagle, 1993, 1145, discussing Howard, 1968, 45). My "allegiance effect" is compatible with this

statement—with one exception: the use of the word "unstable." That term implies some type of random distortion; in the context of my "allegiance effect," though, there is a definitive reason offered for why a different voting pattern might appear—and a particular time frame is also offered for when this difference should be apparent. Collectively, those two factors will set my study apart from previous research into acclimation phases.

When it comes to choosing a time period for testing acclimation, the lineage of "acclimation effect" literature has been sullied by the use of inconsistent standards. For example, Brenner (1983) used a three-year acclimation period (in the sense that he compared voting scores from the first three terms of a justice's tenure to voting scores from remaining terms). On the other hand, Hagle (1993) used a two-year period, and when Brenner and Hagle worked together (1996), they used a one-year test period. Hagle himself is forced to concede that "periods tested in the literature… have ranged from one to five years" (Hagle, 1993, 1143). Epstein and Segal actually offer a more recent study which shows that, "During the first four years of a justice's tenure, their voting behavior correlates at a rather high level (.64) with their appointing president's ideology [measured via ADA ideal points], but for justices with ten years or more of service, that relationship drops to .49" (Epstein and Segal, 2005, 136). In short, they suggest that liberal presidents appoint liberal justices who continue to take liberal positions *for a while*, but in time, as new issues come before the Court, or as the justice "for whatever reason makes adjustments in his or her political outlook, the president's influence wanes" (Epstein and Segal, 2005, 136). Again, however, the four-year time period is arbitrary, for although it corresponds to the length of a presidential term, some justices are appointed late in a particular term, and some early; further, some serve with a president after re-election and some do not end up serving more

than ten terms (which is the standard of comparison used in Epstein and Segal's analysis). This methodology is symptomatic of the flaws that have precluded "acclimation" studies from generating relevant theories of judicial decision-making, because no tangible reason is offered for the selection of a specific time frame. My "allegiance" study, however, will formalize the length of such a period—and will offer a specific rationale for doing so.

A recent study in acclimation research deserves mention at this point. Hurwitz and Stefko do manage to circumvent the use of an arbitrary time standard in their work by calling "acclimation" a "dynamic process [that occurs] over time" (Hurwitz and Stefko, 2004, 123). They add that, "The proclivity of prior research to specify an express period of acclimation may be flawed" (Hurwitz and Stefko, 2004, 121). However, it is important to recognize that Hurwitz and Stefko use this idea to test a justice's "adherence to precedent," a trait which their research suggests will continually decline as a justice becomes more experienced (Hurwitz and Stefko, 2004, 127). This type of research is different from that offered herein, in the sense that my "allegiance effect" standardizes a set period from which to compare changes in voting behavior. After all, while adherence to precedent may diminish exponentially over time, it is not likely for a conservative score to continue to diminish until it approaches zero; instead, it is more likely that there is a point at which ideology levels off, or perhaps changes course. Finding the moment at which either of those things happens may prove to be valuable for judicial scholars who are concerned with the way that voting behavior varies over time. In fact, in his brief discussion of conservative and liberal voting scores, Hurwitz himself actually points out that because lower courts may operate in such a fashion that "legal factors… intrude to a greater degree," new Supreme Court justices may "require some duration of time after their appointments to acclimate

themselves to the great degree of independence and freedom they have in their decision-making on the Supreme Court" (Hurwitz and Stefko, 2004, 123). Of course, while they assess this matter as it applies to precedent conformity, I will address it in terms of changes in liberal and conservative voting behavior.

Ultimately, the implication inherent in my study is that new justices are not just scared to take an ideological stand, but that they may simply be unsure of exactly what form this stand should take. Perhaps, then, it is not too illogical to suggest that, in his or her inchoate moments, a Supreme Court justice—whose voting preferences may not be fully cemented (as Hurwitz and Stefko suggest above)—will be likely to mirror the ideology of an appointing president.

Section 5.2.ii: New Institutionalism and the "Allegiance Effect"

This, it follows, is where my "allegiance effect" forces prior "acclimation" studies to meet the New Institutionalist perspective. As Chapter 2 illustrated, New Institutionalism has been described as "the analysis of judicial politics that stresses the interactive and interdependent nature of judicial decision-making" (Maveety and Maltese, 2004, 232), or what Rogers Smith calls "analysis of… courts as part of broader political processes" (Smith, 1988, 89). Briefly, then, this branch of judicial politics investigates how courts, and individual judges, interact with the other branches of government. Because my "allegiance effect" will assess the impact of the executive branch on the voting behavior of new justices, it can be classified as an "acclimation" study merged with the precepts of New Institutionalism.

Along these lines, many New Institutionalist studies have focused on the relationship between Congress and the Courts; Murphy, for one, has declared that, "Justices would rather hand down a ruling that comes close to, but may not exactly reflect, their preferences than see Congress completely reverse the decision in the long run" (Epstein and Knight, 2004, 204). The

implication here is that justices are willing to adjust their voting patterns out of concern for how Congress might compose, or recompose, legislation. Analysis of the relationship between the executive branch and the judicial branch, though, has been scant. And, that research which does examine this association has focused almost exclusively on the Court's expansion or constriction of presidential power (see Pritchett, 1949; Schubert, 1950; Schubert, 1953; Tanenhaus, 1956; Silverstein and Ginsberg, 1987; Yates and Whitford, 1998). It has been less concerned (or not at all concerned) with the relationship between the executive branch and individual justices when it comes to the ideological direction of votes. (Abraham's *Justices and Presidents, and Senators* (2008) is an exception; however, his research strictly involves a comprehensive array of qualitative, case-study assessments. The work offered herein will provide quantitative research).

Section 5.2.iii: Rational Choice Theory and the "Allegiance Effect"

At this point, an element of rational-choice theory plays a part in my "allegiance effect." In fact, Gibson (1983)—who uttered the famous phrase, "Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do"—has indicated that New Institutionalism implicitly incorporates a degree of rational choice theory (Gibson, 1983, 32). Perhaps this is because, as Epstein and Knight have observed, when judges make choices, those "choices are structured by the institutional setting in which they are made" (Epstein and Knight, 2000, 626). This information is relevant for my "allegiance effect," and further separates it from previous "acclimation" research, because I am positing a theory which does not portray a timid justice in a submissive state of cerebral servitude to those around him. Rather, I depict a justice who is actively making a choice to pursue policy goals that conform to those of the appointing president—perhaps out of

a sense of loyalty, and perhaps out of self-interest related to the implementation of judicial decisions.

Further, my "allegiance effect" is also obviating the "traditionalist" (or legal model) notion that justices are merely "conduits of the law" who mechanically apply legal codes and precedent (Maveety, 2004, 3). Instead, I am suggesting that judges should be viewed as rational actors who pursue specific objectives. At the same time, however, I am also searching for a more comprehensive explanation than the perspective offered by the "attitudinal model," which claims that justices merely follow their policy preferences (Segal and Spaeth, 2002, 45). Attitudinal theorists, it seems, fail to consider from where (or from whom) said "preferences" are derived; in the process, they often offer an incomplete portrait of judicial decision-making.

To clarify how rational choice theory relates to my study, it may help to consider the proposition that a Congressman, after being elected, would cast certain votes out of allegiance to special interest groups that supported his campaign. Clearly, that would not be considered an untenable proposition. Along the same lines, it is also not unreasonable to hypothesize that justices will act out of loyalty to an appointing president—even though justices are not elected officials. After all, in his article "What Judges Want," Baum declares that a judge's "wants" might include things as basic as "approval from the public and the legal community… simply because he [or she] wants to be liked and respected" (Baum, 1994, 759), adding that judges may have "policy and non-policy goals" (Baum, 1994, 760)—some of which, one might infer, could be linked to a justice's relationship with a specific president.

Generally speaking, the rational choice dimension of judicial analysis can be summed up in Baum's declaration that, "Judges hold a multiplicity of goals that are potentially relevant to their

behavior as judges" (Baum, 1994, 760). Further, as Spriggs et al. note, "Justices are indeed rational actors—systematically making judgments about the most efficacious tactic to secure favored outcomes" (Spriggs et al., 1999, 503). As an addendum, I would suggest that, early in a justice's tenure, beneath the shadow of an appointing president, those "favored outcomes" are likely to resemble the ideological tendencies of the chief executive. To assess this supposition, the following hypothesis will be examined herein:

Hypothesis #8: After his or her appointing president leaves office, a Supreme Court justice—without the penumbra of a figure to whom he or she might choose to hold a sense of allegiance—will exhibit a statistically different pattern of voting behavior than he or she did while the appointing president was in office.

No direction is implied in this hypothesis because acclimation research has not concerned itself with the direction of a change in voting behavior, but rather, is concerned with detecting the presence of any existing differences between "early" and "later" voting patterns. Concepts embedded within this hypothesis will now be defined.

Section 5.3: Research Design

Section 5.3.i: Concept Definition

Allegiance period: As mentioned earlier, the lineage of "acclimation effect" literature shows great variety in the length of any so-called "acclimation period." This study will formalize the length of such a period, and will offer a tangible reason for using that duration of time. The formalized length will be referred to as a concept called "allegiance period." The "allegiance period" will be defined as follows: it starts with the justice's first day serving on the Court, and ends when the next president is sworn into office. If the appointing president is replaced before the middle point of a Court term, that term is considered to be a part of the "remainder period."

Remainder period: The period of time between the end of the "allegiance period" and the completion of a justice's tenure on the Court will be referred to as the "remainder period."

Voting behavior: While prior "freshman effect" research has examined judicial "behavior" through the assessment of opinion writing and bloc formation, this study will asses "behavior" by analyzing changes in liberal and conservative voting scores. Doing so will offer a specific measure that reflects actions that are under the direct control of each justice.

Section 5.3.ii: Data Source

The primary source of data to be used in this study will once again be the Spaeth databases. Variables in the databases which are relevant to this study include the direction of individual votes (e.g., conservative or liberal), terms of the Court sorted by year, and issue categories for all cases that are heard. In light of the data available, in order to be included in this study, a Supreme Court Justice had to begin serving on the Court during or after the 1946 term—to assure comparison of the "allegiance" votes with "remainder" votes. Twenty-six justices meet this criterion. However, because Justices Alito and Roberts have only had full terms under President Bush (at the time of publication), their information will not be considered (because no comparison to a "non-allegiance" period is possible); that leaves an "n" of 24. Although this is a relatively small sample size in light of the fact that 110 justices have served on the Supreme Court, 24 is nearly twice the amount which Hagle used in his 1993 study on "acclimation effects" (Hagle, 1993).

Further, this study will heed the advice of Hagle (1993, 1143-1144) and Brenner and Hagle (1996, 239) by comparing "each justice to himself" or herself. This will be different from techniques utilized by early acclimation research, such as the wok of Handberg, which compared the voting behavior of "new justices" against that of so-called "older justices" in the same Court

term, essentially to see if one category of justice was more moderate than the other *at the same point in time* (Brenner, 1983, 321). A flaw in this procedure is implicit in Kidder's discussion of "letting each subject serve as his or her own comparison" (Kidder, 1981, 29). In short, comparing a justice's early behavior with his or her later behavior—as I intend to do (and as Handberg failed to do)—"effectively makes each justice his or her own control" (Hagle, 1993, 1144), in the sense that a true opportunity for discerning ideological change becomes available. Brenner (1983), Hagle (1993), Wood et al. (1998), and Hurwitz and Stefko (2004) are among those who have utilized this technique. It will be implemented herein to assess changes in voting behavior after the appointing president has left office.

Section 5.3.iii: Operationalizing Concepts

At this point, the concept of "voting behavior" must be specifically operationalized. This will entail calculating a conservative voting score for each Supreme Court justice for each term of his or her tenure. The procedure for generating the "conservative voting score" is to take the total number of votes cast by a specific justice in a given term that are coded as "conservative" in the Spaeth databases and to divide that number by the total number of votes cast by that particular justice in that specific term. So, for instance, if Justice Rehnquist cast 178 conservative votes in 1999 out of his 212 total votes cast, his conservative score for the year 1999 would be .84 or 84%. This process will be repeated for each term that a justice has served. If a justice did not participate in more than 20 total decisions[55] in a given term (e.g., Justice O'Connor's 2006 term), those terms will not be included. Furthermore, while some prior research into judicial behavior has excluded unanimous cases, both unanimous and non-unanimous decisions are included in my analysis. The decision to do so is rooted in Baum's assertion that, "Both unanimous and non-

[55] This twenty decision "cap" refers to a combined total of economic and civil rights/civil liberties cases, for in some terms, twenty economic cases may be the complete total heard by the Court.

unanimous decisions… define the [ideological] positions of the Court and of individual justices" (Baum, 1992, 7).

Section 5.3.iv: Breaking the Analysis into Categories: Accounting for Issue Change

To specifically assess rival sources of such change, it is important to recognize that changes in issues that come before the Supreme Court often represent a source of changes in voting patterns (Arledge and Heck, 1992, 763; Baum, 1994, 5; Brenner, 1983, 327; Hagle, 1993, 1150). Beyond that, one must also understand that "it is quite possible that new justices might exhibit unstable attitudes in some issue areas and not in others" (Hagle, 1993, 1144), perhaps because of prior experience within a given field. As a result, it is worth heeding Hagle's advice to research a "newcomer" effect by investigating the behavior of justices in issue-specific areas. Certain issue areas, after all, may be more pertinent in a given era, and a justice might use those areas as a vehicle for expressing his or her allegiance to the executive branch.[56] Along these lines, the fact that this dissertation has generated data that divides cases into civil rights/civil liberties and economic cases is a valuable asset.

A specific method for interpreting these categories also comes from Hagle, whose acclimation studies broke cases up into four different issue areas. In short, Hagle compared conservative scores in a particular area during the acclimation period with conservative scores in *that same issue area* during the remainder terms. In order to be described as exhibiting an "acclimation effect," a justice, for Hagle, only needed to exhibit a statistically significant difference in one area (Hagle, 1993, 1150). This study, on the other hand, will be broken into two categories: one for civil rights and civil liberties cases, and one for economic cases; the existence of an "allegiance effect" will be assessed independently for each category.

[56] In future research, Gallup polls and State of the Union speeches could be analyzed to discern what those issues might be, and what the president's positions are on said issues.

Section 5.4: Testing the Relationship Between "Allegiance" and "Remainder" Scores

Section 5.4.i: Overview of Testing Methodology

Analysis of conservative voting scores will proceed through four parts. The first will mirror the methodology used in the majority of prior inquiry into a "freshman" effect. It will compare conservative voting scores for an individual justice while the appointing president is still in office (the "allegiance period") with the same justice's conservative voting score in later terms by using a difference-of-means *t*-test.

