

## Chapter 1

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### INTRODUCTION

IMMEDIATELY FOLLOWING the Supreme Court's ruling in *Bush v. Gore* (2000), George Washington University law professor Jeffrey Rosen expressed shock that the justices in the majority did "not even bother to cloak their willfulness in legal arguments intelligible to people of good faith." Rosen believed that the decision "made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor" (2000).

Rosen was not alone within the legal academy. Over five hundred law professors wrote a public letter "as teachers whose lives have been dedicated to the rule of law" to condemn the Court's decision (Berkowitz and Wittes 2001). They argued that the majority of justices had acted as "political proponents for candidate Bush, not as judges." One signatory "deplored the fact that one of his primary teachings to his students over a 40-year career in constitutional law—that the U.S. Supreme Court acts as a nonpartisan institution despite differing judicial philosophies—had been rendered null and void by the actions of the five justices who stopped the count" (Dickenson 2001).

Not all Court critics think justices are right-wing partisans. Conservatives, too, routinely attack the Court for pursuing political, not legal, aims. Onetime Supreme Court nominee and conservative icon Robert Bork characterizes the Supreme Court as "an active partisan on one side of our culture wars" (quoted in Boot 1998, vi). Conservative columnist Thomas Sowell claims "Supreme Court decisions suggest that too many justices are not satisfied with their role, and seek more sweeping powers as supreme policy-makers, grand second-guessers or philosopher-kings" (2010).

Many political scientists see politics on the Court as business as usual. Much of the discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences (see discussions in Friedman 2006; Tamanaha 2010). Indeed, seven years before *Bush v. Gore* political scientists Jeffrey Segal and Harold Spaeth predicted that "if a case on the outcome of a presidential election should reach the Supreme Court, . . . the Court's decision might well turn on the personal preferences

of the justices” (1993, 70). *Bush v. Gore* made Segal and Spaeth look like the oracles of Delphi.

If justices are indeed pursuing their personal policy preferences, those who believe that an independent judiciary undermines our democratic system have a strong argument. And the fears that were expressed at the founding will have come to pass. *Federalist 78* noted that if the courts “should be disposed to exercise will instead of judgment, the consequence would be the substitution of their pleasure for that of the legislative body.” The only democratic recourse would be the appointments process, which would, we could hope, elevate individuals to the bench who share the views of the people (Dahl 1957). However, if justices are unconstrained policymakers they need not remain in accord with popular wishes. And with the recent trends of appointing younger justices and the greater longevity of sitting justices, there is more reason to worry that the policy preferences of the Court could become disconnected from the popular will.

Not everyone believes justices are unconstrained policymakers, however. Many believe justices feel constrained to follow established legal principles. The operation of the Court and the norms of the legal community clearly support this. Justices parse legal doctrine in detailed opinions. Law students and journals analyze legal doctrine. Sitting judges express bafflement at the idea that law does not matter (Edwards 1998; Wald 1999). And we suspect that the law professors who objected to *Bush v. Gore* continue to teach that legal doctrines provide useful tools for understanding Court decisions.

One reason the legal model may rise above the ashes of *Bush v. Gore* is that justices routinely make decisions that appear to be inconsistent with their policy preferences. For example, in *Dickerson v. United States* (2000) the Court assessed the constitutionality of a law overturning *Miranda v. Arizona* (1966). Conservatives had long railed against *Miranda* and many saw *Dickerson* as a chance for conservative, Republican-appointed justices to reshape constitutional law. Surprisingly, though, the Court stood behind *Miranda* by a 7–2 majority. No less a conservative than Justice Rehnquist wrote an opinion that defended precedent and argued that since *Miranda* was a constitutionally based decision, Congress could not alter the Court’s ruling by statute.

In addition, the Court is often unanimous. From 1950 to 2004, about 38 percent of Court decisions had no votes against the majority (Epstein, Segal, Spaeth, and Walker 2007, 227). This suggests that justices share legal values that can supersede policy preferences. While it is possible that policy-motivated justices can be unanimous if the alternative or legal status quo (e.g., upholding the lower court) has policy implications that are so extreme that no justice views this as a viable alternative, it is unlikely

that they would do so as frequently as they do. The legal explanation of unanimous votes is that the “roughly similar forms of legal education and professional experience” of justices lead them to agree on cases for legal, not policy, reasons (Breyer 2005, 110).

