

# The Effects of Divided Government on the Supreme Court: Support for the Strategic Model

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The United States government's branches necessarily affect each other because of the separation of powers system. Some of these interbranch effects come from constitutionally-mandated actions, either bi- or tri-laterally taken, such as legislative-executive coordination of warfare or the legislative confirmation of executive appointees for the judiciary. These kinds of activities are direct checks and coordination of power between the branches. However, another kind of activity stems from the strategic interplay between branches and with outside forces. For instance, a president may choose not to utilize all of the funds Congress has allocated to a program he disfavors, especially if the judiciary is unlikely to intervene. Neither the president's ability to allocate funds nor to refrain from doing so are constitutionally specified, and yet the president occasionally takes such action. Outside influences, such as political parties, the media, and public opinion, can also affect how the branches interact, especially as individuals within the branches give more consideration to reelection and reputation.

One particular consideration the branches give when assessing how to interact with one another is the presence or absence of divided government. Divided government arises when the elected bodies of government—namely the House of Representatives, the Senate, and the President—represent different political parties. Relatively rare before 1952, divided government has since become a distinguishing feature of American government (Shafer, 2006; Sundquist, 1989). The effects of divided government on legislative-executive relations are relatively well-documented (see for example, Coleman, 1999; Edwards, et al., 1997; Alesina and Rosenthal, 1996). Other research attempts to explain the comings and goings of divided government by

analyzing outside influences, such as elections and public opinion (Johnston and Shafer, 2010; Jacobson, 1990). Some research extends the impact of divided government to various policy areas and to the bureaucracy, but few discuss the significance divided government may have for the court system (Huber, et al., 2001; Epstein and O'Halloran, 1996). In this paper, I show that divided government does have repercussions for the Court, both for how Justices are confirmed and how the Court makes decisions during divided government.

Particularly in this second area, this study lends support to the strategic model of Court behavior. The strategic model posits that the Court makes decisions by considering the other branches and the overall political environment, in addition to the legal arguments and its own preferences. First presented in 1964 by Walter F. Murphy, this model of behavior lacked rigorous methodological scrutiny and failed to replace the attitudinal model as the dominate theory explaining judicial action. Nearly three decades later, Lee Epstein and Jack Knight offered a larger case inquiry to support the strategic model (1998). The research presented here covers more cases and analyzes them in the context of divided government to show that Justices' opinions become more moderate during divided government than under unified government. This supports the strategic model's supposition that the Court will adjust its rulings to accommodate the opinions of the other political actors in the separation of powers system.

### **Nominations and Confirmations: The Background**

Scholars have conducted a fair amount of research into the area of judicial appointments. Charles Cameron, Albert Cover and Jeffery Segal directed one of the first investigations of senatorial behavior during the nomination and confirmation process. The authors concluded that Senators consider a number of factors when deciding on the appropriateness of a potential judge

to fill a federal position, the most important of which are the nominee's qualifications and ideology. A Senator will be concerned primarily with his role to oblige his constituents by confirming judges who are close in ideology to the Senator's electors and the role to act responsibly by approving only those nominees who will fill the position capably. Thus, a nominee who is both well qualified and close in ideology to the majority of Senators should be confirmed. Conversely, “when nominees are less well qualified and are relatively distant [from the Senators' ideology], however, Senators' votes depend to a large degree on the political environment, especially the status of the president” (Cameron, et al, 1990).

Jonathan Day recently studied possible variables in this political environment that affect a Senator's vote given the nominee is less well qualified and/or relatively distant in ideology. The variables that have the greatest impact, as identified by Day, include “the party of the President in relation to the Senator's party, the popularity of a President, the type of nomination (chief or associate justice), the previous justice's ideology in relation to the nominee's ideology, and specific characteristics of the nominee (qualifications, age, and experience)” (Day, 2007). While the first variable comes closest to investigating the effect of divided government on Supreme Court nominees, Day is only studying the voting behavior of individual Senators, and therefore, he is concerned only with the partisan relationship between the President and any particular Senator rather than between the President and the senatorial party majority. It is this latter relationship which concerns the presence or absence of divided government and is, therefore, a part of what I will explore in this paper.

Sixteen years after the study by Cameron, et al, was published, another set of scholars used the research of Cameron, et al, to explain the “Bork Effect”. Lee Epstein, Rene Lindstadt, Jeffery Segal, and Chad Westerland describe the “Bork Effect” as the transition in the Senate

during the confirmation process away from considerations of qualification and towards considerations of political ideology. In 1987, President Ronald Reagan nominated a judge from the District of Columbia Circuit Court of Appeals, Robert Bork, for the Supreme Court. Despite having sufficient qualifications for the position, the Senate rejected the nominee, probably because of his highly conservative political ideology. Epstein, et al, study the dynamics of this change. Using the model Cameron, et al, described, Epstein, et al, conclude that this transition toward considerations of ideology began approximately three decades before Robert Bork received the backlash from a greater emphasis on ideology than on qualification. While the authors do not state so, I postulate that the change began with the era of divided government. Whether it was caused by the presence of divided government or created by the same factors from which divided government arose is not the object of my study. Rather I shall attempt to identify a correlation between divided government and ideological considerations for appointments in the Senate.

