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# Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000

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## ***Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000***

To date, no study has found evidence that the U.S. Supreme Court is constrained by Congress in its constitutional decisions. We addressed the selection bias inherent in previous studies with a statute-centered, rather than a case-centered, analysis, following all congressional laws enacted between 1987 and 2000. We uncovered considerable congressional constraint in the Court's constitutional rulings. In particular, we found that the probability that the Rehnquist Court would strike a liberal congressional law rose between 47% and 288% as a result of the 1994 congressional elections, depending on the legislative model used.

A central empirical debate in the field of judicial politics is whether or not U.S. Supreme Court justices are constrained in their decisions by the policy preferences of federal elective officeholders (that is, the members of Congress and the president). This debate has focused almost exclusively on the Court's statutory decisions; there appears to be a consensus 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, and 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 that is introduced by using only the sample of cases accepted for review by the Court as one's data.<sup>1</sup> If the hypothesis of a constrained Court is true, then the justices will have few incentives to accept for review those cases that challenge congressional laws that the Court's median

justice thinks cannot be struck in the current political environment. By extension, litigants will have few incentives to challenge such laws in that context. Both limitations 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. We take as our sample all laws enacted by Congress between 1987 and 2000, and we use a grouped-event history model to track the laws' fates through the Rehnquist Court's 2000 October term. Using a variety of models of the legislative process, we reveal 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.

### **The Theoretical Debate**

Our empirical study is situated within an ongoing debate about whether or not 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 incentive for Supreme Court justices to be attentive to the preferences of elected officials? Some researchers argue that, certainly in statutory cases, the Court has clear incentives to be mindful of congressional and presidential policy preferences (Bergara, Richman, and Spiller 2003; Eskridge 1991; Ferejohn and Weingast 1992; Gely and Spiller 1990; Spiller and Gely 1992). If there is a statutory interpretation that the pivotal members of Congress prefer to a judicial interpretation, then they can enact that interpretation after 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 preferable to the interpretation that would be enacted by that Congress were it to act. By taking account of congressional preferences, 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 scholars who contend that, for a variety of reasons, 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 focused on this question. The evidence is mixed, although perhaps the preponderance of the results favors the hypothesis of an unconstrained Court.<sup>2</sup>

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, constitutional 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 researchers who advocate the hypothesis of a statutorily constrained Court typically agree that the Court is unlikely to be constrained in constitutional cases (Bergara, Richman, and Spiller 2003; Spiller and Gely 1992; although see Epstein, Knight, and Martin 2001; Friedman and Harvey 2003; Martin 2005; and Rogers 2001 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 Constitution gives Congress the power to regulate the Court's appellate jurisdiction; stripping the Court of aspects of this jurisdiction is frequently threatened by members of Congress who disagree with the Court's decisions (Friedman 1990).<sup>3</sup>

Congress's control over the lower federal courts may also provide an incentive for the Supreme Court to be attentive to congressional preferences. The number, composition, and jurisdiction of the lower federal courts are arguably entirely at the discretion of Congress (Friedman 1990; Segal and Spaeth 2002, 29–30).<sup>4</sup> Congress's ability to manipulate these aspects of the federal courts may affect the degree to which the Court is effective in policing these courts (McNollgast 1995; Segal and Spaeth 2002, 230).

Congress also has considerable discretion concerning the Court's budget. Although Congress cannot diminish the justices' salaries, it can fail to raise their salaries to keep pace with inflation (Cross and Nelson 2001; Landes and Posner 1976, 885). 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).

Congress also has the authority to alter the number of justices sitting on the Court<sup>5</sup> and 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), being only vaguely defined, might be used to punish the federal judiciary for decisions with which Congress disagrees (Cross and Nelson 2001; Stone et al. 1991; for examples, see Friedman 1998, 740).

Finally, Congress also might simply refuse to implement or follow Court decisions or provide insufficient funds for effective implementation (Cross and Nelson 2001; Friedman 1998, 742; Rosenberg 1991). 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.<sup>6</sup>

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. Yet the few empirical studies that have looked at the justices' decisions in constitutional cases have found no evidence of such constraint. Epstein, Knight, and Martin (2001) provided descriptive evidence appearing 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 (2005), using a more sophisticated methodology, found no such adjustment to congressional preferences. Spriggs and Hansford (2001) found no effect from either congressional or presidential preferences on the likelihood that the Court overturned constitutional precedent, and Sala and Spriggs (2004) found no evidence of congressional or presidential constraint in constitutional decisions between 1946 and 1999.

