

**An Examination of Influencing Factors on Supreme Court Decision-Making Behavior in
Federal Agency Cases**

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*This dissertation is dedicated in loving thanks
to my mother, Lisa, for everything.*

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God Bless Ozzy Osbourne.

ABSTRACT

Theories of Supreme Court decision-making attempt to characterize the Court's behavior in one of three ways: 1) the Court is strictly political (the attitudinal model), 2) the Court is guided by precedent (the legal model), or 3) the Court takes strategic factors, including other institutions' political preference, into consideration (the strategic model) when making decisions. These theories adopt a one-size-fits-all approach to explaining decision-making behavior. In this study, I posit that the type of case being examined affects which theory of decision-making is most accurate.

Here, I ask: which of the three dominant theories of Supreme Court decision-making explains the outcomes of federal agency cases (N = 888; years 1954-2017)? Using measures of the Court's ideology; ideologies of the President, House, and Senate; the Solicitor General's stated position; and legal factors (precedent and case legal complexity), I explore whether the Court considers these external institutions in its decisions, adapting its decisions to better align with their will. I also test the notion that the Court responds to external institutions more when they are ideologically aligned against the Court. My results indicate that the Solicitor General profoundly affects Supreme Court decisions, that the individual chambers of Congress influence the Court, and that legal factors guide the Court in its decision-making.

Overall, my findings suggest that the Court makes decisions within a broader context than just its own political preferences. In sum, the Court behaves strategically in federal agency cases with keen attention paid to relevant legal constraints, the most significant of which is precedent. From these findings, one call to action emerges. Political scientists studying the Supreme Court must consider the possibility that there is no "one size fits all" theory that explains decision-making. Rather, different theories explain different types of cases.

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Part I: Introduction and Background

Introduction

The Courts, Congress, and the President (and by extension also the bureaucracy) all operate in a political policymaking framework in which powers are separated among them, and this separation is maintained by a balance of power between these institutions and the existence of checks that each exercise on the others. In this system, the Supreme Court and the federal judiciary occupy a difficult position in which their checks on the *elected* branches include their power to interpret the law, and namely the Constitution, as well as their power of judicial review (Epstein and Knight 1998; Eskridge 1991a; Segal et al., 2011).

The checks exerted on the courts, however, are numerous and formidable. First, a major check is the President, who appoints all federal judges (the effects of which can extend decades) (Moraski and Shipan 1999). The President also controls and appoints the heads of the federal bureaucracy, which include agencies that are the implementative force of the government (including judicial policies) (Bednar 2025; Lewis 2011). Second, there is Congress, which exerts considerable checks on the courts through its confirmation role in the judicial nomination process, as well as pragmatic checks on the functionality of the courts themselves – control over the number of courts and judges who sit on them, their jurisdiction to hear cases, their budgets and resources, etc. (Clark 2011; Rosenberg 1992). Finally, there is the bureaucracy, seated in the executive branch, which possesses considerable influence through its role as an implementor of judicial policies (Spriggs 1996; Canon and Johnson 1999). Given the complex institutional framework within which the Court must make decisions, it is natural to question whether these institutions affect the outcomes of judicial decisions. Addressing this issue is one of the purposes of this study.

The Court not only behaves differently depending on the type of case before it; this difference may also impact the extent to which other institutions (e.g. the President, Congress, agencies, etc.) scrutinize the Court's decisions (Black and Owens 2012; Caldeira and Wright 1988). One way of characterizing the Court's approach to deciding different types of cases is by the basis of the legal question(s) present in the case. Scholars have noted that the Court behaves differently depending on whether constitutional or statutory issues motivate the case (Segal and Spaeth 2002; Bailey and Maltzman 2011; Martin and Quinn 2002; Lindquist and Cross 2007). This differentiation has even manifested itself in the Court's practice of the long-serving and evolving Double Standard (discussed in greater detail later), which characterizes the Court's decision-making behavior in broad terms of judicial activism and restraint (Tushnet 2003). Whereas the Double Standard has faced significant paradigmatic threats, and whereas scholars have largely neglected the study of statutory cases in lieu of studying salient constitutional decisions with wide-reaching policy impacts, this study sets out to accomplish two goals: to explore whether certain theories of decision-making (legal, attitudinal, strategic) do a better job of explaining judicial behavior in statutory cases, and to better understand how the Court makes decisions in these cases.

What about statutory economic cases make them unique for the study of decision-making? Federal statutes are products of Congress and are implemented by federal agencies, who use their discretion to do so as they see fit. When agencies are accused of straying from the intended implementation path, the courts settle the matter, deciding whether the agencies were within their discretion to interpret statutes as they did, having done so through their expertise and specialized role in the implementation process (Eskridge and Baer 2008). The courts' responsibility in making this judgment evokes the institutional relationship between the courts

and agencies, as well as the broader relationship between the judicial and executive branches. As the Supreme Court of the United States is the apex court of the judiciary, its legitimacy relies at least in part on its maintenance of strong relationships with three institutions: the President, Congress, and the bureaucracy. It is reasonable, then, to conclude that the Court must take the preferences of these institutions into account in its decision-making, even if this means departing from the aggregate of the justices' political preferences. However, theories differ in their views of this conclusion.

Theories of Supreme Court decision-making articulate explanations of Court decisions. The legal model, largely regarded as a normative ideal, places the focus of decisions within the law itself, manifesting as adherence to precedent and common legal reasoning (Friedman 2006). The attitudinal model portrays justices as political actors pursuing their own preferences *through whatever means necessary*, including finding legal precedent to support their attitudinal decisions (rather than allowing precedent to guide their decisions, with ideology omitted) (Tiller and Spiller 1999). Strategic decision-making models take the essence of the attitudinal model – that justices are political actors who pursue their own preferences – and logically frame the ability of justices to pursue preferences by acknowledging the constraints that limit them (decision-making in a “constrained environment”). These constraints include both internal factors (justices’ personal preferences, the preferences of other justices, institutional norms, precedent and *stare decisis*, other legal factors including legal complexity and procedure, and the risk averse nature of decision-making without inherent enforcement) (Segal and Spaeth 2002; Tiller and Spiller 1999; Cramton 1976; Friedman 2006) and external factors (public opinion, political pressures from other branches of government, broader legal and policymaking contexts, and strategies employed by litigants to shape decisions) (Caldeira and Zorn 1998; Tiller and

Spiller 1999; Groseclose and McCarty 2001). Whereas these models will be fully fleshed out theoretically in the next section, the important points are that each has been difficult to validate empirically, and most studies employing them ignore cases surrounding statutory economic issues – particularly federal agency cases.

This study posits that one of the most effective ways to test these theories of Supreme Court decision-making is to examine cases in which the Court is not the sole federal actor. Cases in which the Court reviews agency actions (as introduced above) are perhaps the best avenues to explore the Court's decision-making in a constrained environment because direct institutional conflict between the Court and the other branches of the federal government almost certainly involves strategy as a factor. In these cases, the issue at hand is the interpretation of a federal statute. That means the interpretation of congressional statutes by a federal *bureaucratic* agency. These cases are argued by the Solicitor General (a presidential appointee and fourth highest-ranking legal official in the Justice Department) or a designee. Thus, these cases involve legal questions surrounding bureaucratic actions taken to implement congressional policy, where appeals of these actions are argued before the Supreme Court by the Solicitor General, a high-ranking political appointee. Finally, these cases are less salient than constitutional matters (such as reproductive rights, voting rights, individual freedoms – including religion and speech, as well as gun rights and control, among others) before the Court, thereby saving this strategic environment from the direct effects of public opinion. There is no better avenue to test decision-making models in a constrained environment, and that is what this study undertakes. In summary, it examines court decision-making in a subset of cases that directly involve the interpretation of a federal statute. The interpreting body in all these cases is a federal agency, and

the range of years from which cases are drawn is 1954-2017, producing a dataset of 888 cases for this analysis.

The remainder of this dissertation proceeds as follows. First, I will review the extant literature on theories of Supreme Court decision-making. Second, I will articulate how recent developments on the Court and its decisions necessitate that modern scholars of the Court reconsider their focus on statutory economic cases. Third, I will present a historical account of the development of the Court's dogma of the Double Standard, specifying how the Court has viewed and continues to view its role in deciding constitutional and statutory cases.

From here, I will describe my research design. I begin with my primary research question: What motivates Supreme Court decision-making in statutory economic cases involving federal agencies? Secondary research questions concern the extent to which the Solicitor General influences the Court's decision-making in federal agency cases and whether the ideological alignment of external institutions (the President, House, Senate, Solicitor General, and the involved federal agency) affects the Court's decision-making in these cases. The research design will set out a plan for answering these questions by first testing whether the Court makes ideological decisions in these cases (despite constraining factors). This part of the research design will feature a model testing the effect of ideology and the law on the outcome of these cases. Explanatory variables in this model include the Supreme Court's ideology, the ideologies of the President, House, and Senate, the ideology of the formal position adopted by the Solicitor General¹ in each case, the ideology of the federal agency whose actions are at issue in the case,

¹ For all purposes of this dissertation, any reference to the ideological position of the Solicitor General refers to the ideological characterization of the arguments put forth during the cases in this study, not to the ideology of the Solicitor General themselves. This is consistent with the notions that the Solicitor General's ideology is at least partially reflective of their appointing president (Segal 1997; Pacelle 2003; Black and Owens 2012), as well as the notion that even though Solicitors General argue from a position of government interest and law, this position can still be characterized by ideology (Black and Owens 2012; Pacelle 2003, 2015).

and legal factors including case precedent and legal complexity. Then, I explore scenarios when external institutions align ideologically against the Court, evaluating the extent to which these alignments affect the Court's decision-making behavior. This phenomenon could be due to concerted efforts made by these institutions or could simply be a matter of serendipitous common policy goals.

I then present the results of these analyses. Key findings enable me to draw conclusions about the extent to which the Court appears to consider the ideological preferences of other institutions when making decisions. I find that the Court appears to respond positively to the ideological position argued by the Solicitor General and the ideology of the Senate, while making decisions that are at odds with the ideological will of the House of Representatives. My findings also indicate that the Court largely overlooks the President's position. The results of the alignment configuration models reveal that the Court is responsive to unity among the external institutions. Specifically, the Court seems to respond and adapt its decisions to be consistent with these institutions when there is a unified executive (meaning the President, Solicitor General, and Agency are aligned ideologically), and to a lesser extent when there is unity in Congress (the House of Representatives and the Senate are of the same ideology). This effect is minimal when there is a unified government across the legislative and chief executive branches (meaning the President, House, and Senate are ideologically aligned). From all these results, there is support for the notion that the Court behaves strategically in federal agency cases and carefully considers the legal dynamics surrounding these cases, especially precedent.

In the end, I conclude that whereas other studies on constitutional civil rights and liberties cases heard before the Court may feature decisions that are consistent with and derivative of the ideology of the Court itself (see *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), *Lawrence*

v. Texas (2003), *DC v. Heller* (2008), *United States v. Windsor* (2013), and *Obergefell v. Hodges* (2015) for examples of when justices' preferences appear to be on full display in their majority opinions), in statutory cases that deal with the regulation of the economy and administration of policy (namely federal agency cases), the Court seems to be reluctant to rely solely on its own ideology to reach decisions and instead considers and at times changes course to align with external institutions.

Background: How Justices Make Decisions

Scholars of the Supreme Court have long debated how justices make collective decisions. There are three primary theories of decision-making that have emerged from scholarly work: the legal model, the attitudinal model, and the strategic model. In this section, I will discuss these models.

The Legal Model

The legal model holds that justices close their eyes to politics and personal preferences when they don robes. The legal model holds that justices rely upon the guidance and direction of the Constitution, statute, and precedent when making decisions. If their decisions align with their preferences, this is a function of the law itself rather than justices' efforts to bend the law in a certain direction. Furthermore, proponents of the legal model posit that because justices are unelected and hold lifetime tenure, they should not "make" the law but rather should "find" the law (Pacelle 2002). One theoretical way of looking at it is to view courts as legal machines, for which case facts and specific legal questions serve as inputs. The output comprises unbiased legal opinions that find and apply the law, weighing precedent, aggregated case law, and the Constitution and relevant statutes.

Research has indicated that the Court engages in practices that lend at least some credibility to the legal model. Some “legal realists” (who acknowledge the influence of numerous factors on decision-making) (Pacelle et al., 2011) recognize the discretion exercised in judicial decision-making and accept that justices are unconstrained by this discretion (Gillman 1993; McCann 1999). Some of these legal realists also characterize justices as actors who, despite having significant preferences, rely on precedent nonetheless (Murphy and Tanenhaus 1972). Other realists contrast in their assertion that justices are wholly unconstrained and act according to their own views, a point agreeable to attitudinalists (Clayton 1999).

Legal scholars note the Constitution's and statutes' central role in the Court's decisions and argue that the Court should look at the texts for the black-and-white text itself and the intent contained therein. Interpretivists characteristically appeal to the notion that the Court should look to the higher authority of the Constitution to base its decisions. The authority of the Constitution is in the document itself, in its words and the intent behind them, and accordingly, justices should rely on its words and the intent behind them (Grey 1975). The idea here is that intent should control interpretation, and actions based on interpretation should align as closely to intent as possible (Spaeth 1995). Theoretically, this produces decisions grounded in the Constitution itself, leaving little room for interpretation by subsequent justices, thereby stabilizing the law and reinforcing the politically neutral role of the Judiciary.

Others argue that justices recognize the enduring values enshrined in the texts and should aspire to uphold them. Under this premise, if justices are faced with hard questions, they should seek to promote the general ideas and values presented in the texts from which they draw. One approach would be to promote civil rights and basic democratic values, as liberty is afforded by the Constitution and statutes (Bickel 1962). As the texts are bound to their four corners, all the

complex and novel legal questions posed to the courts today cannot reasonably be directly addressed. In such an absence, justices should err on the side of promoting common ground, aspirational interpretations of the law. This also provides stability in the law over time as justices aspire to the same values and make decisions motivated by the texts themselves, even when immediate answers are void.

Finally, for proponents of the legal approach, the Court is, to the extent that it adheres, bound by its own precedent. The doctrine of *stare decisis* provides order for the judiciary, outlining the path once taken and legally constraining the Court's straying from that path. In adhering to precedent, the Court should acknowledge its previous considerations regarding the effect of legal constraints on decision-making. If the Court has previously decided a case based on the Constitution and relevant statutes, those determinations should be accepted as valid in situations where they are directly applicable (Hettinger et al., 2006). Furthermore, the doctrine of *stare decisis* should simplify the job of the courts. If precedent guides decisions, there is little for justices to do by way of developing their own legal arguments. Instead, for those who subscribe to the legal model, the job of justices is to find and apply the law.

Finally, the legal model emphasizes restraint. As it holds that justices actively ignore preferences in favor of the legal factors that should matter most, it also supports the notion that justices willfully restrain themselves from activism and engagement in partisan politics. This self-restraint limits the Court's actions in its decisions while also strengthening them through narrowing decisions to the extent that they carry less risk of being challenged as being activist. For proponents of the legal model, restraint is the expectation for how justices should act. For critics of the model, restraint through the legal model is, at best, a normative ideal to which the Court should aspire while intentionally falling short (Segal et al., 2005).

The Attitudinal Model

In stark contrast to the legal model, attitudinalists believe that the Court is composed of politically motivated judges who, like others in power, possess political preferences and attempt to achieve them unabashedly (Segal and Spaeth 2002; Epstein and Knight 1998). Proponents of this view of decision-making claim that justices pursue their preferences with few constraints. Furthermore, justices characterized in this model use legal bases to support their stances (making politically motivated decisions and finding precedent to support them instead of allowing precedent to guide decisions) (Segal and Spaeth 1993).

Adherents to the attitudinal model note that justices are appointed for life and have no clear aspirations to further their careers. After all, there have only been 116 justices in the Court's 234-year tenure. Furthermore, there are few paths for justices to leave the Court. Justices were known to die in office for the first half of the Court's history, likely attributed simply to the shorter life expectancy. This reality can also be attributed to the lack of retirement benefits for justices during the Court's earlier history. More recent appointments to the Court have served longer, leaving under different circumstances. Since 1900, of the 52 justices appointed to the Court who have left the Court, only 14 have died while in office, with 38 of them leaving through retirement or resignation (Hylton 2012). Furthermore, over the last 70 years, only five justices have died in office. With the likelihood of a justice dying in office being low and decreasing over time, the mechanisms for justices to leave office include removal and voluntary resignation from the office. As noted above, most justices leave by way of retirement. Only one justice has been impeached, Justice Samuel Chase in 1805, who served further until exiting the Court in 1811 upon his death. All of this reinforces the notion that justices have no clear incentive to bend to the political will of others to protect themselves, as the choice to leave the

Court seems to be exclusively and squarely theirs alone. In short, justices are free to act in accordance with their own political preferences.

Whereas the legal model has been characterized as a normative model explaining how justices should decide cases (Segal et al., 2005), the attitudinal model further engages with the Court on the individual level of the justices, paying closer attention to the motivations that factor into the collective decision-making of the Court. Looking at the Court through this individualistic lens, a few aspects of decision-making become clearer. Most importantly, justices tend to decide according to the political affiliation with which they identified before joining the Court. This is supported by the fact that presidents appoint justices based on these affiliations and expect justices to decide accordingly during their tenure on the Court (Segal and Spaeth 2002; Cameron et al., 2000). Attitudinalists also point out that presidential nominations of justices also reflect the president's ability to move the median justice closer to their own preferences and to influence the Court for a generation or more (Epstein and Segal 2005; Rehnquist 2002; Abraham 2008).

If the legal model were adequate in explaining decision-making on the Court, then the confirmation of justices to the Court would not be the political spectacles they have become in recent years. Furthermore, short of knowing their names by happenstance, the identities of Supreme Court justices would not matter if they were little more than operators of the judicial machine. Instead, the confirmation hearing of Justice Amy Coney-Barrett saw over 5.3 million viewers across the three main reporting networks on day two of the hearings (Joyella 2017), and the confirmation hearing of Justice Brett Kavanaugh saw over 13 million viewers across the three main reporting networks on the day of testimony from Justice Kavanaugh's primary accuser of sexual assault, Dr. Ford (Fitzgerald 2017). Although the salience of these hearings

was heightened by their political aspects (the questionable timing of Justice Coney Barrett's confirmation and the nature of accusations levied against Justice Kavanaugh), they represent an increase in overall scrutiny and public interest in these proceedings. The explanation for this uptick in the influence of politics on the process is attributed to the belief that justices are political actors who will enact their preferences if given the life-long gavel.

Attitudinalists also note that justices are consistent in their decisions despite changes in the political landscape and the growth and development of precedent over time (Rohde and Spaeth 1976; Schubert 1965, 1974; Epstein et al., 1998). The preferences of justices are reflected in their decisions, but the ability of their decisions to fulfill this reflection depends on the type of issue present in the case at hand. Issues involving civil rights and liberties clearly reflect this consistency as justices seem to be more likely to exercise their sincere preferences in these types of cases. On economic issues, justices are less consistent. In economic cases, it seems there are constraints on justices' preferential pursuits (Ducat and Dudley 1987; Hagle and Spaeth 1992, 1993), partially represented in the higher proportion of unanimous economic decisions compared to civil rights and liberties cases (Brenner and Arrington 1987). This makes sense given the nature of these variable types of cases: justices tend to be more politically active in constitutional cases concerning civil rights and liberties, and they tend to practice restraint – or engage in strategic decision-making – when confronted with economic cases (Bickel 1962; Sunstein et al., 2006; Friedman 2006; Epstein and Knight 1998; Tushnet 1999). This produces cases that characteristically feature less consistent preferences, as why bother with the legal interpretation of intergovernmental immunity when one can focus on a decision overturning *Roe* (referencing the decisions of *United States v. Washington* and *Dobbs v. Jackson Women's Health Organization*, respectively, from the Court's 2021 term)?

Despite the varying level of time and consideration of the issues heard by the Court, there is still the enduring notion that justices' votes in cases are "direct expressions of their preferences" (Baum 1997, 25), reinforcing the baseline assumption of the attitudinal approach that justices pursue their own politics, everything else being secondary. This equates to justices making individual decisions that contribute to the overall collective action of the Court, meaning justices vote on their preferences, and the decisions of the Court are an aggregation of these individual decisions. Under this assumption, most cases under the current Court should be 6-3 in support of conservative preferences (reflecting the 6-3 conservative majority on the Court). Of course, there is some variation in this, reflecting a difference in preferences among justices across issues and the constraining aspect of issues themselves. Examples of this variation include *Ramos v. Louisiana* (2020), *Bostock v. Clayton County* (2020), *Carpenter v. United States* (2018), and *McGirt v. Oklahoma* (2020), all instances when Justice Gorsuch formed a 6-member majority consisting of the four liberal justices and Chief Justice Roberts (a fellow Republican-appointee). Justice Gorsuch isn't the only conservative Justice to make the switch to join liberals in recent decisions, with Justice Kavanaugh doing so in other cases such as *Shaw v. United States* (2019), in which he joined the same four liberal justices and Chief Justice Roberts to form a 6-member majority. These examples transcend the constitutional/statutory divide, further articulating how justices, while attitudinal, are not always pushed to the polar ideological opposites of "conservative" and "liberal" in decision-making (Gibson and Caldeira 2009; Sunstein et al., 2006).

