**Abstract:** We evaluate the claim that Supreme Court justices act like legislators in robes by: (1) comparing unidimensional ideal-point estimations of Congressional and Supreme Court decision making, (2) explicitly tying the Supreme Court’s votes on judicial review of federal legislation to Congressional roll call votes on the same bill, (3) evaluating the effect of policy preferences on decisions to strike federal legislation, (4) comparing the influence of the Supreme Court on Congressional decisions to that of Congress on Supreme Court decisions, and (5) comparing the role of party on the Supreme Court and in the Senate, and. The evidence strongly suggests that Supreme Court justices act as if they are “legislators in robes.”

We presented earlier versions of this paper at the 2010 Annual Meeting of the Midwest Political Science Association, the Conference on Empirical Legal Studies, November 2010, Yale University, and colloquia at the Baldy Center at the University of Buffalo School of Law, the University of Georgia, Tel Aviv University and the Hebrew University School of Law. We thank Stefanie Lindquist for thoughtful input throughout this project. We also thank Andrew O’Geen, Jenna Lukasik and Paulo Tanimoto for their research assistance in connection with this project and Deborah Beim and Michael Crespin for helpful comments.
I. INTRODUCTION

The tight fit between the ideology of the justices of the Supreme Court and their voting behavior has led many scholars to refer to them as either “politicians” or “legislators in robes” (Benesh and Spaeth 2007; Sheldon 1970. See also Gibson 2008). The proposition that Supreme Court justices’ behavior resembles legislative behavior nevertheless remains controversial. Justice Breyer, for example, recently complained that “More and more people think that what’s important to us is political and that this is nine junior varsity politicians.”

Likewise, Levinson (2010) objects to this characterization by noting that “many hard-core political scientists are satisfied to describe judges as nothing more than politicians in robes who do nothing more than maximize their policy preferences.” On the other hand, in distinguishing between upper and lower federal courts, Posner takes a more nuanced view, stating that "no responsible student of the judicial system supposes that 'politics' or personal idiosyncrasy drives most (judicial) decisions, except in the Supreme Court" (2008, p. 8, emphasis added).

In this paper we consider just how well the phrase “legislators in robes” fits the justices of the Supreme Court. We conduct our analysis in several stages. First, we compare the fit of unidimensional ideal-point estimation models on Congressional and Supreme Court voting behavior. Second, because the fit of an ideal point model could be consistent with many factors, including the justices legal preferences, we demonstrate that the justices’ votes to strike or uphold federal legislation are similar to the yeas and nays cast by members of Congress on the roll call votes to pass that legislation. Third, we consider stra-

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1 Washington Post, September 13, 2010.
ategic behavior of the Supreme Court and Congress toward each other. We find mixed evidence regarding strategic considerations by both, but the justices’ preferences are a clear predictor of decisions to declare federal legislation unconstitutional. Fourth, we examine the relationship between legislative and judicial partisanship. Briefly, if there is substantial ideological overlap between Republicans and Democrats in the Senate at the time particular justices are appointed, we would expect for some time following that ideological overlap between Republicans and Democrats on the Court. But as the parties diverge in the Senate, we expect new justices of different parties to diverge as well. Overall, the combination of these various analyses supports the conclusion that justices act as if they are “legislators in robes.”

II. IDEAL POINT ESTIMATES OF LEGISLATORS AND JUSTICES

In the literature on Congressional decision making, one of the key advances of the past twenty years has been the development and application of simple spatial models. Work by Poole and Rosenthal (1991, 1997) in particular has thoroughly examined how well these models explain roll call voting in Congress. Poole and Rosenthal start with a single-peaked utility model maximized at a legislator’s ideal point and use roll call votes to estimate these ideal points. Their analysis was not designed to generate ideology scores to be used as independent variables; rather, their goal was to determine how many dimensions explain legislative decision making, how stable these dimensions are over time, and how stable legislator preferences are over time.

The lessons from Poole and Rosenthal on these fronts are clear. First, a single, left-right ideological dimension explains an overwhelming proportion of roll call votes throughout American history. A single dimension correctly classifies 80-85% of all roll call
votes over time, and that percentage rises to over 90% in the most recent sessions of Con-
gress. A second dimension emerges prior to the Civil War and during the civil rights move-
ment in the late 1930’s through the early 1970’s, but adding this second dimension to the
basic model increases the correct classification percentages by only 1 to 3% (Poole and
Rosenthal 1997). Second, Poole and Rosenthal argue that the dominant dimension can best
be understood in terms of a basic left-right, liberal-conservative ideological continuum
whose structure remains remarkably stable over time, especially after the Civil War. The
preferences of individual members of Congress also demonstrate this same stability over
time. According to Poole and Rosenthal, “[m]embers of Congress come to Washington with
a staked-out position on the continuum, and then, ‘die with their ideological boots on’”
(1997, p. 8).

Claims that legislative behavior is largely shaped by a single left-right dimension and
that legislative preferences remain stable over time may seem relatively non-controversial.
However, the literature on legislative decision making posits a wide range of potential insti-
tutional and strategic considerations that make Poole and Rosenthal’s findings far from
 guaranteed. In particular, roll call votes might be influenced by party politics, agenda ma-
nipulation, log rolling, committee structure, and procedural tactics (just to name a few pos-
sibilities), which if true, reduces the likelihood of finding a stable, single dimension. Yet de-
spite the potential for these factors to produce unstable or highly-dimensional roll call
votes, the simple, liberal-conservative dimension nevertheless remains the best predictor
for the vast majority of these votes.

Applying this same liberal-conservative concept of ideology to explain Supreme
Court decision making is at the heart of the attitudinal model (Segal and Spaeth 1993,
Despite very strong initial resistance, most political scientists who study the Supreme Court acknowledge that conventional ideological preferences play an important role in how justices vote. But critics of the attitudinal model maintain that ideology is just one (and maybe not even a very interesting one) of the many determinants of the justices’ voting behavior. Similar to the theoretical arguments against unidimensionality in Congress, a variety of theoretical factors weigh against unidimensionality at the Supreme Court. These include the complex and therefore multi-dimensional nature of legal questions (Shapiro 2009), legal constraints such as stare decisis (Bailey and Maltzman 2008), or the strategic anticipation of Congressional rebukes (Bergara, Richman, and Spiller 2003). If true, this proposition has one of two implications for any analysis that compares legislative and judicial voting patterns. First, the presumption that legal decision making is inherently different from congressional decision making means that the idea of a liberal or a conservative vote will not be applicable in a wide range of Court cases. Alternatively, strategic, forward thinking justices may be operating on the same dimension as members of Congress, but their merit votes will not reflect this fact because the justices will not vote their sincere preferences.

