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American Politics Research 2007; 35; 694
DOI: 10.1177/1532673X06298927

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Keepers of the Covenant or Platonic Guardians?

Decision Making on the U.S. Supreme Court

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How do the justices of the Supreme Court make their decisions? How does the Supreme Court of the United States make its decisions? The answer to these questions may not be the same. In studying judicial decision making, there has been a disconnection between individual and institutional levels of analysis. Lifetime tenure insulates individual justices and permits them to act on their substantive preferences. At the same time, the Court lacks the “sword and purse” and must rely on the other branches to fund or implement its directives. This study develops an integrative model to explain Supreme Court decision making. Using constitutional civil liberties and civil rights cases in the 1953 to 2000 period, conditions favorable to the attitudinal model, we find that institutional decision making is a function of attitudinal, strategic, and legal factors.

Keywords: *U.S. Supreme Court; judicial politics; judicial independence; the attitudinal model; judicial decision making; constitutional law; precedent; stare decisis*

In studying judicial decision making, there has been a disconnection between individual and institutional levels of analysis. Perhaps that

Authors' Note: We wish to thank Professors Lawrence Baum, Christopher Zorn, Laura Langer, Pamela Corley, and Chad King for comments on previous versions of this article. We also wish to thank the reviewers for their suggestions. We would like to thank Andrea Pyatt, Stephanie Lindley, and Marcus Hendershot for their excellent research assistance and Fenton Martin for her help. Funding for this project was provided by the University of Missouri Research Board.

disconnection is best represented in considering the supposed independence of the Court and the justices. Lifetime tenure and the nomination process insulate individual justices and permit them to act on their own views. At the same time, the institution is hardly independent. The Court lacks the "sword and purse" and must rely on the other branches to fund or implement its directives. So although the justices are free to vote their individual attitudes, the Court needs to pay attention to its limitations as an institution.

One well-known symbol of this disconnection is represented by the Supreme Court's decisions concerning abortion. Reproductive rights has been a national political issue for a generation, since the Supreme Court announced that women have a qualified right to control their own reproductive decisions (Keynes, 1989; K. O'Connor, 1996). For 16 of the next 20 years, Republicans dominated the White House, allowing them to place their imprint on the Supreme Court. The one Democrat to serve between 1969 and 1992, Jimmy Carter, was the only president since Reconstruction to be denied the opportunity to select a Supreme Court justice. During the Reagan and Bush administrations, abortion was a litmus test for judicial nominees. Three of Ronald Reagan's selections, Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy, had supposedly been right on the issue. George Bush had the opportunity to nominate two justices, and it was assumed that David Souter and Clarence Thomas had passed a similar litmus test (Abraham, 1999; Epstein & Segal, 2005; C. Smith, 1993).

Reagan and Bush also sent their solicitors general into the Supreme Court to argue that *Roe v. Wade* should be overturned. For many years, the Court refused the invitation and even strengthened *Roe* (Pacelle, 2003). But as the liberal members of the Court retired, the numbers were mounting in favor of the right-to-life position. It was no surprise that when the Supreme Court announced it would hear oral arguments in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, pundits predicted the end of *Roe v. Wade*. A simple head count seemed to confirm the obvious: Chief Justice Rehnquist and Justice White had dissented from the original *Roe* decision and opposed reproductive rights from the outset. Justice Scalia joined them in opposition. Justice O'Connor, though not as militant in her opposition, frequently held that *Roe* was wrongly decided and often permitted state restrictions. In his first opportunity, Justice Kennedy opposed reproductive rights. Justices Souter and Thomas had not yet faced an abortion rights case, but they had replaced liberal Justices William Brennan and Thurgood Marshall. Thus, there seemed to be at least five certain votes to overturn *Roe*.

A funny thing happened on the way to the demise of *Roe*. Justice Blackmun, the author of the original *Roe* decision, and Justice Stevens voted to uphold reproductive rights. As expected, Rehnquist, Scalia, Thomas, and White voted to strike the decision. The anti-*Roe* forces needed only one vote to constitute a majority. Both O'Connor and Kennedy were on record as opposing *Roe* and at least one seemed certain to provide that vote. Instead, O'Connor, Kennedy, and Souter voted to sustain *Roe* (Pacelle, 2002).

This result seems curious on a number of levels. Most significant, perhaps, there has long been an argument that Supreme Court justices decide cases on the basis of their values and attitudes (Rohde & Spaeth, 1976; Segal & Spaeth, 1993, 2002). Yet here in a case that seemed to be teed up for a reversal, O'Connor and Kennedy joined Souter to protect *Roe v. Wade*.

In their joint opinion, O'Connor, Kennedy, and Souter, adopting judicial restraint, reaffirmed *Roe* arguing that "principles of institutional integrity and the rule of *stare decisis*" mandated the holding. Thus, the three justices seemed to put aside their values and personal preferences and supported existing precedent because it was settled law. Their opinion openly discussed the Court's legitimacy, its ultimate resource. The other justices appeared to resort to their values and attitudes in deciding the case (Baum, 1997). This decision, and many like it, raises a number of questions: How do the justices of the Supreme Court make their decisions? How does the Supreme Court of the United States make its decisions? Are the answers to the two questions the same? These questions beg the central question: What factors go into a judicial decision? Three models have been offered to explain judicial decision making: the legal model, the attitudinal model, and the strategic model.

In its pristine form, the legal model stands for the notion that the justices carefully weigh existing precedents and relevant constitutional or statutory provisions when deciding cases. Legal factors are seen as legitimate and suggest that judges adhere to a distinctive set of norms and traditions in carrying out their responsibilities. Legal factors would include reliance on precedent, deference to the elected branches, and the attempt to use neutral principles to unravel the meaning of the Constitution (Ely, 1980; Wechsler, 1959; but see Dworkin, 1986). In a dispassionate manner, the justices are supposed to begin cases with no preconceptions or biases.

Although few would argue that precedents are determinative of decisions, *stare decisis* provides a "gravitational effect" on justices (Aldisert, 1990; Segal, Spaeth, & Benesh, 2005, p. 29). The Court attempts to build doctrine coherently over time (Kahn, 1994). Clayton and Gillman (1999) argue that the legal model is a commitment to apply "interpretive canons or

principles" (p. 26). Justices look to decisions in similar cases and seek to discover the intent of the framers of the Constitution or the legislation in question (Brisbin, 1996). The norm of *stare decisis* instructs justices to consider the authority of prior cases and their applicability to contemporary issues and to utilize relevant precedents when crafting answers to legal questions (Epstein & Knight, 1998). In a practical sense, justices have normative incentives to justify their decisions in light of existing doctrine and precedents (Hansford & Spriggs, 2006).

Although changes in the composition of the Court frequently alter its ideological balance, on the institutional level, evidence demonstrates that the Court overturns very few precedents (Epstein, Segal, Spaeth, & Walker, 2003). As George and Epstein (1992) argued, the legal model creates a monotonic conservative expectation: If the Court is following precedent, doctrinal change is impossible.

