IDEOLOGICAL VOTING ON THE SUPREME COURT: AN ANALYSIS OF JUDICIAL ACTIVISM ON THE BURGER AND REHNQUIST COURTS, 1969-2004

by

TIAHNA CIE LARSEN
B.A. University of Florida, 2003

A thesis submitted in partial fulfillment of the requirements
for the degree of Master of Arts
in the Department of Political Science
in the College of Sciences
at the University of Central Florida
Orlando, Florida

Summer Term 2010

ABSTRACT

The influence of ideology and attitudes on the decision-making process of Supreme Court justices has been well documented, such that the attitudinal model has emerged as the dominant paradigm for understanding judicial behavior. When ideology and personal preferences seem to eclipse legal factors, such as adherence to precedent and deference to the democratically-elected branches, outcries of "judicial activism" have occurred. Previous studies (Lindquist and Cross 2009) have operationalized judicial activism and have provided measures for studying behavior that may be considered activist (as opposed to restrainist), further supporting the premise that ideology trumps other extra-attitudinal and legal factors in the judicial decision-making process.

While the attitudinal model indicates that ideology is the strongest predictor of judicial decision-making, this research will include a number of legal variables that have significantly influenced justices' votes. As previous studies have demonstrated, an integrated model that combines a number of critical variables can have more explanatory power than one that relies on attitudinal reasons alone (Banks 1999; Hurwitz and Stefko 2004; Mishler and Sheehan 1996). As such, the purpose of this research is to examine individual level decision-making of the most ideological justices on the Burger and Rehnquist Courts (1969-2004) in regards to their activist behavior to overrule legal precedents and invalidate federal statutes. This research will employ multivariate regression analysis to assess the effects of attitudinal, legal and extra-attitudinal factors in the judicial decision-making process.

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CHAPTER ONE: INTRODUCTION

Theoretical Grounding

Throughout American history, the U.S. Supreme Court's constitutional role has been to serve as a neutral arbiter of the law. From the public's perspective, this entails the High Court's following of existing legal precedents and limiting its actions that could be interpreted as usurping powers that reside with the democratically-elected branches (i.e., overturning statutes, limiting the power of the president). Although the nine unelected, essentially life-tenured justices cloak themselves in black robes representing their political disinterest, there is no doubt that the Supreme Court is a policy-making institution (Baird 2008; Posner 2008; Pritchett 1948; Schwartz 1992; Segal and Spaeth 2002). The role of the High Court as a policy-making institution is quite controversial, as normative arguments suggest it is undemocratic for unelected officials to wield such significant power. At the same time, others argue that, "the rationale traditionally advanced for investing substantial political power in an unelected Court is the protection of minorities from democratic excess" (Mishler and Sheehan 1993, 1) as it is inherently a counter-majoritarian institution (Bickel 1962).

Members of Congress, the media, and the public alike echo alarm over the growing trend that is referred to by the ambiguous catch-all, "judicial activism." "For the most part, those who decry activist decisions focus on the judiciary's usurpation of political power from the elected branches, especially when judges render those decisions in accordance with their own policy preferences" (Lindquist and Cross 2009, 1). In fact, a 2005 American Bar Association survey found that 56% of Americans are

concerned that judicial activism has become a crisis (Neil 2005). Although some political scientists have successfully operationalized and measured judicial activism (Lindquist and Cross 2009; Segal and Cover 1989; Segal and Spaeth 1996), generally the term is invoked when one is ideologically opposed to the Court's decision. "Everyone thinks that those who do not share his substantive views should be restrained" (Easterbrook 2002, 2). Furthermore, ideological labels such as "conservative" or "liberal" dominate the public debate regarding judicial activism, transforming an institution that was once the alleged bastion of impartiality to a partisan body capable of delivering a perceived political decision such as *Bush v. Gore* (2000).

Undoubtedly, the role of the Supreme Court has changed over time: the expansion of the types of legal questions that the prevailing Court addresses and the evolution of its decision-making process allows the justices several opportunities to inject their personal preferences along the way, creating long-lasting policy implications for the nation (Pritchett 1949; Schubert 1964; 1965). The litigious nature of American society has caused a dramatic expansion of the courts generally to areas of American life that were previously regarded as "private" (Carp and Rowland 1983, 5). These uncharted territories are blank slates—free from the limits of precedent or legislative guidelines—and allow broad discretion for judges to rely on their personal values and political goals for decision-making (Carp and Rowland 1983).

However, despite its changing agenda, the public expects the Supreme Court to maintain some semblance of objectivity while interpreting the law, or else our American value of professing "justice for all" loses meaning. Lacking both "the purse and the

sword" (Hamilton 1788), the Court must consider the public's perceptions of it as a neutral and disinterested entity in order to maintain its authority and legitimacy so its decisions have some effect (Barnum 1985; Caldeira 1986; Lindquist and Cross 2009; Mishler and Sheehan 1993). "The lack of any formal connection to the electorate and its rather demonstrable vulnerability before the president and Congress mean that the United States Supreme Court must depend to an extraordinary extent on the confidence, or at least the acquiescence, of the public" (Caldeira 1986, 1209). Hence, the American ideal of "justice for all" becomes threatened when the public perceives its neutral arbiters acting in a manner that is *not* neutral. Accordingly, Caldeira (1986) found that instances of increased judicial activism (allowing attitudes and personal goals to dictate decisions) resulted in a decrease of the public's confidence in the Court, thereby threatening its legitimacy.

Judicial activism has garnered intense public debate, even though it is a rather subjective term with little consensus concerning its very meaning (Easterbrook 2002). Nonetheless, this contentious topic must be defined and measured if we are to understand the decision-making process of Supreme Court justices. For the purposes of this study, judicial activism will be measured by two variables: namely, precedence conformance and judicial review of federal statutes. Previous studies (Lindquist and Cross 2009) have included the judicial review of state and local laws or executive branch actions in their measures of judicial activism, yet those measures are excluded from the scope of this study, as the focus lies on the interactions with the federal branches of government and their potential influence over the Supreme Court.

While recognizing the merits that the attitudinal model has provided for strengthening our understanding of judicial decision-making, this research posits that the attitudinal model is too simplistic to account for the multi-dimensionality and complexities that characterize justices' behavior. Ideology may be the dominant motivator for a justice's vote to overrule precedent or invalidate a federal statute, but it seems naïve to suggest that legal and extra-attitudinal factors are not relevant at all. As such, this study will rely on an integrated model, incorporating a number of legal and extra-attitudinal variables, in addition to ideology, in order to understand the complexity and strategies of a justice's individual decision-making.

This research will examine the individual votes cast by the most ideological justices who served during the Burger (1969-1985) and Rehnquist Courts (1986-2004) that resulted in the overruling of precedent or invalidation of a federal statute in order to determine which legal, extra-attitudinal and attitudinal factors are significant in influencing judicial decision-making. By studying the most ideological justices who served on these two Courts (1969-2004), this research is able to assess the effects of the political environment, specifically, if the presence of unified or divided government or the party of the president constrains judicial decision-making. For example, using a separation of powers model, this research will gauge the degree to which the presence of a conservative president and majority in Congress might affect the relative likelihood of an ideologically conservative justice's acting to invalidate federal statutes and overrule legal precedents, and vice versa.

By focusing on the most ideologically extreme justices of the Burger and Rehnquist Courts, this study hopes to isolate the effect of ideology and examine the impact of legal and extra-attitudinal factors. Evidence gained from previous studies would allow us to presume that they are likely to manifest activist behavior, as the bulk of literature (Bonneau, Hammond, Maltzman and Wahlbeck 2007; Brenner and Stier 1996; Hagle and Spaeth 1993; Hurwitz and Stefko 2004;) indicates that the most ideological justices are more likely than median justices to exhibit so-called activist tendencies in their decision-making. For example, in regards to the invalidation of federal statutes, Hagle and Spaeth state: "To the extent that the Court accepts cases to reverse them, we might expect significantly different reversal rates for those justices whose voting patterns are more ideologically extreme" (1993, 495). Thus, by focusing on the justices of the Burger and Rehnquist Courts, this study seeks to determine which legal and extra-attitudinal factors are statistically significant in influencing the behavior of some of the most ideological justices and their centrist counterparts.

Relevancy of This Research

Alexander Hamilton attempted to reassure American citizens that the newly-created judiciary, as detailed in Article III of the Constitution, was "the least dangerous branch" (Hamilton, 1788, 437) of the nascent government. He envisioned a Court that was insulated from the political whims of the legislature and the public so that the justices could interpret laws in a manner that was unbiased and in accordance with legal principles that have withstood the tests of time. Surely, he never expected that the

Supreme Court would become the policy-making entity that it is today; yet it is difficult to argue against this notion, as ample evidence exists to support it (Baird 2004; Lindquist and Cross 2009; Schubert 1965; Segal and Spaeth 1996; 2002).

Anyone who has ever witnessed a Supreme Court confirmation hearing can attest to the ideologically-motivated questioning and personal attacks by senators through which they attempt to gauge the candidate's fit for one of the highest positions in the nation. Furthermore, nominees are expected to divulge their personal views on major issues in the same way that senators and representatives do on the campaign trail. The confirmation process is a sort of faux-town-hall meeting, in which the Senate and the public determine whether a Supreme Court nominee's liberal or conservative leanings will result in the desired policy outcomes. For example, during the last three decades, nominees were questioned as to their personal beliefs on abortion so as to determine if a new member on the bench could sway the vote in order to uphold *Roe* or further chip away at it (Banks 1999). The attitudinal model, which views the Court as a policy-making institution whose members rely on personal policy goals in their decision-making, would predict that a change in membership could result in a change in law (or rather, policy).

During one of the most controversial periods of our nation's history, Chief Justice Earl Warren (1953-1968) presided over the Supreme Court and set in part the political course for our nation, expanding civil rights and liberties in an unprecedented manner. The Warren Court is often regarded as the most activist Court (Bickel 1962; Hart 1959), a moniker resulting from a number of decisions rendered during Warren's tenure that

promoted social change, generally at the expense of the Southern way of life. The controversial Warren Court rulings have been criticized for eschewing previous legal precedents and for creating new legal rights in accordance with personal policy preferences. For example, *Griswold v. Connecticut* (1965)[i] is regarded as an example of "judicial lawlessness" (*e.g.*, Bork 1990) as the decision presumably created privacy rights that are not rooted in any legal grounding. Similarly, the landmark decision in *Brown v. Board of Education* (1954)[ii] reversed the precedent that *Plessy v. Ferguson* (1896) set, thereby ending federally sanctioned segregation in public schools in the form of "separate but equal" laws.[iii] The unanimous decision overturned the precedent set in *Plessy*, but relied on the Fourteenth Amendment's guarantee of equality before the law.

Of course social norms change over time and with the norms so does the law and the interpretation of that law - which is how, in 1896, the declaration of separate but equal was constitutional in *Plessy v. Ferguson*, but in 1954, separate was declared to be inherently unequal in *Brown v. Board*. Despite the criticism, the Warren Court cases have withstood the test of time. "Many of the most significant of these decisions remain intact, suggesting that, despite the frequent criticism, efforts to undermine the Court's standing 'brought no literal change or damage to the Court or its rulings'" (Lindquist and Cross 2009 as quoting Wicker 2002, 6).

The liberal decisions of the Warren Court have certainly lent credence to the attitudinal theory that justices view policy problems in accordance with their personal policy preferences. Because of the Warren Court's obvious liberal leanings, judicial activism has often been associated as a liberal phenomenon, incapable of being

associated with conservative justices. However, with membership change resulting in a conservative majority on the Rehnquist Court, conservative justices may be just as likely as liberal justices to rely on personal preferences when interpreting the law (Lindquist and Cross 2009).

The Rehnquist Court may empirically be the conservative equivalent of the liberal Warren Court in regards to activist decision-making (Kerr 2003; Sunstein 2001). The Rehnquist Court's willingness to invalidate congressional enactments under the Commerce Clause or the Tenth and Eleventh Amendments may indicate judicial activism by conservative justices (Lindquist and Cross 2009, 8). Furthermore, although Justice Scalia purports that his judicial philosophy relies on a "strict constructivist" interpretation of the law, he has been known to ignore plain meaning or inconsistently interpret the intent of the Eleventh Amendment to suit his political preferences (Cohen 2005).[iv]

The courts have become another arena for the political parties to battle out their ideological differences. According to Pritchett (1968, 486), "The major development in public law since 1948 has been the shift of attention from the Court as enunciator of legal doctrine to the Court as instrument for the resolution of political conflict." Supreme Court confirmation hearings have become as politicized as elections, as senators prod nominees for their personal views on a range of issues, knowing that because of essentially lifetime tenure of federal judges and increasing life expectancy, justices are able to shape policy that will have broad implications for several generations of Americans. In this sense, Supreme Court justices are essentially politicians who are not

directly accountable to any constituents, nor are they concerned with reelection campaigns. Freed from these constraints, and also because they generally do not seek a higher office, Supreme Court justices are able to pursue their political goals unencumbered. Their only challenge is to juggle the delicate balance between interpreting the law in accordance with legal principles, known as the legal model, and interpreting the law as close as possible to their ideal policy goals, known as the attitudinal model (Segal and Spaeth 2003).

This research intends to contribute to the ongoing debate between proponents of the attitudinal model and those of the legal and integrated models. While the attitudinal model has demonstrated that ideology is the strongest predictor of judicial decision-making, this research will also include a number of legal variables that have proven to significantly influence justices' votes. As previous studies have demonstrated, an integrated model that combines a number of critical variables has more explanatory power than one that relies on attitudes alone (Hurwitz and Stefko 2004; Mishler and Sheehan 1996). "While we largely agree that attitudinal influences explain the greatest proportion of variance concerning justices' votes on the merits, particularly when horizontal *stare decisis* is at issue, it seems to us that a model of Supreme Court decision-making can incorporate critical variables in addition to those based on attitudes and thus become even more explanatory" (Hurwitz and Stefko 2004, 122). Hence, an integrated model that incorporates attitudinal, legal and extra-legal factors will be used in order to provide a thorough understanding of the complexities involved in the judicial decision-making process. While the attitudinal model is a strong predictor of judicial

behavior on its own, it is believed that a much more nuanced understanding can be achieved by using an integrated model. To separate this study from the bulk of literature that exists on the subject of judicial decision-making, this study will employ multivariate regression incorporating a number of attitudinal, extra-attitudinal and legal variables in an integrated model.