Justices may also be subject to external constraints. In particular, the legislative and executive branches may be able to push the Court in favored directions with threats and persuasion, thereby attenuating the danger that the Court becomes a policymaker divorced from public will. Perhaps the most prominent example of such external influence is the “switch in time that saved nine” on *West Coast Hotel v. Parrish* (1937). After the Court struck down several New Deal laws, elected leaders became increasingly aggressive toward the Court, culminating in President Roosevelt’s plan to “pack” the Court with more justices (Friedman 2009). One of the justices who frequently voted to strike government intervention in the economy, Justice Owen Roberts, suddenly voted to allow a Washington state minimum wage law. Roberts’s change in tune relieved political pressure on the Court and sunk Roosevelt’s Court-packing plan.

Hence we are faced with competing views about the role of the Supreme Court in the constitutional order. Many political scientists view the Court as a largely unconstrained policymaking body. Others believe there are constraints, either internal or external. Can empirical analysis resolve this debate? We believe it can. As social scientists, we agree with Segal and Spaeth (1994), who wrote that “it is a basic tenet of science, whether social, political or natural, that an untestable model has no explanatory power.” We do not believe there is—nor does social science promise—an easy and definitive answer, but we are optimistic that advances in theory, data collection, and measurement can help us progress.

There are many benefits to understanding whether policy, law, or inter-institutional pressure shapes decisions made by justices. First, we can better explain the development of law. Many important cases have been decided by 5–4 votes, from *Lochner v. New York* (1905) to *Escobedo v. Illinois* (1964) to *Miranda v. Arizona* (1966) to *Furman v. Georgia* (1972) to *Regents of the University of California v. Bakke* (1978) to *Texas v. Johnson* (1989) (see, e.g., discussion in Tribe 1985, 32). If legal or political constraints switched votes in these cases, history and politics in the United States would be quite different.

Second, understanding the constraints faced by justices helps us assess and possibly even reform the Court. Whether justices simply follow their policy preferences affects the manner in which Congress and the president should interact with the judiciary. The optimal appointment process for justices who act as unelected policymakers looks different than one for justices who operate within legal and institutional constraints. If justices are purely political beings, judicial term limits may make sense in order

to ensure that voters and their elected representatives have regular opportunities to influence who sits on the bench. Likewise, if justices are unconstrained policymakers the nomination and approval process for justices should perhaps be even more political. In addition, some argue that limits on the jurisdiction of the Court or challenges to its authority are reasonable if the Court is primarily policy oriented (Tushnet 1999).

Finally, how we view constraints on the Court affects our normative views of the Court. Is the Court legitimate? The executive and legislative branches derive their legitimacy from elections. Some argue that the Court can represent the public as well as the elected branches (Peretti 1999), but most believe that the Court derives its legitimacy from fealty to the Constitution and the law. A Court that is no different from a legislature may not have any moral standing (Ely 1991). As John Adams wrote in the Massachusetts Constitution of 1780, “the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men” (Adams, Adams, and Bowdoin 1780). Even Rosen (2006, 3–7), who believes that the Court does and should follow public opinion, believes that the legitimacy of the Court depends on judicial decisions being “accepted by the country as being rooted in constitutional principles rather than political expediency.”

#### THE ATTITUDINAL MODEL AND THE ABSENCE OF CONSTRAINTS

We begin our consideration of constraints on the Court with a model that says there are none—the attitudinal model. This model assumes that justices are “decision makers who always vote their unconstrained attitudes” (Epstein and Knight 1995, 2). As Segal and Spaeth summarize it, “simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (1993, 65).

