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The Supreme Court, Congress, and Judicial Review

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THE SUPREME COURT, CONGRESS, AND JUDICIAL REVIEW

JEFFREY A. SEGAL* & CHAD WESTERLAND**

Recent separation-of-powers models presume that the Supreme Court must account for congressional preferences when deciding whether to declare federal legislation unconstitutional. Given Congress's ability to restrict or to overturn judicial decisions—even in constitutional cases—plus Congress's authority to strike at the Court, scholars argue that the Court will be free to overturn laws only when the Court and Congress are ideologically aligned. Therefore, increasing ideological distance between the Court median and Congress may make the Court less likely to overturn legislation. We test this hypothesis by placing the median member of the Court and each chamber of Congress on a common scale and then examining the number of federal laws declared unconstitutional in each year between 1949 and 2001. We find no evidence to support the hypothesis that the ideological distance between the median member of the Court and Congress constrains the Court's constitutional decisions. Rather, our analysis suggests that the Court is more likely to declare laws unconstitutional only as the Court becomes more conservative, which has important implications for how we understand the Court's place in American government.

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INTRODUCTION

In the study of majority rule institutions, the Median Voter Theorem is simply unavoidable.¹ If preferences array along a single dimension, such as liberalism-conservatism, the median voter will be on the winning side of any majority vote.² This disarmingly simple mathematical truism is central to the study of politics. The Median Voter Theorem provides the starting point for understanding everything from the prediction of how political candidates select issue positions in an election to the explanation of where legislative output will be located in policy space. Absent institutional rules that alter the majority rule process, knowledge of the location of the median member of the voting population tells us precisely what the outcome of the vote will be.³

The Median Voter Theorem has an obvious application to the United States Supreme Court. The vote on the merits in any given case is as straightforward as a majority rule process gets. Justices essentially make a binary, reverse or affirm decision. Assuming that

1. See DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 16 (1958) (proving the theorem); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 115-17 (1957) (specifying how the Theorem applies in a democratic, majority-rule setting). For Downs, candidates seeking election should choose policies that are preferred by the median of the electorate because that is the only way to capture enough votes to ensure electoral victory. DOWNS, *supra*, at 116-17.

2. If there are multiple dimensions to a single vote or election, then the Median Voter Theorem does not apply. See PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 164-66 (1986).

3. The literature on the applied mechanics of the Median Voter Theorem is immense. See, e.g., Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 141-52 (2001) (providing a recent examination of how House candidates select issue positions). Ansolabehere et al. find that candidates gravitate toward the median member of their districts with some moderating influence from national party interests. *Id.* at 152-53. This work, like much of the similar work in the field, uses various proxies for legislator position-taking and voter preferences, such as legislator ideology scores and voter survey responses. See generally Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259 (1988) (providing a very thorough overview of the various predictions made by spatial models of legislative behavior that are derived from the Median Voter Theorem).

we can measure the Justices' sincere preferences,⁴ and that the Justices can be placed along a single ideological dimension (usually liberal-conservative) in a particular case,⁵ the median Justice's preference will determine the outcome. If the median member wishes to affirm, by definition, at least four other Justices will agree, thus achieving a majority outcome on the merits. Put in slightly more colloquial terms, the median member of the Court is the swing vote. As goes the median, so goes the Court.⁶

The application of the Median Voter Theorem to the Court becomes more complicated, however, if the Court strategically considers the preferences of other actors, such as Congress or the President. Assuming the Court is mindful of policy outcomes,⁷ it presumably wishes to avoid decisions that are likely to be attacked by other political actors, as such responses could potentially make the Court worse off than if the Court had rationally anticipated the likely responses.⁸ If other political actors actually respond in ways that damage the Court and its decisions, then the Court will avoid making decisions that prompt such attacks because these responses undermine the Court's ability to make policy.⁹ In terms of the

4. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–63 (1989) (measuring Justices' preferences from newspaper editorials prior to the Justices' confirmations); see also Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 140–52 (2002) (using Bayesian statistical techniques to measure the Justices' preferences). But see G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1168–71 (2005) (arguing that behavioralist methodologies overlook “vital elements in the calculus of judges” because they do not analyze a judge's decisionmaking process in “sufficient depth to produce an understanding of his or her jurisprudential sensibility”).

5. For examples of statistical evidence demonstrating that a single liberal-conservative dimension explains the Court's decisions see Martin & Quinn, *supra* note 4, at 145 and Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of ‘Natural Courts’ 1953–1991*, 112 PUB. CHOICE 55, 58 (2002).

6. See, e.g., JAMES F. SIMON, *THE CENTER HOLDS* 287–94 (1995) (finding that the O'Connor-Kennedy center on the Rehnquist Court forestalled a conservative revolution); Grofman & Brazill, *supra* note 5, at 63 (identifying the median Justice as “the ideological center of gravity of each of our natural courts”).

7. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 92 (2002) (arguing that the Justices are motivated by policy goals).

8. See, e.g., Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263, 295–96 (1990) (suggesting that the Court anticipates and avoids congressional responses).

9. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–85 (1957) (arguing that the Court cannot

median member of the Court, the median may sincerely prefer to affirm a decision but may believe such a decision will be legislatively overturned. A legislative response that reverses the Court's decision not only hurts the Court from a policy perspective (a less preferred outcome is realized), but presumably damages the Court's legitimacy and authority as well.¹⁰ Therefore, the assumption that other political actors, namely Congress and the President, have the ability to respond to the Court's decisions animates separation-of-powers analysis. If political actors can respond in such a way to the Court's decisions, knowledge about the median member of the Court is not enough to understand the Court's decision on the merits; rather, one must understand the median member in relation to other political actors.

Of course, for the Court to behave strategically, other political actors must actually be able to respond effectively to the Court's decisions. Available responses, however, vary depending on the nature of the decision made by the Court. At first glance, the Court's statutory decisions (decisions in which the Court only interprets the meaning of a statute) appear to be quite vulnerable to such legislative responses, as Congress can overturn them via ordinary legislation.¹¹ Alternatively, its constitutional decisions (decisions in which the Court rules on the constitutionality of a statute or other governmental actions) seem to be more insulated from attack, given the difficulty of constitutional amendment.¹² Recent separation-of-powers models, however, argue that the Supreme Court must account for congressional preferences when deciding whether to declare federal legislation unconstitutional.¹³ Given Congress's purported ability to

effectively make policy if it makes decisions that a ruling coalition will oppose).

10. See Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 597 (2001).

11. For example, by providing in the Civil Rights Restoration Act that Title IX of the Education Amendments of 1972 apply to *all* programs receiving direct or indirect federal assistance, Congress effectively overturned *Grove City College v. Bell*, which held that Title IX's nondiscriminatory provisions only applied to the college's financial aid program. See The Civil Rights Restoration Act of 1987, 102 Stat. 28 (1998); *Grove City Coll. v. Bell*, 465 U.S. 555, 572 (1984).

12. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (holding that a state statute making flag burning a crime violated the First Amendment); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that a state statute requiring a Bible reading at the beginning of the day at public schools violated the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that prayer in public schools violated the Establishment Clause). None of the above constitutional cases have been effectively overturned by congressional legislation.

13. See Epstein et al., *supra* note 10, at 591–94; Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) [hereinafter Friedman & Harvey,

restrict or to overturn judicial decisions in constitutional cases and Congress's ability to strike at the Court, scholars argue that the Court will be free to overturn laws only when the Court and Congress are ideologically aligned.¹⁴ Therefore, increasing ideological distance between the Court median and Congress may make the Court less likely to overturn legislation.

We test this hypothesis by placing the median member of the Court, each chamber of Congress, and the executive on a common scale and then examining the number of federal laws declared unconstitutional in each year between 1949 and 2001. We find no evidence to support the hypothesis that the ideological distance between the median member of the Court and Congress constrains the Court's constitutional decisions. Rather, our analysis suggests that the Court is more likely to declare laws unconstitutional only as the Court becomes more conservative, which has important implications for how we understand both the Court's decisionmaking process and the Court's willingness to strike down federal legislation.

This Article proceeds in the following manner. Section I provides a brief explanation of precisely how the Court is a median driven institution. In Section II we examine separation-of-powers arguments for why the Court might need to consider congressional and presidential preferences when making statutory and constitutional decisions. We present our hypotheses, research design, and results in Section III. Finally, we offer a brief conclusion rejecting the notion that judicial activism is a liberal phenomenon.