Literature Review

Borrowing from Ancient Rome, a traditional idea of justice is based on a disinterested, impartial judge who is blind to subjective interests; hence, our image of Lady Justice who wears a cloth over her eyes and objectively weighs the scales of justice. This traditional model of judicial decision-making was accepted until the early 1900s when the Legal Realists emerged and began to doubt the tenets of the legal model. "The nineteenth century stereotype of the Court as a body of aloof, bearded gentlemen in black robes who did not make law but merely discovered it by processes too mysterious for laymen to understand was already dissolving in the cynical acid of the twentieth century" (Pritchett 1968, 486). The Legal Realist movement was an attempt to understand and reconcile a judiciary whose behavior could no longer be explained by the legal model. As Pritchett (1968, 488) states: "A primary task for public law since 1948, then, has been [the] development of a theory of democratic government and judicial review, and a corresponding frame of reference for research, which would accommodate the participation of an activist court in the making of public policy."

Like other schools of thought based on realist theory, the Legal Realists focused on more self-interested motivations (namely attitudes, and social, economic and political values) to explain judicial decision-making. Ever since the early realists (such as Thucydides, Machiavelli, and Hobbes) sought to explain international relations, the reigning theoretical notion explaining human behavior suggests that humans are selfish and seek to maximize their own interests. As such, meshing together several schools of thought, including "pragmatism, behavioral psychology, psychoanalysis and statistical sociology," the Legal Realists began to realize the influence of extra-legal factors upon the justices' decisions (Pritchett 1968, 487).

By the 1930s, political scientists began empirically researching and testing theories pertaining to judicial decision-making (Schubert 1964, 1975), and arrived at the judicial behavioral approach. Simply put, "The judicial behavioral approach represents the fusion of theories and methods developed in various social sciences in order to attempt to study scientifically how and why judges make the decisions they do" (Schubert 1964, 3). It could be said that the major rift between the traditional legal formalists and the proponents of the judicial behavior model was a response to the reorganization of the Court under President Franklin D. Roosevelt as it became apparent that policy preferences were clearly influencing the Court's decisions (Pritchett 1968). The Roosevelt Court demonstrated its propensity to inject ideology and attitudes into its decisions (Pritchett 1968), often striking down restrictive state policies that infringed on individual freedoms. The controversial debate concerning the role of the Court was ubiquitous, evidenced by the "classic dialogue between Justices Black and

Frankfurter, representing the contrasting positions of judicial activism and judicial restraint," (Pritchett 1968, 488) on the bench, and among political scientists and elites who were divided along ideological lines: those who believed that the Constitution is a living document, and those who believed that it is static and unchanging.

More recently, political scientists have largely accepted the attitudinal model as the dominant model for explaining judicial behavior. An abundance of research (Baird 2004; Hagle and Spaeth 1993; Mishler and Sheehan 1996; Lindquist and Cross 2009; Pritchett 1968; Segal and Spaeth 1996; 2002; 2003) has successfully demonstrated the influence of extra-legal factors (namely, justices' policy preferences and ideology) in the decision-making process. "Segal and Spaeth verified overwhelming evidence that justices are not influenced by precedents with which they had disagreed, a critical aspect of the legal model. Rather, they found that attitudinal explanations were much more consistent with respect to this type of judicial behavior" (Hurwitz and Stefko 2004, 122). As such, the attitudinal model has prevailed as the dominant paradigm for explaining judicial behavior.

Although the attitudinal model is the current dominant paradigm in explaining judicial behavior, some researchers (Banks 1999; Buena de Mesquita and Stephenson 2002; Mishler and Sheehan 1996) suggest that a one-variable model is much too simplistic to truly account for the many factors that influence a justice's decision-making. After all, the Court may be insulated, but it is not isolated. Instead, it depends on the executive branch in order to enforce its decisions, the public in order to maintain its legitimacy, and Congress, which manages the Court's jurisdiction and budget. Hence,

while ideology may be a dominant factor in judicial decision-making, surely it is not the only factor that influences justices' votes.

Role Theory

Similar to the above-mentioned paradigms, role theory is often utilized as a framework to understand judicial decision-making. The behavioral theory supporting the utility of role theory as an analytical construct is that at least some portion of an actor's behavior is attributable to his or her role perceptions (Kitchin 1978). Kitchin defines role as "a patterned sequence of learned actions or deeds performed by a person in an interaction situation" (1978, 22). Furthermore, the general assumption among behavioralists is that humans attempt to maximize their utility.[v] Utility is often correlated to desire or want; hence in order to maximize utility, an actor will seek to attain his or her preferences or policy outcomes. As such, according to policy-based models of judicial decision-making, Howard and Segal (2004, 132) suggest that because of a lack of electoral accountability and a lack of ambition for higher office, justices will seek to maximize their desired outcomes by placing their policy goals at the forefront of their decision-making process. In most political situations, there is a fair or balanced competitive equilibrium, although surely some actors have certain advantages over others occasionally. However, Supreme Court justices are able to operate in a competition-free context because of the aforementioned advantages of no electoral accountability, little ambition for higher office, and essentially life-tenure, allowing them to maximize utility with very little relative effort.

Kitchin (1978), who studied federal district judges, found that judges generally orient themselves to two purposive roles: the first role, which he refers to as process orientation, encompasses those judges who perceive their role as managing the caseload, focusing on the trial process itself, and operating an efficient, respected court. The second role is termed result oriented and is characterized by judges who see their jobs as deciding matters fairly, imposing justice, and legitimately resolving conflicts. Justices who tend toward activist decision-making are likely to fall into the latter category. "Earl Warren was said to be the 'paradigm of the result-oriented judge' who used his judicial authority to promote his own personal view of social justice" (Lindquist and Cross 2009, 4). In Warren's attempts to create social justice, he may have confused what is fair with what may be legally correct by focusing on the outcome and how to arrive at that outcome. As such, role theory obfuscates that line between result-oriented decision-making and outright ideological activism. On the one hand, a justice may vote one way because it is legally the "right" thing to do; on the other hand, the vote might be purely political and based on personal preferences so that the desired outcome is achieved.

In addition to the result-oriented justices, other policy-based models consider other responsibilities that a justice might find more appropriate; for example, a deference to public officials or a focus on restrainist behavior. "Supreme Court justices' attitudes and policy goals may be constrained by beliefs of what is normatively appropriate, such as deference to the other branches of government, and particularly in constitutional cases, deference to the positions espoused by the Solicitor General of the

United States" (Howard and Segal 2004, 133). In other words, an individual justice might follow a personal conviction to defer to the wishes of Congress or the president, despite his or her own personal ideology and political goals.

Likewise, Buena de Mesquita and Stephenson (2002) use role theory to explain how and why judges use legal factors to advance their policy goals. In their study including appellate judges, they suggest that a policy-oriented judge is likely to defer to precedent because it improves the accuracy of guidelines that are communicated to the lower courts. The basic idea is that a line of cases develops a legal principle better than any one individual case could. For example, the idea of *due process* is vague and offers little meaning on its own. However, a string of cases that follow precedent could shape policy by giving meaning to these inherently vague phrases (2002, 757). Hence, deference to precedent can shape policy while also maintaining a sense of stability in the law, protecting the *status quo,* which in itself is a valued policy goal (2002, 756). Furthermore, a judge may follow precedent because the judge wants his or her own precedents to be upheld. The narcissist judge cites to other cases because he hopes that other judges will cite to his. Last, some policy-oriented judges will follow precedent because it protects the institutional power and legitimacy of the judiciary (Buena de Mesquita and Stephenson 2002). The public expects that precedents will be followed, as that is the most obvious proof of judges acting as neutral arbiters of the law.

There is ample empirical evidence to support the presence of result-oriented decision-making on the Supreme Court (Lindquist and Cross 2009; Segal and Spaeth 1996; 2002). Furthermore, role theory may help to address variance in ideological

voting. For example, there is an array of ideologies present on the Court at any given time, yet unanimous decisions are capable of being reached. This could be the result of a justice's philosophy that his or her role encourages unanimous decisions to show the Court's cohesion on a controversial case. Chief Justice Warren is often considered the ultimate "result-oriented" justice, as he often encouraged unanimity despite a difference of policy views among the justices, in order to give greater authority to decisions that the public may have derided (Lindquist and Cross 2009), such as *Brown v. Board of Education* (O'Brien 2008).

Hurwitz and Stefko (2004) analyze justices' precedent conformance using role theory to suggest that justices experience an "acclimation effect." They find evidence demonstrating that newcomers to the bench follow a dynamic process of acclimation and that precedent conformance is a function of tenure. Their findings confirmed their hypotheses that "votes for precedent dramatically abate as justices' tenures grow, while preference votes amplify with increasing tenure" (Hurwitz and Stefko 2004, 125).

The Norm of Stare Decisis and Adherence to Precedents

The justices who served during the Nineteenth Century responded to the need to increase the legitimacy and authority of the Supreme Court's decisions by strengthening the norm of *stare decisis* (Fowler and Jeon 2008). This need arose from the constitutional structuring of the Court that created an institution with little enforcement power and no accountability to the nation. In this sense, the Court's decisions have been referred to as "paper tigers," (Caldeira 1986) representing nothing more than a

mere suggestion by the Court's justices with no enforcement to actually implement their guidelines. By following the legal principle of *stare decisis,* the justices locate their decisions within a network of neutral legal opinions. In other words, the norm of *stare decisis* represents a decision-making process that is unbiased or unaffected by the justices' personal values and accords with the law. In this sense, justices arrive at the so-called correct decision because it is clear to the public that the law required it.

Fowler and Jeon (2008) demonstrate that the norm of *stare decisis* was in full effect by about 1900. Since then, the justices have perpetuated this norm by writing opinions that cite precedent in order to demonstrate that their decisions are consistent with existing legal principles (Hansford and Spriggs 2006). Furthermore, legal precedents are central in guiding lower court behavior and for ensuring that lower courts act within the constraints of the judicial hierarchical structure (Buena de Mesquita and Stephenson 2002; Carp and Rowland 1983). Lower courts must act in accordance with the guidelines set by the Supreme Court, as the High Court has the power to reverse lower court decisions and will do so in order to maintain uniformity of legal interpretation throughout the judiciary (Buena de Mesquita and Stephenson 2002; Carp and Rowland 1983).

Precedent is one tool that the Supreme Court can use to communicate its legal views within the judicial hierarchy. In this sense, Supreme Court justices create long-lasting policy by adhering to and strengthening existing precedents in order to structure future behavior within the lower courts. "It is not the case that policy-oriented judges ignore precedent, nor is it the case that judges care about precedent instead of, or in

addition to, caring about policy. Rather, judges care about precedent *because* they care about policy" (Buena de Mesquita and Stephenson 2002, 755). Although the norm of *stare decisis* has persisted as an institutional tool to protect the legitimacy of the Court and to maintain uniformity throughout the judiciary, there are extra-legal factors that influence judicial decision-making.

Since the publication of Pritchett's *The Roosevelt Court* (1948), and Schubert's seminal works, *The Judicial Mind* (1965) and *The Judicial Mind Revisited* (1974), the suggestion that a judge's votes could be explained by his or her political views and values has gained increasing scholarly acceptance in further explaining judicial decision-making. Schubert (1964; 1965; 1974) suggested that Supreme Court justices' behavior is influenced in part by their personal values and preferences as opposed to purely legal factors, and that they rely on extra-legal factors while interpreting the law. Since then, Segal and Spaeth (1993; 1996; 2002) have further developed the attitudinal model that the justices' political preferences influence their decision-making to some extent. In testing the influence of precedent, these authors examine justices who initially dissented in a landmark case, then compare those justices' future votes in progeny cases in order to determine if the justices' votes changed from their initial revealed preference. In this sense, the justices' preferences are estimated and can be compared to their votes.

The authors found that 90.8% of the votes conform to the justices' revealed preferences, and only 9.2% of the time did a justice switch to the position that established precedent supported. Furthermore, only two justices (Potter Stewart and

Lewis Powell) showed any systematic adherence to *stare decisis* (Segal and Spaeth 1996). These results suggest that the influence of precedent is rather weak. Similarly, a measure of attitudes seems more reliable in predicting justices' votes than are legal factors, as empirical evidence demonstrates that justices are not solely swayed by legal factors such as precedent. Additionally, the finding that only two justices showed any systematic reliance on precedent implies that the norm of *stare decisis* has declined in power considerably.

Even after retesting and modifying Segal and Spaeth's (1996) model to account for perceived measurement errors, many political scientists have found substantial evidence to support the attitudinal model. Brenner and Stier (1996) retested the attitudinal model, examining the four moderate justices of the Warren Court, believing that the centrist justices are most likely to adhere to precedent in that they are not as ideological as the justices found at each pole. Brenner and Stier (1996, 1042) were unsatisfied methodologically with Segal and Spaeth's (1996) attitudinal model, arguing that it "either inflated the preference category or deflated the precedent category." To elaborate, Brenner and Stier (1996) assert that Segal and Spaeth misclassify some of the justices' votes, resulting in an inflation for the preference category and a deflation for the precedent category. They argue that the coding that Segal and Spaeth employed did not take into account the direction of the justices' decisions and, thus, skewed the results. For example, Segal and Spaeth classify justices' votes in favor of preference if the justice authored or joined the majority opinion that accepted the precedent in the progeny cases. Brenner and Stier argue that these votes should be classified as "both

in favor of preference and in favor of precedent" (1996, 1039) and that this leads to an inflation of the preference category.

Furthermore, Brenner and Stier chose to include memo and per curiam cases that Segal and Spaeth excluded from their analysis. Segal and Spaeth contend that these cases would substantially swell the progeny sample and should be excluded in order to assure decisional parity between precedents and progeny (Segal and Spaeth 1996). Thus, they chose to exclude per curiam cases and memos[vi] to maintain a sense of uniformity between what they coded as precedent and its future progeny cases. Per curiam cases are brief decisions rendered by the Court, generally to ensure that the lower court decision accords with the law and, as such, they do not create progeny (Brenner and Stier 1996; Segal and Spaeth 1996). Even still, Brenner and Stier's results do not show any evidence of the *systematic* adherence to precedents among moderate judges. Overall, they find that the justices followed the established precedent less than half of the time (47%), with a range from a high of 73% for Justice Clark, to a low of 27% for Justice Harlan (Brenner and Stier 1996). Surely 47% may seem high to some, indicating that precedent is, in fact, a significant influence for justices in their voting patterns. On the other hand, some might suggest that the justices are merely flipping a coin, with a roughly equal chance that the case will be decided by either legal precedent or personal ideology. Hence, the basic premise of the attitudinal model (namely that justices' votes are an extension of their policy preferences and attitudes, and not purely legal factors) gains considerable support.