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, 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 Congress from disciplining the Court (Friedman 1998, 758–62; 2002, 47–63; 2003; Segal and Spaeth 2002, 94, 112 fn 85). The sheer difficulty of legislating in the American institutional environment may constrain Congress from reacting to Supreme Court decisions (Friedman 2002, 45–47; 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, Congress may have only limited information about most Court decisions and therefore be unlikely to react to those decisions (Hettinger and Zorn 2005; Segal and Spaeth 2002, 348).

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 only the outcomes 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 or presidential policy preferences (or both). The Court may refrain from granting certiorari because it can anticipate its own deferential response (Cross and Nelson 2001, 1476; Epstein and Knight 1998, 84). And strategic litigants seeking to have laws overturned may refrain from incurring the costs of challenging those laws if they suspect the Supreme Court will fail either to grant review or to overturn the law because of a concern about the congressional reaction.<sup>7</sup> Either or both of these acts of self-censorship 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 a statute-centered test of the hypothesis of a constrained Court. Instead of using Court decisions as our units of analysis, we followed the fates of all laws enacted between 1987 and 2000, tracking whether and when they were 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.

### **The Empirical Model**

We assumed that both justices and members of Congress have symmetric single-peaked preferences over a common left-right policy continuum. We further assumed that each law enacted by a given Congress reflects the midpoint between the ideal points of the pivotal legislators in that Congress.<sup>8</sup> We treated amendments to provisions of existing laws as new laws and gave them the ideological midpoints of the enacting Congresses.

Enacted laws may then be challenged in the courts, with recourse to the Supreme Court.<sup>9</sup> Constitutional challenges may take a variety of forms. Laws enacted by Congresses on the left side of this continuum might typically be challenged on the grounds that they overstep constitutional limits on congressional powers to act. Laws enacted by Congresses on the right side of this continuum might typically be challenged on the grounds that they insufficiently protect the constitutional rights of individuals.

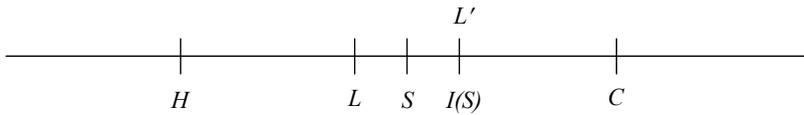
Should a congressional law,  $L$ , come before the Supreme Court, the Court's median justice will select a point on the policy continuum ( $L'$ ) as a standard of constitutionality against which the law will be judged. The probability that the Court will actually strike the law is then an increasing function of the distance between  $L'$  and  $L$ .

Consistent with both the constrained and unconstrained Court models, we assumed that the median justice prefers his or her ideal point ( $C$ ) as the standard of constitutionality against which the law will be judged. In the absence of any institutional constraint (as assumed by the unconstrained model), the median justice will then select  $C$  as the constitutional standard to be applied to the law. In this unconstrained case, where  $L' = C$ , the probability that the Court strikes the law is an increasing function of the distance between  $C$  and  $L$ .

If the Court faces institutional constraints, however, then  $L'$  may not equal  $C$ . The constrained model assumes that after the Court chooses  $L'$ , resulting in some probability that the law will be struck, Congress can choose to punish the Court with retributive legislation (for example, jurisdiction stripping, court packing, and so on). We assumed that Congress will do so only if all pivotal legislators prefer  $L$  to  $L'$ . That is, the pivotal members of the sitting Congress compare the utility they receive from  $L'$  to the utility they receive from  $L$ . Should at least one pivotal legislator be closer to (or equidistant from) the Court's ruling than to the original law, then that member will choose either not to introduce or to block legislation disciplining the Court. If the pivotal members are all closer to the law than to the Court's chosen constitutional standard, then those members will act to ensure passage of punitive legislation.

The constrained Court model assumes that the Court will act to avoid Court-punishing legislation. That is, the median justice will set  $L'$  as close to his or her ideal point as possible while forestalling punitive congressional action. Under some configurations of ideal points and for some laws, the median justice of the Court will be constrained in rulings of constitutionality by congressional preferences. Under other configurations, the median justice will not be constrained and will simply use his or her ideal point as a standard of constitutionality.