The Strategic Model

The legal and attitudinal approaches seek to explain how the Court makes decisions. The legal model normatively describes how justices should act based on the law, and the attitudinal

model portrays justices as being purely political, predicting behavior in only certain types of cases while falling short of explaining the motivations behind their decisions. Neither model provides an empirically accurate explanation of why the Court acts the way it does, nor how it reaches its decisions. For example, the attitudinal model cannot reasonably explain unanimous case decisions, which serve as stark objections to the notion of ideological decision-making on the Court. This is interesting given that unanimity is a common characteristic of Supreme Court decisions, and 42 percent of the cases in this study are unanimous. Although answering how and why justices act the way they do may eventually prove impossible, the strategies justices employ offer an alternative approach to explaining their making. Adherents to the strategic decision-making models acknowledge the attitudinal motivations of justices and note that justices pursue their interests while remaining cognizant of constraints on their ability to do so (Epstein and Knight 1998).

In a comprehensive attempt to understand Supreme Court decision-making, one should consider these three models as pieces of a puzzle: legal foundations for decision-making are omnipresent, justices are attitudinal by way of their preferences and seek to justify their decisions by citing favorable precedent, yet justices are limited in their pursuit by factors internal and external to the Court. Thus, in one sense, the strategic model builds on the legal and attitudinal models and further characterizes the overall complexity of the Court's decision-making.

A reality omitted by the legal model and dismissed by attitudinalists is that external forces on the Court are significant, as are the internal legal forces and small-group dynamics that characterize the Court. Understanding Supreme Court decision-making requires that these factors be considered together, as external forces influence the preferred legal outcomes held by justices

and ultimately impact how they work together to produce decisions that maintain the institution's goals. Supreme Court justices are sophisticated, rational actors who understand the limitations of their own power as well as the Court's ability to affect policy on a large scale (Pacelle et al., 2011).

As rational actors, justices recognize that the best way to advance their own preferences is to ensure that judicial decisions do not engender resistance from other political actors (Eskridge 1994; Spiller and Gely 1992; Ferejohn 2002; Bailey and Maltzman 2011; Clark 2011). In other words, the best way justices can achieve their policy goals is to foster an institutional and political environment in which their actions are not as perceptually extreme as if they were acting in a politically hostile environment (likely created by their brash political actions with disregard for other institutional and political actors). It is reasonable for proponents of the strategic model to assert that justices play the field, yielding to the judicial outcomes favorable and acceptable to the elected branches of government while forwarding their goals without drawing the scrutinous eye.

Avoiding scrutiny is essential to the Court's ability to affect policy in line with its preferences, as retaliation from the elected branches of government poses significant risks to the scope of the Court's policy reach and may impact the Court's legitimacy over time. The Court's legitimacy – ultimately driven by the Court's need for enforcement and implementation of its decisions, which these actors can significantly limit even if unable to impact the Court through official retaliation – is of paramount importance to the Court and its justices. To understand the Court's strategic position, we must understand the internal and external factors exerting pressure on it. I begin with internal factors that qualify the relationship shared between the justices. Then,

I examine the external factors that bind the actions the Court can (and should) take, including considerations of the separation of powers.

Internal Factors

In understanding the nature of Court decision-making, there is much to say about the interactions between justices, as they exist in a close relationship rather than as siloed, selfish individuals who communicate only when required. As working professionals in a small group, their relationships significantly impact their collective job (Epstein and Knight 1998; Hammond et al., 2005; Howard 1968; Maltzman et al., 2000). Rationality is home to the justices; thus rational choices justices make affect their working relationship with their colleagues and the trajectory of the Court's decision-making (Baum 1997).

Earlier, it was noted that the Court's majority opinion authors may adjust the position of decisions to align with the collective interests of the Court (Eskridge 1994; Spiller and Gely 1992; Corley 2008; Owens and Wedeking 2011). This is not a one-way endeavor. Justices likewise adjust their stated preferences to align with the goals of their colleagues, highlighting justices' shared understanding that together they stand and fragmented they fall. Another way to put this is that justices recognize that unity in their decisions further legitimizes the Court, allowing them to fulfill their legal objectives (for example, standardizing the law), while dissonance among them weakens the Court as an institution. The aggregation of movements in policy positions between justices in forming majority coalitions and the subsequent movement in policy positions between the Court and the elected branches by the majority opinion writers represents a strategic consideration justices undertake regarding the impact of their decisions. By adjusting their positions, justices recognize that small steps to narrow or qualify the scope of their decisions in some cases potentially translate into giant leaps for the Court's long-standing

institutional reputation and legitimacy. For those who view the Court as a strategic political actor, it is reasonable to assume that, in the eyes of the justices, the institution's legitimacy outweighs individual preferences.

A further consideration of the strategic actions of the Court in its decision-making concerns the travel of justices' votes throughout the Court's process. Linearly, shifts in votes from the certiorari stage (when the Court votes to grant an appeal to hear a case) to the conference vote (after oral arguments and just as court opinions begin to form) and finally to the formal vote on the merits (after opinions have been concreated) reveal a dynamic environment in which the justices influence the behavior of their colleagues (Epstein and Knight 1998). Scholars have explained why justices are strategic in their votes to grant certiorari (Perry 1991; McGuire and Palmer 1995; Black and Owens 2009, 2011).

Whereas rational choice theories of public institutions tend to overstate the knowledge that actors possess of policy and the political environment, this is not the case with the Supreme Court (Pacelle et al., 2011). As many have noted in recent years since their passing, Justices Ruth Bader Ginsburg and Antonin Scalia were known and revered as much by their close friendship as by their unmistakable differences in their interpretation and application of the law. Justices are sometimes more than colleagues – sometimes, they are friends and build relationships outside the Court in landscapes better suited without robes.

It is reasonable to assume that justices rationally *know* each other and thus understand and predict the behavior of their colleagues. This knowledge is the seat of strategic action during the certiorari stage. For instance, if a justice knows they will not reside in the majority on the merits, they may vote to deny certiorari and thus eliminate opportunities to decide on the merits altogether (Caldeira et al., 1999; Krol and Brenner 1990; Perry 1991). Furthermore, denying a

case certiorari also ensures that the would-be decision is not established as precedent by those opposing justices who would comprise the majority. By attempting to control the process, justices control the decisions made. However, it is also reasonable to assume that justices will champion certiorari in those cases in which they feel confident that they will find themselves in the majority, thus enabling their ability to affect decisions in which at least most of their colleagues will agree (Boucher and Segal 1995; Caldeira et al., 1999; Black and Owens 2009, 2011).

Although there is a hard stop in votes to grant certiorari from votes in conference or on the merits (meaning certiorari and opinion-writing are distinct processes), it is essential to examine these later votes to understand the strategic relationship among justices as the task progresses from granting certiorari to deciding cases. The important aspect of this stage is the shift in votes from those at the conference to the ultimate vote on the merits. Scholars have identified fluidity between conference votes to votes on the merits, marking the average at about one fluid vote per case, or about 10 percent overall (Howard 1968; Johnson et al., 2005; Ringsmuth 2015). Attitudinalists point to this as an indication of politics at play, as justices seem resolute in their preferences (represented by the fact that 90 percent of the time, votes remain as they were in conference). However, any shift in the votes of justices is a dent in the armor of attitudinalists, revealing that justice preferences are flexible (Brenner 1980; Maltzman et al., 2000; Johnson et al., 2006). The impact of vote shifts on the merits on the attitudinal approach aside, this fluidity does reveal the presence of small group dynamics in this latter stage of decision-making, namely bargaining on the language and scope of decisions and adverse internal action (like changing a vote or threatening to author a separate opinion) when bargaining falls on deaf ears and crossed arms (Murphy 1964; Spriggs et al., 1999; Maltzman et al., 2000).

The internal dynamics discussed above paint a portrait of decision-making that looks like attitudinalists claim it should. However, acknowledging the nuance of the process reveals a deeper understanding of the Court's decision-making, which clearly shows the strategy at play. For example, whereas attitudinalists revel in the notion that 90 percent of votes remain the same from conference to the merits stage, they are silent on what votes meaningfully represent in a decision and how the process between conference and the merits stage is more complex than simply tallying votes for one side or the other. That is to say that there is much to consider regarding the interactions between justices despite their votes staying the same throughout. For if a justice can threaten to shift their vote or even author an opposing opinion, they can make considerable progress by influencing the language and scope of the decision while still maintaining their original vote from conference. Attitudinalists would attribute this to policy preferences prevailing. Instead, it is more of policy preferences serving as a starting point from which strategies can be employed (and if those strategies fail, so too may the maintenance of preferences). Furthermore, it is reasonable to expect justices to craft written opinions that are a few steps removed from their preferences, a product of their strategic considerations of their colleagues' aggregated preferences (Maltzman et al., 2000; Hammond et al., 2005; Black and Spriggs 2013; Corley and Wedeking 2014). Despite the internal dynamics of the Supreme Court being important in understanding the motivations behind its decisions, this study aims to understand these motivations by examining the effect of external factors on the Court.

External Factors

The justices face internal pressures from one another, but the Court also faces external pressures from the broader political environment. To fully understand the strategic characterization of the Court's decision-making, it is important to examine the institutional

factors the Court must consider, ensuring its decisions are respected and enforced, and thus that its legitimacy is maintained and protected (Eskridge 1994). The Court must consider the potential for adverse actions (and reactions) from the elected branches and institutionally relevant entities, including the President, House of Representatives, and Senate, as well as actors involved in litigation itself, including the Solicitor General and federal agencies (usually in the instance of statutory economic cases).

As noted above, the Court requires cooperation from the elected branches to legitimize its decisions and ensure they are enforced. The Court must often rely on the President to enforce decisions as they are, and it must rely on Congress to maintain its legal legitimacy by allowing decisions to stand untarnished by adverse congressional action (Eskridge 1994). Scholars have examined how the Court crafts its decisions considering the preferences of elected institutions, namely the President and Congress (Bergara et al., 2003). The reality is that the Court strategically does this to maintain effective policy relationships with these institutions and to avoid potential adverse action (Epstein and Knight 1998).

These strategic considerations are likely a function of the type of case being heard. For example, in statutory cases, the Court faces increased potential constraints on its decisions, as Congress requires a simple majority and presidential approval to overturn or significantly qualify a statutory decision (Fisher and Devins 1992; Rogers 2001). However, the Court faces decreased potential constraints in constitutional cases as it can only be formally corrected or overturned by an amendment to the Constitution (Epstein et al., 2001; Martin 2006). Other analysts believe the difference in experience between statutory and constitutional cases is overrated (Friedman and Harvey 2003); however, that distinction remains compelling when considering the potential reactions to each type of decision.

To make this distinction, it should be noted first that Congress rarely directly attacks the Court in response to its statutory decisions. Members of Congress respond to their constituents, and in the rare instances where Congress corrects the Court, political pressures from constituents are influential. In statutory cases, which are significantly less salient (compared to constitutional cases) among the public and the members of Congress, Congress is not motivated to assume the costs of attacking the Court. Likewise, the Court's concerns regarding congressional reaction to constitutional cases are minimized despite these being among the most salient cases. Concerns in this regard are minimized because the threshold for action is significantly higher and politically more challenging – a constitutional amendment (Martin 2006).

Congress has introduced and successfully passed a constitutional amendment in response to the Court's actions in six instances. The first example of this type of responsive action is the 11th Amendment, passed in response to *Chisholm v. Georgia* (1793). This example is prime as Congress' 11th Amendment response to the Court's decision qualified the role of the Judiciary itself in limiting the requirement that federal courts hear state suits (Orth 2022). Further examples include the 13th and 14th Amendments in response to the Court's *Scott v. Sandford* (1857) decision (Mincberg 2014), the 16th Amendment in response to the Court's *Pollock v. Farmers' Loan and Trust Co.* (1895) decision (Orth 2022), the 19th Amendment in response to the Court's *Minor v. Happersett* (1875) decision, and the 26th Amendment in response to the Court's *Oregon v. Mitchell* (1970) decision (Mincberg 2014). The issues addressed in these cases were salient and motivational to the extent that Congress was warranted to take action. It should be noted that in many instances stated above, congressional action resulted from the Court's decision and the public's mood toward progress.

In today's political environment, few issues fall short of the polarized status of historical issues that required an amendment in response. As the polarization that fuels fighting over policy and political disagreements has increased over time (Boxell et al., 2017), and the urgency to overreact to unpopular Court decisions has become commonplace, the effect of passing a constitutional amendment to counteract Court decisions has been diminished, for there are few issues ripe for the efforts of pursuing a constitutional amendment. This simply means that as polarization and over-politicization of issues has increased over time, the historical threshold for a constitutional amendment to be warranted has been muddied by uncivil discourse. Discussing whether reactive amendments are things of the past is for another setting, but some scholars suggest the threat of constitutional amendments may be immense. For instance, Martin (2006) argues that when Congress focuses its effort to overturn the Court's decisions via a constitutional amendment, success represents a much larger defeat than any comparable outcome in statutory cases. However, it is essential to acknowledge the progressive erosion of congressional responses that may be exercised to counteract Court decisions.

Short of direct attacks on the Court, the elected branches possess tools that can be used to impede effective judicial policymaking. Congress and other political entities may introduce competing interpretations of the law to counter and serve as alternatives to those perpetuated by the Court. These instances of "coordinate construction" of the Constitution eliminate the uniqueness of the Court's interpretation (Barnes 2004; Meernik and Ignagni 1997; Pickerill 2004). Just as dissenting opinions provide an opportunity for oppositional rallying, so does alternate construction of the law, providing a legal basis for those who would challenge the Court's decisions.

Of course, the legitimacy of the Court's decisions relies at least in part on the premise that the Court is the final arbiter of rights. The elected branches may also refuse to enforce Court decisions, highlighting the stark reality that *the Court possesses no formal enforcement mechanism*, and any enforcement depends solely on the legitimacy of the decision (Pacelle et al., 2011). Furthermore, an adverse reaction to a Court decision need not be a full-blown retaliatory countermeasure; instead, Congress may circumvent the Court's decisions without attacking them directly (Whittington 2005, 2007). In many instances, Congress has responded to unfavorable Court decisions by enacting legislation to limit or qualify them. Take the Hyde Amendment in response to *Roe v. Wade* as an example. Congress failed to garner support for an amendment to counteract the Court's articulation of the right to privacy (and, by extension, the right to make reproductive decisions privately). The Hyde Amendment, strengthened by the Court in the 1980 *Harris v. McRae* case, represents an instance in which the Court validated Congress's reaction, a small statutory cession in the grand constitutional battle surrounding the issue of abortion (Hoff 1991).

Both direct (overturning a decision) and indirect (limiting the impact of decisions while falling short of overturning them) attacks are institutional realities for the Court, and it is clear that the Court crafts its constitutional decisions to maintain a positive, or at least palatable, relationship with the elected branches (Epstein and Knight 1998; Epstein et al., 2001; Martin 2006; Eskridge 1994). Just as justices alter their stated preferences to align with the majority coalition of their colleagues, the Court adjusts its decisions to meet its perceptions of the preferences of the elected branches (Epstein et al., 2001). This is primarily to minimize adverse reactions from the elected branches. It also confirms the Court's practice of delivering decisions that fulfill some justices' preferences while appeasing the elected branches rather than pushing

full steam to fulfill the justices' preferences (Epstein and Knight 1998). This is reflected in the reality that the Court perceives any threat or adverse action, however minor, as a cause for steering its decision-making to curb further adverse action (Clark 2011). It should be further noted that the full-steam approach still includes movement within the Court by way of justices adjusting their preferences to the will of the majority in any given case.

Viewing the institutional relationship between the Court, Congress, and the President as strictly aversive ignores the reality that, in many ways, consolidated and concerted efforts between the branches of government create some of the most effective policies (Pickerill 2004). Thus, Congress and the President may use the Court to legitimize policies, and so does the Court, which relies on them, a reminder that the Court possesses no enforcement mechanism of its own. In some cases, the Court has intentionally called on Congress to overturn or, in other ways, qualify its statutory decisions, passing the policy-making ball back into Congress's court (Hausegger and Baum 1999). In these instances, it is usually the case that the Court recognizes the need for a question to be answered and takes responsibility, given the opportunity, while acknowledging the need for Congress to resolve and answer the question through an elected lens. It is worth noting that the policy relationship described here is symbiotic. Congressional statutes are often broad and vague due to the legislative process. It is expected that the bureaucracy will interpret laws as they are implemented and that the Court will ensure these interpretations are valid under the law.

Congressional influence over the Court's decision-making is most pronounced in statutory cases. Empirically, scholars have examined the strategic model through studies of specific decisions (Cohen and Spitzer 1994; Eskridge 1991a; Eskridge 1991b; Eskridge and Frickey 1994; Gely and Spiller 1990), as well as through studies focused on batches of statutory

cases (Eskridge 1994; Hansford and Damore 2000; Hansford and Spriggs 2007; Spiller and Gely 1992). Scholars have found that the effects of strategic factors are prevalent in statutory civil rights cases (Eskridge 1991a; 1991b) and labor relations cases (Spiller and Gely 1992). Other scholars have further determined that strategic factors also feature heavily in the legal rationales the Court uses to reach outcomes (Spiller and Spitzer 1992). Overall, there have been only a few studies that examine the strategic factors that qualify and scrutinize the institutional relationship between the Court and executive agencies, both in terms of how strategy affects the bureaucracy's implementation of Court decisions and how strategy governs the Court's work in conducting legal oversight of the bureaucracy (Eskridge and Baer 2008; Cameron et al., 2000; McNollgast 1999).

This study examines the strategic considerations the Court makes regarding the President, the House of Representatives, the Senate, the Solicitor General, the involved agency, precedent, and legal complexity. Specifically, whereas previous studies have concluded that the Court engages in strategic decision-making, this study examines the ways in which the Court behaves strategically (that is, which institutions the Court considers when deciding these cases and to what extent these considerations matter to the Court's decision-making. The next section explores the role of the Solicitor General in federal litigation before the Court as well as within the broader institutional framework within which the Court makes decisions.

The Solicitor General

The Office of the Solicitor General (OSG) is the most important institutional relative to the Court. While the President appoints the Solicitor General, and the Solicitor General serves at the pleasure of the President, the Solicitor General is far from being a political pawn. It is reasonable to assume that the Solicitor General aligns with the President's basic ideological

preferences, but the task of arguing on behalf of the government's legal interests means it finds itself at odds with the President often (Rehnquist 1987; Devins and Baum 2017). Perhaps one of the most blatant examples of this is when Solicitor General Edwin Griswold argued against President Nixon's attempt to refuse compliance with a subpoena in the landmark case of *United States v. Nixon* (1974). Contemporary examples of when the Solicitor General finds itself at odds with the will of the administration include *Bush v. Gore* (2000), in which Solicitor General Theodore Olson legally argued in support of new President-Elect Bush but not without considerable debates within the OSG (Lund 2001; Dershowitz 2002); *National Federation of Independent Business v. Sebelius* (2012), in which Solicitor General Donald Verrilli navigated the complex task of ensuring support for the Affordable Care Act (ACA) was based in law and the constitutional powers of Congress rather than based on simple politics supported by President Obama and his administration; and *Trump v. Hawaii* (2018), in which Solicitor General Noel Francisco stopped short of arguing that the President's authority to regulate immigration (and thus issue travel bans) was immune to judicial review – this again is an instance in which the Solicitor General falls short of arguing to the extent of the President's wishes.

Recent claims state that the Solicitor General under the first Trump and Biden administrations has experienced less independence, facing charges of arguing politically motivated points before the Supreme Court (Lemos and Widiss 2025). Example of this include the Solicitor General arguing in support of President Trump's travel ban in *Trump v. Hawaii* (2018) and the Trump administration's ending of Deferred Action for Childhood Arrivals (DACA) in *Department of Homeland Security v. Regents of the University of California* (2020), as well as the Solicitor General's defense of President Trump's nominations to the Supreme Court and of the Biden administration's vaccine mandates in *Biden v. Missouri* (2022). These

examples shed light on the reality that the Solicitor General's independence from presidential priorities may be eroding as polarization increases (Lemos and Widiss 2025).

Within a strategic framework, the way the Solicitor General navigates attitudinal presidential priorities in favor of what is *legally* best for the government highlights the Solicitor General's position between law and politics. Theoretically, this means the Solicitor General is the most important institutional player for the Court, as the Solicitor General filters presidential priorities, argues from a position of law, and does so strategically to influence the Court to produce favorable decisions. Furthermore, the Solicitor General's role in representing the government in all cases in which it is a party elevates their position with the Court. Balancing government entities' interests with that of the Chief Executive is difficult. This arduous balance couples with the unique and significant relationship between the Solicitor General and the United States Supreme Court. The Solicitor General serves as the greatest institutional resource for the Court, making major government interests in cases clear for the justices and providing interpretive legal advice when called upon (fulfilling the normative role of a Justice Department official) (Pacelle 2003).

The Solicitor General, or "Tenth Justice" as the position has been called, influences the Court at all stages of the Court's decision-making process, particularly with regard to the granting of certiorari and at the merits stage not only in which the government is a party, but also in those cases which draw the institutional (and political) interest of the federal government or otherwise require the involvement of the Solicitor General at the request of the Court itself. At the certiorari stage, the Solicitor General's significant role is stark. As a litigant, the Solicitor General has a batting average that would make its inclusion in a Hall of Fame for Strategic Actors a shoo-in. For instance, where other litigants who file paid petitions for review experience

a success rate of three or four percent, the Solicitor General experiences significantly higher rates of success, with success in Solicitor General-led petitions being 60 percent or greater (Epstein et al., 2007; Cordray and Cordray 2001). More recent studies have shown that under the Obama administration, this significant contrast persisted, with Solicitor General success in around 70 percent of cases (Pincus 2014; Epstein and Posner 2018). Overall, the Solicitor General experiences favorable treatment at the hands of the Court, and even though it files few petitions (when considered as a single actor), these petitions carry significant weight as it relates to being granted certiorari, and the clear trust-based relationship between the Solicitor General and the Court cannot be overstated.