While my study deals directly with the Supreme Court, it is related to similar studies conducted for lower federal courts. Starting with the backlog of judicial confirmations in 1997 judicial confirmation, Roger Hartley and Lisa Holmes illustrate some trends in Senate scrutiny of lower federal judges. Beginning with the Carter administration, the Senate showed signs of increased scrutiny of presidential nominees. However, this significantly increased in the late Reagan years and even more so after the Republican Revolution in 1995. This trend has two likely causes. Hartley and Holmes propose the first: institutional friction caused by presidents', beginning with Reagan's, public admission that lower federal judicial appointments are important to the administration's policy aims. Institutionally, the Senate responded with increased scrutiny in an attempt to share power with the president over projects and agencies. Congress tries to

monitor the project or creates a parallel agency in an effort to check the president's power. Since presidents have increased the attention given to lower court nominees, so too has the Senate. However, I propose that the second likely cause for the trend of the Senate's increased scrutiny of nominees may also be a result of divided government. Since the Carter and early Reagan administrations both operated under a system of unified government, the Senate felt less partisan pressure to analyze closely the nominees of the White House. In contrast, the late Reagan and Clinton years, as well as the entirety of H. W. Bush's tenure, all experienced divided government and increased Senate scrutiny. The study by Hartley and Holmes supports the argument that divided government affects the nomination process inasmuch as their research proves a relationship between divided government and increased Senate scrutiny of nominees to the lower courts. Furthering the examination of the lower federal nomination process, Nancy Scherer performed a study in which she found that lower federal court judges are no more or less moderate when confirmed during divided government than those under unified government. She suggests that the Senate lacks the resources to have a meaningful impact in shaping judicial ideology on the lower federal courts because there are too many judges to be confirmed during any single presidential administration. One would thus suppose that the Senate would focus its resources on the small number of Supreme Court nominees and that divided government may then have an impact on the ideology of these nominees.

All of these past studies lack an examination of the judicial nomination process for the Supreme Court in regard to divided government, though many of them relate indirectly to the connection. As James Sundquist suggests, any study of the government within the last fifty years requires an inclusion of divided government since the partisan split between branches has become such a prominent feature of the American system (1989). Including this feature in

studies of judicial confirmations would lend increased clarity to the dynamics underlying those confirmations.

### **Nominations and Confirmations: The Study**

The interaction between divided government and the appointment process can be broken into two parts: the nominations and the confirmations. For each part, I generated a hypothesis for the effects of divided government. What follows is a description of and justification for those hypotheses, the methods used to gather and code the data, and the results of the evaluations.

#### *Proposed hypotheses*

Divided government may affect the nomination and confirmation process in several ways. Besides the procedural differences, such as increased time and scrutiny, there may also be differences in the ideology of nominees and confirmed justices. Since nominees during divided government would have to be ideologically acceptable for both parties, I propose that nominees during divided government are more moderate than those when the government is unified. To prove this hypothesis, nominees during unified government must either be (a) on average more liberal, or (b) more conservative than nominees during divided government. Or (c) the nominees under unified government are split between more liberal when Democrats control government and more conservative when Republicans are in charge, and therefore, the nominees during divided government would fall between these two points. If any of these three alternative scenarios proves true in comparison to the situation under divided government, then we reject the null hypothesis of no difference in the ideology of nominees between divided and unified government.

This all concerns nominees of the president; however appointment questions must also consider the confirmation process in Congress. Thus, I also propose that Democratic presidents' nominees will not be confirmed if they are too liberal for a Republican Senate, and conversely, Republican presidents' nominees will not be confirmed if they are too conservative for a Democratic Senate. Discovering the precise tipping point is beyond the scope of this study, but comparing liberal-conservative ideology is possible. Since presidents want a nominee to be confirmed by the Senate, they may select a more moderate nominee in the hopes of appearing more accommodating. By this action, presidents may seek to mollify the opposing party enough so that they will confirm the nominee. In order to assess whether this is the case, ideology of confirmed nominees will be compared with that of rejected and withdrawn nominees to reveal whether ideology is a strong variable for confirmation in the Senate.

To summarize:

*Hypothesis 1:* Nominees during divided government are more moderate than during unified government.

*Hypothesis 2:* Confirmed Justices during divided government are more moderate than the rejected nominees.

#### *Data collection and coding*

The period chosen for this study is 1952-2010, or the years of divided government. Since divided government is partisan in nature, any study that relates the nomination process to the partisan environment must include information on the ideology of the involved parties: the nominees, the Senate, and the president. To enable statistical evaluation, codes were assigned to the political party of the president and the Senate majority. The ideologies of nominees were

also assigned a numerical value. Presidential and senatorial ideology is identified by year by the president's party and the majority party, respectively. In those years in which majority party in the Senate changed mid-year, the party in control at the time of the confirmation vote was used. In both presidential and senatorial cases, Republicans were coded as 0, and Democrats were coded as 1. This scale is the same direction as that for nominees, with 0 being more conservative and 1 being more liberal. When the president's and Senate's political party coincide, this indicates unified government; when the parties are different, the government is considered divided.