FIGURE 1  
Constrained Court Model

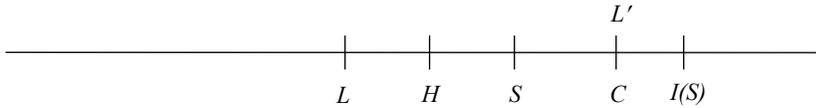


The specific conditions of a constrained Court will be explained in the next section, with attention to alternative theories of legislative behavior. To illustrate the general idea, however, we present an example of a constrained Court in Figure 1. In this figure, the pivotal members of Congress are assumed to be the median members of the House ( $H$ ) and Senate ( $S$ ). The Court's median justice ( $C$ ) 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 constitutional ruling on the law. If the median justice chose his or her own ideal point as the standard of constitutionality in this case, then both the House and the Senate would support punitive legislation aimed at the Court. The median justice thus will moderate the constitutional standard ( $L'$ ) to the point at which the congressional pivot closest to the justice's ideal point is just indifferent between the standard embodied by the law at issue and that articulated by the Court. In Figure 1, this motivation implies that  $L'$  will be set at the indifference point of the median senator,  $I(S)$ . 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. The House and Senate medians have shifted rightward, however, 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 set  $L'$  at  $C$ , 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 probability that the Court strikes the law depends in both cases only on the distance between the Court median and the law at issue. 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.

FIGURE 2  
Unconstrained Court Model



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 probability that the Court will strike the law is now a function of the much-smaller distance between  $L'$ , which in Figure 1 is set at  $I(S)$ , and  $L$ . The constrained Court model thus would predict a smaller likelihood of  $L$  being ruled unconstitutional in this case.

### Theories of Congressional Behavior

The foregoing model requires some assumptions about the legislative process. We followed the literature on congressional behavior, deriving the conditions under which the Court will be constrained from five prominent theories of congressional pivotality (Krehbiel 1998).

#### *The Floor Median Model*

In the floor median model, the pivotal members of Congress are the House and Senate floor medians.<sup>10</sup> 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  $L'$  will be set at the ideal point of the median justice. 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  $L'$  at this leftmost (rightmost) boundary.

*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.<sup>11</sup> As in the previous model, 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.<sup>12</sup> An unconstrained Court median will set  $L'$  at his or her own ideal point; a constrained Court will set  $L'$  at the leftmost or rightmost boundary of this set.

*Majority Party Models*

Some students of Congress assert that the legislative party organizations can influence the votes of legislators such that outcomes are pulled away from the floor medians toward the majority party medians (Aldrich 1995, chap. 7; Dion and Huber 1996, 1997; Rohde 1991). There is considerable controversy about whether or not party organizations wield such power (Krehbiel 1993, 1995, 1998). We employed two different approaches to modeling majority party influence. First we assumed that the majority party can gatekeep but faces an open rule once legislation is allowed onto the floor. Then we assumed that the party can effect a closed rule on the floor by influencing the votes of party members.

*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 they could attain on open floor votes (Krehbiel 1998, 234). But because legislation, once released by a committee, is subject to an open rule, we assumed—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. An unconstrained Court will set  $L'$  at its own median; a constrained Court will set  $L'$  at the leftmost or rightmost boundary of this set.

*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 (for example, Dion and Huber 1996, 1997). In the majority party median model, then, one assumes 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, then 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. An unconstrained Court will set  $L'$  at its own median; a constrained Court will set  $L'$  at the leftmost or rightmost boundary of this set.

#### *The Veto-Filibuster Model*

Finally, we computed the constraint sets for a fifth theory of legislative behavior, namely 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 two-thirds of both houses, and the possibility of a senatorial filibuster, which can be broken only by mustering a three-fifths majority in the Senate. For a Democratic president, the relevant congressional pivots are thus the 146th representative, the 34th senator, the House and Senate medians, and the 60th senator. For a Republican president, the pivots are the 41st senator, the House and Senate medians, the 290th representative, and the 67th senator. We assumed legislation is represented by the midpoint of the appropriate set. Should a congressional law be reviewed by the Court, the Court's constraint set will be composed of the point represented by the law and the indifference point of each congressional pivot in the appropriate set. An unconstrained Court will set  $L'$  at its own median, while a constrained Court will set  $L'$  at the leftmost or rightmost boundary of this set.

### Testable Implications

For each of the five theories of congressional behavior, we tested both the unconstrained and the constrained models of Supreme Court decision making. That is, for each of the theories of congressional behavior, we tested the unconstrained model by examining whether or not the probability that a law is ruled unconstitutional is a function of  $|C - L|$ .<sup>13</sup> The unconstrained model predicts a positive relationship between this variable and the likelihood that the Court overrules a congressional law. We tested the constrained model by examining whether or not the probability that a congressional law is struck by the Court is better understood as a function of  $|L' - L|$ . The constrained model also predicts a positive relationship between this variable and the likelihood that the Court overrules a congressional law.<sup>14</sup>

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

Finally, another implication of all models of a constrained Court is that, in equilibrium, Congress never actually enacts Court-punishing legislation, because the Court always chooses a constitutional standard that 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).

