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State Supreme Courts and the Effects of Statutory Constraint: A Test of the Model of Contingent Discretion

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Kirk A. Randazzo¹, Richard W. Waterman², and Michael P. Fix¹

Abstract

Do state supreme court judges render decisions according to their ideological preferences, or are they constrained by the language of state statutes? Using data from the Judge-Level State Supreme Court Database, the authors analyze the votes of individual judges from 1995 to 1998 to determine whether their behavior is constrained by legislation. The results indicate that more detailed language (resulting in statutes with higher word counts) significantly limits the discretion afforded to liberal judges while simultaneously facilitating the ideological voting of their conservative colleagues.

Keywords

judicial politics, state courts, legislative statutes

In 2008, the California Supreme Court ruled that a ban on same-sex marriage violated the constitutional rights of marriage and of equal protection.¹ Opponents of this decision claimed that the state judges were trying to “stretch California’s Constitution . . . [so it] magically protects what most societies condemn” (quoted in Dolan 2008), thereby usurping the authority of state legislators to “make” the law. This debate prompted other states to craft new statutes (similar to the federal Defense of Marriage Act) or pass amendments to state constitutions that defined marriage in specific ways. These actions, however, beg the question whether new legislation will “keep judges in check.” If judges “make up” the law according to their ideological preferences, then the development of additional legislation will not substantially alter judicial behavior. Yet if judges adhere to the language of statutes, then state legislatures possess an ability to significantly constrain judicial decision making.

Previous research on the constraining effect of statutory language demonstrates that it influences federal appellate judges (Randazzo, Waterman, and Fine 2006) as well as justices of the U.S. Supreme Court (Randazzo and Waterman 2006). Both analyses provide evidence that the decision calculus of federal judges is contingent upon the language of congressional statutes—judges are able to render decisions according to their ideological preferences when federal statutes provide discretion; but when they encounter

more detailed statutes, their behavior is significantly constrained. While these studies provide an important theoretical development, the generalizability of the conclusions is limited in scope. This is because the federal judiciary contains more institutional similarities than differences (for example, all federal judges possess life tenure). Additionally, the statutes litigated in these courts come from the same legislative institution (i.e., Congress). Consequently, empirical tests of the Model of Contingent Discretion have been conducted in the absence of contextual and institutional variation.

We expand upon the previous research by testing the Model of Contingent Discretion at the state supreme court level. Recognizing that courts as institutions are not merely a “collection of individuals . . . pursuing their individual policy preferences” (Gillman and Clayton 1999, 1), a more searching examination of the impact of legislative statutes must focus on judicial decision making under a variety of institutional contexts. As previous research demonstrates (see Brace and Hall 1995), state courts provide the ideal “natural experiment” for

¹University of South Carolina, Columbia, SC, USA

²University of Kentucky, Lexington, KY, USA

Corresponding Author:

Kirk A. Randazzo, 329 Gambrell Hall, Columbia, SC 29208, USA
Email: randazzo@mailbox.sc.edu

examining judicial behavior under a range of institutional variation. This allows researchers to fine-tune theoretical predictions through several contextual environments, thus reducing the likelihood of spurious findings due to institutional homogeneity. The central question of this analysis therefore examines whether state supreme court judges render decisions according to their ideological preferences (similar to federal judges) in lieu of the potentially constraining language of state statutes and other institutional influences (such as method of selection).

Influence of Law and Ideology on State Supreme Courts

In contrast to “the preoccupation . . . with attitudes and policy preferences of individual justices” (Gillman and Clayton 1999, 1) that dominates much of the research on the U.S. Supreme Court, state court scholars combine a “constellation of contextual, institutional, and attitudinal factors” into a single approach (Langer 2002, 26). Known as neoinstitutionalism, this approach creates integrated models that incorporate these various factors (Brace and Hall 1990, 1997; Hall and Brace 1989).

In part, this line of research focuses on the institutional differences between state and federal courts. As with federal judges, it is generally assumed that judges on state supreme courts are interested in furthering their personal policy preferences (Brace and Hall 1997; Langer 2002). Yet lacking insulation from potential retaliation by other institutions (and in some cases by voters), these judges must consider possible sanctions when making decisions (Brace and Hall 1990, 1997; Langer 2002). For example, Douglas and Hartley (2003) demonstrate that, in some states, courts must be concerned with potential sanctions from other institutions in the form of attacks on their budgets and other financial resources.

Certain institutional factors have long been recognized as influencing the decision making of state court judges. In states with elected judges, scholars recognize that electoral considerations affect judicial behavior (Jaros and Canon 1971). In these states, supreme court judges face additional constraints on voting—for example, Hall (1992) demonstrates how judges facing reelection vote strategically in death penalty cases to minimize their chances of electoral defeat. Moreover, other research concludes that state court judges encounter a variety of significant influences beyond ideology and electoral pressures, such as the length of service (Brace and Hall 1997), specific case facts (Brace and Hall 1990), the complexity of a state’s political environment (Brace and Hall 1990), state ideology (Brace and Hall 1997), and the presence of an intermediate appellate court (Hall and Brace 1989).