Despite these objections, scholars have estimated scaling models of the justices’ voting behavior using an approach close to that adopted by Poole and Rosenthal. Most notably, Martin and Quinn (2002) estimate ideal points for Supreme Court justices using a similar underlying spatial model as specified by Poole and Rosenthal. While estimation of the Martin-Quinn scores differs significantly from Poole and Rosenthal’s techniques, both models share the basic features of a random utility model. Martin and Quinn devote most to their attention to exploring changes in the individual justices’ ideal points over time, finding that
most justices’ voting patterns reflect some degree of ideological drift over the course of their careers (see also Epstein et al. 2007, Martin and Quinn 2007). Receiving less substantive attention is that fact that Martin and Quinn only estimate single dimension models for both their dynamic and constant ideal point models. Because the justices’ votes generally conform to the unidimensional model, Martin and Quinn argue that there is no need to bother estimating a second dimension. Analyses of dimensionality of Supreme Court votes suggest that the justices’ votes are, in large part, well explained by a single ideological dimension. Citing their earlier analysis of a sample of years from the Burger Court (1981-85), Martin and Quinn (2002) find that 93% fall along a single dimension (p. 145). During the same time period, a single dimension also explains 75-80% of each justice’s votes. Moreover, Grofman and Brazill (2002) examine votes cast between 1953 and 1991 and conclude that Supreme Court decisions are “fundamentally unidimensional” (p. 57) (but see Edelman, Klein and Lindquist 2008). While it appears that Supreme Court justices exhibit more ideological drift over time than their legislative counterparts, the fact remains that merit votes may be better explained by a single dimension than legislative votes. Ultimately, the only difference between the legislative and judicial issue space over time is that the Court is more stable than Congress.

Before turning to how we might directly compare legislative and judicial preferences, one additional point must be considered. First, regardless of the scaling procedure used, it is up to the researcher to determine the substantive meaning of the dimensions. For the Supreme Court ideal point estimates, nothing about the analysis tells us that a “liberal-conservative” distinction actually explains variations in the voting behavior across legislators or justices. We simply know that some dimension, whatever it might be, correctly clas-
sifies at least 80-90% of legislative and judicial votes. That the legislative first dimension is a liberal-conservative continuum has not been subjected to much, if any, debate. Legislative scholars accept without difficulty that this is the meaning of the latent dimension. Some judicial scholars, however, are reluctant to attach the same meaning to the single dimension that explains judicial behavior. In expressing their skepticism that ideology is actually the underlying dimension, Ho and Quinn (2010) note that the information summarized by ideal point estimates “need have little to do with ‘ideology’ in the attitudinal sense” (p 839) and that it could, in theory at least, be capturing jurisprudential differences. Of course, Ho and Quinn also acknowledge that Supreme Court ideal point estimates correspond perfectly with “conventional perceptions of the left-right spectrum of the Court” (p 837). We argue that by far the most likely meaning of this dimension is a liberal-conservative continuum that is not meaningfully different from the legislative continuum. We are hard pressed to even speculate about what alternative non-ideological dimension could possibly explain so many of these decisions and still yield results that align identically with an attitudinal description of the Court.

Nevertheless, to better answer whether these scores represent ideology or “something else,” we make three points: First, as seen in Figure 1, these scores readily pass face validity tests of ideology. Though the scores are created simply from the justices’ votes to affirm or reverse in each case, they recover commonly held perceptions of liberal and conservative justices remarkably well, with Justice Douglas the furthest to the left (most negative) and Justice Thomas furthest to the right (most positive).
Second, as seen in Figure 2, even though the Justices’ liberal or conservative voting in each case is not part of the data input for the ideal point estimates, these scores predict the justices’ liberal and conservative voting records as established in the Spaeth Supreme Court database remarkably well. The correlation of the Martin-Quinn scores with how the justices voted once on the Supreme Court, -.89, certainly verifies that these scores represent ideology.\(^2\)

Figure 2 About Here

Third, there is a firmer foundation for the ideology-voting relationship on the Supreme Court than in Congress, in that the ideology-voting relationship on the Supreme Court has been verified time and again with exogenous measures of the justices’ ideology, the Segal-Cover scores (Segal and Cover 1989; Segal and Spaeth 1993, 2002; Epstein et al., 1995). For the most part, the effect of ideology on voting in Congress relies on ideology measures derived from the Congressmen’s votes (see Burden, Caldeira and Groseclose 2000; but see Crespin, Gold, and Rohde 2006).

III. SCALING LEGISLATORS AND JUSTICES

A comparison of the results from the various scaling approaches to roll call and merit votes demonstrates that both decisions are primarily predicted by a single underlying dimension. We believe that evidence clearly indicates that the liberal-conservative dimension is not different across chambers. If this assertion is correct, then it should be possible to directly compare legislators and justices. Directly comparing ideal point estimates, however, can be problematic. In the following section, we briefly introduce the problem with

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\(^2\) Because the constant Martin-Quinn scores are no longer updated, we used the 2010 Martin-Quinn score for Roberts, Alito, Sotomayor, and Kagan in Figure 2.
comparing justices and legislators and we detail two solutions to the across-institution measurement problem.

A major issue is that the scale of the latent dimensions in the measure models is unobserved. Assumptions about the underlying scale are necessary to identify the measurement model, and generally speaking, these assumptions are relatively innocuous. The result is that ideal points of -6, 0, 2.75, etc. have no intrinsic meaning – the meaning of those values will depend on how the researcher has chosen to set the scale for the underlying dimension. This makes directly comparing Martin and Quinn scores with Poole and Rosenthal scores an ill-advised plan. The Poole-Rosenthal Common Space scores (Poole 1998), for example, are bound with -1 as most liberal and 1 as most conservative by construction. Martin and Quinn scores are not identified by setting the extreme ends of their scale and are theoretically unbounded (-6.6 [Douglas in 1974] and 4.4 [Rehnquist in 1975] are the most extreme values that have been estimated). A direct, apples-to-apples comparison between the two measures simply cannot be made.