### The Data

Our statute-centered (rather than case-centered) analysis begins with the 100th Congress, elected in 1986, and tracks 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.<sup>15</sup> We followed the fate of these laws through the Rehnquist Court's 2000 term. Table 1 shows the numbers of public laws enacted in each congressional year and the number of years that we followed the laws for each group.<sup>16</sup> In total, we followed the fate of 3,725 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.

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	3,725	1–14	29,755

### *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. We coded laws that were still “alive” as 0. We coded struck laws as 1 in the term in which they were struck down, and we then removed them from the dataset.

To determine which laws were struck down by the Court during this period, we combined several lists of cases involving struck congressional laws (Epstein et al. 2003; Congressional Research Service 2001; United States Supreme Court Judicial Database 2006; Zeppos 1993). 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.<sup>17</sup>

Our sources often disagreed on another requisite piece of data, the year in which a struck law originally was enacted. When sources agreed, we accepted their unanimous determination. When disagreement occurred, typically due to the reenactment or amendment of a law, we adopted the following decision rule. First, we identified the specific section or sections of the statute actually being reviewed by the Court. We then looked at both the original enacting date and all reenactments of or amendments to this section or sections. As long as the challenged language of the statute remained substantially intact through all amendments or reenactments, or both, we adopted the most recent reenacting or amending Congress as the enacting Congress.<sup>18</sup>

In all, 22 of the 3,725 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. This table reveals that 18 of these laws were enacted by Congresses sitting prior to the 1994 congressional elections. Many of these 18 statutes do appear to be “liberal,” as that term is commonly used. They include protections from discrimination on the basis of disabilities or gender, various forms of gun control legislation, and provisions for health care benefits for retirees from the coal industry.

Moreover, among the few struck statutes passed by Congresses after the 1994 elections, there are examples of “conservative” laws. For example, this set of struck laws includes an appropriations act prohibiting the Legal Services Corporation from funding local organizations that represent clients who challenge existing welfare laws.

The list also contains laws whose ideology is harder to ascertain at face value. For instance, legislation restricting speech of various kinds (for instance, casino advertisements, flag desecration, pornographic television broadcasts) was passed by Congresses sitting both before and after the 1994 elections. By some accounts, these measures are traditionally “liberal,” extending the power of the federal government to regulate private conduct. By other accounts, these statutes are more properly understood as “conservative,” because they promote a socially conservative moral agenda.

Instead of trying to make these kinds of judgments, we turned to widely accepted measures of congressional ideology derived from roll-call votes. We also used a set of measures of judicial ideology that permit scaling the Court and Congress in the same ideological space.

TABLE 2  
Struck Congressional Laws, 1987-2000

Statute (Name and Pub. L. No.)	Year Enacted/ Amended	Number 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 Association 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

TABLE 2 (continued)

Statute (Name and Pub. L. No.)	Year Enacted/ Amended	Number of Enacting Congress	Name of Case Striking Law	Date Decided	Oct. Term
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

*Independent Variables*

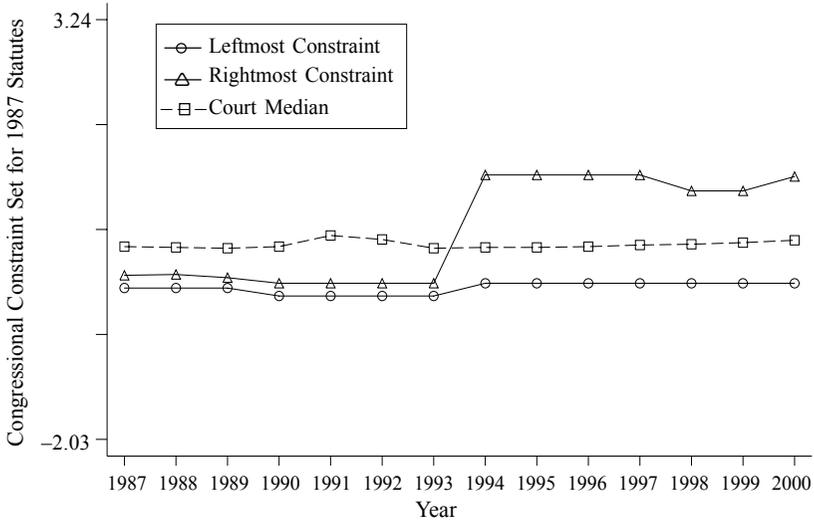
The testable implications of our empirical models require us to compute measures of ideological distance between the Court and various pivotal members of Congress. Typically, researchers testing separation-of-powers models use measures of ideology that are not scaled in the same institutional space (Segal 1997; Segal and Spaeth 2002). Here we used 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 2005; Bailey and Chang 2001). We then used the Bailey Senate estimates from 1987 to 2000 to linearly transform Poole's Common-Space House estimates for the same period into Bailey space (Bailey 2005; Poole 1998, 2003).<sup>19</sup>