While this stream of research has done a great deal to move towards an explanation of judicial decision making that incorporates multiple influences into a single model, it has come up short with respect to legal influences on state supreme court judges. One primary reason involves the type of measurements employed—usually a series of dummy variables to control for various legal aspects (such as case facts or precedent). Unfortunately, reliance on dummy variables only provides information about whether differences exist between the absence and presence of phenomena. To obtain a richer understanding about the degree of influence that the law may exert on judicial behavior, a more robust measure is necessary.

The Model of Contingent Discretion

While there is a renewed focus on institutional approaches to decision making for the U.S. Supreme Court (see, e.g., Clayton and Gillman 1999), the dominant theoretical approach continues to reside with the attitudinal model. This argument by Segal and Spaeth (1993, 2002) provides evidence that judges (in particular Supreme Court justices) render decisions according to their individual ideological preferences, *ceteris paribus*. Yet even in the context of the U.S. Supreme Court, we are less certain about the impact of these ideological influences when other factors are not equal. Various legal considerations such as precedent, case facts, the plain meaning of the law, and legislative intent may affect the ability of judges to rule ideologically. Stated another way, the impact of ideology on judicial behavior may be *contingent* on the degree of legal discretion afforded to judges.

At the state court level, there are few—if any—scholars who assert that a pure attitudinal model operates in this context. Moreover, there is a myriad of extant evidence that *both* law and ideology exert a significant influence on judicial decision making (Brace and Hall 1995, 1997). Yet our understanding of how these potentially opposing influences operate is less clear. Are they truly independent, or is there a more dynamic interdependence between law and ideology? If the former, then we should observe an opposing tension between these forces—as the effects of the law increase, the influence of ideology should decrease (and vice versa). Conversely, if a more dynamic interdependence exists, then we should observe a more complex interaction in which some situations present the opposing tension between law and ideology, while others provide for a convergence of these influences.²

Our Model of Contingent Discretion argues that the laws passed by legislatures may condition the degree to which judges can rely on their individual ideological preferences when adjudicating disputes. As Huber and Shipan (2002, 76) discover, “Legislative statutes are blueprints for policymaking. In some cases, legislatures provide very

detailed blueprints that allow little room for other actors . . . to create policy on their own. In other cases, legislatures take a different approach and write statutes that provide only the broad outlines of policy, which gives bureaucrats [and judges] the opportunity to design and implement policy.” Clearly, judges are not the same as bureaucrats, whose role is to administer or implement the law. Bureaucrats do not have the authority to determine which laws are constitutional; nor can they strike down specific provisions within statutes. Yet the key concept captured by Huber and Shipan is the *level of discretion* provided by legislation. Therefore, the ability of judges to decide cases attitudinally is *contingent* upon the level of detail and the level of discretion included in statutes.

At the federal level, Randazzo, Waterman, and Fine (2006) find that appeals court judges are constrained by more specific federal statutes. In particular, liberal judges are less likely to render liberal decisions in criminal cases. Likewise, conservative judges are constrained in civil liberties cases involving issues related to discrimination. Additionally, Randazzo and Waterman (2006, 19) discover a more dynamic relationship among justices of the Supreme Court: “even when the justices are influenced by their ideological preferences, the law can facilitate the expression of ideological voting among some justices while also constraining ideological voting among others.” Thus, the contingent effect can operate in two ways: it can constrain judges from voting according to their ideological preferences or it can facilitate the influence of ideology. Intuitively, this argument seems extremely plausible. If a legislature passes a broad statute with ambiguous language to prescribe policy outcomes, then one would expect judges to interpret that statute based on their ideological preferences. Yet if that legislature passes a detailed statute that prescribes a conservative outcome, one would expect liberal judges who subsequently interpret that statute to be constrained from voting in a liberal fashion, whereas conservative judges could rely on the same statutory language to facilitate their conservative votes (and vice versa). This Model of Contingent Discretion is therefore dynamic in the sense that some judges may encounter statutory language that constrains their behavior while others are facilitated to rule ideologically.

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

Our qualitative and quantitative investigation of a huge number of statutes suggests that the more words a legislature puts into legislation on the same

issue, the more it constrains other actors who will implement policy on that issue. Similarly, the fewer words it writes, the more discretion it gives to other actors. (Huber and Shipan 2002, 73)

After conducting a series of validity tests on this measure for Medicaid statutes, their analyses reveal that the length of statutes successfully accounts for variation caused by differences among (1) fairly meaningless generalizations, (2) situations where legislators deliberately pass vague consensus statutes, and (3) instances where legislators move beyond mere platitudes to enact statutes containing specific details designed to affect implementation and interpretation. Additionally, Randazzo, Waterman, and Fine (2006) and Randazzo and Waterman (2006) conduct separate validity tests and discover that statutes with higher word counts contained more references to previous legislation or court decisions, along with more detailed descriptions of how these statutes and decisions relate to particular intended outcomes or interpretations.