In contrast to the legal model, there are a series of extralegal factors that include the attitudes of the justices (Segal & Spaeth, 1993, 2002), small group dynamics (Howard, 1968; Maltzman, Spriggs, & Wahlbeck, 2000; Murphy, 1964), and strategic decision making (Epstein & Knight, 1998; Eskridge, 1991a, 1991b, 1994; Hammond, Bonneau, & Sheehan, 2005; Spiller & Gely, 1992; Stearns, 2002) that would see the Court move from its ideal position to avoid retaliation by the other branches of government (Pacelle, 2002).

The attitudinal model lies 180 degrees from the legal model. In its purest form, it states that the justices are totally unencumbered in deciding cases. They are free to decide cases on the basis of their sincere preferences. Justices have lifetime tenure and have reached the pinnacle of their careers. Thus, they are unconstrained in their behavior (Segal & Spaeth, 1993). The empirical evidence suggests that individual justices are very consistent in their decision making. They have fixed preferences in a unidimensional issue space (Rohde & Spaeth, 1976; Schubert, 1965, 1974; but see Epstein, Hoekstra, Segal, & Spaeth, 1998). Segal and Spaeth (1993) argue that the attitudinal model is an individual construct and not a description of institutional behavior. But as George and Epstein (1992) note, the extralegal or attitudinal model suggests an unaltered dynamic: Doctrinal change is expected to be constant and in the direction of the ideological changes on the Court. The fact that the Court, as an institution, overturns very few precedents suggests that the attitudinal model may have limitations.

Strategic models of judicial decision making recognize internal and external constraints on the Court. Although specific conceptualizations of

the strategic model differ, at the individual level the main unifying theme is that “justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act” (Epstein & Knight, 1998, p. xiii). In extending that assumption to the institutional level, we investigate the extent to which the Court’s collective outputs are affected by strategic institutional constraints. For example, when the Court makes decisions, the strategic model maintains that it will collectively consider the position of the president who will have to implement the decision and the Congress that can overturn a decision it disagrees with (Eskridge, 1991a, 1991b).¹ The Court faces important institutional constraints, particularly in cases involving statutory interpretation, and it must respect those in making decisions (Fisher & Devins, 1992; Rogers, 2001). Congress can overturn statutory decisions by a simple majority, so the Court adjusts its preferred outcome to get closer to a point Congress will find acceptable.

The Court as an Institution

This brief analysis of the three dominant models of decision making mixes individual and institutional levels of decision making. The disconnection between the individual and institutional levels is partially a function of theory and methodology. Empirical and behavioral analyses of the Supreme Court were most often based at the individual level, whereas normative and doctrinal studies focused on the institutional level. The neo-institutional approach and separation of powers models were attempts to transplant the propositions and hypotheses gleaned from studies conducted at the individual level to examine the Court as an institution. This study is in that tradition.

We examine the Court as an institutional actor in an attempt to understand the impact of various factors on its decisional outcomes. As an institutional actor, the Supreme Court’s decisions settle individual disputes, develop policy and doctrine, create precedents, and guide lower courts and litigants. Hansford and Spriggs (2006) argue that “the essence of the Court’s policy making power resides in its opinions. . . . These opinions articulate legal principles and, in effect, public policies that affect the behavior of both governmental and nongovernmental decision makers” (p. 3). The opinions help actors overcome uncertainty in their decision making processes (Hansford & Spriggs, 2006, p. 3).

The Court faces a variety of constraints in its decision making. In statutory decisions, those constraints appear to be significant. A simple congressional majority can reverse such decisions. According to Eskridge (1991a, 1991b, 1994), strategic decision making is complicated by the fact that the Court needs to react to the sitting Congress, which can overturn the decision, more than the Congress that passed the legislation in question. In theory, these constraints will induce the Court to move from its collective sincere preferences (Epstein & Knight, 1998).²

In practical terms, these constraints are not always substantial. Although Congress has utilized the statutory override to challenge Court decisions with some success, one early appraisal of the practice cautioned that an "unusual unanimity of interest and opinion . . . is generally required to bring about a congressional reversal [of a statutory decision of the Supreme Court]" (Note, 1958, p. 1337; see also Nagel, 1965). This has been especially true in recent times, as American politics has been dominated by divided government (Fiorina, 1996; Peterson, 1990). Congress may pass legislation overturning a Court decision that its members find objectionable, but presidents can veto such retaliatory legislation during periods of divided government. Thus, absent the unlikely presence of a veto-proof majority in Congress (Krehbiel, 1998), the Court's statutory decision would remain in force. Alternatively, if a presidential administration were to oppose a statutory interpretation of the Supreme Court, the policy positions of the Court might nevertheless coincide with those of the Congress. In either case, then, the Court has an ally to stay the hand of its opponents.

On the other hand, constitutional issues are thought to provide greater freedom to pursue sincere preferences; thus, they provide the strongest hypothetical support for the attitudinal model. Such decisions can only be reversed by a constitutional amendment. This takes an extraordinary majority, thus, there appears to be little likelihood of reversing such a decision. Closer examination suggests that the Court may not be as unconstrained as it appears. The executive and legislative branches have checks if they are unhappy with the Court's decision. If the Court bends its preferences to reflect those of the elected branches, is it because it is responsive to the pressures that can be brought by the elected branches or a matter of concordance between the Court and the administration or Congress?

Robert Dahl (1957) noted that the Court cannot long hold out against majority sentiment to the contrary. The power to appoint justices allows the president to impress his philosophy on the Court. The interpretation of statutes and constitutional provisions and the way existing precedents are handled contribute to the construction of public policy. As a consequence,

presidents can exert enormous power over the direction of the Supreme Court through their appointments. If a Court is closely divided, one or two judicial appointments can dramatically change the membership and potentially influence decisional trends.

Any Court decision has to be enforced. But enforcement power is the province of the president and the executive branch. Thus, the Court is at the mercy of the executive branch. If the president does not like the decision, he does not have to enforce it (Canon & Johnson, 1999). Indeed, history books report that Andrew Jackson, upset at the *Worcester v. Georgia* decision, growled, "John Marshall has made his decision, now let him enforce it."

The president also has a check through the Justice Department and the point man for the executive branch in the Supreme Court, the solicitor general (SG). The president may try to use the SG to pursue his agenda through the Court. Because of the volume of litigation with which the government is involved, the SG plays a major role in helping the Court control its docket. In particular, analysts argue that the SG can use amicus briefs to advance the president's agenda (Bailey, Kamoie, & Maltzman, 2005; Segal, 1988, 1990).³

There is considerable evidence that the role the SG plays has changed over time. Traditionally, most solicitors general have viewed their first responsibility as being to the Court rather than the president. Thus, the president could not count on using the Office of the SG to advance his agenda. As late as 1969, Richard Nixon did not change the SG, keeping Erwin Griswold, a Lyndon Johnson appointee. That suggested a nonpartisanship that is a remnant of a distant past. That appeared to change in 1981 when the Reagan administration forcefully used the office to pursue its agenda (Caplan, 1987).⁴ Power shifted to political operatives who could "force" the SG to advance a case or a position that might be politically motivated but be on shaky legal grounds or difficult to argue in front of the Court (Caplan, 1987; Pacelle, 2003; Salokar, 1992). Reagan, Bush, Clinton, and Bush solicitors general have been quite partisan and expected to carry water for their administrations. The Office of the SG became a resource that could be used to further the administration's policy goals and as a potential check on the Court.