Likewise, Songer and Lindquist (1996) argue that the attitudinal model is "too blunt to capture the subtle interactions" (1052) of the choice continuum between precedent and preference. Because of the uniqueness of the Supreme Court and its power to handpick the cases that it decides, there is an overrepresentation of cases selected for review that will inevitably result in the expansion of precedent, as the Court chooses cases in which the underlying precedent may be in conflict and those that represent compelling and divisive questions of the day. "Therefore, in most of the progeny cases, the justices had the opportunity to vote in a manner consistent with their preferences without clearly repudiating precedent" (1996, 1050).

Surely, the act of overruling precedent is comparatively rare, and there are institutional benefits to adhering to precedent, including: protecting the legitimacy of the Court, setting guidelines that structure the behavior of lower courts, maintaining public support and influencing policy. Yet the true power of the attitudinal model is being able to explain and predict when and why justices vote to overrule precedent or invalidate a statute. Simply put, the attitudinal model explains that those votes were influenced by the justices' ideology and personal policy preferences as opposed to (or perhaps in addition to) established precedent or other purely legal factors (Baird 2008; Lindquist and Cross 2009; Schubert 1964; Segal and Spaeth 2003).

Since conservative and liberal justices both have a vested interest in maintaining the legitimacy and authority of their institution, it would seem that there should be little variance between ideology and precedent conformance. Thus, both conservative and liberal justices have an interest in preserving the legitimacy of their institution, so we

should expect that justices' contrasting ideologies should follow precedent at similar rates. However, many prior studies (Lindquist and Cross 2009; Schubert 1965; 1974; Schwartz 1992; Segal and Cover 1989; Segal, Epstein, Cameron and Spaeth 1995; Spriggs and Hansford 2001) have suggested that the distance between a justice's ideal policy point and that of the precedent is significant in influencing a justice's decision to overrule the precedent. For example, one study found that a one-unit increase in ideological distance between the median justice in the majority of the earlier cases and the median justice of the year of the overruling decision increases the case's likelihood of being overruled by 4.4% (Spriggs and Hansford 2001). Accordingly, it would seem that those justices at each pole of the ideological continuum will be the most likely to vote to overrule established precedent by the simple fact that their ideological distance from a precedent is likely to be greater than that of a median justice. Thus, the greater the ideological distance is between the precedent and the judge's ideal policy outcome, the greater the likelihood that a justice will vote in a way that will ensure a decision as close to his or her ideal point—even if that means overruling established legal precedent.

Similarly, ideological distance also significantly influences justices' votes to invalidate federal statutes (Lindquist and Cross 2009). Simply put, the most ideologically divergent justices may be the most fervent in overruling precedent and invalidating statutes. This point highlights the importance of the Court's agenda, as the types of cases that dominate the agenda will shape policy. Thus, since the Supreme Court is largely unique in that it sets its own agenda, the ideology of the Court is likely to shape

the agenda according to the specific policy areas that it wishes to address and effect change in and, as such, the decisions will follow those agenda cues (Baird 2004, 2007; Mishler and Sheehan 1996).

Judicial Review of Federal Statutes

The general argument opposing a Supreme Court that "legislates from the bench" is based on the premise that an unelected judiciary should take a deferential stance towards legislation or agency regulations that have been passed by elected officials or "more qualified appointees" so as to promote democratic influence (Posner 2008). However, although Posner (2008, 857) states that, "Judges decide cases entirely on the basis of their biases," he is careful to point out that there is a tradeoff that exists in that "review by biased judges can counter legislative bias, forcing legislatures to enact fairer and more socially beneficial statutes than they would otherwise; but review by biased judges also raises legislative bargaining costs, thereby blocking some desirable statutes that would otherwise be enacted." Hence, Posner implies that the checks and balances system inherent in our government's structure is functional. The judiciary is expected to review the legislature's behavior to ensure that the benefits and the costs are evenly distributed throughout society, so that one majority power does not benefit at the cost of the other (Posner 2008). The two-party system that characterizes American politics perpetuates this cycle of fairness "as long as the parties exchange power frequently enough" (Posner 2008, 861). As such, according to Posner (2008), judicial review is essential for ensuring that the legislature fairly distributes costs and

benefits throughout society. However, Posner implies by his trade-off theory that judicial decision-making is obviously influenced by ideology.

Not everyone finds solace in Posner's trade-off theory, and instead view the Court's declaration of laws as unconstitutional as a troubling practice and the most controversial aspect of so-called judicial activism (Howard and Segal 2004; Lindquist and Cross 2009). Not only does the act of judicial review circumvent the democratic process, but it may also impose a chilling effect on Congress. While Posner interprets this as a beneficial result of the checks and balance system, others argue that an activist judiciary has the ability to alter Congress' behavior and influence the type of legislation that is passed (Lindquist and Cross 2009; Rogers and Vanberg 2007).

Marbury v. Madison (1803) was the first example of the Supreme Court's ruling an act of Congress as unconstitutional, thus creating the power of judicial review and officially granting itself the last word. Despite ample criticism of the creation of the power of judicial review and the general consensus that the Courts should defer to the will of the democratic majority, "few argue that the Court should lack this capability…[as] judicial review remains at the heart of the Court's ability to protect the interests of unpopular minorities" (Howard and Segal 2004, 131).

Nonetheless, since the Supreme Court has the last word in the U.S. legal system, a normative argument suggests that countering the wishes of elected officials is contrary to the principles of democracy (Commanger 1943; Howard and Segal 2004). Furthermore, "the exercise of judicial review under the existing Constitution provides the Court with impressive institutional authority to inject itself into the policy-making process

by striking laws as unconstitutional. For that reason, a consensus has emerged that the benchmark measure of judicial activism should be the invalidation of federal legislation" (Lindquist and Cross 2009, 134).

Despite all of the concerns of a crisis, most empirical evidence suggests that the Court is quite reluctant to strike down federal statutes (Howard and Segal 2004; Lindquist and Cross 2009; Segal and Spaeth 1993). While Segal and Spaeth (1993) found that justices use their power of judicial review quite sparingly, they also found that when they do strike down a federal statute, it is generally ideologically motivated. Thus, their evidence suggests that liberals strike down laws that infringe on individual liberties, while conservatives are more likely to strike down laws that limit business interests (Segal and Spaeth 1993). Similarly, Lindquist and Cross (2009) isolate the ideological effect in order to determine what proportion of votes to strike down federal statutes is politically motivated. Like Segal and Spaeth, these researchers find evidence to support the claim that the Supreme Court's decisions to strike down statutes are driven by personal policy preferences (Lindquist and Cross 2009, 58). However, they also find that there is great variation among the individual justices and the likelihood that they will vote to invalidate a federal statute.[vii] Perhaps this variation is due to the justices' perceived roles, as role theory dictates that some justices may be more deferential to the elected branches, despite their ideology. This will be discussed further in the next section.

Howard and Segal (2004) review the propensity of justices to invalidate both federal and state laws and find that "ideological considerations predominate in the

decision to strike down" laws (138). Although the justices rely on their power of judicial review in very few circumstances, those circumstances are likely tied to ideology. Their research strategy relied on the number of requests for judicial review, the party requesting judicial review and the number of times the Court struck down the law. Their overall findings suggest that the Court is reluctant to exercise its power of judicial review, with only 21% of all requests for *certiorari* being granted and only 10% of those actually resulting in an invalidation of the law. Furthermore, they find that the Court generally will not strike a law unless a request is made.

One surprising finding for the authors was that there were more requests from liberal litigants than their were from conservative litigants (159 vs. 89) during an era of conservative control over the Court. Overall, their findings show that "several conservative and liberal justices condition their activism and restraint on the ideological position of the party that requests judicial review, while the pooled model showed the entire Court conditions judicial review on ideology and the perceived ideological position of the Solicitor General" (Howard and Segal 2004, 142).

Furthermore, it is important to note that a position of deference does not exist for state laws in the manner that it does for federal laws, as all of the justices were more likely to strike down state laws, including Justice O'Connor, a self-pronounced states' rights advocate (Howard and Segal 2004, 137). There are several reasons that explain why state laws are more likely to be invalidated than are federal laws. First, there are different rules regulating the judicial review of state and federal laws, under which federal laws are subject to strict scrutiny—a very stringent test that requires a

compelling governmental interest that outweighs constitutional concerns in invalidating the law. Second, the Supreme Court is the Court of last resort and is positioned at the top of the judicial hierarchy. As such, it is obliged to make sure that the laws of the land are in accord with the Supreme Court's decisions and that there are no great disparities across the judicial circuits, as well as to ensure that state laws do not violate federal laws or constitutional rights. For example, recent years have seen several video game laws passed by state legislatures struck down as the laws infringe on the First Amendment.[viii] The Supreme Court has recently agreed to hear a case[ix] pertaining to a California law restricting the sale of video games that has been overruled by the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit. Last, Lindquist and Cross (2009, 48-49) suggest that state laws are more susceptible to invalidation in that they are limited in their scope and do not represent the national consensus in the manner that federal laws arguably do. As such, the invalidation of a state law is not derided as a counter-majoritarian action in the same magnitude as a federal law is, and the state law "may be contrary to the national popular will" (Lindquist and Cross 2009, 49).

Legal Factors

Although the attitudinal model is quite successful in explaining why justices vote the way they do, there is ample evidence suggesting that a number of legal factors significantly influence the likelihood of a precedent's or federal statute's being overruled. These legal factors will be explained below: the unanimity of the decision; the presence

of amicus briefs or support from the Solicitor General; issue type; and, the lower court decision and direction.

It seems intuitive that unanimous decisions will have a lower tendency of being overruled, in that they carry more authority or integrity by the breadth of their consensus (Benesh and Reddick 2002; Spriggs and Hansford 2001). "Without unanimity, adherence to the rule of law is difficult because the first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle" (Banks 1999, 8). For example, Chief Justice Warren encouraged the Court's unanimity in such controversial decisions, such as *Brown v. Board,* knowing that a break from established precedent could cause a backlash (especially in the Southern states), but also because a unanimous decision enhances the legitimacy of the decision (O'Brien 2008).

Spriggs and Hansford (2001) found that a minimum winning coalition (MWC) increases the risk of a precedent's being overruled by 53.6% while a unanimous coalition decreases that risk by 46.9%. However, Banks (1999) finds that unanimity is *not* a guarantee that precedent is sacrosanct: 33.3% of the overrulings in this study were originally unanimous decisions. Clearly, consensus regarding the inviolability of unanimous precedents is mixed; while some argue that unanimity does or does not matter, others have found that the level of consensus does not reach statistically significant levels (Hurwitz and Stefko 2004). Perhaps the size of the voting coalition carries more weight when combined with other factors. For example, Spriggs and

Hansford (2001) found that the greater the consensus *and* clarity of a precedent, the less likely the precedent will be overruled.

On the other hand, dissents and previous negative interpretations are perhaps significant in raising the risk of a precedent's being overruled (Banks 1999; Spriggs and Hansford 2002). In fact, Spriggs and Hansford's (2002) results suggest that if a precedent has been treated negatively in the past, it is 57.4% more likely to be overruled. A precedent receives negative treatment if it is severely distinguished or limited in subsequent rulings by the Court, therefore weakening its precedential value. As Chief Justice Hughes so eloquently states, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court has been betrayed" (Banks 1999, 241). Recognizing the cues in the form of negative interpretations or written dissents, experienced litigators will pursue a strategy in order to unravel a weak precedent that is incongruent with their particular interests and those of the current Court majority (Baird 2007).

Bueno de Mesquita and Stephenson (2002) also emphasize that the justices will act *within* the constraints of precedents as a means for furthering their policy goals. Because of the communication and informational value that precedents offer, justices will use precedent in order to shape policy as close as possible to their preferences. The underlying theory is that Justices can influence the application of the law by deciding how to tailor its opinion.

> "The basic idea is that the development of lines of cases can communicate a legal principle better than an individual case

> could. An initial case may invoke a general phrase or principle such as, 'due process,' 'reasonable,' or 'compelling interest;' future cases will then develop and give meaning to these inherently vague phrases" (Bueno de Mesquita and Stephenson 2002, 757).

Following this logic then, older precedents will be more entrenched within the legal community, so that even when judges disagree with these rulings, they will be more reluctant to overrule them. Similarly, when a precedent is young, it can easily be molded and adapted to fit within the policy goals, making a break with precedent unnecessary. Accordingly, their results suggest that precedents of intermediate age are most vulnerable to being replaced and older precedents are only at risk when confronted by a Court with substantially divergent preferences (Bueno de Mesquita and Stephenson 2002). On the other hand, there are studies with completely contradictory findings. For example, one suggests that recent precedents are more at risk (Banks 1999) and another found that the age of the precedent did not reach statistically significant levels (Hurwitz and Stefko 2004).

Third parties and interest groups often file *amicus* briefs in order to signal to the Court the important policy implications of a particular case (Baird 2004; Wahlbeck 1997). Indeed, *amicus* briefs serve an important function to the Court by alluding to the saliency of a case or legal question. Wahlbeck (1997, 784) found that *amicus* support "did enhance the likelihood that the Court would produce expansive legal change." In analyzing search and seizure cases, Wahlbeck (1997, 795) found that, "on the occasions when the search is supported by substantial *amicus* support and the

government is not supported by *amici*, the chance of expansive legal change is twice as great as the benchmark."

Evidence suggests that justices also consider issue type and issue saliency when deciding to overrule legal precedents or invalidate statutes. Lindquist and Cross (2009) found evidence to suggest that ideological voting may be more pronounced in cases to overturn precedent because those cases are more ideologically salient. Similarly, the existing literature supports the underlying theory (Banks 1999; Benesh and Reddick 2002; Spriggs and Hansford 2001; 2002) that justices behave differently when considering the overruling of constitutional or statutory rulings. Using Brenner and Spaeth's analysis of the Rehnquist Court, Banks (1999) found that 65% of the overrulings dealt with constitutional concerns, while only 20% were statutory. Thus, the Supreme Court is responsive to institutional concerns in that it is more likely to adhere to precedent if the chance of being overruled is present. Evidence that the type of case may constrain the Court's actions is further proof of the significance of legal and institutional factors.