While the validity tests conducted by Huber and Shipan (2002) and Randazzo, Waterman, and Fine (2006) both focused on federal statutes, we are confident that the measure is equally valid for state statutes. To verify this, we examine a sample of state statutes (stratified by state and issue area). Specifically, we analyzed some statutes with longer word counts (greater than two standard deviations above the mean), with smaller word counts (less than two standard deviations below the mean), and with word counts near the mean. Our examine supports the conclusions of the previous validity tests—statute length is a valid indicator of the degree of legislative instruction regarding interpretation of the statute, rather than simply the result of multipart statutes getting at multiple issues. That is, longer statutes contain a greater degree of detail with respect to the meaning and purpose of the law, as well as instructions on its implementation and application. Furthermore, longer statutes include more cross-references to additional relevant statutes and previous court decisions.³ In contrast, shorter statutes tend to be more ambiguous. These statutes tend to use very broad language with few clearly defined terms, statements of purpose, directions on application, or cross-references. An example of two Texas criminal statutes provides clarification of this distinction. Tex. Penal Code § 38.122 provides for the crime of Falsely Holding Oneself Out as a Lawyer. At only 1,967 words, the statute provides little detail as to what constitutes the elements of the crime and leaves a great deal of gap-filling for judges applying the statute to a given case. Additionally, it contains few references to prior judicial decisions or other statutes to assist judges applying the law to a specific situation. In contrast, the Aggravated Sexual Assault statute—Tex. Penal Code § 22.021—is not only substantially longer (166,493 words), but it also provides clearer

instructions to judges applying the law in particular cases. In addition to clearly defining all of the key terms in the statute, it also references many prior judicial decisions and other statutes. Thus, the longer statute provides greater detail, leaving less discretion to judges when applying the law to specific cases.⁴

The question we address in this article is whether the language included in state statutes systematically affects the behavior of state supreme court judges. If the Model of Contingent Discretion influences these judges, then we expect similar patterns of constraint and facilitation to occur. Yet it is possible that the institutional variation among state courts (such as the method of judicial selection) limits an application of the Model of Contingent Discretion to the state level. Furthermore, we recognize that state judges may be called upon to examine only a specific section of the statute rather than the entire law. In these situations, it is difficult to determine precisely whether judges reference only the specific section under review or also examine the remaining portions of the statute to obtain valuable contextual information on the intended effect or general purpose of the specific section. If the latter approach is employed, then our measure of the overall word count is necessary to accurately capture these statutory influences. However, if judges completely ignore other portions of a statute when they are called upon to examine only a specific section, then our inclusion of the overall word count measure makes it unlikely that an empirical analysis will detect any statistically significant relationship (i.e., the results would be biased in favor of supporting the null hypothesis that there is no relation).

Under this more stringent test, if state supreme court judges are affected by the Model of Contingent Discretion and the language of statutes, we expect more ambiguous laws to provide them with more discretion to set policy according to their individual ideological preferences. Conversely, statutes containing more detailed language will constrain the judges from casting ideological votes. This leads to our primary hypothesis:

The Contingent Discretion Hypothesis: If the Model of Contingent Discretion affects state court behavior, as statutory constraint increases we expect judges to have less discretion to vote ideologically.

Yet it would be too simplistic to claim that the Model of Contingent Discretion should affect all state judges in a similar fashion across all issue areas. We should not expect a conservative legislature to pass conservative legislation that effectively constrains conservative judges. Instead, if an effect exists, we should observe conservative legislation constraining liberal judges (and vice versa for liberal legislation constraining conservative judges). While

precisely measuring the policy motivations of state legislatures is beyond the scope of these analyses, we can deduce general expectations about statutory constraint for specific issue areas, based on conventional wisdom. First, criminal statutes tend to prescribe conservative outcomes by specifying the authority of the state over individuals and outlining the various options of punishment for individual transgressions. Consequently, if criminal statutes affect levels of judicial discretion, it is reasonable to expect that liberal judges (who tend to rule in favor of the individual and against state authority, and also impose more lenient punishments) would be most constrained. Conversely, since conservative judges generally desire a conservative outcome in criminal cases, more detailed statutes make it easier for them to reach decisions in line with their ideological preferences. Consequently, their ideological voting will be facilitated by more detailed criminal statutes.

The second area of law that we examine is that of civil liberties. As with criminal law, most state statutes in this area negatively impact individual rights by asserting greater state authority at the cost of individual liberty. This general trend is exemplified by many of today's most salient political issues, from abortion rights to hate crimes speech; states frequently pass laws restricting individual civil liberties in the name of state authority.⁵ Thus, if these statutes have an impact on the level of discretion of state supreme court judges, it should be liberal judges who are constrained. Unlike their liberal colleagues, the Model of Contingent Discretion predicts that the level of ideological voting of conservative judges should be facilitated by greater levels of specificity in the language of state civil liberty statutes. As most of these laws will prescribe outcomes in accordance with the ideological preferences of conservative judges, greater detail simply makes it easier for them to vote according to their predispositions.