Two possible solutions have been proposed for this problem. The Judicial Common Space (JCS) scores developed by Epstein et al. (2007) transform Martin-Quinn scores to be on the same scale as the legislative Common Space scores. By taking an arctangent transformation of the Martin-Quinn scores, the JCS effectively bounds the M-Q scores by -1 and 1. Epstein et al. offer the JCS scores as a research tool that might allow for a more reliable way to evaluate inter-institutional research questions, such as separation of powers models or hierarchical models within the federal judiciary. An alternative approach is to jointly estimate ideal points for members of Congress and the Court. This requires “bridging observations,” which are cases in which actors across institutions take positions on the same case.
or issue. Employing a vast dataset with nearly 12,000 of these bridging observations, Bailey (2007) jointly estimated Congressional, presidential, and Supreme Court ideal points between 1951 and 2002. The estimation of the ideal points differs in important ways between the JCS and the Bailey scores, but the assumptions driving both scores are consistent with the arguments we have advanced thus far: namely, a single, common ideological dimension is shared both across institutions and across time. This of course is a very strong claim, but once again, the evidence supporting this argument is quite compelling.

Our subsequent analysis will rely on the JCS scores because the Bailey scores assume what we want to demonstrate, i.e., that judicial review votes to strike or uphold legislation are similar to the yeas and nays on roll call votes to pass that legislation. Thus we present a quick comparison of legislative and judicial ideal points. Figure 3 shows the JCS score for the House, Senate, and Court medians as well as presidential ideal point estimates. According to the JCS scores, the Court is more liberal than both chambers of Congress through the 1960s, but becomes drastically more conservative in the early years of the Burger Court.

IV: Justices as Legislators: A Closer Look at Judicial Review

Thus far, our argument has relied on existing empirical analyses of legislative and judicial voting decisions. We now turn to a closer examination of how justices exercise the power of judicial review. We go a major step further from existing research by tying the justices’ decisions in judicial review cases to the same ideological scale that members of Congress use: the Common Space. Judicial review cases provide an excellent opportunity to evaluate the extent to which Supreme Court justices are motivated by liberal-conservative policy preferences. The U.S. Supreme Court’s authority to declare Acts of Congress unconstitutional is perhaps its most significant institutional power. In declaring a Congressional
enactment invalid, the Court limits the scope of Congressional control over certain policy areas and thus directly challenges the power of a coordinate branch. If our assertion that justices’ decisions can be explained by the same dimension that explains roll call votes in Congress is correct, then decisions to uphold or strike legislation should be directly analogous to a roll call vote. Put slightly differently, this means that a vote by a member of the Court to declare a law unconstitutional is likely how that justice’s roll call vote would be cast if she were a member of Congress. This claim is usually not made so directly, but it is the strongest, and perhaps the least likely, consequence of the “legislators in robes” idea.

We begin with a model designed to understand whether or not judicial common space ideology predicts judicial review decisions. Using the Spaeth database, we identified all Supreme Court decisions from 1954 to 2004 in which petitioners challenged the constitutionality of federal legislation. From this initial list of cases, we separated out cases challenging an executive or agency decision, keeping only those that challenged Congressional laws.

We then use information about the original roll call vote in combination with the Judicial Common Space scores to measure a justice’s preferences toward a particular piece of legislation. We start by running logistic regressions on the original roll call votes regarding the challenged legislation with support for the bill on the left hand side and the enacting-Member of Congress’s (MC) Common Space score on the right hand side.3 We take the coefficients from these equations along with each justice’s Judicial Common Space scores in or-

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3 Given the scaling procedure, challenged laws that were passed unanimously or with voice votes in both the House and the Senate cannot be included in the analysis. The logit equation used to predict judicial preferences can only be estimated if there is variance in the original roll call vote. Additionally, the roll call vote is the vote on the final passage of the legislation. All of the roll call data used are publicly available on Keith Poole’s voteview website (http://voteview.com).
der to estimate a justice’s expected preferences over the challenged enactment. The justice’s preferences toward the legislation is the predicted probability that the justice would have voted for the enacted bill. This scaling procedure is directly tied to the assumption that ideology is not a different concept across institutions, and further, the dimension that explain the original roll call vote has not changed over time. We are using the roll call equations to predict judicial behavior by assuming that a justice’s JCS score would predict how the justice would have voted if a legislator rather than a justice. We believe that this process provides a strong test for whether or not a common dimension explains legislative and judicial outcomes. Our scaling procedure should only yield significant results if common space scores accurately bridge over time, judicial common space scores accurately bridge across institutions, and most crucially to this project, if judicial review votes to uphold or strike are fundamentally the same the yeas and nays on roll call votes. After applying our scaling procedure, we are left with a dataset consisting of 1557 individual votes across 176 cases, with 529 (34%) votes to strike the law.

As an initial check on the relationship between ideology and judicial review decisions, we estimate a simple logit model using only our predicted ideological support for legislation predicts whether or not a justice votes to strike legislation. The estimated coefficient on the predicted support is -1.086, with a standard error of 0.290. Clearly, this model suggests that judicial ideological preferences predict judicial review decisions. The coefficient is statistically significant and it demonstrates that judicial common space ideology has a substantively meaningful effect. As estimated support for the legislation moves from the lowest value to the highest, a justice is roughly 26% less likely to vote to strike the bill.

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4 The full estimated equation, with standard errors in parentheses is: Pr(Strke) = 0.121 (0.340)–1.086 (0.290) *(Judicial Ideology).
While these are only bivariate results, the next section shows that these findings hold after controlling for a set of strategic and institutional variables. Given the “double-filtering” of our scaling mechanism (across institutions and time), this finding provides clear initial evidence that the same stable, liberal-conservative continuum underlying roll call decisions also explains how justices vote in judicial review cases. Nonetheless, votes in judicial review cases could be a function of a host of factors other than ideology, and we now turn to a discussion of the possible strategic constraints faced by the Court.