Lower court decisions also have shown to significantly influence future judicial decisions (Hagle 1993; Hagle and Spaeth 1993). Hagle (1993) found that "by controlling for the direction of the lower court decision, changes in voting patterns due to changes in the cases will not be mistaken for initial attitudinal instability" (1145). Furthermore, Hagle and Spaeth (1993) together emphasize the importance of the lower court decision as a controlling variable. In an examination of the Burger Court's

decisions on business cases, the lower court's decision significantly impacted every justice's decision.

Extra-Attitudinal Factors: The Political Environment and Public Opinion

Howard and Segal (2004) studied the effect of the political environment on the judiciary, specifically if a change in the partisan control of Congress and the presidency might result in a shift in the justices' preference for deference. The authors test the separation-of-powers hypothesis in order to determine if conservative justices are more or less likely to strike down liberal and/or conservative requests. They hypothesize that conservative and moderate-conservative justices should be the most constrained in their actions (i.e., showing great deference to liberal requests and the least support for conservative requests) during the period from 1993 to 1994 when the Democrats controlled both chambers of Congress, as well as the presidency. What they find, however, is that there is little evidence to support the idea that the justices act strategically in their interactions with Congress and the presidency. "All of the conservative and moderately conservative justices actually have a greater rejection rate of liberal requests to overturn federal laws during the purportedly constrained years than they do during the unconstrained years" (Howard and Segal 2004, 136). Interestingly, justices are responsive to the Solicitor General, who serves as the top attorney representing the United States government's interests before the Supreme Court. When the Solicitor General supports a request to strike, the justices were more likely to vote to strike the law. For example, the authors found that when President Clinton's

Solicitor General requested a law be struck down, the liberal justices were more likely to adhere to that request (Howard and Segal 2004, 141). This is likely because the Solicitor General, the U.S. attorney appointed by the president, and who likely shares his ideological bent, is requesting the invalidation of a law that will likely result in a policy decision that is close to the liberal justices' ideal point. Just as liberals in Congress will generally support a liberal president's legislative agenda (Conley 2000), Howard and Segal's (2004) evidence indicates that justices are also likely to be receptive to the policy agenda of the executive branch via the Solicitor General.

Just as a president is generally more successful in passing his legislative agenda during a period of unified government (Conley 2000), the Supreme Court may be most effective in impacting policy when the majority of the Court and the party of the president are the same. As mentioned above, the solicitor general, a known repeat player in the High Court, is able to influence the subsequent behavior of Supreme Court justices (Baird 2004; Howard and Segal 2004; Lindquist and Cross 2009). The serving president appoints the solicitor general and the two are likely of the same ideological bent (Carp and Rowland 1983; Wahlbeck 1997). If a conservative Court, as is the case with the Rehnquist Court, is met with a conservative solicitor general (appointed by a conservative president) who requests that a law be invalidated, it is almost certain that the Court will grant the request (Howard and Segal 2004). As such, a conservative Court could be empowered by the election of a Republican president, or a liberal Court may be emboldened by the election of a Democrat, as each are representative of the public mood to some extent.

Mishler and Sheehan (1993) suggest that the Court's ideological composition changes in response to shifts in the ideological orientation of the president and Congress, independent of membership change. It is intuitive that a Court's ideology will respond accordingly to changes of its membership; a newcomer to the bench may shift the Court to the left or right on the ideological continuum because of their respective ideology. However, there is a lack of consensus as to the influence of the president or Congress influencing the ideological make-up of the Court. Mishler and Sheehan (1993), however, find that Court's members may shape their ideology in regards to the acting President or party control of Congress. As such, a shift in the ideological position of the Court increases the likelihood that new policy areas may be addressed.

Furthermore, they found that the Court is responsive to public opinion both directly and indirectly (Mishler and Sheehan, 1993). Public support of the Supreme Court is essential to maintaining legitimacy, as the institution lacks any effective enforcement tools and its source of authority stems solely from its reputation (Barnum 1995; Caldeira 1986; Durr, Martin and Wolbrecht 2000). Although the Court is insulated from the public in that its members are not directly elected and have no accountability to a constituency, empirical evidence suggests that the Court infrequently strays too far towards a counter-majoritarian decision (Barnum, 1995; Mishler and Sheehan, 1993). As mentioned previously, the Court is dependent on the public for its very legitimacy because of its institutional structure. The Court's institutional prestige is heavily influenced by the public's perceptions of the Court as a neutral entity.

Similarly, the partisan control of Congress may affect the Court's actions. For example, Harvey and Friedman (2006) assert that when the Republicans gained control in Congress, the probability of the Court's striking down a liberal law rose by 47%. As such, "the Rehnquist Court's willingness to strike Congressional enactments may have been empowered or inspired by a conservative mood in the country or a conservative Congress that was unlikely to retaliate against the Court" (Lindquist and Cross 2009, 52). Thus, the Court is sensitive to the policy views of the democratically-elected branches. This is known broadly as a "separation of powers" model.

Furthermore, Durr, Martin and Wolbrecht (2000, 772) report that the Court's level of public support is a function of "the degree to which the Court's ideological position deviates from the public's ideological preferences." In theory, then, the members of the Court assess the so-called national mood by the party of the democratically-elected president and Congress. As such, justices at the ideological extremes may feel empowered when a president or Congress of their same ideological bent is in power and may be more willing to overrule established precedents or invalidate federal statutes. Furthermore, if the president has the opportunity to nominate new justices to the bench, thus changing the ideological composition of the Court, then there may be new formal opportunities to create policy (Mishler and Sheehan 1996).

Institutional Factors and Agenda Change

During the Rehnquist Court (1986 to 2005), the plenary docket shrunk from around 150 cases to less than 100 cases per term, consisting of a full briefing and oral

arguments before the Court. . According to the attitudinal model, the Supreme Court organizes its agenda according to the ideological composition of its members and specific policy areas in which it wishes to affect change in or create lasting policy implications (Baird, 2008; Lindquist and Cross, 2009; Mishler and Sheehan, 1996). According to Easterbrook (2002, 2), “these justices decide which cases to take, and they are likely to choose those in which the call to activism is hard to resist.” Furthermore, Mishler and Sheehan (1996) found that as the ideological center of the Court becomes more conservative, the Court will grant certiorari to a larger number of conservative cases and to more *strongly* conservative cases, or those with greater policy implications.

Although the Court cannot formally solicit cases, Baird (2004) offers evidence to suggest that the Court tacitly signals litigants demonstrating its willingness to hear cases pertaining to certain policy areas or salient issues. In this sense, the Court not only shapes its own agenda, but it is also able to choose well-crafted cases that allow it to shape policy in those areas (Baird 2004). She finds that the Supreme Court tacitly works together with its litigants and repeat players (such as the Solicitor General) to signal certain policy priorities of high saliency. The litigants interpret these cues, (namely, conflict, disagreement with lower court decisions, the presence of amicus briefs, and support for the Solicitor General and strategic considerations of the justices’), and then present well-crafted cases for the justices at a time lag of approximately five (5) years (Baird 2004, 766). A five-year time lag is hardly an obstacle for essentially life-tenured justices who wish to make policy.

Like other political actors, Supreme Court justices act strategically, weighing their own vote in light of the other eight members on the bench, in order to have the most far-reaching policy implications (Mishler and Sheehan 1996; Segal and Spaeth 1996; 2002;). According to the Rational Choice Model (Segal and Spaeth 2002), rational justices act strategically, considering the consequences of their own decision in light of the others on the bench in order to maximize their utility. For example, if a justice is weighing her decision to grant *certiorari* in a disfavored case in hopes of overturning the decision, but she knows that the Court will not overturn the decision, then it would be in her best interest to act strategically and to deny *certiorari*. Similarly, there are numerous examples of justices' voting against their preferences in order to achieve a unanimous decision, or upholding a well-established precedent and maintaining the status quo, or because they realize that their preferred outcome is impossible. As such, a change in the Court's ideological composition means that new voting coalitions may be created on the Court, pushing the policy center to the left or right.

The relative ideological composition of the Court in the period that will be examined leads to the following hypotheses: 1) the Court's agenda will reflect the ideological composition of the justices themselves, in that the four votes necessary to hear the case are comparatively easily garnered (Mishler and Sheehan 1996); and, 2) the justices at the ideological poles[x] may feel empowered to address issues that they theretofore would have ignored because they lacked the sufficient votes necessary to overrule a precedent (Mishler and Sheehan 1996).

Accordingly, the conservative composition of the Rehnquist Court should reflect an agenda in which ultimately liberal precedents and statutes may be overturned, conservative precedents will be strengthened, and conservative statutes will remain undisturbed. Similarly, a liberal-dominated Burger Court would likely result in an agenda in which conservative precedents and statutes are overturned, while liberal precedents and statutes will be upheld.

Summary

Judicial decision-making is often the topic of intense debate, although the attitudinal model has prevailed as the accepted paradigm for explaining why justices vote the way they do. As the existing literature attests, ideology is one of the strongest predictors of judicial behavior (Baird 2004; Howard and Segal 2004; Hurwitz and Cross 2004; Lindquist and Cross 2009; Segal and Spaeth 1996; 2002; Spriggs and Hansford 2001). Of particular interest for the purpose of this study are the justices who served on the Burger and Rehnquist Courts (between the years of 1969-2004) and are located at the polar ends of the ideology continuum. The ideologically polarized justices are more likely to behave as activists because of their disparate policy views. Furthermore, while a great deal of literature accepts the Supreme Court as a policy-making institution with partisan political goals, there is a lack of empirical evidence pointing to the systematic behavior of conservative and liberal justices who exist at the ideological extremes.

Although the Supreme Court is insulated, it does not operate in a political vacuum. As such, a number of legal, extra-legal and political variables will be employed

in an integrated model for a more complete and accurate view into one of the most complex institutions in our country. The next chapter will elucidate the hypotheses, variables and theoretical groundings that are central to this study.

CHAPTER TWO: MEASURING JUDICIAL ACTIVISM

Uniqueness of this Analysis

The attitudinal model, as developed by Segal and Spaeth (1993; 1996; 2002), has served as the dominant paradigm in explaining judicial decision-making, questioning the influence of legal factors as a predictor of justices' vote choice. The attitudinal model prescribes that ideology and attitudes are sufficient to predict and explain why Supreme Court justices vote the way they do. While the bulk of the literature pertaining to judicial decision-making supports the predictive power of the attitudinal model, its reliance on only one variable has earned it the nickname, "the naïve attitudinal model" (Mishler and Sheehan 1996, 198). In reality, legal factors and other extra-attitudinal factors have some influence over judicial decision-making (Banks 1999; Barnum 1985; Buena de Mesquita and Stephenson 2002; Harvey and Friedman 2006; Hurwitz and Stefko 2004;Mishler and Sheehan 1996;). Unanimous decisions provide evidence of such, as justices may consider factors beyond ideology in these instances of unanimity. Similarly, strategic voting in accordance with the rational choice model may motivate a justice to vote against his or her ideology in order to achieve the desired outcome (Segal and Spaeth 2002). Furthermore, evidence suggests that ideology may have a larger influence over more ideological justices than median justices, who may be more likely to respond to precedent or public opinion (Brenner and Stier 1996; Mishler and Sheehan 1996). Thus, it is evident that judicial decision-making is much more nuanced and complex than the attitudinal model alone might suggest.

As such, this research seeks to understand the behavior of the most ideological justices, those who are positioned at each pole on the ideological continuum. It is of particular theoretic interest to determine whether these justices are influenced by legal and extra-attitudinal factors, or if ideology alone dictates their decisions. Furthermore, this research seeks to understand the systematic differences between ideologically conservative and liberal justices, and to determine if they respond differently to legal and extra-attitudinal factors. To date, the bulk of the literature regarding judicial decision-making seems to address the ongoing debate between proponents of the attitudinal model and those of the legal model (Brenner and Stier 1996; Brisbin 1996; Buena de Mesquita and Stephenson 2002; Knight and Epstein 1996; Mishler and Sheehan 1996; Segal and Spaeth 1996; Songer and Lindquist 1996; Spriggs and Hansford 2001; 2002) or focuses on the median justices (Baird 2004; Brenner and Stier 1996; Bonneau, Hammond and Wahlbeck 2007; Grofman and Brazill 2002;). There is very little evidence to increase our understanding of the differences and motivations between ideological justices who are very conservative or liberal.

The focus of this research is centered on the most ideological justices because it is presumed that their behavior may be characterized as the most activist and ideologically motivated (Brenner and Stier 1996; Lindquist and Cross 2009; Segal and Spaeth 1996). The attitudinal model has demonstrated that the likelihood of a precedent's being overturned or a federal statute's invalidation increases when the ideological distance between the justice's ideal point and the policy outcome is the greatest. By the simple fact that the most ideologically conservative and liberal justices

are at opposite poles, the ideological distance is thereby likely to be greatest in cases that request the invalidation of a statute or address a precedent's longevity. The attitudinal model dictates that ideology is the driving factor behind judicial decision-making, so it is of particular interest to determine if legal factors or extra-attitudinal factors influence decision-making for these ideological justices. By isolating and examining the most ideological justices, this research intends to determine the extra-attitudinal and legal factors that influence decision-making beyond ideology alone.

Data and Methods

The period of analysis for the purposes of this research will be the Burger (1969-1986) and Rehnquist (1986-2005) Courts. These two Courts allow a logical juxtaposition of an ideologically liberal and conservative Court and provide a more balanced sample of extreme ideologues than would the examination of only one of these Courts. Nineteen justices served during the period examined, and six of these may be characterized as extreme ideologues.[xi]

The most ideological justices were determined using Martin and Quinn Scores (2002), providing an ideological measure for each justice for each term that they served on the Supreme Court. These scores are derived using votes on the merits of a case that were collected from the United States Supreme Court Database and they place each justice along the ideological continuum. The Martin and Quinn (2002) scores are methodologically superior to previous ideological scores that have been developed, in that they: 1) are based on actual behavior (as opposed to news editorials, such as the

Segal and Cover (1989) propose); 2) are dynamic, allowing longitudinal comparisons; and 3) have demonstrated high correlations for a number of legal issues, not simply those concerning cases regarding civil liberties and civil rights votes (2002, 13). Furthermore, they have demonstrated a higher correlation than the Segal and Cover (1989) scores (Martin and Quinn 2002, 13). The scale ranges from -6.656 (extremely liberal, as demonstrated by Justice Douglas) to 3.884 (extremely conservative, as demonstrated by Justice Thomas).