**Attitudinal Model Claim:** Justices’ decisions reflect their unconstrained policy preferences.

Empirically oriented scholars have produced decades of research indicating that policy motivations best explain Supreme Court behavior (Spaeth 1961, 1964, 1979; Rohde and Spaeth 1976; Hagle and Spaeth 1992, 1993; Segal and Spaeth 1993, 2002; Segal and Cover 1989). Segal and Spaeth’s book *The Supreme Court and the Attitudinal Model* has become required reading for students of the Court. The model is so influential that empirically oriented political scientists have “an almost pathological skepticism that law matters” (Friedman 2006, 261; see also Tamanaha 2010, 232). The attitudinal model builds on two intellectual foundations.

First, legal realism in the early twentieth century highlighted the indeterminacy of law. This indeterminacy allows justices to inject their personal views (perhaps unconsciously) into the development of the law (Frank 2009 [1930]; Llewellyn 1962; Stephenson 2009; Tamanaha 2010). Second, the behavioral revolution in the middle of the twentieth century moved political science away from simple description and proscription toward theory building and testing (see Maltzman, Spriggs, and Wahlbeck 1999, 44; Tamanaha 2010, 111). Research in this vein emphasized observation and measurement, with Spaeth (1965) famously urging scholars to look at what justices do rather than what they say.

The attitudinal model is based on three premises. First, Supreme Court justices are subject to little or no oversight. Within the judicial branch justices face no oversight given the Supreme Court's position at the top of a judicial hierarchy (Segal and Spaeth 2002, 111; Posner 2005, 42). They arguably face little beyond the judicial branch due to the practical difficulty of overturning Supreme Court cases. Former solicitor general Ken Starr (2002) goes so far as to consider the Court "first among equals" in the constitutional order. While we will discuss the possibility of political oversight in both this chapter and chapter 6, it is plausible that, practically speaking, the Court has the final say on constitutional law in the United States given the relatively few instances in which Congress or a constitutional amendment has explicitly overruled the Supreme Court (J. Barnes 2004).

Second, the law is ambiguous enough to permit multiple interpretations (Segal and Spaeth 2002, 72). This is due not only to constitutional and statutory vagueness but also to the winnowing process that sends only a small fraction of all legal disputes to the Supreme Court. These are the truly tough cases and they are only before the justices because the proper legal conclusion is not straightforward (Cross 1997, 285). Posner (2005, 40) sums up this view when he writes, "Almost a quarter century as federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly." If both sides of a case have plausible legal grounds (and justices are subject to no oversight), justices can easily choose the side they prefer on policy grounds while maintaining an appearance of upholding the law.

The third premise of the attitudinal model is that justices care only about policy (Segal and Spaeth 2002, 111). Court cases often have profound policy implications—touching issues ranging from terrorism to segregation to abortion to elections to the death penalty and beyond—and attitudinalists argue that justices focus only on policy when deciding cases. In the attitudinal model, the legal views justices express in their opinions are simply smoke screens to cover their pursuit of policy.

In this book, we focus on two predictions of the attitudinal model. The first is that law does not matter. In *The Supreme Court and the Attitudinal Model*, Segal and Spaeth scoured Supreme Court history looking for influences of law. They concluded “we have not discovered any narrowly defined issues in which variables of a non-attitudinal sort operate” (1993, 359). They went on to write a book-length refutation of the claim that precedent influences Supreme Court behavior (Spaeth and Segal 1999; see also Brenner and Spaeth 1995). Bolstered by the partisan outcomes in *Bush v. Gore*, they describe a Supreme Court that is “activist and conservative . . . [and] blatantly partisan” (2002, 430). Law in this view is “a low form of rational behavior,” no more science than “creative writing, necromancy or finger painting” (Spaeth 1979, 64; cited in Gillman 2001, 470).

A second prediction of the attitudinal model holds that external actors do not influence justices. This prediction implies that a host of potential influences does not matter, including the legislative and executive branches. It is consistent with the Founders’ intent of creating an independent judicial branch by providing justices with lifetime appointments and protection from a salary reduction (Hamilton, Madison, and Jay 2011, #78, #79). This corollary suggests that Congress will not be able to otherwise threaten the Court and the president will not be able to use the power, prestige, and legal infrastructure of the executive branch to influence the Court.<sup>1</sup>

Neither of the attitudinal model predictions is foreordained. Segal and Spaeth developed the attitudinal model based on empirical evidence. It is possible that justices follow legal values or defer to Congress and the president; attitudinalists claim that as a matter of fact justices do not exhibit these behaviors.