Research Design

Data for this study come from the Judge-Level State Supreme Court Database, compiled by Chris W. Bonneau, Paul Brace, and Kevin Arceneaux and archived at Rice University. The data contain cases from all fifty states from 1995 through 1998.⁶ We examine each case in the database to determine whether the state courts interpret a state statute, and subsequently confine our analysis to those cases. Consistent with our hypotheses, we also restrict our analyses to cases in the area of criminal law and civil liberties law. This yields approximately 41,233 individual state judge votes.

The dependent variable for the analysis is whether a state judge votes in an unconstrained or sincere manner.⁷ We code the variable 1 if a liberal judge casts a liberal vote and 0 if that judge votes conservatively.⁸ Similarly, the variable is coded 1 if a conservative judge votes

conservatively and 0 if that judge casts a liberal vote. This reduces the initial number of observations to approximately 36,714.⁹

Theoretically, our independent variable of primary interest is *Statutory Constraint*. Following the Huber and Shipan (2002) methodology, we examine the length of state statutes. To measure the length, we recoded every state court decision that included an interpretation of a legislative statute, using Lexis-Nexis and the “word count” feature in the web browser Firefox.¹⁰ While this strategy provides a raw count of the number of words per statute, there are important reasons why the raw number is not useful in an empirical model. Theoretically, we expect the impact of statutory constraint to possess diminishing marginal returns. For example, while increasing the length of a statute from 1,000 to 2,000 words dramatically reduces the ambiguity of that particular law (and doubles the length of the statute), a similar 1,000-word increase to a statute containing 100,000 words will have a more muted effect on the influence of judicial discretion. Furthermore, from a methodological standpoint, using the raw number of words is problematic both because of the inherent noise associated with a raw count and the considerable skewness in the measure.¹¹ Consequently, because we are interested in constraint brought by substantial differences among statutes, it is reasonable to take the natural log of each statute as our operationalization of the variable *Statutory Constraint*. This approach allows us to capture empirically the theoretical notion of diminishing marginal returns while simultaneously allowing us to minimize the noise associated with raw counts, thereby addressing both a theoretical and methodological issue with using the raw word count.

Additionally, our hypotheses indicate a theoretical expectation that statutory constraint operates differently between liberal and conservative judges. This suggests that an interaction term is necessary to capture more specifically, the differential effects across these two groups. Therefore, we include a dummy variable *Liberal* to control for the presence of liberal judges on state supreme courts.¹² We then create the interaction term *Liberal* × *Statutory Constraint* to measure this potential dynamic and interdependent relationship. Because we expect criminal and civil liberties statutes to prescribe more conservative outcomes, we expect longer statutes to decrease the likelihood of sincere voting by liberal judges. Therefore, the interaction term *Liberal* × *Statutory Constraint* should possess a negative relationship with the probability of a sincere vote. Conversely, increases in statutory constraint in these issue areas should facilitate (i.e., increase) the likelihood of ideological voting for conservative judges. Due to the presence of an interaction term, these effects will be observed in the original *Statutory Constraint* variable, and consequently, it should

possess a positive relationship with the probability of a sincere vote.

Additionally, we recognize that our theoretical expectations concerning the impact of statutory constraint may be muted by the ideological extremity of a particular judge. That is, extreme ideologues may be more likely to vote in a sincere fashion than their moderate colleagues holding the level of statutory constraint constant. To measure this effect, we rely on the Party Adjusted Judge Ideology (PAJID) scores developed by Brace, Hall, and Langer (2000). These scores place state court judges on an ideological continuum from most conservative (with a score of 0) to most liberal (with a score of 100). Because our theoretical interest focuses on the intensity of a judge’s ideology, regardless of his/her ideological directionality, we “fold” the PAJID scores into a continuum from the most moderate judges to the most extreme ideologues.¹³ Consequently, we hypothesize that judges with stronger ideological preferences will be more likely to render unconstrained or sincere decisions. A positive relationship should therefore exist between our variable *Ideological Intensity* and the dependent variable.

In addition to the two primary variables of interest and the interaction term, our model includes seven other control variables—two measured at the individual case level and the remaining five measured at the state level. The first measures whether the state court is requested to review the constitutionality of a statute. If the court is asked to exercise the power of *Judicial Review*, we expect the judges will be more likely to cast sincere votes (i.e., we do not expect substantial constraint to exist when the constitutionality of the statute is questioned). Therefore, a positive relationship should exist between this variable and the dependent variable. The second individual-level control variable measures the length of time that has elapsed from the passage of the original legislation to the state court’s review. Thus, the variable *Age of Statute* measures the number of years between a statute’s enactment and the actual court case reviewing the law.¹⁴ We expect that more recent statutes will possess more influence over judicial behavior than older legislation. Consequently, this variable should have a negative relationship with the dependent variable.