Using the Martin and Quinn Scores (2002), the ideology scores of each justice for the years 1969 through 2004 were recorded, as well as the calculated mean and standard deviation values. For the purposes of this study, the most ideological justices are defined as those justices who are more than one standard deviation away from the policy mean for each Court term. These justices are: Douglas, Brennan, Rehnquist, Marshall, Stevens and Thomas. These six justices' votes for each Court term that they were identified as an ideologue will serve as the *unit of analysis* in this examination of judicial behavior.

This study will employ multivariate regression. Regression analysis is the preferred method for examining the influence of several independent variables, as it isolates "the effect of one independent variable on the dependent variable, while controlling for the effects of other independent variables" (Pollock 2009, 187). Thus, we can examine the effect of each independent variable on the dependent variable while holding the other variables constant. Furthermore, multiple regression helps to detect spurious relationships that may interfere with the analysis.

Two *dependent variables* will serve as measures of judicial activism for the focus of this study. First, the overruling of legal precedent serves as one of the dependent variable, as precedent is one of the most easily understood and observable legal factors. Thus, when justices decide cases according to previous legal precedent, it is obvious that they are following the law and, thus, are serving as neutral arbiters of the law. However, when a precedent is overruled, however rare that may be, claims of judicial activism are made and the legitimacy of the decision is sometimes called into question. "The most visible and dramatic instance of interpretative instability comes when the Court explicitly overrules one of its own earlier decisions" (Canon 1983, 241). This study will utilize data from the U.S. Supreme Court Database (Spaeth 2005) in order to determine which justices' votes resulted in the alteration of precedent or the invalidation of a federal statute. Precedent conformance will be measured by justices' votes that resulted in the alteration of precedent for cases that were orally argued before the Court during the 1969 through 2004 terms. Votes are coded as 0 if the justice voted for the alteration of precedent (a preference vote) and as 1 if the justice's vote conformed to the precedent (a precedent vote).

The second dependent variable that has been chosen for the purposes of this study is a measure of judicial activism measured by votes to invalidates federal statutes. To measure the second dependent variable, I relied on data collected from the U.S. Supreme Court Database. Accordingly, justices' votes that deemed an act of Congress as unconstitutional will be coded as 1, and all votes that upheld the statute will be coded as 0.

A number of independent variables will be measured in order to capture the effect of possible attitudinal, extra-attitudinal and legal factors that influence the likelihood that a justice will vote to overrule precedent or invalidate a statute:

Ideology Scores. The Martin and Quinn scores identifying each justices' ideal point along the ideology continuum will be used. The Martin and Quinn scores have a range of -6.656 (extremely liberal, as demonstrated by Justice Douglas) to 3.884 (extremely conservative, as demonstrated by Justice Thomas).

Decision Direction. In order to account for the ideology of the case outcome, a variable denoting the direction of the decision will be used. The decisions will be coded using data from the U.S. Supreme Court Database so that conservative case outcomes will be coded as 1, liberal case outcomes will be coded as 2, and those cases where a direction can not be specified are coded as 3.

Number of Dissents. In order to account for the weight of the decision, a variable measuring the number of dissents written by justices in the minority of the original case will be included. The literature has not reached a consensus to date regarding the influence of the vote split on the likelihood that a precedent is overturned, yet it seems intuitive that unanimous decisions and those with fewer corresponding dissents are less likely to be overturned (Banks 1999; Spriggs and Hansford 2002).

Lower Court Decision. Hagle (1993) found that "by controlling for the direction of the lower court decision, changes in voting patterns due to changes in the cases will not be mistaken for initial attitudinal instability" (1145). Furthermore, Hagle and Spaeth (1993) together emphasize the importance of the lower court decision as a controlling

variable. In an examination of the Burger Court's decisions in economic cases, the lower court's decision was a statistically significant influence in economic decisions for every justice's vote. To measure the lower court decision, this study will rely on data from the U.S. Supreme Court Database. The variable *lcdisposition* specifies the treatment of the case in issue's previous rulings; that is, whether the lower court affirmed, reversed, remanded, for example, the previous decisions based on the merits of the case (Spaeth 2005). This variable is coded 1-12 as follows: 1 – stay, motion granted; 2 – affirmed; 3 – reversed; 4 – reversed and remanded; 5 – vacated and remanded; 6 – affirmed and reversed in part; 7 – affirmed and reversed in part and remanded; 8 – vacated; 9 – petition denied or appeal dismissed; 10 – modify; 11 – remand; 12 – unusual disposition.

Lower Court Disposition Direction. This variable specifies the direction of the lower court decision and is coded as follows: 1 – conservative; 2 – liberal; 3 – unspecifiable.

Issue Type. Each case will be coded according to issue type in order to determine if there is an underlying association with a justice's decision and to determine if any patterns arise along ideological lines. The values of this variable are coded as follows: 1 – Criminal Procedure; 2 – Civil Rights; 3 – First Amendment; 4 – Due Process; 5 – Privacy; 6 – Attorneys; 7 – Unions; 8 – Economic Activity; 9 – Judicial Power; 10 – Federalism; 11 – Interstate Relations; 12 – Federal Taxation; 13 – Miscellaneous; 14 – Private Action.

President's Ideology. A continuous variable representing the president's ideology will be measured using Poole's (1998) "common-space" scores, coded as -1 (extremely liberal) to 1 (extremely conservative).

Congress' Ideology. Using the Poole and Rosenthal DW-nominate scores, the mean views of all the members of Congress will be calculated to represent the ideology score. These scores are coded using a scale from -1 (extremely liberal) to 1 (extremely conservative). Thus, the ideological distance between the Supreme Court and Congress can be determined.

Divided vs. Unified Government. A dummy variable to signify the presence of unified (the same party controls both the White House and both chambers of Congress) or divided (one party controls the White House and another party controls either one or both chambers of Congress) government will be employed. A unified government will be coded as 0, and divided government will be coded as 1.

These variables will be tested via multiple regression analysis in order to examine the following hypotheses:

Hypothesis 1a: In a comparison of Supreme Court justices who served between 1969 and 2004, those who are the most ideological (at the ideological extremes according to the Martin and Quinn Scores (2002)) will vote to overrule established precedents more frequently than their centrist counterparts.

Hypothesis 1b: In a comparison of Supreme Court justices who served between 1969 and 2004, those who are the most ideological (at the ideological extremes

according to the Martin and Quinn scores (2002)) will vote to invalidate federal statutes more frequently than their centrist counterparts.

Hypothesis 2a: The justices who are identified as the conservative ideologues will likely overrule more liberal precedents than their conservative non-ideologue colleagues.

Hypothesis 2b: The justices who are identified as the liberal ideologues will likely overrule more conservative precedents than their liberal non-ideologue colleagues.

Hypothesis 3a: When the party of the president and the majority of Congress are both aligned with the party of the majority on the Court, then the justices will be less likely to invalidate federal statutes. (Unified Government Hypothesis)

Hypothesis 3b: When the party of the president and the majority of Congress are NOT aligned with the party of the majority on the Court, then the justices will be more likely to invalidate federal statutes. (Divided Government Hypothesis)

Summary

This analysis is intended to supplement previous attitudinal studies that propose that Supreme Court justices are political beings who use their personal ideology, values, and attitudes in order to decide questions of the law. Specifically, this study examines the systematic behavior between the ideologues on the bench. Undoubtedly, the role of the Court has changed as it delves into political questions that were theretofore reserved for democratically-elected politicians. As such, political scientists may develop a deeper understanding of the Court within a political context and determine if the

ideological patterns of behavior that are evident in the other branches of government are emergent on the Court as well.

CHAPTER THREE: OVERRULING SUPREME COURT PRECEDENTS

Findings and Analysis

The first measure of judicial activism examined for the purposes of this research is the overruling of legal precedent. In general, a high degree of precedence conformance represents judicial restraint in that by following established legal precedents, justices are noticeably following the law. Simply put, "The binding nature of precedent is seen as a constraint on judicial power and hence a limitation on activist decision-making" (Lindquist and Cross 2009, 123). Precedent bolsters predictability, in addition to prestige and legitimacy of the High Court. As such, it is not surprising that the Court's overruling of legal precedent is a rare occasion. Justices are reluctant to overrule established precedent in order to maintain the legitimacy of the Court (Epstein and Knight 1996; Lindquist and Cross 2009; Young 2002). "The authority of precedent is generally thought to be one of the most important institutional characteristics of judicial decision-making" (Young 2002, 1150).

Certainly the reluctance of justices to overrule precedent is apparent in empirical evidence. From 1969 to 2004, spanning the tenure of the Burger and Rehnquist Courts, the justices voted to overrule precedent in 91 cases out of a total of 4,087 that received plenary review. Table 1 shows the percentage of cases in which precedent was overturned for each Court term of the observed period. The data were collected from the United States Supreme Court Database (Spaeth 2005), identifying cases that resulted in the formal alteration of precedent for each court term. Votes were counted as "for the alteration of precedent" if they are coded in the database as: 1 – voted with

majority or plurality; 3 – regular concurrence; and 4 – special concurrence (Spaeth 2005).

Table 1 Percentage of Cases Overturning Precedent by Court Term

Court Term	Percentage of Cases Overturning Precedent	Court Term	Percentage of Cases Overturning Precedent
1969	2.2%	1987	1.4%
1970	2.6%	1988	4.4%
1971	1.5%	1989	0.8%
1972	2.1%	1990	4.5%
1973	1.4%	1991	1.9%
1974	1.6%	1992	0.9%
1975	4.3%	1993	2.4%
1976	4.0%	1994	3.4%
1977	3.1%	1995	5.3%
1978	0.8%	1996	0%
1979	2.3%	1997	3.3%
1980	0.8%	1998	1.3%
1981	0.7%	1999	1.3%
1982	1.3%	2000	1.3%
1983	2.0%	2001	4.0%
1984	1.4%	2002	1.4%
1985	2.7%	2003	2.8%
1986	4.1%	2004	1.4%

Accordingly, evidence suggests that the Burger Court began its tenure as fairly activist, overruling two to three precedents per term, generally at a rate of 2%, more or less. President Nixon appointed Burger to the Supreme Court to replace Chief Justice Warren in 1969 with the expectation that Burger would prove to be a strict constructivist in his judicial interpretations. Moreover, conservatives hoped that Chief Justice Burger would overrule some of the controversial rulings of the Warren Court. However, empirical evidence suggests that the Burger Court was not as activist as some

conservatives may have hoped. Instead, more than half (54.35%) of the cases that resulted in the overruling of precedent actually produced liberal decisions. Only twenty-one cases (45.65%) reached a conservative outcome.

In 1975, the Burger Court appears extremely activist, overruling six precedents in one term (4.3%), although there does not appear to be a decisive pattern or explanation. These cases spanned a variety of issue topics, including: Criminal Procedure, Economic Activity, the First Amendment, Federalism and Unions. Overall, the Burger Court appeared to be the most activist, overruling precedents in cases pertaining to Economic Activity (17) and Criminal Procedure (11). Towards the end of Chief Justice Burger's tenure, again there is a rather high rate of precedents' being overruled, and this pattern seems to continue into the Rehnquist Court.

Indeed, the Rehnquist Court begins its tenure clearly abandoning legal precedent, thus prompting the indignation of Justice Marshall, "who denounced Rehnquist's plurality opinion in [*Payne v. Tennessee*] on the grounds that the Court was creating a novel theory of *stare decisis*" (Banks 1999, 1). In fact, during the 1995 Court term, 5.3% of the cases argued before the Supreme Court resulted in the overruling of precedent. The actual number of cases overruled in 1995 was four, but the percentage rate for that Court term appears high because of the shrinking docket that characterized the Rehnquist Court. Of these four cases, two were decided in the liberal direction (pertaining to the First Amendment and judicial power) and two were decided in the conservative direction (concerning due process and federalism). It appears that the Rehnquist Court heed to existing legal precedent more often as its tenure increases.

The majority of cases (38%) examined concerned Criminal Procedure and, not surprisingly, 60% of these cases that resulted in the overruling of precedent led to a conservative decision.

Table 1 provides some background information regarding the rate of precedence conformance on the Burger and Rehnquist Courts in the aggregate, but the focus of this study is on the individual justices, specifically those who are identified as extreme ideologues. As such, I calculated the percentage of each justice's votes to overturn precedent (the numerator) divided by the total number of votes (the denominator) cast during their service on the Burger and/or Rehnquist Courts. Table 2 shows the results for both the ideologues and the non-ideologues' rates of overruling precedent.

Surprisingly, comparing the mean rate of justices' votes to overrule precedent shows that the mean for the ideologues (.0132) is actually lower than the mean for the non-ideologues (.0156), suggesting that the more centrist justices vote to overrule precedent *more often* than the justices who have been characterized as ideologues. The standard error for the ideologues' mean rate of overruling precedents is .0012 and the standard error for the non-ideologues' mean was calculated as .0007. As such, in an infinite number of random samples of justices, .0108 represents a minimum mean rate of precedents overruled for the ideologues, and .0170 represents a maximum mean rate of precedents overruled for the non-ideologues. Furthermore, the standard error of the difference between the ideologues and the non-ideologues' means is .0014. Using the one-tailed test of statistical significance, the null hypothesis—that the observed

differences in the mean rates of overruling precedent between the ideologues and the non-ideologues occurred by chance or random sampling error—can be rejected.

Mean difference – 1.645(standard error of the difference)

.0024 – 1.645(.0014) = .0001

The p-value was determined to be .0436, so the probability value is less than .05, indicating that the null hypothesis can safely be rejected (Pollock 2009).