### CONSTRAINED BY LEGAL VALUES

Not everyone agrees that justices are unconstrained. Many in law argue that the main constraint on justices “is an internal one: the judge’s integrity and degree of commitment to engage in an unbiased search for the correct legal answer” (Tamanaha 2010, 189). Even legal realists thought that such constraints could and should matter (Stephenson 2009, 206). In its starkest form, this view suggests that justices vote in accordance with legal principles, irrespective of the policy implications. Justice Elena Kagan expressed such a view during her confirmation hearings. After admitting that “I’ve been a Democrat my whole life, my political views are generally progressive,” she said her policy preferences would not influence her decisions as a judge: “You are looking at law all the way

down, not your political preferences, not your personal preferences” (Kagan 2010).

**Legal Model Claim:** Legal doctrines guide the decisions justices make.

Proponents of this view accept that justices gain considerable latitude from being at the top of the judicial hierarchy and that cases can be legally indeterminate. They differ at the third step of the attitudinal model logic: the idea that policy is the only thing that matters to justices. In other words, legalist scholars grant attitudinal model claims that justices have the ability to do what they want but contest whether justices only want policy outcomes.

Legalist scholars instead contend that justices value the law in and of itself (see, e.g., Cross 1997, 297). Kahn argues that judicial values arise from “a distinctive set of institutional norms and customs, including legal principles and theories” (1999, 175; see also R. Smith 1988). Baum (1997) and Gibson (1978, 1983) attribute these values to justices’ socialization in law schools and the legal community. Gillman and Clayton (1999, 4) attribute these values to the nature of the institutional position justices occupy. In particular, the roles of the justices lead them to feel obligated to follow legal principles. This “role orientation” of judges (Gibson 1977, 1978; Ulmer 1973; Glick and Vines 1969) pushes judges to believe that “to regard oneself and be regarded by others, especially one’s peers, as a good judge requires conformity to the accepted norms of judging” (Posner 2008, 61). Even Walter Murphy, a scholar most prominent for arguing that justices strategically pursue policy goals, admits that “much of the force of self-restraint can be traced to individual justices’ concepts of their proper role in American government” (1964, 29).

The law can matter in rational choice perspectives as well. After all, rational choice models posit utility maximization, not the object of utility. Ferejohn and Weingast (1992, 277) present a rational choice theory of statutory interpretation and argue that “in the past, positive political theory has relied too exclusively on the assumption that judges are political actors with ideological motives identical to elected officials. While this assumption undoubtedly captures an important aspect of judicial decision-making, it hardly exhausts the range of judicial behavior and the manifold normative bases of judicial decisions” (see also Baum 1997, 61). Segal and Spaeth (2002, 111) explicitly reject such an approach.

Judges may also follow legal principals in order to minimize effort (Tiller and Cross 2006, 530; Posner 2008). Judges may value avoiding work on what can sometimes be tedious cases, cases that D.C. Circuit of the U.S. Court of Appeals judge Patricia Wald notes often revolve around

such scintillating topics as “appropriate regulatory standards for ‘retro-fitted cell-burners’ as opposed to ‘wall-fired electric utility boilers’” (1999, 237, 241). Faced with such a case, judges may be able to use legal rules and norms to resolve the dispute; without such principles ad hoc rulings could be harder to devise and defend.

Which legal principles might constrain justices? A full accounting would fill a law library (and already has). Here we focus on three prominent possibilities: stare decisis, judicial restraint, and strict construction of the Constitution.

### *Stare Decisis*

Stare decisis is the doctrine that decisions should be consistent with past decisions. The doctrine is central to all legal perspectives (Levi 1949; Dworkin 1978; Kahn 1999; Gillman and Clayton 1999). According to George and Epstein, “at its core, legalism centers around a rather simple assumption about judicial decision making, namely, that legal doctrine, generated by past cases, is the primary determinant of extant case outcomes” (1992, 324). Spaeth and Segal characterize stare decisis as “the lifeblood of the legal model” (2001, 314). Judges themselves emphasize precedent more frequently than any other legal factor (Knight and Epstein 1996).