I. THE MEDIAN VOTER THEOREM AND THE SUPREME COURT

The median member of the Court certainly plays a pivotal role in the Court's decisionmaking process, but the Court is not wholly a median driven institution. Specifically, neither the certiorari decision nor the formulation of the Court's majority opinion may be represented usefully as a function of the median member of the Court.¹⁵ At the outset, a demonstration of why the median member

Electing the Supreme Court]; Anna Harvey & Barry Friedman, *The Limits of Judicial Independence: The Supreme Court's Constitutional Rulings, 1987–2000*, Paper Prepared for the Annual Conference of the Midwest Political Science Association, Apr. 15–18, 2004 [hereinafter Harvey & Friedman, *The Limits of Judicial Independence*] (on file with the North Carolina Law Review).

14. See, e.g., Harvey & Friedman, *The Limits of Judicial Independence*, *supra* note 13, at 2–3 (asserting that “the Court is constrained by the policy preferences of federal elected officials in its constitutional decisions”).

15. See, e.g., Chad Westerland, *Who Owns the Majority Opinion? Policy Making on the U.S. Supreme Court*, Paper presented at the 2003 Annual Meeting of the American

of the Court does not control the bookends of the Court's decisionmaking process provides a necessary reminder that not every decision made by the Court meets the necessary assumptions for the Median Voter Theorem.

The Court's procedure for deciding what cases it hears is governed by the "rule of four."¹⁶ In order for a case to be added to the docket, only agreement between four Justices is necessary. The Court's agenda is created by a non-majoritarian institutional rule, and if these case selection decisions are examined in isolation from the rest of the Court's decisionmaking processes, the Median Voter Theorem does not apply. Even with this non-majority rule, the shadow of the median member of the Court is still likely cast over the agenda decisions, as a forward thinking minority coalition of four would certainly try to avoid docketing cases that they are sure to lose.¹⁷

The creation of the majority opinion also may not be controlled by the median member of the Court. Westerland hypothesizes that the majority opinion could reflect the preferences of the opinion writer, the Court median, or the median of the majority decision coalition, and Westerland's empirical tests suggest that the majority median likely controls the majority opinion.¹⁸ Westerland argues that this is to be expected in part because a majority coalition operates as an independent bargaining unit when creating majority opinions. Disagreement on the merits of a case precludes agreement on the majority opinion, which means that bargaining over the content of the majority opinion will only occur between Justices who agree on the outcome. The logic of the Median Voter Theorem still applies, but only to the subgroup of Justices who make up the majority coalition.

Absent any extra-institutional considerations, the merits decision should be driven by the median member of the Court. This is consistent not just with the Median Voter Theorem, but with the attitudinal model.¹⁹ The major insight of the attitudinal model is that the votes of the Justices are ideologically driven: "Simply put,

Political Science Association 26-30 (demonstrating the importance of the median of the majority decision coalition, and not the median of the Court, in controlling the output of the majority opinion) (on file with the North Carolina Law Review).

16. ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 374-77 (5th ed. 1978).

17. GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 210-54 (1959) (examining forward-thinking strategies among the Justices).

18. Westerland, *supra* note 15, at 7-19.

19. See generally SEGAL & SPAETH, *supra* note 7 (explaining and applying the role of ideological values to an extensive range of Supreme Court behavior).

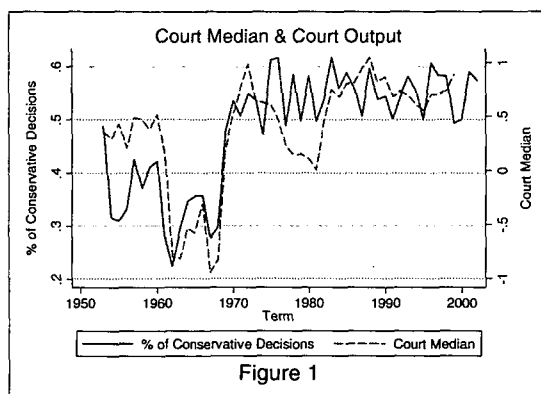
Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”²⁰ The development of exogenous preferences measures facilitated empirical tests of the attitudinal model, and the model performs remarkably well.²¹ If Justices have preferences over policy outcomes and if they sincerely vote according to their ideological preferences, then the Median Voter Theorem tells us that the median member of the Court should be driving the Court’s output. We use the Martin-Quinn scores to calculate the ideology of the median member of the Court and the United States Supreme Court database to derive the Court’s policy outputs.²² Figure 1, which graphs the location of the Court median and the percentage of conservative outcomes for each term, demonstrates this connection. As the location of the median becomes more conservative, a greater percentage of the Court’s cases result in conservative outcomes. Nevertheless, if extra-institutional considerations apply, the Court’s output will not be well-represented by the preferences of the median, thus limiting the scope of the Theorem.

20. *Id.* at 86.

21. For wholly exogenous preference measures, see Segal & Cover, *supra* note 4, at 560. The newspaper editorials used by Segal and Cover are exogenous as they only use editorials referencing Supreme Court nominees’ ideology that appear prior to their serving on the Court. *Id.* at 559–60. For the success of the attitudinal model as an explanatory model of Supreme Court decisionmaking on the merits, see SEGAL & SPAETH, *supra* note 7, at 312–26, who find, among other things, a correlation of 0.76 between the Justices’ ideology and their votes in civil liberties cases.

22. We use the median as calculated with the dynamic Martin-Quinn scores. See Martin & Quinn, *supra* note 4. Martin and Quinn use a Bayesian measurement model to estimate the ideal points of Supreme Court Justices from 1953–1999. See *id.* at 137–45 (providing an explanation of the specification and estimation of their model).

The Supreme Court Database is a multi-user database that provides detailed data, including ideological direction, on Supreme Court decisions since the start of the Warren Court. To calculate the percentage of conservative decisions, we use the Supreme Court Database’s liberal-conservative outcome variable if the unit of analysis is the case citation or a split vote case (ANALU = 0 or 4) and for all orally argued cases that result in an opinion (DEC_TYPE = 1, 6, or 7). For an explanation on coding liberal-conservative outcomes in Supreme Court decisions, see HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATA BASE, 1953–2003 TERMS 55–58 (2004), available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (on file with the North Carolina Law Review).



II. THE SEPARATION-OF-POWERS MODEL

A. Statutory Model

The so-called separation-of-powers models examine the degree to which courts must defer to legislative majorities in order to prevent overrides that result in outcomes worse than what the Court might have achieved through more sophisticated behavior.²³ All such models require placing the Court's policy output in ideological space, using the median member's preferences to do so. In the landmark work, Marks carefully examined the placement of preferences in Congress that prevented *Grove City College v. Bell*²⁴ from being overturned prior to 1986.²⁵ Consistent with the attitudinal model, Marks claimed that the Justices simply voted their ideal points. Building on his work, subsequent "neo-Marksist" theorists argued that if the Court exercised rational foresight, it would not always choose its ideal point.²⁶ Epstein, Knight, and Martin phrase the

23. See generally SEGAL & SPAETH, *supra* note 7, at 326–49 (testing the separation-of-powers model on the Supreme Court's statutory decisions); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (applying the separation-of-powers model to civil rights cases); BRIAN A. MARKS, A MODEL OF JUDICIAL INFLUENCE ON CONGRESSIONAL POLICYMAKING: *GROVE CITY COLLEGE V. BELL* (The Hoover Institution, Working Papers in Political Science, Working Paper No. P-88-7, 1988) (examining the interrelationship between judicial decisions and congressional reaction in the *Grove City* case).

24. 465 U.S. 555 (1984).

25. MARKS, *supra* note 23, at 29 (noting that Senate Judiciary Committee Chair Orrin Hatch (R, UT) kept override legislation bottled up in his committee).

26. See, e.g., John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 17–19 (1990) (examining the circumstances under which courts must defer to congressional preferences); Gely & Spiller, *supra* note 8, at 284–95 (presenting case studies of the separation-of-powers model).

motivating assumption behind separation-of-powers models as simply as possible: “why would Justices who are policy-preference maximizers take a position they know Congress would overturn?”²⁷ Separation-of-powers models are predicated on the ability of Congress to respond to the Court’s decisions. Because the Court has consistently ruled that only a constitutional amendment can override its constitutional decisions,²⁸ advocates of the separation-of-powers models have typically limited the application of such models to statutory cases before the Court. We present a standard representation of these models as applied to the Court’s statutory decisions.