Table 2 Percentage of Total Justice Votes to Overturn Precedent on the Burger and Rehnquist Courts, 1969-2004

Justice Name	Percentage of Total Justice Votes to Overturn Precedent
William O. Douglas *	0.82%
Anthony Kennedy	1.07%
Potter Stewart	1.07%
Thurgood Marshall *	1.23%
William Brennan *	1.25%
John Paul Stevens *	1.39%
David Souter	1.49%
Stephen Breyer	1.49%
Warren Burger	1.52%
Clarence Thomas *	1.56%
John Marshall Harlan II	1.58%
Lewis F. Powell	1.59%
Byron White	1.63%
Sandra Day O'Connor	1.63%
William H. Rehnquist *	1.68%
Hugo Black	1.72%
Antonin Scalia	1.79%
Ruth Bader Ginsburg	1.79%
Harry Blackmun	1.93%

* = Ideologue Justices

The total mean rate for all of the justices' votes (ideologues and non-ideologues alike) to overrule precedent is .0149. It is apparent that the majority of the non-

ideologue justices actually vote to overturn precedent at a greater rate than the total mean, and certainly at a greater rate than the most ideological justices. Thomas and Rehnquist have the highest rates of overruling precedent of the six ideologues, and eight of the twelve non-ideologues (Justices Black, Blackmun, Ginsburg, Harlan, O'Connor, Powell, Scalia, and White) have a higher rate of overturning precedent than the total mean. Accordingly, Justice Blackmun has the highest rate of overturning precedent (1.93%) during the observed period. The evidence also demonstrates the infrequency of which justices vote to overturn precedent, as none of the justices' rates lie above the 2% line, although Justice Blackmun's votes come close.

These results do not support Hypothesis 1 which asserted that the ideologue justices would vote to overrule precedent at higher rates than would the non-ideologues. The hypothesis was based on the theory that because the ideological distance between the justice's ideal point and the policy outcome of the precedent was likely largest for the ideologue justices, more activist behavior would occur. However, these results suggest that the agenda likely plays a larger role than originally hypothesized. Because of the conservative nature of the Rehnquist Court, the agenda is likely comprised of weak liberal precedents and strong conservative precedents. Thus, the conservative justices have more opportunities to overrule liberal precedents, which could account for such high rates of overruling precedent by non-ideologues such as Justices O'Connor and Scalia. Furthermore, previous evidence (Lindquist and Cross 2009) suggests that centrist justices are more likely to cross ideological lines when voting to overrule precedent. This could likely explain the high rates of overruling by the non-ideologues,

as they are more likely to overrule precedents regardless of the ideological incongruence between their ideal point and that of the precedent, whereas the ideologues are likely to overrule precedents only when the ideological distance is great.

In order to examine the ideological influence of justices' voting behavior, I calculated the proportion of cases that resulted in a liberal outcome for each justice for his or her total votes in all cases, as well as cases that resulted in the overruling of precedent. Hypothesis 2a theorized that the ideologue justices would have more pronounced ideological voting behavior. Yet, the results presented in Table 3 show that ideological patterns are evident for all of the justices, ideologues and non-ideologues alike.[xii] In fact, according to Table 3, some of the non-ideologues demonstrate much more pronounced ideological voting than the ideologues. In comparing Justices Breyer and Brennan, it is apparent that Justice Breyer exhibits ideological voting more often. Although Justice Breyer voted to overrule precedent less often than did Justice Brennan, when he did, it was almost always (90%) in order to achieve a liberal outcome. As such, these results do not substantiate the theoretical grounding of Hypothesis 2a.

Justice White has served as a model of judicial restraint and moderation (Lindquist and Cross 2009). The results of Table 3 bolster this characterization, as his votes to overrule precedent do not show any specific ideological leaning. Surprisingly, Justice Thomas also exhibits an ideologically moderate voting record to overrule precedent, as half of his votes to overrule precedent were in the liberal direction. This

seems completely out of character for a justice that is considered a conservative ideologue (Cohen 2005; Lindquist and Cross 2009).

Table 3 Justices Votes to Overrule Precedent by Ideological Outcome

Justice	Total Votes to Overrule Precedent	% Liberal Votes to Overrule Precedent	% of Liberal Votes That Do Not Alter Precedent
Blackmun	45	51.11%	50.09%
Brennan*	36	66.67%	65.43%
Breyer	11	90%	54.45%
Burger	32	43.75%	36.7%
Ginsburg	13	84.62%	55.81%
Harlan	3	66.67%	49.15%
Kennedy	31	41.94%	42.66%
Marshall*	36	75%	65.56%
O'Connor	36	22.22%	40.82%
Powell	32	40.62%	38.72%
Rehnquist*	57	24.56%	33.04%
Scalia	22	27.27%	36.60%
Souter	16	75%	55.42%
Stevens*	33	57.58%	55.78%
Stewart	26	65.38%	45.85%
Thomas*	14	50%	34.58%
White	46	50%	45.12%

* = Ideologue Justices

The literature overwhelmingly confirms that judicial behavior is largely driven by personal preferences (Baird 2008; George and Epstein 1992; Hagle and Spaeth 1993; Hurwitz and Stefko 2004; Lindquist and Cross 2009; Pritchett 1968; Schubert 1964; Segal and Spaeth 1996; 2002); thus, the justices' corresponding rates of precedent conformance must be evaluated while also considering the effects of ideology and the agenda. As previously mentioned, substantial evidence exists suggesting that conservative justices vote to overrule liberal precedents, while liberal justices vote to

overturn conservative precedents (Lindquist and Cross 2009; Segal and Howard 2001). For example, Howard and Segal (2001) found that Justices Scalia and Thomas and Chief Justice Rehnquist voted to overrule liberal precedents twice as often as they voted to overrule conservative precedents, yet liberal Justices Brennan, Stevens and Souter demonstrated support that crossed ideological lines. As such, a great deal of disparity exists between justices ideological behavior.

As such, in order to understand the various influences on the justices' votes, a series of multivariate linear regression analyses were completed. A number of variables were used in the regression analyses with data collected from the United States Supreme Court Database (Spaeth 2005), the Martin and Quinn Justice Ideology scores (Martin and Quinn 2002), as well as Poole and Rosenthal's (1998) common space scores calculating the ideology scores for Congress and the Presidents for each court term. Two regressions were estimated, the first examining the six justices who were identified as ideologues for the purpose of this study, and the second regression represents the 13 non-ideologue justices. The justices' votes for or against precedent served as the unit of analysis, and each case within the dataset was coded to incorporate the justices' ideology during that specific Court term, the president's ideology score and the ideology score of Congress in the aggregate. A dummy variable signifying divided or unified government was included along with other variables from the United States Supreme Court Database, including: issue area, direction of decision, lower court decision, and the number of dissents. Table 4 shows the results of the regression analysis for the six justices characterized as ideologues (Brennan, Douglas,

Marshall, Rehnquist, Stevens and Thomas). The adjusted R^2 of .027 indicates that the total relationship between all of the variables is rather weak—of all of the variation among these ideologue justices' votes, only about 3% is explained by the independent variables.

In regards to judicial decision-making, consensus dictates that ideology is one of the most descriptive variables for predicting behavior. The regression coefficient for the ideology score is -.028, indicating an inverse relationship. Accordingly, for every one-unit increase in the independent variable (as justices become more conservative), precedence conformance decreases by .010 units. Looking at the t-ratio of -6.843, it is apparent that the coefficient is well above the 2-or-greater rule, and we can reject the null hypothesis. Furthermore, the significance coefficient of .000 for the justices' ideology score indicates that the results are statistically significant.

These findings accord with the bulk of the literature concerning judicial decision-making that suggests that ideology is one of the most important variables for explaining behavior. Furthermore, the Pearson correlation coefficient describing the relationship between the justices' ideology and corresponding vote is r = -1.00, indicating a negative association. Thus, as the ideology score of the justice increases (becomes more conservative), precedent conformance decreases. These results must be considered in the context of the period examined, and are likely the product of the conservative membership of the Court. During the observed period, every Supreme Court nominee (with the exceptions of Justices Ginsburg and Breyer, who were appointed by President Clinton) was appointed by a conservative president. As such, a different court

comprised of a more balanced or more liberal membership would certainly yield different results. Furthermore, the docket composition and the cases reviewed certainly sways these results as well. A conservative majority will likely shape the court's docket to reflect a conservative agenda, so that weak liberal precedents are overturned and conservative precedents are upheld.

Table 4: Regression Analysis of Ideologue Justices to Overrule Precedents

Variable	Unstandardized Coefficients		Standardized Coefficients		
	B	Std. Error	Beta	t	Sig.
Constant	2.003	.100		20.055	.000
Justices' Ideology	-.028	.004	-.114	-6.843	.000**
Lower court's decision direction	.000	.032	.000	.013	.990
Lower court decision	.008	.008	.015	1.030	.303
Issue area	-.033	.004	-.113	-7.516	.000**
Direction of the decision	-.117	.032	-.057	-3.668	.000**
R square = .028 Adjusted R Square = .027 Std. Error of the Estimate = 1.024 * $p \leq .05$ ** $p \leq .001$ N = 4462					

As the results in Table 4 demonstrate, there are two other variables in addition to ideology that achieve statistical significance: the direction of the decision (conservative or liberal) and the issue area. These results accord with previous findings suggesting that the issue area is a legal factor that significantly influences justices' decisions to overrule precedent (Banks 1999; Hagle and Spaeth 1993; Wahlbeck 1997). However,

this variable is likely interacting with ideology, as conservatives and liberals are known to be influenced by different issue areas (Hagle and Spaeth 1993; Lindquist and Cross 2009); for example, evidence demonstrates that liberals are more likely to vote in order to expand civil rights whereas conservatives will vote to limit those rights. Both coefficient estimates are negatively signed with very large t-statistics indicating that the null hypothesis can be rejected.

This analysis would not be complete without a comparison of the ideologues behavior with that of the non-ideologues. As such, Table 5 provides the results of the regression analysis completed with all of the non-ideologues' votes for the period examined.

In a comparison of the justices' mean rates of precedent conformance, it became apparent that the non-ideologues had a higher rate of overruling precedents than the ideologues. A comparison of the regression analyses shows that there are several similarities between the two groups. One difference is that non-ideologues seem to consider one legal factor that the ideologues do not as the direction of the lower court decision reached statistical significance for the non-ideologues. Furthermore, the direction of the decision does not reach statistically significant levels, possibly implying that the ideological direction of the policy outcome is not as influential for the non-ideologues as it is for the ideologue justices. Furthermore, ideology does not reach statistically significant levels for the non-ideologues. The coefficient of the ideology variable is also in the negative direction, but it is not nearly as strong of an influence for

the non-ideologues as the ideologues. As such, other variables besides ideology are the driving force behind non-ideologues likelihood of overruling precedent.

Table 5: Regression Analysis of Non-Ideologue Justices to Overrule Precedent

Variable	Unstandardized Coefficients		Standardized Coefficients		
	B	Std. Error	Beta	t	Sig.
Constant	2.204	.199		11.077	.000
Justices' Ideology	-.010	.021	-.053	-.473	.637
Lower court's decision direction	-.170	.079	-.088	-2.161	.031*
Lower court decision	.006	.015	.014	.383	.702
Issue area	-.041	.010	-.155	-4.071	.000**
Direction of the decision	-.128	.077	-.067	-1.665	.096
R square = .029 Adjusted R Square = .024 Std. Error of the Estimate = .940 * $p \leq .05$ N=9659					

Hence, we can discern that the ideologues and the non-ideologues differ in their treatment of precedent in that ideology is a stronger influence for the ideologues in their votes to overrule precedent, although the non-ideologues actually have slightly higher rates of overruling precedent. These findings suggest that the non-ideologues may consider some legal factors, such as the issue area and the lower court's decision, while deciding to overrule precedent.

Logistic Regression analysis was estimated for the ideologue justices in order to further examine the relationship between ideology and overruling precedent. The results depict a negative relationship, as the odds ratio for the relationship between

ideology and overruling precedent is .211. Using this odds ratio, it can be determined that for every one-unit change in ideology using the Martin and Quinn (2002) scores decreases the odds of overruling precedent by 78.9%. The results indicate that only two independent variables achieve statistical significance: the decision direction (.050) and the justices' ideology (.023). Nonetheless, adding all of the independent variables improves the predictive power of the likelihood of overruling precedent. The chi-square test statistic indicates that the extant model is an improvement on the MLE initial know-nothing model, as the value is 125.274. This value, although not statistically significant (.98), suggests that the independent variables improve our ability to predict the likelihood of overruling precedent.

Table 6 Logistic Regression Analysis for Ideologue Justices

Model Estimates	Coefficient	Significance
Constant	1.253	
Ideology	8.784	.023
Decision Direction	1.331	.050
Lower Court Decision	1.280	.073
Lower Court Decision Direction	1.318	.089
Issue Area	1.533	.139
Model Summary	**Value**	**Significance**
Chi-Square	125.274	0.98
Cox-Snell R-Square	.356	
Nagelkerke R-Square	.422	

In reviewing the results for the ideology variable, it becomes apparent that a non-linear relationship exists between the justice's ideology and the likelihood that the justices vote to overrule precedent. In other words, it was hypothesized that the likelihood of overruling precedent would increase for those justices who lie at the extreme values along the ideological continuum. However, the results suggest that the middle range of the ideology variable has the most contrast, as a one-unit change in ideology can sway the justice to vote in order to uphold precedent or vote to overrule precedent depending on his or her specific point along the ideological continuum.

The logistic regression estimate for the non-ideologue justices indicates that only the lower court decision variable achieves statistical significance (.008). The relationship between ideology and the likelihood of overruling precedent is quite difficult to determine as there is great variance among the ideology values. As such, the results from the logistic regression suggests that the relationship between ideology and the likelihood of overruling precedent is non-linear, as there is not a uniform association for predicting a change in ideology with the likelihood that precedent will or won't be overruled. Ideology combined with the other independent variable provides a more detailed picture for increasing the predictive power.

CHAPTER FOUR: JUDICIAL REVIEW OF STATUTES

Findings and Analysis

The second measure of judicial activism concerns the judicial review of federal statutes. The Supreme Court established the power of judicial review in the landmark case *Marbury v. Madison* (1803), creating the power to rule acts of Congress unconstitutional. Although some may view this power as essential for maintaining the balance of power among the three federal branches of the U.S. government, others argue that it disrupts the delicate balance. "By voiding an act of the elected branches, the Court arguably places itself in the position of disrupting the constitutional separation of powers by assuming legislative power" (Lindquist and Cross 2009, 47). As such, the invalidation of federal legislation is considered the "benchmark measure" of judicial activism (Lindquist and Cross 2009, 48).

Similar to the overruling of legal precedents, the invalidation of federal statutes is a rare occurrence. The United States Supreme Court Database (Spaeth 2005) provides data containing justices' votes in cases that ruled an act of Congress as unconstitutional. For the purposes of this examination, only federal statutes were considered, excluding cases pertaining to the invalidation of state, municipal and local laws. During the Burger and Rehnquist Courts, an act of Congress was declared unconstitutional on fifty-four (54) occasions. Figure 1 shows the frequency distribution of these instances, as well as the total number of challenges.

