An Independent Judiciary? Determining the Influence of Congressional and Presidential Preferences on the Supreme Court's Interpretation of Federal Statutes: 1953-1995

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August 1998

Abstract:
I test the implications of the two main theories of judicial decision making (i.e., the Separation of Powers Model and the Attitudinal Model) by examining the extent to which the Court responds to elected bodies' preferences in its interpretation of federal statutes from 1953-1995. I do so by deriving the models within a game-theoretic framework that precisely identifies the models' predictions, and by developing a method that recovers comparable preferences between the Court and the elected bodies. Even allowing for alternative measurement choices, the paper finds scant evidence supporting the predictions of the Separation of Powers Model.

I would like to thank the NSF for the financial support its Graduate Fellowship provides. I would also like to thank Harold Spaeth and Keith Poole for making their data available. Finally, I would like to thank John Ferejohn, Simon Jackman, Adam Meirowitz, Douglas Rivers, Shawn Treier, Barry Weingast, and Alan Wiseman for their helpful comments and suggestions. A version of this paper was delivered at the 1998 Annual Meeting of the American Political Science Association. Unfortunately, all grammatical and intellectual oversights are mine alone.

It is well-documented that the Court is not the apolitical institution that it is often idealized as (Epstein and Knight (1998), Woodward (1979), Lazarus (1998)). However, the extent to which the Supreme Court is responsive to the preferences of elected bodies (i.e., Congress and the President) is uncertain. Although theories about the Court's responsiveness have long existed (e.g., Dahl (1957)), only recently have we begun to examine competing theories head-to-head (e.g., Segal (1997,1998)).

The two main theories of judicial decision-making are the Separation of Powers (hereafter referred to as SOP) model and the Attitudinal model. Unfortunately, since the methodologies used to support these two theories has been largely disjoint, the explanatory power of the two theories has been rarely compared.

The SOP model, which argues that the Court is responsive to the elected bodies' preferences, is mostly articulated using positive political theory models (e.g., Marks (1988), Gely and Spiller (1990), Eskridge (1991,1993) and Ferejohn and Weingast (1992a,1992b)). Although the SOP literature provides models with testable conclusions, most rely on case studies to document their claims (e.g., Marks (1988)). As such, it is not clear how generic the results are (Spiller and Gely (1992) is an exception).

The Attitudinal model, which claims that the Court is independent from (and therefore non-responsive to) the elected bodies, has been largely developed in empirical studies. Segal and Spaeth (1993) provide the most comprehensive treatment of the Attitudinal Model. Other papers test its validity either directly (e.g., Segal (1984)) or indirectly by trying to find covariates of the Justices' decisions (e.g., Segal (1985), Baum (1988), Stimson et. al. (1989), George and

Epstein (1992), and Fleming and Wood (1997)). A problem is that is not clear what would disconfirm the theory, as *ad hoc* preference attributions can justify every possible result.

Recently, attempts to test the two theories head-to-head have emerged (e.g., Segal (1997,1998)). Although Segal's later work addresses the problems raised by Groseclose and Schiavoni (1998), problems still exist with the critical comparison between the relative location of the Court and elected bodies' preferences. This paper refines and extends Segal's analysis.

In this paper I use a game-theoretic model to derive testable comparative statics for the two major competing theories of judicial decision-making: the Attitudinal Model and the SOP Model. I test these implications empirically for a broad range of measurement choices and find that the traditional SOP Model has little predictive power.

This paper advances the literature in four ways. First, I imbed both the SOP and Attitudinal models within a game-theoretic model that clearly identifies the predictions and assumptions of each. Second, I present a method for directly comparing the elected bodies' preferences with judicial preferences on any issue space. This provides a non-arbitrary way to locate the Court relative to the elected branches. Third, I conduct an exhaustive test of the SOP and Attitudinal models by testing the derived implications under many different measurements. The rejection of the SOP model is therefore robust to the alternative measurement choices I examine. Fourth, I provide evidence that the Court operates in a uni-dimensional space.

The argument of the paper proceeds as follows. In Section 1, I present a game-theoretic model and derive subgame perfect Nash equilibria for both the Attitudinal and SOP models. In Section 2, I present a method that allows direct comparisons between the preferences of elected bodies and the Justices' preferences. In Section 3, I test the comparative statics of the Attitudinal and SOP models. Section 4 examines the robustness of the statistical test performed in Section 3 by performing the test under alternative measurements. In Section 5, I conclude. Appendix A investigates the applicability of the Median Voter Theorem and the reasonableness of assuming that the Court decides statutory interpretation cases in a uni-dimensional policy space, and Appendix B presents proofs of Section 1's results

I. Theoretical Derivation:

In this Section, I develop a game-theoretic model from which I derive both the Attitudinal and the SOP models. I imbed these two theories in a common model to clearly identify the assumed and derived results.