Consider the example in Figure 2, where the median Justice, representing the Court, must decide a case in two-dimensional policy space.²⁹ The game is played as follows. First, the Court makes a decision in (x_1, x_2) policy space. Second, the House and Senate can override the Court decision if they agree on an alternative. H , S , and C represent the ideal points of the House, Senate, and Court median, respectively. The line segment HS represents the set of irreversible decisions. That is, no decision on that line can be overturned by Congress, because improving the position of one chamber by moving closer to its ideal point necessarily worsens the position of the other. Alternatively, any decision off of HC , call it x , can be overturned, because there will necessarily be at least one point on HC that both H and C prefer to x . Imagine, for example, a Court decision at the Court’s ideal point, C .³⁰ The arc I_s represents those points where the Senate is indifferent to this decision. Obviously, the Senate prefers any point inside the arc to any point on the arc (or, obviously, outside the arc). Similarly, I_h represents those points where the House is indifferent to the Court’s decision. Thus, both the House and Senate prefer any point between $S(C)$ (the point on the set of irreversible decisions where the Senate is indifferent to the Court’s decision) and $H(C)$ (the point on the set of irreversible decisions where the House

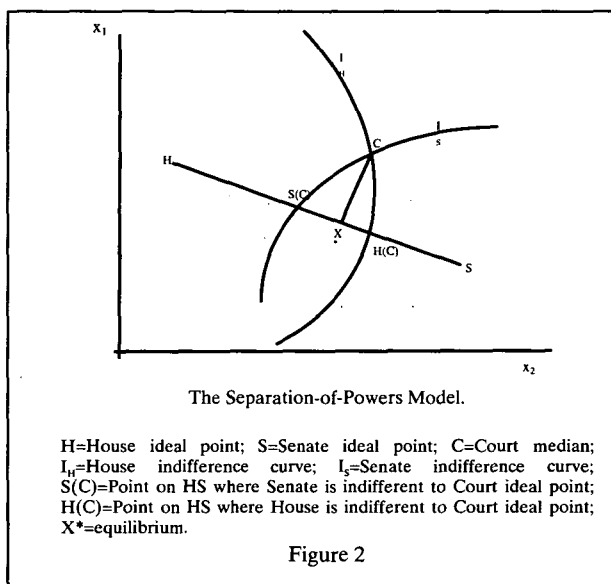
27. Epstein et al., *supra* note 10, at 591.

28. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (rejecting congressional attempts to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966)); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (rejecting congressional attempts to impose a compelling interest standard on free exercise cases).

29. For illustrative purposes, we explain the initial statutory model in two-dimensional policy space. The substantive result of the model, that the Court chooses the spot closest to its ideal point that cannot get overturned, is the same in the one-dimensional case. For an example of the one-dimensional case, see Ferejohn & Shipan, *supra* note 26, at 9–12.

30. This specification of the model is simply for illustrative purposes, and thus ideal points for all actors are purely hypothetical.

is indifferent to the Court's decision) to a decision at C.



What, then, should a strategic Court do in this situation? If the Court rules at its ideal point (or indeed any place off the set of irreversible decisions), Congress will overturn the Court's decision and replace it with something that is necessarily worse from the Court's perspective. For example, if the Court rules at C, then Congress will respond someplace between $S(C)$ and $H(C)$. The trick for the Court is to find the point on the set of irreversible decisions that is closest to its ideal point. By the Pythagorean Theorem, it accomplishes this by dropping a perpendicular onto the line. Thus, rather than voting sincerely at C and ending up with a policy someplace between $S(C)$ and $H(C)$, the Court rules at X^* , the point between $S(C)$ and $H(C)$, indeed, the point between H and S, that it prefers the most. This is the equilibrium result for statutory cases.

The separation-of-powers games differ in a variety of details, such as the number of issue dimensions, the number of legislative chambers, the influence of committees, the existence of presidential veto, etcetera.³¹ But regardless of the specific assumptions made, these models assume that the median member of the Court will construe legislation as close to her ideal point as possible without

31. See SEGAL & SPAETH, *supra* note 7, at 103–10, 326–51 (providing a detailed discussion and review of this work).

getting overturned by Congress. As logical as this appears, there still exist several theoretical problems with separation-of-powers models as applied to statutory cases. Congress is generally assumed to have the last word: the Court acts, Congress reviews, and the game ends,³² even though the Court can readily review congressional overrides.³³ The models assume further that the Court has complete and perfect information about congressional preferences, which the Court uses to predict how Congress will act.³⁴ Finally, and most importantly, these models underestimate the difficulty of actually passing override legislation.³⁵

The seemingly most impressive quantitative support for the separation-of-powers models comes from Spiller and Gely, who find in their sophisticated econometric analysis that changes in the ideal points of relevant congresspersons influence Court decisions in the National Labor Relations Act cases to the same extent that changes in the ideal points of the Supreme Court do.³⁶ Unfortunately, their models for the most part fail to distinguish sincere from sophisticated behavior, and in the one model that does make the distinction, they fail to include a necessary control for the Justices' preferences that would have prevented severe statistical bias in their estimates.³⁷

Additionally, the scaling mechanism used by Spiller and Gely is worthy of more than a little scrutiny. Like all scholars in this field, they need to find a manner of placing judicial preferences and congressional preferences on a single scale. They accomplish this by allowing the computer to find the imputed ADA scores for the Court that best fit the empirical model, so that the median of a Court with *x* number of Democrats will be equivalent to a congressperson with an

32. See Ferejohn & Shipan, *supra* note 26, at 9–12; John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 276–77 (1992); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988*, 23 RAND J. ECON. 463, 465 (1992).

33. See Eskridge, *supra* note 23, at 636–38.

34. We should point out that congressional scholars are nowhere close to agreement on this point. For classic examples illustrating the difficulty of determining congressional preferences, see generally GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993) and Keith Kreihbel, *Where's the Party?*, 23 BRITISH J. POL. SCI. 235 (1993).

35. For a full discussion, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and the Courts*, 91 AM. POL. SCI. REV. 28, 32–33 (1997).

36. Spiller & Gely, *supra* note 32, at 489.

37. SEGAL & SPAETH, *supra* note 7, at 332–40 (discussing the effect of statistical bias on the sincere behavior-sophisticated behavior distinction, in favor of falsely finding strategic behavior).

ADA score of y .³⁸ What is notable about this technique, though, is that it allows the imputed ADA score for a given Court to change dramatically given different specifications of congressional behavior. For example, in their Floor Median model,³⁹ the median Supreme Court Justice's imputed ADA score is equal to $-46.13 + 1.9 \times \text{SCDEM}$, where SCDEM equals the percent of Democrats on the Court. Thus, this model finds a significant impact for Congress by giving the Court median during the later Vinson Court (Reed or Minton) an imputed ADA score of 122.97, a fantastic result given that ADA scores theoretically range from 0 (most conservative) to 100 (most liberal) and that Ted Kennedy (D-MA), considered most liberal by many, only averages a 95.⁴⁰ So too, the imputation finds the post-Douglas Burger Court median (Stevens) to have an imputed ADA score of 16.57.⁴¹ Alternatively, in the Committee Median model,⁴² the model overemphasizes Congress's impact by giving the Reed/Minton Vinson-Court median an imputed ADA score of 109.71, and the Stevens Burger-Court median an imputed ADA score of 30.75.⁴³

Beyond the far from conclusive Spiller and Gely study, evidence for the statutory separation-of-powers models has been difficult to find. Segal's research findings have consistently found no support for the statutory separation-of-powers model.⁴⁴ Marshall's and

38. ADA scores are one of many ideological report card scores given to Congressmen by interest groups, in this case, the liberal Americans for Democratic Action. Scores are based on the percentage of time members of Congress vote "correctly" in the specific roll calls selected by ADA. See J. MICHAEL SHARP, *THE DIRECTORY OF CONGRESSIONAL VOTING SCORES AND INTEREST GROUP RATINGS XI-XII* (1988); see also Spiller & Gely, *supra* note 32, at 478 (describing the author's coding of the Justices by the Justices' own party affiliations).

