There are three major theories, legal constraint, sincere preferences and strategic decision-making, which attempt to explain how to empirically analyze the judicial body of the Supreme Court and its decision-making process. These theories present themselves as being in direct conflict with each other in their beliefs of exactly what constrains the judiciary in their decision making process. While each theory does offer it's own unique perspective on judicial interpretation and has it's own particular caveats, the theories are not actually fundamentally in conflict with each other. Rather the legal constraint theory generally proves more applicable to situations confined completely within the authority of the Court where as the other two theories work better when the Court relies on other actors to enforce its rulings. Furthermore, the sincere preference theory can at times intertwine itself with the legal constraint theory, and at other times it can fit perfectly within the strategic decision-making theory. Therefore instead of being three theories that are completely in conflict with one another, they are three theories that could potentially be applicable to the same judge on the Supreme Court, even with different decisions on the same case.

The first theory of judicial decision-making is the theory of legal constraint. This is the broadest theory which also might be the most difficult to empirically analyze. This theory rests on the idea that "the federal courts were designed to be independent" and thus "we should not be surprised that they are capable of actually being independent," [1] Segal continues to describe that "the legal discretion that exists in the type of cases that reaches the Court combines with institutional incentives that favor independence to produce a Court that is capable of acting like 'single minded seekers of legal policy'", [2] Therefore, according to advocates of the constraint theory, the judiciary really is independent, and therefore each judge is able to chose the way

in which he will interpret the Constitution, determined by the particular nature of their office and the decisions they make, without serious consideration of how any outside actors will respond.

One difficulty that arises with this particular theory of judicial analysis is the determination of what exactly is the correct perception of legal constraint, and how one can measure whether the particular proclaimed legal constraint is being adhered to. Jeffrey Segal and Harold Spaeth examine the use of precedence and the affect that this particular legal constraint has on Supreme Court justices. They come to the conclusion that by and large, most justices do not adhere to precedent in a truly meaningful way. They are willing to acknowledge though, as Justice William Rehnquist also says that though "some precedents are more appropriately disregarded than others," [3] there are times when Justices do adhere to precedence. Justice Rehnquist states in the case of *Payne* v. *Tennessee* that "considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved," [3].

Justice Rehnquist feels more comfortable applying the precedent line of legal constraint to matters more concerned with statute-based concerns. There are also at least two Justices, "Stewart and Powell" who "display adherence to precedent," while most other Justices are "supportive of their preferences at a minimum rate of at least 80%," [4]. Therefore many Justices use precedent sometimes, a few Justices almost all the time, and some hardly ever. This illustrates that the type of legalistic constraint a Justice uses, as well as how and when they choose to apply that legal constraint, depends very much on how the Justice views their role and their responsibilities in the Judiciary and the government at large. When Justices are making decisions that are not in fact constrained by outside factors, they are able to "apply a set of interpretive

canons, a set of principles that guide them in interpreting the Constitution, statutes, precedent, and derive an outcome" [5]. For some of these Justice's their interpretive canon is strict adherence to precedent. For some Justices it is adherence to an originalist mode of interpretation. Other Judges might strictly follow Ely's doctrine of interpretation. The singular term "legal constraint" could potentially apply to an infinite number of legally constraining ideologies chosen by the Justices. The Justices are in fact completely at leisure to choose the ideology that they are going to utilize, and the legal theory of constraint works best, as long as they are making decisions based on interpretations that are not going to rely on other major actors in the government for enforcement. If this happens to be the case, then the legal theory of constraint is not as applicable, since the Justices must consider first and foremost actors' responses outside of the Court, and another theory is deferred to. Therefore in order for the legal theory to have its full force, it can only really be used in matters that don't involve other major actors as enforcers of the decisions, such as with procedural and evidentiary matters whose execution the Court presides completely over, or matters that are more statutory in nature, such as those involving property or contract rights.

The next theory of constraint is the sincere preferences theory. The sincere preferences theory claims that the Court's does it "decisionmaking by policy-motivated, politically sensitive judges who are constrained by democratic forces," [6]. A Justice would simply cast their vote in a way that would yield the policy they desire most, but this is not a problem because of several mechanisms that keep them from running a muck and being an all mighty council that just makes decisions according to their whims. Peretti claims that the appointment process that Justices go through is an integral part of their connection to democracy, and that "by voting her values, the

policy-motivated justice is carrying out the value premises of her appointment, premises actively and deliberately selected by elected officials-the president and the senate," [7]. Therefore a Justice proudly proclaiming that they will be politically motivated on the Court and making it clear to those in the President and Senate how they are politically leaning will legitimate the use of personal preferences on the Court by letting it be checked be democratically elected actors. The Judiciary as a redundant policy making institution can "expand the number and diversity of opportunities for groups to advance their interests and contest policies that they believe will harm their interests," [8], and thus provide another meaningful actor in our pluralistic system. This is because the "Court's value lies in its capacity to give another chance to legislative losers and thereby to promote a broader consensus and system stability," [9]. Because it is a reactive institution, in theory it should be offering a different type of forum to citizens where they can directly bring up grievances with legislation that might have had unforeseen individual consequences, or that is just plain unconstitutional.