Ideology of the nominee was drawn from data constructed by Jeffrey Segal as part of his collaborative project with Albert Cover in 1989 based on newspaper editorials. While Segal used the data comparatively with qualifications of Supreme Court nominees to determine which had more weight with the Senate, it serves an equally appropriate position in the study here. Nominees' ideology fits on a scale from 0 to 1, 0 being most conservative and 1 being most liberal. This number refers to the Senate's perceived ideology of the nominee at the time of confirmation, rather than what the nominee's actual ideology was or how he behaved after confirmation, since the Senate's perception of the nominee's ideology is the relevant measure for this study.

### *Results and implication*

To test the first hypothesis, the thirty-one Supreme Court nominees for the time period were divided into three categories: those nominated during Democrat-controlled government, Republican-controlled government, and divided government, where "government" refers to only to the president and Senate. Within each category, the average ideology score and error were

calculated. The results appear in Table 1. The data indicate that nominees during divided government are more moderate than when the government's party is either conservative or liberal. While the nominees are still more conservative than the exact middle of the spectrum, they are moderate to a statistically significant degree because the range does not overlap with those of the nominees during Republican-controlled government or of Democrat-controlled government.

The more conservative score for nominees during divided government is also a result of the facts of divided government; during the period from 1952-2010, whenever there was divided government, it was always with a Republican president and a Democratic Senate. This indicates that Republican presidents will nominate conservative individuals, but will make their nominees slightly more moderate when facing a Democratic Senate. Indeed, of the eighteen Republican presidential nominees, only three are above the mid-point on the ideology scale: Warren, Harlan, and Stewart. All were nominated by the same president, all in years of divided government, and all within the first decade of the era of divided government, when the trend had not yet solidified. The numbers involved for nominees in divided government suggest that the president is the greater determinant of nominees' ideology, but that the Senate has some influence. This is what we would expect, given the constitutional structure; the statistics support the theory and reveal the degree to which the Senate may influence nominees' ideology.

The results of evaluating the second hypothesis, comparing ideology of confirmed and rejected nominees, elaborate on the moderating effect of the Senate. Controlling for different partisan situations, the nominees who were confirmed were always more moderate than those who were rejected. While this may show a preference for more moderate Justices regardless of the nominating and confirming parties, the greatest ideological change in nominees between

those confirmed and rejected occurs under divided government, indicating that divided government has a more moderating effect than other possible factors.

Given the relatively few nominees the Senate ever has rejected, only four cases fall within the time period in question. The Senate rejected three by vote and filibustered the fourth: Haynsworth, Carswell, Bork, and Fortas. Conclusions drawn from such a small data set must be cautious at best. Since we are comparing them with successful nominations, the results may be just large enough to begin to see a trend, but more time and more rejected nominees will be needed in order to draw a stronger conclusion. That said, the comparisons in Table 2 offer some value, especially since there is a trend.

There are no complete data for a Republican-controlled government nor for a Republican Senate because there were no rejected nominees under either of these conditions; however, the average ideologies of confirmed nominees in these two categories are given for comparative purposes. Also, the Democrat-controlled government and Democratic president rows lack an associated error for the rejection statistic because only one rejection fit this profile, and it was the same rejection, thus the data are the same.

In all combinations of parties the confirmed nominees are more moderate than the rejected ones. This does not prove that the president and/or the Senate prefer more moderate nominees, nor does it preclude very liberal or very conservative individuals from being confirmed. It does indicate, however, that on the whole, comparatively moderate nominees are more likely to be confirmed than their extreme counterparts. To put it another way, rejected nominees are usually individuals holding more extreme ideologies than those who were confirmed. Although the comparison in Table 2 can support the second hypothesis, it does not prove the hypothesis. This is in part because some very conservative justices were confirmed by

Democratic Senates and some liberal justices by Republican Senates. For instance, in 1971, Rehnquist was appointed to the Court for the first time: nominated by a Republican president, confirmed by a Democratic Senate, and scoring a very conservative 0.045 on the ideology scale. The results also fail to prove Hypothesis 2 in part because of the relatively small number of cases from which to establish a trend, which makes it difficult to distinguish between a trend and similar circumstances for three or four nominees. Thus the results of testing Hypothesis 2 are tentatively in favor of the hypothesis, but should be read with caution.

As for the appointment process on the whole, the results above show that divided government is likely to have a moderating effect on the ideology of nominees. This is so, first, because nominees during divided government are more moderate than during unified government and second, because confirmed nominees are more moderate than rejected nominees, regardless of party-control, though this latter trend is even more pronounced during divided government.

