

The Limits of Judicial Independence:
The Supreme Court's Constitutional Rulings, 1987-2000

Anna Harvey
Associate Professor
Department of Politics
New York University
726 Broadway, 7th Floor
New York, NY 10003
212-998-3709 (phone)
212-995-4184 (fax)
anna.harvey@nyu.edu

Barry Friedman
Professor of Law
NYU School of Law
40 Washington Square South
Room 317
New York, NY 10012
212-998-6293 (phone)
barry.friedman@nyu.edu

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A central empirical debate in the field of judicial politics is whether U.S. Supreme Court Justices are constrained by Congress in their statutory and constitutional decisions. To date no study has found evidence of congressional constraint in constitutional decisions. We suggest that the predominant failure of researchers to find evidence in support of congressional constraint is due at least in part to the selection bias inherent in the most commonly used data, namely Justices' votes on the merits in cases before the Court. We propose a statute-centered rather than a case-centered analysis, following all congressional laws enacted between 1987 and 2000. We find, across a variety of legislative models, that the probability that a law is ruled unconstitutional during this period is very strongly related to the degree of constraint imposed on the Court by the ideological composition of Congress. We find in particular that the probability that the Rehnquist Court would strike an average congressional law rose between six to fifteen times as a result of the 1994 congressional elections, depending on the legislative model used.

1 Introduction

A central empirical debate in the field of judicial politics is whether U.S. Supreme Court Justices are constrained in their decisions by the policy preferences of federal elective office holders (i.e., the members of Congress and the President). This debate has focused almost exclusively on the Court's statutory decisions, as a general consensus appears to favor the hypothesis that the Court is wholly unconstrained in its constitutional decisions. Few studies have found any evidence supporting the hypothesis of a constrained Court in statutory decisions. No study has found any evidence of congressional constraint in constitutional decisions.

We propose that the uniform failure of researchers to find evidence of a congressionally constrained Court in constitutional cases may be the result of a fairly simple yet enormously consequential methodological problem: a failure to take account of the selection bias introduced by using as data only the sample of cases accepted for review by the Court.¹ If the hypothesis of a constrained Court is true, that is, then the Justices will have few incentives to accept for review cases which challenge congressional laws that the Court's median Justice anticipates cannot be struck in the current political environment. By extension, litigants will have few incentives to challenge such laws in that context. Both processes may result in a sample of cases being heard by the Court each Term whose outcomes will systematically understate the Court's responsiveness to the elective federal branches.

We offer a novel solution to this problem, namely a statute centered rather than a case centered analysis. That is, we take as our sample all laws enacted by Congress between 1987 and 2000, and use a grouped event history model to track their fate through the Rehnquist Court's 2000 October Term. Using a variety of models of the legislative process, we find striking evidence for the proposition that the Court is in fact constrained by congressional preferences in its constitutional decisions. We conclude with thoughts on the broader relevance of our findings.

2 The Theoretical Debate

Our empirical study is situated within an ongoing debate about whether the structure of American political institutions constrains Supreme Court decision-making. The question is this: do the powers of the elective branches of government provide an incentive for Supreme Court Justices to be attentive to the preferences of elected officials?

Some argue that certainly in statutory cases the Court has clear incentives to be mindful of congressional and presidential policy preferences (Gely and Spiller 1990, Eskridge 1991, Spiller and Gely 1992, Ferejohn and Weingast 1992, Bergara et al 2003). If there is a statutory interpretation that the pivotal members of Congress prefer to a judicial interpretation, they can enact that interpretation following the Court's ruling. For this reason, there may well be situations in which the Court is better off issuing a statutory interpretation that is not the preferred interpretation of the Court's median Justice, but is both unlikely to be overturned by a sitting Congress, and is preferable to the interpretation which would be enacted by that Congress were it to act. By taking account of congressional preferences, that is, the Court can forestall congressional action that would move the eventual outcome further from that preferred by the Court's median Justice.

The case for a constrained Court in statutory cases has been challenged by those who contend that, for a variety of reasons, the Congress is unlikely to be effective in restraining the Court from enacting its most preferred statutory interpretations (Rohde and Spaeth 1976, Segal 1997, Segal and Spaeth 2002). Several empirical studies have been conducted on this question. The evidence is mixed, though perhaps the preponderance of the results favors the hypothesis of an unconstrained Court.²

The question of constraint in constitutional cases has received far less empirical attention, perhaps because of the theoretical assumption that constitutional structures leave the Supreme Court relatively immune from constraint in such cases (Segal and Spaeth 2002, 96-97). Under Article III of the Constitution, appointed Supreme Court Justices are given life tenure, and are protected from congressional salary reductions. In addition, constitu-

tional decisions cannot be overturned by a simple congressional statute: common wisdom is that only a constitutional amendment will alter the Supreme Court's constitutional determinations. These rules presumably give the Court protection from the elected branches in constitutional cases. Even those who advocate the hypothesis of a statutorily constrained Court typically agree that the Court is unlikely to be constrained in constitutional cases (Spiller and Gely 1992, Bergara et al 2003, although see Rogers 2001, Epstein, Knight and Martin 2001, and Martin 2003 for dissenting opinions).

Nonetheless, as many students of the Court have recognized, there are several institutional mechanisms that may provide the Justices with an incentive to take congressional preferences into account before making even constitutional decisions. For instance, the Congress may exercise considerable control over the Court's jurisdiction. The Court's original Article III jurisdiction is quite narrowly defined and fixed by the Constitution.³ But the Supreme Court's appellate jurisdiction, what Segal and Spaeth refer to as "the heart of its policy making capacity" (Segal and Spaeth 2002, 230) is subject under Article III to "...such Exceptions, and under such Regulations, as the Congress shall make." Under some interpretations, that gives the Congress substantial control over the Court's appellate jurisdiction (Friedman 1990).⁴

Congress' control over the lower federal courts is less discussed in the literature on constraint in constitutional cases, but this power also may provide an incentive for the Supreme Court to be attentive to congressional preferences. Both the number of lower federal courts and their jurisdiction arguably are entirely at the discretion of Congress (Friedman 1990; Segal and Spaeth 2002, 29-30). Congress might simply abolish lower federal courts and reconstitute them with entirely new judges (for examples see Nagel 1965, 926 fn. 3; Rosenberg 1992, 380-1; Friedman 1998, 740). Less dramatically, the Congress can add judgeships to the federal court system (including creating specialized federal courts), and tinker with the lower courts' jurisdiction. Both happen with some frequency (Landes and Posner 1976, 885; Mcnollgast 1995, 1648, 1663; Cross and Nelson 2001, 11; Segal and Spaeth 2002, 226 fn8, 227-228, 236, 236 fn 34). Finally, the President and the Senate can move with greater or

lesser alacrity to simply fill vacancies in the lower federal courts, and can of course appoint judges with policy preferences close to those of the pivotal office holders. All these mechanisms have the potential to affect the degree to which the Court can police the lower federal courts (McNollgast 1995, Segal and Spaeth 2002, 230).

The Congress also has considerable discretion concerning the Court's budget. Although the Congress cannot diminish the Justices' salaries, it can fail to raise their salaries to keep pace with inflation (Landes and Posner date, 885; Cross and Nelson 2001, 12). Similarly, Congress could refuse to appropriate sufficient funds for the Court's supporting personnel, including the clerks who are critical to the Justices' ability to manage their caseload (Cross and Nelson 2001, 12).

The Congress also has the authority to alter the number of Justices sitting on the Court. During the Civil War the size of the Supreme Court was for a time increased to 10, later reduced to 8, and then restored to 9 after Grant's assumption of the Presidency (Rosenberg 1992, 381; McNollGast 1995, 1632, Friedman 1998, 743, 746). The New Deal Congress elected in 1936 seriously considered Roosevelt's proposal to "pack" the conservative Supreme Court with new liberal members (Rosenberg 1992, 381, Friedman 1998 749-750).

The Congress also possesses the ability to remove Justices from the Court for "... Treason, Bribery, or other high Crimes and Misdemeanors" (Article III, Section I). The power to impeach (and convict), given that it is only vaguely defined, might be used to punish the federal judiciary for decisions with which Congress disagrees (Stone et al 1991; for examples see Friedman 1998, 740). At least some members of recent Congresses appear to be aware of their impeachment power, and refer to that power publicly when they are displeased with particular court rulings. Representative Tom DeLay has reportedly cultivated something of a reputation for judicial intimidation with his repeated impeachment threats (Cross and Nelson 2001, 10).