39. In the Floor Median Model, the median member of the legislative chamber is assumed to drive legislative output.

40. See SHARP, *supra* note 38, *passim* (providing ADA scores). Note that Spiller and Gely code Frankfurter as a Democrat for purposes of calculating the Court's percent Democratic. See Spiller & Gely, *supra* note 32. The imputed ADA score for the Vinson Court is derived using the Spiller & Gely floor median formula and substituting 88.9 for the Supreme Court's percent democratic during the Vinson era. See *id.* at 470.

41. The imputed ADA for the Burger Court is derived using the Spiller & Gely floor median formula and substituting 33.3 for the Supreme Court's percent democratic during the Burger era. See Spiller & Gely, *supra* note 32, at 470.

42. In the Committee Median Model, the median member of the committee is assumed to drive legislative output.

43. These data are derived by using the Spiller & Gely committee median formula and multiplying the Supreme Court's percent democratic during the Vinson (88.9) and Burger (33.3) eras and then subtracting 15.78. See Spiller & Gely, *supra* note 32, at 468.

44. SEGAL & SPAETH, *supra* note 7, at 344-49 (finding no influence of congressional preferences on Supreme Court statutory decisions in civil liberties cases under a variety of different specifications).

Broscheid's work turns the Downsian space of the typical separation-of-powers model into the binary "Schubertian" space that arguably better represents judicial decisions.⁴⁵ They nevertheless find no support for the separation-of-powers model.⁴⁶ Martin uses a two-level hierarchical probit model to test the influence of the separation-of-powers model on the Justices' behavior.⁴⁷ Despite ample evidence that Court preferences strongly influence congressional decisions, Martin finds no significant impact of either Congress or the President on the Court's statutory decisions.⁴⁸ Two studies examining narrower sets of United States Supreme Court decisions find no support for separation-of-powers hypotheses: McGuire finds that strategic behavior does not account for the Supreme Court's support for the Solicitor General,⁴⁹ while Spriggs and Hansford find that congressional preferences have no impact on the Court's decision to overturn precedent.⁵⁰ Dealing explicitly with the problem of how to compare ideology scores between Congress and the Court, Clinton's work attempts to handle the scaling problem between Supreme Court and congressional preferences by using the Presidency as a bridge between them.⁵¹ Under an extraordinary array of tests, he finds no

45. See Melissa Marschall & Andreas Broscheid, *A NeoMarxist Model of Supreme Court/Congress/President Interaction: The Civil Rights Cases, 1953–1992* 6 (Dec. 6, 1995) (unpublished manuscript, on file with the North Carolina Law Review). Downsian space treats policy decisions by the Court on a continuum, as in Figure 2. Schubertian space treats policy decisions by the Court as binary, as in reverse/affirm.

46. Marschall & Broscheid, *supra* note 45, at 21–22.

47. Andrew D. Martin, *Decision Making on the Supreme Court and the Separation of Powers* 9 (Sept. 16, 1998) [hereinafter Martin, *Decision Making on the Supreme Court*] (unpublished manuscript, on file with the North Carolina Law Review). The two-level hierarchical probit model employed by Martin accounts for the theoretical expectation that the Justices' decisions will vary depending on the strategic context (meaning the relative alignment of congressional and executive preferences). The model allows the effects of the independent variables to vary depending on the political context in which the decision is being made. See also Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 368–79 (2001) (using similar analysis).

48. See Martin, *Decision Making on the Supreme Court*, *supra* note 47, at 28 (finding no congressional influence in the Court's constitutional decisions, but finding presidential influence consistent with the well-established impact of the Solicitor General); see also SEGAL & SPAETH, *supra* note 7, at 411–12 (discussing the impact of the Solicitor General on the Supreme Court's decisions on the merits).

49. See Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 522 (1998).

50. James F. Spriggs, II, & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1101, 1103 tbl.1 (2001).

51. See Joshua Clinton, *An Independent Judiciary? Determining the Influence of Congressional and Presidential Preferences on the Supreme Court's Interpretation of Federal Statutes, 1953–1995*, at 10–12 (Aug. 1998) (unpublished manuscript, on file with

support for the separation-of-powers model.⁵² Bergara, Richman, and Spiller correct for the errors noted above in the Spiller and Gely article,⁵³ but when they do they find significant results in the opposite direction in three out of their four models.⁵⁴ An analysis of congressional overrides by Hettinger and Zorn suggests it would be counterproductive for the Court to consider congressional preferences, because Supreme Court decisions outside of the congressional set of irreversible decisions are no more likely to be overridden than decisions that fall into the set.⁵⁵ Why this might be is subject to speculation,⁵⁶ but regardless, deferring to Congress makes little sense if such deference does not decrease the likelihood of override. The obvious implication of this work is that sincere behavior may almost always be the rational alternative for the Court in statutory cases. Finally, we turn to Eskridge, one of the most prominent separation-of-powers advocates, who wrote that:

The Court that decided *Patterson* and the other 1989 decisions was producing results that did not reflect current legislative preferences. However, this was also true of the Warren Court (which thrived on such independence and never got overruled) and was often true of the Burger Court (which in almost every instance was promptly overruled). Therefore, again, ignoring current legislative preferences is nothing new. Finally, the Rehnquist Court approached *Patterson* and the other 1989 decisions from a perspective substantially more conservative than that of Congress. But that has been true of the Court since 1972, when Justices Rehnquist and Powell started voting.⁵⁷

Et tu, Eskridge?

While the foremost proponent of the statutory separation-of-powers model apparently finds reason to doubt the model, other proponents accept not just the statutory model, but extend the argument to constitutional cases as well. The constitutional model

the North Carolina Law Review).

52. See *id.* at 21.

53. See *supra* notes 36–43 and accompanying text.

54. Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 267 (2003).

55. Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. (forthcoming 2005).

56. One relevant factor may be that, in even-numbered years at least, the contemporary Congress will soon be replaced.

57. Eskridge, *supra* note 23, at 683.

appears theoretically more problematic as it is more difficult for Congress to overturn the Supreme Court's constitutional decisions than it is for Congress to overturn the Court's statutory decisions. The Court, knowing this, should have much more leeway to decide as it pleases. Nevertheless, scholars have put forward a number of factors that could constrain the Court even, or especially, in constitutional cases.⁵⁸

B. *Constitutional Constraints*

The separation-of-powers argument as applied to the Court's constitutional decisions relies on the same logic as the statutory models: the wish to avoid decisions that induce responses that damage the Court and/or its decisions. But since Congress and the President arguably cannot directly overturn the Court's constitutional decisions, scholars have had to look for other, less direct ways that Congress or the President can respond. Rosenberg provides a list of ten options, all which he argues have been attempted by either Congress or the President or by both at some point in American history.⁵⁹ This list includes: (1) using the Senate's judicial confirmation power; (2) enacting constitutional amendments; (3) impeaching; (4) withdrawing the Court's appellate jurisdiction; (5) altering the selection and removal process; (6) requiring super-majorities for the Court to declare legislation unconstitutional; (7) allowing appeal from the Supreme Court to another body; (8) removing the power of judicial review; (9) slashing the budget; and (10) altering the size of the Court.⁶⁰ Further, scholars argue that ordinary legislation can be an effective response to the Court's constitutional decisions,⁶¹ contending that the Court is actually more constrained in constitutional decisions because the costs associated with these types of responses are incredibly high.⁶² Epstein et al. argue that successful attempts to override the Court's constitutional decisions are very costly to the Court and that even unsuccessful

58. See, e.g., Epstein et al., *supra* note 10, at 58 (listing the ways that Congress can constrain the Court in constitutional cases); Freidman & Harvey, *Electing the Supreme Court*, *supra* note 13, at 126–30 (same).

59. See Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376–77 (1992).

60. *Id.* at 377.

61. See Epstein et al., *supra* note 10, at 596–97; James Meernik & Joseph Ignagni, *Judicial Review and the Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447, 450–52 (1997).