Congress also has means of dealing with Court decisions short of overturning them (Keynes, 1989; Murphy, 1962, 1964). Congress can introduce blocking legislation to limit the impact of a decision it opposes. Not long after *Roe v. Wade*, Congress, unable to muster the extraordinary majorities necessary for a constitutional amendment to overturn the decision, passed the Hyde Amendment to cut off federal funds for abortions. The decision did not overturn *Roe*, but it clearly made the exercise of reproductive rights more difficult (Hoff, 1991, pp. 302-305).

The "Exceptions Clause" of the Constitution gives Congress authority to alter the Court's jurisdiction, and it has occasionally done so. Many of the successful attempts have been conceived in a neutral fashion to assist the Court in handling its growing caseload. In other circumstances, attempts to alter the Court's jurisdiction were far from neutral and not designed to help the Court. Often they involved a reaction to a Supreme Court decision that members of Congress opposed. Whether Congress can constitutionally strip the Court of jurisdiction over specific constitutional cases is uncertain, and it has not successfully done so since *Ex parte McCordle* (see Fallon, Meltzer, & Shapiro, 1996, pp. 365-370). But that has not deterred Congress from trying. Many controversial issues reach the Supreme Court. The Court's decisions are bound to provoke a response and have led members of Congress to introduce legislation to limit or deny jurisdiction (Katzmann, 1997). Indeed, since 2004, three such court-stripping measures have passed the U.S. House of Representatives (Curry, 2005).

Although these efforts have generally been unsuccessful, they are nevertheless consequential. When powerful members of Congress lend their support to such jurisdictional measures, it creates a precedent for attacking the Court and, by extension, its legitimacy. Moreover, it poisons institutional relations among the branches. As Justice O'Connor observed shortly before her retirement from the Court, "In all the years of my life, I don't think I've ever seen relations as strained as they are now between the Judiciary and some members of Congress" (S. D. O'Connor, 2005, p. 8). She went on to note that "there are efforts being made currently to limit federal court jurisdiction to decide certain issues on an issue-by-issue basis in areas that some members of Congress think that the federal courts should not be involved [with]. That's . . . worrisome" (p. 8). In effect, these attacks undermine respect for the judiciary as an institution. That respect and legitimacy are the Court's ultimate resources. On a few occasions, the Court has retreated in subsequent cases, thus giving Congress a short-term victory (Murphy, 1962).

Although the chances are remote that a constitutional decision will be overturned or that the Court's jurisdiction will be limited by congressional fiat, there are significant threats. Congress can engage in what Meernik and Ignagni (1997) call "coordinate construction" of the Constitution. Members of Congress and interest groups offer their interpretation of the Constitution to rival that of the Court. Congress tried to pass legislation to reverse constitutional decisions in almost one fourth of the instances. Of those attempts, about one third were successful (Bartels, 2001, p. 8). These are not insignificant numbers.

But does the threat have to be case specific? The Court may strategically act, not because of a specific perceived threat but to blunt broad range opposition to the institution. An individual decision might not create a problem, but a long-term trend might endanger the Court. The Court may strategically act or retreat to allow itself to pursue its designs in other areas and may have more diffuse reasons for strategically acting. The Court's ultimate resource is its institutional legitimacy. If the Court oversteps its boundaries, it risks losing its legitimacy (Pacelle, 2002).

If none of the three models describes all judicial decision making, then what are the factors that appear to make some cases amenable to the legal model, others to the attitudinal model, and a third set to the strategic model? Perhaps the most notable factor is policy or issue area. In their studies of case selection and the Court's agenda, Perry (1991), Ulmer (1972, 1978, 1984), and Pacelle (1991) argue that justices care more about some issues and decisions in those areas are governed more by their values and attitudes. For other issues, the Court's role at the top of the judicial hierarchy takes precedence. The justices may decide an issue to settle a lower court conflict or to correct a lower court error. The substance of the decision is less important than the fact that the issue is settled. More recently, analysts have argued that statutory decisions lead justices to abandon their policy preferences in hopes of blunting a potential congressional response (Eskridge, 1994; Spiller & Gely, 1992). Constitutional decisions would appear to be more amenable to the attitudinal model.

This study investigates decision making by the Supreme Court as an institution in constitutional cases. Although we build on the leading test of competing models of judicial decision making (Segal, 1997), our approach differs in two respects. First, this study tests components of the legal model in addition to the attitudinal and strategic models of judicial decision making. Second, it treats the Court as a unitary actor situated in an institutional relationship with the Congress and the president. As such, we use the decision of the Court rather than the votes of the individual justices in attempting to discern the relative impact that legal, attitudinal, and strategic considerations play in shaping the Court's collective interaction with Congress and the president and determining the constraints and opportunities posed by institutional norms, such as precedent and the nature of the particular case.

We posit that no single model explains judicial decision making at the institutional level under all circumstances. The composition of the Court is the most important factor, but the Court is constrained by the need to impose doctrinal stability and to protect its collective legitimacy by seeing

its decisions implemented and respected. What the Court does is the result of multiple intertwined forces that operate in complicated ways to shape decisions (Baum, 1997, 2006).

By using constitutional cases, we consider conditions that are most favorable to the attitudinal model. In addition, we isolate civil liberties and civil rights cases because they are central to the policy designs of the justices. Because the three models are ideal types and it is likely that no single model explains all the Court's decision making at the institutional level, we choose a perspective that weighs strategic, legal, and attitudinal considerations.

This analysis is important on three levels. First, as previously noted, rather than mix individual and institutional levels of analysis, this study focuses on Supreme Court decision making at the institutional level. Second, this is an integrative model of decision making, combining legal, attitudinal, and strategic variables and the development of the issue. Finally, the study has theoretical significance for separation of powers scholarship, the appropriate role of the Supreme Court in that system of separated powers, and the protection of individual rights and liberties (Clayton & Gillman, 1999; Franklin & Kosaki, 1989; Gillman & Clayton, 1999; Pacelle, 2002; R. Smith, 1985; Sunstein, 1993).

Research Design

We examine a portion of the Court's plenary docket: constitutional civil liberties and civil rights decisions in the 1953 to 2000 period as determined by the Supreme Court Data Base. We use full, signed decisions from orally argued cases as a filter and adopt the definition of constitutional cases used by Martin (1998). We use the decision as the unit of analysis for the study.⁵ This yields a total of 1,513 cases.

The dependent variable is the ideological direction of the decision, coded as *favorable to civil rights and liberties* (1) or *unfavorable* (0). Because it has two values, we use logistic regression analysis or logit (Long, 1997). The distribution of liberal and conservative decisions during this period is nearly equal. The proportion of liberal decisions was slightly greater than 51%.