Additionally, at the state level, we include a control variable to measure the *Partisan Balance of the State Legislature*. This measure comes from Klarner (2003) and is a ratio of the proportion of seats held by Democrats versus the proportion held by Republicans.¹⁵ We also include a dummy variable to control for the presence of an *Intermediate Appellate Court*. Previous research indicates that the presence of an intermediate appellate court—combined with the corresponding increase in docket control for the state court of last resort—allows the state judges to review more salient and/or important cases, thereby increasing

the likelihood of sincere votes (Arceneaux, Bonneau, and Brace 2008; Bonneau and Rice 2007). The third state-level control variable measures the degree of *Judicial Professionalism* possessed by state court judges. We rely on Squire's (2008) professionalism measure, which assesses the informational capacity of each state high court based on its degree of docket control, level of judicial salaries, and number of law clerks. Finally, we include two separate dummy variables to control for those states in which judges are subject to *Retention Elections* and those states in which judges experience *Partisan/Nonpartisan Elections*. Several previous studies of state court behavior demonstrate the different behavioral patterns exhibited by judges who are directly elected to the bench versus their appointed colleagues (see Hall 1992; Brace, Hall, and Langer 2001). Consequently, we control for these institutional differences across states.

Empirical Results

Because our data represent individual choices nested within state-level influences, we employ a series of multilevel models to examine the effects of the Model of Contingent Discretion on state court judges. In so doing, we rely on a Bernoulli sampling specification with an accompanying logit link to examine the binary dependent variable. We initially define the logit link, $\Pr(Y_{ij} = 1) = \rho_{ij}$, which is the probability of a sincere vote for judge i in state j . We then define π_{ij} as the log-odds of ρ_{ij} (i.e., $\pi_{ij} = \log[\rho_{ij} / 1 - \rho_{ij}]$), which allows us to specify the log-odds as a linear function of the level 1 independent variables. This equation is then conditioned on the level 2 macro (i.e., state-level) effects. Therefore, the overall model estimates a two-level random coefficient model with the following specification:

$$\begin{aligned} \text{(Level 1): } \pi_{ij} &= \beta_{0ij} + \beta_{1ij} \text{ Statutory Constraint} + \\ &\beta_{2ij} \text{ Liberal} + \beta_{3ij} \text{ Liberal} \times \text{Statutory Constraint} + \\ &\beta_{4ij} \text{ Ideological Intensity} + \beta_{5ij} \text{ Judicial Review} + \\ &\beta_{6ij} \text{ Age of Statute.} \\ \text{(Level 2): } \beta_{0j} &= \gamma_{0j} + \gamma_{1j} \text{ State Ideology} + \\ &\gamma_{2j} \text{ Intermediate Appellate Court} + \gamma_{3j} \text{ Judicial} \\ &\text{Professionalism} + \gamma_{4j} \text{ Retention Election} \\ &+ \gamma_{5j} \text{ Partisan/Nonpartisan Election.} \end{aligned}$$

In the level 1 equation, the likelihood of a sincere vote (π_{ij}) for any individual judge is associated with the degree of statutory constraint (as interacted with whether the judge is liberal or conservative), the strength of the judge's ideological preferences, and whether the case involves an aspect of judicial review. β_{0ij} is a random intercept that varies across individual judges and states, and it can be conceptualized as the general propensity of a sincere vote. Furthermore,

the level 1 equation is also affected by differences among states (j). The term γ_{0j} is a random intercept that represents the general propensity for state j to experience sincere votes among its judges. Additionally, the level 2 effects are also conditioned by state ideology, specific institutional features (such as an intermediate appellate court and professionalism), and the selection mechanism used to determine its judges.

Table 1 presents separate models for criminal law cases¹⁶ and civil liberties cases.¹⁷ Examining these results reveals that the Model of Contingent Discretion significantly influences state supreme court judges in the expected directions. For both criminal cases (model 1) and civil liberties cases (model 2), the coefficient for the variable *Statutory Constraint* is statistically significant and positive. Recall that because of the inclusion of the interaction term, this variable now measures the effect of statutory language on conservative judges. Consequently, these results provide empirical support for our hypothesis—as statutes become more detailed, conservative judges are able to use the statutory language to reinforce and facilitate their ideological voting. In contrast, the interaction term *Liberal* \times *Statutory Constraint* is statistically significant but possesses a negative coefficient. This indicates that for both criminal and civil liberties cases, liberal state court judges are constrained from voting ideologically as state statutes become more detailed. The result for the interaction term provides empirical support for our hypothesis.¹⁸

Examining the remaining individual-level variables reveals that none of the coefficients attain statistical significance in either model. Additionally, turning our attention to the state-level effects reveals that none of the variables exert a statistically significant influence on individual behavior (although collectively it is still important to control for state-level effects).