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. Figure 3 displays the congressional constraint set for 1987 statutes under the floor median model. This figure illustrates a phenomenon common to all constraint sets for pre-1995 statutes—except for those generated by the veto-filibuster model—namely that the Court lies to the right of the rightmost boundaries of these constraint sets prior to 1994. After 1994, the Court lies within these constraint sets. With the exception of the predictions of the majority party median model, the Court also lies within the predicted constraint sets for all laws enacted by the post-1994 Congresses. The majority party median model predicts that between 1995 and 1999 the Court should actually be 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 identical to that of the floor median model between 1987 and 1994. Its predictions are thus observationally equivalent to those of the floor median model.

These estimated constraint sets suggest that, prior to the 1994 congressional elections, the Rehnquist Court would have been quite hesitant to strike the liberal legislation enacted by the Congresses sitting between 1987 and 1994. After those elections, however, the Court would have been liberated to strike those laws essentially at will.

This pattern is indeed reflected in Table 2, which reports the years and cases in which congressional statutes were struck by the Court. Of the 22 laws struck between 1987 and 2000, 18 were enacted by Congresses sitting prior to the 1994 congressional elections. Of those 18 laws, only 2 were struck by the Court prior to the 1994 October term.

FIGURE 3  
Floor Median Model



The constraint set generated by the veto-filibuster model is qualitatively different from those generated by the other four models. This model predicts that, for all laws enacted prior to the 1994 congressional elections, the Court should be constrained by Congress and the president only during the 103d Congress, or that sitting during 1993 and 1994. During this period, the Democratic Congress was joined by a Democratic president, and the Court lay to the right of the rightmost boundary of the constraint set generated by the relevant pivotal actors. For all laws enacted after the 1994 elections, the veto-filibuster model predicts a Court unconstrained by Congress and the president.

### The Econometric Specifications and Results

Our data consist of individual laws observed over discrete units of time (years). In any given year, a law may be overruled (and generate a value of 1) or continue to “survive” (and generate a value of 0). We observed the laws for only a limited period of time, ending our period of observation with the close of 2000. There is some possibility that laws are less likely to be overruled the longer they survive. We thus require an empirical method that takes into account the facts that we have a binary dependent variable, data that are “right censored,” and

potential temporal dependence (for example, 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, Katz, and Tucker 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 applied 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 that is unknown and possibly time varying.

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

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  $e^{\mathbf{x}_{i,t}\hat{\alpha}}$  term, and on the possibly time-varying baseline hazard,  $h_0(t)$ . Its grouped version is reported in equation (2).

$$P(y_{i,t} = 1|\mathbf{X}_{i,t}) = h(t|\mathbf{X}_{i,t}) = 1 - \exp(-e^{\mathbf{x}_{i,t}\hat{\alpha} + \hat{\epsilon}_t}) \quad (2)$$

In equation (2),  $y_{i,t}$  is the binary indicator of whether or not 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  $\hat{\epsilon}_t$  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, Katz, and Turner 1998; Zorn 1998). We estimated 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. 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 that included simpler linear trend terms.<sup>20</sup>

*Poisson Estimates*

For 6 of the 14 years for which we tracked 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 we dropped these 8,581 observations from the initial estimations. For all seven sets of estimations reported in Table 3, likelihood ratio tests failed to reject the null hypothesis that the duration dummy variables were no better than linear trend terms at capturing the effects of time on the baseline hazard rate. The linear term (*Age of Law*), whose values range from 1 to 14, has the advantage that it can be estimated using all observations. Table 3 thus reports the results of estimations including that linear term using Huber (1967) robust standard errors. Finally, the Poisson goodness-of-fit statistics reported in Table 3 confirm the appropriateness of a Poisson model for all seven estimations.<sup>21</sup>

*The Unconstrained Court Model.* The estimations reported in Table 3, models 1–3, provide no support for the hypothesis of an unconstrained Court. In these estimations, the probability that a law is struck by the Court is modeled as a function of  $|C - L|$ , where  $C$  is the Court median and  $L$  represents the law being reviewed by the Court.