Finally, and perhaps most importantly, Congress also might simply refuse to implement or follow Court decisions, or provide insufficient funds for effective implementation (Rosenberg

1991, Friedman 1998, 742, Cross and Nelson 2001, 13). Many of the other weapons possessed by Congress are quite blunt, and their use can attract public attention and debate. But Congress can wage a lower-level war of attrition with regard to some constitutional decisions simply by failing to take heed of them.⁵

The foregoing opportunities for congressional action would seem to provide relatively powerful incentives for the Justices to be mindful of congressional policy preferences, even in constitutional cases. However, the few empirical studies which have looked at the Justices' decisions in constitutional cases have found no evidence of such constraint. Epstein, Knight & Martin (2001) provided descriptive evidence which appeared to support the proposition that moderate justices adjusted their voting behavior in constitutional civil rights cases to take account of the preferences of presidents and median Senators, but Martin (2003), using a more sophisticated methodology, found no such adjustment to congressional preferences in the same cases. Spriggs and Hansford (2001) also found no effect from either congressional or presidential preferences on the likelihood that the Court overturned constitutional precedent.

The lack of evidence for a constitutionally constrained Court may imply that the rival null hypothesis is correct. That is, despite the formal institutional constraints detailed above, the Court may be remarkably unconstrained in its actual decision-making (Rohde and Spaeth 1976, Segal 1997, Segal and Spaeth 2002). For example, public support for an independent judiciary may prevent the Congress from disciplining the Court (Friedman 2003; Friedman 2002, 47-63; Friedman 1998, 758-762; Segal and Spaeth 2002, 94, 112 fn 85). The sheer difficulty of legislating in the American institutional environment may constrain the Congress from reacting to Supreme Court decisions (Friedman 2002, 545-47; Segal and Spaeth 2002, 18-19, 94-95). The Court may have only very limited information about the policy preferences of elected officials, and therefore have only limited incentives to react to those preferences (Segal and Spaeth 2002, 348). Likewise, the Congress may have only limited information about most Court decisions, and therefore be unlikely to react to those decisions (Segal and Spaeth 2002, 348, Hettinger and Zorn 2003). Finally, because any given

sitting Congress will be of relatively short duration, the Court may have little to fear from that Congress (Segal and Spaeth 2002, 348).

On the other hand, constraint may exist in constitutional cases, and the lack of evidence of it may be the product of a shared and significant oversight in previous empirical studies: the failure to take into account the fact that the Court selects which cases it will hear in any given term. As noted earlier, all existing studies of the Justices' decision-making, in statutory as well as constitutional cases, take as data the final decisions on the merits in the cases chosen by the Justices themselves in any given Term. The problem with analyzing just the decisions in these merits decisions (or some subset thereof) is that the criteria by which those cases were selected for inclusion on the Court's docket may well have included a consideration of congressional and/or presidential policy preferences. The Court may refrain from granting certiorari in such cases because it can anticipate its own deferential response (Epstein and Knight 1998, 84, Cross and Nelson 2001, 1476). And strategic litigants seeking to have laws overturned may refrain from incurring the costs of challenging those laws if they anticipate the Supreme Court either will fail to grant review, or to overturn the law, because of a concern about the congressional reaction.⁶ Either or both of these processes could bias the sample of orally argued cases against finding evidence of strategic self-restraint in judicial decision-making.

One way to correct for this selection bias is to undertake what we call a "statute-centered" test of the hypothesis of a constrained Court. That is, instead of using Court decisions as our units of analysis, we follow the fates of all laws enacted between 1987 and 2000, tracking whether and when they are ruled unconstitutional by the Court.

The next section details our empirical model, which specifies how both the constrained and unconstrained Court hypotheses can be tested in the context of a statute-centered analysis.

3 The Empirical Model

We assume, along with proponents of both the constrained and unconstrained Court hypotheses, that both Justices and members of Congress have standard single-peaked preferences over a common left-right policy continuum. We further assume that each law enacted by a given Congress reflects the midpoint between the ideal points of the pivotal legislators in that Congress.⁷

Enacted laws may then be challenged in the courts, including recourse to the Supreme Court.⁸ Constitutional challenges may take a variety of forms. One might imagine that laws enacted by Congresses on the left of this continuum would typically be challenged on the grounds that they overstep constitutional limits on congressional powers to act. Laws enacted by Congresses on the right of this continuum might typically be challenged on the grounds that they insufficiently protect the constitutional rights of individuals.

Should a congressional law come before the Supreme Court, the Court's median Justice selects a point on the policy continuum as a standard of constitutionality against which the law will be judged. The probability that the law will be overturned (ruled unconstitutional) is increasing in the distance between the standard chosen and the point represented by the law. For instance, a constitutional standard set at .75 will generate a higher probability that a law enacted at .25 will be overturned than a standard set at .50.

Both the constrained and unconstrained Court models assume that the median Justice prefers her ideal point as the standard of constitutionality against which the law will be judged. That is, both models assume that the propensity of the Court to overrule a law is at least in part an increasing function of the distance between the ideal point of the median Justice and the point represented by the law at issue. The greater the distance between a law and the ideal point of the median Justice, the more the median Justice will want to overrule that law.

The constrained Court model also, however, allows the median Justice to choose a constitutional standard at some distance from her ideal point. For instance, to continue the above

example, the median Justice's ideal point may be at .75, resulting in some probability that a law enacted at .25 will be overturned. However, she may choose to impose as a constitutional standard .50, resulting in a lower probability that the law will be overturned.

After the Court imposes a constitutional standard, resulting in a given probability that the law at issue will be overturned, the constrained Court model assumes that Congress can choose to punish the Court with retributive legislation. We assume that the Congress will do so only if all pivotal legislators prefer the constitutional standard embodied by the law itself to that chosen by the Court. That is, the pivotal members of the sitting Congress compare the constitutional standard for congressional authority chosen by the Court to that represented by the law. Should at least one pivotal legislator be closer to (or equidistant from) the Court's ruling than to the original law, that member will choose either not to introduce, or to block, legislation disciplining the Court. However, if the pivotal members are all closer to the law than to the Court's chosen constitutional standard, those members will act to ensure passage of punitive legislation.

The constrained Court model assumes, finally, that the Court will act to avoid Court-punishing legislation. That is, the median Justice will set a standard of constitutionality as close to her ideal point as possible, which yet forestalls punitive congressional action. Under some configurations of ideal points and for some laws, that is, the median Justice of the Court will be constrained in her rulings of constitutionality by congressional preferences. Under other configurations, she will not be constrained, and will simply use her ideal point as a standard of constitutionality.

The formal conditions of a constrained Court will be given in the subsequent section, with attention to alternative theories of legislative behavior. However, to illustrate the general idea here, we present an example of a constrained Court in Figure 1. In this figure, the pivotal members of Congress are assumed to be the median members of the House (H_m) and Senate (S_m). The Court's median Justice (C_m) is located to the right of both houses' medians. The law at issue (L) is located closer to both the median Representative and the median Senator

than is the ideal point of the median Justice, ensuring that the latter will be constrained in her constitutional ruling on the law. Were she to choose her own ideal point as the standard of constitutionality in this case, both the House and the Senate would support punitive legislation aimed at the Court. The median Justice thus will moderate the constitutional standard to the point at which the congressional pivot closest to her own ideal point is just indifferent between the standard embodied by the law at issue and that articulated by the Court. In Figure 1, this implies that the constitutional standard chosen will be the indifference point of the median Senator ($I(S_m)$). While the median Representative will still support Court-attacking legislation, the median Senator will not support that legislation, thus preventing its passage.

The second, unconstrained, case is represented by Figure 2. In this case, neither the Court nor the law has changed ideological positions. However, the House and Senate medians have shifted rightward, such that the latter's ideal point is now closer to the Court median than to the law at issue. The median Justice may now use as a constitutional standard her own ideal point, for the median Senator will prefer that standard to the one embodied by the law at issue, and will again block any Court-attacking legislation.

According to the unconstrained Court model, the key variable in both cases is the distance between the Court median and the law at issue ($|C_m - L|$). As the value of this variable does not vary between the two cases, we should likewise not expect to see any variation in the likelihood that the Court rules the law unconstitutional.