The attitudinal model, taken to its logical conclusion, has a single independent variable: the values and attitudes of the justices. Neoinstitutionalism would argue that the factors contributing to decision making are more complicated. Decisions are a function of the collective attitudes of the

individual justices, precedent, institutional norms, the history of the issue, constitutional and statutory provisions, and the position of the elected branches and agencies. The problem is providing measurements for such variables.

In using civil rights and civil liberties cases, we consider the conditions that are most favorable to the attitudinal model: Justices care the most about these issues, and there are few constraints on their decisions (Pacelle, 1991). We model the Court's decisions as a function of its ideological composition, the evolution of the specific issue, existing precedent, public opinion, and the policy position of the president and Congress. In this fashion, we incorporate variables from the legal, attitudinal, and strategic models.

To assess whether the Court strategically responds to the ideological position of other branches in making decisions, we need measures for the policy positions of Congress, the president, and the Court. We utilize the common space measures created by Epstein, Martin, Segal, and Westerland (in press). The common space measures are derived from a nonlinear transformation of the Martin and Quinn (2002) scores that are based on the Poole and Rosenthal (1997) *W*-Nominate technique originally created to measure the ideological scores for Congress and the president.⁶ The Poole and Rosenthal measure is based on the median member of the House and Senate, and the common space measure is based on the median justice. Thus, the common space scores not only provide a common metric for these three independent variables but are also designed to allow for comparisons on ideology across institutions.⁷

Controlling for the other variables, the Court's ideological score, a proxy for an attitudinal variable, should be positively related to the Court's decisions and strongly significant. Similarly, we use the annual aggregate ideological scores for the president and Congress as independent strategic model variables. The strategic model suggests that the Court's decision should respond to the ideological position of Congress and the president. As Congress and the president become more liberal, the Court should become more likely to make pro-civil rights and civil liberties decisions. In particular, the variable for the president is expected to be positively related, given the close connections between the executive and judicial branches (Pacelle, 2003; Scigliano, 1971). Because the Court tends to be the least constrained in its constitutional civil rights and civil liberties decisions, the variable measuring the ideological position of Congress may not be statistically significant.

To examine issue evolution, we use a measure devised by Pacelle (2003, in press) that traces the development of an issue from its emergence,

through the creation of the landmark decision that defines the particular issue area, through second-generation cases that raise more difficult questions in a unidimensional issue space, and finally through the “complex” stage when the specific issue may get tied to other issues, thus leaving the unidimensional space (Pacelle, in press; Ulmer, 1982; Wasby, 1993, pp. 202-203).

The early attitudinal studies (Schubert, 1965) and fact pattern analyses (Kort, 1957) incorporated the difficulty of the case into the models. Segal (1984, 1986) and refined versions of the attitudinal model (Segal et al., 2005; Segal & Spaeth, 2002) argued that the variation in case facts helped explain the variation in decision patterns. The notion of issue evolution reflects the need to distinguish between cases. The measure combines aspects of precedent and difficulty of case (see the appendix). It combines elements of the concepts of policy change developed by Wahlbeck (1997), the jurisprudential regimes of Richards and Kritzer (2002; Kritzer & Richards, 2003), and minimalism and maximalism designed by Sunstein (1999). A jurisprudential regime is defined as “a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area” (Richards & Kritzer, 2002, p. 308). Jurisprudential regimes then highlight the relevant facts that justices consider when deciding a case. But although the measures of case facts and jurisprudential regimes are confined to a single issue, such as free speech (Richards & Kritzer, 2002), freedom of religion (Ignagni, 1993, 1994), or search and seizure (Segal, 1984, 1986), the issue evolution measure has the advantage of permitting comparisons across policy areas. Thus, if two cases at the same stage of their respective development arrive on the docket in different issue areas, the dynamics and the behavioral expectations for these cases should be similar.

The issue evolution variable has four possible values, each representing a distinct stage. In the first stage, doctrine is unstable as the Court, having little experience with the existing issue, tries to find a related doctrinal home in an existing area of law. For instance, early free exercise of religion cases led to instability in doctrine, and the Court tried to fit them into free speech doctrine. The second stage involves the cases that immediately precede and follow the landmark decision. In establishment litigation, the cases that led to *Lemon v. Kurtzman* (1971) and helped refine the Court-created test would be part of this stage. In the third stage, cases get more difficult, causing support to decline. Aid to colleges and cases such as *Wolman v. Walter* (1977) forced the Court to balance more difficult forms of government assistance. The fourth stage is marked by a multidimensional

issue space. In other words, the original issue is joined to a separate issue. The hate speech cases raise issues of free speech and civil rights and challenge the Court to find a doctrinal niche (Pacelle, in press).

Consider the evolution of right to counsel doctrine as a comparison. In the area of criminal procedure, *Gideon v. Wainwright* (1963) was the key landmark decision (coded 2) that incorporated the right to counsel to the states and stabilized law. Like most landmarks, although it structured subsequent decisions, it did not answer all the questions in the area. Some of the important cases that were part of the third stage (coded 3) and helped flesh out doctrine included *Argersinger v. Hamlin* (1972), involving a sentence of less than 6 months, *Scott v. Illinois* (1979), involving fines but no jail time, and *Ross v. Moffitt* (1974), involving whether the right to counsel extended to appeals. The expectations regarding the Court's treatment of these later cases are similar to those for *Wolman v. Walter* (1977) in the establishment litigation. Each is governed by the major precedent in the area but presents a different, more difficult set of facts, suggesting it would be more difficult for the Court to reach a pro-civil liberties decision. Thus, as cases get more difficult, we hypothesize that the probability of a positive civil rights or individual liberties decision should decline, controlling for the other variables.

Just more than 5% of the constitutional civil rights and civil liberties cases fall into the unstable first stage of development. The second stage, when the Court isolates the issue and develops the central precedent, accounts for just more than 20% of the cases in civil rights and individual liberties. By far the largest percentage of cases occurs in the third stage. Slightly less than 65% of the cases involve these second-generation cases that raise more difficult but unidimensional questions. Finally, roughly 10% of the cases populate the complex stage when the civil liberties and civil rights issue in the case has become joined to another unrelated issue.

The majority opinion allows the Court to justify its substantive decisions and serves as the precedent to guide future justices, lower court judges, political actors, litigants, and the behavior of citizens. In normative terms, justices and analysts consider precedent an important component of a judicial decision. In addition to issue evolution, we utilize precedent as a proxy for a legal model variable. We seek to measure the impact of precedent, controlling for the collective position of the Court. We are interested in discovering whether precedent has an independent effect on the decisions of the Court.

Although most assume the importance of precedent, it is seldom modeled as a part of judicial decisions. The literature tends to have a dichotomous

view of precedent. Precedent is typically seen as either a determinant of decisions or as a mere cloak for the sincere preferences of the justices. But as Hansford and Spriggs (2006) argue, that dichotomy is too simplistic. If precedent were the sole factor then it would govern the preponderance of cases and be the sole statistically significant determinant of Supreme Court decisions. On the other hand, if it were a mere cloak for naked preferences, we would expect to see that the Court just cited precedents that supported the outcome the majority desired and the attitudinal model would be the sole determinant.