A second section will offer a similar difference-of-means *t*-test except for the fact that the "remainder" period will be shortened so that the length of the "allegiance period" and the length of the "remainder period" are identical. This might help to eliminate some alternative sources of unexpected changes in voting behavior that may occur later in a justice's tenure—sources of change that may be unrelated to the departure of an appointing president, such as Blackmun's liberal turn after the issuance of *Roe v. Wade* (410 U.S. 113, 1973) (see Abraham, 2008, 242). (This portion of the research will actually be offered in Appendix C).

A third section will then code justices with a dichotomous variable based on whether they show signs of an "allegiance effect" or not. That variable will then serve as the dependent variable for a logistic regression model which searches for common traits among justices who do exhibit signs of an effect. This type of analysis will represent an improvement over previous "freshman effect" literature in that it searches for commonalities that could provide explanations for variation in the voting behavior of certain justices.

Finally, to offer an even more sophisticated technique, a fourth section will be used to generate a GLS, random-effects time series model that analyzes a large panel dataset of year-by-year conservative voting scores. In this model, the conservative voting score will serve as a

dependent variable, and the key independent variable will be "allegiance period," coded as "1" or "0" in the dataset—with a "1" representing a justice term where the appointing president was still in office and a "0" representing a justice term in which the appointing president was not in office. Other control variables will also be employed, and the analysis will be broken into two models: one for civil rights and civil liberties cases, and one for economic cases.

Section 5.4.ii: Mimicking Prior "Freshman Effect" Research: Difference-of-Means Tests

For the first analysis, the scores from the specific terms that fall within the "allegiance period" (that period in which the appointing president is still in office) will be averaged. The resultant figure will be called an "allegiance score." In addition, the scores from subsequent terms will also be averaged together to create a "remainder score." Next, the "allegiance score" and the "remainder score" for each justice will be compared using a difference-of-means *t*-test. Brenner's disclaimer that a probability value of .10 is "significant" when dealing with Supreme Court justices seems to be an appropriate reference point (Brenner, 1983, 322). Therefore, any justice for whom the difference between "allegiance scores" and "remainder scores" is statistically significant at less than a .10 level will be said to exhibit an "allegiance effect."

While this may appear to be "fishing" for an effect by attempting to locate statistical significance in isolated cases (Cook and Campbell, 1981, 42), this technique is compatible with prior research on how an "acclimation effect" is discerned (Brenner, 1983; Hagle, 1993; Brenner and Hagle, 1998; Hurwitz and Stefko, 2004). Ultimately, to refute criticism related to "fishing," I will state that 80% of all justices examined in my study must exhibit signs of an "allegiance effect" for the overall findings to be considered significant. This is the standard that was implicitly set by Hagle in his 1993 study on "acclimation effect," a study in which 9 of 13 justices were said to show signs of an "acclimation effect" (Hagle, 1993, 1147). This analysis

will permit a general assessment of whether an "allegiance effect" seems to be a viable phenomenon.

Of course, before I can reject the null for hypothesis #8, I must also control for plausible alternatives that could explain variation in voting behavior between the "allegiance period" and the "remainder period." Breaking the analysis into social and economic cases will be one important step in this regard, because that will provide a control for changes in the issues that come before the Court. Furthermore, some care must also be taken to account for what Arledge and Heck dub "unexpected ideological shifts" (Arledge and Heck, 1992, 763). While this is very difficult to accomplish, in order to test for ideological shifts that are not compatible with the "allegiance effect," one must operate on the assumption that a president will appoint a justice with like-minded values. In terms of this study, then, change in voting behavior must be assessed in lieu of the political beliefs of the appointing president.

For instance, one can submit that a Democratic president will be likely to appoint a justice that he *believes to be* liberal. Consequently, exhibiting allegiance to an appointing president who is a Democrat would imply voting more liberally while that president is in office. If qualitative assessments do not reveal such a reality, an observed change in voting behavior cannot be attributed to an "allegiance effect," and a justice exhibiting such anomalous variation would have to be excluded from the final "allegiance" tally. This is the reason for including the direction of change, measured as a positive or negative integer, in the difference-of-means table. To clarify, however, this would not necessarily mandate excluding a justice like Earl Warren from consideration for an "allegiance effect." After all, if his voting scores while President Eisenhower was in office were more conservative (or less liberal) than they were after

Eisenhower left office, then an "allegiance effect" would be feasible. To reiterate, in the context of this study, such assessments will be made qualitatively, on a case-by-case basis, after the generation of difference-of-means *t*-tests.

In this sense, close examination of the "allegiance" and "remainder" scores for individual justices that might at first appear to yield statistically significant differences is required in order to rule out spurious findings. Johnson and Reynolds highlight the importance of using such qualitative case study analysis after first obtaining quantitative information for a larger sample (Johnson and Reynolds, 2005, 84). In other words, further examination of the quantitative findings from Tables 5.1 and 5.2 are required to improve the internal validity of this research. That additional scrutiny will help to prevent the declaration of an "allegiance effect" in cases where statistical differences in voting behavior are likely to result from plausible alternative sources. And, again, the fact that I am merely *considering* such rival sources of variation represents an improvement over previous research in the domain of "acclimation" or "freshman effect" literature.

To summarize, as a starting point, conservative scores for each justice during the tenure of their appointing president will be compared to conservative scores in subsequent terms. A difference-of-means *t*-test is then employed to assess the statistical significance of the difference. Qualitative analysis will follow. This technique will be used to assess the null for hypothesis #8, which will read as follows:

Ho8: After his or her appointing president leaves office, a Supreme Court justice—even without the penumbra of a figure to whom he or she might choose to hold a sense of allegiance—will NOT exhibit a statistically different pattern of voting behavior than he or she did while the appointing president was in office.

As Table 5.1 illustrates, of the 24 justices whose voting behavior is examined herein, only six justices exhibit a statistically significant difference-of-means *t*-test in civil rights and civil liberties cases. These six justices include the following: Justice Blackmun—who became more liberal after the Republican President Nixon left office; Justice Fortas—who became more conservative after the Democratic President Johnson left office; Justice Ginsburg—who became more liberal after the Democratic President Clinton left office; Justice Harlan—who became more conservative after the Republican President Eisenhower left office; Justice O'Connor—who became more liberal after the Republican President Reagan left office, and Justice Souter—who became more liberal after the Republican President Bush left office.

Based on these cursory descriptions, it is important to note that two of the results appear to belie any semblance of an "allegiance effect." First, the finding for Justice Ginsburg is unusual in that she became more liberal after her Democratic appointer left office. Second, the outcome for Justice Harlan is also unusual in that he became more conservative after his Republican appointer left office. In keeping with the rationale that was suggested earlier, qualitative analysis reveals that these findings must be described as incompatible with an "allegiance effect," because both justices appear to move further in the ideological direction that their appointing presidents should have expected (based on party affiliation). The only counter argument that could be employed at this juncture would involve positing that Clinton was a moderate liberal and Eisenhower was a moderate Republican, both of which are reasonable contentions. Herein lies a problem with using t-tests: there is no opportunity to control for other potential influences on a dependent variable. Further, it is also apparent that future "allegiance" research may require more precise measures of presidential ideology, such as the use of "ideal points."

Table 5. 1: Difference-of-Means Test for Conservative Voting Scores in Civil Rights and Civil Liberties Cases (Before and After the Term of the Appointing President)

Justice	"Allegiance Period"	"Remainder Period"	Difference	*T*-Test Probability
Blackmun	69.3 (4 terms)	53.8 (20 terms)	-15.5	.01***
Brennan	24.4 (4 terms)	24.6 (30 terms)	-0.2	.958
Breyer	43.6 (6 terms)	41.4 (8 terms)	-2.2	.470
Burger	74.0 (5 terms)	77.1 (12 terms)	+3.1	.301
Clark	62.4 (3 terms)	58.7 (15 terms)	-3.7	.599
Fortas	21.6 (3 terms)	35.6 (1 term)	+14.0	.079*
Ginsburg	44.3 (7 terms)	36.3 (8 terms)	-8.0	.069*
Goldberg	15.0 (1 term)	12.7 (2 terms)	-2.3	.893
Harlan	50.9 (5 terms)	60.6 (11 terms)	+0.7	.05**
Kennedy	78.7 (1 term)	68.1 (20 terms)	-1.6	.251
Marshall	32.1 (1 term)	23.4 (23 terms)	-8.7	.186
Minton	70.3 (3 terms)	67.4 (4 terms)	-2.9	.732
O'Connor	78.0 (7 terms)	65.5 (17 terms)	-12.5	.01***
Powell	70.4 (3 terms)	70.1 (13 terms)	-0.3	.950
Rehnquist	82.9 (3 terms)	82.0 (31 terms)	-0.9	.787
Scalia	80.6 (2 terms)	77.9 (20 terms)	-2.7	.607
Souter	71.0 (2 terms)	41.1 (16 terms)	-29.9	.001***
Stevens	47.7 (1 term)	42.4 (32 terms)	-5.3	.710
Stewart	57.5 (2 terms)	52.4 (21 terms)	-5.1	.525
Thomas	80.0 (1 term)	79.2 (16 terms)	-0.8	.903
Vinson	62.8 (6 terms)	75.7 (1 term)	+12.9	.462
Warren	31.1 (7 terms)	22.9 (9 terms)	-8.2	.279
White	47.6 (1 term)	64.1 (30 terms)	+16.5	.203
Whittaker	50.0 (4 terms)	59.5 (2 terms)	+9.5	.321

Total terms for each category in parentheses
*** $p<0.01$; ** $p<0.05$; * $p<0.1$

When it comes to economic cases, as Table 5.2 illustrates, only five justices exhibit a statistically significant difference-of-means *t*-test. These five are Brennan—who became more liberal after the Republican Eisenhower left office, Clark—who became more liberal after the Democratic President Truman left office, Fortas—who became more liberal after the Democratic President Johnson left office, Marshall, who became more liberal after President Johnson left office, and White—who became more conservative after the Democratic President Kennedy left office. Based on these descriptions, only Justice Brennan and Justice White demonstrate shifts that would be compatible with an "allegiance effect," for after their respective appointing presidents left office, their voting behavior shifted away from what would be expected based on the parties of those presidents. Specifically, Justice Brennan became more liberal after his conservative appointer completed his second term, and Justice White became more conservative after President Kennedy's assassination.

As for the other justices in the sample, their movement was toward a more extreme position in the expected direction (based on the party of the appointing president), which makes it difficult to impute such movement to an "allegiance effect." After all, if a justice becomes more liberal after an appointing Democratic president has left office, the only way an "allegiance effect" could be justified is if that justice was said to be offering "allegiance" by acting more conservatively while the Democratic president was in office—which would be a dubious claim. This is why qualitative analysis of the difference-of-means *t*-tests is necessary. Ultimately, however, what is truly needed (for all acclimation studies) is the implementation of a stronger statistical design. Even so, based on this initial design and its lack of significant findings, there is no option but to fail to reject the null, in both case categories, for hypothesis #8.

Table 5. 2: Difference-of-Means Test for Conservative Voting Scores in Economic Cases (Before and After the Term of the Appointing President)

Justice	"Allegiance Period"	"Remainder Period"	Difference	*T*-Test Probability
Blackmun	49.4 (4 terms)	42.3 (20 terms)	-7.1	.271
Brennan	24.0 (4 terms)	31.4 (30 terms)	+7.4	.099*
Breyer	46.1 (6 terms)	39.9 (8 terms)	-6.2	.470
Burger	56.2 (5 terms)	54.8 (12 terms)	-1.4	.793
Clark	44.5 (3 terms)	28.2 (15 terms)	-16.3	.047**
Fortas	39.2 (3 terms)	25.0 (1 term)	-14.2	.029**
Ginsburg	41.9 (7 terms)	35.6 (8 terms)	-6.3	.230
Goldberg	22.4 (1 term)	35.9 (2 terms)	+13.5	.163
Harlan	51.3 (5 terms)	52.3 (11 terms)	+1.0	.808
Kennedy	50.0 (1 term)	49.2 (20 terms)	-0.8	.954
Marshall	54.5 (1 term)	34.6 (23 terms)	-19.9	.059*
Minton	40.1 (3 terms)	36.1 (4 terms)	-4.0	.643
O'Connor	54.8 (7 terms)	57.0 (17 terms)	+2.2	.644
Powell	57.4 (3 terms)	53.5 (13 terms)	-3.9	.585
Rehnquist	59.7 (3 terms)	54.1 (31 terms)	-5.6	.414
Scalia	45.7 (2 terms)	55.5 (20 terms)	+9.8	.359
Souter	55.3 (2 terms)	39.7 (16 terms)	-14.7	.102
Stevens	32.1 (1 term)	38.1 (32 terms)	+6.0	.564
Stewart	43.7 (2 terms)	49.4 (21 terms)	+5.7	.422
Thomas	59.5 (1 term)	60.6 (16 terms)	+1.1	.918
Vinson	42.0 (6 terms)	49.2 (1 term)	+7.2	.511
Warren	20.0 (7 terms)	23.7 (9 terms)	+3.7	.515
White	21.8 (1 term)	39.9 (30 terms)	+18.1	.10*
Whittaker	55.6 (4 terms)	57.3 (2 terms)	+1.7	.755

Total terms for each category in parentheses
*** $p<0.01$; ** $p<0.05$; * $p<0.1$

Section 5.4.iii: An Alternative Design

Earlier, it was suggested that an alternative methodology would involve the construction of a model in which voting scores from the "allegiance period" are compared against voting scores from a subsequent time period of identical length. For example, if a justice served five years with the appointing president, the voting score for that five-year period would be compared with the following five-year period. This would shorten the span of the "remainder period," and could perhaps minimize the impact that alternative influences (such as the ones that may have altered Justice Blackmun's voting behavior) would have on the statistical analysis. Such a model is presented in Appendix C, but even it must be classified as a rudimentary statistical model—and given the paucity of significant findings in Table 5.1 and Table 5.2, expectations for this alternative design are low.

Section 5.4.iv: Using Logistic Regression to Search For Commonalities Among Justices That Exhibit an "Allegiance Effect"

Although small numbers of justices demonstrated differences between their allegiance and remainder scores in Table 5.1 and Table 5.2, these justices can be used to precipitate an investigation of whether a certain type of justice is more prone to exhibiting an "allegiance effect." In a general sense, this section will be concerned with the external validity of findings from the aforementioned *t*-tests. This mirrors an idea proposed by Scheb and Lyons in "The Myth of Legality and Popular Support for the Supreme Court," where they first determine whether an effect is present and then try to assess if a certain type of individual is more likely to be influenced by it (Scheb and Lyons, 2000, 934). Similarly, Hagle also declares that, when it comes to understanding "initial instability" in voting behavior, "we would like to know whether there are common factors among those justices who do (or those who do not)" exhibit such an effect (Hagle, 1993, 1150).