According to the constrained Court model, however, when all congressional pivots prefer the law at issue to the Court median, as in Figure 1, the Court will be constrained from implementing its most preferred constitutional standard. The magnitude of this constraint will vary with the distance between the indifference point of the congressional pivot closest to the Court and the Court median. In Figure 1, this distance is $|C_m - I(S_m)|$. When however at least one pivot prefers the Court median to the law at issue, as in Figure 2, then the median Justice is completely unconstrained in her ruling. In this case the magnitude

of the constraint on the Court is zero. The constrained Court hypothesis predicts that the likelihood that a law will be overruled is decreasing in this constraint variable.

4 Theories of Congressional Behavior

The foregoing requires some assumptions about the legislative process. We here follow the literature on congressional behavior by deriving the conditions under which the Court will be constrained from four prominent theories of congressional pivotality (Shepsle and Weingast (1995) and Krehbiel (1998)).⁹

4.1 The Floor Median Model

In the *Floor Median Model* we assume that the pivotal members of Congress are the House and Senate floor medians.¹⁰ The vision of congressional authority embodied in any given law thus may be represented by the midpoint between the floor medians of the two enacting houses. Should a congressional law come before the Court, the constraint set for that Court in that case will be defined by three points: the law, the sitting House median's indifference point, and the sitting Senate median's indifference point. The leftmost boundary of the set is the minimum of these three points; the rightmost boundary of the set is the maximum of the three. If the Court median lies within this set, then the Court is unconstrained and the median Justice will choose her own ideal point as the constitutional standard in that case. If the Court median lies to the left (right) of the leftmost (rightmost) boundary of this set, then the Court is constrained and will set the constitutional standard at this leftmost (rightmost) boundary.

4.2 The Committee Gatekeeping Model

The *Committee Gatekeeping Model* assumes that committees can prevent legislation from reaching the floor, but that once legislation has reached the floor, an open rule obtains.¹¹ As

with the previous model, then, the vision of congressional authority embodied in any given law may be represented by the midpoint between the floor medians of the two enacting houses. The Court's constraint set in any given case will be defined by five points: the law, the sitting House median's indifference point, the sitting Senate median's indifference point, the sitting House Judiciary Committee median's indifference point, and the sitting Senate Judiciary Committee median's indifference point.¹²

4.3 Majority Party Models

Some students of Congress assert that the legislative party organizations are able to influence the votes of legislators such that outcomes are pulled away from the floor medians toward the majority party medians (Rohde 1991, Aldrich 1995, Chapter 7, Dion and Huber 1996, 1997). There is a considerable amount of controversy about whether this is the case (Krehbiel 1993, 1995, 1998). We take two different approaches to modeling majority party influence. First we assume that the majority party can gatekeep, but faces an open rule once legislation is allowed onto the floor. Next we assume that the party can effect a closed rule on the floor through influencing the votes of party members.

4.3.1 The Majority Party Gatekeeping Model

In the *Majority Party Gatekeeping Model* the relevant gatekeepers are not committee medians but rather the majority party medians, acting as principals. Majority party committee members hold back legislation when such action gets the majority party medians better outcomes than would be attained on open floor votes (Krehbiel 1998, 234). But because legislation, once released by a committee, is subject to an open rule, we assume – again – that the vision of congressional authority embodied in any given law may be represented by the midpoint between the floor medians of the two enacting houses. In any challenge to legislation, the Court's constraint set will be defined by five points: the law, the sitting House median's indifference point, the sitting Senate median's indifference point, the sitting House

majority party median's indifference point, and the sitting Senate majority party median's indifference point.

4.3.2 The Majority Party Median Model

A second way of modeling majority party influence is to assume that legislative party organizations can ensure that party members will only vote for party sponsored measures. Majority party leaders thus can pull legislative outcomes to the majority party medians rather than the floor medians (e.g. Dion and Huber 1996, 1997). In the *Majority Party Median Model*, then, we assume that the vision of congressional authority embodied in any given law may be represented by the midpoint between the majority party medians of the two enacting houses. Should a congressional law come before the Court, the constraint set for that Court in that case will be defined by three points: the law, the sitting House majority party median's indifference point, and the sitting Senate majority party median's indifference point.

5 Testable Implications

For each of the four theories of congressional behavior, we test both the unconstrained and the constrained models of Supreme Court decision-making. The unconstrained model assumes that the key variable affecting the probability of overruling is the absolute value of the distance between the Court's ideal point and the point represented by the law. The unconstrained model predicts a positive relationship between this variable and the likelihood that the Court overrules a congressional law.

The constrained model assumes that the Justices care, in addition, about constraints posed by the sitting Congress. The constrained model thus contains both the variable representing the distance between the Court and the law, and a variable measuring the degree of constraint imposed on the Court by the sitting Congress, should it review that law. When the Court is located within any model's constraint set, and can set as a constitutional standard

its own ideal point, this variable takes on the value of 0. When the Court is located outside of the constraint set, this variable takes on the absolute value of the distance between the median Justice's ideal point and the indifference point of the congressional pivot closest to the median Justice. The greater the distance between the Court and the congressional pivot's indifference point, the greater the constraint placed on the Court's underlying propensity to overrule a law. According to the constrained model, we should expect a negative relationship between this variable and the likelihood that the Court overrules a congressional law. According to the unconstrained model, we should expect no significant relationship between this variable and that likelihood.

We recognize that our test of the constrained model at best provides indirect evidence of a constrained Court. That is, if we in fact find that the probability that a congressional law is overturned is responsive to the predictions of the models of a constrained Court, then we will have evidence that either the Court, *or* actors who anticipated the Court's likely actions, was/were constrained by congressional preferences in constitutional cases.

Finally, another implication of all models of a constrained Court is that, in equilibrium, the Congress never actually enacts Court-punishing legislation, because the Court always chooses a constitutional standard which deters such legislation. While we do not directly test this implication, it does comport well with the historical record (Friedman 1998, Segal and Spaeth 2002).

6 The Data

Our statute-centered (rather than case-centered) analysis begins with the 100th Congress, elected in 1986, and continues to track all public laws enacted through the 106th Congress, elected in 1998. The public laws enacted by the 100th Congress were first available to be reviewed by the Supreme Court sitting in October of 1987, the second Term of the Rehnquist Court.¹³ We follow the fate of these laws through the Rehnquist Court's 2000 Term. Table

1 contains the numbers of public laws enacted in each congressional year, and the number of years that the laws are followed for each group.¹⁴ In total we follow the fate of 3725 laws over a range of 1 to 14 years. An observation thus consists of law i observed in year t ; we have 29,755 observations in all.

6.1 Dependent Variable

Because we are interested in whether (and when) these laws eventually are struck down by the Court, our dependent variable is dichotomous: a law survives unless and until it is struck down by the Court. Laws still “alive” are coded as 0; struck laws are coded as 1 in the Term in which they are struck down and are then removed from the dataset.

In order to determine which laws were struck down by the Court during this period, we combined several lists of cases involving struck congressional laws (Zeppos 1993, Library of Congress 2001, Epstein 2002).¹⁵ When the lists agreed with one another, we accepted that the case identified by the various lists was one that struck a congressional law. When the lists disagreed, we examined the relevant Supreme Court precedent to determine which of the sources was correct.¹⁶

There often was disagreement on another requisite piece of data, the year in which a struck law originally was enacted. This likely is because of the difficulty in reaching this determination. When sources agreed, we accepted their unanimous determination.

In the face of disagreement, we adopted these decision rules. First, laws frequently are re-enacted or amended, posing the question of which year is the relevant one. If a Congress re-enacts a law, we assume it is ideologically supportive of that law and therefore report and use the most recent plausible date of enactment.¹⁷ If the Court specifically referred to a later amendment of an existing law as the portion of a law being struck, then we designated the amending Congress as the enacting Congress. If a statute was amended, but the Court provided no overt guidance, we essentially asked: “Did the fact of amendment show explicit, affirmative support for the part of the statute later invalidated by the Supreme Court?” If

the fact of amendment showed explicit support for the part of the statute later invalidated by the Court, then we used the amending Congress as the enacting Congress.¹⁸

In all, 22 of the 3725 laws were struck between 1987 and 2000. Table 2 reports the years in which, and the Congresses by which, the 22 struck laws were enacted, as determined by the foregoing decision rules. Table 2 also reports the names of the laws, as well as the years and cases in which they were struck by the Court.