V. STRATEGIC CONSIDERATIONS AND JUDICIAL REVIEW

Despite the power that the Court has in reviewing the constitutionality of legislation, these cases pose risks for the Court: when Congress is displeased with the Court’s decision, it has various legislative means available to curb the Court and undermine its institutional standing and resources. Moreover, assuming that the invalidated legislation was supported by a majority at the time of its enactment, judicial review may also undermine majoritarian or democratic preferences. The countermajoritarian nature of judicial review is much debated (see e.g. Friedman 2009), but regardless of whether many of the Court’s constitutional decisions are consistent with popular opinion at the time they are rendered, they nonetheless have the potential to counter the popular will. Judicial review of Congressional enactments thus implicates sensitive institutional and political dynamics, as well as normative concerns related to democratic representation.

It is also clear that Supreme Court justices are motivated by their own policy preferences in the exercise of judicial review (Segal and Spaeth 2002). Nevertheless, in pursuing their preferred policy outcome when voting to invalidate federal enactments, the justices must also be aware of potential reactions from the elected branches. First, a justice might
anticipate that the “announcement of a policy in an opinion would stir a political reaction which would gravely threaten that policy” (Murphy 1964, 171). Congress (and the President) may, for example, pursue policy-changing legislation or a constitutional amendment that reverses or alters the justice’s preferred policy. Indeed, scholars have claimed that Congress regularly (Meernik and Ignagni 1997) and effectively (Dahl 1957) overrides (or at least circumvents) constitutional Court decisions by ordinary legislation. Even when the Court responds negatively to such legislative action, Congress can react further. At the very least, members of Congress may strategically respond to declarations of unconstitutionality when creating subsequent legislation (Pickerill 2004). As Epstein and Knight (1998) note about the interbranch struggle over the Religious Freedom Restoration Act: “Shortly after the decision in City of Boerne was announced, Congress held hearings to discover how it might be circumvented. Therefore, the game over RFRA may not be over, with the possibility always existing that the Court will eventually buckle under” (p. 142).

Under a regime in which Congress can reverse or undermine the Court’s constitutional decisions by ordinary legislation, we might expect the justices to rationally anticipate Congressional reaction to their constitutional decisions in specific cases (cf. Ferejohn and Shipan 1990). Under such a theory of rational anticipation, the justices assess the potential Congressional reaction to their judgments in individual cases; in doing so, the justices may vote strategically by avoiding outcomes that Congress would likely overturn. As Walter Murphy has suggested, “[t]he objective of judicial strategy is to achieve a policy goal, not simply to win a battle with Congress” (1964, 157).

Congressional reaction may not be limited to reversing or altering a specific policy announcement in a given case, however. Congress may instead react to unwelcome rulings
in ways that adversely affect the Court’s institutional powers more broadly. Congress has a number of means at its disposal to launch an assault on judicial power (Murphy 1964, 173). For example, Congress can shape the jurisdiction of the lower federal courts and the Supreme Court’s appellate jurisdiction, it controls the Court’s budget and pay increases, and may even change the Court’s size (Rosenberg 1992; Perry 1982). These devices enable Congress to challenge the Court’s institutional authority and autonomy, and such “an assault against judicial power can be far more perilous than an attack against a particular facet of public policy” (ibid.).

The elected branches therefore might operate to constrain a strategic justice in two ways. First, the justice might rationally anticipate Congressional (and presidential) reaction to its specific decisions by enacting policy that shifts the Court’s outcome away from her preferred outcome or position. We refer to this theoretical possibility as the “rational anticipation model” of SOP constraint. Second, the justice may decide that the elected branches will react with hostility to the Court’s decisions not at the individual policy level but at the institutional level. According to this “institutional maintenance model” of SOP constraint, the justices are less concerned about the elected branches’ policy preferences over the individual case outcome. Instead, they are concerned about maintaining their institution’s legitimacy in the face of potential legislative retaliation.

Segal, Westland and Lindquist (2010) tested the rational anticipation and institutional maintenance models at the Court level. They constructed a measure of Congressional and presidential preferences over the substantive policy embodied in the challenged enactment and evaluated the influence of that variable on the likelihood that the Court would invalidate the enactment. They found no evidence that the rational anticipation model con-
tributed to an explanation of the Court’s exercise of judicial review. On the other hand, they tested the institutional maintenance model by evaluating whether the Court’s ideological distance from the dominant preferences of members of Congress shaped the justices’ willingness to invalidate federal legislation. Controlling for the rational anticipation model and the Court’s own preferences, they found that the Court’s distance from Congress affected its exercise of judicial review. At the Court level, therefore, the rational anticipation model failed to demonstrate any empirical foundation, while their tests for the institutional maintenance model achieved robust, consistent and statistically significant results.

As noted above, however, individual justices might respond to these forms of Congressional constraint differently. For some, institutional maintenance may trump personal policy preferences; for others, concern over Congress’s reaction in specific policy areas may shape their voting behavior; and for others, personal policy preferences may dominate. Existing research demonstrates that the justices are not monolithic with respect to influences on their behavior. For example, precedent may constrain some justices but not others (Spaeth and Segal 2001). Public opinion may also have a differential impact on the justices. Mishler and Sheehan (1996) concluded that Stevens, White and Stewart were more responsive to public opinion than other justices with more extreme ideological preferences. Similarly, we expect that the justices may vary in their responsiveness to Congressional preferences.

Given our goal of comparing justices with legislators, it is worth noting that the same kinds of strategic voting decisions have been hypothesized to constrain roll call votes. But as members of Congress must explain their votes to their constituents, strategic behavior of the form “I voted for the amendment to protect women in the Civil Rights Act in order to
help kill the bill” becomes difficult to justify (Denzau, Riker and Shepsle 1985), especially, if, as happened to Virginia Congressman Howard Smith, the killer amendment passed along with the entire bill (Bennett 2007, p. 527). Nevertheless, Martin’s (2001) more systematic study finds that some members of Congress, particularly those near their chamber’s ideological center, are willing to vote in a sophisticated manner by accounting for the preferences of the other chamber and for the preferences of the Court. As the Supreme Court becomes more conservative, moderate members of the House and Senate, i.e., those who can most affect the outcome of legislation, are more likely to vote conservatively in order to prevent extreme liberal outcomes (2001, p. 370).