62. See Epstein et al., *supra* note 10, at 598 (discussing damage to the Court's authority and legitimacy).

attempts damage the Court's legitimacy, which in turn damages the Court's ability to influence policy effectively.⁶³ Cross and Nelson concur, arguing that the only thing Congress can do to the Court in statutory cases is to reverse the Court's decision, which leaves the Court no worse off than if it had taken Congress's preferred path from the beginning.⁶⁴ But in the constitutional realm:

[T]he courts are more likely to be responsive to other sources of influence, ranging from threats of impeachment to controls on jurisdiction to budgetary pressures to reluctance to implement the spirit or the letter of the courts' opinions. Cumulatively, these influences are potentially significant and may substantially impact judicial decisionmaking.⁶⁵

A tempting response to the institutional mechanisms that Congress does have over the Court—impeachment, appellate jurisdiction, etcetera—is to claim that these mechanisms are so rarely used that they could not possibly threaten the Court. But constitutional separation-of-powers theorists would counterclaim that that is exactly the point: the rarity of their use may be because the Court is effectively constrained. Rogers notes that while the rarity of congressional discipline of the Court may be because of an inability to do so effectively, it is also possible that “we do not observe justices being disciplined for their constitutional decisions because, as the [separation-of-powers] equivalent of nuclear war, the cost to them is so HIGH that they act strategically (to avoid) precisely that sort of devastating retaliation.”⁶⁶

The final constitutional separation-of-powers argument is that ordinary legislation is a legitimate response to the Court's legislation. Little is said about the ultimate success of such legislation, but Meernik and Ignagni seem to have empirical support for what they term the “coordinate construction” of the Constitution.⁶⁷ They model a two-step process: first, they model whether a legislative response was made to a Court's decision to strike legislation; second, they

63. See *id.* at 597.

64. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1437 (2001).

65. *Id.* at 1452–54.

66. Posting of Jim Rogers, ROGERS@politics.tamu.edu, to lawcourts-l@usc.edu (Mar. 2, 2002) (on file with the North Carolina Law Review). As we believe that the free and open exchange on listservs could be damaged by academic quoting of such exchanges, we note that this quote appears with the gracious permission of Rogers.

67. Meernik & Ignagni, *supra* note 61, at 448.

model whether that attempt was successful.⁶⁸ In 444 of the 569 instances that the Court struck down a federal or state law or an executive order between 1953 and 1990, no attempt to override was made.⁶⁹ In the second stage, forty-one of the 125 override bills passed, which meets their definition for a successful override.⁷⁰ Epstein and Knight note that "because Congress has in the past overridden the Court, the justices have reason to believe that the legislature will do so in the future, and this may be enough to cause them to, at the very least, pay some attention to its preferences."⁷¹ These points lead Epstein and Walker to conclude that the Court's constitutional decisions "will never be far removed from what contemporary institutions desire. . . . This does not mean, however, that the Court will never . . . strike down federal laws. Indeed, if preferences of the contemporary regime and of the Court support those weapons, the Court will feel free to deploy them."⁷²

Thus, while we remain skeptical about the impact of Congress on the Court's constitutional decisions, the arguments above suggest the need for further testing.

III. CONTINUING THE SEARCH FOR THE CONSTRAINED COURT

A. *Hypotheses*

Despite a wide-ranging body of research, convincing evidence that the Court is constrained by Congress in statutory cases remains elusive. Nonetheless, theoretical arguments continue to be made that the Court must act strategically in constitutional decisions, perhaps even more so than in statutory decisions.⁷³ Our purpose is to test whether ideological distance between the median of the Court and the House and Senate has any significant effect on the decision to declare federal legislation unconstitutional. Increasing ideological distance between the Court and Congress should make the Justices less likely to declare laws unconstitutional because of the fear of a congressional response. Such responses could be quite costly to the

68. *Id.* at 452.

69. *Id.* at 458.

70. *Id.*

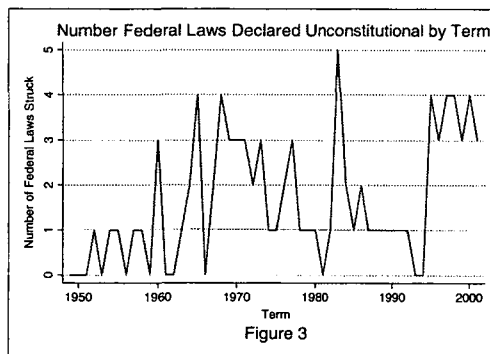
71. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 142 (1998).

72. Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in *CONTEMPLATING COURTS* 323-24 (Lee Epstein ed., 1995).

73. Cross & Nelson, *supra* note 64, at 1437; Epstein et al., *supra* note 10, 597-601; Friedman & Harvey, *Electing the Supreme Court*, *supra* note 13, at 126-30.

Court, and the risk such responses pose should make the Court less likely to exercise its power of judicial review. Thus, if decreasing ideological distance between the Court and Congress increases the frequency with which the Court declares laws unconstitutional, then the Court may be behaving strategically in the manner explored by Harvey and Friedman. They argue that the increase in the number of laws declared unconstitutional after 1994 is evidence that a strategic conservative Court finally found itself free to overturn legislation at will after the 1994 midterm elections.⁷⁴ We note, however, that this increased activism, though with a small lag, only came after the Court obtained a fifth vote for conservative activism with the appointment of Thomas in 1991.⁷⁵ We examine below whether the Court's recent activism is a response to changes in the Court's ideology vis-à-vis Congress or is due to changes in the Court median's position.

We test this version of the constrained Court hypothesis by examining how frequently the Court is willing to declare federal legislation unconstitutional. More specifically, our dependent variable is the number of laws declared unconstitutional for each term between 1949 and 2001, as reported in *The Supreme Court Compendium*.⁷⁶ Figure 3 shows the number of federal laws declared unconstitutional for each term during this time period. There appears to be a substantial jump in the number of laws declared unconstitutional in 1995, but note as well that the Court was fairly consistently striking federal legislation throughout the 1960s and 1970s.



74. Harvey & Friedman, *The Limits of Judicial Independence*, *supra* note 13, at 25–26.

75. THOMAS KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 201–03 (2004).

76. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 163–66 (3d ed. 2003).

The key for the constrained Court hypothesis is the relationship between the median member of the Court and Congress. Increasing ideological distance between the Court median and Congress should significantly reduce the number of laws declared unconstitutional, while decreasing ideological distance should increase the Court's willingness to strike federal legislation. Given our skepticism about this argument, we provide an alternative explanation for the number of federal laws declared unconstitutional. We argue that if the Court does not need to consider congressional preferences in constitutional cases, then the number of laws declared unconstitutional should be a function of changes in the ideological location of the median member of the Court. Any such findings, needless to say, must survive controls for other factors that might also influence that relationship. Such decisions may thus be a function of more general "activist" proclivities, which can be defined in many ways but for our purposes consist of the Court's inclination to strike state legislation.

Overall, then, our analysis speaks to three related questions. Are the Court's constitutional decisions structured by strategic considerations of congressional and presidential preferences? Alternatively, are these decisions simply a function of internal changes on the Court? If so, what types of changes result in more or fewer federal laws declared unconstitutional?

Before describing our independent variables and our theoretical expectations concerning their effects on the willingness of the Court to strike federal laws, we must tackle briefly a major methodological concern in all separation-of-powers tests: the comparability of preference measures.

B. Measuring Cross-Institutional Preferences

As we have seen in our review of the various separation-of-powers studies, a major hurdle in testing these models is the difficulty of creating ideological measures across different institutions that are directly comparable. Assumptions about the relationship between disparate scales will necessarily drive any substantive conclusion about inter-institutional relationships. Take as an example the use of spatial models to specify presidential strategy in the selection of Supreme Court nominees.⁷⁷ Bailey and Chang demonstrate quite

77. See Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 *passim* (1999). Spatial models place actors or policies in ideological space. Here, such models specify what types of nominees to the Court would be accepted or rejected by the Senate, given the relevant actors' ideological preferences. This involves identifying the

simply that any conclusion about whether Presidents consider Senate preferences when nominating Justices is possible given different assumptions about how to compare the preference measures of the actors involved in the decision.⁷⁸ If the preferences of the different actors cannot be aligned reliably along a common scale, then empirical tests designed to test such spatial theories will be inherently suspect. The substantive conclusions in any separation-of-powers test, therefore, are only as reliable as the scales used to measure preferences across institutions.⁷⁹

Various solutions to this problem have been implemented, but the most direct method is to derive preference estimates along a common scale for individuals across institutions. Fortunately, Bailey and Chang have developed such a method for estimating the preferences of the Court, Senate, and President.⁸⁰ While estimation is computationally intensive, the intuition is straightforward. Estimating preferences along a common scale requires “bridging” observations—individual cases in which actors from different institutions take positions.⁸¹ The idea is to take advantage of these observations in order to form a reference for the scales on which the preferences are to be estimated. In the context of estimating preferences of Presidents, Senators, and Supreme Court Justices,

ideological location closest to the nominating president that will result in a confirmed nominee.