In most cases, the controlling precedent in a case is easy to identify. The question is whether the Court is going to follow that precedent, distinguish it, or overturn it. The Court may narrow or expand the reach of the existing precedent. In more than 40% of the civil rights and civil liberties decisions, the majority opinion distinguished the case at hand or overturned the extant precedent. Thus, it appears that it is not simply a cloak for naked preferences.

As a proxy for this legal factor, we code the direction of the most important precedents cited in the syllabus of the case. The syllabus must be approved by the majority opinion author before the opinion can be released. Thus, Benesh and Spaeth (2001) argue that to cite a given opinion in the syllabus means that the opinion rests on or makes great use of the precedent in that case and, therefore, that controlling case is salient to the author and arguably to all of the justices in the majority opinion coalition.⁸ If the Court followed the precedent, we code that as consistent with the existing precedent. If the Court distinguished the case from the existing precedent or overturned that precedent, we coded that as not following *stare decisis*.⁹ For example, in an attempt to circumvent *Brown v. Board of Education* (coded 1 as a pro-civil rights precedent), Southern states tried freedom of choice plans and closing the public schools. The Court, adhering to the *Brown* precedent, struck these state laws down.

In the wake of *Roth v. United States* (1957) and *Memoirs v. Massachusetts* (1966), the Court used these precedents to strike down state attempts to censor movies and books. But in *Ginzburg v. United States* (1966), the Court adopted an exception for pandering, distinguishing the case from the standards laid out in *Roth* and *Memoirs* (each coded 1 as pro-civil liberties precedents). Ultimately, the Court changed the entire nature of doctrine in *Miller v. California* (1973; coded -1 as a precedent limiting civil liberties) but had to distinguish cases such as *Jenkins v. Georgia* (1974) from that precedent when local communities went too far in their restrictions.

The inclusion of this variable permits us to examine the decision in the instant case as a function of the direction of the precedent. If precedent is

important, the Court should be constrained in its decision making. The variable is expected to be significant and positively related to the decision, controlling for the other variables.

In some of the decisions, the case before the Court is a direct reflection of a previous decision, and there is a precedent that is directly on point. On-point precedents typically refer to cases that are virtually identical to a recent decision. In most instances, the on-point case is a companion to the full decision. In the companion decision, the Court briefly refers to the basic decision without repeating all of the justifications laid out in the fuller opinion. In other circumstances, the on-point decisions occur in cases that follow the landmark decision by a year or two. This often occurs just after the Court announces an important decision and then gets a series of cases that were percolating through the lower courts and raise very similar issues, but the lower court did not have the benefit of knowing the new precedent. Thus, the Court's on-point decision would typically remand the case "in light of our recent decision." When the precedent is on point, the Court should be particularly constrained by the previous decision. The variable is expected to be strongly significant and positively related to the decision.¹⁰

Although the on-point cases can occur in any field of law, in the period we examined there were a number of civil rights, internal security, and criminal cases that had significant abuses of defendant rights. In total, such cases (coded 1 if on point, 0 otherwise) made up less than 16% of the constitutional civil rights and civil liberties decisions in the 1953 to 2000 period.

Finally, analysts have posited that the Court may respond to public opinion (McGuire & Stimson, 2004; Mishler & Sheehan, 1993, 1996). As Mr. Dooley noted, the Supreme Court follows the election returns. If proponents of the strategic model are correct, then public opinion might have at least an indirect effect, filtered through Congress and the president. Not all analysts believe there is a connection between public opinion and Supreme Court decision making (Norpoth & Segal, 1994). To test the influence of public opinion, we construct a model using Stimson's public mood measure with a 1-year lag. For a variety of reasons, the impact of public mood is expected to be tepid at best. First, the Court was insulated from the winds of public opinion by the Framers. Second, we isolated a group of issues that are expected to be the most removed from public influence: civil rights and individual liberties issues decided on constitutional grounds. As constitutional cases, a potential override takes extraordinary majorities of both houses of Congress. In addition, the issues are considered the very reason to have an undemocratic judicial branch: the protection of minority rights.

Interpreting the Results

Model I shows the results from the basic model with precedent, issue evolution, and the ideological composition of the three branches of government. These variables represent the three different models of judicial decision making: the legal, attitudinal, and strategic models. Under conditions that favor the attitudinal model, variables representing each of the three models are statistically significant, and the relationships are in the correct direction. As expected, the attitudinal variable is positively related to civil rights and civil liberties decisions and strongly significant. The variable for the president is also statistically significant and positively related to the decision to support individual liberties and civil rights, controlling for the other variables. By contrast, the variables for the House and Senate are not statistically significant. The variable for precedent, the legal variable, is also statistically significant, suggesting that the Court has a legal anchor to guide its decisions. The variable is positively related, suggesting the Court follows precedent. Issue evolution, a reflection of the stage of the issue area, is strongly significant and negatively related to support for civil liberties and civil rights. As the stages progress and the cases become more difficult, support for liberties and rights declines.

The specification of Model II adds a variable for precedents that are directly on point. Such precedents are specific to the case at hand. In other words, the instant case has very similar facts and therefore is expected to be governed by the precedent that is on point. Under such circumstances, the Court is constrained. The results of the model confirm the impact of those constraints: The coefficient is strongly positive and statistically significant. According to this revised model, the Court is only constrained by precedent when it is on point. This offers a caveat to the legal model, as it suggests that unless the instant case is very similar to the existing precedent, the justices are not overly constrained and can presumably fall back on their values and attitudes. The effects of the other variables on the Court's decisions remain the same.

Model III represents the full model in that it includes all of the previous variables and adds the final variable, public mood. The significance and direction of the variables remain consistent with the previous model suggesting the robustness of the results. The last column of Table 1 provides the predicted probabilities for Model III to assess the substantive impact of each of the independent variables on the Court's decisions. Thus, a one standard deviation change of the Supreme Court in the liberal direction increases the probability of a pro-civil rights or pro-civil liberties decision

Table 1
Integrated Models of Supreme Court Decision Making

Independent Variables	Model I		Model II		Model III		Δ in Probability
	Coefficient	SE ^a	Coefficient	SE	Coefficient	SE	
Supreme Court	3.18**	0.48	3.29**	0.51	3.37**	0.51	0.11
President	0.29*	0.14	0.31*	0.15	0.32*	0.15	0.05
House	-0.22	0.54	-0.18	0.55	-0.06	0.55	0.00
Senate	0.21	1.01	0.29	1.02	0.25	1.04	0.00
Precedent	0.45**	0.06	0.13	0.08	0.12	0.08	0.02
On point	—	—	0.98**	0.12	1.01**	0.12	0.23
Issue evolution	-0.61**	0.09	-0.55**	0.09	-0.49**	0.09	-0.12
Public mood	—	—	—	—	4.48**	1.47	0.04
Constant	1.63**	0.27	1.51**	0.27	-1.46	0.92	
Pseudo R ²	.14		.19		.21		
χ^2 (<i>p</i>)	< .000		< .000		< .000		
Log likelihood	-944.6		-911.7		-907.4		
<i>N</i>	1,513		1,513		1,513		

Note: Computed probabilities in column 5 are derived from Model III. The values represent the growth (or decline) in the probability of a pro-civil liberties or pro-civil rights decision for every one standard deviation change in the independent variable of interest, controlling for the other independent variables.

a. Standard errors are robust.

p* < .05. *p* < .01.

by .11, controlling for the other variables. Although it is largely an individual-level construct, the attitudinal model is widely considered the most powerful explanation of Supreme Court decision making. The results here demonstrate that it is a viable explanation of institutional-level decision making also.