At the merits stage, the benevolent experiences of the Solicitor General do not exhaust. The Solicitor General enjoys the luxury of favor with the Court at this stage as well, prevailing on the merits a greater number of times than imagined by the common appellant (Pacelle 2003). Rarely does the Court call on interested parties for their specific views in a particular case. The Court often does just that with the Solicitor General, issuing a “call for the views of the Solicitor General” (CVSG) when it requires the government’s position in a case (Cordray and Cordray 2010). The Court’s request for the government’s position is a direct instance in which the Court strategically considers others in its decision-making (Thompson and Wachtell 2009; Lepore 2010). This relationship represents the institutional ebb and flow that characterizes Court decision-making in that the Solicitor General and the Court work in tandem, with the Court relying on the Solicitor General for institutional pulses on the issues and the Solicitor General relying on their strong relationship with the Court for favorable outcomes to the government’s legal interests. This effect is evidenced by Pacelle’s (2003) claim that the Court often adopts lengthy parts of Solicitor General filings directly into its own decisions, signaling not only the

trust shared between these two institutions, but also the prevalent impact the Office of the Solicitor General has on the Court's practices.

As Pacelle (2015) notes, the Solicitor General is the ultimate repeat player before the Court. This is attributed to the unique role the Solicitor General plays in serving as the point of contact between the President and the Court mentioned before – arguing cases on behalf of the government and maintaining a positive and productive relationship with the Court and avoiding the ire of the President if not directly forwarding it in the cases it brings. Because of this repeat player status, the Solicitor General is perhaps the best actor in the separation of powers to motivate the Supreme Court to make decisions consistent with other federal institutions, and issuing ideologically favorable decisions is particularly attractive to a Court seeking to maintain its legitimacy among these institutional siblings. It just so happens that this practice of adapting its decisions to be more palatable reflects strategy, not blatant attitudes at work on the Court.

Common Critiques of the Models of Supreme Court Decision Making

The models explained above are not perfect, and each fall short of fully explaining judicial behavior independent of the others. The models complement each other, with the shortcomings of one model serving as the baseline assumptions of others. This theoretical entanglement has led modern scholars to consider these models together, moving away from testing “models” of decision-making to instead testing variables that capture the basic tenets of these models (Pacelle et al., 2011; Yates et al., 2013; Pickerill and Brough 2017; Katz et al., 2017; Spiller and Gely 2007). In the section that follows, I describe the criticisms of each model, explaining how criticisms of each serve to fuel the assumptions of others. This section concludes by examining studies that integrate the models together to explain judicial behavior, highlighting the types of cases studied using this integrated approach.

Legal Model Critiques

Critics of the legal model question the assumptions upon which it is based and the tenets its proponents use to justify the legal explanation for Court behavior (Gillman 1999; Segal and Spaeth 2002; Friedman 2009; Baum 2006). These criticisms have progressed to the extent that this approach has been characterized as nothing more than a normative view of how the Court should act, failing to fully explain how it acts. One criticism of the model is that if legal factors are the guiding lights for justices, they should always follow precedent and apply the law to new cases in a predictable manner (Hansford and Spriggs 2006; Gerhardt 2008). If the legal basis for a decision needs to be clarified, or if there are equally valid legal bases that have been ignored or refuted by the Court in its decisions, the model is flawed.

If justices are political actors seeking to advance their preferences, the legal model may provide cover for them while incurring few costs (Pacelle et al., 2011). In other words, if justices can advance their own preferences while claiming to adhere to legal factors, they avoid the charge of being blatantly political. This reflects the point made earlier that competing legal interpretations (often represented in precedent) provide justices with discretion to adopt those that favor their policy preferences.

Additionally, critics of this model say that viewing the courts' work as a mechanized legal process dilutes the reality of *who* serves on the courts. If judicial outputs are mechanized products devoid of individual impact, the study of judicial decision-making is better suited for engineers than political scientists. To say that the legal questions the courts answer are "specified" or that the process is "objective" and produces "unbiased" legal opinions is to deny individual justices agency. The model's flaws may reflect a legal guise under which the Court may exercise its preferences.

To the extent that there are myriad legal interpretations justices may adopt to advance their preferences, it is also difficult to empirically test the legal model. Doing so requires the assumption that justices make decisions based solely on legal factors. The difficulty in making this assumption presents an additional shortfall for the legal model. More attention needs to be paid to identifying the motivations of justices in pursuing legal interpretations.

Further criticism exists in response to various approaches to the legal model. For one, there is significant opposition to the notion that justices should seek the intent behind legal provisions to use it in making decisions, as ascertaining intent is difficult for several reasons (Segal and Spaeth 1993). Discerning the intent behind significant provisions of the Constitution is difficult, as there was much debate about the words used. Moreover, the document's production was a collective effort by the drafting and style committees at the Constitutional Convention, as well as the further efforts of the authors of its twenty-seven amendments. This complicates the effort to ascertain intent. Moreover, such intent is directly irrelevant in cases involving statutes or administrative actions based on statutes. In these instances, intent becomes a web of language that even the legally eloquent Court cannot disentangle.

Critics of the legal model also point to the restrictive role that precedent plays in the model. If justices follow precedent blindly, the law always stays the same at the hands of the judiciary (George and Epstein 1992). To take this notion to the historically foul extreme, the decision in *Scott v. Sandford* (1857) provided the precedent that descendants of Black African origins could not enjoy the rights afforded by the federal Constitution. The Court's ability to weigh its own precedents against the progression of law and the tide of time enables it to strike down decisions such as this. Furthermore, if precedent is to play a role in constraining justices from pursuing their preferences by providing a legal guide by which justices should decide, then

it may also skew how justices view the law. Because justices have interpreted since the Court's inception, modern reliance on these interpretations is potentially problematic if politics and the preferences of justices of the time influenced prior interpretations. Furthermore, precedent has a limited impact on new decisions, as it is only approximately relevant. Because lower courts usually oversee new cases that directly evoke precedent, the Court only hears cases that present new questions for consideration. Over time, this produces questions that fall in the gray areas between precedents, the scope of which may narrow significantly, representing a further need for the Court to exercise discretion in its decisions when precedent falls short of providing clear guidance (Pacelle et al., 2007).

Though the legal model provides a roadmap for how many legal scholars would like the Court to act, it is unfortunately not the whole picture. Though the Constitution remains supreme, the Court respects the legislative and interpretative roles of Congress and agencies, respectively. As the Court aspires to uphold the intent, philosophies, and values enshrined in the Constitution, it is free to do so as it sees fit. Meaning that the ways in which the Court interprets the Constitution and subsequently makes decisions are the products of the Court itself rather than some guide by which the Court must follow.

These criticisms are not just isolated considerations a legal formalist must wrestle with to justify their perception of decision-making. Instead, critics point to the limitations of the legal model and highlight how its shortcomings characterize decision-making through attitudinal or strategic terms. For example, the claim that the legal model overemphasizes the constraining influence of the law itself lends support to more complex perspectives on decision-making. For (Friedman 2006), the task of making decisions based in law is more complicated than simply "finding the law" and applying it. The real task lies in navigating complex networks of case law,

which themselves evolve over time as new decisions are issued. Justices on the Court take on this task for many of the cases before the Court, and the legal model simply fails to capture these complexities. Furthermore, the legal model fails to fully explain judicial decision-making behavior. When pitted against alternative explanations (for example, that justices make decisions ideologically), the legal model falls short of explaining decisions. Sure, decisions are based in law but even more so are they motivated by political ideologies (Segal and Spaeth 1993, 2002; Gibson and Caldeira 2009). Proponents of the strategic model take this criticism further by articulating how justices use favorable legal reasoning to support their decisions, thus protecting their decisions from political attacks from external entities (Tiller and Spiller 1999). Despite its shortcomings, however, proponents of the attitudinal and strategic models cannot negate the significant impact of the law on Supreme Court decision-making.

Attitudinal Model Critiques

While the legal model has been attacked for overemphasizing the impact of law on decisions, the attitudinal model can be criticized on several fronts for similar reasons. First, it cannot fully explain unanimous cases. While it appears to do a better job of explaining judicial outcomes than the legal model (Segal and Spaeth 2002), proponents of this approach often overlook unanimous cases as anomalies or instances where ideological preferences align on an issue before the Court. Epstein et al., (2012) argue that ideology can drive the Court to reach unanimous decisions. Their argument is that the Court may reach unanimous decisions because of legal considerations *and* ideological preferences. In other words, while the law may support one side over the other in a case, it also may be that the justices coincidentally agree ideologically as well. However, they articulate that this may indicate strategic behavior on the Court (also reflecting the attitudinal claim that justices support ideological decisions with legal

foundations). Still, the reality is that unanimous decisions are more likely to be reflective of strategic decision-making than outright ideological decision-making. Take the landmark decision of *Brown v. Board of Education* (1954) as a case in point. The unanimity of this decision was certainly not because of ideological convergence among the justices on the issue of segregation. Justice Reed was reluctant to side with Brown because of his conservative view on segregation; Justice Frankfurter was reluctant to overturn precedent (*Plessy v. Ferguson* (1896)); and Justice Jackson was worried about public reaction to striking down segregation (Kluger 1975; Balkin and Levinson 2001). Despite these concerns, the decision was unanimous, not because of ideological convergence, but due to strategic necessity, given the gravity of the decision and its implications. Thus, the attitudinal approach alone cannot explain the Court's behavior in these unanimous instances.

Second, the attitudinal approach is naive and overly simplistic. Whereas the legal model portrayed the Court simplistically as little more than a legal machine, the attitudinal approach portrays justices simplistically as self-centered political actors with blinders on to anything that would inhibit the pursuit of their personal preferences (Baum 1997). Of course, on its face, this charge is brash and itself too simplistic. But the essence remains. For attitudinalists to claim that justices make decisions that are "direct expressions of their preferences" is to acknowledge that ignoring legal, institutional, small-group, and legitimate factors in making decisions is common and acceptable. Such a perspective is limited at best and simply wrong at worst.

The attitudinal model's emphasis on the individual votes of justices dilutes the importance of understanding the Court's collective policy-making function (O'Brien 1999). That is, since the Court makes collective decisions, theoretical endeavors that examine the individual choices justices make and overlook how these choices may influence collective decision-making,

attitudinalists simply aren't looking at the full picture. Even if justices vote in strict accordance with their preferences, it would be reasonable to say that the Court's written opinions are more than just aggregating their votes. Majority opinion writers move the ideological position of decisions away from the position identified by the ideological split of the Court and more toward the legal position of precedent, though not far enough to alienate majority justices and thus risk losing their support (the extent of this positional shift is hard to gauge) (Maltzman et al., 2000). This is exacerbated by the horse-and-cart question of whether judicial preferences are the motivating factor in determining justices' preferred outcomes or if their preferred outcome alters the role their policy preferences play in their decision-making.

There is much to say regarding how preferences materialize and evolve over time, both during the decision-making process in cases and more broadly throughout a justice's tenure on the Court. One criticism of the legal model relies on the attitudinal premise that justice preferences are fixed both in a unidimensional space and through time. Some justices' preferences, as represented through their votes (more on that later), shift during their time on the Court, as well as shift from case to case across policy space (Blasecki 1990; Epstein et al., 1998; Greenhouse 2005; Maveety 1996; Ulmer 1973, 1979). While deciding cases, there is also empirical evidence to support the notion that justices occasionally shift votes from conference to voting on the merits. When justices change their votes from the conference stage (when justices initially meet to discuss oral arguments and make initial decision to form majority and, in the case of a split decision, minority coalitions) to the merits stage (after the opinions are written and justices make their decision of support for one side over the other), this signals both that justice preferences aren't as concrete as proponents of the attitudinal theory might suggest and that

justices engage in strategic interactions while writing opinions of the Court. Thus, strategy seems to matter more than attitudinal preferences.

If justices' preferences were consistent over time and were congruent with the votes they cast, the process through which the Supreme Court "says what the law is" could be simplified. For if the decisions of the Court are purely political, no attention ought to be paid to several components of the process upon which decades of research are based. Indeed, if the attitudinal model is accurate, amicus briefs and the arguments presented by attorneys representing parties before the Court are worthless beyond providing additional yet irrelevant information about the issues before the Court and only serve to reinforce the justices' preferences. One could go so far as to say that the process of oral argument itself is a waste, as cases can be decided through unsigned *per curiam* opinions, making further litigation processes obsolete in lieu of counting justice preferences as votes.

A significant critique of the attitudinal model is that it is best at predicting the Court's behavior rather than understanding the motivations of justices and the nuances that impact decisions, even in cases in which justices' preferences are clearest (Smith 1994). Empirically, there are difficulties in isolating and verifying the role and impact of justice preferences. Attitudinal approaches derive the justices' preferences from their voting patterns and then use these preferences to predict votes in future cases. Some critics find issue with this method, and others have shown that decision outcomes that do not reflect the Court's ideological split weaken the notion that decisions are simple preferential tallies (Epstein and Mershon 1996). The translation of preferences into votes is futile, potentially the result of issue scaling (as noted before), but more likely because Court decision-making is complex. Increases in unanimous decisions in cases where justices are less consistent in their voting patterns (economic cases, as

discussed before) contradicts the attitudinal approach (this is reflected in the reality that attitudinal studies often drop unanimous cases from analyses). Overall, a comprehensive review of the attitudinal model suggests that justices are likely to be as politically motivated as theorized and pursue their preferences *when circumstances and constraints permit*. Many of the purported criticisms of this approach serve as the motivation and basis for an understanding of Supreme Court decision-making in strategic terms.

Strategic Model Critiques

Compared to the legal and attitudinal models, the strategic model of Supreme Court decision-making makes good theoretical sense. However, critics of the approach highlight that the strategic approach grossly over-inflates the institutional influence that weighs on Court decisions (Segal et al., 2005). This criticism focuses on the Court's inability to predict the elected branches' behavior effectively and then to act based on those predictions. It is reasonable to assume that the elected branches pay general attention to the Court's actions, but it cannot be taken for granted (Epstein and Knight 1998). A history of elected reactions to the Court provides some indication, but there remains difficulty in articulating the justices' ability to make accurate predictions. According to critics, whereas the Court is an excellent fit for a rational choice framework where knowledge of other players' preferences is prevalent (justices know each other, understand executive preferences by way of the Solicitor General, and can glean the preferences of Congress), such does not hold for individual justices attempting to identify and act in accordance with the preferences of the majority in Congress (Baum 1997). This is partly due to the reality that, despite justices being appointed for life, members of Congress are denied such a luxury, facing electoral challenges every two or six years. Elections impact the Court's ability to predict and act in accordance with the majority preferences of Congress, as new Congresses

convene every two years. It is worth noting that if the attitudinal model fails to predict the outcomes of judicial policymaking on the Court, an adapted model that predicts congressional preferences and reactions also fails due to its strict reliance on the ideological composition of Congress (Baum 1997). Suppose the Court is expected to act strategically, often limiting itself from achieving its sincere policy goals. In that case, Congress should act strategically to achieve its goals. This complicates the Court's ability to understand the stances of the elected branches in its decision-making process.

Following the same line of reasoning about the difficulties in knowing the preferences of the elected branches, critics also charge that the strategic model overstates the extent to which the elected branches will take adverse action to counteract or overturn unfavorable Court decisions. Although the costs of taking retaliatory action can be calculated and are likely considered by the Court in making decisions, it is safe to assume that the elected branches will not incur those costs to act unless necessary, an instance that is historically infrequent and increasingly unlikely (Segal and Spaeth 2002). Though no longer (if ever) accessible from the quarrels of petty politics, the Court remains on its legitimate pedestal, in many ways shielded from the types of political backlash other institutions face in response to their distasteful actions. The cost of retaliating against the Court is high. And if congressional reaction fails, which it often does, the Court's decision stands, and the costs of attempting to rectify its decision are assumed solely by Congress.

This risk is a double-sided coin: Congress risking failed efforts to control the Court and the Court potentially facing significant impacts on its decisions and institutional legitimacy if those efforts succeed. Despite this risk, the Court may still be incentivized to yield to congressional whims. Because adverse congressional reactions are costly and infrequent, it is

reasonable to assume that the Court rarely considers these strategic considerations. Furthermore, there needs to be more evidence that congressional overrides have the expected widespread effect, as the judicial hierarchy faces its own issues with the flow of information and communication regarding precedent and the establishment of legal standards. It would be difficult to assert that congressional overrides pierce the judicial hierarchy to effectively impact the judiciary's plotted course, something the Court is aware of and takes in stride.

An empirical critique of strategic theories of Court decision-making rests on two major facts. First, the strategic model needs to be more specific to the role of individual justices in strategic considerations. The Court may not be incentivized to yield to congressional whims, and individual justices are probably unaffected by the elected branches' institutional threats. Some might argue that justices are shielded from interference because their true preferences are displayed only behind closed doors. This insulation likely explains how justices could pursue their preferences fully, disregarding external forces. Second, the strategic model has been tested primarily against statutory cases. This narrow focus puts the Court's decision-making in a finer context where institutions are major players and strategic interactions between them are pronounced. However, when analyses are expanded to include a full range of cases, empirical findings of strategy diminish. This is due in part to the reaction thresholds in the elected branches. It is also due to the Court's adherence to the preferred position doctrine under the Double Standard, which will be discussed in further detail later. Criticisms of the strategic approach face challenges as the approach continues to gain steam and becomes further validated. Recent studies have addressed strategic considerations in constitutional cases, and it seems that the strategic approach does an adequate job of explaining judicial decision-making despite some limitations (see Clark and Lauderdale 2010; Gibson and Caldeira 2009).

Adherents to the strategic model reject these criticisms. Critics of the approach cite the difficulty the Court has in predicting the reactions of elected officials to its decisions, but the Court is a resource in its own right. Access to and influence over the Supreme Court is access to an elite policy-making entity with no electoral or temporal checks. Thus, it is reasonable to assume that the Court is educated about the political preferences of others through amicus briefs and oral arguments before the Court, as well as through the robust institutional relationships the Court maintains with key institutions and players, notably with the Solicitor General.

Out of Many, One: Integrated Studies of Decision Making

Given the criticisms of the three models of decision-making, recent scholars have attempted to model their effects through an integrated approach, evoking variables that measure the simultaneous effect of each when studying the Court's decisions. Pacelle et al., (2011) argue that justices – and by extension, the Court – are influenced by their own sincere *attitudinal* preferences, and exercise decision-making given *legal* constraints (namely, precedent and norms surrounding statutory interpretation), while *strategically* considering the other branches of government. Their study examined civil liberties and economic cases from 1953 to 2000 and found that decision-making was more complex than any one of the models of decision-making could articulate. Likewise, Katz et al., (2017) measured the effect of legal constraints and ideological preferences on decisions, using machine learning to predict judicial behavior. Other studies include one by Yates et al., (2013), which focused on the Court's decision-making with emphasis on justice ideologies and strategies used to select the cases brought before the Court. Furthermore, Pickerill and Brough (2017) highlight the role of ideology in the Court's decision-making, specifying how the ideology of justices interact with legal precedent, particularly in constitutional cases with broader policy implications.

Whereas these studies are all examples of efforts of integrating the models of decision-making into a singular explanatory analysis, a broader problem of recent scholarship in this fashion is that many studies (Yates et al., (2013) as an example) focus almost exclusively on the Court's decision-making in constitutional contexts. This approach is justifiable, though, given the reality that constitutional cases usually have broader policy and political implications (Epstein and Knight 1998), typically involve more complex questions of interpretation (Rosenberg 2008), and strike at the Court's sense of being *the* interpreter of the Constitution (Caldeira and Gibson 1992). This translates to decision-making in which justices are more likely to disagree (Segal and Spaeth 2002) and to act strategically (Tiller and Spiller 1999), and in which the public and the media – often serving as a catalyst for public opinion regarding the Court's decisions – exercise stricter scrutiny of the Court's decisions (Friedman 2006).

Furthermore, the alternative – statutory cases – usually feature technically difficult questions of law (Knight and Epstein 1996) and usually involve ambiguous statutes that result in both less attention paid by the public and media (Friedman 2006; Eskridge and Frickey 1994) and lesser opportunities for justices to exert their preferences, as these cases usually exceed justices' technical expertise and are more difficult to frame in ideological terms (e.g. cases involving the interpretation of the Fair Labor Standards Act (FLSA) aren't easily framed into conservative versus liberal narratives) (Segal and Spaeth 2002; Gellhorn et al., 1992). Does this mean statutory cases should be cast aside by scholars as being unworthy (or unwieldy) of further examination? Absolutely not. As the next section explores, statutory cases, particularly statutory economic cases focused on questions of federal administration action, provide valuable insights for exploring Supreme Court decision-making.

The Unsung Cases

Studies of Supreme Court decision-making often focus on those cases that grab the headlines - usually constitutional cases dealing with complex questions related to our rights. These salient cases are useful for examining the broad strokes of Court policy making and the role of justice preferences in decision-making (see above the discussion of activism in constitutional cases). However, suppose one wishes to examine the nuances of decision-making when the Court operates in a constrained environment. Cases in which other government institutions are directly involved may serve such a purpose. Specifically, this study will examine a subset of cases in which intergovernmental relations are a key characteristic - cases involving bureaucratic agency interpretations of the law.

It is no surprise that, over time, Congress has increasingly been unable to pass specific or succinct laws. It is commonly acknowledged that this reality is a consequence of polarization within the institution's chambers and the growth and development of the administrative state. Today's politics produce vague laws as members of Congress build and maintain majority coalitions with slim margins (Brock and Mallinson 2023; Binder 2003; Gluck and Bressman 2013). This is not necessarily a problem for Congress, as in basic terms, the bureaucracy is an expert in implementation, given that it interprets vague laws correctly.