78. See Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation*, 17 J.L. ECON. & ORG. 477, 478–80 (2001).

79. See *id.* at 479–80 (making the important point that it is not that the scales are necessarily incomparable, but rather, there is no way to know whether or not the scales can be compared).

80. Bailey & Chang, *supra* note 78, at 483–84; see also Michael Bailey, *Bridging Institutions and Time: Common Space Preference Estimates for Presidents, Senators, and Justices, 1946–2002*, at 2–12 (Sept. 2003) (describing the methodology used in the calculations) (unpublished manuscript, on file with the North Carolina Law Review).

81. Bailey uses positions taken by Senators on Supreme Court cases in the Congressional Record, in amicus briefs filed by Senators, and in Senate roll call votes dealing with Court decisions to bridge the Court and the Senate. To bridge the President and the Court, Bailey uses available presidential public papers for presidential statements on Court cases and Solicitor General amicus filings. Bailey uses Spaeth’s Supreme Court Database to code whether Justices’ decisions are liberal or conservative. Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953–2003 Terms* (Lexington, Ky.: Program from Law and Judicial Politics, University of Kentucky, 2004), available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (on file with the North Carolina Law Review); see also KEITH POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Nolan McCarty & Keith Poole, *Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986*, 11 J.L. ECON. & ORG. 282, 296–309 (1995) (describing applications of using bridging observations with Presidents and members of Congress).

Bailey and Chang use positions taken in Supreme Court cases in which solicitors general filed amicus briefs as a way to bridge Supreme Court Justices and Presidents.⁸² This provides a set of cases in which both Presidents and Justices take positions that in turn allows for the estimation of preferences across institutions along a common scale.

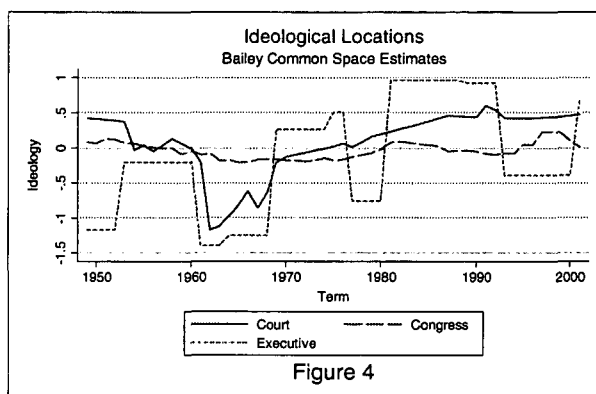
In our analysis, we use Bailey's updated Court-Senate-President scores as a starting point for common measures of ideology.⁸³ We begin with the Bailey estimates of the Court median, the Senate median, and the President. Because Bailey's scores have yet to include the House, we transform Poole's common space scores for the House into "Bailey space" with linear regression.⁸⁴ This involves first regressing the Bailey Senate estimates on the Poole common space Senate estimates. The parameters from the regression equation are then used to linearly transform Poole's House estimates on to the Bailey scale.⁸⁵ Finally, we calculated the midpoint between the House and the Senate to create a single ideological value for Congress. As a side note, Bailey allows the Court ideology scores to vary over time, while Senate and President estimates do not. Thus, the position of the Court median can vary over time without membership change. In Figure 4, we graph the ideology scores for the Court median, Congress, and the President. Figure 4 demonstrates that the Court has been more conservative than Congress since 1970. It is also important to note that there is less distance between the Court and Congress in the mid-1990s, but the Court remains more conservative than Congress during that time period.

82. Bailey and Chang, *supra* note 78, at 487.

83. We use the latest version of the scores, which we will refer to as "Bailey scores." For the newest set of measures, see Bailey, *supra* note 80, at 18–24. We thank Bailey for his generosity in making a preliminary version of his scores available to the authors. We wish to stress that Bailey's preference estimates used in this paper are provisional in nature, as the scores are currently in the process of being updated to include measures for the House.

84. Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954, 978–88 (1998). Scores updated through the 107th Congress are readily available on Poole's website. See The Voteview Website, www.voteview.com (last visited Feb. 9, 2005) (on file with the North Carolina Law Review). Also, like the Bailey scores, larger values in Poole's common space correspond to increasing conservatism.

85. This has become an increasingly popular solution for generating comparable estimates. See Hettinger & Zorn, *supra* note 55; Clinton, *supra* note 51, at 12; Harvey & Friedman, *The Limits of Judicial Independence*, *supra* note 13, at 17–18.



C. Specification

From these ideology scores, we are able to calculate our first two independent variables: the ideological distance of the Court median to Congress and the ideological distance of the Court median to the President. Obviously, these are central to the constrained Court hypothesis, and the theoretical expectations should at this point be quite clear. Recalling the insights of the Median Voter Theorem, the median member of the Court will be able to exert great control in all cases in which there is a simple majority rule decision to be made, as is the case when the decision is made on the merits.⁸⁶ A median member that strategically considers the preferences of the ruling regime, however, would not strike down a law given the threat of a costly reprisal. Therefore, our first independent variable is the ideological distance between the median member of the Court and Congress. If the Court strikes down fewer laws as ideological distance between the two branches increases, then we have evidence that the Court considers congressional preferences in its constitutional decisions. We also calculate the distance between the Court median and the President. While most of the separation-of-powers models focus on the Court-Congress relationship, the constrained Court hypothesis extends to Court-President relations as well. The President, like Congress, has an array of possible negative responses to unpalatable Court decisions, even in constitutional cases,⁸⁷ and the Court may seek to avoid such responses from

86. See generally BLACK, *supra* note 1, at 16–18 (discussing majority voting generally); DOWNS, *supra* note 1, at 115–22 (demonstrating the median voter result in democratic elections).

87. See Epstein et al., *supra* note 10, at 598 (discussing the President's ability to detract from the Court's legitimacy); Rosenberg, *supra* note 59, at 377 (discussing the congressional and presidential tactics noted *supra* in Section II.B).

Congress and the President alike, insofar as those responses incur costs to the Court. These two variables provide a direct test of the constrained Court hypothesis.

Our next set of independent variables aims to test the unconstrained Court hypothesis. The unconstrained Court hypothesis suggests that changes in the location of the ideological position of the median member of the Court should determine how many laws per term the Court declares unconstitutional. As the ideological position of the median of the Court changes, so too will the cut point that determines whether a majority will strike a law as unconstitutional. For example, a federal law survives constitutional review if it is just to the right of the median member's cut point, yet that same law could be struck if the median of the Court is located just to the left of the median's cut point. Laws that were acceptable to the previous majority on the Court may no longer be supported by the new majority that is created as the median changes. Also, since the Court has almost complete discretion over the cases it decides, changes in the location of the Court median should have an immediate effect. Therefore, a change in the position of the median could result in an immediate increase in the number of laws declared unconstitutional, since the new Court will likely have little difficulty in selecting cases as vehicles to overturn legislation. From the unconstrained Court perspective, the number of laws per term that the Court declares unconstitutional is primarily a function of the change in the ideological composition of the Court. To test this hypothesis, we include as an independent variable the absolute value of the change from term to term in the location of the median of the Court.

There are good reasons to believe, though, that the direction of the change in the location of the median may be more important than just change itself. A central but much disputed tenet of the attitudinal model is that the liberal-conservative dimension of judicial ideology matches up with a conventional understanding of those terms.⁸⁸ The attitudinal model argues that judicial ideology is not arrayed along dimensions unique to judges.⁸⁹ Conservatism, which can be associated with a desire for less federal regulation, could mean that increasing conservatism on the Court should lead to more federal

88. See EPSTEIN ET AL., *supra* note 76, at 230 tbls. 3-7 (discussing liberal judicial decisions as pro-civil rights, pro-individual against the government in First Amendment and criminal procedure cases, and pro-privacy in privacy cases); SPAETH, *supra* note 22, at 55-58.