The justices of the Supreme Court face a different set of constraints when faced with the prospect of strategic voting. In statutory cases, unlike the well-known path of legislative amendment(s) to final vote, the justices do not know whether Congress will review their decisions. Furthermore, to the extent statutory cases involve binary decisions (is pregnancy discrimination sex discrimination under the civil rights act?), the Court is never worse off from a policy standpoint from voting its sincere preferences. While justices do not have constituencies to whom they must appeal for reelection, they do have audiences that they care about (Baum 2006) and this concern might militate against strategic behavior. Nevertheless, justices toward the center of the Court, much like legislators in the center of their chambers, might be more likely to vote in a sophisticated manner.

A TESTING PREFERENCES AND STRATEGIC CONSTRAINTS

Rational Anticipation Model. The rational anticipation model suggests that justices will rationally anticipate Congressional response to the Court’s unique policy judgments in particular cases. Where the justices anticipate that Congress will attempt to reverse a judi-
cial decision using ordinary legislation (e.g., Dahl 1957, Meernik and Ignagni 1997) or even a constitutional amendment, the justices will exercise caution in voting to invalidate legislation and instead save the battle for another day. Evaluating the rational anticipation model requires that we measure current Congressional preferences regarding the specific statutory provision at issue. To do so, we use the same procedure as with judicial preferences. We use the coefficients from the logistic regression roll call equations along with each sitting legislator’s Common Space score to estimate the legislator’s preferences with respect to the challenged enactment at the time of the Supreme Court’s decision.

We began by calculating the House and Senate median voter’s preferences at the time the Court rendered a decision. Because of the importance of pivotal players in the legislative process, we used our logit model of original roll call votes to predict the relative propensity of various members of the House and Senate to support of the law challenged before the Supreme Court. We included those members relevant to several possible pivotal models: the members who represent the House and Senate floor and majority party medians, the House and Senate members who represent the veto override pivots, and the Senate member who represents the filibuster pivot. In addition, we calculated the propensity of the median member of the House and Senate Judiciary Committees to support the challenged law.\(^5\) We used the President’s Common Space score to estimate his preferences over the statute in question, using the same equation we use to predict Congressional prefer-

\(^5\) In this connection we considered two possible sets of committees: (1) the Senate and House Judiciary Committees (see Ferejohn and Shapin 1990; Segal 1997), and (2) the individual substantive committees associated with each challenged enactment in our database. Because the data were limited with respect to the second category—with some ambiguity about which committees considered which bills in a meaningful percentage of our cases—we focused our attention on the Judiciary Committees.
ences for the same law. While we have tested four versions of our pivotal model of legislative decision making, we will focus on Filibuster Veto model in our analysis below.6

Institutional Maintenance Model. In addition to these predictions regarding specific support for the legislation at issue—which stem from the rational anticipation model—we also constructed measures of constraint based on the proximity of each justice’s ideology to those of the median members of the sitting Congress. We created a variable coded as zero in situations in which a justice’s ideal point falls between that of the median of the two chambers and the distance between the justice and the closer floor median if the justice’s ideal point falls outside those medians.

We also calculated measures reflecting the absolute value of the ideological distance between the justice and both the Judiciary committee chairs (House/Senate Judiciary Chair Distance from Court). From the institutional maintenance perspective, relevant players on the judiciary committees have the potential ability to attack a divergent Court. Although we formulate our approach primarily in terms of Congressional influence over judicial outcomes, Congress generally cannot act alone in disciplining the Court; the President is also potentially a relevant actor in the Court’s strategic calculations. We thus created a measure of the ideological distance between the President and the justice by calculating the distance between the President’s Common Space score and the median justice’s Judicial Common Space score (President-Justice Distance).

Finally, the institutional maintenance model focuses on Congressional hostility to the Court as an institution under political conditions that disfavor the Court. In addition to the Court’s distance from the relevant actors in Congress and the executive, another meas-

6 Our substantive conclusions are identical if we use a Floor Median model, a Party Caucus model, or a Committee Gatekeeper model.
ure of the political climate involves legislation introduced in Congress to curb the Court’s authority (Clark 2009). Clark has demonstrated that the introduction of court-curbing legislation serves to constrain the Court because it threatens the Court’s legitimacy—reflecting the central tenet of our institutional maintenance model. To assess this effect, we therefore incorporated into our models a variable reflecting the number of court-curbing bills introduced per year.7

Judicial Preferences. Of course, our argument is that justices will primarily be motivated by their policy preferences. As before, we predict the justices’ preferences using the same logit equations relied upon to predict the sitting Congress’s preferences regarding the challenged legislation. Once again, we are treating a member of the Court just as we treat a pivotal player in the House or Senate or the President. If the ideological dimension that underlies Supreme Court votes is the same as the legislative dimension, then these equations should be effective in mapping judicial preferences over the legislation even after accounting for strategic considerations. We are still asking a great deal from our scaling mechanism – we are taking transformed Martin-Quinn scores, plugging these variables into an equation derived from the legislative roll call, and using those results to explain whether or not a justice votes to uphold or strike legislation. If the judicial and legislative policy space is not significantly similar, then this mechanism should not work. To test this proposition, we use the predicted probability of support for the individual justice to measure his or her ideological response to the enactment.

Control Variables. Several variables serve as controls in our models. First, although the Solicitor General appears in support of the challenged enactments in the vast majority

7 We thank Tom Clark for generously providing the data on Court-curbing legislation.
of cases in our database, in a small minority of cases the Solicitor did not appear (the case was litigated by private parties). Thus, we created a variable reflecting whether the Solicitor supported the statute (Solicitor Support). We include this variable as a control because of the ample evidence that demonstrates the importance of the Solicitor as a persuasive litigant before the Court, whether because the Solicitor is an able advocate, has unique credibility, selects the best cases, or provides important signals to the justices about the President’s policy preferences (Bailey et al. 2005). And although we test for the influence of the President on the Court’s decision making using direct measures of presidential preferences, the role of the Solicitor in expressing those preferences cannot be ignored. We also expect that the Court might be influenced by outside interests that support or oppose the legislation. We thus included two variables measuring the number of amicus curiae briefs in support of upholding the challenged legislation and opposed to the legislation filed in the case (Amicus Brief Support, Amicus Brief Opposed). Amicus briefs may provide an indirect measure of public opinion as expressed through organizations interested in the particular case outcome; research has demonstrated that these briefs can have an important impact on the justices’ voting behavior (Collins 2009). Because it is possible that the justices’ constitutional decisions may be affected by this form of interest group pressure, we included two measures to control for that possibility.