In order to accomplish this end, measurements will now take the form of dichotomous variables. Specifically, justices will be grouped into two categories: those exhibiting an "allegiance effect" and those not exhibiting an "allegiance effect." Ultimately, locating patterns associated with the presence or absence of an "allegiance effect" could help to explain under what conditions it persists; beyond that, as mentioned above, such patterns could prove to be valuable for predicting how certain categories of justices might behave in the future. Consequently, characteristics that might influence whether particular types of justices are more likely to show evidence of such an "allegiance effect" will be assessed.

To begin with, independent variables will account for four basic characteristics of justices: 1) those appointed by Democrats versus those appointed by Republicans, 2) those who are chief justices, 3) those confirmed under conditions of divided government, and 4) those that had previously held elected political office. An additional variable will also distinguish those with prior judicial experience from those without it, in keeping with Wrightsman's suggestion that if a justice has previous experience, then any "freshman effect" may be "diminished somewhat" (Wrightsman, 2006, 99); for this matter, a continuous variable will capture the total number of years that a justice served as a judge prior to their appointment and confirmation to the Supreme Court. In addition, presidential approval rating at the time of appointment is included—to address whether a "popular" president is more likely to appoint a justice who exhibits an "allegiance effect." Furthermore, a variable that separates "first choice" nominees from others is also included. A reason for this is nestled in the following statement from Justice Blackmun, who was nominated after the rejections of Carswell and Haynsworth: "I never met Mr. Nixon until I was called into the Oval Office. We had never met and he had no reason to know me. I

am not obligated to him in any way. He didn't know me from Adam's off ox" (Abraham, 2008, 242). Finally, age at appointment is included to assess whether younger justices are more prone to displaying an "allegiance effect." The dependent variable for this examination, then, is "allegiance effect: absent or present" (coded "0" or "1"), and a logistic regression equation which incorporates the independent variables discussed above may read as follows:

Y (Allegiance effect—present or absent) = a + x1 (Party of appointing president) + x2 (Chief Justice) + x3 (Prior judicial experience) + x4 (1^{st} choice or 2^{nd} Choice nominee) + x5 (Divided government appointee) + x6 (Years of previous judicial experience prior to ascending to Supreme Court) +x7 (Held elected office prior to joining Court) + x8 (Age at Appointment) + u

Ultimately, this equation could help to clarify why certain justices are more likely to exhibit an allegiance effect—and thereby explain variation in voting behavior over time for said justices. Beyond that, such information could prove useful for predicting how recent appointments will vote in the future—based on how their background characteristics correlate with prior observed regularities in the voting behavior of Supreme Court justices. Unfortunately, as Table 5.3 illustrates, no variables in the logistic regression model are statistically significant. Given the fact that so few justices exhibited any statistically significant variation in voting scores, this is not entirely surprising. Even so, future research into "freshman effects" might wish to consider the use of a similar logistic regression model if statistically significant findings arise for difference-of-means *t*-tests between "early" and "later" voting scores. Another possibility for future research might involve taking the above equation and replacing the dichotomous dependent variable ("allegiance/no allegiance") with a ratio that places the "allegiance period voting score" in the numerator and "allegiance score + remainder score" in the denominator.

Table 5. 3: Logistic Regression Model Designed to Locate Common Traits Among Justices That Exhibit an "Allegiance Effect"

Independent Variables	Dependent Variables	
	Presence of "Allegiance Effect" in Civil Rights and Civil Liberties Cases	Presence of "Allegiance Effect" in Economic Cases
Presidential Approval Rating at Time of Justice Confirmation	0.2044 (0.1414)	0.0154 (0.0851)
"First Choice" Candidate	0.0908 (2.3274)	Dropped
Number of Years of Prior Experience as a Judge Before Joining Supreme Court	0.2531 (0.1768)	0.1388 (0.1722)
Held Elected Political Office Prior to Joining Supreme Court	1.1669 (1.8915)	Dropped
Age at Appointment	0.2563 (0.1967)	-0.2662 (0.2035)
Appointed by a Democrat	-1.9417 (1.9867)	20.1420 (13.7703)
Presence of Divided Government at the Time of a Justice's Confirmation	-2.0675 (2.2102)	17.6003 (13.1879)
Chief Justice	Dropped	Dropped
Constant	-26.6343 (17.7766)	-6.4463 (0.0000)
Observations	24	24

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

Section 5.4.v: Implementing a More Sophisticated Methodology for Use in "Acclimation Research"

At this point, one must address the fact that difference-of-means *t*-tests represent a rudimentary form of statistical analysis. Even so, they have been the cornerstone of "freshman effect" research. The previous section attempted to bolster this methodology by incorporating a logistic regression model as an adjunct to difference-of-means *t*-tests; however, further advances are needed. An excellent example of why this is so comes from the case of Justice Harry Blackmun. Although a *t*-test indicates that his voting behavior yields an "allegiance effect" (and would probably reveal a "freshman effect" to be apparent, as well), one could easily suggest that his voting behavior turned in a liberal direction after his opinion in *Roe v. Wade* (410 U.S. 113, 1973) was heavily criticized by conservatives (Abraham, 2008, 242). As a result, it would be erroneous to attribute a difference between his "early" and "later" voting scores to a sense of "allegiance" to President Nixon. A *t*-test assessing the difference between "early" and "later" voting scores, then, cannot control for the myriad influences that may impact voting behavior.

In order to better explain variation in voting behavior across multiple terms, one must be able to 1) control for other variables that may account for variation in a voting score and 2) account for the effects of time. For these reasons, the ideal statistical tool for this "allegiance" study and, in turn, any future examination of a "freshman effect," should be GLS, random-effects time series regression. Therefore, to reassess hypothesis #8, a panel dataset is created in which each justice's conservative voting score is compiled for individual terms; conservative scores are then used as a dependent variable. "Allegiance periods," meanwhile, are used to form an independent variable, and are denoted with a "1," while "remainder periods" are denoted with a "0." Control variables are included for party of the appointing president (because that could obviously have a

discernable influence on the conservative voting score), and the party of the president for each term assessed in the model—which is necessary to distinguish allegiance to the appointing president from allegiance to the party ideology in general. In addition, a "cross-party" nominee variable is included, along with one that assesses whether a justice previously held elected office as a member of the Democratic Party[57]—both of which could be related to the dependent variable of conservative voting score. Moreover, a control variable is used to address how many years of experience a judge held (at either the state or federal level) prior to ascending to the Supreme Court—in keeping with the empirically-untested assertion that if a justice has previous experience, then any sort of "freshman effect" may be "diminished somewhat" (Wrightsman, 2006, 99). Finally, a control variable is also included to measure a president's approval rating at the time of a justice's confirmation, in case a popular president is more likely to foster an "allegiance effect." The regression equation will read as follows:

Y (Conservative voting score) = a + x1 (Allegiance period) + x2 (Appointed by a Democratic President) + x3 ("Cross-Party" nominee) + x4 (Held elected political office as a Democrat prior to joining Supreme Court) + x5 (Democrats controlled White House in a given year) + x6 (Number of years of previous experience as a judge) + x7 (Presidential approval rating at the time of confirmation) + u

The number of justices involved in testing this equation is 24, while the number of total observations, in regard to Supreme Court terms assessed, is 444. A model for civil rights cases and a model for economic cases are reported in Table 5.4. The null hypothesis remains as follows:

Ho8: After his or her appointing president leaves office, a Supreme Court justice—even without the penumbra of a figure to whom he or she might choose to hold a sense of allegiance—will NOT exhibit a statistically different pattern of voting behavior than he or she did while the appointing president was in office.

[57] These justices include Black (senator), Minton (senator), Warren (governor), and Vinson (congressional representative).

Table 5. 4: Explanation of Changes in Conservative Voting Scores Over Time; Assessing Variation After the Appointing President Leaves Office (GLS, Random-Effects Time Series Model)

Independent Variables	Dependent Variables	
	Conservative Voting Score in Civil Rights and Civil Liberties Cases	Conservative Voting Score in Economic Cases
Appointing President Was Still in Office	0.0368*** (0.0134)	0.0187 (0.0148)
Appointing President Was a Democrat	-0.1793* (0.0897)	-0.1096*** (0.0390)
"Cross-Party" Nominee	-0.1380 (0.1589)	-0.0747 (0.0667)
Nominee Previously Held Elected Political Office as a Democrat	0.0211 (0.1328)	-0.0987* (0.0581)
Democratic President Was in Office During a Given Term (Not Exclusive to Appointing President)	-0.0225** (0.0097)	-0.0029 (0.0108)
Years of Judicial Experience (State or Federal) Before Ascending to Supreme Court	-0.0020 (0.0097)	-0.0010 (0.0041)
Presidential Approval Rating at Time of Confirmation Vote	-0.0023 (0.0046)	-0.0012 (0.0019)
Constant	0.7530*** (0.2976)	0.5675*** (0.1249)
Wald Chi-Squared	17.69***	13.06*
R-Squared	0.18	0.39
Observations (Court terms)	444	444
Number of justices	24	24

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

Although there was a dearth of statistically significant findings from the difference-of-means *t*-tests, in the civil rights and civil liberties portion of Model 5.4, "allegiance" is in fact statistically significant at the .006 level. Specifically, there is a 3.7 point difference, on average, in a justice's voting behavior when the appointing president is in office as opposed to when the appointing president has left office. As a result, we must reject the null for hypothesis #8—as it applies to civil rights and civil liberties cases. The inclusion of the control variables, which are not possible to assess with a simple difference-of-means *t*-test, and the inclusion of a time series aspect to the analysis, may be responsible for the isolation of statistically significant results in Table 5.4.

Beyond this primary finding, Table 5.4 also reveals, as one would expect, that those justices appointed by Democratic presidents have a conservative score that is, on average, 17.93 points lower than their Republican-appointee counterparts, a finding that is significant at the .062 level. Furthermore, it is interesting to note that a variable which accounts for the party of every appointing president that sits during a justice's tenure indicates that, for all justices, when a Democrat is in the White House, conservative scores decrease by 2.25 points, on average, in civil rights and civil liberties cases—a finding which is significant at the .022 level. (This finding is compatible with the results found in Table 4.6, which indicates a link between voting behavior and White House party control when it comes to civil rights/civil liberties cases).

In the economics portion of Table 5.4, however, the "allegiance" variable is not significant, occurring at the .21 probability level. Even so, as expected, those justices appointed by Democratic presidents have conservative scores that are lower than those of Republican appointees. Specifically, on average, the conservative scores of Democratic appointees is 10.96

points lower in economic cases, a value that is significant at the .008 level. The only other significant variable for economic cases suggests that those justices who had previously held elected political office as a Democrat had conservative scores that were, on average, 9.87 points lower than other justices, a finding that is significant at the .089 level. Perhaps, then, having held elected office as a Democrat could be proxy for liberal voting behavior on the Supreme Court—at least in economic cases.

In terms of hypothesis #8, then, an "allegiance effect" does seem to exist for civil rights and civil liberties cases, but not for economic cases. This might be attributed to the salience of civil rights and civil liberties cases, or to the fact that the preferences of a president may be easier to discern on such issues, or to the role that the executive branch plays in enforcing such decisions. Nevertheless, this study cannot, based on one regression model, declare that an "allegiance effect" has widespread manifestations. One can simply state that, based on the results of Table 5.4, there appears to be a difference between the voting behavior of Supreme Court justices in civil rights and civil liberties cases when the appointing president is in office as opposed to when the appointing president has left office.

Section 5.5: Implications and Suggestions for Future Research

In his 1971 book *The Supreme Court and the Presidency*, Robert Scigliano noted that the Supreme Court and the president "have had a special relationship to each other that neither has had to Congress" (Silverstein and Ginsberg, 1987, 375, quoting Scigliano, 1971, 197). Scigliano goes on to add that, "There is an affinity in the basic powers given to the Supreme Court and the Presidency…. The Constitutional framers strengthened the judicial and executive branches relative to Congress in order to offset the power of Congress" (Scigliano, 1971, 197). This

statement seems to indicate that there might be reasons for a justice to exhibit loyalty to an appointing president. Of course, a number of justices have not followed the paths that executives envisioned for them. Ultimately, this makes "the question of how a newly appointed justice is likely to vote [one] of interest not only to the president, but to all who recognize the Supreme Court's policy making function" (Heck and Hall, 1981, 852).

Within this chapter, that "question" has been addressed by assessing whether Supreme Court justices change their voting behavior after the appointing president leaves office. At first, this idea is examined through the use of difference-of-means *t*-tests, which has been the standard method employed by most "freshman effect" scholars. Herein, these tests reveal that less than 20% of justices in this sample showed any significant variation in their voting behavior after the appointing president left office. In some regard, then, this finding seems to reinforce the notion of a truly independent judiciary—one unaffected by influences from the other branches. However, when a more sophisticated statistical tool (a time series regression model) is adopted, statistically significant findings indicate that Supreme Court justices do in fact vary their voting behavior in civil rights and civil liberties cases after the appointing president leaves office. This finding suggests that there may be a specific time period, and a specific type of case issue, that is correlated with a lesser degree of independence on the part of Supreme Court justices.

In addition, this type of information could provide scholars with a useful starting point from which to offer an explanation for the behavior of certain "anomalous" justices (e.g., Earl Warren), whose voting patterns over time belie expectations of the appointing president. In some sense, it follows, by adjusting the "cut-off" point for the "allegiance" variable, one might be able to see exactly when Earl Warren began to deviate from the conservative pattern that

Republican Dwight Eisenhower foresaw when he appointed Warren. Future research may wish to create time series regression models for individual justices to generate such analysis.

Therefore, even if this study (or future scholarship) fails to present multiple examples of justices who individually exhibit an "allegiance effect," it is important to heed the words of Brenner and Hagle, who note that simply because "all justices do not suffer from an acclimation effect does not diminish the importance of this topic as an area of investigation, because we are interested in variables that influence judicial behavior, even if those variables do not influence *all* of the justices on the Court" (Brenner and Hagle, 1996, 254) (italics added). Brenner and Hagle expound upon this idea by suggesting that, "If present, [acclimation] effects represent a major extralegal factor affecting the short-term behavior of the justices and the overall policymaking of the Court" (Hagle, 1993, 1143). The same value could be attributed to my findings regarding an "allegiance effect." After all, these findings might prove useful for assessing what Epstein and Knight would call the "evolution of ideological values and preferences" over the course of a justice's tenure (Epstein and Knight, 2000, 653). When analyzing variation over time, however, no matter how sophisticated the statistical tools that one employs are, it is always possible that justices simply, at some point, undergo changes in their fundamental ideologies—transformations that cannot be captured by a statistical model and transformations which contradict presidential expectations. This idea highlights the difficulty inherent to any attempt at explaining and predicting judicial behavior.