89. *Id.*

laws being declared unconstitutional. Conversely, there is a long standing assumption that liberal judges are more willing to strike down legislation.⁹⁰ While there have been important attempts to make careful distinctions between different types of activism,⁹¹ a conventional understanding of the concept still includes the willingness of a judge to strike down laws as unconstitutional. Activism on the Court has seemed to refer to a liberal Court's readiness to use the power of judicial review to strike down legislation.⁹² The label "liberal activist judge" may be more than conservative invective, and there may in fact be an empirical basis for the continuing association of liberalism with this type of activism.⁹³

Because direction of change may matter, we estimate an alternative model with the raw value, rather than the absolute value, of change in the ideological position of the median member of the Court. For the Bailey measures, larger scores reflect increasing conservatism, so positive values of the change in the Court median reflect increasing conservatism on the Court, while negative values of change mean the Court becomes more liberal. Therefore, a positive, significant coefficient on the raw value of Court change would suggest that increasing conservatism results in more laws declared unconstitutional and increasing liberalism results in fewer laws declared unconstitutional. A negative coefficient on the raw value of change means that more laws will be struck as the Court becomes more liberal. The specification of a model with the raw value of change allows us to test whether or not the direction of ideological change matters by providing a comparison with the absolute change specification and also allows us to evaluate long-standing claims about the nature of ideology and activism on the Court.

We include one additional independent variable that is also potentially related to activism on the Court. It could be that there is a level of willingness to strike down legislation that is unrelated to both the Court's relationship to Congress and the President and to changes in the location of the median member of the Court. Some courts may, all else being equal, simply have a greater proclivity to strike

90. KECK, *supra* note 75, at 183-86.

91. See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 238-39 (1983).

92. *Id.* at 237-38.

93. See generally RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977) (decrying the extensive liberal activism of the Warren Court); Robert H. Bork, *Activist Judges Strike Again*, WALL ST. J., Dec. 22, 1999, at A18 (decrying liberal judicial activism).

legislation.⁹⁴ To measure this possible latent activism, we use the number of state laws declared unconstitutional per term.⁹⁵

D. Estimation and Results

Because our dependent variable is an event count (i.e., the number of times an event happens per specified time period) and therefore is not normally distributed, Ordinary Least Squares (OLS) regression is generally inappropriate.⁹⁶ We therefore estimate a series of different event count models along with OLS regression.⁹⁷ If the

94. See, e.g., Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800–1973*, in STEPHEN C. HALPERN & CHARLES M. LAMB, *SUPREME COURT ACTIVISM AND RESTRAINT* 103 (1982) (examining the extent of judicial activism over time).

95. As with counting the number of federal laws declared unconstitutional, we rely on EPSTEIN ET AL., *supra* note 76, at 167–93 & tbl. 2-6.

96. OLS, the most basic regression technique, minimizes the sum of squared errors when fitting regression models, but is inappropriate under many different conditions, including event counts, where the error term rarely meets the assumption of a normal distribution. See GARY KING, *UNIFYING POLITICAL METHODOLOGY* 122 (1989) (explaining the potential problems with using OLS with count data); Gary King, *Statistical Models for Political Science Event Counts: Bias in Conventional Procedures and Evidence for the Exponential Poisson Regression Model*, 32 AM. J. POL. SCI. 838, 845–46 (1988) [hereinafter King, *Statistical Models*]. Poisson regression is appropriate for count data because a dependent variable that can be assumed to follow a poisson distribution will have nonnegative, whole values. King, *Statistical Models, supra*, at 841–42.

97. There are also issues raised by the potential dynamics that may be inherent in our time-series data. We will not focus on dynamic specifications for several reasons. First, all of the tests we conducted (Dickey-Fuller, Augmented Dickey-Fuller, and KPSS) to determine whether the dependent variable is generated by a long-memory process lead us to conclude that the series is stationary and not generated by a long-memory process. An examination of the ACF graphs suggest there may be some slight autocorrelation in our data, however. To test whether a dynamic specification would change any of the inferences we present, we estimated an AR (1) model with a lagged dependent variable. This estimation assumes the dependent variable is normally distributed, but the similarity between the non-dynamic OLS and event count models we estimate suggest that this is an acceptable specification for illustrative purposes. The lagged dependent variable is positive and significant in the AR (1) model, but more importantly, all of the rest of the substantive results from the non-dynamic specifications hold in this model. The significance of the lagged dependent variable suggests there is a positive linear trend over time. The lagged dependent variable is not as direct of a test of either the constrained or unconstrained Court hypothesis, but the finding that overturning laws in the previous term leads to slightly more laws being overturned in the next term is hard to reconcile with the constrained Court hypothesis. Further, we estimated the same model with the Prais-Winston estimator, which is a generalized least squares, rather than maximum likelihood, estimator to estimate a model with a first order autoregressive error term. This yields identical estimates to the maximum likelihood model. For interested parties, all of these results are available upon request. We should note that two recent estimation techniques for event count time series data have been introduced in the political science literature. See Patrick T. Brandt & John T. Williams, *A Linear Poisson Autoregressive Model: The Poisson AR (p) Model*, 9 POL. ANALYSIS 164, 164–66 (2001); Patrick T. Brandt, John T.

mean and variance of the process being modeled are equal, then a poisson regression model is appropriate. In practice, unobserved heterogeneity or possible contagion effects will cause the conditional variance to be larger than the conditional mean, in which case poisson estimates remain consistent but the standard errors will be too small.⁹⁸ This increases the danger of making incorrect inferences since, under these circumstances, poisson regression is (inappropriately) more likely to find significant effects among the independent variables. The negative binomial regression model relaxes the restriction that the mean and variance are equal and provides a solution by introducing an estimated dispersion parameter.⁹⁹ We present the OLS, poisson, and negative binomial results in Table 1.

Table 1

EXPLAINING THE NUMBER OF FEDERAL LAWS DECLARED UNCONSTITUTIONAL

Independent Variable	OLS		Poisson		Neg. Binomial	
Court/Congress Distance	-0.41 (0.72)	-0.22 (0.71)	-0.27 (0.44)	-0.23 (0.39)	-0.28 (0.44)	-0.24 (0.39)
Court/Executive Distance	-0.55 (0.51)	-0.46 (0.48)	-0.35 (0.27)	-0.24 (0.34)	-0.37 (0.35)	-0.25 (0.34)
# of State Laws Unconstitutional	0.01 (0.03)	0.01 (0.03)	0.01 (0.02)	0.01 (0.02)	0.01 (0.02)	0.01 (0.02)
Change in Court Median (absolute)	-1.40 (1.03)	-----	-1.17 (1.10)	-----	-1.20 (1.09)	-----
Change in Court Median (raw)	-----	2.16*** (0.75)	-----	1.78*** (0.59)	-----	1.80*** (0.62)
Constant	2.13*** (0.62)	1.92*** (0.58)	0.83** (0.36)	0.63* (0.33)	0.84** (0.36)	0.63* (0.34)
alpha (Dispersion Parameter)					0.07 (0.11)	0.03 (0.10)
Log Likelihood			-84.811	-82.917	-84.667	-82.895
Wald χ^2			3.12	13.20**	3.18	12.16**

N = 52. Robust Standard Errors in ()

*p ≤ .10; ** p ≤ .05; *** p ≤ .01

Williams, Benjamin O. Fordham, & Brian Pollins, *Dynamic Modeling for Persistent Event-Count Time Series*, 44 AM. J. POL. SCI. 823, 824 (2000). The model suggested in Brandt et al. (2000) is only appropriate for long-memory data processes. The model suggested in Brandt and Williams (2001) is potentially more useful, but not necessarily so. With data with considerably more autocorrelation than is present in our data, Brandt and Williams fail to find any meaningful distinctions between a standard poisson model and their PAR (p) model. This leads Brandt and Williams to the conclusion that, "event count time series models such as the PAR (p) may not change the substantive interpretations of Poisson or other event count regressions." Brandt & Williams, *supra*, at 180.