Furthermore, some studies have examined the extent of agencies' role in the lawmaking process. Christopher Walker (2015) examined the perspectives of agency rule drafters to understand how agencies view their position in the policymaking process and as agents of Congress. Walker found that rule drafters are conscious of their roles as implementers and aware of the discretionary and deferential doctrines that govern their relationships with Congress and the courts. Walker found evidence that agencies play a key role in the initial lawmaking process,

serving as “the authoritative interpreter (within the limits of reason) of such statutes” (*Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* (2005), 983). This expanded view of the role of agencies as more than simple foot soldiers following orders does much to strengthen our understanding of the importance of cases involving agency interpretation.

There have also been studies examining the principal-agent relationship between agencies and Congress. Intuition would suggest that, as a matter of law, Congress is the principal, and agencies are agents. Congress is primarily responsible for passing the laws that agencies implement. Despite the discretion to implement, agencies serve as the agent role of implementing decisions made by Congress, doing so with congressional intent as the driving force when statutory text is lacking. However, with minimal oversight and paired with their substantive expertise and policy mobility, agencies enjoy some autonomy as agents of Congress. Brigham Daniels (2014) contends that agencies sometimes “flip the script” on Congress in various scenarios, becoming agents of principals and manipulating the elected branches in policy-driven, localized situations. Miller and Whitford (2016) take these notions a step further by examining the extent to which agencies face control from multiple sources, including the President, congressional committees, the courts, and even the public (see also Whitford 2005). Though the nuances of these phenomena are beyond the scope of this study, the implications are important in our understanding of the policy relationships shared between Congress and agencies.

When agencies act to implement statutes, regardless of whether they are working to implement their best interpretation of Congress's intent or acting as principals to push their own policy agendas, their actions carry the weight of Congress and thus the weight of the law. Whereas Congress delegates authority and discretion to agencies to implement *in the best way*

possible, such does not include a preclusion from litigation or challenges mounted on the premise that undemocratic agencies are doing the work of a democratic institution (Congress) in fleshing out the meaning of legislation after the fact during implementation.

Agencies take liberty in their discretionary power to interpret and subsequently implement, making way for challenges. When agencies promulgate rules and regulations and take actions that others (including private entities, subjects of regulations, etc.) believe are violations of their authority granted via organic statutes, adjudication and litigation thrive. Whereas agencies often manage such challenges internally through institutional adjudication processes, these matters procedurally migrate to the courts, resulting in a complex situation of intergovernmental relations. All three branches of government have been engaged at this point in the process.

Agencies in the executive have implemented congressional statutes, and the Judiciary is tasked with addressing questions related to implementation. From a strategic perspective, this complex situation is an excellent example of when the Court might consider strategic factors in its decision-making. Furthermore, despite the fact that justices have preferences as to the limits of agency interpretation and subsequent action that are not easily boxed into ideological terminology (Chemerinsky 2019; Vermeule 2013; Bressman 2003), agency cases still suffer from being less important in their ability to serve as opportunities for the Court to decide from its “preferred position” (Pacelle 1991).

Why does studying these types of cases matter if other institutions and the public pay more attention to the constitutional issues brought before the Court? How ought the Court decide these types of statutory cases – by following the same motivations that contribute to its decisions in constitutional cases, or by other means? Setting the first question aside for now, the answer to

the second question is provided by the Court's adoption of different approaches for deciding different types of cases. Certainly, constitutional cases differ substantially from statutory cases, and that fact is not lost on the Court and its justices.

However, constitutional and statutory cases share characteristics as well, like the fact that over a third of them are unanimous. In fact, attitudinalists usually discount unanimous decisions in favor of examining split decisions (usually featuring a 5-4 vote among justices) (Epstein et al., 2012). This is concerning, considering that 39.4 percent of all cases the Court has considered since its inception have been unanimous (Epstein et al., 2021). Attitudinalists would cast aside this statistic by claiming that these cases are either those which feature legal and substantive issues that cannot be framed in traditional ideological terms of "liberal" and "conservative," or are cases in which justices simply do not have an opinion based on preferences (in other words, the justices do not care about the outcome) (Segal and Spaeth 2002; Corley et al., 2013). However, 30.2 percent of constitutional cases that attitudinalists claim the Court "cares" about are unanimous. This doesn't bode well for the attitudinal claim. Additionally, 43.1 percent of the federal agency cases studied here are unanimous, meaning this study provides a good opportunity to examine decision-making in cases that are most likely to feature consensus among the justices.

In the section that follows, I articulate the process by which the Court has governed its decision-making in constitutional and statutory contexts – the Double Standard.

The Double Standard

As the history of government institutions shows, daily practices often stem from learned experiences, and the Supreme Court is no different. Modern scholars of the Court describe the Court's behavior in relation to ideology and popular opinion (Levendusky et al., 2023, 2024;

Davis and Hitt 2024, 2025). However, a more nuanced examination of the Court's decision-making behavior reveals predictable decision-making patterns. The connotations of judicial activism and restraint have long been considered antithetical, and this is not the product of happenstance. Instead, the Court's pursuance of activism and restraint can be characterized as the ebb and flow of maintaining its own legitimacy. Historically, the Court's exercise of activism and restraint in certain types of cases has some basis in its initial role in opposing President Franklin D. Roosevelt's New Deal legislative efforts and, subsequently, the fallout associated with attacks on the Court's legitimacy in response.

President Roosevelt's answer to the ills of the Great Depression was sweeping legislation supported by Democratic majorities in the House and Senate. Under unified government, this New Deal legislation garnered widespread support from all. Still, the Republican Supreme Court, often referred to as "nine old men," whose decisions struck down the work of newly elected and empowered Democrats, contributed to the ire of President Roosevelt (Ross 2007). In response and retaliation, the president proposed a plan to pack the Supreme Court, an attack on the Court and its legitimacy under the guise of the Judicial Procedures Reform Bill of 1937, which proscribed a new justice to be appointed to the Court for every that reached the age of 70 and failed to retire (Cushman 1998; McKenna 2002; Shesol 2010). Certainly, to help the "nine old men" by diluting their opposition to New Deal legislation represented a significant threat to the Court's legitimacy by altering the institution's composition. A sweeping action itself, and the Court was subdued by this constitutional crisis.

A single vote makes all the difference. Justice Owen Roberts switched his vote to break the five-justice majority that had inhibited the New Deal, starting with the 1937 case of *West Coast Hotel Company v. Parrish*, thereby enabling legislation to stand. This vote has since been

articulated as the product of the pressure from threats of court packing; however, others suggest his vote in this case was simply his stance on the issue (Cushman 2017). By way of Justice Roberts' vote switch, the Court took a hit to its legitimacy and the Court's character of being above politics was amended to reflect the Court's vulnerability to politics. In the face of a procedural challenge to the Court's size, the Court seemed to change course. To avoid further hits to legitimacy, the Court took drastic steps again to secure its position in the national policy-making field.

Historically based in the famous Footnote Four of the *United States v. Carolene Products Co.* (1938) case, the decision in which was authored by Justice Harlan Fiske Stone, the Double Standard of active decision-making by the Supreme Court has weighed on the Court's decision-making since (Mason 1956), though it has faced significant challenges and has been altered such that the question remains today whether it is still alive and well. The Double Standard established by the Court governs how the Court should approach decision-making in different types of cases. In economic cases, the Court has expressed restraint rather than activism, showing deference to the other branches and generally upholding their actions unless they are blatantly unconstitutional. In contrast, in civil rights and liberties cases, as the Court is seen as the final arbiter of constitutional rights, the Court has adopted a "preferred position" from which it is empowered to decide cases actively (Pacelle 1991). Thus, a Double Standard was born – restraint in economic cases and activism in constitutional civil rights and liberties cases.

The motivations behind the Court's adoption of these standards in different types of cases may be normative. On the one hand, the Court practices activism in cases concerning civil rights, civil liberties, and the protection of fundamental freedoms. The Court's role of protecting individual rights and vulnerable populations, especially when facing majoritarian policies and

politics underlines this active practice. On the other hand, the Court practices restraint in statutory cases concerning the regulation of the economy and the administration of policy including matters of public welfare and actions of the administrative state. The rationale behind this practice is that democratically elected branches are better suited to make policies in these areas because they are accountable to the electorate.

These motivations underscore characteristics and expectations of a strategic Court. For example, in protecting the rights and fundamental freedoms of individuals and minorities, the Court is often positioned at odds with the elected branches – and by extension, majoritarian politics. This “countermajoritarian difficulty” as Bickel (1962) would call it, produces a situation in which the Court strikes down democratic policies in the pursuit of upholding the Constitution. Of course, this means the Court faces off against the elected branches, and, through its role as *the* interpreter of the Constitution, usually wins at the cost of a strong relationship and perhaps some legitimacy along the way. Perhaps, these costs are offset by the deference paid to the elected branches in statutory cases by way of the Court staying in its lane and allowing the elected branches to make policy in substantive areas based in statute so long as these policies do not violate the Constitution. If the Double Standard was maintained by these characterizations, perhaps the Court will have found the fountain of youth in the political system – sustained by its economic decisions while making progress in the constitutional cases about which it (and other politics actors) cares the most. The question here is whether the Court has maintained this dogma – if yes, the matter is settled, and the Court is secure to continue on its trajectory. If not, how have the standards changed? Furthermore, is the Double Standard still operational, and what does it mean for the Court’s decision-making and ultimately its legitimacy?

The Historical Trajectory of Maintaining Two Standards

The Double Standard set forth in the *Carolene Products* (1938) decision has changed over time. Despite holding strong through the initial tests of the later New Deal legislation and furthermore through the evolving policies of the 1940s and subsequent Great Society era, the Double Standard underwent significant reconsideration and revision in the 1970s and 1980s, and has persisted through modified execution of these standards since the 1990s under what's been classified by scholars as "New Federalism" (Friedman 1997; Whittington 2007; Friedman and Delaney 2011).

Following the *Carolene Products* (1938) decision, the Court seemed to adopt this new Double Standard of review, though not without initial hesitations. Despite the association of the Double Standard with Footnote Four of the *Carolene* decision, it took some time for the Court to adopt this approach (Stephanopoulos 2019). Keep in mind that Footnote Four was part of Justice Stone's *concurring opinion* and thus was not binding. In fact, the Court's adoption of this new approach began with exercises of the Standard's premises in decisions following *Carolene*. The influence of Stone's suggestion can be found in subsequent cases concerning civil rights and liberties, an example of which is *West Virginia State Board of Education v. Barnette* (1943), in which the Court (through Justice Jackson's *majority* opinion) exercised its role of protecting individual liberties against majoritarian infringements related to compulsory flag-in-schools laws. Another significant development in the Court's move toward Double Standard adoption was its decision in *Korematsu v. United States* (1944) in which the Court upheld the constitutionality of Japanese internment camps. Despite the majority's opinion upholding legislation targeting minorities, the Court's justices were not entirely complacent. Justice Murphy's dissent in which he characterizes the internment camp laws as being the "legalization

of racism” serves as an example where justices on the Court, even when not in the majority, began to consider the validity of Stone’s suggestion (Ackerman 1991; Ely 1980; White 2002).

Looking forward, the Double Standard began to guide the Court’s behavior. As Ely (1980, 58) noted, the Court should not function as a substantive moral philosopher and should instead focus its attention on ensuring the political process was constitutionally fair. This is reflected in the Court’s decisions in the 1940s – for example the Court’s decision in *Wickard v. Filburn* (1942) in which it upheld considerable federal power under the Commerce Clause by empowering Congress to regulate intrastate activity that, if engaged in by many entities, could have significant impacts on interstate commerce. Likewise, with the surge in civil rights litigation in the 1950s and 1960s, the Court moved to solidify these standards on constitutional grounds. Landmark cases like *Brown v. Board of Education* (1954), *Reynolds v. Sims* (1964), *Loving v. Virginia* (1967), *Sherbert v. Verner* (1963), and *Griswold v. Connecticut* (1965), which ended school segregation, addressed voting rights and the establishment of the one person, one vote rule, protected minorities and the right to interracial marriage, upheld employment rights regardless of religious affiliation, and examined implicit rights to privacy in the use of contraceptives, respectively (Ackerman 1991; Tushnet 2006; Klarman 2004). These decisions provided unambiguous evidence of the Court’s adherence to the strict scrutiny standard of review in constitutional cases under the Double Standard.

However, the Court’s adherence to this new paradigm was not limited to civil rights cases. From the 1950s through the 1970s, the Court also executed its deferential role in economic and statutory cases. For example, decisions like *Ferguson v. Skrupa* (1963), *Dandridge v. Williams* (1970), *Jefferson v. Hackney* (1972), and *Usery v. Turner Elkhorn Mining Co.* (1976), in which the Court upheld laws regulating professions, setting welfare caps, imposing retroactive

liability, and ultimately emphasizing deference to legislative judgment, provide textbook examples of the Court shirking from substantive due process in economic cases (Ely 1980; Eskridge and Frickey 1990). Interestingly, the Court took opportunities to practice restraint in statutory cases involving constitutional issues – for example in *McGowan v. Maryland* (1961) the Court upheld “blue” laws requiring businesses to close on Sundays, deferring to the states’ regulatory power over the economy despite challenges centered on the Equal Protection and Establishment Clauses. Another example can be found in *San Antonio Independent School District v. Rodriguez* (1973), in which the Court upheld Texas’ school funding laws despite significant claims of violations of the Equal Protection Clause. These cases further characterize the Court’s practice of deference in economic and statutory matters despite having the ability to decide on constitutional grounds from its “preferred position.”

This momentum subsided with the reconsideration of the Double Standard in the 1980s. Part of the overarching conservative countermovement characterized by President Reagan’s pushes to deregulate, cut spending, and readdress social policies and programs, the Court was not immune to these political pressures, re-examining its role in championing civil rights and protections for individuals and minorities, and deferring to the elected branches in economic matters. Under the Burger and early Rehnquist Courts, the Court issued a series of decisions that eroded both standards of review. Cases like *Mobile v. Bolden* (1980) and *City of Richmond v. J.A. Croson Co.* (1989) limited the Voting Rights Act by allowing racial discrimination in electoral processes and strictly scrutinizing affirmative action claims, respectively. Another example of the Court reconsidering constitutional matters is *National League of Cities v. Usery* (1976), which prohibited Congress from exerting wage and overtime pay provisions on state and local employees, asserting state sovereignty over state workforces under the Tenth Amendment

(Friedman and Delaney 2011; Zietlow 2002). These cases reasserted federalism as an important constitutional facet weighing on the actions of the federal government (Tushnet 1999).

The practice of accepting the leading role of the elected branches over economic and administrative areas also saw significant revision. Whereas the standard of review in these cases following *Carolene* was a form of blanket deference, through which the Court only intervened when there existed questions of constitutionality regarding the actions by the elected branches, the revolution of the 1980s changed that. In cases like *INS v. Chadha* (1983), which rejected Congress' attempt at providing itself a "legislative veto" over executive decisions, or *Bowsher v. Synar* (1986), which again limited legislative execution of executive functions, the Court reasserted separation-of-powers limits (Whittington 2007; Merrill 1992). The realignment of the Court's review of statutory actions culminated in the landmark decision of *Chevron v. NRDC* (1984). This decision, while also deciding that the EPA's definition of terms regulating industrial pollution were permissible, provided structure for the evolving decision-making environment in statutory cases.

Under *Chevron* doctrine, the Court established a new practice of judicial review of administrative action. This *Chevron* deference provided that courts reviewing an agency's interpretation of law would first address whether the provision of law being interpreted by an agency was ambiguous enough to warrant further interpretation in the first place. If the law was sufficiently clear in its language and intent, agency interpretation could not survive if it did not match the Court's reading of clear intent. If, however, there was statutory ambiguity, the second provision of *Chevron* deference was the question of whether the agency's interpretation was "permissible under the statute," meaning the agency's interpretation didn't violate the basic intent of the law nor the language of the statute's text itself. If both provisions were met –

statutory ambiguity followed by permissible agency interpretation – the Court would defer. The underlying rationale behind this new standard was that the Court is not suited to answer complex regulatory questions, and it certainly wasn't in a position to supplant its own interpretation of statute for that of the agency, which after all, was substantively expert in its domain (Barron and Kagan 2001).

While *Chevron* provided an articulate standard for review in statutory cases, it was not the end-all in the overall progression of the Double Standard. Take, for example, the cases of *Commodity Futures Trading Commission (CFTC) v. Schor* (1986) and *Garcia v. San Antonio Metropolitan Transit Authority* (1985). In *CFTC v. Schor* (1986), the Court asserted the role of judicial independence in reviewing Article III matters of jurisdiction – in this case the Court upheld agency adjudication of counterclaims normally handled by Article III courts. Likewise, in *Garcia*, the Court reversed its previous *National League of Cities v. Usery* (1976) ruling to re-exert federal control over commerce policy – in this case upholding the Fair Labor Standards Act (FLSA)'s minimum wage and overtime pay application to state employers. These cases represented a turbulent reality for the Court and its adherence to the Double Standard. The conservative countermovement was successful in realigning the Court's perception of judicial responsibility over deciding cases (Chemerinsky 2022). *Chevron* provided a framework by which the Court could reason to allow the elected branches breadth over administrative implementation, while the Court retracted its role of protecting rights. These developments laid the groundwork for the emergence of the New Federalism of the 1990s and 2000s, leading to the modern decision-making environment in which the Double Standard faces its most significant threats.

A Modern Consideration of the Double Standard: From New Federalism to Uncertainty

The modern exercise of the Double Standard is based on political considerations that determine whether the Court will follow the original 1937 articulations of the two standards of review or will instead exercise the revisions to the Double Standard resulting from the 1980s' conservative countermovement. This is evident in the Court's exercise of review starting in the 1990s and persists today with the Court's overturning of *Chevron* and selective protection of rights.

Following the conservative countermovement of the 1980s, the Court adopted a split application of the Double Standard, maintaining its deference *to states* in their regulation of the economy while scrutinizing the federal government's regulatory power, especially in matters dealing with the Commerce Clause (Chemerinsky 2022; Whittington 2007). In a series of blows to the federal government's regulatory power over the states the Court clearly articulated this New Federalism under which states were insulated from federal intrusion – *United States v. Lopez* (1995) in which the Court struck down the Gun-Free School Zones Act by holding that the Commerce Clause doesn't permit congressional regulation of noneconomic activity (based on the Court's rationale that handgun ownership near schools did not substantially impact interstate commerce); *United States v. Morrison* (2000) in which the Court struck down the Violence Against Women Act (VAWA) by holding that civil remedies for gender-motivated violence were not economically regulable; and *Printz v. United States* (1997) in which the Court declared the Brady Act's requirement of background checks for local handgun purchases unconstitutional and reminded Congress that it couldn't compel states to enforce federal laws.

This New Federalism was not limited to instances of the Court striking down federal actions. In addition to the cases listed above in which the Court limited federal overreach into

economic matters in the states, the Court also actively upheld state sovereignty over regulating state issues (Tushnet 2003). Take, for example, *FCC v. Beach Communications, Inc.* (1993), which upheld federal statutory regulation of cable systems under the Cable Act while also reasserting the control states possessed over their economies. Additional examples can be found with *Nordlinger v. Hahn* (1992) which upheld California's Prop 13 changes to property taxes, *Vacco v. Quill* (1997) and *Washington v. Glucksberg* (1997) both of which upheld state bans on physician-assisted suicide in New York and Washington state, respectively, and finally *Kelo v. City of New London* (2005) which upheld cities' use of eminent domain for economic development.

Based on these cases, the Court certainly adopted a new style of applying the Double Standard. Echoing the conservative shift in the 1980s, the Court exercised increased scrutiny in federal regulation cases while selectively allowing certain state exercises of policy to stand against federal intrusion. This wasn't the Double Standard of the 1940s – this was a Double Standard characterized by conservatism on the Court and its effect on judicial interactions with constitutional and statutory cases. If one could not accept the Double Standard as being a strategic paradigm adopted by the Court to preserve and further protect its legitimacy, then by this point in the Court's exercise of the Double Standard it should be blatant.

New Federalism, however, has not persisted, with the Court shifting further from the traditional Double Standard and pivoting again to refocus its protection of civil rights and fundamental freedoms against the rights of federalistic states. Cases like *Gonzales v. Raich* (2005), which upheld the federal ban on marijuana against a California marijuana propagation law, or the string of cases concerning the enforceability of the Americans with Disabilities Act (ADA) against state objections: *Tennessee v. Lane* (2004), which upheld Title II of the

Americans with Disabilities Act (ACA) and required states to comply with public access accommodations, *Alabama v. Garrett* (2001), which upheld ADA Title I suits for employment discrimination, and *United States v. Georgia* (2006), which upheld provisions of the ADA that allowed for individuals to sue states for lack of ADA accommodations, all speak to the evolution of the Court's shifting approach to deciding federalistic cases.

These cases represent a fragmentation in the Court's Double Standard practice following the 1980s and 1990s. As noted above, these cases involved the Court's limitation of protection of states' rights in matters concerning constitutional rights. In some way these hinted at the Court returning to its original standard of actively protecting rights as we saw with post-*Carolene* Court decision-making (Chemerinsky 2022; Post and Siegel 2003). However, with *Gonzales*, the Court seemed to defer back to the federal government in its regulation of drug policy. This fragmentation serves as the basis for the recent threats to the Double Standard.

In the last ten years, the Court has significantly altered its approach to decision-making across constitutional and statutory cases. The Double Standard of *Carolene* has likely departed for good, and the evolution of the Court's decision-making in this regard from the 1980s to the early 2000s underscores recent developments. For example, the Takings Clause cases that arose in Hawaii provide noteworthy evidence of both the fragmentation that characterizes the Court's modern decision-making processes and how this process has evolved gradually over time.