### **Strategic Court Rulings: The Background**

Similar to the literature for appointments, the second area of interaction between the Court and divided government, Supreme Court rulings, also has not received much attention in political science literature. Several works obliquely study the relationship between Supreme Court rulings and divided government, but few explicitly do so, and even fewer provide extensive data for support. Tangential to this study, most of the research on the strategic model or the Court's relationship with the other branches relates to the question at hand: how divided government affects Supreme Court rulings. Assumed behind such a study is that the bodies of divided government (Congress and the president) affect the Supreme Court. This assumption is

supported by literature on the strategic model. However, little of this literature directly addresses divided government. Nevertheless, it is useful to review some of the major contributions to the strategic model as they will strengthen the argument that the branches affect one another, an argument which is essential to continuing this study and which will be supported further by my results.

Since the foundational works of the strategic model by Walter F. Murphy and Lee Epstein and Jack Knight have already been introduced, let us now discuss this latter work by Epstein and Knight more in depth. Epstein and Knight examine both the internal and external forces that may alter how Justices make decisions. Internal factors occur within the Supreme Court, such as the need to accommodate the preferences of all the Justices. External forces, according to Epstein and Knight, include both the preferences of the other branches and those of the American people at large. This first set of external preferences is what concerns the work of this paper. The authors explain, "...because they [the Justices] serve in one of three branches of government, their decisions are subject to the checks and balances inherent in the separation of powers system instantiated in the Constitution. To create efficacious law—that is, policy that the other branches will respect and with which they will comply—Justices must take into account the preferences and expected actions of these other government actors" (1998). To learn the preferences of the other actors, Epstein and Knight argue that Justices gather information from the media, current legislation, and *amici curiae* briefs. While these are undoubtedly good sources of information on the preferences of the executive and legislative, I suggest that the Court may also pick up cues for preferences from the platforms of the majority political parties. The party that is in power at any given time should indicate to the Court the general trend of preferences. This becomes a bit more difficult to predict when the government is divided between the parties, in which case I

hypothesize that the Court will heed the preferences of Congress before that of the president, for reasons to be presented later.

Jeffrey Segal contributes to the literature on Congress-Court interaction by testing both the strategic “separation of powers” model and the attitudinal model (1997). While he finds support for the attitudinal model, his study is still important to the work herein. He primarily uses formal modeling with some empirical evidence to compare the two theories on Court performance. The separation-of-powers game as applied to the Supreme Court illustrates the ability of Congress to overturn Court decisions. Thus, the Supreme Court would wish to alter its rulings to fit better the preferences of Congress when in a situation in which Congress may overturn a decision. Segal also uses a party-caucus model, which presumes that the legislation of a Democrat-controlled Congress is more liberal than that of a Republican-controlled Congress. Segal intermingles this assumption with the effectiveness of liberal or conservative Justices on the Court. My study, rather, will mix the assumptions of the party-caucus model with the results of Court rulings to determine if the liberal-conservative content of cases change as political control of Congress changes, as well as control of the executive office, a branch Segal mentions only in passing.

Several authors disagree with the findings of Segal's study, particularly the support he gives to the attitudinal model. Mario Bergara, Barak Richman, and Pablo Spiller apply a maximum likelihood model, designed by Spiller and Rafael Gely in 1992, to the dataset Segal used (2003). They conclude that the Court does adjust its decisions to accommodate congressional and presidential preferences. Specifically, the authors state that from 1947 to 1992, these external preferences of the other branches constrained the Court with an average probability of approximately one-third. Bergara, et al, contribute the discrepancy between their

results and Segal's to a misspecified econometrics model. Without retesting either Segal's or Bergara, et al's, studies, I also find support for the strategic model through a different series of tests relating to the presence of divided government during the time specified by Bergara et al.

Another author, Gerald Rosenberg further explores the relationship between Congress and the Courts. He ranks the Supreme Court in terms of independence or subservience to Congress by identifying the five factors that reveal Congress's preferences, and which may then influence the Court's decisions. These factors are “the number of bills introduced, the number and strength of their supporters, the intensity of the support, the likelihood of coalitions forming, and the results of elections” (1992). As in Epstein and Knight's study, I propose this list lacks partisan preferences, which can be revealed through the majority party of Congress. Rosenberg's work also neglects to study the relationship between the executive and the judiciary, though he qualifies the omission because Congress is the only body that can directly affect the institutional features of the Court. However, as already discussed, indirect effects can also have a great impact on the judiciary, and the president can greatly affect the validity and efficacy of the Court by interpreting how to enforce decisions or by refusing to enforce them entirely. Therefore, the lack of presidential inclusion is a potential shortcoming of Rosenberg's research.

Few of the studies above give much attention to the executive branch. In contrast, Keith Whittington examines the relationship between the Supreme Court and the presidency. While he does not particularly take up a question of the strategic model, his work does illustrate the relationship between the executive and judiciary in interpreting the meaning of the Constitution. While his analysis deals with the central relationship between the branches, he addresses congressional relations very seldom and fails to account for the strategic inclusion of presidential (and congressional) interpretations and preferences in Court opinions.

While this broad array of literature on the Court's strategic maneuvers is relevant to my study, little of it directly discusses the impact of divided government on Supreme Court decision-making. Divided government could be easily integrated into the works of Epstein and Knight and Rosenberg as an additional factor revealing congressional preferences. However, I provide a more detailed and tailored study of the effects of divided government on Supreme Court rulings.