All three estimations provide extremely poor fits to the data. None of the variables measuring ideological distance are significant. The trend variable, *Age of Law*, also fails to generate a significant coefficient in any estimation. No model provides a better fit to the data than a model including only the constant term.

*The Constrained Court Model.* All four of the constrained Court estimations reported in Table 3 appear to fit the data much better than do the unconstrained models. For these estimates, the probability that a law is struck by the Court is modeled as a function of  $|L' - L|$ , where  $L'$  represents the predicted point at which the Court will set its standard of constitutionality, given the constraint exercised by the sitting Congress, and  $L$  again represents the law at issue.

In all four estimations, the coefficients on the  $|L' - L|$  variable are in the predicted (positive) direction and are significant at the level of .05 or above. The trend variable measuring the age of a law is now consistently in the direction we would expect (negative) and is significant in all estimations except the veto-filibuster model. Three of the constrained Court models report significantly better fits to the data than do constant-only models, while the majority party median model falls just short of improving on a constant-only model at conventional significance levels.<sup>22</sup>

TABLE 3  
Grouped Event History Estimations Poisson Link Function with Linear Time Term

	Unconstrained Floor Median/Party Gatekeeping/Committee Gatekeeping Models	Unconstrained Majority Party Model	Unconstrained Veto-Filibuster Model	Constrained Floor Median/Party Gatekeeping Models	Constrained Committee Gatekeeping Model	Constrained Majority Party Model	Constrained Veto-Filibuster Model
$ C - L_1 $	-0.676 (1.364)						
$ C - L_2 $	-1.444 (0.963)						
$ C - L_3 $		1.312 (1.843)					
$ L_1' - L_1 $				3.188*** (1.118)			
$ L_2' - L_1 $					3.356*** (1.386)	1.488** (0.760)	2.333** (1.117)
$ L_3' - L_1 $							
$ L_4' - L_2 $							
$ L_5' - L_3 $							
<i>Age of Law</i>	0.002 (0.053)	0.033 (0.063)	-0.007 (0.055)	-0.137** (0.064)	-0.121* (0.063)	-0.144* (0.077)	-0.014 (0.054)
<i>Constant</i>	-6.916*** (0.614)	-5.738*** (0.949)	-7.558*** (0.704)	-7.709*** (0.485)	-7.912*** (0.564)	-7.864*** (0.597)	-7.783*** (0.499)
N	29,675	29,675	29,675	29,675	29,675	29,675	29,675
Wald Chi <sup>2</sup>	0.26	2.40	0.63	9.57	6.84	4.48	4.78
Prob > Chi <sup>2</sup>	0.880	0.302	0.729	0.008***	0.033**	0.107	0.091*
Poisson GOF	1.000	1.000	1.000	1.000	1.000	1.000	1.000

Note: Huber (1967) robust standard errors reported in parentheses. \* $\alpha = .10$ ; \*\* $\alpha = .05$ ; \*\*\* $\alpha = .01$  (all two-tailed tests).

TABLE 4  
 Predicted Probabilities of Overruling 1987 Statutes  
 as a Function of Congressional Constraint Variable

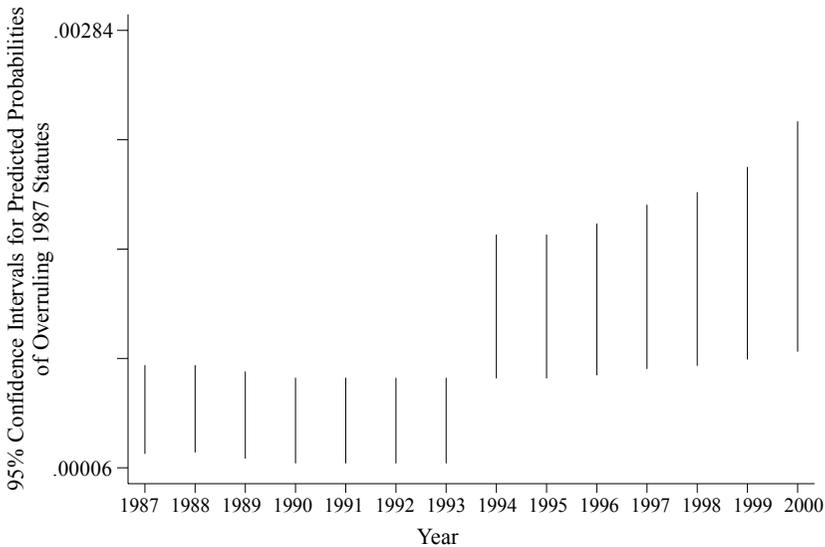
Year	Floor Median/Majority Party Gatekeeping Model	Committee Gatekeeping Model	Majority Party Median Model	Veto-Filibuster Model
1987	.00036	.00070	.00039	.00065
1988	.00037	.00049	.00039	.00063
1989	.00032	.00046	.00039	.00062
1990	.00027	.00043	.00039	.00064
1991	.00027	.00037	.00039	.00089
1992	.00027	.00025	.00038	.00043
1993	.00027	.00025	.00038	.00043
1994	.00102	.00097	.00129	.00063
1995	.00102	.00097	.00129	.00063
1996	.00106	.00101	.00131	.00065
1997	.00113	.00108	.00136	.00068
1998	.00117	.00112	.00138	.00069
1999	.00124	.00120	.00143	.00072
2000	.00137	.00133	.00151	.00077

