1

Introduction

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.
>
> —Benjamin Hoadly, quoted in Carter and Burke (2002, 68)

This quotation raises an important and fundamental question concerning the development of law in the United States: from where does the law emerge? Benjamin Hoadly's statement indicates that the answer lies with courts and judges, since they possess the authority to interpret the law. Yet, the Constitution provides Congress with the authority to make the law. This overlapping Constitutional authority consequently creates an "invitation to struggle" (Corwin 1957, 171) between the legislature and the judiciary over who makes the law—the Congress that writes statutes, or the courts that interpret them.[1] Chief Justice John Marshall recognized this "invitation to struggle" when he wrote the opinion of the Court in *Marbury v. Madison*.[2] While this case is often cited as the foundation of the Supreme Court's power of judicial review—the ability to examine a legislative statute in reference to the Constitution—it is worth noting that Marshall concluded the opinion by stating that "the framers of the constitution contemplated that instrument [the Constitution] as a rule for government of courts, as well as of the legislature."[3] Fisher (2011, 18) builds upon Marshall's logic when he explains that "the Constitution is often protected when political interests triumph. Political interests have successfully prevailed over judicial opinions in such areas as commerce, race, women's rights, child labor, religion, and privacy." Bailey and Maltzman (2011, 3) agree with Fisher when they note that "the legislative [branch] may be able to push the Court in favored directions with threats and persuasion, thereby attenuating the danger that

the Court becomes a policymaker divorced from public will." Thus, from the earliest days of the United States through more recent years the question about the development of the law has perplexed legal experts and generated tension between the legislative and judicial branches.

In the last decade, this "invitation to struggle" became apparent during the confirmation hearing of John Roberts to replace the late William Rehnquist as Chief Justice of the U.S. Supreme Court. On the first day, Senator Arlen Specter (Chair of the Judiciary Committee) included the following statement in his opening remarks: "I'm very much concerned about what I conceive to be an imbalance in the separation of powers between the Congress and the court. I am concerned about what I bluntly say is the denigration by the court of congressional authority."[4] In his opening comments, John Roberts remarked that "judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The roles of an umpire and a judge are critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire."[5] John Roberts was confirmed as Chief Justice of the Supreme Court, in part, because these comments indicated to the U.S. Senate that he viewed a judge's role as an applier of the rules and not as a legislator in judge's robes. Stated another way, the statutes passed by Congress should receive substantial deference from judges and justices because those statutes are the law.

Similar to the Roberts confirmation, the question of "who makes the law" was a prominent issue during the confirmation hearing of Sonia Sotomayor to replace David Souter as an Associate Justice on the U.S. Supreme Court. During her opening remarks Judge Sotomayor stated, "In the past month, many senators have asked me about my judicial philosophy. Simple: fidelity to the law. The task of a judge is not to make the law. It is to apply the law."[6] Throughout her confirmation hearing, Judge Sotomayor was asked repeatedly to elaborate on this comment and to discuss her opinions regarding the separation of powers between Congress and the courts on the meaning of law. On day three of the hearings, Senator Benjamin Cardin stated, "One of my concerns is that we are seeing judicial activism in restricting the clear intent of Congress in moving forward on fundamental protections . . . During your testimony yesterday . . . you made it

clear that judges apply the laws enacted . . . with deference to the intent of Congress. Yet we've seen in recent decisions of the Supreme Court . . . that they reject long-standing legal interpretations in the federal [statutes]."[7] As part of her response, Judge Sotomayor stated that the Court must make decisions "with a recognition of the deference it owes to the elected branches in terms of setting policy and making law."[8] Similar to the comments made by John Roberts during his confirmation hearing, Sonia Sotomayor repeatedly indicated that Congress was the branch constitutionally responsible for making the law, while the judiciary simply applied those rules to particular cases.

Anecdotal Evidence of Statutory Influence on Judges

The examples of the Roberts and Sotomayor confirmation hearings serve to illustrate the inherent tension between Congress and the courts over the law. Indeed, defining the lawmaking responsibilities of the legislative and judicial branches is "a highly dynamic process sometimes overlooked" by scholars of these institutions (Campbell and Stack 2001, xiii). Fisher (2001, 21) notes that "although it is conventional to view the judiciary—and especially the Supreme Court—as the ultimate and final arbiter of constitutional law, numerous examples over two centuries suggest a more dynamic and less hierarchical model." This dynamic process is also observed by Paschal (1992) when he notes that there is a "continuing colloquy" between the legislative and judicial branches over the meaning of the law. This ongoing dialogue raises important questions for scholars of the judiciary. To what extent do legal factors (such as legislative statutes) influence the behavior of judges and justices?