The legal model is often considered to be the antithesis of the attitudinal model. The impact of the legal model is confirmed, if muted. The precedent variable is statistically significant in the original model but disappears when on-point precedents are added to the model. The latter is statistically significant and suggests that the Court is only constrained when the precedent is direct and on point. The presence of an on-point precedent in the liberal direction increases the probability of a pro-civil rights or civil liberties decision by .23, controlling for the other variables. Regular precedents have no discernible impact.

Why are attitudes so important, whereas the impact of precedent appears to be so muted? The results should not be surprising. Most analysts agree

that the attitudinal model is the most important factor in decision making. In addition, the cases isolated for this analysis are the most amenable to the sincere preferences of the justices. Pacelle (1991) and Perry (1991) argue that civil liberties and civil rights cases are among the most important parts of the Court's volitional agenda: the cases the justices and the Court care the most about.

By contrast, the impact of legal considerations is difficult to discern because the law seldom lies conclusively on one side or the other. The legal ambiguity of such cases makes it difficult to follow precedent and frees the Court to rely on its collective preferences. In addition, by using only full decisions and not memoranda and *per curiam* decisions, we underestimate the impact of precedent (Songer & Lindquist, 1996). Related to the legal model is the notion of issue evolution. In each of the integrated models, issue evolution is statistically significant and in the expected direction. As issues get more complicated and cases get more difficult, the probability of a positive civil liberties and civil rights decision decreases. Indeed, a one-unit change in the complexity of the case decreases the probability of a pro-civil liberties or civil rights decision by .12, controlling for the other variables. Issue evolution is a realistic reflection of the development of issues in the Supreme Court. Doctrine is built in stages with the Court trying to maximize its sincere preferences while it attempts to stabilize the law. Litigants, often repeat players, assist the Court by bringing the next set of cases, usually progressively more difficult as they attempt to push the envelope in that particular issue area (Baird, 2006; Epstein & Kobylka, 1992).

In the areas of civil rights and individual liberties, the impact of Congress is nonexistent. This is not surprising, given that the cases are constitutional in scope. Civil rights and individual liberties are issues that often pit majoritarian impulses against the protection of minority rights. Congress is probably a reflection of the former rather than the latter. The Court does not need to worry about Congress, as most of the cases are decided on constitutional grounds and, thus, the veto point is at the extraordinary majority.

But there is support for some portions of the strategic model. The variable for the president is statistically significant and in the right direction. A one standard deviation change in the liberal direction for the president increases the probability of a positive civil rights and civil liberties decision by .05, controlling for the other variables. The president has the SG and the appointment power to improve the chances of congruence between the two branches. Moreover, given enough opportunities, presidents can bring the ideology of the Court into line with their own by making appointments to

the Court (Epstein & Segal, 2005). On a more stable basis, the president has influence through the appointment of the SG who argues cases on behalf of the U.S. government and is sometimes referred to as the “tenth justice”. The SG has the most success of any litigant in getting cases accepted and in winning on the merits (Salokar, 1992). Indeed, the SG serves as a linkage between the executive and judicial branches. This connection between the president and the Court is more direct than any linkages between the legislative and judicial branches (Scigliano, 1971).

Model III shows that the public mood variable is statistically significant. This result suggests that the Supreme Court is at least somewhat attuned to public opinion when deciding civil rights and civil liberties cases. This supports the findings of Mishler and Sheehan (1993, 1996) and McGuire and Stimson (2004).¹¹ The relationship, however, has important normative implications for the role of the Supreme Court. This seems to contradict the claim that the most important role of the Supreme Court is to protect the rights and liberties of minorities despite majority opposition (Casper, 1976; Dahl, 1957). Indeed, one of the strongest arguments for an undemocratic Supreme Court is its protection of individual rights.

A Different Interpretation of the Results?

There is a different possible interpretation of the results. Proponents of the attitudinal models could argue that the results do not disprove the attitudinal model or support the legal and strategic models. Those proponents could argue that the causal arrows could be reversed. Segal and Spaeth (1996a, 1996b; Brenner & Spaeth, 1995) are among those who argue that precedent is used after the fact and that justices reach their decisions and then search for precedents that support their preferences. Furthermore, they might argue that the apparent impact of the president represents the strategic activity of the SG, not the strategic response of the Court. Indeed, it could be that the congruence between the SG and the Court is a result of the SG’s responding to the Court rather than the reverse (McGuire, 1998; Pacelle, 2003).

This raises the question of whether the impact of precedent is normative or empirical (Brisbin, 1996). Is precedent a viable factor in judicial decision making or is it merely a normative construct that shrouds the dominance of the attitudinal model? As noted, the impact of *stare decisis* is difficult to gauge because precedent is seldom clear. The cases before the Supreme Court raise different questions than those settled in the precedents.

Table 2
Reexamining Precedent: The Influence of Issue Evolution

Independent Variables	Stage I	Stage II	Stage III	Stage IV
Supreme Court		X	X	
President			X	
House				
Senate				
Precedent		X		
On point	X		X	
Public mood				

Note: X denotes that the variable of interest is significant and in the hypothesized direction.

The lower courts can take care of those cases that are just like the precedent. In addition, legal ambiguity frees the Court to rely on its policy preferences.

Another cut at the data may help to unravel the impact of precedent. Perhaps precedent is more important in some issue areas than in others. Pacelle (1991) argues that precedent plays a more important role in many of the economic issues. Because we have limited this analysis to civil rights and civil liberties, that awaits further investigation. Another possibility is that precedent has a greater impact at certain stages of issue evolution. In addition, precedent may be time dependent. Perhaps the Court has changed as an institution, such that precedent played a significant role during one period but was less important during other periods. The last two propositions can be tested.

To test whether the impact of precedent varies across the different stages of evolutionary development, we separately run the model for each stage (see Table 2). Those results are very interesting. At the initial stage, only the on-point precedent variable is statistically significant, though precedent just misses statistical significance. This is not surprising. These cases arise in an unsystematic fashion and doctrine is unstable. The Court is looking for a niche for these cases and trying to tie them to existing precedents, often in other areas. During the second stage, when the issue emerges, precedent is statistically significant but on point is not. This is the stage at which the landmark and its immediate progeny emerge. Not surprisingly, the attitudinal variable is also statistically significant. With a chance to stamp its imprimatur on the new issue, consistent preferences emerge and the Court attempts to build policy coherently, paying attention to precedent.