Hawaii Housing Authority v. Midkiff (1984) reviewed Hawaii's law requiring redistribution of land to facilitate economic growth. This ultimately meant the Court deferred to legislative responsibility of regulating the economy. Over two decades later, another case arose from Hawaii, *Lingle v. Chevron U.S.A. Inc.* (2005), in which the Court again addressed the permissibility of state laws focused on the Takings Clause. In *Lingle*, the Court exercised its

control over lower courts and their interpretation and application of the Takings Clause in property rights cases. These cases taken together highlight the tumultuous landscape that now characterizes the Court's exercise of the Double Standard (Merrill 1987; Tushnet 2003; Chemerinsky 2022).

Another case development that serves to frame the current paradigm is *Michigan v. EPA* (2015). In this case, the Court considered the EPA's practice of considering costs when deciding if regulations were "appropriate and necessary." In its review, the Court found that the EPA was required under the Clean Air Act (the statute serving as the legal basis for the case) to consider costs when first deciding if regulations were permissible. This ruling, while limiting the EPA's regulatory procedures, also cracked the long-held assumption that agencies were experts over their domain and thus best-suited to make policy decisions within this regulatory jurisdiction. In the Court's analysis, the question wasn't whether the regulation of air standards was permissible under an ambiguous statute (following *Chevron* doctrine), but instead it involved the Court deciding as to the cost-benefit feasibility of regulations, extending the Court into the realm of expertise over which the EPA had reigned for nearly 45 years (Sunstein 2018; Freeman and Vermeule 2007; Chemerinsky 2022). By making its own determination as to how the costs of regulation should be considered when evaluating the regulation itself, the Court became involved in the process of regulating from the bench. Take Justice Scalia's assertion in the majority opinion as evidence of this enhanced degree of involvement: "No regulation is 'appropriate' if it does significantly more harm than good." The expansion of the role of the courts into this regulatory space is clear.

This case also represents an interesting insight into the Court's application of the deferential standard of review in economic matters. In *Michigan*, the Court chose to exert its

interpretive power in reviewing the EPA's actions. For a conservative Court issuing a conservative decision (the majority consisted of all conservatives – Justices Scalia, Kennedy, Thomas, Alito, and Chief Justice Roberts), this seems to be an instance of the Court applying the Double Standard in ideological terms. Further evidence of this claim can be found in cases contemporary to *Michigan*, including *King v. Burwell* (2015), in which the Court refused to extend deference to the Internal Revenue Service (IRS)'s interpretation of the Affordable Care Act (ACA), *Utility Air Regulatory Group v. EPA* (2014), in which the Court again limited the EPA's interpretation of the Clean Air Act regarding greenhouse gas regulations, *National Federation of Independent Business v. OSHA* (2022), in which the Court limited the ability of OSHA to issue widespread rules on COVID-19 vaccination and testing for large employers, and in *West Virginia v. EPA* (2022), in which the Court struck down the EPA's emissions rules under the Major Questions doctrine – thus shirking from *Chevron* deference and signaling the end of *Chevron* deference (Hickman et al., 2023; Beermann 2024; Merrill 2022, 2024). This signal was confirmed by the Court's decision in *Loper Bright v. Raimondo* (2024).

While *Chevron* ruled as the doctrine by which the Court weighed administrative action cases for 40 years, *Loper Bright v. Raimondo* (2024) ended this stability. In 2019, the Court ruled in *Kisor v. Wilkie* that agencies could interpret their own regulations, provided the regulations were reasonably ambiguous, thereby upholding the basic standard of deference while characterizing the limitations to the application of deference in agency regulation contexts. *Loper Bright* expanded this reconsideration of deference, providing a sharp end to *Chevron* deference and, with it, stability on the economic side of the Double Standard. In *Loper Bright*, the Court ruled that courts must exercise independent discretion and judgment over statutory interpretation (returning to a full-fledged version of judicial review sans required deference). Furthermore, by

overruling *Chevron* directly, the Court articulated that no longer would a binding standard of deference dictate the Court's role in economic regulation cases (Sunstein 2024). The Court did resort back to the *Skidmore* standard of deference in which the Court defers to agencies dependent on agencies' ability to be compelling in defense of their interpretations – but this is not legally binding in effect (see *Skidmore v. Swift and Co.* (1944) and *Christensen v. Harris County* (2000) for more information regarding *Skidmore* deference). One way of looking at the *Loper Bright* decision is the collapse of the economic pillar of the traditional 1937 version of the Double Standard in lieu of a new practice where judicial discretionary review determines degrees of deference if any, on a case-by-case basis.

Recent threats to the Double Standard are not limited to the death of *Chevron* and the instability of the Court's review of administrative actions. On constitutional grounds, the Court has likewise abandoned the practice of upholding rights and protecting fundamental freedoms. The case that best expresses this shift is *Dobbs v. Jackson Women's Health* (2022), in which the Court struck down the historic landmark decisions of *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). In *Dobbs*, the Court reasoned that issues like abortion should be left to majoritarian policy processes, meaning that the provision of protections for rights enshrined in the Constitution should be done by the elected branches, departing from the long-lasting judicial exercise of activism in protecting the rights of individuals.

In basic terms, this seems to mean that the Double Standard is flipped on its head – strict scrutiny in economic matters and deference to the elected branches and states in constitutional matters. However, it is not that straightforward. Instead, what has transpired is the Court's practice of selectively exercising strict review of economic cases over which liberals and conservatives are polarized (look at the cases mentioned above – EPA regulations, healthcare

provisions, and COVID-19 guidelines and practices), while at the same time selectively allowing some constitutional issues to be settled by elected bodies (see *Dobbs*). What does this mean for the Double Standard? Is it completely abandoned, or is it evolving into a new form of selective application motivated by politics?

With these recent decisions, scholars indicate the Double Standard's imminent demise (Sunstein 2024; Chemerinsky 2022; Ziegler 2022; Siegel 2022). The reality is that it is too soon to tell. With pending cases on the Court's docket covering a slew of topics that would normally be decided by the Double Standard – granted petitions for certiorari concerning state LGBTQ+ protections against discrimination and the regulation of LGBTQ+ inclusive practices in public schools, further challenges to the EPA's Clean Air Act provisions post-*Loper Bright*, and remands in cases involving access to abortion medication and the role of administrative courts in regulating the economy – the future holds the answer.

Despite it being too early to tell what will happen regarding the Court's adherence to Double Standard principles, there are a couple of perspectives on where the Court's decision-making behavior could be headed based on the *Dobbs* and *Loper Bright* decisions. These decisions were the first iterations of the Court's potential reconsideration and redirection of its role in deciding constitutional and statutory cases. It may be that these decisions represent an institutional recalibration of the Court's authority over constitutional and statutory matters, recontextualizing the distinct decision-making behavior between these two types of cases. If this is true, the Court is likely to decide consistently with these new standards while continuing to protect fundamental rights through the lens of federalism (sending constitutional back to the states to handle) and reclaiming its interpretive role over statutes from federal agencies.

However, if these decisions are indicative of broader developments in the Court's exercise of its authority, then the Court may likely continue striking down constitutional precedents and sending associated issues back to the states under the legal guise of the Tenth Amendment. Likewise, it will likely extend its review of agency actions, taking on the task of statutory interpretation directly in its efforts to reign in the administrative state. The effects of this could be far-reaching and extend across several areas of policy including environmental, education, labor, energy, and economic policy areas. While these trajectories portray vastly different perspectives on the Court's trajectory post-*Dobbs* and post-*Loper Bright*, one reality is constant: as the Court moves forward, its legitimacy is on full-display and thus faces significant potential threats dependent on the Court's next steps.

The future is uncertain, but this study attempts to frame the Court's decision-making approach to federal agency cases in ideological and institutional terms so that as the Court moves forward, we have a frame of reference for what motivates decisions in federal agency cases. This frame of reference is a standard by which we can judge the Court's decisions in this type of case post-*Loper Bright*.

Part II: Research Design

Study Rationales

As explained above, the Double Standard provides a meaningful reference for how we should normatively expect the Court to make decisions. In statutory economic cases (of which federal agency cases are a type), the Court has exercised restraint rather than activism, showing deference to the other branches and generally upholding their actions unless they are blatantly unconstitutional. In contrast, in civil rights and liberties cases, as the Court is seen as the final arbiter of constitutional rights, the Court has adopted a “preferred position” from which it feels empowered to decide cases actively (Pacelle 1991). However, recent developments on the Court indicate that this clear distinction in decision-making practices may no longer exist. In fact, some scholars (Sunstein 2023, 2024; Chemerinsky 2022, 2023; Ziegler 2022; Siegel 2024) prophesize the end to the Double Standard and with it the progression of the Court to uncharted territory in which constitutional issues are polarized on the Court and statutory issues face increased judicial scrutiny (especially with *Loper Bright*’s overturning of *Chevron*).

Furthermore, as studies of decision-making have evolved to treat the basic theories of decision-making (legal, attitudinal, and strategic) as factors in a larger context, most studies still fall short of considering the Court’s behavior across *all* cases. This has resulted in statutory economic cases, particularly cases involving federal agency action, being largely neglected from empirical examination. This study attempts to reconcile this issue by examining the Court’s strategic decision-making in federal agency cases through the lens of the Double Standard, as it provides the frame of reference for how the Court *should* decide these and other (constitutional) cases. Furthermore, this study, by examining federal agency cases, also considers decision-making in cases which have a higher rate of being unanimous. Whereas attitudinalists would characterize unanimity in statutory cases as a symptom of low political salience or justices’

realization of the low stakes of revising statutory decisions (Segal and Spaeth 2002), this study purports that unanimity is more so a function of strategic decision-making and the dominant rule of law over matters of administrative interpretation.

The Double Standard, once adopted by the Court, was clear in how the Court should approach different types of cases. Despite the historical developments in its utilization discussed above, there remains a general expectation that the Court still adheres to it today, though with the lines that separate its approaches to deciding constitutional and statutory cases blurred (Coenen 2007; Strauss 2010). Whereas the Court decides constitutional cases from its “preferred position,” and thus practices ideological activism in them, the Court has again begun to change its approach to deciding all types of cases such that its new “preferred position” transcends the normative lines that separate the Court’s decision-making paradigm – reconsidering fundamental rights instead of promoting them and exercising stricter standards of scrutiny against administrative actions, especially at the federal level (see *Dobbs* and *Loper Bright* for prime examples). This progression likely stems from the Court’s careful consideration of the other players over time.

Regarding statutory economic cases, restraint can manifest itself in federal agency cases for many reasons (Baum 1997; Pacelle 2002; Hall 2018). Some of these include a simple pursuit of making good law while casting aside personal preferences, deferring to the other branches for their expertise and democratic characteristics, or a calculated application of precedent to standardize the law and avoid legal complications of judicial interpretation (Songer and Lindquist 1996). Moreover, practicing restraint in federal agency cases pairs nicely with being active in constitutional cases. As there is limited docket space for the Court, some aspects of

decision-making must be taken for granted to allow for attention to be paid in cases that rely so heavily on the Court's interpretation of rights and liberties.

Pragmatically, the split between statutory economic cases and constitutional civil rights and liberties cases is reflected in the reality that legitimacy underlines all decision-making in the Court. Statutory cases welcome restraint because counteractions to decisions in these cases require only a simple majority of Congress and a signature (Hausegger and Baum 1999; Rogers 2001). Conversely, counteractions to decisions in constitutional cases require constitutional measures, such as amendments. As noted above, these types of reactions are not only costly for the political actors engaging in them; they are also significantly reliant on public opinion. Constitutional amendments are anomalies and are rarely used to redress Court decisions. Overall, these external limitations on the Court's decision-making, as well as other institutional factors that affect the day-to-day decision-making of the Court, contribute to the restraint that is a common characteristic of the cases studied here.

Another significant purpose of this study is examining in additional detail the role of the Solicitor General's position in federal agency cases before the Court. As noted previously, the Solicitor General enjoys a special position with regard to the Court, serving as a significant advocate on matters of federal law and benefitting from access to the Court as the ultimate repeat player (Pacelle 2003, 2015). This relationship alone is significant in understanding why and how the Court makes decisions in federal agency cases. But the Solicitor General's position may also showcase evidence of strategy within the broader institutional setting surrounding the Court itself. Of particular interest is the extent to which the President affects the Solicitor General's task of representing government in federal agency cases.

Does the President attempt to influence judicial outcomes via the Office of the Solicitor General (OSG)? Whereas it is clear that the President attempts to affect judicial outcomes through exercising checks on the Court and using institutional positioning (like uniting with Congress on issues before the Court) (Clark 2009, 2011; Rogol et al., 2018), some scholars claim that the President also attempts to affect judicial policy indirectly through exercising control over the Solicitor General (Wohlfarth 2009; Black and Owens 2012). However, the Solicitor General is equipped to moderate presidential influence and does so by selectively choosing which cases to take to the Court, framing arguments based in the law and on what serves government's best legal interests, and exercising its close relationship with the Court appropriately – relying on the Court's perceptions of neutrality and legal professionalism surrounding the OSG (Lemos 2009; Black and Owens 2012; Epstein and Posner 2018).

The question then is whether the Solicitor General is isolated completely from presidential politics or is subject to politicization by the President. Given claims that the Solicitor General has become politicized since the Reagan administration (Wohlfarth 2009; Black and Owens 2012), there is reason to believe that the OSG has remained political in its actions since and into the Obama, first Trump, and Biden administrations (and almost definitely into the second Trump term) (Lemos and Widiss 2025), this study provides a great opportunity to empirically examine the impact of the Solicitor General controlling for presidential ideology across a long period of time (1954-2017, including the focus of politicization of the OSG during the Reagan Administration (1981-1988)). By examining the impact of institutions on the Court before and after President Reagan assumed office in 1981, perhaps this study can provide some insights regarding both the persistent effect of political institutions on the Court and more specifically the important yet evolving role of the Solicitor General over time.

In the section that follows, the research design for this dissertation is introduced, starting with the restatement of research questions and introduction of hypotheses, and followed by details pertaining to case selection, data characteristics, and discussion of the methods through which hypotheses are tested.

Hypotheses, Data, and Methods

The focus of this study is on examining the decision-making processes of the Court in the specific legal context of litigation involving federal administrative agencies. Recognizing the naivete of the legal factors, the default conclusion is that the Court is political and will do whatever it takes to achieve its policy objectives. However, if the Court holds concern for its legitimacy in its frontal lobe, then perhaps the strategic factors do a better job of explaining the Court's behavior. Epstein and Knight (1998, 12) offer that strategic behavior is "to say that [the justice] realizes her success or failure depends on the preferences of other actors and the actions she expects them to take, not just her own preferences." The goal of this study, more than simply evaluating the theories of decision-making directly, is to determine whether certain theories of decision-making explain certain types of cases better than others.

This study focuses on and tests strategic factors by examining 888 Supreme Court cases from 1954 to 2017, in which the preferences of the other branches of the federal government loom large – specifically, cases involving administrative actions taken by federal agencies. The general proposition that guides my work here is this: In agency cases, despite the existence of strategic factors, the Supreme Court is still substantially motivated by ideology. However, the Court's ability to realize its preferences is constrained by external forces. This general proposition flows directly from the notion of the Double Standard. In other words, I posit that the Court will be strategic in its approach to federal agency cases. I do not suggest here that the

Court will be strategic in its approach to constitutional rights and liberties cases, as I do not consider such cases here. In agency cases, the constraining forces are other government institutions, including the President, Congress, the Solicitor General, and to a lesser extent the agency whose actions are the basis for the case. The law itself constrains as well, articulated through adherence to precedent and the Court's consideration of case complexity when deciding.

Restated Research Questions and Hypotheses

In the most general sense, I hypothesize that the Supreme Court, by acting strategically, will consider the preferences of the President, both chambers of Congress, and the Solicitor General, as well as the law, when making its decisions. Focusing on strategic factors, the Court's general approach when making decisions in agency cases will be to consider the views of these actors and to rely on extant case precedents to navigate through legally complex case details. Because ideology is influential across all Supreme Court cases, I treat ideology as the mechanism through which these institutions attempt to influence the Court.

Before the articulation of this study's specific hypotheses, a few additional general points. First, the other institutions of government can influence judicial decisions, either alone or in conjunction with one another. For example, the Court may consider the preferences of the House, but not those of the other branches, or it may consider the preferences of the House *and* some other actor or set of actors. Second, my hypotheses flow from the assumption that the Court seeks to maintain its legitimacy by ensuring that it is not too ideologically out of step with other political actors. Here, I wish to emphasize that I assume the Court, in acting strategically to maintain its legitimacy, seeks to placate other actors rather than antagonize them. Below, each research question is restated with the associated hypotheses listed under each.

Research Question 1: What motivates Supreme Court decision-making in statutory economic cases involving federal agencies?

H1. Non-Attitudinal Hypothesis: *In statutory economic cases, the Supreme Court's ideology will not have a positive, statistically significant impact on its decisions, controlling for all other variables.*

This hypothesis flows from consideration of the attitudinal factor, which holds that justices on the Supreme Court are motivated by their policy preferences. Because these cases require strategic consideration of external institutions (as theorized above), the Court's reliance on its own ideological preferences will be minimized. Support for this hypothesis would support the refutation of the attitudinal factor in the context of statutory economic cases.

H2. Strategic Hypothesis: *In statutory economic cases, the President, House, and Senate will have a positive, statistically significant impact on Supreme Court decisions, controlling for all other variables.*

This hypothesis flows from strategic factors, which holds that multiple constraints affect Supreme Court decisions in statutory economic cases (i.e. the low veto point of 50%+1), such that the President and Congress will exert a positive and statistically significant impact on the Court's decisions in these cases. Support for this hypothesis would yield support for strategic factors.

H3. Precedent Hypothesis: *In statutory economic cases, precedent will have a positive, statistically significant impact on the Court's decisions, controlling for all other variables.*

Based on legal factors, this hypothesis flows from the notion that the Court follows the doctrine of *stare decisis* (letting previously decided decisions stand). This means that the leading precedent in a case should guide the Court's decision-making in statutory economic cases. As a

result, a conservative precedent should lead to a conservative decision. Support for this hypothesis would yield support for legal factors.

H4. Legal Complexity Hypothesis: *In statutory economic cases, the more difficult the facts of the case, the more likely the Court will reach a conservative decision, controlling for all other variables.*

This hypothesis is based on the notion that the law is complex, and so is the legal environment in which the Court must decide cases. When the Court is faced with cases whose facts involve multiple issues or evoke multiple or conflicting precedents, it is more likely to issue restrictive decisions, which are characteristically more conservative. Support for this hypothesis would yield support for legal factors.

Research Question 2: To what extent does the Solicitor General influence the Court's decision-making in federal agency cases?

H5. Solicitor General Hypothesis: *In statutory economic cases, the position adopted by the Solicitor General will have a positive, statistically significant impact on Supreme Court decisions, controlling for all other variables.*

This hypothesis stems from the notion that the Solicitor General's significant relationship with the Court, amplified by the Solicitor General's elevated role in statutory economic cases, likely influences the Court's decision. This ultimately means the Court decides cases consistently with the position argued by the Solicitor General. Support for this hypothesis might suggest the influence of strategic factors (given the Solicitor General's role as liaison between the judicial and executive branches in these cases), or legal factors (given that the Solicitor General argues from a position supported by law and argues on behalf of government while cognizant of relevant precedent).

Research Question 3: Does the ideological alignment of external institutions (the President, House, Senate, Solicitor General (represented by its argued position in cases), and the involved federal agency) against the Court affect the Court’s decision-making in federal agency cases?

H6. Ideological Congruence Hypothesis: *In statutory economic cases, the ideological alignment of external institutions against the Court (i.e. liberal external institutions against a conservative Court) will have a positive, statistically significant impact on Supreme Court decisions, controlling for all other variables.*

If individual external institutions exert an influence on the Court, it follows that if many of these institutions are ideologically congruent with each other, they will together exert a positive, statistically significant impact on the Court's decisions. Multiple alignments are possible. Examples of specific alignment scenarios include unified government, where the President, House, and Senate agree ideologically; when both chambers of Congress agree ideologically; or when executive actors (the President, Solicitor General, and Agency) agree ideologically. Support for this hypothesis might suggest the influence of strategic factors.

Data Source and Selection

I test these hypotheses using data on 888 Supreme Court cases involving federal agencies’ interpretations of federal statutes. The unit of analysis is a case in which the Supreme Court addresses an agency’s interpretation of a federal statute. I obtained this data from the Supreme Court Database (Spaeth et al., 2024), which comprises data on every Supreme Court case from 1946 to 2024. Here, I examine the period from 1954 to 2017, starting in 1954 because it marks the beginning of what some judicial scholars refer to as “the modern Court” (Wasby 2024; Hockett 2021; Keck 2004). This era was ushered in by the Court’s landmark decision in *Brown v. Board of Education* (1954), as *Brown* fundamentally changed the Court and its study by

refocusing the Court's position in championing civil rights, led scholars and critics of the Court to wrestle with notions of judicial activism and restraint, and served as a starting point for expansion of rights in other arenas of public interest including education, voting rights, interracial marriage equality, protections for disabled persons, same-sex marriage equality, and religious liberty (Tushnet 2015). This study concludes with 2017 due to lack of available data sourced from the Supreme Court Database (Spaeth et al., 2024), and for lack of data necessary for coding key explanatory variables.

Again, this study examines the Court's decisions in cases where agencies have interpreted federal statutes. After obtaining all cases in the Supreme Court database for the study period, I identified cases that focused on an agency action, ensuring that only cases involving agency interpretations are included here. I accomplished this task of case selection by including only those cases in which federal statutes served as the legal basis of the decision (and thus excluding cases dealing with constitutional matters as well as cases focused on articulation of judicial power, federalism, and states' issues).