While these empirical results confirm our hypothesis related to the Model of Contingent Discretion, they do not offer insights into the substantive effects of statutory constraint on judicial behavior. To provide a better understanding of the dynamic relationship between statutory language and ideological preferences, we offer Figure 1. This graph presents the impact of increases to statutory constraint on the probability of individual state judges casting sincere votes in criminal cases. Examining the dashed line (which represents conservative judges) reveals that as the length of legislation increases from its minimum to maximum value, the probability of conservative judges casting sincere votes increases by approximately .100 (from a probability of .600 to a probability of .700). Therefore, holding all other influences constant (including the degree of ideological extremism), for every ten criminal cases the average conservative state court judge reviews, we should expect to see one additional conservative vote when the

Table 1. Multilevel Model of Statutory Constraint

	Model 1: Criminal cases	Model 2: Civil liberties cases
Individual-level effects (level 1)		
Statutory constraint	.068*** (.013)	.130* (.062)
Liberal	.112 (.168)	1.353 (.817)
Liberal × Statutory Constraint	-.136*** (.018)	-.253*** (.097)
Ideological intensity	.001 (.001)	-.009 (.006)
Judicial review	.015 (.053)	.019 (.198)
Age of statute	.000 (.000)	-.001 (.002)
State-level effects (level 2)		
Partisan balance of the state legislature	-.077 (.432)	.599 (.531)
Intermediate appellate court	-.134 (.165)	.207 (.213)
Judicial professionalism	-.364 (.456)	.540 (.718)
Retention election	.198 (.186)	.211 (.253)
Partisan/nonpartisan election	.050 (.168)	-.006 (.211)
Constant	.311 (.385)	-.703 (.799)
N	29,429	910
Log-likelihood	-19,767.91	-1,310.33
Wald χ^2	680.061	42.241
Probability > χ^2	.000	.031

Dependent variable: unconstrained or sincere vote (1), constrained vote (0). Estimates calculated with HLM 6.07 (Raudenbush, Bryk, and Congdon 2005).

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

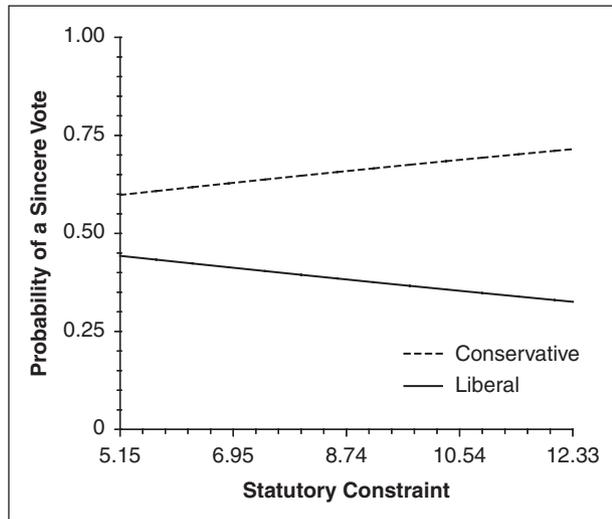


Figure 1. Impact of constraint on sincere voting in criminal cases

statute involved contains more detailed language. Conversely, the solid line indicates that increases in the length of legislation from minimum to maximum decreases the probability of liberal judges casting sincere votes by approximately .100 (from a probability of .450 to a probability of .350). Thus, holding all other influences constant, the

average liberal judge is expected to cast one less liberal vote in a set of ten criminal cases.

Theoretical Implications

The combined findings for *Statutory Constraint* and the *Liberal × Statutory Constraint* interaction term suggest a theoretically important way of thinking about judicial behavior. Rather than conceptualizing the legal model and the attitudinal model as competitors (i.e., that there is a trade-off between law and ideology), the empirical evidence suggests that legal influences and ideological influences also work in tandem among state supreme courts. These judges are influenced by the Model of Contingent Discretion, and occasionally, the traditional tension exists and statutory language constrains the judges from voting ideologically. However, in other instances these two influences operate in a more dynamic and interdependent manner, and we observe statutory language facilitating the expression of ideological voting among the judges.

Yet an important question remains—why are the state level effects not more prominent in the model, in particular the method of judicial selection? In model 1 and model 2 neither *Retention Election* nor *Partisan/Nonpartisan Election* is statistically significant. This indicates that elected judges and merit-selected judges behave similarly to judges who are appointed to state supreme courts. This

Table 2. Determinants of the Level of Detail in State Statutes

	Model 3: All cases	Model 4: Criminal cases only	Model 5: Alternative specification
Retention election	.252*** (.013)	.556*** (.022)	—
Partisan/nonpartisan election	.366*** (.013)	.483*** (.024)	.030* (.017)
State ideology	.269*** (.005)	.264*** (.009)	.214*** (.008)
Judicial appointment	—	—	-.177*** (.008)
N	101,338	37,783	37,783
F	933.850	419.930	419.930
Probability > F	.000	.000	.000
R ²	.027	.032	.032
Adjusted R ²	.027	.032	.032

Dependent variable is *Statutory Constraint*. Estimates are ordinary least squares (OLS) coefficients; standard errors are in parentheses. Models 3 and 4 use *Judicial Appointment* as the baseline category (for comparisons), and model 5 uses *Retention Election* as the baseline (for comparisons).

* $p < .05$. *** $p < .001$.

conclusion contradicts the general consensus among state court scholars: that elected judges encounter additional constraints as the result of electoral pressures from the public (see Bonneau and Hall 2003; Brace and Hall 1993, 1997; Hall 1992; Hall and Brace 1992; and Langer 2002).¹⁹ As these studies demonstrate, electoral pressures often serve to constrain the ideological voting of individual judges.