The Court benefits in a number of ways when it follows precedent. First, precedent is a useful heuristic. How did other judges interpret the Constitution when faced with similar problems? How did they balance competing values? How did they resolve ambiguity? Precedent encapsulates the answers of previous judges to these questions.

Second, the Court can smooth the operation of the judicial branch by respecting precedent. Lower court judges will struggle to apply case law as a guide if there is too much ambiguity and incoherence. If the Supreme Court sticks to precedent, though, lower court judges will have clearer standards to guide them. As Justice Louis Brandeis once argued, “stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right” (1932, 406).

Third, justices can use precedent to indirectly pursue policy goals; in other words, “judges [may] care about precedent because they care about policy” (Bueno de Mesquita and Stephenson 2002, 755). Justices following precedent may “lose” in policy terms on a case, but the outcome may strengthen the Court’s ability to control lower courts by maintaining the norm of stare decisis (Bueno de Mesquita and Stephenson 2002; Hansford and Spriggs 2006, 19–20; Landes and Posner 1975). In addition, the justices may be better able to achieve policy goals the more the Court is



viewed as legitimate (Peretti 1999, 81). If the Court disregards precedent too often, individuals and organizations affected by the law could come to see the Court as a political institution not deserving of legitimacy and compliance (Hansford and Spriggs 2006, 20; Kahn 1999, 189).

### *Judicial Restraint*

Another doctrine that may constrain justices is judicial restraint. Judicial restraint implies that justices should defer to elected officials as much as possible within the bounds established by the Constitution (and, depending on one's view of *stare decisis*).<sup>2</sup> In this view, an ideal judge's temperament "is marked by modesty, by caution, by deference to others in different roles with different responsibilities" (Kronman 2006).<sup>3</sup>

There are two ways of justifying this doctrine. The first is a normative claim that if justices exercise restraint, they will be less likely to usurp legitimate democratic will. Law is, as we have seen, complicated and many cases are amenable to multiple legitimate decisions. If justices are the final source for choosing among such alternatives, there is little recourse, as justices are not elected and overturning their decisions is very difficult with democratic means. On the other hand, if justices defer to the judgment of elected officials, voters have a chance to discipline these officials at the ballot box if they make poor decisions. Therefore, Thayer (1893), Wechsler (1959), and many others have argued that justices should not overturn laws unless the laws clearly conflict with constitutional provisions.

A second justification for judicial restraint is more practical: the less the Court challenges legislative actors, the less likely those actors will threaten its legitimacy. The Court requires the consent of the executive branch and states to enforce its decisions. If it challenges elected actors too often, those actors may become less inclined to value the Court and find more reason to disobey. The tenuousness of Court power led Ferejohn and Kramer to observe that "the judiciary is a self-regulator: it has created a system of self-imposed institutional and doctrinal constraints that keep judges within the bounds required by institutional vulnerability" (2006, 163). Rosen summarizes this view: "history suggests that courts can best maintain their democratic legitimacy . . . by practicing judicial restraint" (2006, 13).

Justices frequently espouse judicial restraint. Justice Oliver Wendell Holmes quipped, "if my fellow citizens want to go to hell I will help them. It's my job" (1920, cited in Howe 1953). Justice Harlan Fiske Stone lamented, "the truth is that I feel obliged to uphold some laws which turn my stomach" (quoted in Dunne 1977, 199). Felix Frankfurter said that the philosophy of judicial restraint was "the alpha and omega of our job"

(quoted in Urofsky 1991, 31), and Justice John Marshall Harlan II made the case that

the Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. (1964, 624–25)

Contemporary justices espouse judicial deference as well. Justice Kagan testified that “every judge has to be committed to the policies of restraint” (2010). Future Chief Justice John Roberts testified during his D.C. Circuit confirmation hearing that “the Supreme Court has, throughout its history, on many occasions described the deference that is due to legislative judgments. . . . It’s a principle that is easily stated and needs to be observed in practice, as well as in theory” (2003, 49). Justices Sonia Sotomayor and Samuel Alito, too, made strong statements in support of judicial deference in their confirmation hearings (Sotomayor 2009; Alito 2006).