Stage 3 involves the continuation of doctrinal construction. The cases during this stage typically raise more difficult issues but in the unidimensional policy space. The question is whether the Court will apply the existing

precedent and how far will it be extended. The Court often distinguishes its decision in these more difficult cases from the extant landmark; thus, it is not surprising that there is no relationship between precedent and decisions. The model shows that during the third stage, the attitudinal variable is significant, as is the variable for the president and the one for on-point precedents. These are more difficult cases and the aggregate attitudes of the Court are a dominant determinant of the decisions. The influence of the president variable is probably a result of the influence of the SG. Pacelle (2003) shows that the SG typically does not participate in the early stages of issue evolution. Rather, the office waits for the Supreme Court to define the issue and its parameters and then moves to help the Court fill in the gaps in doctrine. This permits the SG (and presumably the president) to have its say on policy development.

In the fourth and final stage, none of the important variables is statistically significant. The fourth stage is when the current issue becomes multidimensional and attracts other issues. Because some justices view one of the issues as dominant and other justices view the other issue as controlling, the Court fails to come to consensus. No precedent is controlling. The SG may help the Court try to home in on one of the issues, but the office is not typically involved in such cases. In the end, the impact of precedent appears to be a function of the development of the issue, suggesting that precedent has some impact under some circumstances.

Does precedent vary by the Court era? We use 1969 as a dividing point. The nomination of Thurgood Marshall followed a few years later by the election of Richard Nixon and the retirement of Earl Warren represents a potential change in the Court (Abraham, 1999). Until the mid- to late 1960s, few justices were selected because of their views on civil rights and individual liberties. Civil libertarians such as William Douglas, Hugo Black, and William Brennan were selected for their views on economic regulation (Abraham, 1999), to embarrass the Supreme Court (McKenna, 2002), and to help the Republicans make inroads into the Catholic vote (Powe, 2000). Nixon made the judiciary a campaign issue and soon had the opportunity to replace Warren with conservative Chief Justice Warren Burger.

There does appear to be a temporal effect for precedent, as shown in Table 3. The attitudinal variable is statistically significant and in the correct direction for both periods. The variable for the president is not statistically significant prior to 1970 but subsequently emerged as a strong factor. In addition, the public mood variable is statistically significant but only for the later period.

Is this a statistical anomaly, or are there good reasons for these apparent changes? In the early part of the 1953 to 1969 period, the Court began its first significant foray into civil rights and civil liberties (McCloskey,

Table 3
The Impact of Changes Across Time

Independent Variables	1953 to 1968	1969 to 1998
Supreme Court	X	X
President		X
House		
Senate		
Precedent		X
On point	X	X
Issue evolution	X	X
Public mood		X

Note: X denotes that the variable of interest is significant and in the hypothesized direction.

1960; Pacelle, 1991). Despite the fact that the issues were new and there was some individual-level inconsistency in decision making, the impact of the attitudinal variable is still strong. The lack of an impact from the president is probably a function of the fact that in civil rights and, to a lesser degree, civil liberties, it did not matter who controlled the White House, the SG was supportive of rights and liberties (Pacelle, 2006). In addition, the Warren Court was rewriting constitutional law in civil liberties and civil rights, which might explain why precedent had no discernible impact (Belknap, 2005; Powe, 2000). The decisions of the Warren Court, particularly in upholding free speech for unpopular groups, limiting school prayer and Bible reading, and protecting defendants' rights flew in the face of public opinion. This countermajoritarian stand is reflected in the lack of a statistically significant effect for public opinion on Warren Court decisions.

After 1970, the exodus of liberal justices and a shift to the Right marked the change from the Warren Court to the Burger Court. The Burger Court did not, analysts maintain, initiate a constitutional counter revolution (Blasi, 1983; Maltz, 2000, pp. 264-266; but see Kahn, 1994). Even the Rehnquist Court did not overturn many of the Warren Court precedents (Yarbrough, 2000, pp. 267-268). The president variable emerges as significant, and this is not surprising as the parties split decisively on civil rights and individual liberties issues (Pacelle, 2003) and they became the litmus tests for new nominees (Epstein & Segal, 2005). Finally, as public mood got more conservative, the Burger Court and the Rehnquist Court became less protective of civil rights and individual liberties, explaining the relationship between public mood and Court decisions.

Although the differential impact of precedent across individual stages of issue evolution and across time between issues does not conclusively demonstrate the impact of precedent, it does give us pause before we dismiss the influence or claim that it is causal. Armed with this additional evidence, it appears precedent plays a viable role in decision making and an integrated model is the best explanation for institutional behavior.

Implications

Too often, scholars have treated the Court as little more than a collection of nine individuals who were separately pursuing their personal policy preferences. The results of the analysis suggest that although the individual justices have a great deal of independence, the Court does not have complete independence. Although its ideological composition is the most important factor, the Court is not simply a constitutional convention or a super-legislature. The Court is often seen as the protector of individual rights and liberties, but the results of this analysis neither conclusively confirm nor refute that. Public opinion has a varying impact. Although the Court was in tune with public opinion for part of the period, at other times, the Court's civil liberties and rights decisions ran counter to public preferences.

The legal model deserves more attention. Although precedent can be determinative in those instances when the case is on point, in most instances, it exerts a gravitational effect on the Court as an institution. The Court pays attention to precedent and seeks to establish consistency in the law. But the application of law is ambiguous. The Court devises tests and tries to build doctrine in a coherent fashion. Richards and Kritzer (2002) identify jurisprudential regimes as influences that structure the Court's decision. The impact of issue evolution supports that conclusion. Indeed, issue evolution and the desire to ensure some consistency in the law represents an additional impact of precedent and the legal model.

Robert Scigliano (1971) argues that the framers designed the judicial and executive branches as "an informal and limited alliance against Congress" (p. vii). This analysis tends to confirm the existence of that relationship. Whatever the source of the congruence, the appointment power or the SG, the Court seems to be influenced by the president. The Court does not seem to react to changes in the House or the Senate. This is not surprising given the extraordinary majorities needed to overturn a constitutional decision.

The behavior of the Supreme Court is governed by the sincere preferences of the justices, but that is tempered by the need to attend to precedent

and the institution's sense of duty and obligation to the law and the Constitution. The Court needs to protect its legitimacy and that serves as a restraint on the institution. The results suggest that institutional contexts, norms, and rules matter. The Court is, as Justice Robert Jackson said, part of "a complex, interdependent scheme of government from which it cannot be severed."