There are some potential problems with the Democratic checks that Peretti proposes. For example potential Justices being interviewed for a position on the Court often completely evade the questions being asked of them by the Senate and President, in order to try and deny any sort of suggestion that they might be making decisions based on their personal policy preferences. So there would have to be a cultural shift that resulted in an acceptance in the politically motivated Justice that would make this a truly meaningful constraint. There's also the problem with the Court being a truly open forum for anyone who has grievances. It is often argued that it is only those with money, political influence or an inordinate amounts of media coverage that ultimately will get their cases hard by the Supreme Court the fastest, or

at all. Therefore there is the potential for the Court to be an extremely valuable redundant institution if equal access is a reality, but if it's too swayed by wealth or notoriety then it will end up being very similar to the legislature.

This theory could actually potentially intertwine at times with the legal constraint theory if the Judge happens to choose the legalistic canon of interpretation that is the most likely to yield his own personal policy preferences. For example a more conservative Justice who genuinely wants to see more conservative outcomes and policies will be more likely to choose a more conservative canon for interpreting the Constitution, like an Originalist line of thought. When one thinks about the Justices that have sat on the Supreme Court, it is more often than not the case that a liberal Justice happens to proclaim and defend a more liberal cannon of interpretation while the more conservative Justices devote themselves to conservative cannons. Because American society at present is not very accepting of the idea of a blatantly political Justice, regardless of whether Justices are in fact making policy based decisions, it seems as if the legal constraint method is a way for a Justice to show that they aren't making decisions in a capricious manner but instead according to a defined cannon, while at the same time that cannon is most likely very instep with the Justices personal preferences.

It can actually be seen through the controversial case of *Bush v. Gore* (2000), that when the legal cannons that each justice normally adhered to did not produce the policy choice they desired, the justices were willing to completely change the legal cannons they used to interpret the Constitution in order to get the candidate they desired into office. This instance suggests that the cannons that the justices chose to interpret the constitution by and large generally reflect their sincere policy choices, and when they do not reflect them, if they care about the policy outcome enough, they

are willing to compromise adherence to their usual mode of legal constraint in order to produce their sincere policy preference; in this case getting the candidate they desire into office.

As opposed to the legal theory of constraint which is best adhered to most completely when the Supreme Court is only making decisions encapsulated within the sphere of the law, the strategic decision making theory is best applied to all situations that require the aid or enforcement of another political body in order to make the decision of the Court effective. This idea makes most sense in light of the fact that the founders of the U.S. not only desired the Court to be an independent body, but also a body subject to the system of checks and balances that they were crafting. As Knight and Epstein say, "judicial supremacy in the United States is not a formal provision established by intentional design. It is rather an informal norm, like many political institutions, that achieves its force to structure constitutional politics primarily through the willingness of political actors to continue to submit to its proscriptions," [10]. Therefore as the strategic theory goes, the judiciary when making their decisions must keep in mind how willing political actors are to submit to the decisions they make, or else they could lose their legitimacy as an authoritative institution. It follows then that "if justices wish to see their policy preferences etched into law…then they must make calculations about their political clout relative to that of the other institutions,"[11]. This idea fits in particularly well with Rosenberg's ideas about how the Court is constrained by three major factors, "they must convince courts that the rights they are asserting are required by constitutional or statutory language…courts are wary of stepping too far out of the political mainstream" and since the judiciary "has no influence over either the sword or the purse…but merely judgment…litigants are faced with the task of implementing the decisions," [12]. It is

almost impossible to think that the Court can make decisions that require outside actors cooperation without considering how constrained by those outside actors they are in regards to the particular issue they're deciding on.

The personal preference theory, and thus at times potentially the legal theory of constraint, easily fall within the confines of the strategic theory. If a Justice truly wants to generate their personal policy preferences from a decision, if they are acting during a period of increased judicial restraint where the federal government isn't necessarily willing to put their full support behind the decision of the judiciary, or the public is not accepting of the Court's decision, they will want to reflect on what will truly generate their policy preferences within this system of constraint. Justices are not only constrained by their own professed legal cannons, their own policy preferences or the democratic constraints that Peretti speaks of; rather they are also constrained by the realities of how other political actors and citizens will enforce and respond to their rulings. Therefore a justice who desires their true policy choice might potentially strategically alter his ruling so that maybe even though the outcome of the case is not the way they would have wanted it most, the policy that forms as a result is more inline with what the justice desired.

Though the three different theories of empirical analyzing of judicial decision making are presented by their proponents as being completely in opposition with each other, there are actually many ways in which the theories can be intertwined and overlap. There are certain times when certain situations lend themselves better to one of the theories over another, for instance it's generally more appropriate to use a strict legally constrained approach when the justices don't have to rely on any actors outside of the Court itself, but the personal preferences within the strategic constraint theory when dealing with other agents. The strategic constraint model actually would

not even make sense in proceedings that were completely contained within the judiciary, because there would not be a need to take into consideration what other actors would do, because there wouldn't be other actors. Therefore the legal constraint model can potentially overlap with the sincere preferences model, and then if there are other actors involved, the sincere preference model is very much intertwined (and thus potentially the legal constraint model) with the strategic decision making theory.

---

[1] Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model,* from Supreme Court Decision Making, pg. 252
[2] Segal, pg. 237
[3] Jeffrey Segal and Harold Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices,* from *American Journal of Political Science*, pg. 972
[4] Segal & Spaeth, pg. 983
[5] Segal & Spaeth, pg. 973
[6] Terri Jennings Peretti, *In Defense of a Political Court*, pg.226
[7] Peretti, pg. 228
[8] Peretti, pg. 231
[9] Peretti, pg. 232
[10] Lee Epstein & Jack Knight, *On the Struggle for Judicial Supremacy*, from *Law and Society Review*, pg. 91
[11] Epstein & Knight, pg. 92
[12] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, pg. 21