Briefly examining a few specific cases serves to illustrate how legislative statutes affect judicial behavior, and also highlights the tension between the legislative and judicial branches over statutory interpretation and the law. For example, in the case of *Burlington Industries, Inc. v. Ellerth*, a civil rights case heard before the Rehnquist Court in 1998,[9] the Supreme Court voted 7–2 in favor of the respondent, who had been sexually harassed by her boss, a vice-president at Burlington Industries. After 15 months she quit her job, and later sued Burlington Industries, claiming they were liable to pay civil damages because the company was negligent in addressing the circumstance and was

therefore liable under the Civil Rights Act of 1964. The Court held that even if the employee had no adverse job-related consequences the company is vicariously liable for supervisors who create hostile work environments, even if said employer is not directly responsible for the supervisor's behavior (42 U.S.C. § 2000e is a subsection of Title VII of the Civil Rights Act). This subsection contains a list of legal definitions, which include very specific instructions for judges about how to define vague terms such as "employer," "employment agency," and "labor organization." In the Court's opinion, Justice Anthony Kennedy, a moderate Republican appointee, cited detailed language in 42 U.S.C. § 2000e, which defines an employer to include any agent of the employer. Because the vice-president was an agent of the Burlington Industries, the company was liable and the employee was able to bring suit. This specific language compelled Kennedy, his moderate Republican colleagues Justices O'Connor and Souter, as well as Chief Justice Rehnquist, to vote with the high court's liberal wing (Justices Stevens, Ginsburg, and Breyer).

A second example is found in the case, *Mansell v. Mansell* (1989),[10] which involves an interpretation of the Uniformed Services Former Spouses' Protection Act, where the Supreme Court adjudicated a question concerning retirement pay. Though the justices preferred to rule in favor of the spouse, they were constrained from doing so by the specific language of the Act. In writing for the majority, Justice Thurgood Marshall states:

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.[11]

A third example comes from the case *Guidry v. Sheet Metal Workers National Pension Fund*.[12] In this case the Supreme Court reviewed a trial court order that placed a constructive trust on an individual's pension benefits pursuant to a guilty plea involving the embezzlement of union funds. The dispute arose, in part, because of a conflict between provisions in the Labor-Management Report-

ing and Disclosure Act of 1959 and the Employee Retirement Income Security Act of 1974. In ruling on behalf of the petitioner, Guidry, Justice Harold Blackmun commented specifically on the language of the congressional statutes. He stated that "courts should be loath to announce . . . exceptions to legislative requirements or prohibitions that are unqualified by the statutory text . . . The impracticability of defining such [an exception] reinforces our conclusion that the identification of any exception should be left to Congress."[13]

Additionally, it is important to note that these types of examples do not exist solely at the Supreme Court level. Similar discussions occur within the deliberations of state supreme court judges as well. For example, in *Maier v. General Telephone Co.* (2002),[14] the Michigan Supreme Court was asked to review an appeal over the interpretation of the Michigan Worker's Disability Compensation Act. In writing a concurring opinion, Chief Justice Maura D. Corrigan elaborates on aspects of statutory interpretation. She states that "a first principle of statutory interpretation is that *the words expressed in the statute are the law*."[15] She continues to defend this position by claiming that the specific words used in statutes are of paramount importance (rather than the intent of the legislature) because "men may intend what they will; but it is only the laws that they enact which bind us."[16]

Systematic Statutory Influences on Judicial Behavior

While the anecdotal evidence presented above serves as useful illustrations of the tension between legislatures and the judiciary, it does not provide a systematic accounting of the influence of statutory language on judicial behavior. Consequently, in expanding on the "invitation to struggle" between the legislature and the judiciary, one must ask to what extent do legal factors (such as legislative statutes) influence systematically the behavior of judges and justices? On one side of this debate are advocates of the "attitudinal model" who argue that judges are motivated primarily by their personal ideological policy preferences (Segal and Spaeth 1993, 2002). On the other side are legal advocates who contend that the law is of paramount importance (Posner 2001). While numerous analyses exist which empirically demonstrate the influence of ideology,[17] a similar pattern has not emerged for the quantitative analysis of legal influences. Though qualitative

research reinforces the conventional wisdom about the influence of law, "the real question is not whether such behavior exists at all, but whether it exists at systematic and substantively meaningful levels" (Spaeth and Segal 1999, 7). Unfortunately, previous quantitative research of legal influences is plagued by inadequate measures. Our book addresses this inadequacy by developing an empirical measure of statutory influence. We then test the measure across decisions in state and federal courts.