Next, because this study examines the Court's behavior in the constrained environment of agencies interpreting federal statutes, I further restricted case selection to include only those in which a federal statute was construed by a federal agency for the sake of implementation itself. This eliminated cases where a state agency or other government actor construes a statute, as well as cases where administrative action is taken (rule, regulation, executive order, etc.) but the action is not for the purpose of implementing a statute directly. Again, the cases selected through these means provide a catalytic environment for testing motivating factors in decision-making.

To complete case selection, I eliminated *per curiam* decisions without oral arguments, as these cases contain little substance in their decisions and thus provide little opportunity to

understand the motivations of an ideological Court. Following this process, the remaining total was 1,031 cases. The final number of cases included in the analysis is 888, a decrease from the previous figure due to the lack of availability of data for key variables (namely the *Solicitor General Position* and *Issue Evolution* variables).

Once obtained from the SCDB and employing appropriate selection criteria, the dataset was constructed by integrating measures of institution ideology for the Supreme Court, President, House of Representatives, and Senate from the Judicial Common Space (JCS) (Epstein et al., 2007, 2024). I also utilize a measure of the ideological position adopted by the Solicitor General in each case from Pacelle (2003, 2015), and a static measure of the involved agency's ideology from Clinton and Lewis (2008). Finally, I use measures of legal constraints on Court decision-making in these cases in the form of precedent (Benesh and Spaeth 2001; Pacelle et al., 2007) and issue evolution, which tests the legal complexity of a case in terms of its position within the larger caselaw context in which it must be decided (Pacelle and Pyle 2020). The variables that measure these effects are discussed in further detail in the next section.

Variables

This study examines decision-making in the context of federal agency cases. As noted above, I theorize that ideology is the mechanism through which external institutions (namely the President, House of Representatives, Senate, and Solicitor General) attempt to influence the Court. Nevertheless, decision-making also entails legal constraints (including precedent and case legal complexity) impacting the Court's decisions. The hypotheses presented above articulate my expectations for how these factors impact the Court's decision-making behavior. This study employs logistic regression models to test these hypotheses on the likelihood of the Court reaching a conservative decision (as opposed to a liberal one). In the section that follows, I

introduce the variables utilized in these models. Table A-1 in the Appendix presents summary statistics and characteristics of these variables, and their purposes for inclusion in this study are examined individually below.

The Dependent Variable: Ideological Direction of Decision

The dependent variable in this study is *Decision direction*. I created this binary variable by relying on the Supreme Court Database's decision direction variable, which captures the ideological direction of a decision coded in the database as conservative, liberal, or neutral. For this study, no cases had a *neutral* ideological characterization (by the SCDB's coding scheme), leaving only instances in which cases were coded as being liberal or conservative. To maintain sign comparability across the study's variables, I recoded this variable so that a value of 1 indicates that the Court reached a conservative decision, and a value of 0 indicates that the Court reached a liberal decision. Again, when recoding this variable, I excluded a value for a neutral decision because none were present in my dataset.

Independent Variables: Ideologies of Supreme Court, President, House of Representatives, Senate, and Solicitor General

The variables of interest for this study measure the ideology of key institutions including the Supreme Court, President, House of Representatives, and Senate. For the first part of this study, *Supreme Court ideology* serves as the primary independent variable of interest, measuring the ideological direction of the Supreme Court as an institution each year. This variable directly tests the Non-Attitudinal Hypothesis, and when taken alongside the ideologies of the other institutions, indirectly tests the Strategic Hypothesis. This variable is pulled directly from the Judicial Common Space (JCS) database. For this study, I adapted the raw JCS scores by adding 1 to all scores, thus ensuring they are all positive. Thus, the new range for these variables is 0 to 2,

where values less than 1 indicates a liberal ideology and values greater than 1 indicates a conservative ideology.

To test the Strategic Hypothesis, I use the variables *President ideology*, *House ideology*, and *Senate ideology*. Each variable is pulled from the same JCS database as *Supreme Court Ideology* (Epstein et al., 2007, 2024). First, there is *President ideology*, which measures the President's ideology in each year, where values less than 1 represent a liberal President, and values greater than 1 represent a conservative President. Second, there is *House ideology*, which measures the ideology of the House of Representatives each year. Values less than 1 indicate a liberal House and values greater than 1 indicate a conservative House. Third, there is *Senate ideology*, which measures the yearly ideology of the Senate. Values less than 1 indicate a liberal Senate, while values greater than 1 indicate a conservative Senate.

In the second part of this study, I examine the effects of different ideological configurations of government institutions on Supreme Court decisions. This part of the analysis primarily tests the Ideological Congruence Hypothesis while secondarily addressing the results of the first part of the analysis that tests the Legal, Non-Attitudinal, Strategic, and Solicitor General Hypotheses. For this exercise, I utilize a binary variable for each institution, indicating if the institution is liberal or conservative. To test the Non-Attitudinal Hypothesis in this empirical context, I created the variable *Supreme Court binary ideology*, which is just *Supreme Court ideology* reduced to simple liberal and conservative values. A value of 1 on this variable indicates that the Court is conservative (i.e., has a value greater than 1 on *Supreme Court ideology*), while a value of 0 indicates that the Court is liberal (i.e., has a value less than 1 on *Supreme Court ideology*). The mean of this variable is 0.863, and the standard deviation is 0.344.

Likewise, I also include additional variables to test the Strategic Hypothesis in this empirical context. The variables are *President binary ideology*, *House binary ideology*, and *Senate binary ideology*. *President binary ideology* measures the ideology of the presidency each year. It is binary and has a range of 0 to 1, where a value of 0 represents a liberal President and a value of 1 represents a conservative President. Its mean is 0.619, with a standard deviation of 0.486. *House binary ideology* measures the ideology of the House of Representatives each year. A value of 1 indicates a conservative House, and a value of 0 indicates a liberal House. The variable has a range of 0 - 1, a mean of 0.269, and a standard deviation of 0.444. Finally, *Senate binary ideology* measures the ideology of the Senate each year. A value of 1 indicates a conservative Senate, and a value of 0 indicates a liberal Senate. The variable has a range 0 – 1, a mean of 0.401, and a standard deviation of 0.490.

Independent Variables: Ideological Position of the Solicitor General

This study theorizes that the Solicitor General will play a significant role in the Court's decision-making in federal agency cases. This is largely because of the Solicitor General's role in arguing on behalf of the federal government (and by extension, the agency whose actions are in question). Furthermore, because this is a study focused on the ideological pressure exerted by institutions, the Solicitor General's duty of liaising between the executive and judicial branches is on full display. As noted in the discussion of the Solicitor General's role in Part I of this study, the position argued by the Solicitor General significantly impacts the Court's ultimate decision (Pacelle 2003, 2015). Due to this reality, this study examines the extent of the Solicitor General's influence in federal agency cases. The Solicitor General Hypothesis introduced above articulated that the Solicitor General's position in a federal agency case should have a positive, statistically significant impact on the Court's decisions.

For both analyses, the Solicitor General Hypothesis is tested by the inclusion of the *Solicitor General position* variable, which measures the ideological position taken by the Solicitor General when it argues these cases before the Court (Pacelle 2003, 2015). This theoretically serves as a litmus test of the government's formal stance and reinforces notions that the Executive may exert additional influence on the Court's ideological decision-making if there is ideological unity in the Executive itself (testing the Ideological Congruence Hypothesis). This measure is binary and has a range of values from 0 to 1, where 0 indicates a liberal position taken by the Solicitor General and a 1 indicates a conservative position.

Independent Variables: Legal Constraints

In addition to the independent variables focused on ideology explained above, this study utilizes two variables that test the extent to which precedent and caselaw complexity impact the Court's decision-making. As discussed above, it was theorized that the Court must consider the law in its strategic decisions. By including these variables, this study tests that notion.

Precedent is important in Supreme Court decision-making regardless of the type of case being heard by the Court. Normatively, justices care about precedent, and it contributes to the decisions they make (Hansford and Spriggs 2006). Studies have created proxy measures for the impact of precedent, with Benesh and Spaeth (2001) arguing that the impact of precedent can be found in its use in case syllabi. Whereas case syllabi serve as executive summaries in which the Court succinctly expresses its decision and cites supporting precedent (or guiding precedent, depending on how its role is considered), the precedents cited in them carry legal weight in the case.

As Benesh and Spaeth (2001) note,² precedents cited in a case's syllabus are relied on by majority justices to legally rationalize their opinion, and this implies that these precedential cases are salient to the justices in the majority, especially the majority opinion writer. Because case syllabi must be approved by the majority opinion author, precedents cited therein are legitimized as being influential in the Court's decision-making in the case itself. While salient and influential precedents cited in the syllabus may serve as evidence of the role of justice preferences at work in the Court, they also demonstrate the impact of the law. When testing the impact of the law, the ideological direction of precedents matters as much as their legal substance (Pacelle et al., 2007). By examining the precedents used to justify decisions, scholars can determine how precedent is employed in conjunction with ideology to influence judicial outcomes.

Precedent is seen as a constraining factor on decision-making (the Court is normatively expected to adhere to the doctrine of *stare decisis*, after all), and the ideology of precedential cases cited in case syllabi likely impact the Court's behavior in the case at hand.³ Because this study examines the impact of ideology on Court decision-making through institutional and legal means, I utilize Pacelle et al., (2007)'s variable measuring the ideological direction of precedent. The Precedent Hypothesis states that precedent will have a positive, statistically significant impact on the Court's decision-making, and by including this variable, I can test this hypothesis directly. *Precedent* is coded here to reflect the ideological direction of the leading precedent in

² Benesh and Spaeth (2001) argue that when a case is cited in the syllabus of a Supreme Court opinion, it reflects the majority opinion author's view of that case's significance. Although the syllabus is initially drafted by the Reporter of Decisions, it is sent to the majority author's chambers for review and approval, giving the justices influence over its content. Analyzing orally argued, signed opinions from the 1987 to 1998 terms, they found an average of 1.30 citations per syllabus (2,062 citations across 1,583 cases), leading them to conclude that citations in the syllabus carry meaningful weight.

³ For cases in which multiple precedents are cited in the syllabus, the precedent variable is coding as following precedent when the Court makes it clear that it is following all the precedents cited in the syllabus.

each case, where -1 indicates a liberal precedent, 0 indicates no precedent, and 1 indicates a conservative precedent.

In addition to *Precedent*, this study also includes a variable that measures the legal complexity of cases (directly testing the Legal Complexity Hypothesis). It does so by examining the position of cases within the broader context of relevant case law. *Issue evolution* is a measure of legal difficulty devised by Pacelle (2003, 2009; Pacelle et al., 2007; Pacelle and Pyle 2020) that traces the development of case issues from their emergence in case law to the evolution of issues beyond unidimensional policy space.⁴ As legal context becomes more complex, the Court is more likely to issue restrictive decisions (Schubert 1965, 1974; Segal and Spaeth 2002). The more complex and thus restrictive a decision is, the more likely it is that case outcomes are conservative (Baum 2007). Taken together, this means that as cases become more complex, the Court is generally more likely to reach conservative decisions. I adopt this rationale for this study and employ Pacelle's (2003, 2009; Pacelle et al., 2007; Pacelle and Pyle 2020) *Issue evolution* variable to measure this effect in federal agency cases. Its range of values span from 1 to 4, where 1 indicates a case in which a new issue arises, likely linked to existing issue areas, 2 indicates a case in which the Court establishes foundational precedents to address the substantive issue, 3 indicates a case in which the Court refines its precedents and builds upon them, and 4 indicates a case in which the issue evolves beyond the unidimensional policy space, influencing Court decisions in broader contexts (Pacelle and Pyle 2020).

⁴ Early research relied on Guttman scaling to show that as cases became more complex, courts were more likely to issue restrictive rulings (Schubert 1965, 1974). Later attitudinal studies applied dimensional analysis, ranking cases by difficulty based on voting patterns, labeling 8-1 liberal rulings as the easiest and 8-1 conservative rulings as the hardest (Baum 2007). Likewise, analyses of case fact patterns have found that as case circumstances become more challenging for the defendant (such as a warrantless home search versus a warrantless car search), the likelihood of a decision favoring the defendant decreases (Segal 1984).

Control Variable: Agency Ideology

This study examines Supreme Court decision-making in the constrained environment where the Court reviews actions of federal agencies. Because of this, agency ideology might impact the Court's behavior to a menial degree. Whereas the Solicitor General argues cases on behalf of these agencies, its position is closer to the Court, and when taken alongside the fact that the Solicitor General has an immense institutional relationship with the Court, it is likely true that the ideological position argued by the Solicitor General (which naturally aligns to some degree with the ideology of the agency since the Solicitor General is arguing on *behalf of the agency*) is more important than the agency's ideology itself. Nevertheless, I controlled for agency ideology in these analyses. By controlling for it, I can empirically distinguish the impact of it from the impact of the Solicitor General.

To accomplish this task, I introduce *Agency ideology*, which measures the ideology of the agency whose actions are the basis for litigation in each case. This is an aggregated measure based on the opinions of thirty-nine administrative experts, where negative values indicate a liberal agency and positive values indicate a conservative agency (Clinton and Lewis 2008). It is worth noting that this control variable has its limitations, as its values remain static (i.e., the ideology of agencies does not change annually), and not all agencies included in my analyses are directly represented in Clinton and Lewis' dataset. Additional details regarding how their measure was adapted for this study can be found in the Appendix. Table A-2 in the Appendix specifies the agencies being studied here, as well as the agencies whose ideologies were included as a substitution if an agency wasn't present in Clinton and Lewis' dataset.

Modeling Supreme Court Decision Making in Federal Agency Cases

Modeling the constrained context within which the Court makes decisions in federal agency cases was difficult. This study focuses on the effect that external institutions of government and key litigant players (namely the Solicitor General) exert on the Court. The mechanism through which these institutions are theorized to exert this influence is ideology, with the Court perceiving the ideological preferences of other institutions and considering its own preferences (aggregated from the preferences of individual justices on the Court) when making decisions. Where I theorized that federal agency cases serve as a good basis for empirically testing the theories of decision-making, I employed a series of models that explore this notion. Because the ideological impact of external institutions materializes as the decisions the Court ultimately makes in cases, I utilized logistic regression models to measure changes in probability of the Court reaching one ideological outcome over the other – reaching a conservative decision over a liberal decision.

To address Research Question 1, the first analysis measured the effect of ideology exerted by the President, House of Representatives, and Senate, the ideological position argued by the Solicitor General, the legal constraints of precedent and issue evolution on Court decision direction, while controlling for effects of agency ideology. To address Research Question 2, a subsequent series of predicted probability calculations were conducted using the Clarify package in STATA (Tomz et al., 2003), in which values for explanatory variables were set at specific values and were used to generate means and associated confidence intervals for the probability of the Court reaching a conservative decision (versus a liberal one). This was utilized to measure the impact of the Solicitor General (testing the Solicitor General Hypothesis directly) by setting other explanatory measures at their means and calculating the predicted probability of a

conservative decision as the Court itself becomes more conservative (which also indirectly tests the Non-Attitudinal Hypothesis). These values were generated for two scenarios – one in which the Solicitor General argues a liberal position before the Court, and another in which the Solicitor General argues a conservative position before the Court.

The first analysis concluded with consideration of the endurance of the Solicitor General despite claims of its politicization by and since the Reagan administration in the 1980s. This analysis is timely and relevant given recent charges of the Solicitor General's office becoming more political under the Obama, Trump, and Biden administrations (Dreeben 2021; Bodderly 2019). While no formal hypothesis was presented for this specific model, the idea is that the President has attempted to politicize the OSG since the Reagan administration in the 1980s, leading to questions of whether the OSG successfully averts these attempts or at least moderates political affects to maintain its position with respect to the Court. To test this notion, given the empirical context of this study, a comparative model testing the effect of constraining factors on decision-making was conducted with emphasis on differences in cases before President Reagan took office in 1981, compared to those cases after. This model employed the same logistic regression setup as the first model, with cases divided into two categories: pre-1981 and post-1981. While this comparative model largely served as an opportunity to generally test the endurance of the Solicitor General (and by doing so it indirectly tested the Solicitor General Hypothesis), results from this model also reinforced potential findings pertaining to the Non-Attitudinal, Strategic, Precedent, and Legal Complexity Hypotheses within a historical context.

To answer Research Question 3, the second analysis examined the impact of ideological alignment and congruence among external institutions on the Court's propensity to reach conservative decisions (versus liberal ones). This was accomplished by first employing a new set

of binary ideology variables (*Supreme Court binary ideology*, *President binary ideology*, *House binary ideology*, and *Senate binary ideology*) alongside other key variables from the first analysis (*Solicitor General position*, *Precedent*, and *Issue evolution*), as well as the *Agency ideology* control.

The second analysis again utilized the Clarify STATA package to generate predicted probabilities of a conservative decision for different scenarios of ideological alignment and congruence among external institutions against the Court. These scenarios included a unified government alignment, in which the President, House of Representatives, and Senate are the same ideologically; a unified Congress alignment, in which the House of Representatives and Senate are the same ideologically; and finally, a unified executive alignment, in which the President, Solicitor General, and Agency are the same ideologically. In these alignment configurations, key institutions (e.g., in the unified government alignment, the President, House, and Senate) were set to an ideology opposite to the Court, and predicted probabilities were generated while setting other variables at their means. By calculating predicted probabilities of the Court reaching a conservative decision in these scenarios, I tested the notion that the Court changes course when facing pressures from external institutions aligned ideologically against the Court (a direct test of the Ideological Congruence Hypothesis).

As noted previously, this second analysis indirectly tested the Non-Attitudinal, Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses, as the individual ideologies of these institutions contribute to the alignment configurations that are front and center. Thus, for example, evidence for a unified government (President, House, and Senate ideologically aligned) configuration impacting the chances of the Court reaching a conservative decision inadvertently

speaks to the impact these institutions exert individually, providing further context as to their overall impact on Court decisions.

Part III: Results

In this section, I present the results of my quantitative analyses. The first analysis sought out to answer Research Questions 1 and 2 and thus tested the notion that the Supreme Court behaves differently when it is ideologically out of step with one of the other branches of government than it does when it is not. Specifically, the first analysis tested the Non-Attitudinal, Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses by examining how various factors affect the Court's decisions in federal agency cases. The first analysis addressed Research Question 2 through calculations of predicted probabilities of the Court reaching a conservative decision given the ideological position taken by the Solicitor General, as well as by a model examining the notion that the Solicitor General's impact on the Supreme Court has diminished since the politicization of the Solicitor General's office in the 1980s. The second analysis addressed Research Question 3 and thus tested the notion that the Supreme Court will alter its decision-making when it is out of step with other branches of government *united ideologically against the Court*. This analysis tested the Ideological Congruence Hypothesis directly, and provides additional context within which the Non-Attitudinal, Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses can be tested indirectly.

Testing the Ideological Effect of Individual Institutions and Players on Supreme Court Decision Making

The first analysis addressed Research Question 1 and thus tested the overarching notion that the Court will alter its decision-making when out of step with the other branches of government. The results of the first logistic regression (which tests the Non-Attitudinal, Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses) are presented in Table A-3 in the Appendix and are explained in detail below. The first logistic regression used the *Decision direction* dependent variable, and *Supreme Court ideology*, *President ideology*,

House ideology, Senate ideology, Solicitor General position, Precedent, and Issue evolution explanatory variables, as well as the *Agency ideology* control variable.

As Table A-3 shows, the coefficient of *Supreme Court ideology* is positive but not statistically significant ($p = 0.842$, two-tailed test). This result suggests we cannot conclude that the Supreme Court's ideology affects its propensity to reach a decision of a particular ideology in federal agency cases. This is likely due to the existence of other constraining factors, including the law and other political institutions seeking to exert ideological influence on the Court. This initial finding supports the Non-Attitudinal Hypothesis. The Court makes decisions that can be characterized ideologically as being liberal or conservative, but the probability of the Court reaching a conservative decision over a liberal decision apparently is not dependent on the Court being conservative. Thus, Court decision-making in federal agency cases cannot be explained by the simple breakdown of conservative versus liberal justices, reinforcing previous findings (Bailey and Maltzman 2011).

The coefficients on *Precedent* and *Issue evolution* are both positive and statistically significant ($p=0.000$; 0.023 , respectively). These results provide support for the Precedent and Legal Complexity Hypotheses. If the leading precedent in a federal agency case is conservative, the Court is more likely to reach a conservative decision. This reinforces previous studies' findings that articulate the significant importance of *stare decisis* and following the law (Hansford and Spriggs 2006; Wahlbeck et al., 1998). This also reinforces expectations of restraint through the Double Standard. Furthermore, the more legally complex a case is, the more restrictive (and conservative) it is likely to be (Corley and Wedeking 2014; Pacelle and Pyle 2020). In the broader strategic context, these findings reinforce the notion that the Court faces

considerable constraints in its decision-making, including constraints based in the law itself (Epstein and Knight 1998; Bailey and Maltzman 2011).