Members of Congress agree. In announcing his vote to confirm Roberts as Chief Justice, Senator Patrick Leahy (D, Vermont) urged “appropriate deference to congressional action taken by the people’s elected representatives” (2005). Senator Jeff Bingaman (D, New Mexico) said he voted for Roberts because Roberts’s testimony convinced him that Roberts would show “adequate deference to Congress” (2005). Likewise, Senator Al Franken (D, Minnesota) stated at the Sotomayor confirmation hearings that “I am wary of judicial activism and I believe in judicial restraint. Except under the most exceptional circumstances, the judicial branch is designed to show deep deference to Congress and not make policy by itself” (2009).

Judicial restraint is complicated by the fact that complete deference to elected officials nullifies a major purpose of the judiciary. Courts are necessary because legislatures and executives might violate or misconstrue the Constitution and somebody needs to resist such encroachments. Hence visions of judicial restraint often come with conditions—and these conditions can vary dramatically from justice to justice. Justice Stephen Breyer’s constitutional vision centers on “judicial modesty” (2005, 5), as he wants the Court to let legislators use their values and expertise to develop laws acceptable to the public. He sees limits to judicial modesty when the political process malfunctions (see also Ely 1980).

The famous footnote 4 of *United States v. Carolene Products* (1938) provides a slightly different view of judicial restraint. In it, Justice Stone argued that while the Court should presume the constitutionality of

legislation whenever possible, it should subject to a higher level of scrutiny any legislation that affects personal rights or that may be a result of “prejudice against discrete and insular minorities.” This view of judicial restraint led the Court to accept economic legislation unless it was very clearly in violation of the Constitution and to be skeptical toward legislation that harmed minorities or non-economic rights.

Yet other views of judicial restraint provide different guidance. In a textualist reading of the Constitution, the Court should defer to the judgment of legislatures and executives unless there is specific language in the Constitution banning the action in question (Scalia 1997). And if there is doubt as to what is and is not allowed under the Constitution, originalists (often, but not always, allied with textualists) look to the beliefs and practices accepted at the time of the Constitution’s drafting or ratification of an amendment (Bork 1990). In practice, textualists have been less willing to strike laws and actions that may harm minorities or individual rights and have been more willing to strike laws and actions that threaten economic rights.

This discussion makes it clear that legal values are nuanced, and it is possible that justices will embrace legal values that are at odds with the legal values endorsed by their colleagues on the bench. Legal values may also conflict. For example, Breyer’s commitment to deference to legislative will comes into tension with his commitment to precedent cases about state regulations on abortion.

### *Strict Construction*

Another prominent legal principle is strict construction of constitutional and statutory texts. Cases invariably arise where the disputed legal language conflicts with common sense, with another law, or with a judge’s sense of justice. Judges come down in varying places on what to do in these situations. Some are easily swayed from legal texts by contextual factors; they are loose constructionists. Others stick to the text, easily when they agree with the outcome but also when they do not; they are strict constructionists. They do not let purpose trump the plain meaning of laws and will rule consistently with the law as written even if the outcome in a particular case appears unjust.

The early debate over the Bank of the United States provides a classic example of the distinction (Zavodnyik 2007). Alexander Hamilton proposed the First National Bank in order to improve the scope and efficiency of the nation’s financial system. There was no explicit constitutional provision for the bank, but Hamilton was a loose constructionist and saw the power to incorporate and to regulate as clearly inherent in the constitutional governance structure. Thomas Jefferson took a strict

constructionist view and argued that the bank was unconstitutional since the Constitution did not explicitly authorize such a bank.

Strict constructionists view the Constitution as a contract that describes how to determine government policies and how to change the terms of the contract. The job of the courts is to enforce the contract. If justices impose their values or interpretations or allow other considerations to intervene, they are usurping the law. The result would not be law but policymaking via a mechanism that was not agreed to by the parties to the contract. We are using strict constructionism in a general sense to indicate avowed adherence to the text of the Constitution and the intent of its framers. There are many permutations. For example, Scalia advocates textualism over strict construction, saying, “A text should not be construed strictly and it should not be construed leniently. It should be construed reasonably, to contain all that it fairly means” (quoted in Taylor 2005, 2354).