To date, the empirical literature on congressional influence over the courts has focused primarily on the nomination process or congressional overrides of judicial decisions. However, these two aspects involve only a small fraction of the interactions between the two branches. Most exchanges between Congress and the judiciary occur after confirmation of judges and before attempts at overrides; namely, over the interpretation of statutes by courts. Yet, statutes have received relatively little attention in the empirical judicial literature, mostly because only rough measures (such as dummy variables) have been available to test their impact. This is unfortunate since, theoretically, statutes are extremely important because *they represent the primary opportunity legislatures have to ensure that those individuals who interpret or implement the law (e.g., judges and bureaucrats) will follow their preferences.* Hence, in those cases where lawmakers have clear policy preferences they can write legislation that encourages judges to strictly interpret the plain meaning of the law, a goal consistent with the legal model of judicial decision making. If legislatures do not write clear legislation, then it leaves open the possibility that judges will make decisions based on their own policy preferences in accord with the tenets of the attitudinal model. Consequently, an important empirical question remains unresolved—*to what extent do legislative statutes exert a systematic influence on judicial behavior?*

"While many (if not most) scholars recognize that the [judges] probably respond to both of these concerns [attitudes and the law], the literature nonetheless tends to present them as competing explanations" (Hansford and Spriggs 2006, 9–10). Consequently, a more robust and dynamic theoretical model is needed that integrates both ideological and legal factors, thereby allowing researchers of the judiciary to fully integrate both Congress and the courts into a single model of judicial behavior. The main reason for this lack of integration is that while scholars possess viable measures of judicial ideology

(e.g., Segal and Cover 1989; Martin and Quinn 2002) to support theories of attitudinal voting, similar empirical measures of legal concepts have been less forthcoming. As Segal and Spaeth (2002, 59) argue, "no one [has] systematically demonstrated that [the law] influences the decisions of Supreme Court justices. . . ."

In this book we take up the challenge articulated by Segal and Spaeth and *provide a model that dynamically integrates ideological and legal factors via an empirical measure of the plain meaning of statutes*. The concept of the plain meaning of the law "holds that judges rest their decisions in significant part on the plain meaning of the pertinent language" in statutes and other legal authorities (Segal and Spaeth 2002, 53). However, previous research has been severely hampered in testing this influence. As Segal and Spaeth (2002, 59) declare:

> No proponent has even suggested a falsifiable test for this component of the legal model . . . [This] requires . . . that some method of determining plain meaning in some cases be established *a priori*; corroboration of the model might require . . . that *ceteris paribus*, justices must systematically react positively in some meaningful degree to such arguments. Of this, we have no evidence.

In developing an empirical measure of the plain meaning of statutes, we focus specifically on how much *discretion* Congress (or state legislatures) provides in the statutes it enacts into law. The basic argument is that judges will render decisions according to their ideological preferences *contingent on the level of discretion* afforded by the law. For those statutes containing vague or ambiguous language, judges will possess more discretion to vote according to their individual preferences. However, for statutes containing more detailed language, judges will have less discretion and consequently will be constrained from ideological voting.

Measuring Legal Factors

Our work differs from past research in that scholars most often examine legislative-judicial interactions in terms of a *trade-off* between judicial attitudes and legal constraints (Rowland and Carp 1980; Segal

1997, 1998; Spaeth and Segal 1999; Segal and Spaeth 2002).[18] In so doing, they essentially load the deck by including continuous measures of attitudinal factors, while using less robust measures for legal factors. In fact, "few studies have been undertaken by empirically oriented scholars to examine the effects of traditional legal concepts on case outcomes or judicial votes" (Songer and Haire 1992, 979). In part, this lack of empirical analysis on legal influences arises because of the difficulty inherent in measuring concepts such as plain meaning, legislative intent, and precedent. Some scholars rely on strategies that examine progeny cases from landmark decisions (Songer and Sheehan 1990; Knight and Epstein 1996; Segal and Spaeth 1996; Songer and Lindquist 1996). Other scholars employ a series of dummy variables to capture the presence or absence of specific case facts or legal doctrine (Segal 1984; George and Epstein 1992; Songer and Haire 1992; Songer, Segal and Cameron 1994). Fortunately, more recent studies are now focusing on developing better and more precise ways to measure legal aspects (Gillman 2001; Richards and Kritzer 2002; Friedman 2006; Hansford and Spriggs 2006; Lindquist and Klein 2006; Kahn and Kersch 2006; Black and Owens 2009; Bailey and Maltzman 2011; Geyh 2011, and Corley, Steigerwalt, and Ward 2013).