### **Strategic Court Rulings: The Study**

Just as for nominations and confirmations, the study of strategic Court rulings proceeds in two parts: how the cases' ideology changes and what causes the change. This section outlines the hypothesis for each part, identifies the coding system, and elaborates on the raw results. For each part, I test a hypothesis specifically relating Supreme Court decisions to divided government.

#### *Proposed hypotheses*

The executive and legislative naturally have an impact on the Supreme Court because the three branches all relate to one another within the same government. Beyond the constitutional and direct actions the other branches may take (such as appointments, impeachments, and control of pay increases) both Congress and the President indirectly affect the Court. As Alexander Hamilton succinctly stated in Federalist #78, the Supreme Court “has no influence over either the sword [executive] or the purse [legislative], no direction either of the strength or of the wealth of the society...” Since the Court attempts to interact with the law and society, it occasionally requires either or both the sword and the purse to act in coincidence with its decisions in order to be effective and to preserve its reputation. To avoid becoming impotent, the Court must consider

the reactions of the other branches and hope for their support in its decisions. When the government is united under a single ideology, the type of decisions which will receive the most support is relatively clear to the Court. However, when government is divided between parties, the Court must take a more moderate approach to cases in the hopes of securing support from both the Republican and Democratic bodies. This can be proved in two manners. First, if the hypothesis is accurate, then the general trend of decision ideology over time will be more moderate during periods of divided government than for times of unified government. Second, removing the time-context, if decisions are more moderate during divided government than when the government is either Democrat- or Republican-controlled, the hypothesis will also find support.

Which branch of government holds more sway over the Court becomes an auxiliary hypothesis. To determine this, first we must prove that the Court's opinions change on the liberal-conservative scale in relation to the parties in the executive and legislative. Then the degree of change depending on which party controls which body should indicate which branch the Supreme Court accounts for more when making decisions. I propose that Congress's preferences influence the Court's decisions more so than does the president's because Congress confirms Justices, can increase their pay, can impeach Justices, and makes the laws on which the Court often rules.

To summarize:

*Hypothesis 3:* Decisions made during times of divided government will be more moderate than those during unified government.

*Hypothesis 4:* Congress's liberal-conservative preferences influence Court decisions more than do the president's.

### *Data collection and code*

To test the hypotheses the partisan character of the president and Senate from “Nominations and Confirmations” had to be expanded to include the House of Representatives. As for Court rulings, information for this study came from The Supreme Court Database, organized by Harold J. Spaeth. Available are cases from 1953-2009, which is almost the entire period of divided government. Cases are listed as either conservative, liberal, or unspecifiable. The former two designations were determined based on generalizations about the direction of the main issue in a case. For example, case decisions that were pro-affirmative action would be liberal and those that were pro-business would be listed as conservative. For each year of the Database, the average ideology score for the year reflects the comparative frequency of conservative decisions (0) and liberal decisions (1), with a score of 0 meaning all cases were decided conservatively, 0.5 being an even split between liberal and conservative decisions, and 1 indicating that all cases were decided with a liberal bent. Some cases, however, were coded as unspecifiable, which Speath explains as those cases in which “the issue does not lend itself to a liberal or conservative description (e.g., a boundary dispute between two states), or because no convention exists as to which is the liberal side and which is the conservative side (e.g., the legislative veto).... or where one state sues another under the original jurisdiction of the Supreme Court and where parties or issue cannot be determined because of a tied vote or lack of information.” The unspecified cases were not included in the liberal-conservative calculations. Despite this omission, the data includes over 7,300 cases. The years 1953, 1954, 2001, and 2002 were also omitted because no single party controlled the Senate for the entire year, making it hard to relate the rulings in individual cases to the presence or absence of divided government.

### *Results and implications*

There are two tests to prove Hypothesis 3. The first is a comparison of the ideology of cases between Democrat-controlled government, Republican-controlled government, and divided government. These data are displayed in Table 3. The results indicate that cases are indeed more moderate given the presence of divided government. The 95% confidence intervals do not overlap for any of the types of government; therefore, the difference between the ideology of cases in different types of government is noticeable. Besides proving Hypothesis 3, the results also support the strategic model since the frequency of liberal or conservative cases change relative to the partisan composition of the other branches in government. Rulings delivered during times when the Democratic party controls both houses of Congress as well as the presidency are substantially more liberal than those delivered during Republican control. This offers even more support for the strategic model when considering that not all of the Justices ruling in each type of government were appointed by the same kinds of government. Statistical expounding on this latter point could be interesting and valuable to determining more precisely how parties in the elected branches can affect Supreme Court decisions.

A second proof of Hypothesis 3 provides similar information arranged temporally. Graph 1 offers the average ideological score of cases by year with a best-fit (6<sup>th</sup> power) line to illustrate better the trend and a dashed line at the liberal-conservative dividing point.