Before presenting the results, we must deal with how we decide to pool the analysis. We have several alternatives when modeling individual decisions in these cases, each representing a different approach to modeling differences between the justices. First, we could simply pool the decisions completely. This assumes that the underlying mechanics of the constitutional separation of powers model are identical across all justices and further, that
we have no unmodeled heterogeneity across justices. These are particularly strong assumptions that are unlikely to hold. From our discussion, it is certainly possible that not all justices view Congressional constraint in the same light. Another alternative would be to include a fixed effect for each justice. These dummy variables will account for all across-justice variance, but at the cost of limiting our substantive interpretations about the differences between justices. While not always recognized in applied work, the fixed effect model is also a completely unpooled approach to the analysis.

A final approach is to estimate a multilevel model with random effects for each justice. Random effects are a commonly adopted approach for clustered data and have the advantage of partially pooling the analysis while accounting for unobserved heterogeneity across groups. Parameter estimates are a weighted average of the estimated effect for each group (between justices) and the pooled effect (across justices). The random effects model can also be extended to a random coefficient specification in which the effect of a covariate is allowed to randomly vary across clusters.

Because it is not clear precisely how to pool our analysis, we adopt several of these approaches. A quick examination of the differences between the rates at which justices vote to strike legislation suggest that unmodeled variation may be a concern for our analysis. Justice Douglas is the most likely to vote to strike (68% of the cases), while Justice Powell only votes to declare a law unconstitutional in 16% of his decisions.\(^8\) To be sure, our covariates may account for these large differences, but possibly not completely. We are also substantively interested in determining which justices might be more or less constrained

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\(^8\) These numbers only reflect the decisions in the cases in our dataset. Because challenged laws that were adopted unanimously or by voice vote cannot be included in our model, these numbers do not reflect all of the decisions in constitutional cases decided during a justice’s tenure.
by rational anticipation or institutional maintenance model. As a result, we estimate a completely pooled model, a fixed effects model, and a series of random coefficient models. We discuss these models below.

B: Results

The first column in Table 1 presents the estimates from a completely pooled logit model. These results are similar to earlier, Court-level analyses (Segal, Westerland, and Lindquist 2010) but differ in a very critical way. As before, the rational anticipation model is not supported, as the coefficient on the Filibuster Veto variable is not significantly different than zero (and also not in the predicted direction), and the various control variables are also not significant predictors of decisions to strike federal legislation. These results are all in line with earlier findings and are consistent across model specifications in Table 1.

Table 1 About Here

The individual justice results yield a substantially different conclusion about the institutional maintenance model, however. Unlike the Court-level analysis where a strong, negative effect was found for the distance between the Court median and the nearest chamber, the present analysis finds a positive and moderate effect for an individual justice’s distance to the nearest chamber. We also find no influence of the distance between a justice and the President. The unexpected sign on the Congressional constraint variable and the absence of a Presidential distance effect are major departures from earlier findings. While the distance between a justice and the chair of the House Judiciary committee is significant

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9 We calculated standard errors clustered by justice in this model. The logit coefficients are unaffected by this and are thus still completely pooled estimates.

10 Nor any of the other rational anticipation models. See fn. 6.
and in the correct direction, this is the only support for the institutional maintenance model in the pooled analysis.11

Column 2 in Table 1 presents the estimates of a model that specifies a random intercept for each justice and a random coefficient for the Congressional distance measure. First, as is the case in all of our specifications, the preferences of the justices are a strong, statistically significant predictor of constitutional review decisions. Figure 4 graphs the predicted probability of voting against a law as predicted support decreases. In this specification, the probability of voting to strike the law decreases by about 40 percentage points (0.67 to 0.27), or nearly 60%. We emphasize that the importance of judicial preferences is clear, regardless of model specification. Just as in our bivariate model presented earlier, our scaling mechanism leads to the conclusion that a stable, liberal-conservative dimension explains both legislative and judicial decisions, in other words, that the justices vote to uphold or strike as if they were legislators voting yea or nay. We also estimated a model with a random coefficient on judicial preferences. Importantly, this specification does not result in a better model fit than a model without the random coefficient on preferences, which suggests that justices do not vary in their pursuit of ideological goals when reviewing federal legislation.

A more nuanced view of the institutional maintenance model emerges with a multilevel specification.12 The effect of the distances from both the Judiciary Committee chairs is as predicted. Figure 5 demonstrates that an increasing distance between a justice and ei-

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11 If fixed effects for each justice are included, the institutional maintenance model does find more support, as the Senate Judiciary chair distance becomes statistically different than 0. Nonetheless, the Congressional and Presidential distance variables are not statistically significant.
12 A likelihood ratio test shows we have significant heterogeneity across justices and that the multilevel model fit is better than a pooled model ($\chi^2 = 44.7$, df=2, p<.001).
ther committee chair reduces the likelihood of voting to strike a law. Even when accounting
for justice-level heterogeneity, this component of the institutional maintenance model
holds. The average effect of Congressional distance also remains positive and is not statisti-
cally significant. Nonetheless, random effects for this variable demonstrate that this is not
the case for all members of the Court. Figures 6 plots the estimated total effects of the Con-
gressional constraint variable for each justice with estimated deviation from the pooled ef-
fec for each justice (with 90% intervals). Figure 6 suggests that for most justices, the Con-
gressional distance variable is close to 0 and/or positive. These results demonstrate that for
most justices, deciding whether or not to strike a law is unrelated to their ideological posi-
tion relative the House and Senate.13 But this is not the case for all members of the Court.
For Justices White, Powell, Kennedy, and Rehnquist, increasing distance from the nearest
chamber decreases the likelihood of striking a law.14