All perspectives under this rubric, however, share a starting point that the Constitution must be enforced as written. If a law is allowable under the original intent of the Constitution, a justice should not strike it, no matter how personally objectionable the justice finds it. In Bork’s view, “we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law” (1990, 6). Bork therefore controversially rejected popular Supreme Court decisions including one that banned racial covenants (*Shelley v. Kramer* [1948]) and one that banned poll taxes (*Harper v. Virginia Board of Elections* [1966]) (Bork 1990).

The right to privacy is anathema to strict constructionists. This right was articulated by Justice William O. Douglas in his majority opinion in *Griswold v. Connecticut* (1965). Douglas argued that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” and that a right to privacy included a right for married persons to make personal decisions about birth control. Strict constructionists look, in vain, for explicit text to justify this specific right and, absent it, would not hold legislatures to protecting it.

Strict constructionism is undeniably a major element of the legal landscape. Bush hailed his nominee for Chief Justice, John Roberts, as “a strict constructionist, somebody who looks at the words of the Constitution for what they are, somebody who will not legislate from the bench” (Stout 2005). President Nixon used the same term to describe his nominee for Chief Justice, Warren Burger (Nixon 1969). Senators commonly use the term to characterize their views on the Court. Senator Tom Coburn

(R, Oklahoma), for example, stated during the Kagan nomination hearings that

There is a group in America, though, that believes in strict constructionism. We actually believe the founders had preeminent wisdom, that they were very rarely wrong, and—and that the modern idea that we can mold the Constitution to what we want it to be, rather than what that vision was, is something that’s antithetical to a ton of people throughout this country. (2010)

For reasons we discuss in chapter 4, we are not able to measure the influence of strict constructionism broadly construed. We are able to investigate one aspect of it, which is strict construction of the First Amendment’s free speech clause that “Congress shall make no law” prohibition on restricting speech. This is an area in which the modern Court in general has shown a strong commitment (Friedman 2009, 378). For example, Justice Hugo Black, widely reputed to be a strict constructionist (see, e.g., Ely 1980, 3; U.S. Congress 1971), famously repeated that “no law means no law” in justifying his votes to strike laws that he may well have agreed with but for his interpretation of the Constitution (Black 1969).

#### CONSTRAINED BY OTHER ACTORS

Another source of possible constraint on the Court is external. In contrast to both the attitudinal and legal models in which justices are isolated decision-makers, “separation of powers” models (perhaps more aptly called “checks and balances” models) assert that Congress and the president constrain justices.<sup>4</sup> In this view, justices may still primarily be interested in policy but may find that they cannot ignore the desires of the other branches of government if they want to achieve their policy goals. As Epstein and Knight put it, “justices are strategic actors who realize that their ability to achieve their goals depends upon a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act” (1998, 10).

**Separation-of-Powers Model Claim:** The preferences of the legislative and executive branches shape the decisions justices make.

A large academic literature elaborates on the mechanism of such constraint (W. Murphy 1964; Eskridge 1991; Ferejohn and Shipan 1990; Ferejohn 1999; Gely and Spiller 1990; Spiller and Gely 1992; Eskridge, Ferejohn, and Gandhi 2002). In the standard version of the model, justices

and elected officials have one-dimensional policy preferences (Marks 1989; Ferejohn and Weingast 1992), meaning we can line up justices, the president, and the medians of the House and Senate from most liberal to most conservative. If, when interpreting a law passed by Congress, the Court makes a decision that places the policy outcome outside the “political pareto set” defined by the line segment that connects the president, House median, and Senate median, all three political actors will agree to new legislation overturning the Court. In contrast, a decision by the Court that is within the political pareto set will be protected as an effort to move policy to the right will be resisted by whatever political actor is to the left of the Court’s decision and an effort to move policy to the left will be resisted by whatever political actor is to the right of the Court’s decision. Cognizant of this, strategic justices should produce an opinion that reflects the policy outcome that is nearest to the Court median’s ideal point and within the pareto set defined by elected officials (Bawn and Shipan 1997, 1). Doing so yields the best outcome for the Court median that will not be overturned.