By itself, the graph simply demonstrates that the ideology of cases over time began quite liberal in the mid-1950's, dropped rapidly to a slightly conservative bent in the late 1960's and remained relatively constant since about 1970. This information by itself is not helpful for explaining the relationship between case decision ideology and divided government. However,

if we divide the data after 1968 and 1999, which is where the data points seem to have the greatest divergence, and then analyze the prevalence of divided government in each of the three resulting periods, a clearer trend emerges. This is summarized in Table 4. Prevalence of divided government is given on a scale of 0 to 1, where 0 is a completely unified government and 1 is a divided government. While the slight rise at the liberalism of cases in recent years makes it hard draw any strong conclusions from the third time period, the steep drop from liberal to conservative and correlating rise of divided government implies a relationship between Supreme Court rulings and divided government. This analysis shows that case decisions became more moderate as the occurrence of divided government increased, which supports Hypothesis 3.

In addition, Graph 2 parses the data into divided government (purple line), Republican-controlled government (red line), and Democrat-controlled government (blue line). Little information can be gleaned from the Republican relationship, since there are so few data points. However, years of divided government consistently show more moderate cases than years of Democrat-controlled government with the exception of eight years (1988-96). Despite this, six of those eight years were under divided government (1988-1994), which indicates that the relationship between the two lines is a result of fitting, since the lines either had remain separate or cross for divided government cases to be more moderate than cases under Democrat-controlled government. Therefore, Graph 2 illustrates more clearly that cases delivered under divided government tend to be more moderate than those during unified government.

In the tests for Hypothesis 3, the cases under divided government were slightly more conservative than the exact moderate position, though more moderate than under Republican government. One reason for this is revealed during the test for Hypothesis 4.

Now that we have established that the Court does adjust its opinions based on what the

partisan environment is in Congress, Hypothesis 4 suggests that Congress should have a greater impact than the president on Court decisions. To determine this, the comparative impacts of party control of each branch on decision ideology are displayed in Table 5. Included are only those times of divided government when one party controlled both chambers of Congress. Table 5 reveals that Congress overall, and especially a Republican Congress, has greater control over the ideology of Court cases than does the president, which supports Hypothesis 4. Despite having a Republican president, when Congress is controlled by the Democratic party, Court decisions are slightly liberal. Conversely, even under a Democratic president, decisions made during Republican control of Congress are more frequently conservative. The table also offers a possible explanation as to why the results from Hypothesis 3 showed the moderate, divided government cases as slightly more conservative than the exact moderate point; cases under a Democrat-controlled Congress are slightly, but statistically significantly, more liberal, but cases under a Republican-controlled Congress are very conservative. This would shift the average between the two, even though Democrat-controlled Congress are much more frequent, to a slightly conservative average ideology score for cases delivered under divided government, which is in keeping with the results of Hypothesis 3's tests.

If Congress influences the Court's decisions' liberal-conservative score more than does the president, the next logical question to ask is: which house of Congress has more influence? This presents us with another auxiliary hypothesis: since the Senate confirms Justices and Senators have longer terms, the Senate ought to have more influence than the House of Representatives.

*Hypothesis 4.2:* The Senate's liberal-conservative preferences influence Court decisions more than do the House's.

Sadly, we must wait a year or two before this hypothesis can be tested. In the time for which case information is available, from 1953-2009, a split in party control of Congress has always resulted in a Democrat-controlled House and a Republican-controlled Senate. 2011-2012 will have the opposite situation and so can provide comparative statistics. Until the necessary data become possible, no meaningful tests can be conducted. However, the hypothesis will be an interesting one to test in the near future.

Despite the untestable nature of Hypothesis 4.2, my study has shown several trends in the relation between the Supreme Court and other branches of government. First, the Court tends to be more moderate when deciding cases during times of divided government. In contrast to times of Republican or Democrat control, where typically more decisions are either conservative or liberal, respectively, during divided government, the Court attempts to decide cases with a balance to the number of conservative and liberal rulings it makes. Second, though the Court does seem to be adjusting for the party preferences of the elected branches, it appears to be more attentive to the preferences of Congress than of the president, though to which chamber of Congress is yet to be determined.

### **Conclusion**

As the separate branches carry out their roles and interact with one another, they must necessarily be conscious of the preferences of one another. This is important to facilitating bi- or tri-lateral action as well as to avoid being thwarted by another branch. While actors may determine the preferences of others from a variety of cues, political parties provide a good indicator of preferences in the elected branches. Since the early 1950's, this does not always mean recognizing a simple Republican or Democratic majority in control of government, but

rather the presence or absence of divided government and how that divided government may be arranged. For the unelected branch of government, the Supreme Court, divided government provides a useful insight into understanding the actions and preferences of the other bodies of government.

Two areas of interaction between the branches are greatly influenced by divided government and have particular import for the Court. First, the appointment process involves the potential Justices as well as the executive and the upper chamber of the legislative. When separate parties control the executive and this chamber of the legislative, both liberal and conservative preferences are present in the appointment process. Thus, we see more moderate ideologies for both the nominees and the confirmed Justices. This was illustrated respectively through a comparative analysis of nominees in divided government versus unified government and through a comparison of confirmed and rejected nominees' ideologies, this latter also with attention to the variable of divided government.