Of course, as Scigliano says, "The Supreme Court was not… intended to be a satellite of the presidency. Its members were to be eminent and independent men, not hirelings" (Scigliano, 1091, 199). And, he notes, "Perhaps every president has been displeased with some action taken

by the Supreme Court" (Scigliano, 1971, 23)—as evident in examples ranging from Jefferson's feelings toward John Marshall, to Andrew Jackson's statements about the Court's decision regarding Cherokee land, to FDR's "Court-packing" plan, to Truman and Eisenhower's blunt declarations that Tom Clark and Earl Warren were, respectively, their "biggest mistakes" (Abraham, 2008, 193). However, the value of the time series regression model offered in this chapter is that it presents empirical findings with stronger external validity than any delineation of case studies related to "anomalies" or any discussion of specific instances where the Court and the president clashed. In the end, the regression model included herein does indicate some evidence that the voting behavior of a Supreme Court justice is different while the appointing president is in office. Even so, as mentioned above, there could be a number of reasons why a justice's "later" voting behavior may be different from his or her "early" behavior. For instance, as Epstein and Segal note, "[With] the passage of time, justices will be hearing issues to which their appointing president [and Senate] probably never gave much thought." As an example, they cite Anthony Kennedy and observe that President Reagan probably paid more attention to Kennedy's views toward criminal activity than his stance on gay rights (Epstein and Segal, 2005, 136), even though the latter became a prominent issue in future Court terms.

Along these lines, the possible inclusion of more characteristics to include as control variables in a time series model might be warranted in future research. These might involve examining this issue from the perspective of the president—e.g., "Are certain types of presidents more likely to elicit an 'allegiance effect' from an appointed justice?" This could be accomplished by including dummy variables that identify each justice as the product of his or her appointing president (e.g., "1" if appointed by Kennedy, "0" if not appointed by Kennedy… and so on for a

sample of presidents). Furthermore, the inclusion of variables that account for the most salient issues areas of a particular time period may also be useful.

In this regard, when it comes to suggesting future research regarding executive-judicial relations, it is important to point out that there may be difficulties inherent in the time period covered by the Spaeth databases utilized herein (1946-2007). For example, Silverstein and Ginsberg note that, "Historically, the Court was more closely aligned with the executive branch, and a Court not closely in step with the president's political agenda was vulnerable to political attack" (Silverstein and Ginsberg, 1987, 375). By "historically," they seem to be referring to the years before 1966; this is evident in the fact that they cite the advent of "new tools"—such as the 1966 amendment to Rule 23 of the *Federal Rules of Civil Procedure*, which made it easier for citizens to band together and propagate class-action suits—as having changed the relationship of the Court to the public (Silverstein and Ginsberg, 1987, 379). In the process, one could extrapolate, the relationship between the executive branch and the Supreme Court may also have been fundamentally altered.

"Liberalizing rules of justiciability coupled with the development of new tools of judicial power," Silverstein and Ginsberg state, permitted the Court to "forge political links with important constituency groups," a process which was augmented by the advent of modern media tools that facilitate communication among large groups of people—particularly geographically diffuse minority groups (many of which, they say, have become the "allies of the Court") (Silverstein and Ginsberg, 1987, 381). As a result, by the start of the Burger Court, some scholars claimed to be witnessing a judiciary "freed from executive control… as [if it were becoming] a coequal branch" (Silverstein and Ginsberg, 1987, 381-382), in the sense that the

public could be counted upon, through electoral checks on officials, to maintain the legitimacy of the Court in the eyes of the other branches. In the process, the Court would, it seems, become less dependent upon—or perhaps less loyal to—the executive branch.

All in all, then, there may be certain periods in our history where the "allegiance effect" is more likely to be apparent. Therefore, future work might wish to apply this research design to different eras in the history of the Supreme Court. That would allow this research to include a larger sample of justices, and further, would extend the external validity of this study as it relates to justices serving prior to 1946. Others have done cursory research into the pre-1946 Supreme Court era. For instance, Wood et al. (1988) found no evidence of an "acclimation effect" from 1888-1940 when it came to voting bloc formation, and Bowen and Scheb reported similar results for bloc formation from 1921-1953 (Bowen and Scheb, 1993, 1). These studies, however, did not specifically address changes in voting scores, nor did they attempt to discern the presence of an "allegiance effect," a concept that may be embedded elsewhere in our nation's history of judicial decision-making.

Ultimately, Nadel calls the role of a Supreme Court justice "a part meant to be played" (James, 1968, 161). "Throughout history," add Heck and Hall, "presidents… have sought to name individuals who would support the president's policy goals once on the Court" (Heck and Hall, 1981, 852)—or, who would "play the part" in a certain way. To the extent that it assesses how Supreme Court justices "play their part," this chapter might prove to be useful for explaining the behavior of long-standing (or long-departed) Supreme Court justices—and could also help to predict the short-term and long-term behavior of more recently appointed justices. Those objectives, it follows, serve as the fundamental reasons for blending together three

different theories of judicial scholarship ("acclimation" theory, New Institutionalism, and rational choice theory) to generate the ideological underpinnings of my search for an "allegiance effect," a search that should remain a component of future scholarship within the sub-discipline of public law. Lastly, although this chapter has focused on matters related to executive-judicial relationships, information germane to the relationship of the Supreme Court and Congress (as analyzed in chapter 4) could be combined with data contained in this chapter to yield a comprehensive perspective on how changes in the other institutions of government can be used to explain variation in the voting behavior of Supreme Court justices over time. The final chapter will attempt to offer just such a comprehensive model.

Chapter 6: Concluding Remarks / A Comprehensive Portrait of Judicial Behavior

Section 6.1: Refocusing the Objectives of this Dissertation

In light of the fact that explanation and prediction are two fundamental components of science, it is worthwhile to note that Segal and Spaeth, in their landmark work *Supreme Court and the Attitudinal Model Revisited*, highlight a critical difference between physical science and social science. They do so when they observe that while natural phenomena are suitable to being distilled into concise formulas like $E=mc^2$, "the causes of human behavior are typically much more complex and intermeshed" (Segal and Spaeth, 2002, 44). A particularly vexing type of behavior for political scientists involves the explanation and prediction of judicial behavior. While public law, the sub-field of political science that is concerned with explaining and predicting judicial behavior, has been a central part of political science since the field's inception, Clayton is quick to state that, "Political scientists… [have] always understood that they were not interested in law as such, but only in understanding how law was a part of politics" (Clayton and Gilman, 1999, 20). In a more specific sense, then, this dissertation has been a sojourn that seeks to define the place that Supreme Court justices hold within the infrastructure of the American political system.

As the literature review explains (Chapter 2), four major theories have emerged to offer explanations of judicial behavior: the legal "model," the attitudinal "model," the rational choice/ strategic-behavior "model," and the New Institutionalist "model." Although proponents of each approach often bandy about the word "model" when describing their ideas, "theory" is probably a more appropriate moniker. This is evident from a cursory examination of Hammond et al.'s statement that, "A theory is a broad claim about how the world [or in this case, the Supreme

Court] works and why it works the way it does" (Hammond et al., 2005, 53). Hammond further specifies that a theory should offer "some general kinds of variables [that] lead, in predictable sorts of ways, to particular kinds of… outcomes" (Hammond et al., 2005, 53).

By using ideas suggested under the rubric of the major theories of Supreme Court decision-making, this dissertation has in fact isolated several variables that can be examined to assess their relationship to the voting behavior of Supreme Court justices. These variables have facilitated the generation of testable propositions and, subsequently, the creation of statistical models that offer tangible evidence about factors that influence voting behavior—models which incorporate aspects of the theories implied in the attitudinal, rational choice and New Institutionalist perspectives.

Succinctly, the primary objective of this dissertation has been to examine the influence that the legislative and executive branches have in shaping the voting records of individual Supreme Court justices and, by extension, the policy outputs of the Court as a whole. Each of the substantive chapters has been designed to offer a falsifiable hypothesis that can be used to explain and predict the behavior of individual justices. Overall, this examination has been bifurcated into two broad categories: 1) Pre-confirmation assessments were designed to examine the influence that the president and the Senate have in terms of shaping the ideological direction of the Court—specifically through the appointment and confirmation of justices whose characteristics make them likely to exhibit certain voting patterns. 2) Beyond that, post-confirmation assessments were designed to examine whether pressure from the legislative and executive branches holds any sway in deftly altering behavior while a justice is serving on the Court.

Section 6.2: Summary of Findings Regarding the Confirmation Process

Section 6.2.i: The Role of the President

In terms of the confirmation process, the most prominent indicator of an individual justice's voting pattern is the party of the appointing president. Evidence in support of this assertion can be found in a rudimentary analysis of the 31 justices examined herein. Specifically, a simple difference-of-means *t*-test reveals that, in civil rights and civil liberties cases, Republican appointees have an average conservative score of 60.88% for the duration of their respective tenure, while Democratic appointees have an average conservative voting score of 43.21%. The difference between these two values yields a *t*-test of 2.58, which is statistically significant at the .01 level. In economic cases, the Republican appointees have an average conservative score of 48.67%, and Democratic appointees have an average conservative score of 38.81%. While both of these numbers indicate that the sample of justices has been more liberal in economic matters than in social matters, the Republican appointees remain "less liberal," with the difference between the two yielding a *t*-test of 2.59 which is significant at the .01 level. (Seventeen Republican appointees and fourteen Democratic appointees comprised this sample).

More sophisticated statistical tools that are utilized during the course of this dissertation buttress the findings offered in these *t*-tests. Specifically, the panel data used to generate GLS, random-effects time series models in Chapters 4 and 5 includes a variable for the party of the appointing president. As for their results, Table 4.6—which controls for factors that might have an impact on a conservative voting score, including whether a justice was a "cross-party" nominee, whether a justice held elected political office as a Democrat prior to confirmation to the Supreme Court, total terms served, party of the president by term, and a measure of the Democratic Party's strength in Congress—demonstrates that those justices appointed by

Democratic presidents have conservative voting scores that are 15.75 points lower than those appointed by Republican presidents in civil rights and civil liberties cases, and 8.19 points lower in economic cases; both values are statistically significant at less than the .01 level. Subsequently, in Table 5.4—which controls for whether a justice was a "cross-party" nominee, whether a justice had previously held elected office as a Democrat, and whether a Democratic president held the White House in specific terms of a justice's tenure—Democratic appointments possess conservative voting scores that are, on average, 17.93 points lower than their Republican counterparts in civil rights and civil liberties cases, and 10.96 points lower in economic cases; both figures are statistically significant at less than the .10 level.

As a starting point, then, and as one would expect, the party of the appointing president can help students of political science explain and predict the voting patterns of Supreme Court justices. Beyond that, this information reveals that individual citizens have a distinct avenue for shaping the direction of Supreme Court outputs: their vote choices for the presidency. Of course, as the results in Chapter 3 indicate, and as the Constitution's edict for "advice and consent" mandates, the Senate plays an essential role in this process, too. The extent of this role was examined herein by assessing the differences between justices appointed under conditions of unified government and those appointed under conditions of divided government.

Section 6.2.ii: Assessments Regarding Divided Government and the Supreme Court

Specifically, in this dissertation, tests measured whether divided appointees were more moderate in their voting behavior than their unified counterparts.[58] In all three regression models offered in Chapter 3 (see Tables 3.1, 3.2 and 3.3), statistically significant findings illustrate that

[58] "Divided government" is defined as those situations where the White House and the Senate are controlled by different parties at the time of a confirmation vote. "Unified government" refers to situations where the two are controlled by the same party at the time of a confirmation vote.

divided appointees are in fact more moderate in their voting behavior. The reasons for this include the fact that a hostile Senate is less likely to confirm an ideologically extreme nominee, and the fact that a president may actually be less inclined to nominate such a candidate in the face of staunch opposition.

In terms of concrete results, Tables 3.1, 3.2, and 3.3 utilize "extreme" scores (the absolute value of the difference between a justice's career conservative voting score and .5) as a dependent variable. When the presence or absence of divided government is included as an independent variable, Table 3.1 provides a statistically significant coefficient of -0.0805 for this variable as applied to civil rights and civil liberties cases (significant at the .082 level). Since the "extreme" scores are proportions derived from conservative voting scores, this value indicates that, on average, in civil rights cases, justices appointed under conditions of divided government will exhibit an "extreme" vote score that is 8.05 points lower than that of justices appointed under conditions of unified government, while controlling for the president's approval rating, the justice's tenure length, whether the justice was a "first choice," whether the justice was a chief justice, and whether the justice had previously held elected office.

This finding is also replicated in Table 3.1 as it concerns economic cases, with the model yielding a co-efficient of -0.0585, which is statistically significant at the .061 level. Even in Model 3.2—which adds three new independent variables: favorable Senate votes received by a nominee, number of years served as a federal judge, and whether a candidate was a "cross-party" nominee—"divided government" remains a statistically significant variable in civil rights/civil liberties cases (coefficient of -.1386, significant at a probability level of .025) and in economic cases (coefficient of -.0738, significant at a probability level of .057).

Table 3.2 also offers a statistically significant finding regarding "favorable Senate votes received by a nominee." In civil rights and civil liberties cases, it yields a regression coefficient of -0.0028, which is statistically significant at the .088 level. This suggests that, on average, for every one percentage point increase in favorable Senate votes received, a justice's "extreme" score decreases by 0.28 points, when controlling for divided government, "first choice" status, presidential approval rating, whether a justice was a chief justice, whether a justice had previously held political office, the number of years that a justice served as a federal judge before ascending to the Supreme Court, and whether a justice was a "cross-party" nominee or not.

In economic cases, the model yields a coefficient of -0.0017 for this variable, which is statistically significant at the .08 level. Specifically, this suggests that, on average, for every one percentage point increase in favorable Senate votes received, a justice's "extreme" score will decrease by .17 points, while controlling for the other variables listed above. As a result, for both models, one can suggest that the number of favorable Senate votes received by a Supreme Court nominee is a significant predictor of that justice's "extreme" voting score once he or she ascends to the bench. In general terms, the more votes that a candidate receives, the more moderate his or her voting behavior will be once he or she begins serving on the Court. This seems logical because a justice confirmed by a wide margin is usually one who generates little controversy, and thus, would be more likely to hold moderate political views.