6.2 Independent Variables

The testable implications of our empirical models require us to compute measures of ideological distance between the Court and various pivotal members of Congress. Typically, researchers testing separation of powers models use measures of ideology which are not scaled in the same institutional "space" (Segal 1997, Segal and Spaeth 2002). Here we use the measures developed by Michael Bailey and Kelly Chang, which use bridging observations to scale the Court, the Senate, and the President in the same space (Bailey and Chang 2001, Bailey 2003). We then use the Bailey Senate estimates from 1987 to 2000 to linearly transform Poole's common space House estimates for the same period into Bailey space (Poole 1998, as updated on July 13, 2003, Bailey 2003).¹⁹

Using the Bailey and rescaled Poole common space estimates of judicial and congressional ideology, we can characterize the constraint sets generated by the various models of congressional behavior. For the purposes of illustration, Figures 3 and 4 display the congressional constraint sets for 1987 statutes under the *Floor Median* and *Committee Gatekeeping* models. Both figures illustrate a phenomenon common to all constraint sets for pre-1995 statutes, namely that the Court lay to the right of the rightmost boundaries of these constraint sets prior to 1994. After 1994, the Court lay within these constraint sets. All models thus predict an increase in the likelihood that the Court strikes liberal congressional laws beginning in 1994. With the exception of the *Majority Party Median Model*, all models also predict that the Court was unconstrained in its rulings on laws enacted by the post-1994 Congresses.

The *Majority Party Median Model* predicts that between 1995 and 1999 the Court was actually mildly constrained by the *leftmost* boundary of the congressional constraint set for laws enacted by the 104th-106th Congresses. Finally, the *Majority Party Gatekeeping Model* generates a rightmost boundary for the congressional constraint set which is identical to that of the *Floor Median Model* between 1987-1994. Its predictions are thus observationally equivalent to those of the *Floor Median Model*.

6.3 Descriptive Statistics

Before applying an econometric model to the data, we computed some simple descriptive statistics. Tables 3-5 report the means of the independent variables for laws that were both struck and not struck by the Court, by legislative model. The variable *Court/Law Distance (1)* measures the absolute value of the distance between the Court median and the law at issue, assuming the law at issue takes on the value of the midpoint between the enacting houses' medians, while the variable *Court/Law Distance (2)* measures the same distance but assumes that laws take on the value of the midpoint between the enacting houses' majority party medians. The variables *Court/Congress Distance (1)*, *(2)*, and *(3)* measure the absolute value of the distance between the Court median and the indifference point of the closest congressional pivot, for cases where the Court is predicted to be constrained (and is 0 otherwise), for the *Floor Median/Majority Party Gatekeeping*, *Committee Gatekeeping*, and *Majority Party Median Models*, respectively.

Neither of the two measures of the distance between the Court and a law provide any evidence in support of the unconstrained Court model. Indeed, for both measures the Court appears to be more likely to strike congressional laws to which it is *closer* ideologically, although these differences are not significant at conventional levels.

On the other hand, we do find considerable evidence in support of the constrained Court model. All three measures of the variable *Court/Congress Distance* are significantly smaller for laws that are struck than for laws that are not struck. The Court appears to be less

likely to strike congressional legislation when it faces an ideologically more distant sitting Congress.

7 The Econometric Specifications and Results

We can further test the unconstrained and constrained models with an econometric specification more appropriate to the structure of our data. The latter consist of individual laws observed over discrete units of time (years). In any given year, a law may get overruled (and generate a value of 1), or continue to “survive” (and generate a value of 0). We observe the laws for only a limited period of time, ending our period of observation with the close of 2000. Finally, there is some possibility that laws are less likely to be overruled the longer they survive. We thus require an empirical method which takes into account the facts that we have a binary dependent variable, data which are “right censored,” and potential temporal dependence (e.g., younger laws may be more likely to be overruled than older laws). The appropriate method for analyzing this kind of data is grouped event history analysis (also known as duration, hazard or survival analysis) (Beck *et al* 1998). Grouped event history models are derived from continuous time event history models, which estimate the probability of an event occurring as a function of both the set of theoretically derived independent variables, and a baseline “hazard” rate.

We here apply the grouped version of the most common continuous time event history model, namely the Cox (1975) proportional hazards model. The Cox continuous time model, reported in Equation 1, is widely used because it allows the estimation of a baseline hazard rate which is unknown and possibly time varying.

$$h(t|\mathbf{x}_{i,t}) = h_0(t)e^{\mathbf{x}_{i,t}\beta} \quad (1)$$

In Equation 1, the instantaneous hazard or probability of an event occurring (h) as a function of the time t and the vector of independent variables measured for unit i at time t

$(\mathbf{x}_{i,t})$ depends both on the latter (through the $e^{\mathbf{x}_{i,t}\beta}$ term) and on the possibly time varying baseline hazard ($h_0(t)$). Its grouped version is reported in Equation 2.

$$P(y_{i,t} = 1|\mathbf{x}_{i,t}) = h(t|\mathbf{x}_{i,t}) = 1 - \exp(-e^{\mathbf{x}_{i,t}\beta + \kappa_t}) \quad (2)$$

In Equation 2, $y_{i,t}$ is the binary indicator of whether an event occurred to unit i within year t , $\mathbf{x}_{i,t}$ represents the observed values of the independent variables for the entire year t , and κ_t is a dummy variable marking the length of time the unit has been “at risk.”

The model reported in Equation 2 is identical to a binary dependent variable estimated using either a complementary log-log (cloglog) or Poisson link function, with duration dummy variables included (Beck et al 1998, Zorn 1998). We here estimate Equation 2 with a Poisson link function, as this specification more easily facilitates comparison with split population models estimated using a zero-inflated Poisson link function (see below). Following Beck (1998), we first included duration dummies in each estimation to capture potential nonlinearities in the baseline hazard rate. We then tested these initial models against ones which included simpler linear trend terms.²⁰

7.1 Poisson Estimates

For 6 out of the 14 years for which we track the laws in our dataset, no laws were overruled by the Court. The coefficients for the duration dummy variables thus could not be estimated for these years, and these 8581 observations were dropped from the initial estimations. For all 5 sets of estimations reported in Table 6, likelihood ratio tests failed to reject the null hypothesis that the duration dummy variables were no better than linear trend terms to capture the effects of time on the baseline hazard rate.²¹ The linear term (*Age of Law*), whose values range from 1-14, has the advantage that it can be estimated using all observations. Table 6 thus reports the results of estimations including that linear term. Table 6 also reports Huber (1967) standard errors calculated to allow for the possibility of “clustering” of errors

by the enacting Congress.²² Finally, the Poisson goodness-of-fit statistics reported in Table 6 confirm the appropriateness of a Poisson model for all five estimations.²³

7.1.1 The Unconstrained Court Model

The estimations reported in Table 6, Columns 1 and 2, provide no support for the model of an unconstrained Court. The estimation in Column 1 corresponds to the theoretical predictions made by the *Floor Median Model*, the *Committee Gatekeeping Model*, and the *Majority Party Gatekeeping Model*, all of which assume that a law's ideological position may be represented by the midpoint between the floor medians of the two enacting houses (*Court/Law Distance (1)*). The estimation in Column 2 corresponds to the predictions made by the *Majority Party Median Model*, which assumes that a law's ideological position may be represented by the midpoint between the majority party medians of the two enacting houses (*Court/Law Distance (2)*).

Both estimations, which omit the congressional constraint variable, provide extremely poor fits to the data. The variables *Court/Law Distance (1)* and *Court/Law Distance (2)* are both signed in the incorrect direction, although the coefficients are not significant. The trend variable *Age of Law* also fails to generate a significant coefficient in either estimation. Neither model provides a better fit to the data than a model including only the constant term.

7.1.2 The Constrained Court Model

With the exception of the *Majority Party Median Model*, the constrained Court models appear to provide much better fits to the data than the unconstrained models. Columns 3-5 in Table 6 report the results of estimations for the *Floor Median/Majority Party Gatekeeping Model* (Constrained Model (1)), the *Committee Gatekeeping Model* (Constrained Model (2)), and the *Majority Party Median Model* (Constrained Model (3)). The first two estimations provide significantly better fits to the data than constant-only models, and thus more appro-

appropriate fits to the data than either unconstrained Court model. The *Majority Party Median Model* does not improve over a constant-only model.

In the two estimations which appear to fit the data the best (Constrained Models (1) and (2)), the coefficients on the variable *Court/Law Distance (1)* are now in the predicted (positive) direction, although they remain short of conventional levels of significance. In all three estimations the variables measuring the degree of congressional constraint (*Court/Congress Distance (1)*, *(2)*, and *(3)*) are in the predicted negative direction and are highly significant. The trend variable measuring the age of a law is now consistently in the direction we would expect (negative) in all three estimations, and is moderately significant in Constrained Models (1) and (2).