As the findings demonstrate, the Burger Court (1969-1986) used the power of judicial review quite sparingly. With the exception of five Court terms (1969, 1970,

1972, 1975 and 1982), the justices voted to invalidate statutes at a rate of one or less per term, despite the fact that there was a large amount of opportunities to do so. Perhaps the most interesting finding is that 77.27% of these cases were decided in the liberal direction. Furthermore, the majority of these cases concerned Civil Rights and the First Amendment. Of the eight cases that the Burger Court justices ruled unconstitutional pertaining to Civil Rights, each one was decided in the liberal direction.

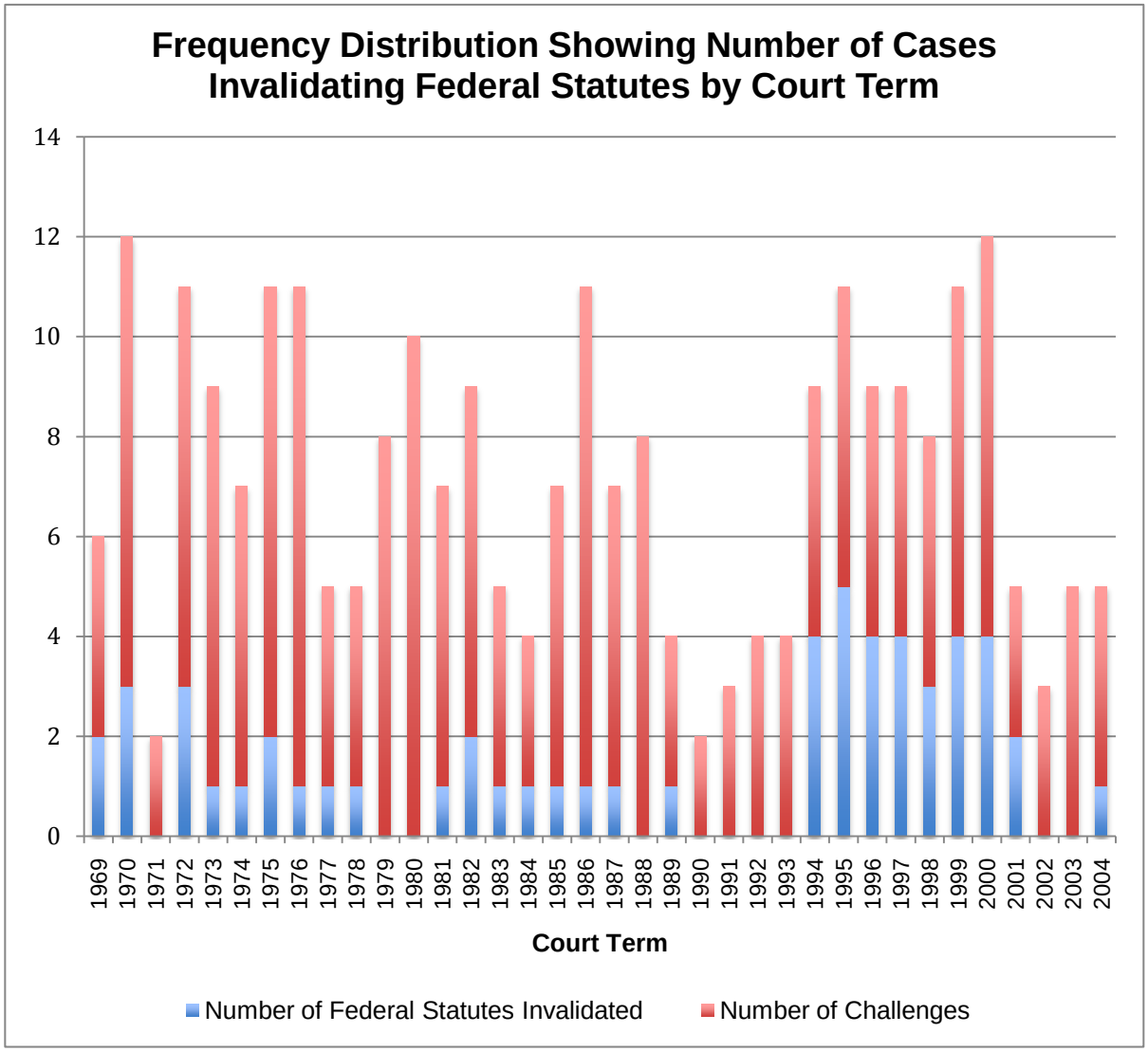

Figure 1 Frequency Distribution of Federal Statutes Challenged and Invalidated by Court Term

The Rehnquist Court (1986-2005) begins its tenure exhibiting quite restrainist behavior. In fact, for the first eight years of Chief Justice Rehnquist's service, only three acts of Congress were ruled unconstitutional. However, the next eight years demonstrate a disproportionate amount of statutes that were invalidated by the Court—a total of 30. When considering the political environment of that time period, these results seem to substantiate the findings of Harvey and Friedman (2006), who provide evidence to suggest that the Supreme Court is influenced by Congress' ideological preferences. The majority of these rulings declaring Congressional acts unconstitutional occurred when the Republican Party maintained control of Congress. According to Harvey and Friedman, who examined the Rehnquist Court from 1987 to 2001, "The justices were less likely to hear cases involving constitutional challenges to liberal statutes from 1987 to 1994, when the House and the Senate were under Democratic control, than they were from 1995 to 2001, when Republicans had a majority in both chambers" (2006). These findings indicate that the justices consider the political environment and the ideological make-up of Congress. For example, their reluctance to invalidate liberal statutes during a period of Democratic control of Congress may be evidence of the court's concern for the public's preferences, lest it be characterized as a countermajoritarian institution (Barnum 1985; Mishler and Sheehan 1993).

The issue of utmost concern during the Rehnquist Court was the First Amendment as almost half (43.75%) of these federal statutes pertained to this Constitutional right. Another 25% concerned federalism, not surprising considering the

number of states' rights advocates on the Rehnquist Court. Perhaps most surprising is that the majority (53.13%) of these rulings resulted in a liberal decision. However, when the issues are considered in conjunction with the decision direction, the results are similar to what would be expected from the Rehnquist Court: all (*N*=8) of the cases concerning federalism were decided in the conservative direction, and almost all (92.9%) of the First Amendment cases where decided in the liberal direction. The First Amendment requires a strenuous test of strict scrutiny under which the Justices review the law, making it a difficult task to limit the rights enumerated in the First Amendment.

Multivariate regression analysis was completed using justices' votes to invalidate federal statutes as the dependent variable. Table 7 shows these results. Most importantly, none of the independent variables reached the level of significance. Yet interestingly, the coefficient for Congress' ideology indicates a substantial influence, though it's statistically insignificant. On the other hand, the relationship between the acting president's ideology and the justices' votes to invalidate statutes is inversely related. The coefficient's value is -.025, suggesting that for every one-unit increase in the acting president's ideology (as the president becomes more conservative) there is a corresponding .025-unit decrease in the number of justices' votes to invalidate statutes, although it too is not significant.

These findings may support those of previous studies (Harvey and Friedman 2006; 2008; Mishler and Sheehan 1993) that suggest that the justices' decision-making is influenced by the ideological make-up of Congress. In this regression, Congress' ideology resulted in the largest coefficient value of all of the other independent

variables. Similarly, Harvey and Friedman (2008, 3) found that "the likelihood that the Rehnquist Court during its 1994-2001 terms would review a generic liberal statute enacted between 1987 and 1994 increased by 123% as a result of the rightward congressional turn of Congress after 1994, and by 500% for landmark liberal statutes." Mishler and Sheehan (1993, 97) found that "the ideological and partisan orientations of the president and Congress are also important."

Table 7: Regression Analysis of Ideologues' Votes to Invalidate Statutes

Variable	Unstandardized Coefficients		Standardized Coefficients		
	B	Std. Error	Beta	t	Sig.
Constant	2.051	1.888		1.086	.285
Issue Area	.001	.055	.005	.026	.979
Ideology Score	.049	.047	.188	1.042	.304
Divided/Unified Gov't Dummy Variable	.213	4.231	.080	.050	.960
President Ideology	-.025	4.427	-.009	-.006	.996
Congress' Ideology	3.613	8.932	.107	.405	.688
R Square = .045 Adjusted R Square = -.091 Std. Error of the Estimate = 1.202 *p ≤ .05 N=3111					

In reviewing the regression analysis of the non-ideologue justices' votes to invalidate statutes, it is apparent that there are more similarities between the two groups than there are differences. Table 8 shows these results. Again, none of the variables reach levels of statistical significance. The coefficient estimate for Congress' ideology is

not as strong for the non-ideologues as it was for the ideologues suggesting that the Congress' influence is not as great for the non-ideologues. Perhaps the most interesting difference between the two regression estimates is that the President's ideology has reversed directions for the non-ideologues. Thus, for every one-unit increase in the president's ideology (as the president becomes more conservative), there is a corresponding increase in the justices' votes to invalidate statutes. Again, this finding is not statistically significant.

Table 8 Regression Analysis of Non-Ideologues' Votes to Invalidate Statutes

Variable	Unstandardized Coefficients		Standardized Coefficients		
	B	Std. Error	Beta	t	Sig.
Constant	1.863	.199		9.361	.000
Issue Area	-.019	.015	-.062	-1.267	.206
Ideology Score	.025	.102	-.012	-.239	.811
Divided/Unified Gov't Dummy Variable	.178	3.959	.067	.045	.964
President Ideology	.010	4.164	.004	.002	.998
Congress' Ideology	1.594	2.777	.107	.409	.685
R Square = .004 Adjusted R Square = .000 Std. Error of the Estimate = 1.013 *p ≤ .05 N=6241					

CHAPTER FIVE: CONCLUSION

Judicial activism has become the catch-all phrase for conservatives and liberals alike for characterizing Supreme Court decisions that are disagreeable to one's own policy preferences. Indeed, judicial scholars have provided substantial evidence to suggest that justices make decisions in order to advance their own policy goals, yet the justices must consider a number of constraints that limit their ability to achieve those goals. Thus, while ideology is a significant predictor of judicial behavior, it is not the only one. The findings of this research contribute to previous literature that suggests that extra-attitudinal and legal factors act as constraints, limiting justices' votes to overrule precedents and invalidate statutes within the context of the justices personal preferences. The justices will temper their decisions and try to get as close as possible to their ideal policy outcome while considering these constraints.

Perhaps Justice Souter's commencement address at Harvard University explains the judicial decision-making process best when he described the "fair-reading model." In this sense, justices must make a decision among various competing values that have been embedded in the Constitution and this does not constitute judicial activism, but is a necessary element of interpreting the law. As Justice Souter so eloquently states,

> "A choice may have to be made, not because language is vague, but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now,

> and a court has to do more than read fairly when it makes this kind of choice."

Essentially, Justice Souter hints at a key element involved in the judicial decision-making process and that is the timing. Thus, legal change is connected to social change, as the social context of the political environment and public preferences are all considered when justices vote to overrule established precedents or invalidate federal statutes (Rosenberg 2008). However, Justice Souter also implies the role of the justices' personal preferences in that it is likely that a justice's ideology is a key factor for choosing between one constitutional good and another.

This study sought to examine the Supreme Court as a political institution comprised of political actors. As such, the focus of this research centered on the most ideological leaning justices, theorizing that the ideologues would exhibit more pronounced activist behavior. In general, ideologues in the masses have stronger partisan leanings and are less likely to moderate their attitudes. It does not appear that this is the case with the most ideological justices. Although ideology is indeed one of the strongest influences over judicial decision-making, the justices who lie at the ideological poles along the continuum appear more likely to moderate their votes than hypothesized. Thus, the most ideological justices cannot be compared to the extremely ideological politicians in that the justices are more likely to temper their votes, likely because of institutional factors. The institutional legitimacy and prestige rely on the public's perceptions of a neutral, unbiased Court. Whereas the public is willing to accept extremely ideological politicians, it is not likely to be so accepting of justices who brashly pronounce their policy preferences. Democratically-elected politicians are held

accountable for their votes via reelection campaigns and responses from their constituents, and they campaign by expressing their personal policy preferences in order to identify with the public. Supreme Court justices, on the other hand, are intended to moderate their votes according to the law and not ideology.

Future Research

The Court is a political institution, and should be understood as such. Political scientists and judicial scholars have a ways to go in order to truly understand the dynamic process of judicial decision-making. Furthermore, the Court is always changing, as shifts in membership shape the agenda and voting coalitions. The attitudinal model is accepted for its predictive power, but the model can be rigid and is not always able to account for changing attitudes. As such, future research would benefit by considering the context in which attitudes are formed, instead of ignoring the influence of the political environment, legal factors and public preferences. "The enormous controversy that resulted from the Warren Court's work, the survival and acceptance of the fundamental doctrinal developments of the Warren Court era result from its largely successful effort to accommodate a newly developing pattern of pluralism in America" (Lindquist and Cross 2009, 145).

In the aftermath of *Bush v. Gore*, the public now views the Court as a political institution, capable of rendering partisan rulings. Observers of the Court who criticize its decisions as activist often cite to a so-called chilling effect on legislative action, suggesting that Congress is limited in its legislative proposals out of fear of Supreme

Court reversal. On the other hand, as Posner (2008) suggests, a trade off functions so that Congress does not pass unconstitutional laws, and in return, the Supreme Court does not behave overtly activist lest Congress limit the Court's jurisdiction.

Judicial activism might be better understood from several facets, not only in cases that overrule precedent or invalidate statutes. Activism should be redefined so that it characterizes judicial decision-making that is influenced by partisan preferences. Future research could provide a better understanding of restrainist behavior that actually should be considered activist in that it advances one's personal political goals. All in all, the Court is a political institution and its actors have partisan interests despite the black robes and air of objective decision-making.

A deeper understanding of the Court's agenda would likely lead to a more complete understanding of the judicial decision-making process. Thus, future research should focus on what influences are significant in shaping the Court's agenda and how that, in turn, relates to judicial activism. Further research could potentially predict how cases on the court's agenda will shape precedence conformance and votes to invalidate statutes.