In terms of democratic theory, the results are decidedly mixed. Although Congress appears to have little or no impact on the Court, public opinion does appear to have some effect. The ultimate justification for the modern Court is its ability to stand up to public opinion and the elected branches and to protect the rights and liberties of unpopular minorities. In civil liberties and civil rights cases, the Warren Court was often countermajoritarian in its civil rights, criminal procedure, and free speech and religion decisions. Thus, the Court protected rights and liberties in the face of public opposition. During the Burger and Rehnquist Courts, the Court seemed more in step with public opinion. This lends some credence to Dahl's (1957) classic argument that the Court cannot long hold out against the majority. It is also important to remember that Republican presidents made civil liberties and civil rights election issues and litmus tests for their nominees.

Conclusion

To return to the question that animated this research, how do we reconcile these results with individual-level analyses that show the domination of the attitudinal model? If individual justices are consistent in their decision making and there are membership changes, why does the Court not change its policies to reflect those membership changes? Though the Court overturns few precedents, it does chip away at existing precedents, such as *Mapp v. Ohio* (1961), *Miranda v. Arizona* (1966), *Brown v. Board of Education*, and *Roe*. Attitudes are the basis of decisions and are supposed to be stable over time. But when membership changes threaten to tip the Court ideologically, it seems that one or more justices move to counter those changes. Justices Blackmun (Greenhouse, 2005), Powell (Blasecki, 1990), O'Connor (Biskupic, 2005), and Kennedy (Yarbrough, 2000) are all recent examples of this phenomenon. Someone ideologically migrates to protect the Court as an institution, to enhance his or her influence on the Court, or perhaps attitudes are not as stable and justices can change over time (Epstein et al., 1998).

So can we answer the question posed in the title? Is the Court the keeper of the covenant or a bevy of Platonic guardians? We will hedge and say, “a little of both.” The Court has been referred to as the “schoolmaster of the republic” (Franklin & Kosaki, 1989). As a result, members of the Court are the modern political theorists of the polity (Kahn, 1994; Lowi, 1969). The Court carved a new role for itself in 1938, acting as Platonic guardians. In fulfilling that role and fleshing out its implications, the Court became the keepers of this new covenant. Indeed, even after all the proponents of the preferred position doctrine had left the Court, the Court continued to uphold many of its precedents. More recently, the Court has acted like Platonic guardians in rejecting the preferred position and creating a new dominant philosophy (Keck, 2004; Pacelle, 2002). And as keepers of this new covenant, the Court is trying to impose stability on the law. In the end, the results reflect the balance that James Gibson (1983) advanced: Justices’ decisions “are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do” (p. 9).

Appendix

Coding of Issue Evolution and Precedent Variables

Issue evolution: This variable is coded 1 to 4, each value pertaining to a stage of issue evolution. When there is no existing policy in the area connected to the particular case, the value assigned to issue evolution is 1. When the central precedent and its immediate progeny emerge, the value of issue evolution is 2. As the cases become more difficult but remain in the unidimensional space, the value becomes 3. When there are multiple issues, the value assigned to issue evolution for the particular case is 4. If the Court reversed the core precedent or overturned the basic policy, the case is coded 2. The intercoder reliability was greater than .92.

Precedent: The most important cases cited in the syllabus of the case are coded according to their ideological direction. The original case cited as precedent was checked as to whether it supported civil rights and civil liberties and would assume a value of +1. A precedent that did not support civil rights or individual liberties would be coded -1. A decision that is listed as overturned or distinguished would be negatively related to the instant case. Conversely, a decision that is followed would be positively related. If multiple cases were cited, it would be coded as following precedent only if every case cited were followed. If there were no existing precedent, the value of the variable would be 0 for that particular case. The intercoder reliability was almost .97.

On point: An initial variable is coded 1 if the case is directly on point with a previous decision and 0 if it is not. For a case to be considered on point, one of two things

must occur. The Court's decision must state that this case is a virtual copy of the previous decision or that the present case is paired with another identical case (but is a separate full opinion). But we need to refine that variable to make it directional to use it in the model. To create the on-point variable, the original dichotomous variable is multiplied by the precedent variable. Thus, it would yield a variable that has three values: not on point (coded 0), a liberal on-point decision (coded +1), or conservative on point (coded -1). The intercoder reliability for the original variable (simply on point or not on point) was almost .94.

Notes

1. We refer to a single "strategic model" in the interests of parsimony but readily acknowledge that there are variations in the application of strategic considerations within the judicial decision-making literature.

2. Of course, this can work in the opposite direction, as Hausegger and Baum (1999) point out.

3. But Pacelle (2003) argues that there are multiple forms of amicus briefs and that only some can be used to advance the president's agenda. Indeed, in most areas, the position of the solicitor general (SG) when filing amicus briefs does not reflect that of the president (Pacelle, 2006).

4. Pacelle (2003) argues that Carter opened Pandora's box by selecting the unknown Wade McCree to serve as SG. He did not have the clout to counteract the political forces.

5. By contrast, in the Supreme Court Data Base, Spaeth uses the issue as the unit of analysis. In coding the cases, we found a number of constitutional decisions that were not included in the database. We added them to this analysis. We selected cases on the basis of the issue area. Among the Fifth Amendment cases that were gathered through this filter were a large number of eminent domain decisions. We prefer to view them as economic cases and excluded them from the analysis.

6. The results, whether using the Segal and Cover (1989) scores (Segal, Epstein, Cameron, & Spaeth, 1995), Baum (1988, 1989, 1992) adjusted scores, or Martin and Quinn (2002), yield comparable results. Similarly, we tried two separate measures of presidential liberalism—Segal, Timpone, and Howard (2000) and Erikson, MacKuen, and Stimson (2002)—with no significant changes in the coefficients.

7. For ease of interpretation, we multiplied the common space and nominate scores by -1 to make them compatible with the other measures that run from -1 (conservative) to +1 (liberal) for variables such as precedent or from 0 (conservative) to +1 (liberal) for the dependent variable.

8. The syllabus is a summary of the majority opinion's holding in the case. Benesh and Spaeth (2001) consider the citation of a case in the syllabus to be a signal of the importance of that case to the majority opinion author. The syllabus is composed by the reporter of decisions, and a draft is sent to the chambers of the majority opinion author for editing and approval. Benesh and Spaeth prefer this measure to simply counting cases cited in the majority opinion because it avoids the problem of string citations and the practice of citing precedent to back up any major argument. They found that the average number of citations in the syllabus of orally argued, signed Rehnquist Court opinions handed down between the 1987 and 1998 terms was 1.30 citations per syllabus (2,062 citations in 1,583 decisions). Counting

all cases cited in the opinion, rather than the syllabus, produced far more citations. Thus, they conclude that citing a case in the syllabus is more consequential (Benesh & Spaeth, 2001).

9. If there are multiple decisions cited in the syllabus, the precedent variable is coded as following precedent only when the Court claims it is following all of the precedents cited.

10. To create a directional measure of the on-point variable, a measure of how close the precedent is to the case at hand, we coded precedents that were directly relevant (1 = *directly relevant*) and multiplied that by precedent (-1 = *unfavorable to civil liberties*, +1 = *favorable to civil liberties*).

11. Statistically, there was no difference regardless of which time lag we used. Theoretically, we could think of no good reason not to use a single year lag.

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