The second interaction between divided government and the Supreme Court affects the ideology of Supreme Court decision-making. While the Supreme Court theoretically makes decisions in isolation from the other branches, the ramifications of those decisions often affect the policies of the other branches and/or require some form of support from the executive and legislative, even if that support is the absence of opposition. Thus, the Court may find it prudent to be aware of and to some degree to accommodate the preferences of the president and Congress. This latter action of the Court suggests some form of adjustment in decision-making that would include the preferences of the other branches. This adjustment is a key component of the strategic model of Court behavior.

Partisan identification and majorities provide one method of determining the preferences

of the executive and legislative. When both liberal and conservative preferences are expressed, as happens in divided government, the Court ought to, and is shown to, moderate its decisions. This study illustrates in two contexts how the Court becomes more moderate in divided government: first, by comparing the average ideology of decisions made during divided government with those made during unified government and second, by offering a temporal analysis that correlates moderate decisions with divided government. In addition, this paper also shows that the Court is more likely to adjust during divided government for the partisan preferences of Congress as opposed to the preferences of the executive, again illustrating that the Court accommodates the preferences of the other branches, which lends support to the strategic model.

## Tables and Graphs

### Hypothesis 1

*Table 1. Moderate nominees in divided government*

Type of Government	Average ideology of nominees	95%-confidence associated error	Number of nominees
Democrat-controlled government	0.751	$\pm 0.008$	9
Divided government	0.331	$\pm 0.013$	15
Republican-controlled government	0.243	$\pm 0.020$	7

## Hypothesis 2

Table 2. Moderate confirmations, extreme rejections

Type of Government	Average ideology score for confirmations	95%-confidence associated error for confirmations	Number of confirmations	Average ideology score for rejections	95%-confidence associate error for rejections	Number of rejections
Democrat-controlled government	0.739	$\pm 0.009$	8	0.845		1
Divided government	0.389	$\pm 0.017$	12	0.098	$\pm 0.002$	3
Republican-controlled government	0.238	$\pm 0.027$	6			
Democratic president	0.739	$\pm 0.009$	8	0.845		1
Republican president	0.339	$\pm 0.011$	18	0.141	$\pm 0.005$	4
Democratic Senate	0.529	$\pm 0.010$	24	0.285	$\pm 0.069$	4
Republican Senate	0.238	$\pm 0.027$	6			

### Hypothesis 3

Table 3. Moderate rulings in cases during divided government

Type of government	Average ideology of cases	95%-confidence associated error	Number of cases
Democrat-controlled government	0.60	$\pm < 0.00$	2087
Divided government	0.48	$\pm < 0.00$	4580
Republican-controlled government	0.44	$\pm < 0.00$	318