One other area of research that would be quite interesting to explore is that of the presidential veto and its effect on the Court's rate of deference to federal statutes. Some presidents may exercise the presidential veto power more often than others, resulting in variation court terms' rates of statutory deference. For example, President Clinton vetoed several abortion statutes during his two terms, essentially saving liberal justices a vote that could have been characterized as activist. A comparison of

presidential veto rates and justice rates to invalidate federal statutes could explain another aspect of the separation-of-powers model and how that corresponds to judicial behavior.

APPENDIX A – CASE LIST

Brown v. Board of Education, 347 U.S. 483 (1954).

Bush v. Gore, 531 U.S. 98 (2000).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Marbury v. Madison, 5 U.S. 137 (1803).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Roe v. Wade, 410 U.S. 113 (1973).

APPENDIX B – LIST OF CASES THAT OVERRULED PRECEDENT ON THE BURGER AND REHNQUIST COURTS (1969-2005)

Number	Court Term	Case Name	Citation
1	1969	*Boys Market, Inc. v. Retail Clerks Union*	398 U.S. 235
2	1969	*Maragne v. States Marine Lines, Inc.*	398 U.S. 375
3	1970	*Blonder-Tongue Laboratories, Inc. v. University of Illinois*	402 U.S. 313
4	1970	*Perez v. Campbell*	402 U.S. 367
5	1970	*Griffin v. Breckenridge*	403 U.S. 88
6	1971	*Illinois v. City of Milwaukee*	406 U.S. 91
7	1971	*Andrews v. Louisville & Nashville Railroad Co.*	406 U.S. 320
8	1972	*Lehnhausen v. Lake Shore Auto Parts Co.*	410 U.S. 356
9	1972	*Braden v. 30th Judicial Circuit Court of Kentucky*	410 U.S. 484
10	1972	*Miller v. California*	413 U.S. 15
11	1973	*North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*	414 U.S. 156
12	1973	*Edelman v. Jordan*	415 U.S. 15
13	1974	*Taylor v. Louisiana*	419 U.S. 522
14	1974	*United States v. Reliable Transfer Co., Inc.*	421 U.S. 397
15	1975	*Michelin Tire Corp. v. Wages*	423 U.S. 276
16	1975	*Hudgens v. National Labor Relations Board*	424 U.S. 507
17	1975	*Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*	425 U.S. 748

18	1975	*National League of Cities v. Usery*	426 U.S. 833
19	1975	*Lodge 76 v. Wisconsin Employment Relations Commission*	427 U.S. 132
20	1975	*Gregg v. Georgia*	428 U.S. 153
21	1976	*Craig v. Boren*	429 U.S. 190
22	1976	*Oregon v. Corvallis Sand & Gravel Co.*	429 U.S. 190
23	1976	*Complete Auto Transit, Inc. v. Brady*	429 U.S. 363
24	1976	*Continental T.V. v. GTE Sylania, Inc.*	433 U.S. 36
25	1976	*Shaffer v. Heitner*	433 U.S. 186
26	1977	*Department of Revenue of Washington v. Association of Washington Steve Doring Companies*	435 U.S. 734
27	1977	*Monell v. Department of Social Services*	436 U.S. 658
28	1977	*Burks v. United States*	437 U.S. 1
29	1977	*United States v. Scott*	437 U.S. 82
30	1978	*Hughes v. Oklahoma*	441 U.S. 322
31	1979	*Trammel v. United States*	445 U.S. 40
32	1979	*United States v. Salvucci*	448 U.S. 83
33	1979	*Thomas v. Washington Gas Light Co.*	448 U.S. 261
34	1980	*Commonwealth Edison Co. v. Montana*	453 U.S. 609
35	1981	*United States v. Ross*	456 U.S. 798
36	1982	*Illinois v. Gates*	462 U.S. 213
37	1982	*Michigan v. Long*	463 U.S. 1032
38	1983	*United States v. One Assortment of 89 Firearms*	465 U.S. 354
39	1983	*Limbach v. Hooven & Allison Co.*	465 U.S. 354
40	1983	*Copperweld Corp v. Independence Tube Corp.*	467 U.S. 752

41	1984	*Garcia v. San Antonio Metropolitan Transit Authority*	469 U.S. 528
42	1984	*United States v. Miller*	471 U.S. 130
43	1985	*Daniels v. Williams*	474 U.S. 327
44	1985	*Batson v. Kentucky*	476 U.S. 79
45	1985	*Brown-Forman Distillers Corp. v. New York State Liquor Authority*	476 U.S. 573
46	1985	*Rose v. Clark*	478 U.S. 570
47	1986	*Griffith v. Kentucky*	479 U.S. 314
48	1986	*Puerto Rico v. Branstad*	483 U.S. 219
49	1986	*Tyler Pipe Industries, Inc. v. Washington State Department*	483 U.S. 232
50	1986	*American Trucking Associates, Inc. v. Scheiner*	483 U.S. 266
51	1986	*Solorio v. United States*	483 U.S. 435
52	1986	*Welch v. Texas Department of Highways and Public Transportation*	483 U.S. 468
53	1987	*Gulfstream Aerospace Corp. v. Mayacamas Corp.*	485 U.S. 271
54	1987	*South Carolina v. Baker*	485 U.S. 505
55	1988	*Thornburgh v. Abbott*	490 U.S. 401
56	1988	*Rodriguez de Quijas v. Shearson American Express, Inc.*	490 U.S. 477
57	1988	*Wards Cove Packing Co., Inc. v. Antonio*	490 U.S. 642
58	1988	*Alabama v. Smith*	490 U.S. 794
59	1988	*Healy v. The Beer Institute*	491 U.S. 324
60	1988	*Webster v. Reproductive Health*	492 U.S. 490
61	1989	*Collins v. Youngblood*	497 U.S. 37

62	1990	*Shirley v. Department of Veteran Affairs*	498 U.S. 89
63	1990	*California v. Charles Steven Acevedo*	500 U.S. 565
64	1990	*Exxon v. Central Gulf Lines, Inc.*	500 U.S. 603
65	1990	*Coleman v. Thompson*	501 U.S. 722
66	1990	*Payne v. Tennessee*	501 U.S. 808
67	1991	*Keeney v. Tamayo-Reyes*	504 U.S. 1
68	1991	*Planned Parenthood v. Casey*	505 U.S. 833
69	1992	*Harper v. Virginia Department of Taxation*	509 U.S. 86
70	1993	*Nichols v. United States*	511 U.S. 738
71	1993	*Department of Labor v. Greenwich Collieries*	512 U.S. 267
72	1994	*Hubbard v. United States*	514 U.S. 695
73	1994	*Adarand Constructors, Inc. v. Federico Pena*	515 U.S. 200
74	1994	*United States v. Gaudin*	515 U.S. 506
75	1995	*Seminole Tribe of Florida v. Florida*	517 U.S. 44
76	1995	*44 Liquormart Inc. v. Rhode Island*	517 U.S. 484
77	1995	*Quackenbush v. Allstate Insurance Company*	517 U.S. 706
78	1995	*Lewis v. Casey*	518 U.S. 343
79	1997	*State oil Company v. Barkat*	522 U.S. 3
80	1997	*Hudson v. United States*	524 U.S. 236
81	1997	*Hohn v. United States*	527 U.S. 666
82	1998	*College Savings Bank v. Florida Prepaid*	527 U.S. 666
83	1999	*Guy Mitchell v. Helms*	530 U.S. 793
84	2000	*U.S. v. Hatter*	532 U.S. 557

85	2001	*Lapides v. Board of Regents*	535 U.S. 613
86	2001	*U.S. v. Cotton*	535 U.S. 625
87	2001	*Atkins v. Virginia*	536 U.S. 304
88	2002	*Lawrence v. Texas*	539 U.S. 558
89	2003	*Crawford v. Washington*	541 U.S. 36
90	2003	*Vieth v. Jubelirer*	541 U.S. 267
91	2004	*Roper v. Simmons*	543 U.S. 551

APPENDIX C – LIST OF CASES THAT INVALIDATED FEDERAL STATUTES ON THE BURGER AND REHNQUIST COURTS (1969-2005)

Number	Court Term	Case Name	Citation
1	1969	*Turner v. United States*	396 U.S. 398
2	1969	*Schacht v. United States*	398 U.S. 58
3	1970	*Oregon v. Mitchell*	400 U.S. 112
4	1970	*Blount v. Rizzi*	400 U.S. 410
5	1970	*Tilton et al. v. Richardson*	403 U.S. 672
6	1972	*Frontierto v. Richardson*	411 U.S. 677
7	1972	*U.S. Dept of Agriculture v. Murry*	413 U.S. 508
8	1972	*U.S. Dept. of Agriculture v. Moreno*	413 U.S. 528
9	1973	*Jimenez v. Weinberger*	417 U.S. 628
10	1974	*Weinberger v. Wisenfeld*	420 U.S. 636
11	1975	*Buckley v. Valeo*	424 U.S. 1
12	1975	*National League of Cities v. Usery*	426 U.S. 833
13	1976	*Califano v. Goldfarb*	430 U.S. 199
14	1977	*Marshall v. Barlow's, Inc.*	436 U.S. 307
15	1978	*Califano v. Westcott*	443 U.S. 76
16	1981	*Northern Pipeline Construction v. Marathon Pipeline Co.*	458 U.S. 50
17	1982	*United States v. Grace*	461 U.S. 171
18	1982	*INS v. Chadha*	462 U.S. 919
19	1982	*Bolger v. Youngs Drug Products Corp.*	463 U.S. 60
20	1983	*FCC v. League of Women Voters of California*	468 U.S. 364
21	1984	*FEC v. National Conservative*	470 U.S. 480

		Political Action Committee et al.	
22	1985	*Bowsher v. Synar*	478 U.S. 714
23	1986	*FEC v. Massachusetts Citizens for Life*	479 U.S. 238
24	1987	*Boos, Waller and Brooker v. Barry*	485 U.S. 312
25	1989	*United States v. Eichman*	496 U.S. 310
26	1994	*United States v. National Treasury Employees Union*	514 U.S. 454
27	1994	*Plaut v. Spendthrift Farm, Inc.,*	514 U.S. 211
28	1994	*Rubin v. Coors Brewing Company*	514 U.S. 476
29	1994	*United States v. Lopez*	514 U.S. 549
30	1995	*Seminole Tribe of Florida v. Florida*	517 U.S. 44
31	1995	*United States v IBM Corp.*	517 U.S. 843
32	1995	*Colorado Republican Federal Campaign Committee v. FEC*	518 U.S. 604
33	1996	*Babbitt v. Youpee*	519 U.S. 234
34	1996	*City of Boerne v. Flores*	521 U.S. 507
35	1996	*Reno v. ACLU*	521 U.S. 844
36	1996	*Printz v. United States*	521 U.S. 898
37	1997	*United States v. United States Shoe Corporation*	523 U.S. 360
38	1997	*United States v. Hosep Krikor Bajakajian*	524 U.S. 321
39	1997	*Clinton v. City of New York*	524 U.S. 417
40	1997	*Eastern Enterprises v. Apfel*	524 U.S. 498
41	1998	*Greater New Orleans Broadcasting Assoc., Inc. v. United States*	527 U.S. 173

42	1998	*Florida Prepaid Postsecondary Education Expense, Inc., v. College Savings Bank and United States*	527 U.S. 627
43	1998	*College Savings Bank v. Florida Prepaid Postsecondary Education Expense, Inc.*	527 U.S. 666
44	1999	*Kimel v. Florida Board of Regents*	528 U.S. 62
45	1999	*United States v. Morrison*	529 U.S. 598
46	1999	*United States v. Playboy Enterprises Group, Inc.*	529 U.S. 803
47	1999	*Dickerson v United States*	530 U.S. 428
48	2000	*Board of Trustees of the University of Alabama v. Garrett*	531 U.S. 356
49	2000	*Legal Services Corporation v. Carmen Velazquez*	531 U.S. 533
50	2000	*U.S. v. Hatter*	532 U.S. 557
51	2000	*United States and Dept. of Agriculture v. United Foods, Inc.*	533 U.S. 405
52	2001	*Ashcroft v. The Free Speech Coalition*	535 U.S. 234
53	2001	*Thompson v. Western States Medical Center*	535 U.S. 357
54	2004	*United States v. Booker*	543 U.S. 220

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END NOTES

[i] 381 U.S. 479 (1965).
[ii] 347 U.S. 483 (1954).
[iii] There is actually an argument as to whether or not *Brown v. Board of Education* overturned the precedent set by *Plessy v. Ferguson.* The argument has been made that *Brown* did not directly overturn the precedent in *Plessy*, but rather distinguished it and struck down the "separate but equal" clause.
[iv] EXPLAIN FURTHER
[v] *See, e.g.,* the economist, Paul Samuelson.
[vi] EXPLAIN PER CURIAM AND MEMOS.
[vii] Lindquist and Cross (2009, 62-63) organize the justices who were members of the Supreme Court between 1954 – 2004 into four categories associated with high and low **institutional activism** (defined as, "reflects the justice's propensity to defer to the coordinate branches or to exercise judicial power to enforce the constitution, regardless of the ideology of the underlying statute") and high and low **ideological activism** (defined as, "the propensity to strike federal legislation that is contrary to the justice's ideology but a high propensity to uphold statutes that are ideologically aligned with the justice's preferences"). They find that the following Justices exhibit both high institutional and ideological activism: Marshall, Brennan, Thomas, Scalia, Souter, O'Connor, Douglas and Black. The Justices who exhibit low institutional and ideological activism are: Blackmun, Breyer, White, Powell, Stewart, Frankfurter and Harlan. The Justice who exhibits high institutional activism and low ideological activism is Kennedy, and the Justices who exhibit high ideological activism and low institutional activism are: Burger, Rehnquist, Ginsburg, Stevens, Clark and Warren.
[viii] Video game laws have been overruled in the following states and municipalities: California, Illinois, Indianapolis, Louisiana, Michigan, Minnesota Oklahoma, St. Louis, and Washington. For more information, please visit: http://www.theesa.com/policy/legalissues.asp.
[ix] *Schwarzenegger v. EMA/Entertainment Software Association.*
[x] For the purposes of this research, the justices' ideology will be measured using the Segal and Cover (1989) ideology scores, discussed in the next chapter.
[xi] The six Justices who have been identified as the ideologues for the purpose of this study are: Justices Brennan, Douglas, Marshall, Rehnquist, Stevens and Thomas.
[xii] Justices Douglas and Black were excluded from this analysis as their voting records were not available for analysis with the U.S. Supreme Court Database.