Section 6.2.iii: A Comprehensive Model of the Confirmation Process (see Table 3.3)

Table 3.3 seems to include enough statistically significant variables to be considered a comprehensive model for explaining how the confirmation process is related to subsequent voting behavior in civil rights and civil liberties cases. In fact, seven of the variables in this

model are statistically significant—five of which are significant at or below the .01 probability level. However, these findings are not replicated in a model that deals with economic cases. In fact, if Table 3.3 were generated with economic cases, only tenure length would return a statistically significant finding, perhaps an indication that civil rights and civil liberties cases are more salient for those actors involved in the confirmation process. As a result, discussion of Table 3.3 focuses exclusively on civil rights and civil liberties cases.

To begin, the key independent variable, which measures "the number of seats controlled by the majority party in the Senate," offers a coefficient of .0028, which is statistically significant at the .01 level. This indicates that, for each percentage point increase in seats controlled by the majority party, the "extreme" score of an appointed justice rises by .28 points, while controlling for the other variables in the model, including the presence or absence of divided government. This finding is probably a result of the fact that a robust majority can invoke cloture, and thereby eliminate even the threat that a filibuster might jeopardize the appointment of an ideologically extreme candidate.

In Table 3.3, "divided government" also remains statistically significant when it comes to explaining "extreme" voting scores in civil rights and civil liberties cases, yielding a coefficient of -22.18, which is significant at the .007 level. This suggests that "divided" appointees have "extreme" scores that are 22.18 points lower than their "unified" counterparts when the other variables in Model 3.3 are held constant. In addition, the percentage of favorable votes received by the Senate is also significant, this time at the .005 level, with a coefficient of -0.004. This indicates that, essentially, for each additional vote that a nominee receives from the Senate, their "extreme" score will decrease by .4 points. Therefore, the presence of divided government and

the number of supporting votes received in Senate confirmation hearings are both variables that can be considered excellent predictors of how "extreme" a Supreme Court justice's voting scores will be.

The real surprise in Model 3.3, however, is that "presidential approval rating" is significant for civil rights and civil liberties cases, producing a coefficient of .0084, which is significant at the .006 level. This indicates that for each additional point increase in the appointing president's approval rating at the time of confirmation, a justice's "extreme" score in civil rights and civil liberties cases will increase by .84 points, while controlling for the other variables in the model. *This appears to be the first statistical evidence in judicial politics literature that offers an indication of a significant relationship between presidential approval ratings and the subsequent voting behavior of Supreme Court justices*.

Finally, Model 3.3 also suggests that justices who replace other justices of similar ideology are more "extreme," on average, than those who replace justices of a divergent ideology—as defined through a comparison of the outgoing justice's conservative voting score and the party of the appointing president for the incoming justice. On average, the former are 7.43 points more "extreme," a finding which is significant at the .074 level. This is an expected finding, as it seems likely that confirmation hearings would be more contentious when a change in justices could alter the overall ideological balance of the Court.

Two other variables are significant in Model 3.3—including tenure, which will be discussed later in this chapter, and "cross-party" nominees, who are revealed to hold "extreme scores" that are 19.08 points higher than their counterparts. It is difficult to find a theoretical justification for the latter, as one would hypothesize that a "cross-party" nominee might be more moderate, in

that a president should be likely to appoint a "cross-party" candidate who is a moderate member of the opposing party. Of course, the inclusion of William Brennan and Lewis Powell in this category, who had "extreme" scores of 25.5 and 20.5 respectively, would be sufficient to account for such a finding, especially since Harold Burton is the only other "cross-party" nominee in the sample ("extreme" score of 13.2); in the end, this result may simply be a function of having a small sample of "cross-party" nominees included in the overall examination.

Ultimately, in regard to the confirmation process, Models 3.1, 3.2, and 3.3, as well as the time series regression models offered in Chapters 4 and 5, all reveal that the party of the appointing president, the presence or absence of divided government, and the number of favorable votes received from the Senate serve as excellent resources for predicting how "extreme" the voting behavior of Supreme Court justices will be in both civil rights/civil liberties cases and economic cases. However, as Baum notes, "Full explanation goes well beyond successful prediction… it reaches fundamental sources of behavior" (Baum, 1997, 3). This might indicate a shortcoming of the confirmation models offered herein, in the sense that the models predict how justices will vote, but offer little in the way of explaining why they do so. Even so, the general research question posited at the outset of this dissertation attempts to address the interplay between the voting behavior of Supreme Court justices and the actions of other political actors. That question reads as follows (see page 1):

> *Do democratic processes—those that are driven by elected officials who are, in theory, responsive to a diversity of interests in society—have an impact on the policy outputs of the Supreme Court?*

Within the context of the issues raised by this query, the information offered in Chapter 3 can help to explain how the policy outputs of the Supreme Court might change in relation to

democratic processes—provided that one accepts the assumption that the behavior of individual justices aggregate to the policy outputs of the Court. After all, the models in Chapter 3 explain how the vote choices of individual citizens, in regard to presidential and senatorial selections, can have a significant impact on the ideological direction, and the ideological extremity, of the Court. For example, split-ticket voting may have a moderating effect on the Court; conversely, vote choices that precipitate unified government could have the opposite effect. As a result, the evidence offered herein suggests that democratic processes do in fact have a statistically significant impact in shaping what types of justices are appointed to the Supreme Court and, in turn, what types of voting outputs will arise from the Court. In that regard, the research offered in Chapter 3 does help to explain how the president and the Senate can shape the outputs of the Supreme Court, in keeping with the Founders "advice and consent" protocol; furthermore, it also helps to explain how individual voters can have a discernable impact on this process.

Section 6.3: Summary of Findings Regarding Post-Confirmation Behavior

During a 2003 speech at the *Arab Judicial Forum* in Bahrain, Justice O'Connor stated that:

> Judicial independence allows judges to make decisions that may be contrary to the interests of the other branches of government. Presidents, ministers, and legislators at times rush to find convenient solutions to the experiences of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty and must act to ensure that those values are not subverted (Toobin, 2007, 250).

While this statement highlights the importance of having an independent judiciary, the actual extent to which the Supreme Court of the United States is in fact "independent" has long been a subject for debate, and therefore, is statistically assessed herein. For the purposes of this inquiry, a basic dictionary definition is used as a commencement point. Specifically, *Merriam-Webster's*

dictionary suggests that "independence" is defined as "not looking to others for one's opinions or for guidance in conduct" (*Merriam-Webster's Online Dictionary*).[59] Drawing on this definition, a research design has been constructed to examine whether the voting patterns of individual Supreme Court justices—who must rely on compliance from the legislative and executive branches to enforce judicial decrees, and who must be cognizant of legislative overrides and constitutional amendments that can obviate judicial holdings—are influenced by the political composition of those branches *at the time* when judicial decisions are made. In short, Chapters 4 and 5 assess whether justices are "independent" or whether they are "looking to others for guidance in conduct."

The first research design employed herein to test this notion of "independence" addresses whether the voting behavior of Supreme Court justices changes during different regimes. Specifically, an OLS regression model is crafted to assess the relationship between the percentage of a justice's total terms served facing "unified opposition" from the other branches and how "extreme" that justice's voting behavior is. ("Unified opposition" is defined as a Senate, House, and White House controlled by the opposite party of the justice's appointing president—except in the case of Earl Warren, whose "opposition" is defined as a Republican Congress and a Republican White House).

The underlying rationale for this analysis is that a justice who is not fearful of legislative override, and who is unconcerned with noncompliance from the other branches, will expand the scope of his or her ideological proclivities. In keeping with this supposition, as Model 4.3 illustrates, when the number of terms facing unified opposition increases, a justice's "extreme"

[59] As noted earlier, the use of such an apparently simplistic source is not inappropriate in this setting, for Justice O'Connor is among those to reference a dictionary within the text of a Supreme Court opinion (see: *Smith v. United States* (508 U.S. 223, 1993)).

score seems to get lower. Specifically, on average, for each additional term served facing unified opposition from the House, Senate and White House, a justice's "extreme" scores will drop by .33 points in civil rights/civil liberties cases (significant at the .02 level) and by .21 points in economic cases (significant at the .033 level).

A second, similar model (delineated in Table 4.4) assesses the relationship between "extreme" voting scores and the percentage of a justice's total terms that involve "unified support" from the other branches. As one would expect in light of the findings in Table 4.3, when the number of terms served with unified support increases, the "extreme" score will get higher. Specifically, on average, for each additional term served with unified support from the House, Senate and White House, a justice's "extreme" score will increase by .20 points in civil rights/civil liberties cases (significant at the .027 level) and .19 points in economic cases (significant at the .001 level). Ultimately, the findings from Tables 4.3 and 4.4 appear to indicate that justices are constrained in their behavior when facing unified opposition and are more liberated in pursuing their ideological preferences when bolstered by unified support; such findings would seem to be contrary to the aforementioned definition of independence, which lauds the merits of "not looking to others."

To extend the scope of this inquiry—and to isolate the effects of Congress and the White House as distinct institutions—a panel dataset is generated to match the year-by-year conservative voting scores for individual justices (the dependent variable) with the year-by-year composition of the White House and Congress (independent variables). Control of the White House is measured with a dummy variable, coded "1" for Democratic occupancy and "0" for Republican. After some methodological adjustments which are addressed in Chapter 4, control

of Congress is measured with a unique indicator. This is crafted by taking the margin between Democrats and Republicans in the House and dividing that number by 435, and by taking the same margin in the Senate and dividing it by 100.[60] This process enables the differences in the two houses to be standardized with equal weight. Those two values are then averaged to form a comprehensive measure of Democratic strength in Congress. A GLS, random-effects time series model is then generated using this information as one of the independent variables.

For the civil rights and civil liberties cases, the time series regression model produced with these data indicates that when the White House is controlled by a Democratic president, on average, the conservative voting scores of individual Supreme Court justices are 2.11 points lower than when Republicans control the White House, a finding which is significant at the .027 level (see Table 4.6). The most logical explanation for such a result is rooted in the fact that many social issues rely on the executive branch for implementation—particularly through executive orders, budget proposals and directives for administrative agency action. In addition, since many social issues are based on constitutional grounds, Congress may have more difficulty overturning them than it would in overturning economic decisions. As a result, it may behoove justices to consider the views of the executive branch even more than the ideological leanings of Congress when it comes to civil rights and civil liberties cases. Perhaps this is why the independent variable which captures the total margin by which Democrats differ from Republicans (and independents) in the House and Senate produces a statistically insignificant coefficient for these types of cases. The ultimate conclusion that springs from these data is that

[60] 100 is replaced with 96 for those terms prior to the addition of Hawaii and Alaska to the United States. "Independents" are coded based on the party with which they caucused—if doubt existed as to this matter, they were coded with the minority party.

Supreme Court justices seem to consider the party controlling the White House, but not the party controlling Congress, when they formulate vote choices in civil rights and civil liberties cases.

However, when it comes to economic cases, the time series regression model suggests that the party controlling the White House does not offer a statistically significant explanation for variation in the conservative voting scores of Supreme Court justices. Therefore, the aforementioned effect that was found in civil rights and civil liberties cases seems to be limited to those issues. Interestingly, though, the measure for the relative strength of Democrats in the House and Senate does present a highly significant finding in economic cases (even though it yields no such significance in the civil rights and civil liberties cases). For this "congressional" independent variable, the time series model indicates that, on average, for each additional point increase in Democratic strength in the two houses of Congress (per the index created herein), conservative scores will decrease by .22 points. This value is highly significant, yielding a z-score that is probable at less than the .0000 level. That finding is compatible with the notion of a legislative constraint on judicial action, because such a constraint would manifest itself in the fact that individual justices would vote more liberally in the face of a liberal Congress—perhaps to mitigate the possibility of legislative override.

Consequently, it seems as though justices are likely to vary their voting behavior in response to the composition of *Congress* in economic cases, but not in civil rights and civil liberties cases; on the other hand, it appears as if justices are likely to vary their voting behavior in response to the composition of the *White House* in civil rights cases, but not in economic cases. While this may seem to be a paradoxical finding, as mentioned earlier, it is consistent with the role that Justice Harlan Fiske Stone propounded for the Court in the famous "Footnote Four" to his 1938

opinion in *United States v. Carolene Products Co.* (304 U.S. 144, 1938). In that footnote, Stone hypothesized that justices should defer to the legislative branch on matters of economics, which were, in his opinion, beyond the scope of the justices' technical understanding; conversely, he felt that the Court should serve as a protector of individual rights in social matters. This long-ago expressed purview seems to have found statistical support in the GLS time series model generated herein.

Ultimately, it follows, this model does not necessarily sully the notion of an "independent" Supreme Court, but merely indicates the circumstances—particularly the types of cases and the specific branches of government—for which an individual justice may alter his or her voting behavior. Future research may wish to examine whether economic cases take on added significance for justices in light of the economic crisis of 2009, in the sense that justices might become less likely to defer to the economic assessments of Congress as those determinations become more politicized, and could instead become more likely to exhibit a voting pattern in economic cases that is statistically distinct, ideologically, from that of Congress.

The fifth chapter of this dissertation extends the breadth of this inquiry by examining one additional circumstance—a specific time period that could impact this notion of judicial independence. More precisely, that chapter is concerned with the possibility that variation in voting behavior could occur after the appointing president leaves offices. The same panel dataset that is used in Chapter 4 is also used for this analysis, with the key independent variable being a dummy variable, coded "1" for the Court terms in which the appointing president was in office, and "0" for those terms in which a different president was in power (a variable known as an "allegiance" variable). A control variable for yearly party control of the White House is also

included to distinguish change associated with the appointing president's departure from change associated with shifts in party control of the White House itself.

For the civil rights and civil liberties cases, the "allegiance" dummy variable is, in fact, statistically significant at the .006 level, as seen in Table 5.4. In short, there seems to be a 3.7 point difference, on average, in a justice's conservative voting score when the appointing president is in office, as opposed to when the appointing president has left office. (The ideological direction of this shift is toward a more conservative direction while the appointing president is serving, even when controlling for the party of the appointer; however, the direction of this shift is not as critical as the sheer presence of variation). As a result, this model indicates yet another circumstance in which the independence of individual Supreme Court justices may be constrained: the time period of the appointing president's tenure (in terms of voting behavior in civil rights and civil liberties cases). Interestingly, a variable in Table 5.4 which accounts for the party of every appointing president that sits during a justice's tenure indicates that, for all justices, when a Democrat is in the White House, conservative scores in civil rights and civil liberties cases decrease, on average, by 2.25 points—a result which is significant at the .021 level, and is consistent with the findings in Chapter 4's Model 4.6. For the economic cases addressed in Model 5.4, the "allegiance" variable is not statistically significant, for it occurs at the .21 level—which is also consistent with Chapter 4's finding that justices are more attuned the political composition of the White House in social matters than in economic matters.