The Attitudinal model argues that the Court is able to make policy subject only to its members' preferences. It argues that as the third branch of government, the Court is able to utilize institutional, as well as perceptual, resources to maintain its independence.[1] The SOP model argues that the since the Court is dependent upon Congress for funding efforts to enforce the Court's decisions, and since Congress can exert additional influence by restricting the Court's jurisdiction, enacting statues that change the Court's interpretation, and/or decreasing the Judiciary's budget, the Court decides statutory interpretation cases with an eye to the preferences of Congress.

To translate the two theories into game-theoretic form, let the players of the game be defined as follows: the President (P), with an ideal point *p*, the House median member (H) with an ideal point *h*, the Senate Median member (S) with an ideal point *s*, and the Justices (J_i) with an ideal point j_i, where the subscript i represents the ordinal ranking of the justices on a liberal-conservative scale according to their ideal points (i.e., J_1 is the most conservative Justice).[2] The

1 See Segal (1997) and Segal and Spaeth (1992) for a more detailed exposition of the Attitudinal Model.

2 I exclude two agents from the theoretical analysis: the filibuster pivot and the Congressional committee chair. Although I include the filibuster pivot in the empirical analysis, including it in the theoretical model only increases the number of cases requiring examination without changing the substantive theoretical results. I exclude

policy space over which the players operate is defined as $S \subseteq \Re^1$, with q representing the status quo, and z depicting the final outcome of the game.[3]

The players' utility functions are strictly concave and based on the Euclidean distance between their ideal points and the final policy outcome (i.e., they are single-peaked). Thus,

$$U_{Ji} = -|j_i - z| \quad \forall i \in \{1,2,\ldots,8,9\}$$

$$U_H = -|h-z|$$

$$U_S = -|s-z|$$

$$U_P = -|p-z|$$

I assume that players possess complete and perfect information, and I solve the game for subgame perfect Nash equilibria to restrict off-the-equilibrium path play to credible actions (e.g., the elected bodies cannot give the Court an ultimatum of the following form: "enact *x* or else we will pass an extreme *y* that none of us prefer").

Although the sequence of play is repeated, because the players receive payoffs after every stage game, I characterize play in the stage game alone. The play of the stage game, whose extensive form is depicted in Figure 1, proceeds in two halves. In the first half, the Supreme Court acts. The stage game begins with Nature selecting a status quo point $q' \in S$. Then, either J_4 and/or J_5 can force the Court to consider q'.[4] This move represents the fact that a vote of 4 is required for the Court to grant a writ of *certiorari* to a case. If both decide not to

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Congressional committees for several reasons. First, it is not clear which committee(s) would have jurisdiction over each of the cases. Second, including committees would only increase the boundaries of the elected bodies' Pareto set if committee preferences are outliers (Weingast + Marshall (1987)). However, Section 4 shows that increasing the size of the Pareto set does not affect the results. Third, majoritarian devices such as the discharge petition enables the median member to prevent committee gate-keeping (Krehbiel (1992)). Fourth, if committees are centrist (ala Krehbiel (1992)), then including committees will not alter the boundaries of the Pareto Set.

3 The choice of a uni-dimensional issue space is justified in Appendix A.

4 In reality, the Court is constrained by a finite docket and must choose which cases to hear in a strategic fashion. However, including this complicates the model without changing its qualitative conclusion. If a finite hard budget constraint were incorporated, the Court would choose to hear as extreme status quos as possible, as it is there that they can induce the most change.

bring *q'* before the Court, the stage game ends. If *q'* is brought before the Court, the median justice J_5 picks an outcome $x \in X \subseteq S$, and the first half ends.

[Insert Figure 1 Here]

The second half begins when H is given the opportunity to offer *x'* (or set *x'* = *x* if no change is desired). Although in reality H is only guaranteed the first move for appropriations bills, it is a useful simplification given that the second half is off the equilibrium path of play. S then has the opportunity to either offer a bill *x"* (if H does not offer a bill), or, if H offers a bill, amend *x'* to *x"* (or set *x"* = *x'* if no amendment is desired). Then, in the "conference stage," H and S must both agree to *x"* over *x*. Finally, the President chooses between the Court's choice *x*, and the latest amendment *x"* (which could equal *x*). The President's choice (*z*) is implemented, payoffs are received, and the stage game ends.

Segal (1997) questions why the stage game gives the elected branches the ability to respond to the Court rather than visa-versa. Although the SOP literature often presents this game form with little discussion, one explanation is that the elected branches implement the Court's decisions. Without the administrative and financial powers of the elected branches, the Supreme Court's rulings are mere words, as the Taney Court found out following its infamous *Dred Scott* decision (see Schwartz (1993)). Hence, the second half represents the implementation of the Court's decisions.