Median Justices. We are left with a puzzle on how to reconcile the individual level
findings with the earlier Court level analysis. One crucial point from the individual analysis
is the recognition of the justices who seem to be most constrained by their distance from
Congress. In 56% of our cases, Justices White, Powell, or Kennedy is the median member on
the Court.15 The Court-level finding is driven largely by the fact that these three justices in
particular are constrained by ideological location of Congress. While not all centrally locat-
ed justices exhibit this type of constrained decision making, column 3 of Table 1 suggests
that the median members of the Court are far more sensitive to Congress than the rest of

13 We tested the effect of justice distances from chamber medians, majority party medians, and committee
medians. None of these distances are statistically related to whether or not a justice votes to strike a law.
14 Figure 5 shows that this effect is significant with a two tail test at the 90% level for Kennedy and Rehnquist
but not for White and Powell. The effect is significant at the .15 level for all four justice, which is not an un-
acceptable confidence level given the relatively small numbers of observations.
15 The only other justice who is the median member of the Court in 10% or more of our cases is O'Connor.
the Court. In this model, we interacted the Congressional constraint variable with a dummy variable that indicates whether or not a justice is the median member of the Court. These findings roughly parallel Martin’s (2001) finding about the impact of the Court on center Members of Congress.

These findings are also consistent with the theory of regime politics advanced by Whittington (2005) and others (e.g. Gillman 2002). Regime theory politics posits that the judicial review does not always involve a confrontation between a wayward Court and an unhappy Congress. Rather, judicial review may be exercised by a friendly Court in such a way as to advance the policy preferences of the elected branches. By “interposing a friendly hand,” the Court may invalidate enactments passed by previous legislative coalitions so as to promote the interests of the sitting Congress.

These findings also conform well to Dahl’s seminal work (1957) suggesting that the Court is more likely to strike legislation enacted by previous majorities and uphold legislation enacted by the current regime. Here we show that the median justice acts most aggressively when his or her preferences conform to the dominant preferences in the two chambers and in the Presidency. Although we do not test directly whether the statutory invalidations during unconstrained periods actually further the policy objectives of those sitting in the legislature at the time decisions are rendered, the Court tends to uphold statutes that conform to the dominant preferences in Congress and strike those that do not (Lindquist and Solberg 2007). Moreover, to the arguable extent that the Court is responsive to public opinion (Friedman 2009), one might expect that its decisions would be constrained by the political configuration within the elected branches. In combination with existing studies (including, e.g. Epstein and Knight 1992), therefore, our analysis helps
complete the empirical portrait of a constrained Court in the unique context of constitutional review.

The results presented here paint a portrait of median justices as savvy strategic actors who are more willing to assert their collective policy preferences when their institution is insulated politically from potential institutional retaliation by the elected branches. In 1997, Segal demonstrated that the justices are not constrained by any rational anticipation of Congressional reaction to their decisions involving statutory interpretation. Apparently the same is true with respect to constitutional decisions, but with a twist: while median justices may not rationally anticipate other political actors’ responses to specific decisions, they do appear to recognize the Court’s broader institutional position vis-à-vis the elected branches and modify its decisions accordingly. We have advanced the theory that it does so less from concern over specific policy pronouncements that counter its own ideological preferences than from concern over the Court’s institutional vulnerability and authority.

*Chief Justices.* The one justice who appears most constrained by the relative ideological position of Congress but who is not ideologically moderate is Rehnquist. Combined with the finding that Burger also has a negative, albeit small, effect of Congressional distance, we also tested a model that includes a dummy variable for Chief Justice (1 if Chief), which we interacted with the Congressional constraint measure. The results in column 4 of Table 1 demonstrate that as Chief Justices become more distant from Congress, they are less likely to vote to strike a law. As Congressional distance moves from the minimum to the maximum, the probability of striking a law is reduced by about 16% for Chief Justices. Not sur-
prisingly, this suggests that the institutional maintenance model also explains judicial re-
view decisions for the institutional leader of the Court.

While we have mixed results regarding the institutional maintenance model, the
findings regarding judicial preferences are unequivocal. In every specification, the estimat-
ed support of a justice is a strong, significant predictor of decisions to strike legislation.
Further, we have no evidence that justices vary in the effect of their ideological preferences.
Centrally located justices do exhibit evidence that they consider their ideological position
relative Congress, and the idea that the median justice might be the most affected by Con-
gressional preferences under our institutional maintenance model is consistent with the
Court-level model and consistent with prior findings that justices at the center of the Court
are most responsive to public opinion (Mishler and Sheehan 1996). That Rehnquist is also
sensitive to his position relative to the closest Congressional chamber is also consistent
with prior findings that, after he became Chief, Rehnquist moderated his ideological behav-
ior, perhaps in light of enhanced institutional concerns (Cross and Lindquist 2006). Other
justices’ votes, however, are unaffected by Congressional preferences except with respect to
the House and Judicial Committee Chairs. Indeed, for most justices, the most profound in-
fluence continues to be their ideological preferences.

VI PARTIES IN CONGRESS AND THE COURT

If ideology is a key determinant of political behavior (Stimson 1991), partisanship
may be right up there with it (Green, Palmquist and Schickler 2002), though in a slightly
different manner. That is, we expect partisanship to have ex ante associations with the vot-
ing behavior of both members of Congress and Supreme Court justices. Presumably both
justices and legislators chose which party to identify with at least in part based on the prox-
imity of that party’s policy platform to the legislators’ personal policy preferences. On the other hand, election concerns create *ex post* partisan pressures for members of Congress (Cox and McCubbins 1993, 2005; Carson, Coger, Lebo and Young 2010; cf. Krehbiel 1993)) that simply do not exist for Supreme Court justices.

Nevertheless, the relationship between the Supreme Court and Congress on the question of parties might survive in an altogether different manner. Given the fact that Justices are nominated by the President and confirmed by the Senate, the impact of party on justices should roughly reflect the amount of partisan division at the time of the justices’ appointment. For example, the Senate confirmed Justice Stevens, a liberal Republican, at a time when there were many liberal Republicans in the Senate. Similarly, the Senate confirmed Lewis Powell at a time when conservative Democrats were fairly common. Given growing party polarization in Congress over the last 30 years, we should expect a relatively tighter fit between party and voting behavior on the Court in 2010 than we would find in 1994 (Abramowitz 2010).