In sum, then, an "allegiance effect" does seem to exist for civil rights and civil liberties cases, but not for economic cases. This might be attributed to the salience of civil rights and civil liberties cases, or to the fact that the preferences of a president may be easier to discern in regard

to such matters, or even to the role that the executive branch plays in enforcing such decisions. In terms of extrapolating claims from this information, one can simply state that there appears to be a difference between the voting behavior of Supreme Court justices in civil rights and civil liberties cases when the appointing president is in office as opposed to when the appointing president has left office—while controlling for the party of the appointing president, presidential approval rating at the time of confirmation, whether a justice was a "cross-party" nominee, whether the justice previously held elected office as a Democrat, the number of years of judicial experience that a justice had prior to ascending to the Court, and year-by-year changes in the composition of the White House. The inclusion of these control variables and the time series component help to explain why statistically significant findings are evident in Table 5.4—in spite of the dearth of significant findings in the difference-of-means *t*-test that compared individual justice scores "during the term of the appointing president" against individual justice scores "during remainder terms" (Table 5.1 and Table 5.2). This latter technique, with its reliance on the use of *t*-tests, has been the standard procedure used in so-called "freshman effect" literature; at the very least, this dissertation has offered a methodological advance in this area of judicial scholarship by demonstrating the value of a GLS, random-effects time series model.

Finally, it is important to highlight the fact that the independent variable "total terms served" has been statistically significant in nearly every model offered herein. This variable's inclusion in multiple OLS regression models has indicated that justices tend to become more "extreme" with each term that they serve on the Court (see Tables 3.1, 3.2, 3.3, 4.3, and 4.4). Ultimately, though, it is the GLS, random-effects time series model from Chapter 4 (Model 4.6) which offers a more specific analysis of changes in voting behavior as they relate to tenure length. In this

model, the independent variable "term" is statistically significant for both civil rights/civil liberties cases *and* economic cases, with the coefficients suggesting that justices become .28 points more liberal in civil rights/civil liberties cases with each term that they serve (significant at less than the .000 level) and .18 points more liberal in economic cases (significant at the .006 level). These are highly significant outcomes, and are contrary to conventional wisdom that justices, or people in the population at large, would become more conservative over time. No prolonged explanation will be offered herein for why justices would become more liberal over time, other than to surmise that perhaps society in general has grown more liberal between the years that define the parameters of this inquiry (1946-2007). However, the fact that Justices Black, Brennan, and Douglas are among the longest serving justices in this sample may have skewed the results in a liberal direction, and their behavior probably impacted findings from linear regression models which indicate that justices become more "extreme" with each term that they serve (see Models 3.1, 3.2., 3.3, 4.3 and 4.4). On the other hand, it seems apparent that even Republican appointees like Rehnquist, Stevens, and O'Connor became less conservative with time, and that may have further contributed to findings which suggest that justices become more liberal with each term that they serve. Overall, the impact of tenure on voting behavior is not the primary focus of this dissertation, but models presented earlier have consistently reported data to indicate that justices become more liberal the longer that they sit on the Court; consequently, it will be left to future research to examine this matter in greater detail and to assess whether these findings hold in different time periods and with different datasets.

Section 6.4: Reconciling Results With the Notion of an Independent Judiciary

Christopher Zorn observes that, "An enduring, fundamental question in American politics is how to reconcile the existence of an independent judiciary with a democratically based system of government" (Zorn, 2006, 43; see also Dahl, 1957; Bickel, 1962; Casper, 1976). Chapter 3 of this dissertation offers convincing evidence that democratic processes—such as the party controlling the White House at the time of a Court appointment, as well as the presence or absence of divided government—can have a significant impact on the nature of judicial outputs. This is compatible with Geyh's statement that, "Its focus on the future decision-making of judicial nominees enables the Senate to counterbalance the judiciary's long-term independence gains in other areas of Court governance with a measure of prospective accountability in the appointment process" (Geyh, 2006, 264).

Furthermore, in terms of making sense of the post-confirmation data outlined in Chapters 4 and 5, it appears as though justices seem to be constrained by the party controlling the White House in civil rights and civil liberties cases, and are constrained by the party controlling Congress when it comes to economic cases. Finally, a temporal influence seems to appear in the fact that justices are likely to exhibit a statistically different voting pattern in civil rights and civil liberties cases while the appointing president is in office. In short, after a justice takes his or her place on the bench, there appear to be certain types of cases (civil rights/civil liberties or economic), certain types of political conditions (in terms of Congressional or White House control), and certain types of time periods (such as the period of the appointing president's tenure, or even terms later in a justice's tenure) which have an impact on the voting behavior of individual justices. Geyh may offer an adequate summary of these findings when he observes

that there exists a "conceptual tension between judicial independence and judicial accountability," a notion that he depicts with the moniker "dynamic equilibrium" (Geyh, 2006, 253)—as if to suggest that there are moments when justices must consider the potential reactions of "the sword" and "the purse," and other instances where they are less trammeled when it comes to pursuing their preferred policy preferences. In reality, then, there may be no such thing as unfettered judicial manumission; yet at the same time, one should not suggest that individual justices persist in a perpetual state of thrall whereby they capitulate to actors in the other branches of government. Geyh recognizes this in his assertion that, "Absolute independence and absolute accountability are at opposite ends of a continuum in which the middle ground is occupied by varying combinations of each. The trick is to determine which combination is optimal" (Geyh, 2006, 8).

This dissertation has reserved judgment on what constitutes an optimal state of equilibrium for this relationship, but has offered specific evidence of conditions under which that equilibrium is altered. In many ways, then, this dissertation does not entirely vitiate the principles of the attitudinal model, even though it supports Maltzman et al.'s portrait of justices as "constrained seekers of legal policy" (Maltzman et al., 1999, 60). More specifically, evidence suggests that justices do pursue principles consistent with their respective ideologies, as illustrated by the highly significant relationship between the party of the appointing president and a justice's conservative voting score. Even so, as Robert Eugene Cushman declared in 1925, "The Supreme Court does not do its work in a vacuum" (Clayton and Gillman, 1999, 20). As a result, strategic choices related to potential reactions from the other branches—or a rational reaction to perceived institutional constraints—may in fact be an integral component of any explanation of judicial

decision-making. Perhaps this is why Rogers Smith declared, some twenty years ago, that New Institutionalism is the "future of public law" (Smith, 1988, 89). This dissertation has attempted to illustrate that that future has in fact arrived, specifically by offering innovative statistical approaches to assessing the relationship between the Supreme Court and the major institutions of American government. In the process, this dissertation may offer evidence to validate a famous edict related to our nation's founding principles, a proclamation offered by Richard Neustadt, who observed that, "The Constitutional Convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers" (Neustadt, 1990, 29). This statement lucidly summarizes the findings derived herein.

Section 6.5: Limitations of this Work / Suggestions For Future Research

The chief limitation of this work lies in the small sample size. While 31 justices constitute a marked increase over many studies of Supreme Court decision-making, it still represents a small number of observations relative to other types of political science research. Extending the Spaeth database to the era before 1946 would enable a larger sample of justices to be examined, as will the passage of time and the appointment of new justices. Unfortunately, though, this limitation is simply an inevitable consequence of research involving the Supreme Court.

Another primary limitation of this dissertation, as Hammond et al. might suggest, is that "decision-making by the Supreme Court involves several stages… from the grant of certiorari to conference votes to majority opinion writing to the formation of concurring and dissenting opinions" (Hammond et al., 2005, 2). Nevertheless, this dissertation has focused exclusively on the final vote—largely because it is the most readily quantified manifestation of judicial

behavior. Even so, this dissertation would fail to account for strategic behavior related to institutional considerations in a situation where a strategic justice might be worried about the enforcement of a judicial decree to the point where he or she may vote to deny certiorari in the first place (Vanberg, 2006, 89). Furthermore, this dissertation does not offer categories for "constitutional" and "statutory" decisions during the institutional phase of its analysis, largely for the sake of maintaining some semblance of parsimony—since categories for economic and civil rights/civil liberties cases are already presented (and since civil rights/civil liberties cases are more likely to have constitutional import). In addition, Andrew Martin's recent work has suggested that even constitutional decisions mandate that justices consider potential responses by the other branches of government (Martin, 2006, 3); in keeping with this supposition, the research design presented herein is crafted to offer a comprehensive, yet succinct account of a broad cross-section of cases. Future research may wish to utilize "statutory" and "constitutional" categories as added components of similar institutional analysis.

To further address the aforementioned flaws, I would also suggest that future research involve the creation of a multivariate regression model which uses the vote choice in a specific type of case (e.g., abortion) as the dependent variable. Independent variables could also be included to capture factors like the public's opinion toward the issue in question, the presence or absence of "passing" during conference votes, the nature of the opinion writing assignment, the information contained in amicus curiae briefs, and the partisan composition of the other branches of government. This would allow for examination of some broader New Institutionalist factors like public opinion and interest group influence. Clearly, the use of a case study would limit external validity, but it might still offer relevant insights into the judicial decision-making process—and

the model could be replicated for a variety of different cases or for a "line" of cases in the same issue domain. The inclusion of such "lines" might also afford an assessment of the impact that the judicial branch itself has on the executive and legislative branches (a converse matter to that addressed herein).

Section 6.6: Toward a Comprehensive Model of Supreme Court Decision-Making

In 1963, Theodore Becker lamented that "judicial behavioralism has not begun to consider the Court as a court." Few scholars, he added, had "viewed the judicial decision-making process in its uniqueness. Most [had] treated it no differently from any other decision-making process, e.g. from the street corner gang to the Congress" (Becker, 1963, 266). Today, we are certainly closer to having a more comprehensive portrait of judicial decision-making than we were at the time of Becker's declaration. The biggest reason for this is that more of the variables associated with the process of Supreme Court decision-making have been identified and empirically studied—a fact illuminated by even a cursory analysis of the four theories of judicial decision-making that are outlined in the literature review (Chapter 2). Of course, judicial scholars have had to confront the daunting challenging of finding a way to link the unique characteristics of these four theories into one comprehensive paradigm. Some of the difficulties associated with this task include the fact that the theories include different units of analysis (some examine the votes of individual justices, some examine the decisions of the Court as a whole, some examine decisions in particular cases, some assess decisions over the course of a Court term, and some focus on a justice's entire career). In addition, some of the rational choice concepts require subjective assessments of written opinions and conference papers, and thus may be more suitable for case study analysis and more likely to suggest the use of dichotomous variables (e.g., "passed at

conference vote or not," and "assigned opinion or not"). On the other hand, attitudinal theories typically use cross-sectional, continuous data. Therefore, combining all of the models discussed earlier would represent an arduous task, and this matter is further complicated by the fact that pre-confirmation and post-confirmation considerations must be taken into account.

Of course, as Segal and Spaeth note, "A model is a *simplified* representation of reality" designed to "explain and predict behavior" (Segal and Spaeth, 2002, 44, 46). And, by adding the disclaimer that when a model "explains everything" it actually "explains nothing" (Segal and Spaeth, 2002, 86), they seem to indicate that scholars may not want to covet the pursuit of one model that incorporates all of the information discussed herein. What we are looking for, though, is a model that can "focus… on a select and often related set of crucial factors" that might help to explain the behavior in question (Segal and Spaeth, 2002, 45); and, in turn, "simple models that account for a large share of the behavior in question" (Baum, 1997, 6). In other words, a "model [does] not need to accord fully with reality in order to advance our understanding [of a subject]" (Baum, 2004b, 19). As a result, one could feel comfortable with the fact that any of the statistical models presented earlier could stand alone as a "comprehensive" explanation of judicial behavior, in the sense that "a model is a simplified representation of reality; it does not constitute reality itself" (Segal and Spaeth, 2002, 45).

The "aspects of reality" selected for inclusion in the models offered herein were derived from a thorough examination of literature that discusses the major theories of judicial decision-making. In the end, a model is designed to take "the variables highlighted by [a] theory and [to subsequently] construct a series of specific 'if… then' statements [to] show that if particular initial conditions hold… then particular decisions or outcomes are the logical consequences"

(Hammond et al., 2005, 53). Accordingly, the models presented in this dissertation have been carefully constructed to demonstrate how certain factors—whether they be pre-confirmation variables (such as the presence of "divided government") or whether they be post-confirmation variables (such as changes in the Democratic margin in Congress)—can impact the voting outputs of individual Supreme Court justices if specific "conditions hold," or are controlled for. With this in mind, it may be possible to combine certain aspects of the information presented earlier into a comprehensive research design from which one could derive explanations and predictions about the behavior of Supreme Court justices who are confirmed under different conditions, even as the composition of the "other" branches changes over the time that these justices are actually serving on the Court.

Although Maltzman et al. note that, "Life is too complex, varied, and even random to be perfectly captured by any single model" (Maltzman et al., 1999, 61), if one were to attempt to construct a compendious model that "captures" an expansive portrait of Supreme Court decision-making, I would suggest using the individual voting records of a sample of Supreme Court justices (coded in the form of year-by-year conservative "scores") as a dependent variable. This would be easy to quantify for a wide cross-section of justices. Beyond that, analyzing vote scores can have valuable explanatory and predictive power because those scores represent the most visible outcome of the judicial decision-making process, and they offer an indication of the ideological direction in which justices are shaping policy.

Further, I would suggest studying variation in this dependent variable through the use of time series regression. This would enable a scholar to track how the year-by-year conservative scores change as the composition of the Court changes, as the party controlling Congress changes, as

the party controlling the White House changes—and even as a justice becomes "acclimated" to his or her role on the Court. One might also wish to include some ex-ante measures, such as the party of the appointing president (which could serve as a proxy for attitudes) and the party of the appointing Senate (perhaps with a numerical measure of seats controlled by the majority party—to account for intra-Senate dissention and the possibility of a filibuster). One could also control for other variables that might influence liberal and conservative voting behavior, such as whether a candidate was a "cross-party" nominee or whether he or she had previously held elected office for a particular political party. This would allow a scholar to incorporate a variety of attitudinal, rational choice and New Institutionalist variables into one regression equation.