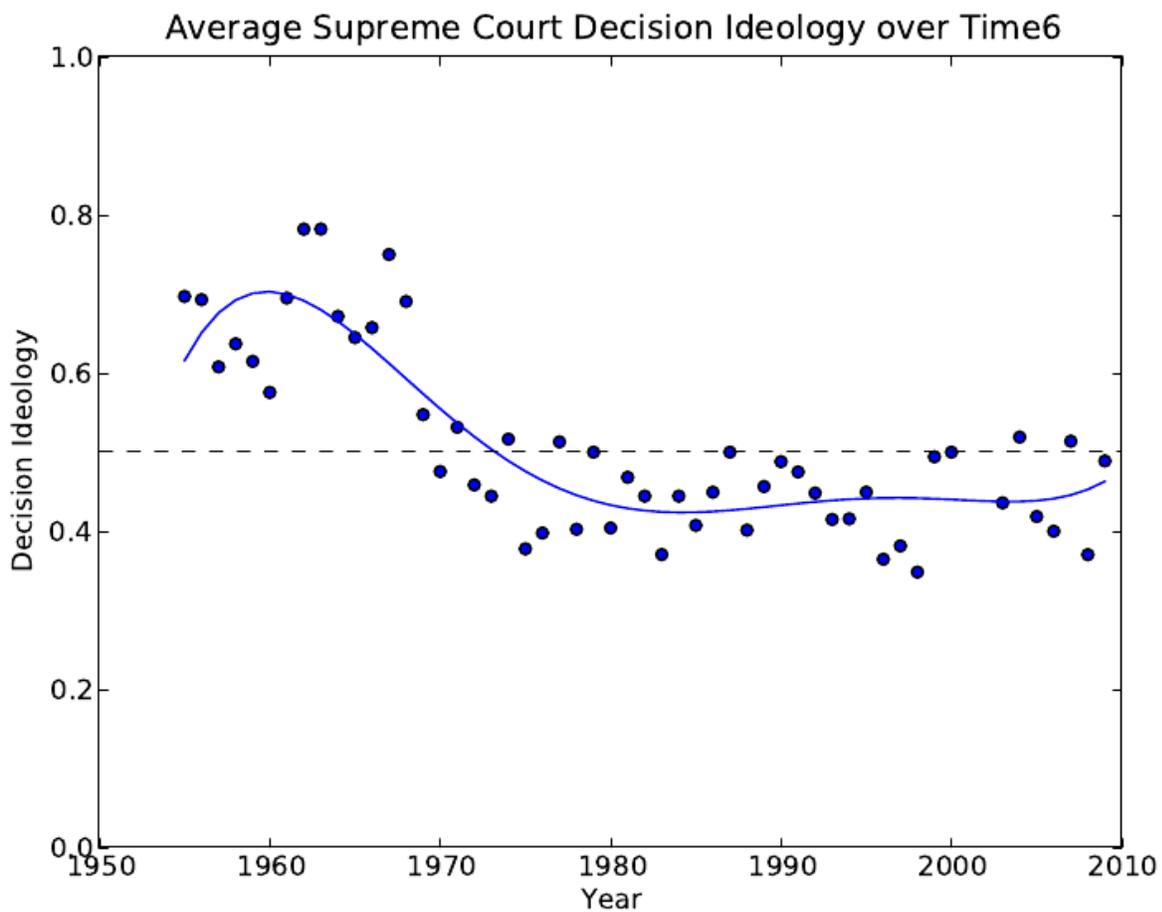
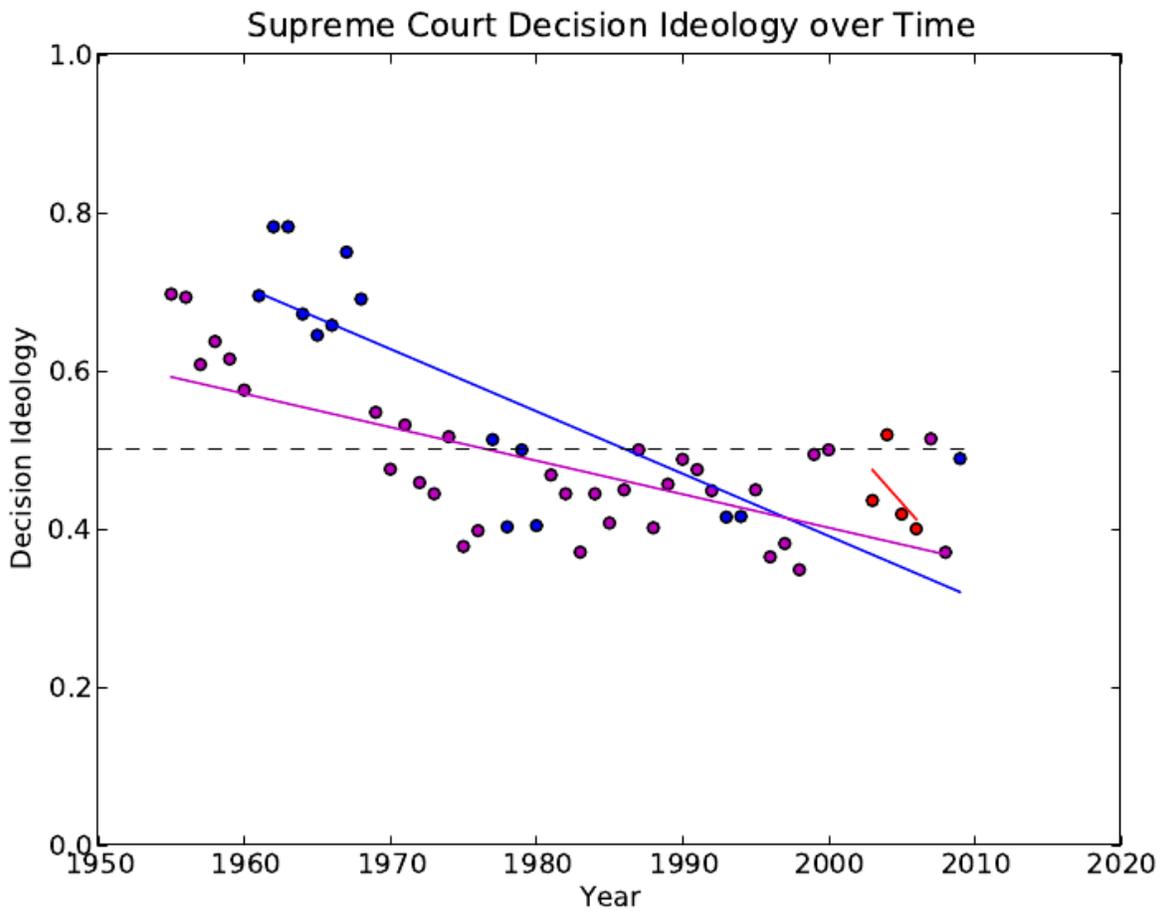


Table 4. Prevalence of divided government by time period

Time period	Prevalence of divided government
1955-1968	0.429
1968-1999	0.806
2000-2009	0.333



#### Hypothesis 4

Table 5. Congress more than the president affects Court decisions

Type of government	Average case ideology	95%-confidence associate error	Number of cases
Democratic Congress and Republican president	0.51	$\pm < 0.00$	3051
Republican Congress and Democratic Congress	0.42	$\pm < 0.00$	542

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