The coefficient of *President ideology* is negative but is not statistically significant ($p=0.905$, two-tailed test). While this would normally lead us to discount the effect of presidential ideology on the Court's decision-making, I would like to address the negative sign of the coefficient and the overall statistical insignificance of this variable. The statistical insignificance of this variable may confirm previous findings (Segal et al., 2011; Bailey et al., 2005) which demonstrate that presidential ideology seems to influence the Court *indirectly* (filtered through the Solicitor General's office and judicial nominations). Presidents seem to have no direct effect on Court decision-making contemporaneously. The negative coefficient indicates that the Court responds negatively to conservatism in the White House, meaning that as the President becomes more conservative, the Court is less likely to reach a conservative decision. This seems counterintuitive to claims in previous studies that the Court is responsive to other government institutions, including the Chief Executive (Bailey and Maltzman 2008). However, it is important to note these are federal agency cases argued by the Solicitor General's office, so in perceiving external institutions' preferences when making these decisions, the Court is more likely to directly consider the position adopted by the Solicitor General than the direct ideological preferences of the President (this is supported by the positive, statistically significant *Solicitor General Position* finding explored below). This finding does nothing in terms of providing support for the Strategic Hypothesis *in a presidential context*. While the President is not influential on the Court in steering its decisions, other institutions, including the House and the Senate, could be.

The coefficient of *House ideology* is statistically significant ($p=0.005$, two-tailed test), but it is negative. This is intriguing, as it also seems counterintuitive to the notion that the Court responds positively to pressures from external institutions. However, this result could shed light on the intergovernmental dynamics at play in judicial policymaking. By counteracting in response to House ideology, the Court may be “strategically counterbalancing” the heightened ideological majoritarianism for which the House is known (Friedman 2006; Pickerill 2004). In other words, where the House is often characterized as being ideologically extreme (it is closest to the electorate after all), the Court may mitigate its decisions in response to counteract this “ideological extremism.” This certainly fits with the broader characterization of the Court as being “countermajoritarian” (Bickel 1962). Overall, though, this individual result provides partial (and mixed) support for the Strategic Hypothesis, as the Court is responsive to the House, but not in the expected direction.

The coefficient of *Senate ideology* is positive and only moderately statistically significant ($p=0.074$, two-tailed test). This means that the Senate exerts a moderate effect on the Court’s decision-making, such that as the Senate becomes more conservative, the chances of the Court reaching a conservative decision increase slightly. This provides limited support for the Strategic Hypothesis, as it seems the Court adopts decisions that are amenable to the Senate, partially driven by the Senate’s ideology to do so. This result is interesting when considered alone, but especially when taken in tandem with the House result. Alone, the Senate likely exerts influence because of its role in judicial confirmations, which, while infrequent, significantly impacts the Judiciary (Moraski and Shipan 1999; Epstein and Knight 1998). This motivation shouldn’t be taken as gospel, though, because again this effect takes place within the broader institutional

context of judicial policymaking in which other institutions (including the House) seek to exert their ideological preferences on the Court's decisions.

The coefficient on *Solicitor General position* is positive and statistically significant ($p=0.000$, two-tailed test). This result validates the conclusion that the Solicitor General plays a crucial role in the Court's decision-making in federal agency cases. This provides substantial support for the Solicitor General Hypothesis and reinforces findings in previous studies that the Solicitor General is influential as a repeat player before the Court (Bailey et al., 2005).

Measuring the Magnitude of the Solicitor General's Impact in Federal Agency Cases

To answer Research Question 2, I conducted another analysis in which the magnitude of the Solicitor General's impact over federal agency decisions was examined. The significant impact of the Solicitor General on Court decision-making is graphically presented in Figure A-1 in the Appendix, in which *Supreme Court ideology* is plotted against the predicted probabilities of the Court reaching a conservative decision. Two plots are shown – one in which the Solicitor General adopts a conservative argument before the Court (red plot) and one in which the Solicitor General adopts a liberal argument before the Court (blue plot). This graph was generated using predicted probabilities calculated using the Clarify STATA package (Tomz et al., 2003), where the values of other explanatory variables were set to their means and two sets of predicted probabilities were generated as values of *Supreme Court ideology* increased from its minimum (0.6835 – the Court at its most liberal) to its maximum (1.4552 – the Court at its most conservative) and the *Solicitor General position* variable was set to 0 (a liberal position) and 1 (a conservative position).

This graph clearly shows that the Supreme Court's ideology does not matter much in driving its decisions when controlling for other variables (this is reflected in the inconsequential

change in the probability of a conservative decision as the Court moves from being the most liberal to the most conservative). However, the Solicitor General does influence the Court's likelihood of reaching a conservative decision. The predicted probability of the Court reaching a conservative decision increases by ~25 percent and 35 percent, respectively, when the Solicitor General is liberal vs. conservative. The gap between the two plots (and their confidence intervals) visually confirms this effect. When the Court is moderately conservative (*Supreme Court ideology* ≈ 1.2) the impact of the Solicitor General's position is greatest. Finally, the difference in impact between a liberal position taken by the Solicitor General and a conservative position taken by the Solicitor General is greatest when the Court is liberal (*Supreme Court ideology* > 1). This is shown visually in the larger gap between the *Solicitor General position* plots when the Court is liberal compared to when it is conservative. These results echo the notion that the Court is increasingly responsive to the Solicitor General's position when the Solicitor General seemingly shifts from the position it is expected to take, including positions previously taken by the OSG (Schoenherr and Waterbury 2022; Lemos and Widiss 2025). All of this provides support for the Solicitor General Hypothesis. Taken as a whole, the impact of the Solicitor General as a key player in the Court's decision-making in federal agency cases cannot be ignored.

In all, the results of the first analysis provide moderate support for the Non-Attitudinal, Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses. This analysis further characterized the Court's decision-making behavior in federal agency cases, expanding knowledge of what motivates the Court's decision-making when faced with a constraining institutional environment. These results provide evidence for the broader theoretical claim that the Court is, to some degree, strategic in its decision-making, taking into consideration the

ideological preferences of other institutions of government, respecting the position taken by the Solicitor General, but most of all remaining cognizant of the limitations of the law. These results highlight the significant importance of the law in statutory cases. As shown here, precedent is dominant, and the legal complexity that characterizes statutory economic cases (including the federal agency cases studied here) is controlling, reducing the opportunities for justices to exercise political preferences in decisions. Legal factors are important and perhaps exert the most constraining pressure on the Court in these cases. Thus, for the period from 1954 to 2017, the Court broadly practiced self-restraint in its decision-making (keeping with Double Standard expectations of restraining itself in lieu of deference paid to the other branches of government through decisions more consistent with their ideological preferences and the rule of law than its own preferences). This self-restraint is characterized by the Court strongly following extant precedent and refraining from venturing out into making decisions based solely on the preferences of the Court's justices.

Has the Solicitor General Endured Politicization?

Previous discussion in this dissertation examined the reality that the OSG has and continues to face politicization at the hands of the President. To test the Solicitor General's resilience to these efforts, I conducted an identical logistic regression as before, with cases broken into two subsets: cases before President Reagan took office in 1981, and those after. By testing the before and after effect of the Solicitor General's office facing initial politicization, this model afforded additional context for understanding how the Court navigates its relationship with such a legally strategic actor as the Solicitor General. Consequently, this comparative analysis provides an indirect means of testing Research Question 2 and the Solicitor General Hypothesis.

The results of this comparative analysis are presented in Table A-5 in the Appendix. In the pre-1981 model, the statistical significance of the Supreme Court ideology ($p=0.023$), House ideology ($p=0.000$), Senate ideology ($p=0.002$), and Solicitor General position ($p=0.000$) (all two-tailed tests) variables overwhelmingly supports the idea that the Solicitor General enjoyed a positive relationship with the Court before President Reagan took office. The coefficient of *Supreme Court ideology* is negative, signaling the Court's rejection of its preferences as a direct result of the Double Standard that seemed to rule prior to the conservative countermovement under President Reagan. This likely means the Court relied on other institutions to guide its decisions in statutory matters, and the Solicitor General was perhaps the most active (and had the most access) in these cases. Finally, whereas the coefficient on *Precedent* is positive and statistically significant ($p=0.000$, two-tailed test), indicating the significant impact of following precedent in statutory economic cases, *Issue Evolution* is not significant, indicating that perhaps the complexity of statutory economic cases wasn't influential in the years preceding the 1980s – reflecting that perhaps the statutory issues raised before the Court were not as complex as those to follow in the decades after. These findings support the Non-Attitudinal, Strategic, Precedent, and Solicitor General Hypotheses while rejecting the Legal Complexity Hypothesis *within the context of the pre-1981 federal agency cases*.

Also presented in Table A-5 in the Appendix, the results of the post-1981 analysis provide a stark contrast in terms of the factors that influence Court decisions. The only variables that are statistically significant are *Solicitor General position* and *Precedent* ($p=0.000$; 0.000 , two-tailed tests), and both are positive, signaling that conservative arguments put forth by the Solicitor General and conservative precedents produce a higher likelihood of the Court reaching a conservative decision. Beginning with President Reagan's election in 1980, it seems that the

Court increased its reliance on and attention to the Solicitor General in federal agency cases. The prevailing statistical significance of the *Solicitor General position* variable provides support for the idea that there exists some level of stability in the relationship between the Solicitor General and the Court despite political challenges faced by both. This stability could be the result of the Court relying on the Solicitor General to help impose doctrinal consistency in federal agency cases, a reflection of the importance of precedent and standardizing the law. Taking this into consideration alongside the President's attempted politicization of the OSG, and these results may indicate that institutions (including the President) attempt to utilize the Solicitor General to affect judicial policies indirectly. In a broader context this means that political institutions, in lieu of trying to influence the Court's decision-making directly, may seek to influence the Court indirectly by attempting to exert political pressure on the Solicitor General to argue positions more consistent with their preferences. These results when taken as a whole support the Non-Attitudinal, Precedent and Solicitor General Hypotheses, while refuting the Strategic, Legal Complexity Hypotheses, *all within the context of the post-1981 federal agency cases*.

What to make of these results in terms of the endurance of the Solicitor General's impact on Court decisions in federal agency cases? The Court's navigation of conservatism in the 1980s seemingly had no effect on its relationship with the Solicitor General, given the strong significance of the Solicitor General position variable across both models (pre- and post-1981) while other institutional variables fell out of significance. This is reflective of the strength of the relationship between the Solicitor General and the Court and underscores the importance of the Solicitor General over statutory matters. This relationship can be characterized in terms of institutional trust placed in the Solicitor General given its role in arguing cases from a position of law that serves the government's legal interests.

Considering the Solicitor General's position amongst the other institutions that wish to exert influence on the Court, these results indicate that the Solicitor General has been resilient against political pressures exerted by others. The question that still looms large is whether the Solicitor General will continue to resist these pressures; though that question is beyond the scope of this study, results here provide an early indication that the Solicitor General remains overwhelmingly impactful (and thus may be reveling in a strategically healthy institutional relationship with the Court resultant of its resistance to and rejection of the positions motivated almost exclusively by politics) (Schoenherr and Waterbury 2022; Lemos and Widiss 2025). Post *Loper Bright*, the importance of answering this question is essential to understanding not only the evolution of the Solicitor General's role under politicized administrations, but also the Court's consideration of key institutions and players looking forward.

Testing the Effect of Ideological Alignment Among External Institutions on the Court's Decision Making

The second (and final) analysis in this study answered Research Question 3 and examined the extent to which external institutions' ideology may be united and strengthened in its effect on the Court's decision-making. Theoretically, this means that the Court may change its course in decision-making if there is unity in the external institutions ideologically aligned against the preferences of the Court (reflected in the Ideological Congruence Hypothesis). For example, when the Court is liberal and faces a conservative President and Congress, the Court may be incentivized to decide more in line with the conservative will of these institutions given these cases involve federal action and are of institutional interest to these entities. Thus, a more conservative decision in this case can be at least partially attributed to the aggregated ideological force of these external institutions, thus highlighting strategic considerations taken by the Court.

To test this notion, this model used several new variables. Instead of *Supreme Court ideology*, *President ideology*, *House ideology*, *Senate ideology*, and *Agency ideology*, this model included *Supreme Court binary ideology*, *President binary ideology*, *House binary ideology*, *Senate binary ideology*, and *Agency binary ideology*. These variables were coded by reducing the ideological position of these institutions to a binary coding of 0 = liberal and 1 = conservative. To do this, because for all these institutions an initial value of 1 on their original ideology variable (e.g. *President ideology* from the JCS) represents ideological neutrality, for the coding of these binary variables any value less than 1 was recoded to a 0 for the new variable (for example, if *President ideology* had a value of 0.835, it is recoded to a 0 for *President Binary ideology* (liberal) because 0.835 is less than 1). The *Solicitor General position* was kept the same as in other analyses because it was already binary (0=liberal argument; 1=conservative argument). Likewise, because this model considered the ideological alignment of institutions, non-institutional variables such as *Precedent* and *Issue evolution* (which were still relevant) were kept the same as in the first analysis.

The results of this logistic regression analysis are presented in Table A-6 in the Appendix. As shown here, the variables for the House, Senate, and Solicitor General ideologies were all significant ($p = 0.001$, 0.005 , and 0.000 respectively, two-tailed tests). This means that when reducing the ideologies of these institutions down to simple liberal/conservative terms, these institutions' ideologies have a significant impact on the propensity of the Court reaching a conservative decision. Furthermore, *Precedent* and *Issue evolution* were statistically significant ($p=0.000$; 0.022 , respectively, two-tailed tests) as well, signaling the enduring importance of the law even when ideological factors are diluted. These results are consistent with previous findings

presented in this study and facially support the Strategic, Precedent, Legal Complexity, and Solicitor General Hypotheses.

However, the purpose of this model was not to reinvent the wheel of testing the ideological influence of external institutions on the Court on an individual basis. Instead, this model aimed to test the effect of when institutions are united by their ideologies and thus exert compounded influence on the Court to produce favorable decisions. To accomplish this, I utilized the Clarify statistical tool (Tomz et al., 2003) to generate predicted probabilities of the Court reaching a conservative decision given different liberal/conservative alignments among the institutions included in the model. By doing this, I was able to directly test the Ideological Congruence Hypothesis.

The results of this process are shown in Table A-7 in the Appendix, in which the predicted probabilities of the Court reaching a conservative decision are shown for three configurations of institutions uniting in their ideologies – when there is a unified executive (the President, Solicitor General, and Agency are all of the same ideology), when Congress is unified (the House and the Senate are of the same ideology), and lastly when there is unified government between the executive and legislative branches (when the President, House, and Senate are all of the same ideology). These configurations were compared when the Court is liberal and the configurations are conservative (predicting the extent to which the institutions “pull” the Court’s decision toward being conservative), and when the Court is conservative and the configurations are liberal (predicting the extent to which the institutions dissuade the Court from making a conservative decision despite its conservative ideology). For these predictions, the values for institutions not explicitly included in each configuration (again, Unified Executive means the President, Solicitor General, and Agency are aligned; Unified Congress means the House of

Representatives and the Senate are aligned; and Unified Government means the President, House of Representatives, and Senate are aligned) were set at their means when predicted probabilities are calculated. So, for example, when examining the effect of a liberal and united Congress on a conservative Court, the Court (*Supreme Court binary ideology*) was set to a conservative value (1), the House (*House binary ideology*) and Senate (*Senate binary ideology*) were set to a liberal value (0), the ideologies of the President (*President binary ideology*) and Agency (*Agency binary ideology*), as well as the position taken by the Solicitor General (*Solicitor General position*) are set to their observed means when predicted probabilities are calculated.

The results show interesting dynamics in the Court's decision-making behavior given the ideological alignment of external institutions. To start, the baseline for these comparisons began with the predicted probability of the Court making a conservative decision when all institutions (the Court, President, House, Senate, Solicitor General, and Agency) are liberal and when all are conservative. The predicted probability when all are liberal was 32.4 percent. This means that the Court is 32.4 percent likely to reach a conservative decision in federal agency cases when all institutions (the Court included) are liberal. Conversely, when all institutions are conservative, the predicted probability of the Court reaching a conservative decision was 47.7 percent. This means that the Court is 47.7 percent likely to reach a conservative decision in federal agency cases when all institutions (the Court included) are conservative.

This finding alone provides interesting insights into discussions of the decision-making behavior of the Court in broad theoretical terms. When *all* government institutions involved in these federal agency cases are conservative, the Court is still only 47.7 percent likely to produce a conservative decision. This does not bode well for attitudinalists who proclaim the Court

pursues its policy interests unabashed. Instead, it sheds light on the reality that decision-making is more complex than a simple tally of conservative versus liberal Justices on the Court.

When the Court Faces a Unified Executive

Given these baselines, looking at the first alignment in which the Court faces a unified executive branch (both a unified liberal executive branch against a conservative Court and vice versa), we see that from the baseline where all institutions are liberal, when the President, Solicitor General, and Agency shift to being conservative, the chances of a conservative decision for the liberal Court increased dramatically from the baseline probability of 32.4 percent to 42.3 percent. This increase is attributable to the effect of institutions aligning ideologically in contrast to the Court. We see here that the Court shifts its decision-making behavior to provide decisions that are more in line with the ideological expectations of the executive branch.

This effect was echoed when I reversed the roles. When examining the same situation from the baseline of all institutions being conservative, the chances of a conservative decision for the conservative Court decreased dramatically when faced with a unified liberal executive, from the baseline 47.7 percent to 32.8 percent. Again, we see a decrease attributable to the cooling effect that ideology plays in the Court's decision-making when the Court is opposed by a unified executive. These results partially support the Ideological Congruence Hypothesis.

When the Court Faces a Unified Congress

The second ideological alignment configuration examines the behavior of the Court when faced with a unified Congress in which the House and Senate align ideologically (both a unified liberal Congress against a conservative Court and vice versa). Again, starting with the baseline where all institutions are liberal, when the House and Senate shift to being conservative, the chances of a conservative decision for the liberal Court increased from 32.4 percent to 34.4

percent. This increase is negligible given the confidence interval. Examining the inverse of this, when starting from the baseline where all institutions are conservative, the chances of a conservative decision for the conservative Court decreased from 47.7 percent to 39.3 percent. This decrease of around 8 percent echoes the same dynamic presented above – the Court shifts its decision-making away from the amenable conservative decision to a more palatable decision favorable to a liberal Congress.

Interestingly, the effect of Congress on the Court was greater when the Court itself is conservative, indicating that the Court is more likely to be drawn away from making a conservative decision than it is to being drawn toward making a conservative decision. What this means for the institutional relationship between the Court and Congress is hard to tell based on this analysis. However, the Court is more or less likely to reach a conservative decision based on the ideology of Congress is noteworthy and provides minimal support for strategic factors. These results minimally support the Ideological Congruence Hypothesis.

When the Court Faces a Unified Government

The final ideological alignment configuration explored here is that of a unified government in which the President, House, and Senate are all aligned with each other ideologically, in contrast to the Court (both a unified liberal government against a conservative Court and vice versa). This configuration does exclude the roles of the Solicitor General and involved agency despite their position in the executive branch, as in discussions of government in terms of unification and division, rarely are inferior offices of the executive included – normally when scholars speak of unified versus divided government they refer to Congress and the President as heads of the respective legislative and executive branches. For the sake of this configuration, I adopted this norm.

From the baseline in which all institutions are liberal, when the President, House, and Senate shift to being more conservative, the chances of a conservative decision for the liberal Court increased from 32.4 percent to 32.8 percent. This increase is mathematically insignificant and does nothing to tell us of the Court's willingness to adapt its decisions to the desires of a unified government. Looking at the inverse, from the baseline in which all institutions are conservative, when the President, House, and Senate shift to being more liberal, the chances of a conservative decision for the conservative Court decreased from 47.7 percent to 42.3 percent, a decrease of ~5 percent. This effect is more important than the inverse discussed above but is still mathematically insignificant given the associated confidence intervals. Because of this uncertainty, support for the Ideological Congruence Hypothesis is indiscernible.

From these collective results, we see that the Court's behavior changes depending on the institutional environment in which it makes decisions. Because these cases involve the actions of the federal government and draw the interests of primary institutions across the branches of government, the Court behaves strategically. This strategy must be characterized by its reliance on precedent and other legal factors. The Court acknowledges its lack of expertise over administrative matters and relies on other institutions, particularly the Solicitor General, to ensure statutory matters are resolved in the best interest of the law. Furthermore, the Double Standard characterizes the Court's behavior deciding these cases in terms of activism and restraint, and from these results the Court seems to practice restraint – through deference to the actions of the other institutions of government and adherence to the law.

Part IV: Conclusions and Implications

This study posed research questions focused on the theory that best explains Supreme Court decision-making behavior in statutory economic cases (specifically, federal agency cases), the extent of the impact of the Solicitor General in these cases, and whether ideological congruence among external institutions matters in influencing the Court's decisions. From the results presented here, it can be argued that legal factors (and when controlling for precedent, strategic factors) best explain decision-making in the federal agency cases studied, the Solicitor General has an overwhelming impact on the Court's decisions, and the Court is partially responsive to ideological alignment among external institutions. But what does it all mean?

In broad terms, federal agency cases studied here provide a lens through which we can further characterize what strategic decision-making looks like. For instance, we see that the President serves almost no measurable direct purpose in these cases, largely because the President usually takes no position on most issues addressed in these cases. Furthermore, indirect attempts to influence the Court politically through checks or institutionally through the Solicitor General face considerable challenges as checks on the Court incur significant costs and the Solicitor General tactfully navigates politicization when arguing before the Court (Moraski and Shipan 1999; Rogol et al., 2018).

The House of Representatives and Senate, however, may have some impact on the Court, though from the findings presented here the nature and magnitude of such an impact is indiscernible. The idea that the Court is responsive to specific chambers in Congress has been theorized before (Segal 1997; Eskridge 1992; Clark 2009; Owens et al., 2013) – after all, each may attempt to influence the Court differently through the system of checks and balances, but previous studies have not empirically tested the notion that the Court responds differently to the House and Senate separately. This study showed that the Court counteracts heightened ideology

in the House and tends to align with the Senate's preferences. The question of impact between these two chambers is unresolved. When considering the moderate positive statistical significance of the Senate along with the strong negative statistical significance of the House together, what these diametrically opposed results mean for the Strategic Hypothesis is complicated.