In doing so, one would generate a model that quantitatively addresses the factors embedded in a famous statement that may summarize how the state of research in judicial behavior has evolved since Becker's 1963 lamentation about "street corner gangs" (Becker, 1963, 264). I will funnel this dissertation toward its conclusion with that declaration, which comes from James Gibson (parenthetical notes added): "Judge's decisions are a function of what they prefer to do [i.e., attitudes], tempered by what they think they ought to do [i.e., perceptions of how other actors, like an appointing president, expect them to act], but constrained by what they perceive is feasible to do [i.e., how Congress, or the Executive Branch, will react to their decisions—and perhaps whether bargaining with other justices will be needed to achieve a majority]" (Gibson, 1983, 32). Table 6.1 offers an example of how a GLS, random-effects time series model would appear if it empirically addressed these concerns in a comprehensive pre-confirmation/ post-confirmation model of judicial decision-making. In terms of its specific findings, the critical

Table 6. 1: A Comprehensive Pre-Confirmation / Post-Confirmation Model (GLS, Random-Effects Time Series Model)

Independent Variables	Dependent Variables	
	Conservative Voting Score in Civil Rights and Civil Liberties Cases	Conservative Voting Score in Economic Cases
Nominated by a Democratic President	-0.1788* (0.1109)	-0.0888** (0.0454)
"Cross-party" Nominee	-0.1109 (0.1690)	-0.0815 (0.0683)
Presidential Approval Rating at Time of Nominee's Confirmation Vote	-0.0016 (0.0046)	-0.0008 (0.0019)
Margin Between Democrats and Republicans in Senate at Time of Confirmation Vote	-0.0045 (0.0043)	-0.0021 (0.0018)
Nominee is Replacing a Justice of "Similar Ideology"	0.1058 (0.1067)	0.0084 (0.0433)
Nominee Has Previously Held Elected Office as a Member of the Democratic Party	-0.0853 (0.1552)	-0.1286** (0.0646)
Previous Years of Judicial Experience Prior to Ascending to Supreme Court	-0.0031 (0.0100)	-0.0027 (0.0041)
Terms Served While the Appointing President is Still in Office	0.0064 (0.0157)	-0.0014 (0.0174)
Term Served Alongside Unified Democratic Government (White House, Senate, and House of Representatives)	-0.0223** (0.0118)	-0.0394*** (0.0131)
Total Terms Served (Measured Year-by-Year)	-0.0029*** (0.0008)	-0.0013 (0.0009)
Constant	0.7559*** (0.3078)	0.5982*** (0.1249)
Observations (Court terms)	444	444
Number of justices	24	24
R-Squared	0.27	0.47
Wald chi-squared	29.57***	25.16***

Standard errors in parentheses
*** p<0.01; ** p<0.05; * p<0.1

pre-confirmation variable which holds statistical significance in Table 6.1 is the party of the appointing president, for Democratic appointees hold conservative scores that are, on average, 17.9 points lower in civil rights/civil liberties cases, and 8.8 points lower in economic cases than those of Republican appointees. The primary post-confirmation variable which is statistically significant is the presence of "unified Democratic government," which results in conservative scores that are, on average, 2.23 points lower in civil rights/civil liberties cases, and 3.94 points lower in economic cases. Each additional term served also seems to be correlated with more liberal voting behavior. Results, then, are consistent with those provided earlier—in terms of which variables appear to be germane for explaining and predicting the voting behavior of Supreme Court justices.

Therefore, it seems as though there is no shortage of independent variables available to the student of judicial decision-making, because an array of factors that are incorporated into models presented in previous chapters have been left out of this final model. Of course, the final model is just one representation of the combinations that can be used to integrate both pre-confirmation and post-confirmation variables into a time series regression analysis. It is this type of assimilation that will provide scholars with the intellectual infrastructure for addressing two-hundred year-old debates concerning the appropriate level of independence that a court of last resort should possess in a constitutional republic. As the number of justices available to be scrutinized in such analysis increases—whether through the coding of cases prior to the 1946 threshold employed herein, or with the passage of time and the appointment of new justices—the task will fall upon future research to build upon this information in pursuit of the following objectives: to further our understanding of the factors that might explain and predict judicial

behavior, to reconcile the inherent tension between Madisonian ideals like "checks and balances" and Hamiltonian considerations for an "independent judiciary," and to advance the political scientist's understanding of how the three major institutions in the American political system interact with one another to generate policy outputs that impact the lives of individual citizens.

Overall, this dissertation has offered a sedulous appraisal of the major theories of judicial decision-making, and has used those theories to derive empirically-testable propositions regarding the impact that Congress and the president can have on individual Supreme Court justices. In doing so, this dissertation has extended the scope of research offered by previous assessments of judicial behavior—from those of Corwin to those of Schubert, to those of Epstein and Knight to those of Segal and Spaeth. Ultimately, it is the author's hope that the research design presented herein will precipitate further inquiry that leads political scientists toward a more comprehensive understanding of institutional influences on the voting behavior of Supreme Court justices—and will simultaneously provide individual citizens with a lucid depiction of how their vote choices can indirectly impact the policy outputs of our nation's highest Court.

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See also: *Gallup Presidential Approval Polls*; http://www.ropercenter.uconn.edu

See also: Martin Quinn Scores; http://www.mqsquores.wustl.edu

See also: *Merriam-Webster Online Dictionary*; http://www.merriam-webster.com

See also: Spaeth Supreme Court *ALLCOURT* Database, Ulmer Update; *Vinson-Warren* Database; and Supreme Court Database Codebook of Terms; http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm

See also: U.S. Supreme Court Justice Database. Compiled by Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson, and Jason Roberts. http://www.cas.sc.edu/poli/juri/databases.htm

APPENDICES

APPENDIX A: Additional Information and Tables Related to Chapter 3

Table A 1: Comparison of "Extreme" Scores Between Unified and Divided Appointments

Justice	"Extreme Score" in Civil Rights and Civil Liberties Cases	"Extreme Score" in Economic Cases
Unified Appointments		
Alito	18.5	1.6
Roberts	17.1	10.0
Breyer	8.6	6.1
Ginsburg	10.1	11.5
Scalia	29.5	3.4
O'Connor	21.5	6.2
Minton	19.4	11.9
Goldberg	37.9	20.1
Fortas	24.6	12.0
Clark	9.2	20.4
Warren	24.7	28.1
White	15.2	11.4
Marshall	26.2	15.1
Vinson	11.9	7.3
Jackson	10.7	9.5
Frankfurter	4.5	6.7
Douglas	36.3	23.2
Black	26.1	29.3
Burton	13.2	4.4
N=19	Mean=19.2 Std. Dev=9.5	Mean=12.5 Std. Dev=8.1
Divided Appointments		
Thomas	30.0	10.9
Souter	4.1	8.0
Kennedy	20.9	0.5
Stevens	3.0	10.6
Rehnquist	33.5	3.7
Powell	20.5	3.3
Blackmun	8.1	5.8
Burger	26.5	4.5
Whittaker	5.0	7.1
Brennan	25.5	19.6
Stewart	3.2	2.4
Harlan	7.7	1.7
N=12	Mean=15.7 Std. Dev.=11.6	Mean=6.5 Std. Dev=5.3
Difference-of-Means *T*-test Coefficient (Probability Level)	.937 (.357)	2.27 (.03)**

Table A. 2: Traits of Justices

Justice	Appointing President	Years Served	Conserv. Score in Civil Rights / Civil Liberties Cases	Conserv. Score in Economic Cases	Senate Confirmation Vote	Unified or Divided Govt.
Alito	Bush II	2006-present	0.685	0.516	58-42	Unified
Black	FDR	1937-1971	0.239	0.207	63-16	Unified
Blackmun	Nixon	1970-1994	0.581	0.442	94-0	Divided
Brennan	Eisenhower	1956-1990	0.245	0.304	Voice	Divided
Breyer	Clinton	1994-present	0.414	0.439	87-9	Unified
Burger	Nixon	1969-1986	0.765	0.545	74-3	Divided
Burton	Truman	1945-1958	0.632	0.456	Voice	Unified
Clark	Truman	1949-1967	0.592	0.296	73-8	Unified
Douglas	FDR	1939-1975	0.134	0.268	62-4	Unified
Fortas	Johnson	1965-1969	0.254	0.38	Voice	Unified
Frankfurter	FDR	1939-1962	0.455	0.567	Voice	Unified
Ginsburg	Clinton	1993-present	0.399	0.385	96-3	Unified
Goldberg	Kennedy	1962-1965	0.121	0.299	Voice	Unified
Harlan	Eisenhower	1955-1971	0.577	0.517	71-11	Divided
Jackson	FDR	1941-1954	0.607	0.595	Voice	Unified
Kennedy	Reagan	1988-present	0.709	0.495	97-0	Divided
Marshall	Johnson	1967-1991	0.238	0.349	69-11	Unified
Minton	Truman	1949-1956	0.694	0.381	48-16	Unified
O'Connor	Reagan	1981-2006	0.715	0.562	99-0	Unified
Powell	Nixon	1971-1987	0.705	0.533	89-1	Divided
Rehnquist	Nixon	1971-2005	0.835	0.537	68-26	Divided
Roberts	Bush II	2005-present	0.671	0.6	78-22	Unified
Scalia	Reagan	1986-present	0.795	0.534	98-0	Unified
Souter	Bush I	1990-present	0.459	0.42	90-9	Divided
Stevens	Ford	1975-present	0.470	0.394	98-0	Divided
Stewart	Eisenhower	1958-1981	0.532	0.476	70-17	Divided
Thomas	Bush I	1991-present	0.8	0.609	52-48	Divided
Vinson	Truman	1946-1953	0.619	0.427	Voice	Unified
Warren	Eisenhower	1953-1969	0.253	0.219	Voice	Unified
White	Kennedy	1962-1993	0.652	0.386	Voice	Unified
Whittaker	Eisenhower	1957-1962	0.550	0.571	Voice	Divided

Table A. 3: "Justices and Their Replacements"

Justice	Party of Appointing President	Replaced	Party of Replacement's Appointer	Same Ideology	"Special Case"
Alito	Republican	O'Connor	Republican	Yes	
Black	Democrat	VanDeVanter	Republican	No	
Blackmun	Republican	Fortas	Democrat	No	
Brennan	Republican	Minton	Democrat	Yes	*
Breyer	Democrat	Blackmun	Republican	No	
Burger	Republican	Warren	Republican	No	*
Burton	Democrat	Roberts	Republican	Yes	*
Clark	Democrat	Murphy	Democrat	Yes	
Douglas	Democrat	Brandeis	Democrat	Yes	
Frankfurter	Democrat	Cardozo	Republican	Yes	*
Fortas	Democrat	Goldberg	Democrat	Yes	
Ginsburg	Democrat	White	Democrat	Yes	
Goldberg	Democrat	Frankfurter	Democrat	Yes	
Harlan	Republican	Jackson	Democrat	No	
Jackson	Democrat	Hughes	Republican	Yes	*
Kennedy	Republican	Powell	Republican	Yes	
Marshall	Democrat	Clark	Democrat	Yes	
Minton	Democrat	Rutledge	Democrat	Yes	
O'Connor	Republican	Stewart	Republican	Yes	
Powell	Republican	Black	Democrat	No	
Rehnquist	Republican	Harlan	Republican	Yes	
Roberts	Republican	Rehnquist	Republican	Yes	
Scalia	Republican	Burger	Republican	Yes	
Souter	Republican	Brennan	Republican	No	*
Stevens	Republican	Douglas	Democrat	No	
Stewart	Republican	Burton	Democrat	Yes	*
Thomas	Republican	Marshall	Democrat	No	
Vinson	Democrat	Stone	Democrat	Yes	
Warren	Republican	Vinson	Democrat	Yes	*
White	Democrat	Whittaker	Republican	No	
Whittaker	Republican	Reed	Democrat	No	

APPENDIX B: Additional Information and Tables Related to Chapter 4

This section offers a multivariate model in which a justice's year-by-year conservative score acts a dependent variable and is regressed, linearly, alongside an independent variable which represents the margin between the number of seats controlled by the Democrats and Republicans in the House and another independent variable which represents the same margin in the Senate. Models are run individually for each justice, and are broken into economics and civil rights/civil liberties cases; results are provided in Table B.1. Those justices for whom statistically significant variation is revealed in a specific category of cases are highlighted in bold.

A second set of models is offered in which the dependent variable remains year-by-year conservative scores but the independent variables are changed to dummy variables which capture control of the White House, House of Representatives, and Senate ("1"=Democrats; "0"=Republicans). These results are offered in Table B.2 (which deals with civil rights/civil liberties cases) and Table B.3 (which deals with economics cases).

Few significant findings are apparent in these models, a fact which suggests that individual Supreme Court justices are actors who behave independently of the other branches of government. However, the lack of a time series component in these models is a significant limitation, which is why just such a time series model is offered in the body of this dissertation (see Table 4.5 and Table 4.6).

Table B. 1: How Quantitative Changes in Senate and House Composition Are Correlated With Changes in Voting Behavior of Individual Supreme Court Justices (OLS Regression)

Justice	Conservative Voting Score in Civil Rights and Civil Liberties Cases		Conservative Voting Score in Economic Cases	
	Each Additional Democratic Senate Seat…	Each Additional Democratic House Seat…	Each Additional Democratic Senate Seat…	Each Additional Democratic House Seat…
Alito	**+.15* (.07)**	**+.15* (.07)**	+.26 (.865)	+.05 (.865)
Black	-.14 (.258)	-.01 (.697)	-.14 (.258)	-.01 (.697)
Blackmun	-.01 (.981)	-.01 (.943)	+.16 (.497)	+.09 (.221)
Brennan	-.004 (.957)	-.02 (.380)	**-.22 (.041)****	-.03 (.392)
Breyer	-.42 (.309)	-.05 (.605)	-.11 (.894)	-.10 (.610)
Burger	**-.25 (.013)****	-.05 (.139)	+.03 (.886)	-.01 (.881)
Burton	.17 (.628)	+.002 (.959)	-.04 (.571)	-.30 (.580)
Clark	-.26 (.121)	**-.10 (.046)****	**-.49 (.011)****	**-.12 (.046)****
Douglas	**-.49 (.002)*****	**-.10 (.011)****	-.06 (.649)	-.02 (.630)
Frankfurter	**+.64 (.01)*****	**+.10 (.09)***	-.23 (.315)	-.04 (.493)
Fortas	**-.89 (.02)****	-.11 (.296)	+.67 (.246)	+.03 (.807)
Ginsburg	+.34 (.318)	+.10 (.160)	-.25 (.527)	-.07 (.428)
Goldberg	+.27 (.441)	+.14 (.441)	+.4.93 (.504)	+.14 (.504)
Harlan	**+.47 (.009)*****	+.03 (.520)	-.05 (.742)	-.02 (.689)
Jackson	+.04 (.896)	+.02 (.538)	+.12 (.816)	+.002 (.973)
Kennedy	+.27 (.215)	+.06 (.155)	-.08 (.794)	-.01 (.831)
Marshall	+.06 (.564)	**-.08 (.041)****	+.09 (.620)	+.01 (.856)
Minton	-.50 (.6)	-.03 (.841)	-.94 (.314)	-.14 (.274)
O'Connor	+.14 (.590)	**+.11 (.011)****	-.08 (.745)	-.01 (.735)
Powell	**-.21 (.05)****	-.06 (.137)	+.03 (.911)	+.03 (.706)
Rehnquist	+.11 (.184)	**+.05 (.006)*****	-.25 (.140)	**-.06 (.081)***
Roberts	+.22 (.395)	+.04 (.395)	+.02 (.993)	+.004 (.993)
Scalia	+.23 (.149)	+.02 (.447)	-.23 (.502)	-.06 (.325)
Souter	**+.84 (.019)****	**+.21 (.001)*****	-.12 (.749)	-.02 (.726)
Stevens	+.**43 (.04)****	**+.16 (.000)*****	**-.27 (.088)***	+.001 (.961)
Stewart	**-.52 (.012)****	-.01 (.907)	-.20 (.309)	-.04 (.451)
Thomas	+.03 (.865)	-.02 (.634)	-.34 (.224)	-.05 (.371)
Vinson	+.67 (.440)	+.09 (.380)	+.28 (.609)	+.05 (.462)
Warren	**-.46 (.069)***	**-.14 (.071)***	-.06 (.754)	-.05 (.348)
White	**-.64 (.000)*****	-.66 (.330)	**-.5 (.000)*****	**-.10 (.088)***
Whittaker	+.51 (.106)	+.14 (.216)	+.10 (.605)	+.03 (.662)