We examine this by looking at the overlap between (1) partisanship in the 98th Senate and the justices serving 10 years later, i.e., on the 1994 Term of the Court, and (2) partisanship in the 107th Senate and the justices serving on the 2010 Term. As Figure 7 shows, there was a fair amount of overlap in partisanship in the 98th Senate. Ten years later, we find, based on the Martin-Quinn ideal-point scores, Republican Justice Stevens to be the most liberal member of the Court while Republican Justice David Souter falls to the left of Democratic Justice Stephen Breyer (See Figure 8).

Figures 7 and 8 About Here
By the 107th Senate, we observe far less overlap between Republicans and Democrats (see Figure 9). The increasing homogeneity of the Republican Party since the 1980s, combined with the battle cry “No More Souters” should make it increasingly difficult for a Republican president to nominate a Supreme Court justice who overlaps ideologically with Democratic justices. While Harriet Miers’s lack of qualifications no doubt hurt her chances for confirmation, her failure was certainly aided and abetted by conservatives who were not certain about her ideological purity, given ambiguous statements about abortion rights and past political contributions to Democrats Albert Gore and Lloyd Bentsen. In fact, conservative commentator Charles Krauthammer laid out her eventual exit strategy (Krauthammer 2005). To a lesser extent, liberal Democrats vocally expressed some dissatisfaction that President Obama’s choice to replace John Paul Stevens, Elena Kagan, was not sufficiently liberal (Baker 2010). While Democrats had no intention of voting against Kagan, the carp-ing about her nomination was certainly a signal from liberal Democrats to President Obama to resist further movement toward the political center in future nominations.

Figures 9 and 10 about Here

Ten years after the 107th Senate, and given Justice Stevens’s retirement, we no longer observe any overlap between Republicans and Democrats on the Court (see Figure 10). To be sure, this segregation by party only exists because of the retirement of Justice Stevens, but Justice Stevens, from the moderate wing of the Republican Party, was appointed at a time when there were many moderates and even some liberals in the Republican Party. Our model of course cannot predict how long partisan-ideological aberrations such as Stevens will remain on the Court once that partisan-ideological package largely disappears from the Senate, only that with some undetermined lag that it will happen.
VIII: DISCUSSION

Are U.S. Supreme Court justices merely legislators in robes? Our findings indicate that, for the most part, they are. Table 2 summarizes our findings. Even through the double filter we have used—which relies on a cross-institutional and cross-temporal measure of judicial preferences—common space ideology plays a profound role in the justices’ individual decisions whether to invalidate Congressional enactments. While few are likely to be surprised that ideology plays some role in these decisions, our contention that this is evidence that the ideological dimension underlying judicial decision is identical to the dimension underlying legislative decisions is potentially more controversial. Regardless, when the results from our scaling procedure and our analysis of judicial review decisions are combined with the implications of the various scaling models discussed at the beginning of our paper, the differences between legislators and justices become harder to see.

Table 2 About Here

Of course, we do have some evidence that justices consider factors other than ideology in their judicial review decisions. For example, the House and Senate Judicial Committee chairs’ preferences matter across the board as well. Thus, while ideology is paramount, some “audiences” appear to matter to the justices (Baum 2006). Judiciary Committees are likely the most attuned to the justices’ voting behavior; and thus perhaps it comes as no surprise that they are influential. The institutional maintenance model therefore receives some support in our data, but analysis of the individual justices’ voting behavior yields more nuanced findings than did our Court level analysis. Only those justices at the center (with the exception of O’Connor), and only a single Chief Justice, was apparently motivated by their distance from Congressional preferences more broadly defined. The rational antic-
ipation model also failed to find support in the data, which means that in constitutional cases, like in statutory cases, the justices do not appear to consider the possibility that the sitting Congress is likely to override specific policy pronouncements. Ultimately, we do not believe that the mixed evidence for the institutional maintenance model detracts from our broader conclusion that judicial preferences are directly analogous to legislative preferences.
References


Meernik, James and Joseph Ignagni. 1997. Judicial Review and Coordinate Construction of


Figure 1. Face Validity of Martin-Quinn Constant Ideal Point Estimates

Source, Martin-Quinn Scores (2002)
Figure 2. Relationship between Martin-Quinn Scores and Voting

Figure 3: JCS Medians.

Source: Court data from Epstein et al (2007); Congressional and legislative data from http://voteview.com
Table 1: Logistic Regression Analyses of Probability of Vote to Strike Federal Legislation by United States Supreme Court Justices 1954 to 2004

<table>
<thead>
<tr>
<th></th>
<th>Pooled Model with clustered standard errors</th>
<th>Random Coefficient On Justice Distance Model</th>
<th>Pooled Model with Median Dummy &amp; Interaction</th>
<th>Pooled Model with Median and Chief Interactions</th>
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<tbody>
<tr>
<td>Justice Preference for Statute (-)</td>
<td>-1.409***</td>
<td>-1.699***</td>
<td>-1.414***</td>
<td>-1.467***</td>
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<td></td>
<td>0.202</td>
<td>0.267</td>
<td>0.208</td>
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N=1557; *p<.05; **p<.01, ***p<.001. Predicted direction in parentheses.
Figure 4: Impact of Justice Ideology on Votes to Strike Federal Enactment
Figure 5: Impact of Judiciary Committee Distance on Votes to Strike Federal Enactment
Figure 6: Magnitude of Congressional Constraint per Justice

(Ideological Distance from Congress)
Figure 7: Ideal Points by Party, 98th Senate

Source: http://voteview.com
Figure 8. Partisan Polarization and Ideology of the Justices, 1994 Term.

Source: Andrew Martin and Kevin Quinn, [http://mqscores.wustl.edu/](http://mqscores.wustl.edu/)

Note: Scores based on 2010 Martin-Quinn ideal point estimates

Legend: Nominees by Republican Presidents in CAPS.
Figure 9: Ideal Points by Party, 107th Senate

Source: [http://voteview.com](http://voteview.com)
Figure 10. Partisan Polarization and Ideology of the Justices, 2010 Term

Source: Andrew Martin and Kevin Quinn, http://mqscores.wustl.edu/

Note: Scores based on 2010 Martin-Quinn ideal point estimates

Legend: Nominees by Republican Presidents in CAPS.
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