To address this apparent contradiction, we conduct a corollary analysis on the determinants of statutory constraint. In particular, we focus on whether some states are more likely to pass detailed statutes than others. For this analysis we utilize the *Statutory Constraint* variable as the dependent variable, and we regress it on three independent variables: *Retention Election*, *Partisan/Nonpartisan Election*, and *State Ideology*.²⁰ The results reported in Table 2 for all cases (model 3) and for criminal cases only (model 4) provide extremely interesting information. In each model, the coefficients for *Retention Election* and *Partisan/Nonpartisan Election* are significant and positive (even when controlling for *State Ideology*)—states that do not possess complete and direct control (i.e., states that do not appoint judges) over the makeup of their courts of last resort are significantly more likely to pass detailed statutes. Additionally, we ran an alternative specification (model 5) for criminal cases in which we changed the baseline category from judicial appointments to retention elections. The results in model 5 indicate that states with *Partisan/Nonpartisan Elections* are significantly more likely to pass more detailed statutes than states with retention elections.

The results of this corollary analysis help paint an extremely interesting portrait of legislative-judicial interactions at the state level. It is apparent from the empirical evidence in Table 2 that states with direct and complete control over the composition of their supreme courts

(i.e., through judicial appointments) are significantly more likely to pass vague and ambiguous statutes. However, as state legislatures lose control over the makeup of their courts—as they move to retention elections and then to partisan/nonpartisan direct elections—they respond by passing more detailed legislation, legislation that according to our empirical evidence in Table 1 significantly influences judicial behavior. This finding highlights an important intervening variable that has heretofore been excluded in existing research. The scholarly consensus agrees that state court judges facing electoral pressures are more likely to deviate from voting according to their ideological preferences. For example, Hall (1992) demonstrates that liberal judges seeking reelection in four relatively conservative states are significantly more likely to vote conservatively (and join conservative majority coalitions) in death penalty cases. Our corollary analysis suggests that future research should explore the potentially mediating effects of legislation on the impact of electoral pressures. It is possible that judges in states with judicial elections are not simply encountering direct electoral pressure as the previous research indicates. Rather, these judges may face competing pressures—from both the electorate and from the state legislature—that is attempting to make elected supreme court judges more accountable to the legislative branch. Our results suggest that scholars need to explore the potentially complex intricacies of this dynamic relationship.

Conclusions

Are state supreme court judges influenced by the Model of Contingent Discretion, similar to their federal colleagues? Stated another way, do these judges render decisions according to their ideological preferences, or are they constrained by the language of state statutes? Our examination into this question provides empirical evidence to support

the latter contention. The measure of statutory constraint reveals that more detailed language (resulting in statutes with higher word counts) significantly limits the discretion afforded to liberal judges while simultaneously facilitating the ideological voting of their conservative colleagues in both criminal and civil liberties cases.

Our analysis provides initial empirical evidence to support a new theoretical conceptualization of judicial behavior—based on the Model of Contingent Discretion. If everything else is held equal, judges may render decisions according to their ideological preferences. Yet all things are not equal, and the presence of legal factors, such as statutory constraint, limits the ability of some judges to rule ideologically. However, the story does not end here. The presence of detailed statutory language can also facilitate the expression of ideological voting among other judges. Thus, while some individuals experience significant constraint from the presence of detailed statutory language, others experience an enhancement of their ability to follow their ideological preferences and are more likely to vote in a sincere manner. Based on this dynamic interaction between political attitudes and statutory influences, one should not think of the legal model only as a set of forces that operates in contrast to ideological attitudes. Our conceptualization of the Model of Contingent Discretion consequently provides a more complete model of judicial decision making that accounts for the dynamic interaction of political preferences and statutory influences.

While these results suggest an important new theoretical direction for judicial behavior, the research also raises additional questions for future studies to address. First, though we provide evidence concerning the passage of detailed legislative statutes in those states with direct or retention elections of judges, more research is needed to determine the precise nature of this relationship.²¹ Second, since our analysis is limited to only four years, future research is needed to determine if these results are confined to the period under study or whether they can be generalized to a broader context. In addition to these temporal aspects, it is important to see if these results hold in other issue areas, specifically areas where one would expect legislation to prescribe more liberal outcomes (e.g., civil rights statutes). If the Model of Contingent Discretion operates in these areas as well, we would expect to see patterns of constraint and facilitation reversed with more detailed legislation making liberal judges more likely to vote in a sincere manner and conservative judges facing constraint.²² Empirically examining these questions in future research is important to determine additional aspects of the dynamic and interdependent relationship between statutory influences and ideological preferences.

Finally, the results of our analysis have significant implications for the study of interbranch relations in general, and

for separation of powers studies specifically. While speculations exist about the underlying strategy employed by state legislatures in determining the level of detail in statutes, the results of our analysis provide evidence that at minimum there is an opportunity for strategic state legislatures to constrain the behavior of judges. Future work should examine the decision making of state legislatures with respect to the level of detail included in legislation.