On constitutional interpretation the model is more complicated as Congress and the president cannot, in principle, overturn the Court legislatively. A constitutional amendment is possible but faces a high hurdle that requires the consent of Congress and most state legislatures. However, the political branches can sanction the Court by not implementing its rulings, curtailing its jurisdiction, limiting its budget, manipulating the size of the bench, or even impeaching justices (W. Murphy 1964; Cross and Nelson 2001; Rosenberg 1991; McNollgast 1995; Friedman 1990, 1998; Ferejohn 1999; Peretti 1999; Epstein, Knight, and Martin 2004; J. Barnes 2004).

There could also be an informal basis for the Court to try to please Congress and the president: justices might desire to avoid conflict with the other branches (Baum 2006, 77). This might reflect a desire to protect the legitimacy of the Court or to be socially embraced by the Washington community and to maintain personal friendships with members of the executive and legislative branches.

## OUTLINE OF THE BOOK

We are left with an open question: are justices constrained? Segal and Spaeth argue justices are not and defend their view with voluminous and well-received empirical analysis. As for doubters, Segal and Spaeth’s response is direct: show us the evidence (2002, chapter 2). They want specific measurable predictions from non-attitudinal models that can be tested empirically.

We take up Segal and Spaeth's challenge. We offer new approaches to assessing constraints on Supreme Court behavior. We rely heavily on two types of methodological advances. The first relates to measurement. In chapter 2, we describe recent statistical developments that allow us to measure the ideologies of justices, members of Congress, and the executive on the same ideological scale over time. These developments allow us to leverage cross-institutional and cross-time data to pin down legal and political constraints on justices. The second type of methodological advance relates to "identification." We expend considerable effort fleshing out exactly what kind of evidence is necessary to disentangle various influences on the Court. "Identifying" the effect of law, for example, requires careful theoretical development and new uses of data.

In chapters 3, 4, and 5, we explore if and how legal values influence justices. In chapter 3, we make the theoretical case that the influence of legal doctrines can get hidden in seemingly ideological behavior by justices. We also develop a technique for disentangling the effect of policy preferences and legal values. In chapter 4, we implement the technique, using the positions taken by non-Court actors, to identify the influence of stare decisis, judicial restraint, and strict construction of the First Amendment. We find that these legal doctrines influence justices although there is considerable diversity in how much each justice is affected by each factor. In chapter 5, we explore the sources and implications of this diversity.

In chapter 6, we assess whether the elected branches of government constrain the justices. We build on the extensive "separation of powers" literature to isolate the instances in which the threat of legislative response to Court actions is most likely to induce justices to defer to Congress and the president. We find substantial evidence that justices respond to the other branches on both statutory and constitutional interpretation, although there is again considerable diversity across justices.

In chapter 7, we evaluate whether the president can constrain the Court via his top lawyer, the solicitor general. The attitudinal model rejects the notion that justices are influenced by external actors. But we find evidence that the solicitor general influences justices. We use a signaling model and find that the persuasive ability of the executive branch varies across political contexts.

How justices decide cases is more than just an interesting puzzle. It is a question that has important normative implications. Indeed, how justices reach decisions may influence political support for the judiciary. Therefore, in the final chapter we conclude by presenting a series of survey experiments that demonstrate the importance of legal constraint for the public's acceptance of the judiciary.

Our evidence suggests a nuanced portrait of the Supreme Court and the choices justices make, a portrait of policy-motivated but legally and

institutionally constrained justices. Law matters, although how it matters to individual justices is highly variable. Inter-institutional politics matters too. Sometimes justices value judicial restraint enough to defer to elected officials' judgment; other times justices defer to elected officials out of fear (as in separation-of-powers models) or persuasion (as in signaling models). No unicausal explanation can account for all the choices justices make, but we can nonetheless understand the Court in analytically meaningful ways.