Yet, there are reasons to believe that statutes are extremely important to consider. For example, in a recent study of the bureaucracy, Huber and Shipan (2002, 31) argue, ". . . legislation is potentially the most definitive set of instructions that can be given to bureaucrats with respect to the actions they must take during policy implementation. In some cases legislatures provide very detailed blueprints that allow little room for other actors . . . to create policy on their own. In other cases, legislatures take a different approach and write statutes that provide only the broad outlines of policy, which gives bureaucrats the opportunity to design and implement policy" (2002, 76). Clearly, judges are not the same as bureaucrats, whose role is to administer or implement the law. Bureaucrats do not have the authority to determine which laws are constitutional, nor can they strike down specific provisions within statutes. Yet, we argue that the key concept captured by Huber and Shipan, the *level of discretion* provided by legislative statutes, is relevant to judges because it embodies an important aspect of the law.

The question we address in this book is whether discretion influences the decisions of federal and state judges. To do so, we develop

and test a model of contingent discretion, which posits that *judicial decision making is contingent on the level of discretion afforded by the law*. Consequently, we expect to observe judges voting according to their ideological preferences when they interpret vague or ambiguous statutes that provide high levels of discretion. Conversely, when courts encounter statutes that prescribe more detailed outcomes, and therefore reduce the level of discretion, then we expect the ability of judges to decide cases attitudinally will be constrained. Stated this way, our model of contingent discretion is formulated as a tradeoff between ideology and the law. Yet, we should not expect all judges to encounter similar constraints from any particular statute; and, our findings demonstrate that an additional dimension exists to the model of contingent discretion. Not only can legal factors constrain ideological decision making, they can also enhance and support attitudinal outcomes. That is, the law can actually facilitate the expression of ideology. While this may seem counterintuitive initially, further reflection should reveal that this proposition is extremely compelling. If the law prescribes a particular ideological outcome or policy, then individual judges whose ideological preferences converge with that policy have an opportunity to vote attitudinally without seeming to appear ideological or partisan. Therefore, as we argue throughout the book, the model of contingent discretion is more than a tradeoff model. It captures a vibrant and *dynamic interaction between law and ideology* in its influence on judicial behavior.

Organization of the Book

Chapter 2 explores the theoretical foundations of the analysis. In particular we define our theoretical model—the *model of contingent discretion*—and provide a discussion of how this theoretical model operates on judicial behavior. We then provide a detailed discussion of how the *model of contingent discretion* is operationalized, borrowing from the literatures on bureaucratic politics, judicial politics, and law. We conclude this chapter by stating a testable hypothesis and discussing how this hypothesis could be confirmed or falsified.

Chapter 3 provides the initial test of the *model of contingent discretion*. This empirical analysis expands upon our article (coauthored with Jeffrey Fine) in the *Journal of Politics* (2006) and focuses

on the behavior of judges serving on the U.S. Courts of Appeals (from 1960 to 2002). In addition to providing an empirical assessment of all appellate judges, we also analyze the circuits separately to determine whether the influence of statutory language operates consistently across all circuits.

Chapter 4 turns the analysis to the justices of the U.S. Supreme Court (from 1953 to 2007) and expands on our article in the *Justice System Journal* (2011). We begin this chapter by discussing how the unique institutional structure of the Supreme Court—namely the discretionary control of its docket—should mitigate against finding empirical support for statutory influences. We then present the results of several statistical models and demonstrate that justices are constrained by statutes in some instances and in other situations rely on statutory language to facilitate their ideological voting.

Chapter 5 focuses on the effects of statutory language for justices of state supreme courts (from 1994 to 1998), and further develops our article (co-authored with Michael P. Fix) in *Political Research Quarterly* (2011). We begin this chapter with a discussion of the multiple institutional environments encountered by state court judges, and how this institutional variation potentially affects statutory influence. We then present the results of several empirical models to demonstrate the conditions under which state judges are influenced by statutory language. Finally, we provide a corollary analysis that indicates which states employ detailed statutes. The results of this corollary analysis demonstrate that states in which the supreme court justices are directly elected by the public, significantly pass more detailed statutes—presumably to control judges over whom the legislature has no direct influence.

Chapter 6 examines the effects of statutory language on the U.S. Supreme Court from a temporal perspective. We begin the chapter discussing the temporal nature of the law and examining the evolution of statutory language from Congress. We provide several empirical analyses demonstrating the conditions under which statutes have evolved over time, and how this evolution has affected judicial behavior.

Finally, Chapter 7 offers several conclusions concerning the theoretical *model of contingent discretion* and the empirical measure of statutory influence. Additionally, we identify several unanswered questions and argue that these deserve more attention from scholars in future research.