*Note:* Predicted probabilities simulated by Clarify 2.1 (King et al. 2000). Statute age is held at the sample mean.

These estimates thus give fairly robust support, across different models of the legislative process, to the hypothesis of a constitutionally constrained Court. We can 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 both the Court's preferences over the law and the relevant congressional constraint. We held the age of the law at the sample mean. Table 4 reports these probabilities for the relatively liberal laws enacted in 1987. Figure 4 displays these predicted probabilities graphically, along with their 95% confidence intervals, for the floor median/majority party gatekeeping model.

As can be seen in both Table 4 and Figure 4, the changes in the predicted probability that a liberal congressional law will be struck by the Rehnquist Court can be dramatic. In particular, for the floor median/majority party gatekeeping model—the model that appears to fit the data the best—the predicted probability that a 1987 statute would be struck increases by 278% immediately following the 1994 congressional

FIGURE 4  
Floor Median/Majority Party Gatekeeping Model



elections. The committee gatekeeping model predicts a 288% increase in the likelihood that such a law would be struck, while the majority party median model predicts an increase of 239%. Figure 4 illustrates the minimal overlap in the confidence intervals for the 1993 and 1994 point predictions of the floor median/majority party gatekeeping model; the results for the other two models are substantially similar.

As could be expected from its significantly different constraint set, the veto-filibuster model predicts a much smaller increase in the probability that a liberal law would be struck as a result of the 1994 congressional elections. The predicted increase according to this model is only 47%, and there is substantial overlap in the 95% confidence intervals for its 1993 and 1994 point predictions. It is noteworthy, however, that even under this alternative set of assumptions about the legislative process, the constrained model performs significantly better than does the unconstrained model.

These findings help to clarify an empirical puzzle that 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 (Merrill 2003, 569, 586; Segal and Spaeth 2002, 414; Waxman 2001, 1074). Indeed, the Court's recent willingness to strike congressional legislation has even been cited as evidence of an unconstrained Court (Segal and Spaeth 2002, 112–13, 277 *fn* 151). We find the results of our analysis to be fairly compelling support for the rival hypothesis.

### Conclusion

We are not the first researchers to note the dramatic increase in the propensity of the Rehnquist Court to strike congressional legislation in the mid-1990s. We believe, however, that 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 literature on legislative-judicial relations. 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 studies not only of constitutional cases, of which there are few, but also of statutory cases, which constitute a more robust literature.

Finally, we are aware of no other study that has provided systematic empirical support for the proposition that the Court is bound by institutional constraints to take account of congressional preferences when making constitutional decisions. 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 (Bork 1997; Dworkin 1977; Ely 1980; Fried 2004). The normative status of a Court bound in the way that we suggest is much less clear.

Moreover, our finding of congressional constraint in constitutional cases raises significant concerns about studies that assume that votes in such cases are unconstrained (for instance, Segal 1997). A common empirical technique in analyzing the justices' votes in statutory cases has been to take their votes in constitutional cases as reflective of their "true," unconstrained preferences. If these preferences are, in fact, constrained, then such analyses are misspecified, and their findings likely do not capture the full extent to which the justices' votes in statutory cases are constrained by Congress as well.<sup>23</sup>

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

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## NOTES

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

2. 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. But 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.