Probability levels in parentheses; *** p<0.01; ** p<0.05; * p<0.1

Table B. 2: Institutional Influences on Conservative Voting Scores in Civil Rights and Civil Liberties Cases for Supreme Court Justices (OLS Regression)

Justice	Democrats Control House	Democrats Control Senate	Democrats Control White House	Any Significance?
Alito	**+10.17 (.07)***	**+10.17 (.07)***	Not applicable	Yes
Black	+2.69 (.762)	+2.69 (.762)	+2.54 (.698)	No
Blackmun	No variation	-3.52 (.530)	-5.23 (.349)	No
Brennan	No variation	-0.33 (.908)	-1.88 (.410)	No
Breyer	-4.06 (.495)	+1.90 (.682)	+2.17 (.607)	No
Burger	No variation	**-6.93 (.0009)*****	+0.81 (.807)	Yes
Burton	-3.20 (.427)	-3.20 (.427)	+0.03 (.994)	No
Clark	-9.47 (.249)	-9.47 (.249)	-4.61 (.379)	No
Douglas	**-15.11 (.019)****	**-15.11 (.019)****	+5.35 (.246)	Yes
Frankfurter	+6.79 (.411)	+6.79 (.411)	+6.31 (.377)	No
Fortas	No variation	No variation	**-13.96 (.079)***	Yes
Ginsburg	+3.67 (.527)	+2.59 (.600)	**+7.99 (.069)***	Yes
Goldberg	No variation	No variation	No variation	N/A
Harlan	No variation	No variation	**+11.91 (.006)*****	Yes
Jackson	+2.73 (.530)	+2.73 (.530)	-4.61 (.349)	No
Kennedy	+2.73 (.497)	+1.64 (.681)	+4.85 (.906)	No
Marshall	No variation	+1.76 (.571)	-2.84 (.388)	No
Minton	+4.41 (.636)	+4.41 (.636)	+2.92 (.732)	No
O'Connor	**+11.59 (.0009)*****	+3.15 (.514)	-2.32 (.646)	Yes
Powell	No variation	-3.71 (.211)	+0.25 (.942)	No
Rehnquist	**+6.90 (.0001)*****	+2.96 (.145)	-2.23 (.293)	Yes
Roberts	+2.85 (.395)	+2.85 (.395)	No variation	No
Scalia	+0.42 (.889)	+2.15 (.466)	-2.06 (.501)	No
Souter	**+13.75 (.042)****	+8.79 (.187)	+3.77 (.580)	Yes
Stevens	**+22.47 (.000)*****	+6.79 (.154)	-7.04 (.155)	Yes
Stewart	No variation	**-18.63 (.08)***	-4.82 (.278)	Yes
Thomas	-2.11 (.525)	-2.12 (.490)	+0.47 (.876)	No
Vinson	+6.60 (.600)	+6.60 (.600)	-12.91 (.462)	No
Warren	**-45.60 (.000)*****	**-45.60 (.000)*****	-9.86 (.181)	Yes
White	No variation	-8.78 (.128)	**-15.83 (.000)*****	Yes
Whittaker	No variation	No variation	+9.51 (.321)	No

Probability levels in parentheses; *** p<0.01; ** p<0.05; * p<0.1

Table B. 3: Institutional Influences on Conservative Voting Scores in Economic Cases for Supreme Court Justices (OLS Regression)

Justice	Democrats Control House	Democrats Control Senate	Democrats Control White House	Any Significance?
Alito	+3.31 (.865)	+3.31 (.865)	Not applicable	No
Black	+0.49 (.923)	+0.49 (.923)	+5.02 (.169)	No
Blackmun	No variation	+0.77 (.891)	-0.63 (.912)	No
Brennan	No variation	**-7.42 (.052)***	-2.60 (.404)	Yes
Breyer	-7.96 (.506)	-7.29 (.430)	+6.10 (.471)	No
Burger	No variation	+1.03 (.836)	-1.84 (.744)	No
Burton	-4.37 (.490)	-4.37 (.490)	+4.62 (.437)	No
Clark	**-2.17 (.023)****	**-2.17 (.023)****	-2.65 (.685)	Yes
Douglas	-5.69 (.256)	-5.69 (.256)	+4.67 (.175)	No
Frankfurter	-7.70 (.259)	-7.70 (.259)	+1.72 (.776)	No
Fortas	No variation	No variation	**14.22 (.029)****	Yes
Ginsburg	-4.26 (.524)	-8.33 (.128)	+6.31 (.230)	No
Goldberg	No variation	No variation	No variation	N/A
Harlan	No variation	No variation	+1.97 (.620)	No
Jackson	-3.42 (.604)	-3.42 (.604)	+5.08 (.500)	No
Kennedy	-0.84 (.875)	-3.40 (.519)	-0.07 (.990)	No
Marshall	No variation	-0.28 (.956)	+1.00 (.853)	No
Minton	-11.45 (.192)	-11.45 (.192)	+4.02 (.643)	No
O'Connor	-0.46 (.913)	-0.35 (.406)	+4.69 (.288)	No
Powell	No variation	+0.08 (.989)	+4.15 (.520)	No
Rehnquist	**-7.69 (.062)***	**-7.75 (.045)****	-0.15 (.971)	Yes
Roberts	+0.28 (.993)	+0.28 (.993)	No Variation	No
Scalia	-7.08 (.251)	-4.19 (.502)	+1.96 (.762)	No
Souter	-3.26 (.623)	-6.18 (.321)	-1.03 (.870)	No
Stevens	+1.60 (.665)	**-8.47 (.012)****	-3.30 (.370)	Yes
Stewart	No variation	+12.22 (.210)	**-7.18 (.065)***	Yes
Thomas	-5.50 (.286)	-6.93 (.140)	+6.72 (.147)	No
Vinson	+4.69 (.545)	+4.69 (.545)	-7.17 (.511)	No
Warren	**-32.75 (.000)*****	**-32.75 (.000)*****	+4.69 (.395)	Yes
White	No variation	**-11.47 (.017)****	**-12.51 (.001)*****	Yes
Whittaker	No variation	No variation	+1.63 (.755)	No

Probability levels in parentheses; *** p<0.01; ** p<0.05; * p<0.1

APPENDIX C: Additional Information and Tables Related to Chapter 5

This appendix offers a research design that can serve as an alternative to the standard difference-of-means *t*-tests commonly used in "freshman effect" literature. The tables below continue the idea of comparing "early" voting scores to "later" voting scores with *t*-tests. However, these tables attempt to shrink the length of the "remainder" period by having it match identically—when possible (since some justices served more years in the "allegiance period" than in the "remainder period")—the length of the "early" period. This may help to reduce the impact of some of the difficult-to-control-for factors that might generate changes in voting behavior. Ultimately, the results of these tables are not significantly different from those offered in the body of the text (see Table 5.1 and Table 5.2, which compare voting scores from the "allegiance" period with voting scores from the entire length of the "remainder" period).

As Table C.1 illustrates, in civil rights and civil liberties cases, Justices Blackmun, Fortas, Harlan and O'Connor continue to exhibit a statistically significant difference in their behavior (as they did in Table 5.1), but Justices Ginsburg and Souter, who exhibited such an effect in Table 5.1, no longer do. This suggests that the changes in Ginsburg's and Souter's respective voting patterns came after a length of time identical to the "allegiance period"—and thus, are likely to be unrelated to the departure of an appointing president. In economic cases (Table C.2), only Justices Ginsburg and Souter show signs of an "allegiance effect," even though neither showed such signs in the earlier model (Table 5.2); this indicates that they may have incurred a short term change in voting behavior in the interim immediately after their respective appointing presidents left office—only to return to a similar voting patter at a later point in time. Further, while Table 5.2 had Justices Brennan, Clark, Fortas, Marshall, and White all showing signs of an "allegiance effect" in economic cases, those results are obviated when the length of the

"remainder period" is standardized to equal the length of the "allegiance period" in Table C.2—an indication that variation occurred later in their respective tenures on the Supreme Court. Because it helps to eliminate such "late tenure" change from the analysis, this type of a research design may represent an upgrade over techniques normally used in "freshman effect" studies. However, even this "advance" is still far inferior to the GLS, random-effects time series regression model included in the body of this dissertation (see Table 5.4).

Table C. 1: Difference-of-Means Comparison of Conservative Voting Scores in Civil Rights and Civil Liberties Cases (During the "Allegiance Period" and in An Equal Number of Subsequent Terms)

Justice	Allegiance Period	Identical # of Subsequent Terms	Difference	*T*-Test Significance
Blackmun	69.3 (4 terms)	63.8	-5.5	.099*
Brennan	24.4 (4 terms)	19.1	-5.3	.205
Breyer	43.6 (6 terms)	42.3	-1.3	.779
Burger	74.0 (5 terms)	73.1	-0.9	.803
Clark	62.4 (3 terms)	59.9	-2.5	.790
Fortas	21.6 (3 terms)	35.6 (1 term)	+14.0	.079*
Ginsburg	44.3 (7 terms)	36.3	-7.0	.090
Goldberg	15.0 (1 term)	4.8	-10.2	N/A
Harlan	50.9 (5 terms)	62.1	+11.2	.049**
Kennedy	78.7 (1 term)	81.2	+3.5	N/A
Marshall	32.1 (1 term)	29.2	-2.9	N/A
Minton	70.3 (3 terms)	64.4	-5.9	.534
O'Connor	78.0 (7 terms)	68.9	-9.1	.020**
Powell	70.4 (3 terms)	63.1	-7.3	.180
Rehnquist	82.9 (3 terms)	79.3	-3.6	.539
Scalia	80.56 (2 terms)	80.64	+0.08	.984
Souter	71.0 (2 terms)	56.3	-14.7	.186
Stevens	47.7 (1 term)	51.2	+3.5	N/A
Stewart	57.5 (2 terms)	46.3	-11.2	.217
Thomas	80.0 (1 term)	74.2	-5.8	N/A
Vinson	62.8 (6 terms)	75.7 (1 term)	+12.9	.462
Warren	31.1 (7 terms)	20.1	-11.0	.191
White	21.8 (1 term)	30.6	+8.8	N/A
Whittaker	50.0 (4 terms)	59.5 (2 terms)	+9.5	.321

Terms served per category listed in parentheses
*** $p<0.01$; ** $p<0.05$; * $p<0.1$

Table C. 2: Difference-of-Means Comparison of Conservative Voting Scores in Economic Cases (During the "Allegiance Period" and in An Equal Number of Subsequent Terms)

Justice	Allegiance Period	Identical # of Subsequent Terms	Difference	*T*-Test Significance
Blackmun	49.4 (4 terms)	51.8	+2.4	.664
Brennan	24.0 (4 terms)	27.9	+3.9	.473
Breyer	46.1 (6 terms)	41.4	-4.7	.586
Burger	56.2 (5 terms)	56.5	+0.3	.966
Clark	44.5 (3 terms)	40.0	-4.5	.746
Fortas	39.2 (3 terms)	25.0 (1 term)	-14.2	.029**
Ginsburg	41.9 (7 terms)	35.9	-6.0	.287
Goldberg	22.4 (1 term)	33.9	+11.5	N/A
Harlan	51.3 (5 terms)	51.1	-0.2	.970
Kennedy	50.0 (1 term)	42.5	-7.5	N/A
Marshall	54.5 (1 term)	24.1	-30.4	N/A
Minton	40.1 (3 terms)	38.4	-2.7	.869
O'Connor	54.8 (7 terms)	59.4	+5.6	.430
Powell	57.4 (3 terms)	57.5	+0.1	.986
Rehnquist	59.7 (3 terms)	56.5	-3.2	.567
Scalia	45.7 (2 terms)	51.7	+6.0	.766
Souter	55.3 (2 terms)	25.8	-29.5	.076*
Stevens	32.1 (1 term)	48.1	+16	N/A
Stewart	43.7 (2 terms)	42.4	-1.3	.858
Thomas	59.5 (1 term)	42.4	-17.1	N/A
Vinson	42.0 (6 terms)	49.2 (1 term)	+7.2	.511
Warren	20.0 (7 terms)	23.3	+3.3	.596
White	21.8 (1 terms)	30.6	+8.8	N/A
Whittaker	55.6 (4 terms)	57.3 (2 terms)	+1.7	.755

Terms served per category listed in parentheses
*** p<0.01; ** p<0.05; * p<0.1

Vita

Hemant Sharma is a graduate of Cornell University, where he was an English major. At Cornell, he was a member of the Dean's List and winner of the prestigious James E. Rice Writing Prize, granted annually to the top essay composed in all writing seminars at Cornell. He also earned All-Ivy League honors while serving as the goalkeeper for the nationally-ranked, Ivy League Champion, Cornell University Men's Soccer team, leading the team into the NCAA Tournament during his senior season and setting a school record for shutouts. He went on to play professional soccer for five years. He arrived in Knoxville, Tennessee in 2004, and has served as an assistant coach for the University of Tennessee women's soccer team, which has captured three Southeastern Conference championships during the last five years. He coordinated the Lady Vol Soccer team's involvement in TOPSOCCER, which is a soccer program for disabled athletes, and also served as the assistant director of coaching for the Knoxville Football Club, which is an organization for youth soccer players. He completed his Master's Degree in Political Science at the University of Tennessee in 2006, and his PhD in Political Science in 2009. He passed comprehensive exams in American Government and Politics and Public Administration, earning high distinction in both fields, and completed his course work with a 4.0 grade point average. He was also the first recipient of the University of Tennessee's *Otis Stephens Fellowship*.