These estimates thus give fairly robust support, across different models of the legislative process, to the hypothesis of a constitutionally constrained Court. We can also convert the Poisson estimates into more meaningful quantities, namely the predicted probabilities that a congressional law will be overturned in any given October Term as a function of the appropriate congressional constraint variable, holding other variables at their means. These probabilities are reported in Table 7 and displayed, along with their 95% confidence intervals, in Figures 5 and 6 for the *Floor Median/Majority Party Gatekeeping* and *Committee Gatekeeping* models, respectively. For the actual value of the relevant constraint variable in any given term, we computed the weighted average of this variable's values for all laws reviewable by the Court in that term.

As can be seen in both Table 7 and Figures 5 and 6, the changes in the predicted probability that an average congressional law will be struck, as a function of the degree of constraint imposed by the sitting Congress, can be dramatic. In particular, for the *Floor Median/Majority Party Gatekeeping Model*, the predicted probability that a congressional law would be struck as a result of the ideological changes in Congress brought about by the 1994 elections increases by a factor of 6. For the *Committee Gatekeeping Model*, the predicted probability that a congressional law would be struck increases by a factor of 15 over the same

period. There is zero overlap in the confidence intervals for these point predictions.

This finding clarifies an empirical puzzle which has animated the legal community, namely the dramatic increase in the propensity of the Rehnquist Court to strike congressional laws beginning in the mid-1990s. Several observers have noted this phenomenon, but have not linked it to the ideological changes in Congress brought about by the 1994 midterm elections (Waxman 2001, 1074, Segal and Spaeth 2002, 414, Merrill 2003, 569, 586). Indeed, the Court’s recent willingness to strike congressional legislation has even been cited as evidence of an *unconstrained* Court (Segal and Spaeth 2002, 112-113, 277 fn 151). We find the results of our analysis to be fairly compelling support for the rival hypothesis.

7.2 Split Population Models

One shortcoming of the grouped event history model used here is that it assumes that all units will eventually experience the event in question. That is, the model assumes that, if we were able to observe them for a long enough period of time, all congressional laws would eventually be overruled by the Supreme Court. Clearly this is not a reasonable assumption. One possibility is to estimate a split population event history model, which allows us to assume that some laws will *never* be struck by the Court. That is, we assume that laws could fail to be overruled for two reasons. The first is because many laws will never be overruled by the Court, perhaps because they do not inflict sufficient legal damages upon some group or groups to warrant both the costs of litigation and the opportunity costs to the Court of hearing that case as opposed to some other case (e.g., a law that establishes National Pork Producers’ Day). The second is because even though some laws might warrant both litigation and consideration by the Court, the process assumed to be at work in Equation 2 produces the outcome of “no overruling” as opposed to “overruling.” By contrast, for some other laws which warrant both litigation and consideration by the Court, that process generates the outcome of “overruling” as opposed to “no overruling”. A split population model estimates separate equations for the two outcomes in our model, assuming that the

data generation process differs between those outcomes (Greene 2000, for an application to judicial politics see Hettinger and Zorn 2003).

Split population models in the context of grouped event history analysis may be estimated using zero inflated Poisson (ZIP) regressions with duration dummy variables included.²⁴ As we lack reliable objective measures of the “importance” of laws, we used the same sets of independent variables as in Table 6 to estimate, separately for each model of a constrained Court, the probability that an overruling occurs at all, and the probability that an overruling occurs, conditional on a law being of sufficient “importance” to warrant overruling. Greene (2000) reports that the Vuong (1989) test may be applied in this context to determine whether a ZIP model improves upon the standard Poisson model. Positive values over 2 indicate a significantly better fit with a ZIP model, as opposed to a standard Poisson model. For all 3 ZIP estimations, we found positive Vuong statistics of less than 2. In this case, then, split population models do not provide better fits to the data than conventional event history models. Rather, the estimates we obtained in the previous section are the best estimates we can obtain using an event history model.

8 Conclusion

We are not the first to note the dramatic increase in the propensity of the Rehnquist Court to strike congressional legislation in the mid-1990s. However, we believe we are the first to link that propensity to the ideological changes in Congress brought about by the 1994 elections.

More generally, we hope to have contributed a methodological insight to the judicial politics literature. Specifically, we hope to have demonstrated that using the Justices’ decisions in cases, without accounting for the process by which those cases were generated, may confound empirical studies. In particular, scholars may be significantly underestimating the effect of institutional constraints on the Court. This selection effect could be influencing stud-

ies not only of constitutional cases, of which there are few, but the more robust literature on statutory cases as well.

Finally, we are aware of no other study that has provided empirical support for the proposition that the Court is bound by institutional constraints to take account of congressional preferences in its constitutional decisionmaking. Such a proposition, if supported by further research, has the potential to reshape the landscape of constitutional theory. Constitutional theorists typically require that the Court be free of institutional constraints so that the Justices may implement their own best understanding of the law (Dworkin 1977, Ely 1980, Bork 1997, Fried 2004). The normative status of a Court which is bound in the way that we suggest is much less clear.

However, the present study cannot speak precisely to where congressional constraints bind. Their effect could occur mainly at the cert stage, when the Justices select cases for their docket. Perhaps the Justices simply do not accept for review cases that challenge congressional laws when they do not anticipate that they will be able to strike those laws in the current congressional context. Or, perhaps litigants simply *anticipate* that the Justices will be constrained by congressional preferences, and do not challenge congressional laws that they predict cannot be struck in the current congressional environment. When that environment changes, however, litigants bring those laws forward. Further research on these issues may clarify the exact nature of the limits of judicial independence.

Notes

¹It is likely that this methodological problem affects studies of constraint in statutory cases as well, though we look only at constitutional cases here.

²While Spiller and Gely (1992) found support for the constrained Court hypothesis in statutory labor relations cases between 1949 and 1988, and Bergara, Richman, and Spiller (2003) found support in statutory civil liberties cases between 1947 and 1992, Segal (1997) and Segal and Spaeth (2002) found no such support in the same latter set of statutory civil liberties cases. Hansford and Damore (2000) found only mixed support for a constrained Court in statutory cases, and Spriggs and Hanford (2001) found no effect from congressional or presidential ideology on the likelihood that the Supreme Court overruled statutory precedents.

³Article III provides that the Supreme Court shall have original jurisdiction over ". . . Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party."

⁴For examples of jurisdiction stripping see Nagel 1964, 928; Rosenberg 1992, 377, 385, 387, 390; Mcnollgast 1995, 1664; Friedman 1998, 741, 745, 751-3; Cross and Nelson 2001, 11; Segal and Spaeth 2002, 230; and Martin 2003, 10. More drastic congressional proposals to limit judicial review have included allowing appeal from the Court to an elective body like the Senate (Rosenberg 1992, 377, Friedman 1998, 740,) or the entire Congress (Friedman 1998, 749), and requiring extraordinary majorities for declarations of unconstitutionality (Rosenberg 1992, 377, 387, Friedman 1998, 744, 748).

⁵See Fisher (1993) for a claim that this has happened with regard to the Supreme Court's invalidation of the legislative veto.

⁶McGuire *et al* (1999) make the point that petitioners petition only when they expect to win, although they do not analyze the potential effect of congressional and presidential policy preferences on petitioners' decisions.

⁷The question of which members of Congress are pivotal depends upon how one models the legislative process. We use a variety of models, as detailed below.

⁸This is true even for laws that have a finite time horizon, such as an annual appropriations bill. Such a bill may still be litigated to the Supreme Court even after its formal authority has expired.

⁹We also computed the constraint set for a fifth theory of legislative behavior, namely that of the veto-filibuster model proposed by Krehbiel (1998). Krehbiel asserts the significance of two institutional rules that may pull legislative outcomes away from floor medians: the possibility of a presidential veto, necessitating a congressional override by 2/3 of both houses, and the possibility of a senatorial filibuster, which can be broken only by mustering a 3/5 majority in the Senate. However, we found that this model applied to our data generated a largely unconstrained Court, such that no overrulings took place by the Court during the few periods when it was constrained. As a result we could not estimate a constraint parameter for this model.