98. J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 221-30 (1997).

99. Otherwise, the negative binomial model is the same as the poisson model.

The first thing to note in Table 1 is the consistency of the results; the conclusions that follow clearly do not depend on the different modeling choices. The first substantive point from these results is the complete lack of support for the hypothesis that ideological distance between the Court and Congress and the President constrains the Court's constitutional decisions. In all specifications, the ideological distance between the Court and either Congress or the President has no significant effect on the numbers of laws declared unconstitutional, and neither distance measure remotely approaches conventional levels of statistical significance. Despite the prestigious list of scholars who have argued that Congress and/or the President constrain the Court's constitutional decisions, and noting that there may be other ways to test this relationship, we find no support for that argument in this analysis. The fear of a potentially costly reprisal from an ideologically divergent Congress or President is not enough to prevent the Court from striking down legislation.

As noted, Harvey and Friedman contend that the increase in the number of laws declared unconstitutional after 1994 is evidence that a strategic conservative Court found itself finally free to overturn legislation at will after the 1994 midterm elections.¹⁰⁰ At first glance, this may seem to be an enticing conclusion, yet the intuitive appeal is not matched with empirical support. This is less surprising given a more careful consideration of the assumption behind the Harvey and Friedman hypothesis that the distance between Congress and the Court median suddenly and drastically reduced after 1994. As Figure 4 shows, the Court and Congress moved closer together in ideological space in 1995, but the distance between the Court and Congress was still larger in 1995 than the mean difference over the time period for our data.¹⁰¹ Once this is considered, even the single point in time that seems to support the constrained Court hypothesis no longer fits easily into an explanation of strategic constitutional decisionmaking.¹⁰² Again, the unavoidable conclusion from our

100. See Friedman & Harvey, *Electing the Supreme Court*, *supra* note 13, at 138; Harvey & Friedman, *The Limits of Judicial Independence*, *supra* note 13, at 25–26.

101. The mean distance between Congress and the Court from 1949 to 2002 was 0.32. In 1995, the distance between the Court and Congress was 0.37 (down from 0.50 in 1994). It is also worth noting that by 2001, the distance between the Court and Congress was back to pre-1995 levels (0.46 in 2001). This change has not included a corresponding reduction in the number of laws per term declared unconstitutional.

102. As another test of the constrained Court hypothesis, we substituted ideological distance between the Court and Congress with the change in distance. Negative values mean the Court and Congress moved closer together, positive values that the institutions moved apart. Needless to say, the results in no way differ from the estimates that we

analysis is that there is simply no relationship between the ideological distance between the Court, Congress, and the President and the number of laws that the Court decides to overturn.

Our results do more than just fail to provide evidence for the constrained Court hypothesis. While the number of state laws declared unconstitutional has nothing to do with the number of federal laws struck,¹⁰³ change in the location of the median member of the Court does significantly increase the number of laws declared unconstitutional. When the absolute value of the change in the position of the median member of the Court is included in any of the models, there is no significant effect. The raw value of Court change, however, is significant. The positive sign on the coefficient means that as the Court becomes more conservative, it is more likely to strike down more federal laws as unconstitutional. Because of the insignificant dispersion parameter in the negative binomial regression, we interpret the poisson regression estimates. We use CLARIFY to estimate the predicted number of laws declared unconstitutional for particular values of Court change with the other independent variables held at their means.¹⁰⁴ Figure 5 graphs the predicted probability of the number of laws declared unconstitutional for the most liberal change observed in our data, the median value of change (which is a slight change in the conservative direction), and for the most conservative change observed in our data. For the largest change in the liberal direction in the location of the Court median, the predicted probability of having zero laws overturned is 0.72, while the probability of zero laws being overturned when the Court moves slightly in the conservative direction is only 0.19. For the most conservative value of change that we observe, the predicted probability that the Court overturns three or more laws is 0.66.¹⁰⁵ To

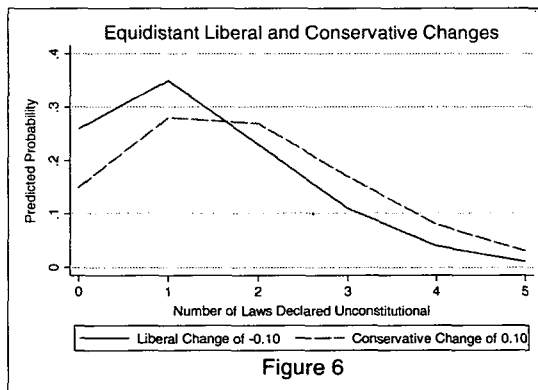
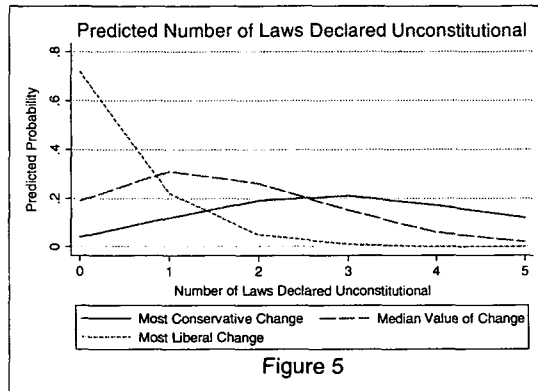
present.

103. We also explored the possibility that the number of state and federal laws declared unconstitutional were cointegrated. As previously mentioned, the number of federal laws declared unconstitutional is not a long memory series, which precludes the possibility of it being cointegrated with another series. Further, a simple regression of one series on the other and an examination of these residuals also indicate that there is no relationship between these two series.

104. CLARIFY is a software tool that uses a statistical simulation to provide readily interpretable quantities of interest for statistical models. See *Software by Gary King*, at <http://gking.harvard.edu/stats.shtml> (last visited Feb. 14, 2005) (on file with the North Carolina Law Review). For an extended discussion, see generally Gary King, Michael Tomz, & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000).

105. This is calculated simply by adding the probability of observing 0, 1, or 2 laws overturned and subtracting from 1. In terms of Figure 5, this predicted probability

compare changes of equal magnitude in different directions, we graph in Figure 6 the predicted probabilities for a change of 0.10 (conservative change) and of -0.10 (liberal change). Figure 6 shows that there is a greater chance of observing zero or one law overturned as the Court median moves 0.10 in the liberal direction compared to an equal change in the conservative direction, while a change of 0.10 in the conservative direction makes observing two or more laws overturned more likely than the corresponding liberal change.



CONCLUSION

The median Justice on the Court may or may not be crucial to the granting of certiorari and does not appear to be crucial to the writing of the majority opinion.¹⁰⁶ But given majoritarian voting rules

corresponds to the total area under the curve of the maximum conservative change from three laws to infinity.

106. See Westerland, *supra* note 15, at 30 (arguing that the median member of the

and the apparently unidimensional nature of Supreme Court decisionmaking, the median is crucial to the decision on the merits, including the decision as to whether to strike federal legislation. While the substantial weight of evidence rejects the notion that the Court median defers to Congress in statutory cases, many prominent scholars argue that the Court has separate reasons to defer to congressional preferences in constitutional cases.¹⁰⁷

While there may be many ways to test these findings, our tests, based on the number of federal statutes declared unconstitutional per year, reject the notion that distance between the Court and Congress and the executive is a factor in such decisions. Rather, this form of judicial activism appears to be the result of an increasingly conservative Court. Thus, these findings do reject the notion, for those who still need clarity on this issue, that judicial activism is a liberal phenomenon.

We do not believe, though, that the finding that the Court strikes down more laws as it becomes more conservative is inherent in the nature of Supreme Court-congressional relations. During the past fifty years, the federal government has taken the lead, among other things, in protecting civil rights¹⁰⁸ and providing social welfare benefits,¹⁰⁹ at least compared to the states. Were the federal government to move consistently in the opposite direction, liberal Courts might be more inclined to strike federal laws. Regardless, these decisions are now and will continue to be the result of the preferences of the Court's median Justice.

majority, not the median member of the Court, most influences the writing of the majority opinion).

107. See, e.g., EPSTEIN & KNIGHT, *supra* note 71, at 57 (describing the interplay between outside forces and the Supreme Court); Epstein et al., *supra* note 10, at 600–01 (same); Harvey & Friedman, *The Limits of Judicial Independence*, *supra* note 13, at 3–8 (same).

108. See, e.g., the Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000 (2000) (providing that all persons, regardless of race, shall have equal rights under the law).

109. Examples include the Medicare and Medicaid programs, which are both part of the Social Security Act amendments of 1965. See 42 U.S.C. § 1395x (2000).