I would argue that just because the House and Senate (or the President and one of the chambers of Congress) disagree ideologically does not necessarily mean that the Court is free to do what it wants. The magnitude of the effect of each institution matters, and while that is beyond the scope of this study, it should lead toward further discussion of how the Court strategically considers these ideological positions and makes decisions accordingly. Furthermore, it plays into the notion that the Court responds differently to different institutions. If the Court viewed all institutions equally and responded uniformly, then opposing ideologies within these institutions would cancel each other out, allowing the Court to act on its preferences unconstrained. However, we know from the characterization of the various checks each of these institutions have on the Court that the Court likely perceives each institution's preferences differently from others, and thus the impact of each institution's ideology on the Court is not equivalent to the others (Segal et al., 2011; Clark and Kastellec 2015). This means opposite ideologies, though reducing the overall impact of external ideological pressure on the Court in its decisions, still force the Court to decide strategically (perhaps even more so given the complexity of understanding the ideal points of each institution and positioning its decisions where it placates other institutions while maximizing its preference priorities).

The Solicitor General's impact has been discussed at length throughout the results, but I would like to emphasize the meaningful implications of the role the Solicitor General plays in

federal agency litigation. The Solicitor General controls a significant portion of federal agency litigation, particularly the initial stages of the process before a case is presented to the Court. This is in large part because the Solicitor General's role in gatekeeping agency litigation, choosing which agency cases will be taken to the Court on appeal, and subsequently morphing the initial arguments made by agencies to ensure they are consistent within the larger context of law, defensible from the perspective of government, and in some cases, aligned with administrative priorities (Bailey et al., 2005). Furthermore, as articulated here, the Solicitor General exerts considerable influence in federal agency cases. Take this alongside the established characteristics of the Solicitor General being the ultimate repeat player and a legal (and strategic) resource to the Court, as well as the immense success rate the Solicitor General enjoys at the amicus and merits stages, and the importance of the Solicitor General should be clear. Overall, this study illuminates how the Solicitor General impacts the Court's overall adherence to the Double Standard across all types of cases. Future research can further explore this relationship.

Regarding concerns over the future of the Double Standard and how the Court will employ it to promote legitimacy in its decisions, this study has provided a frame of reference for how the Court has decided federal agency cases. Here, the Court's behavior has been characterized as adhering to precedent and remaining cognizant of the legal difficulties that underscore these cases. Furthermore, the Court responds to legal and strategic considerations in the form of precedent and ideological pressures exerted by external institutions, particularly the House of Representatives and Senate (though those relationships are complex and understanding the exact ways in which the Court navigates competing preferences between the chambers of Congress is beyond the scope of this study).

Most important for understanding how this study frames our view of the Double Standard looking forward, this study demonstrated that when faced with considerable constraining factors, the Court relies less on its own ideological preferences. This confirms the expectations of the Double Standard in broad terms. However, the question of how the Double Standard will be exercised in the future (considering claims of politicized Solicitors General and significant decisions in *Loper Bright* and *Dobbs*) remains. For scholars of Supreme Court legitimacy, the future likely holds situations in which the Court continues to refine its approach to employing the Double Standard – most likely continuing to dilute fundamental freedoms at the federal level (and thus leaving them to the states) while scrutinizing the massive administrative state. This results in decrease in the public’s trust in the Court (Patterson et al., 2024; Levendusky et al., 2024), the inevitable further politicization of the Court toward conservatism (Davis and Hitt 2025), and concerns for democracy (McMahon 2024; Kestellec 2024) – all of which entail threats to the Court’s legitimacy are likely soon to follow.

One of the motivating goals of this study was to explore whether the Court behaves differently depending on the type and character of the case before it. Historically, this dyadic practice has been characterized through the Double Standard. If the Court continues to adhere to the Standard despite recent developments, then one-size-fits-all explanations of Court behavior are unlikely to be compelling in explaining Court decisions and predicting future Court behavior. Thus, the claim here is that scholars should examine cases as subsets, allowing them to reach clearer conclusions about the Court’s motivations and subsequent decision-making behavior. To test this idea, this study examined federal agency cases in which the Court faces considerable constraints in its decision-making.

Here, federal agency cases were examined free from the attitudinal context of constitutional cases, and the strategic and legal considerations taken by the Court were fully on display throughout the analyses. Looking forward, additional studies should be conducted on these cases, for though a strategy was at play here, and it was discovered that the Court alters its decisions to better align itself with the institutions involved in these cases and to align itself with precedent, I will not claim that strategy trumps the Court's ideology outright. Even in these cases where the Court's consideration of institutional factors is influential and compelling, its ideology has much to do with determining the exact means by which it reaches these decisions, as strategic as they may be. Furthermore, the law is commanding and statutory cases like those studied here seem to face the strongest effects of precedent.

Future studies of these cases should look toward scrutinizing the Court's perception and consideration of the preferences of the chambers of Congress individually, as well as the interaction of institutions as they attempt to influence the Court simultaneously. Furthermore, future studies could consider the motivating institutional factors in constitutional cases (replicating this type of study to examine the Court's behavior in constitutional cases – the other half of the Double Standard), as well as the effect of time on the Court's decision-making (this study studied decision-making across time, not controlling for it). Mixed method studies could expand on the analyses presented here by examining specific strategic circumstances present in case studies involving certain agencies or policy areas. Additional methodological steps forward could include qualitative analyses conducted through interviews with Solicitors General and their staff and examination of Solicitor General briefs to further understand its role in crafting arguments before the Court in federal agency cases, and nestling analyses of justice motivations within the larger institutional framework focused on the Court as an institution. Expansions on

the institutional alignment models could explore decision-making environments in which institutions face off in multidimensional policy space.

Alas, the best approach to studying the Court is to first understand that not all cases are created equal, nor do all cases receive the same attention and undergo the same decision-making processes. There are cases best explained by attitudes, those in which the Court ought to be attitudinal in its decisions – cases that protect the rights and fundamental freedoms of individuals and disadvantaged groups. Then there are cases best explained by legal and strategic factors, those in which the Court must engage in strategy to maintain its goals while satisfying or at least appeasing other influential factors – such as statutory cases involving the regulation of the economy and administration of policy – all while adhering to and strengthening the law. Further studies of Court decision-making, as well as those focused on the legitimacy of the Court, may look to the reconciliation of how the Court manages to decide these different types of cases under different philosophies, where successful balance means legitimacy for the Court and its decisions.

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Appendix

Table A-1: Summary Statistics and Characteristics of Variables

Variable Name	Hypothesis / Purpose	Description	Measurement	Data Source	Mean	Standard Deviation	Range
Decision Direction	Dependent Variable	Measures decision ideology (liberal or conservative)	Categorical Binary	(SCDB); Spaeth et al., 2024	0.413	0.493	0, 1
S. Court Ideology	Attitudinal	Annual measure based on behavior in high-profile cases	Continuous	(JCS); Epstein et al., 2007, 2024	1.238	0.202	0.684 – 1.455
President Ideology	Strategic	Annual measure of President ideology	Continuous	(JCS); Epstein et al., 2007, 2024	1.187	0.489	0.496 – 1.693
House Ideology	Strategic	Annual measure of median House ideology	Continuous	(JCS); Epstein et al., 2007, 2024	0.941	0.138	0.782 – 1.292
Senate Ideology	Strategic	Annual measure of median Senate ideology	Continuous	(JCS); Epstein et al., 2007, 2024	0.934	0.125	0.793 – 1.283
Sol. Gen. Position	Strategic / Legal	Measure of ideological position argued by Solicitor General	Categorical Binary	Pacelle 2003, 2015	0.428	0.495	0, 1
Precedent	Legal	Measures ideology of leading precedent	Nominal	Benesh & Spaeth 2001; Pacelle et al., 2007	-0.195	0.935	-1, 0, 1
Issue Evolution	Legal	Measures legal complexity based on case relation to caselaw	Ordinal	Pacelle and Pyle 2020	2.798	0.699	1 – 4
Agency Ideology	Control Variable	Static measure of involved agency ideology	Continuous	Clinton and Lewis 2008	0.106	0.909	-2.01 – 2.40
Note: Decision Direction and Precedent signs are switched to be compatible with other variables in the analysis; JCS scores are adapted by adding “1” to each.							

Agency Identities and Coding Rationales for Agency Ideology

This study includes a control variable for agency ideology. This control is included to isolate the average effect of agency ideology from the effect of the Solicitor General on the Supreme Court's decision-making. This is important given that the Solicitor General argues on behalf of agencies in these cases, and thus at least in some part adopts the position of the agency even if in basic ideological terms only (though this may not always be the case). Selecting a measure of agency ideology was particularly difficult given the range of years this study examines (1954-2017). Specific difficulties included measuring agency ideology in a way that captures the average ideology of an agency over time. Another difficulty lies in finding a comparable measure of ideology for agencies over the years, many of which ceased to exist many years ago and were simply abolished or consolidated into other administrative entities. These difficulties resulted in rational judgement calls being made, and here I explain how these judgement calls impact the validity and relevance of the measure of agency ideology included as a control in this study.

While other measures of agency ideology exist (Clinton et al., 2012; Richardson et al., 2018), I selected the measure from Clinton and Lewis (2008) to serve as the basis for my measure of agency ideology, adapting their measure to fill gaps in my dataset for which they lacked a direct measure of agency ideology. Clinton and Lewis' measure is based on the opinions of over three dozen bureaucratic politics experts and features a multi-rater system to provide principled measures of agency ideology. While this measure has its limits, it worked best to reduce the number of agencies present in my dataset for which I had to make judgement calls as to their ideological leanings, the method for which I describe below.

For some of the cases included in this study, the agency whose actions were the basis of the case either weren't included in Clinton and Lewis' study by choice or were already nonexistent by the time of their study. Thus, for most cases I was able to utilize the direct measure of agency ideology from Clinton and Lewis (e.g. Department of Agriculture), or I was able to match the stated administrative entity with its identical corresponding agency (e.g. Secretary of the Air Force coded as the Department of the Air Force instead). However, in other cases, this task was impossible. For these cases, I adopted an approach in which I first tracked the administrative entity listed for the case to its end and for most of these the entity was consolidated into another existing agency (e.g. the Civil Aeronautics Board was eventually consolidated into the Department of Transportation and was coded as such for this study). This covered most of the agencies for which I lacked measures of agency ideology from Clinton and Lewis. For the remaining cases, the issue was that the entity listed for the case was too specific for the level of analysis in Clinton and Lewis' study. In these cases, I aggregated the entity's ideology vertically up the administrative hierarchy to the next closest entity for which Clinton and Lewis provided a measure (e.g. while the Board of Immigration Appeals exists to this day, Clinton and Lewis did not have a measure for it, but it did have one for the Department of Justice under which the Board is positioned).

Following these standards, I was able to assign ideological scores for the agencies whose actions are at question in the cases examined in this analysis. Table A-2 presents these agencies by alphabetical order in the first column. The second column specifies the entity for which an ideology score was substituted in the instances discussed above (if there is no entity listed in the second column that indicates that the agency was included in Clinton and Lewis' study and thus its ideology score was transcribed directly into my dataset for the *Agency Ideology* variable).

Table A-2: Agency Ideology – Agency Names and Substitutions

Agency Name	Agency Substitution (where applicable)
Army Air Force Exchange Service	Department of Defense
Atomic Energy Commission	Nuclear Regulatory Commission
Benefits Review Board	Department of Labor
Board of Immigration Appeals	Department of Justice
Bonneville Power Administration	Department of Energy
Bureau of Indian Affairs	Department of the Interior
Bureau of the Census	Department of Commerce
Civic Aeronautics Board	Department of Transportation
Civil Rights Commission	
Civil Service Commission	Office of Personnel Management
Commodity Futures Trading	
Commission	
Comptroller of Currency	Department of the Treasury
Consumer Product Safety	
Commission	
Customs Service	Department of Homeland Security
Defense Base Closure and	
Realignment Commission	Department of Defense
Department of Agriculture	
Department of Commerce	

Table A-2 Continued

Agency Name	Agency Substitution (where applicable)
Department of Defense Department of Education Department of Energy Department of Health and Human Services Department of Health, Education, and Welfare Department of Housing and Urban Development Department of Justice Department of Labor Department of State Department of the Interior Department of the Treasury Department of Transportation Environmental Protection Agency Equal Employment Opportunity Commission	Department of Education OR Department of Health and Human Services (dependent on type of issue addressed in specific case)

Table A-2 Continued

Agency Name	Agency Substitution (where applicable)
Farmers Home Administration	Department of Agriculture
Federal Aviation Agency	Department of Transportation
Federal Bureau of Investigation	Department of Justice
Federal Bureau of Prisons	Department of Justice
Federal Communications	
Commission	
Federal Deposit Insurance	
Corporation	
Federal Election Commission	
Federal Energy Regulatory	
Commission	Department of Energy
Federal Home Loan Bank Board	Federal Housing Finance Board
Federal Housing Administration	Department of Housing and Urban
	Development
Federal Labor Relations Authority	
Federal Maritime Board	Federal Maritime Commission
Federal Maritime Commission	
Federal Power Commission	Department of Energy
Federal Railroad Administration	Department of Transportation
Federal Trade Commission	

Table A-2 Continued

Agency Name	Agency Substitution (where applicable)
Food and Drug Administration	Department of Health and Human Services
General Service Administration	
Immigration and Naturalization Service	Department of Homeland Security
Indian Claims Commission	Department of the Interior
Internal Revenue Service	Department of the Treasury
Interstate Commerce Commission	
Merit Systems Protection Board	
National Aeronautics and Space Administration	
National Credit Union Administration	
National Highway Traffic Safety Administration	Department of Transportation
National Labor Relations Board	
National Mediation Board	
National Security Agency	Department of Defense
Nuclear Regulatory Commission	

Table A-2 Continued

Agency Name	Agency Substitution (where applicable)
Occupational Safety and Health Administration	
Occupational Safety and Health Review Commission	Occupational Safety and Health Administration
Office of Management and Budget	
Office of Workers' Compensation Programs	Department of Labor
Provider Reimbursement Review Board	Department of Health and Human Services
Secretary of the Air Force	Department of the Air Force
Secretary of the Army	Department of the Army
Secretary of the Navy	Department of the Navy
Securities and Exchange Commission	
Small Business Administration	
Social Security Administration	
U.S. Forest Service	Department of Agriculture
U.S. Patent Office	Department of Commerce
U.S. Public Health Service	Department of Health and Human Services
Veterans' Administration	Department of Veterans Affairs

Table A-3: Logistic Regression of Constraining Decision-Making Factors on Supreme Court Decision Direction

Variable	β	S.E.
SC Ideology	0.086	0.434
Pres Ideology	-0.022	0.182
House Ideology	-2.018 ***	0.716
Sen Ideology	1.477 *	0.826
SG Position	1.043 ***	0.152
Agency Ideology	-0.123	0.084
Precedent	0.705 ***	0.081
Issue Evolution	0.248 **	0.109
Constant	-0.957	0.764
Log-likelihood	-519.328	
Prob > X^2	0.000	
Pseudo R^2	0.1375	
N	888	
<i>Note:</i> Significance indicated by asterisks (***) is $p < 0.01$, ** is $p < 0.05$, * is $p < 0.1$; all two-tailed tests).		

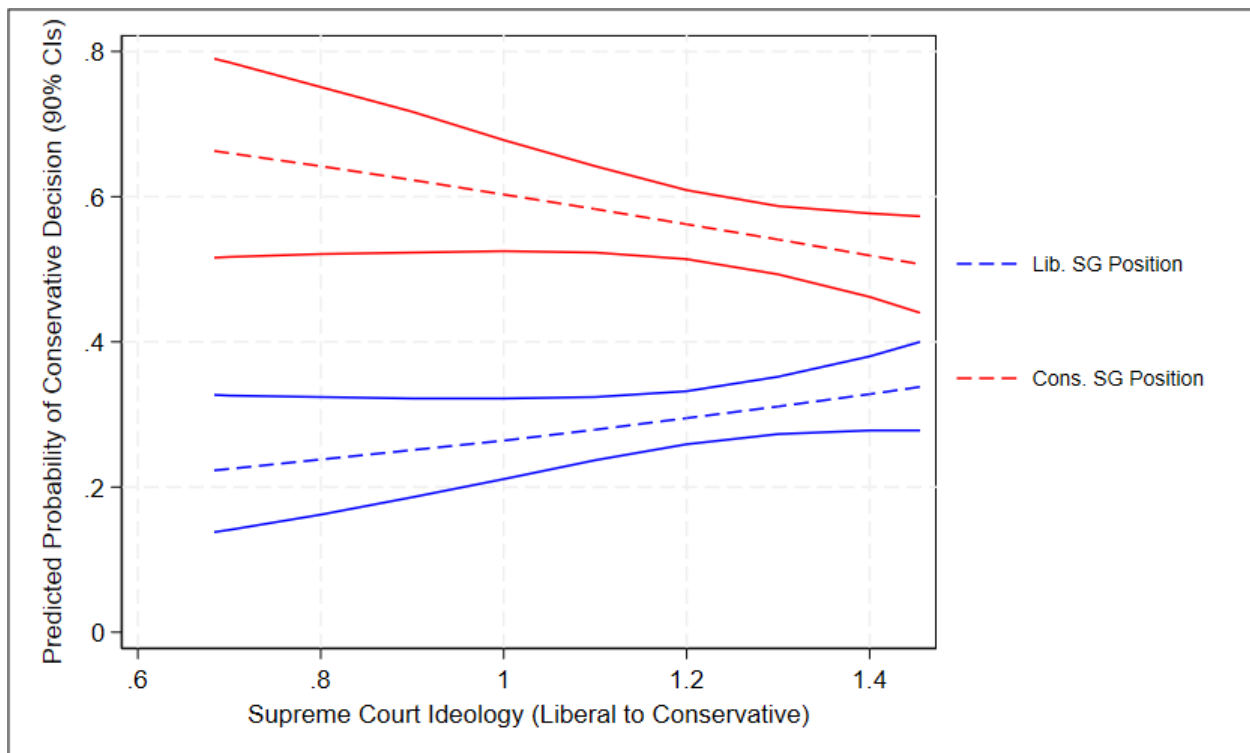


Figure A-1: The Effect of Supreme Court Ideology on the Probability of a Conservative Decision Given Position of the Solicitor General

Table A-4: Logistic Regression Comparing Effect of Constraining Factors on Decision Direction Pre- and Post-1981

Variable	Pre-1981		Post-1981	
	β	S.E.	β	S.E.
SC Ideology	-1.422 **	0.627	2.155	1.422
Pres Ideology	0.252	0.318	-0.025	0.247
House Ideology	-13.002 ***	2.935	-0.858	0.950
Sen Ideology	8.198 ***	2.631	1.215	0.910
SG Position	1.399 ***	0.230	0.844 ***	0.215
Agency Ideology	0.075	0.146	-0.170	0.106
Precedent	0.757 ***	0.122	0.714 ***	0.113
Issue Evolution	0.171	0.151	0.264	0.170
Constant	4.294	1.599	-4.453	2.855
Log-likelihood	-247.865		-259.170	
Prob > X ²	0.000		0.000	
Pseudo R ²	0.1723		0.1296	
N	457		431	
Note: Significance indicated by asterisks (***) is p < 0.01, ** is p < 0.05, * is p < 0.1; all two-tailed tests).				

Table A-5: Logistic Regression of Effect of Institution Binary Ideologies on Determining Supreme Court Decision Direction

Variable	β	S.E.
SC Binary Ideo.	0.112	0.260
Pres Binary Ideo.	-0.201	0.186
House Binary Ideo.	-0.719 ***	0.224
Sen Binary Ideo.	0.592 ***	0.210
SG Position	1.071 ***	0.153
Agency Binary Ideo.	-0.212	0.157
Precedent	0.698 ***	0.081
Issue Evolution	0.250 **	0.109
Constant	-1.306 ***	0.365
Log-likelihood	-518.210	
Prob > X^2	0.000	
Pseudo R^2	0.1393	
N	888	
Note: Significance indicated by asterisks (***) is $p < 0.01$, ** is $p < 0.05$, * is $p < 0.1$)		

Table A-6: Predicted Probabilities of a Conservative Decision Given Various External Institution Ideological Alignments

Institutional Configuration	Probability of Conservative Decision (%)	Confidence Interval
<i>Baselines (Total Unity)</i>		
All Liberal	32.4	23.9 – 41.4
All Conservative	47.7	40.0 – 55.1
<i>With Liberal Court</i>		
Unified Conservative Government	32.8	22.2 – 45.6
Unified Conservative Congress	34.4	24.0 – 45.8
Unified Conservative Executive	49.2	37.9 – 60.2
<i>With Conservative Court</i>		
Unified Liberal Government	42.3	36.2 – 48.7
Unified Liberal Congress	39.3	35.1 – 43.6
Unified Liberal Executive	35.7	29.1 – 42.7
Note: Unified Government includes President, House, and Senate. Unified Congress includes House and Senate. Unified Executive includes President, Solicitor General, and Agency.		

Vita

Originally from South Carolina, George has attended the University of Tennessee, Knoxville since Summer 2015, completing his Bachelors of Arts in Political Science with a concentration in Public Administration in 2018, his Masters of Public Policy and Administration in 2021, and pursuing his Doctor of Philosophy in Political Science with a focus on American Politics and Government and Public Administration, with a specialization in Advanced Methods. His research interests included Supreme Court decision-making, administrative policy, and the study of federal institutions as partners in the public policy making process. After graduation, George will begin his new role in the Department of Political Science at Clemson University. He is extremely grateful for the support and direction afforded to him over the last decade of higher education and is looking forward to the exciting next steps.