¹⁰This model is motivated by three institutional details of the House and Senate: a majority may order a committee to discharge a bill to the floor, thus preventing committee gatekeeping (Krehbiel 1995, 1997, 1998, 233), any restrictive voting rules must be approved by majority vote, thus ensuring open rules (Krehbiel 1997, 1998, 233), and committees do not possess ex post vetoes in the conference stage (Krehbiel 1987, 1998, 233). According to proponents of this hypothesis, these two rules imply that all legislative decisions will be made by the floor median voters of both houses of Congress (Krehbiel 1987, 1995, 1997, 1998, Krehbiel and Rivers 1988).

¹¹Gatekeeping models typically assume that congressional committees possess special parliamentary powers that allow them to prevent legislation from reaching the floor and/or protect such legislation from amendment by the floor (e.g., Shepsle and Weingast 1987, Ferejohn and Shipan 1990, Dion and Huber 1996). The existence of such powers, however, is a matter of some dispute (Krehbiel 1987, 1995, 1997, 1998, Krehbiel and Rivers 1988). Here we employ the most minimal form of a gatekeeping model (Ferejohn and Shipan 1990).

¹²We assume that legislation attacking the Court would most likely lie within the juris-

diction of both houses' Judiciary Committees.

¹³Although it usually takes several years for a challenge to a law to work its way to the Supreme Court, it can happen quite quickly. Examples from our dataset include a November 18, 1988 amendment to the Communications Act of 1934, struck by the 1988 OT Court, the Flag Protection Act of October 28, 1989, struck by the 1989 OT Court, and provisions of the Communications Decency Act of February 8, 1996, struck by the 1996 OT Court.

¹⁴The data in Table 1 were obtained from the Congressional Record's summaries of legislative activity, also available from <http://thomas.loc.gov/home/resume.html>. The Congress also enacts an increasingly small number of "private" bills every legislative session; these bills concern topics of very narrow interest to individual members. Private bills are not included in our dataset.

¹⁵The criteria used to determine overruling in the U.S. Supreme Court Database, compiled by Harold Spaeth, are narrower than those used in the sources noted in the text. The Spaeth database requires an explicit statement that a law is unconstitutional. The Court can however strike congressional laws without using that explicit language.

¹⁶Compilers would on occasion include a case that struck down a state law, *e.g.*, *Saenz v. Roe*, 143 L.Ed.2d 689 (1999) (involving the constitutionality of a California statute limiting the maximum welfare benefits available to newly arrived residents), included in the Supreme Court Compendium (Epstein 2002), or exclude cases that struck down congressional laws, *e.g.* *United States v. Bajakajian*, 524 U.S. 321 (1998), excluded by the Library of Congress.

¹⁷This most recent date must be prior to the date of the law's challenge, of course. Commonly this is the case, but one exception was *Legal Service Corp. v. Velasquez*, in which Congress re-enacted the appropriation for the Legal Service Corporation annually, including after the challenge to the original law was filed. In that case we used the enactment date of the original enactment, as that was the law properly on review before the Court.

¹⁸For example, in *Greater New Orleans Broadcasting Assn. v. United States* (1999), the Supreme Court invalidated a 1934 congressional law prohibiting the advertisement of casinos.

A 1988 amendment to the section of this law at issue before the Court had added the words “or television,” thus including television broadcasting as a medium through which casino advertising was prohibited. This amendment clearly signaled congressional support for the thrust of the original law, indeed extending this section of the law to cover a new medium. The later Congress was thus designated as the enacting Congress in this instance.

¹⁹As a check on the Bailey estimates we also used an additional set of ideological measures derived from the Poole common space scores and the measures of judicial ideology developed by Andrew Martin and Kevin Quinn (Martin and Quinn 2002, as updated on October 14, 2002). Since 1937 (the earliest date for which we can get both Poole and Martin-Quinn scores), four Justices have served in Congress prior to their service on the Court: Hugo Black (Senate 1927-1937, Court 1937-1971), Harold Burton (Senate 1941-1945, Court 1945-1958), James Byrnes (House 1911-1925, Senate 1931-1941, Court 1941-1942), and Sherman Minton (Senate 1934-1940, Court 1949-1956). We used these four Justices as bridging observations between the two sets of ideological estimates in a linear transformation of common space scores into Martin-Quinn space (this regression has 55 observations). This is the same rescaling method used by Hettinger and Zorn (2003), although they omit Byrnes and Minton from their rescaling regression. The results we attained using these measures of ideological distance were qualitatively identical to those obtained using the Bailey estimates.

²⁰Beck (1998) and Beck et al (1998) also recommend a natural cubic spline as a way to capture nonlinearities in the baseline hazard rate without using up as many degrees of freedom as required for the duration dummy variables. However, to attain full equivalence with a Cox proportional hazards model, the Poisson model must be estimated with the dummy variables, not the cubic spline (Zorn personal communication 5/14/02). In any case, as we will see, our data show no evidence of nonlinear baseline hazard rates.

²¹The p value for the Floor Median/Majority Party Gatekeeping Models (Constrained Model (1)) was .40, that for the Committee Gatekeeping Model (Constrained Model (2)) was .39, and that for the Majority Party Median Model (Constrained Model (3)) was .44.

²²Conventional standard errors computed without the clustering assumption do not produce qualitatively different results from those reported in Table 6.

²³Beck *et al* (1998) report that Equation 2 may also be estimated using the more familiar probit or logit link functions as long as the probability of an event occurring remains less than 50%. Since in our dataset, the probability of a law being overruled is considerably below this threshold, we used the probit link function to estimate Equation 2, as in Equation 3.

$$P(y_{i,t} = 1|\mathbf{x}_{i,t}) = h(t|\mathbf{x}_{i,t}) = \Phi(\mathbf{x}_{i,t}\beta + \kappa_t) \quad (3)$$

These estimates were qualitatively identical to those reported in Table 6.

²⁴ZIP models with duration dummy variables in this context are equivalent to split population Cox proportional hazard models in the continuous time context (Zorn 1998).

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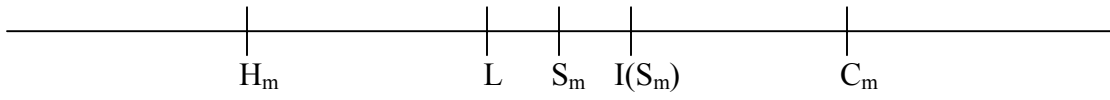


Figure 1

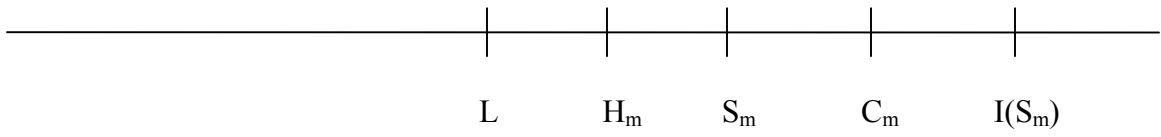


Figure 2

Table 1
Public Laws, 1987-2000

Congress	Years	Number of public laws enacted	Number of years laws are followed	Number of observations
100	1987	240	14	3360
	1988	473	13	6149
101	1989	240	12	2880
	1990	410	11	4510
102	1991	243	10	2430
	1992	347	9	3123
103	1993	210	8	1680
	1994	255	7	1785
104	1995	88	6	528
	1996	245	5	1225
105	1997	153	4	612
	1998	241	3	723
106	1999	170	2	340
	2000	410	1	410
Total	1987-2000	3725	1-14	29755