3. For examples of jurisdiction stripping, see Cross and Nelson 2001; Friedman 1998, 741, 745, 751–53; Martin 2005, 10; McNollgast 1995, 1664; Nagel 1965, 928; Rosenberg 1992, 377, 385, 387, 390; and Segal and Spaeth 2002, 230. More-dramatic congressional proposals to limit judicial review have included allowing appeal from the Court to an elective body like the Senate (Friedman 1998, 740; Rosenberg 1992, 377) or the entire Congress (Friedman 1998, 749) and requiring extraordinary majorities for the Court's declarations of unconstitutionality (Friedman 1998, 744, 748; Rosenberg 1992, 377, 387).

4. For examples of congressional manipulation of the number, composition, and jurisdiction of the lower federal courts, see Cross and Nelson 2001; Friedman 1998, 740; Landes and Posner 1976, 885; McNollgast 1995, 1648, 1663; Nagel 1965, 926 fn. 3; Rosenberg 1992, 380–81; and Segal and Spaeth 2002, 226 fn. 8, 227–28, 236, 236 fn. 34.

5. During the Civil War, the size of the Supreme Court was for a time increased to 10 justices, later reduced to 8, and then restored to 9 after Grant's assumption of the presidency (Friedman 1998, 743, 746; McNollgast 1995, 1632; Rosenberg 1992, 381). The New Deal Congress elected in 1936 seriously considered Roosevelt's proposal to "pack" the conservative Supreme Court with new liberal members (Friedman 1998, 749–50; Rosenberg 1992, 381).

6. See Fisher 1993 for a claim that the Supreme Court's invalidation of the legislative veto has been ignored this way.

7. McGuire et al. (2005) make the point that petitioners petition only when they expect to win, although these authors do not analyze the potential effect of congressional and presidential policy preferences on petitioners' decisions.

8. The question of which members of Congress are pivotal depends upon how one models the legislative process. We explored a variety of models, as detailed later in the article.

9. Even a law that has a finite time horizon, such as an annual appropriations bill, may be litigated to the Supreme Court even after its formal authority has expired.

10. This 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 three 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).

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

12. We assumed that legislation attacking the Court would most likely lie within the jurisdiction of both houses' Judiciary Committees.

13. We could have also assumed a quadratic form here with little difference in the estimation results.

14. Sala and Spriggs (2004) note that the observational equivalence between the two models for the observations for which the Court is predicted to be unconstrained will dampen the results for the constrained model. Our estimation is thus a conservative test of the constrained model.

15. Although it usually takes several years for a challenge to a law to work its way to the Supreme Court, this movement 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.

16. We obtained the data in Table 1 from the *Congressional Record's* summaries of legislative activity at the Library of Congress (2004). Congress also enacts an

increasingly small number of “private” bills every legislative session; these bills concern topics of very narrow interest to individual members. We did not include private bills in our dataset.

17. For example, the list generated by the U.S. Supreme Court Judicial Database appears to both include cases that do not strike congressional laws, e.g., *Saenz v. Roe* (1999) (involving the constitutionality of a California statute limiting the maximum welfare benefits available to newly arrived residents) and to exclude cases that do strike congressional laws, e.g., *Bartnicki et al. v. Vopper et al.* (2001) (involving a provision of federal wiretapping law found to violate the First Amendment).

18. For 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. The original prohibition on casino advertising remained intact through this amendment, clearly signaling congressional support for the thrust of the original law. The later Congress was thus designated as the enacting Congress.

19. As 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 (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 (2005), although they omitted 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.

20. Beck (1998) and Beck, Katz, and Tucker (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. Our data show no evidence of nonlinear baseline hazard rates, however.

21. Beck, Katz, and Tucker (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 the probability of a law being overruled is considerably below this threshold in our dataset, we also 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 3. We also reestimated all models in Table 3 using the rare events logistic regression (RELOGIT) estimator recommended by King and Zeng (2001). We found only negligible differences in the estimated coefficients, standard errors, predicted probabilities, and confidence intervals.

22. One shortcoming of the grouped-event history model used here is that it assumes that all congressional laws will eventually be overruled by the Supreme Court. As an alternative strategy, we estimated several split-population event history models, which allow us to assume that some laws will never be struck by the Court (Greene 2002; for an application to judicial politics, see Hettinger and Zorn 2005). We estimated these models using zero-inflated Poisson regressions with duration dummy variables included (Zorn 1998), with the same dependent and independent variables as in Table 3. The reported Vuong statistics for each estimation failed to provide any improvement in fit over the standard Poisson models used in Table 3 (Greene 2002; Vuong 1989).

23. We thank an anonymous reviewer for *Legislative Studies Quarterly* for suggesting this point.

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