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Notes

1. *In re Marriage Cases*. 2008. 43 Cal. 4th 757; 183 P.3d 384; 76 Cal. Rptr. 3d 683.
2. Theoretically, this argument is similar to Lindquist and Cross's (2005) research concerning the effects of precedent (although the precise mechanisms differ). Thus, the effect of statutory constraint—similar to the effect of precedent—does not necessarily decrease the ability of judges to vote according to their preferences in a uniform manner. Rather, it creates a more complex environment that at times constrains ideological voting, while at other times providing a facilitating mechanism.
3. In addition to the text of the actual statute, the LexisNexis entries for many laws include references to previous judicial decisions interpreting a given statute as well as any cross-references to other relevant statutes. Our measure of a statute's word count includes the full LexisNexis entry, thereby allowing us to capture all information available to judges when they interpret a particular statute.
4. It is possible that statutory constraint may possess a quadratic relationship with judicial discretion. Similar to the effects identified by Lindquist and Cross (2005) regarding precedent, it is possible that more detailed statutes have a constraining effect up to a certain level, at which time they begin to afford greater discretion by allowing judges to pick and choose the specific language upon which to base their decisions. Yet because statutes are unified documents rather than a set of separate and disparate decisions (similar to a set of precedents), our contention is that a linear specification is more accurate. Further research is necessary to determine

- more precisely the conditions under which statutory language influences judicial behavior.
5. For civil liberties cases in our sample, we include only First Amendment and Privacy cases. The assumption that most laws involving individual liberties will proscribe a conservative outcome would be strongest in these two areas. We recognize that most civil rights laws proscribe a liberal outcome, and thus we do not include them in our sample of civil liberties cases. We also recognize that trends in recent years for some states have moved toward more liberal statutes especially in terms of granting greater privacy rights to homosexuals. However, since our data include cases from 1995 to 1998 (as discussed below), the time frame of our analyses predates these trends.
 6. This includes all fifty-two state supreme courts since Texas and Oklahoma possess separate courts of last resort for civil and criminal cases.
 7. Since we are not testing a strategic model, we hesitate to use the term "sincere." However, this is the most straightforward connotation to determine the influence of ideology and constraint.
 8. We rely on the PAJID measure of state supreme court judge ideology to determine whether a judge is considered 'liberal' or 'conservative' (Brace, Hall, and Langer 2000). A judge is coded as liberal if PAJID > 50, conservative if PAJID < 50. No judge in the data has a PAJID score equal to 50.
 9. Since we examine subsets of cases, the total number of observations in each statistical model will fluctuate.
 10. As a check on the reliability of the Firefox "word count" feature, we also utilized the "word count" tool in Microsoft Word for a sample of statutes.
 11. Examination of the descriptive statistics associated with the word count reveals that the mean number of words per statute equals 25,008 with a standard deviation of 37,765, a minimum of 173, and a maximum of 243,835 words. Similar descriptive statistics for the logged measure are mean = 9.16, standard deviation = 1.51, minimum = 5.15, and maximum = 12.40.
 12. As we explain later in the article, we rely on the Brace, Hall, and Langer (2000) PAJID scores to determine ideology. We simply divided this continuum at its midpoint to determine which state judges were considered liberal.
 13. The folding is accomplished by subtracting 50 from the PAJID score for each individual judge and taking the absolute value of that result.
 14. This is calculated by subtracting the year in which the legislation was passed from the year in which the specific case came to the state supreme court.
 15. Previous versions of this analysis also included measures of state ideology developed by Wright, Erickson, and McIver (1987) and Berry et al. (1998). The substantive results with these alternative measures are consistent with the analyses presented here.
 16. We define criminal cases as the set of cases in the original Brace and Hall data set where the variable *genissue* = 1.
 17. We define civil liberties cases as the set of cases in the original Brace and Hall data set where either *gen_first* = 1 or *gen_priv* = 1.
 18. To examine these effects in a more specific issue area that is highly salient, we estimated the model on death penalty cases only (the results of which are presented in Appendix A, available online at <http://prq.sagepub.com/supplemental>). While the effects of statutory language vanish for conservative judges, liberal judges remain significantly constrained as statutes become longer (i.e., the interaction term *Liberal* × *Statutory Constraint* remains significant and negative).
 19. Additionally, the defeat of California Chief Justice Rose Bird in her recall election of 1986 serves as a primary example of the pressures state judges encounter during retention elections.
 20. As measured by Wright, Erickson, and McIver (1987).
 21. For example, future models should examine factors pertaining to legislative intent when passing detailed statutes. In particular, scholars should focus on the ideological influences of state legislatures, the costs associated with such behavior, and whether the preferences of sitting legislatures affect judicial behavior.
 22. As an auxiliary test of the influence of statutory constraint in areas where legislation prescribes a liberal outcome, we examine employment discrimination cases. The results from this auxiliary test (reported in Appendix B, available at <http://prq.sagepub.com/supplemental>) support our theoretical expectations—more detailed employment discrimination statutes significantly constrain conservative judges, while also facilitating the sincere voting of liberal judges. However, these results should be viewed with caution due to the small sample size of the analysis.

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