Table 2
Struck Congressional Laws, 1987-2000

Statute (Name and Pub. L. No.)	Year Enacted/ Amended	No. of Enacting Congress	Name of Case Striking Law	Date Decided	Oct. Term
Indian Gaming Regulatory Act (Pub. L. 100-497, § 11(d)(7))	1988	100	Seminole Tribe of Florida v. Florida	27-Mar-96	1995
The Communications Act of 1934, as amended (Pub. L. 100-625, § 3(a)(4))	1988	100	Greater New Orleans Broadcasting Assn. v. United States	14-Jun-99	1998
The Communications Act of 1934, as amended (Pub. L. 100-690)	1988	100	Sable Communications of California v. FCC	23-Jun-89	1988
Flag Protection Act (Pub. L. 101-131)	1989	101	United States v. Eichman	11-Jun-90	1989
Ethics Reform Act of 1989 (Pub. L. 101-194)	1989	101	United States v. National Treasury Employees Union	22-Feb-95	1994
Americans with Disabilities Act (Pub. L. 101-336)	1990	101	Board of Trustees of University of Alabama v. Garrett	21-Feb-01	2000
Mushroom Promotion, Research and Consumer Information Act (Pub. L. 101-624, Title XIX, Subtitle B)	1990	101	United States vs. United Foods, Inc.	25-Jun-01	2000
Gun-Free School Zones Act of 1990 (Pub. L. 101-647)	1990	101	United States v. Lopez	26-Apr-95	1994
Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, § 476)	1991	102	Plaut v. Spendthrift Farm, Inc.	18-Apr-95	1994
Cable Television Consumer Protection and Competition Act of 1992 (Pub. L. 102-385, §§ 10(b) and 10(c))	1992	102	Denver Educational TV Consortium v. FCC	28-Jun-96	1995
Anti-Drug Abuse Act, as amended (Pub. L. 102-393, § 638(e))	1992	102	United States v. Bajakajian	22-Jun-98	1997
Coal Industry Retiree Health Benefit Act of 1992 (Pub. L. 102-486, Title XIX, § 19143(a))	1992	102	Eastern Enterprises v. Apfel	25-Jun-98	1997
Trademark Remedy Clarification Act (Pub. L. 102-542)	1992	102	College Savings Bank v. Florida Prepaid Education Expense Board	23-Jun-99	1998
Patent and Plant Variety Remedy Clarification Act (Pub. L. 102-560)	1992	102	Florida Prepaid Education Expense Board v. College Savings Bank	23-Jun-99	1998
Religious Freedom Restoration Act (Pub. L. 103-141)	1993	103	Boerne v. Flores	25-Jun-97	1996
Brady Handgun Violence Prevention Act (Pub. L. 103-159)	1993	103	Printz v. United States	27-Jun-97	1996
Violence Against Women Act (Pub. L. 103-322, § 40302)	1994	103	United States v. Morrison	15-May-00	1999
Communications Assistance for Law Enforcement Act (Pub. L. 103-414)	1994	103	Bartnicki v. Vopper	21-May-01	2000

Communications Decency Act of 1996 (Pub. L. 104-104, Title V, § 502)	1996	104	Reno v. ACLU	26-Jun-97	1996
Communications Decency Act of 1996) (Pub. L. 104-104, § 505)	1996	104	United States v. Playboy Entertainment Group	22-May-00	1999
Line Item Veto Act (Pub. L. 104-130, §2(a))	1996	104	Clinton v. New York City	25-Jun-98	1997
Omnibus Consolidated Rescissions and Appropriations Act (Pub. L. 104-134 § 504(a)(16))	1996	104	Legal Services Corp. v. Velazquez	28-Feb-01	2000

Table 3
The Floor Median/Majority Party Gatekeeping Model
Two-Sample t test with Unequal Variances

	N	<i>Court/Law Distance(1)</i>		<i>Court/Congress Distance(1)</i>	
		Mean	Std. Error	Mean	Std. Error
Laws Not Struck	29653	.450	.001	.143	.001
Laws Struck	22	.433	.037	.034	.023
		Hyp.: Diff. \sim 0		Hyp.: Diff. \sim 0	
		t = .453		t = 4.709	
		P > t = .655		P > t = .000	

Table 4
The Committee Gatekeeping Model
Two-Sample t test with Unequal Variances

	N	<i>Court/Law Distance(1)</i>		<i>Court/Congress Distance(2)</i>	
		Mean	Std. Error	Mean	Std. Error
Laws Not Struck	29653	.450	.001	.117	.001
Laws Struck	22	.433	.037	.020	.014
		Hyp.: Diff. \sim 0		Hyp.: Diff. \sim 0	
		t = .453		t = 6.807	
		P > t = .655		P > t = .000	

Table 5
The Majority Party Median Model
Two-Sample t test with Unequal Variances

	N	<i>Court/Law Distance(2)</i>		<i>Court/Congress Distance(3)</i>	
		Mean	Std. Error	Mean	Std. Error
Laws Not Struck	29653	1.146	.001	.322	.002
Laws Struck	22	1.094	.043	.155	.063
		Hyp.: Diff. \sim 0		Hyp.: Diff. \sim 0	
		t = 1.225		t = 2.638	
		P > t = .234		P > t = .015	

Table 6
Grouped Event History Estimations
Poisson Link Function with Linear Time Term

	Unconstrained Model (1)	Unconstrained Model (2)	Constrained Model (1)	Constrained Model (2)	Constrained Model (3)
<i>Court/Law Distance (1)</i>	-0.676 (1.779)		1.456 (1.898)	1.487 (1.936)	
<i>Court/Law Distance (2)</i>		-1.444 (1.060)			-0.442 (1.939)
<i>Court/Congress Distance (1)</i>			-4.854*** (1.005)		
<i>Court/Congress Distance (2)</i>				-6.867*** (1.318)	
<i>Court/Congress Distance(3)</i>					-1.678** (0.833)
<i>Age of Law</i>	.002 (.033)	0.033 (0.030)	-0.131* (0.069)	-0.129** (0.064)	-0.095 (0.094)
<i>Constant</i>	-6.916*** (0.881)	-5.738*** (1.266)	-6.862*** (0.903)	-6.882*** (0.918)	-5.886*** (1.923)
N	29675	29675	29675	29675	29675
Wald test	0.15	3.85	25.17	32.40	5.70
X ²	0.926	0.146	0.000***	0.000***	0.127
Poisson Goodness of Fit	1.000	1.000	1.000	1.000	1.000

Note: * $\alpha=.10$; ** $\alpha=.05$; *** $\alpha=.01$ (all two-tailed tests). Huber (1967) robust standard errors reported in parentheses, assuming possible correlation of errors within enacting Congresses.

Table 7
 Predicted Probabilities of Overruling as a Function of Congressional Constraint Variable,
 Holding Other Variables at Means

	Floor Median/ Majority Party Gatekeeping Model	Committee Gatekeeping Model	Majority Party Median Model
1987	.00021	.00052	.00033
1988	.00021	.00025	.00034
1989	.00018	.00024	.00034
1990	.00014	.00017	.00033
1991	.00007	.00005	.00028
1992	.00009	.00003	.00029
1993	.00016	.00007	.00032
1994	.00111	.00112	.00109
1995	.00111	.00112	.00105
1996	.00111	.00112	.00097
1997	.00111	.00112	.00092
1998	.00111	.00112	.00086
1999	.00111	.00112	.00084
2000	.00111	.00112	.00109

Note: Actual values of congressional constraint variable in any given year computed by taking weighted average of *Court/Congress Distance* (1), (2), or (3) for all laws that were reviewable by the Court in that October Term. Predicted probabilities simulated by Clarify 2.1, available at <http://gking.harvard.edu>.

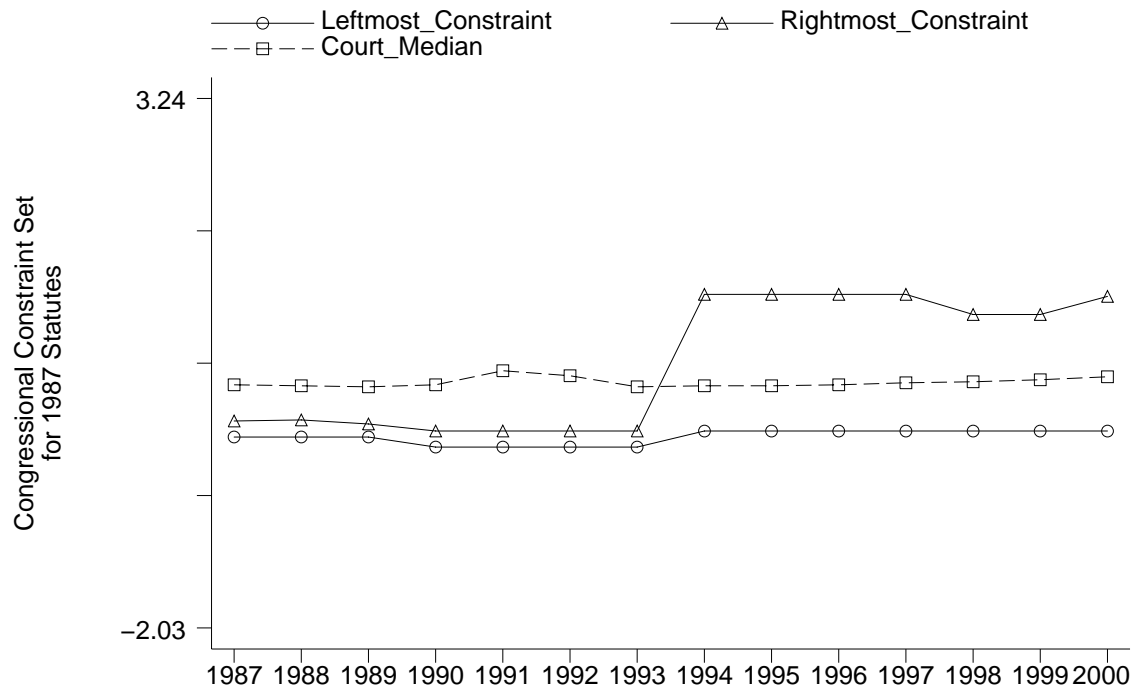


Figure 3: Floor Median Model



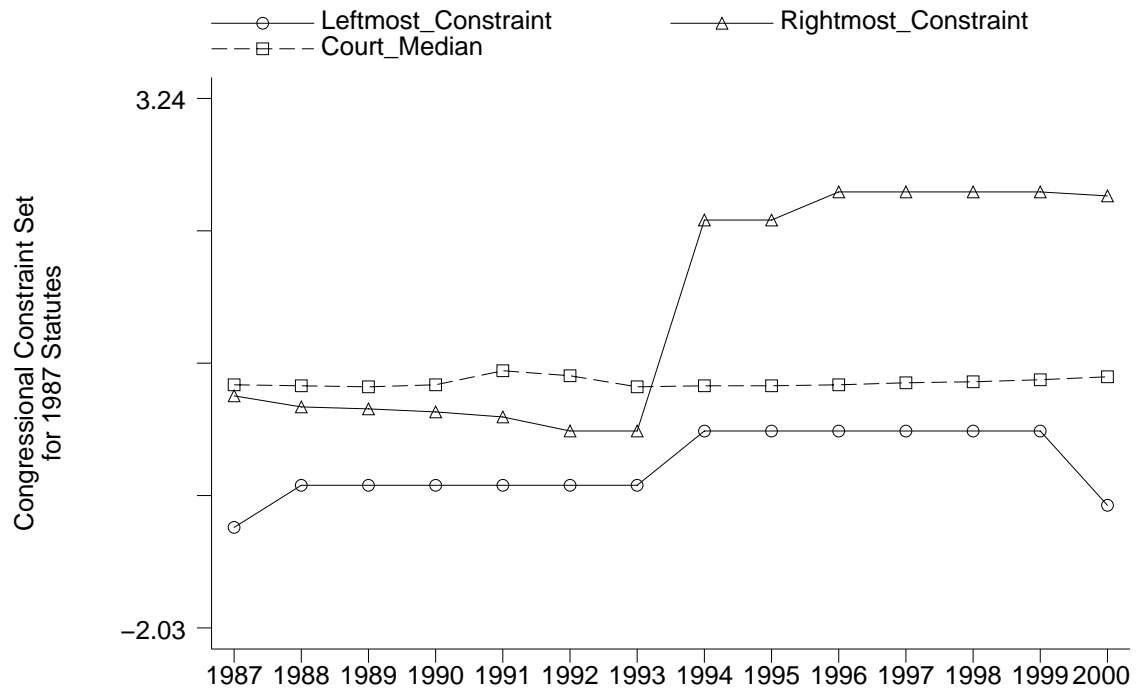


Figure 4: Committee Gatekeeping Model



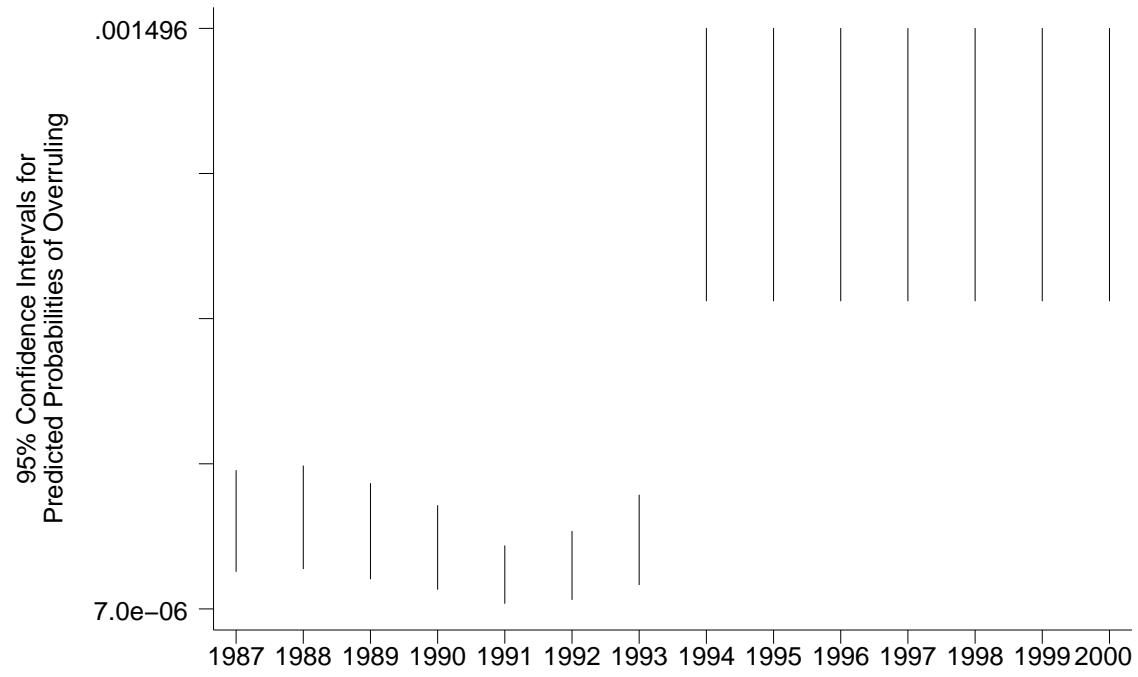


Figure 5: Floor Median/Majority Party Gatekeeping Model



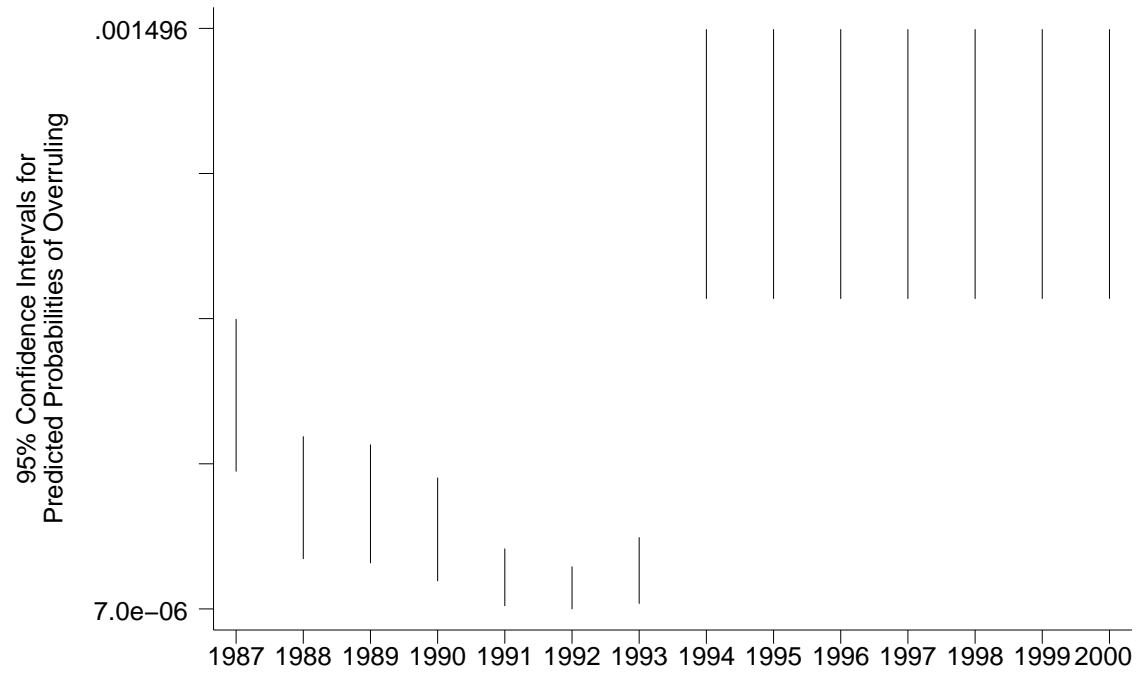


Figure 6: Committee Gatekeeping Model