A second reason for having elected bodies move second is that otherwise, we should never observe the Court acting. Under perfect information, the elected bodies will correctly anticipate the Court's response to their every move, and the Court will have no reason to act in equilibrium.[5]

If the Court's decision requires action by the elected bodies, the derivation of the Pareto Sets in most SOP models is incorrect.[6] Since all elected branches must agree on a bill for it to pass (or else a veto-proof majority in the House and Senate must agree), all branches must prefer the Court's decision to the status quo for the decision to be implemented.[7] Current papers implicitly assume that the Court's decision is implemented if only at least one elected body prefers the decision to the status quo (e.g., Ferejohn and Weingast (1992a), Eskridge (1991)).

In Appendix B, Theorem 3 derives the equilibria if unanimous agreement by the elected bodies is required to implement a decision. In Theorem 4, I show that Theorem 3's comparative statics are observationally equivalent (with respect only to the test performed in Sections 3 and 4) to the comparative statics of the SOP model that allows non-unanimous implementation (Theorem 2 below). In other words, requiring the unanimous agreement of the elected bodies to implement the Court's decision does not affect the test I perform in Section 4. For continuity with the literature, I assume non-unanimous implementation.

Given this stage game, I prove several results.[8]

Lemma 1: *If* $\min\{h,s,p\} \leq x \leq \max\{h,s,p\}$, $x' = x'' = x = z$.

[5] Theorem 5 in Appendix B proves this result. Of course, this is a weak reason, as one could argue that the fact that Congress rarely revisits statutory interpretation decisions indicates that it is Congress who moves second.

[6] A Pareto set is a set such that $\forall$ individuals $i \in N$, if for the set of alternatives X, $x \in$ Pareto Set, $\sim\exists\ x' \neq x$ s.t. $x' R_i x\ \forall\ i \in N$ for $x, x' \in X$.

[7] To see why the agreement of more than one actor is required, consider the case when only the President prefers the Court's outcome to the status quo. Is the President able to unilaterally implement the Court's decision? Given that the other branches provide appropriations for the Executive Branch, it is not clear why Congress could not simply defund the agency that the President uses to try to implement the decision.

[8] For continuity of presentation, all proofs are in Appendix B.

Lemma 1 says that if the Court's decision (*x*) falls within the elected bodies' set of preferences (i.e., the Pareto Set), the elected bodies will be unable to alter the Court's decision because at least one elected body will prefer the Court's decision to any other possible outcome.

Lemma 2: *If* $x \notin [\min\{h,s,p\}, \max\{h,s,p\}]$, $\{x', x''\} \in [\min\{h,s,p\}, \max\{h,s,p\}]$ *and* $z \in \{x', x''\}$.

Lemma 2 states that if the Court announces a decision *x* outside of the elected bodies' Pareto Set, *x* will be amended and defeated by *x'* and/or *x"* in the second half of the game.

Together, Lemmas 1 and 2 define the behavior of the elected bodies in the second half of the stage game. As such, they define the Court's expectations in the first half about the elected bodies' response to their decision, as they show for which decisions the elected bodies will defer to the Court's decision (Lemma 1), and under what conditions they will alter them (Lemma 2).

Since the Court is independent of the elected bodies under the Attitudinal Model, there is no second half, and the model is a simple Median Voter model. This yields Theorem 1.

Theorem 1: *Assuming the Attitudinal Model is correct,* $x = z = j_5$.

Deriving the predictions of the SOP model is more tedious because it requires an examination of all possible preference orderings. Theorem 2 characterizes the result.

Theorem 2: *Assuming the SOP Model is correct,*

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\begin{array}{ll}
x = z = j_5 & \text{if } \min\{h,s,p\} \le j_5 \le \max\{h,s,p\} \\
x = z = \min\{h,s,p\} & \text{if } q' \le j_5 \le \min\{h,s,p\} \text{ and } (\min\{h,s,p\})\, R_{j6}\, q' \\
x = z = \min\{h,s,p\} & \text{if } j_5 \le q' \le \min\{h,s,p\} \text{ and } (\min\{h,s,p\})\, R_{j6}\, q' \\
x = z = \max\{h,s,p\} & \text{if } q' \ge j_5 \ge \max\{h,s,p\} \text{ and } (\max\{h,s,p\})\, R_{j4}\, q' \\
x = z = \min\{h,s,p\} & \text{if } j_5 \ge q' \ge \max\{h,s,p\} \text{ and } (\max\{h,s,p\})\, R_{j4}\, q' \\
x = \varnothing,\ z = q' & \text{else.}
\end{array}
$$

Inspecting Theorems 1 and 2 reveals that the two theories have identical predictions if $\min\{h,s,p\} \le j_5 \le \max\{h,s,p\}$. Thus, empirical testing of the two theories must occur when either $j_5 \le \min\{h,s,p\}$ or $j_5 \ge \max\{h,s,p\}$. If we normalize $\{h,s,p,j_i\} \in [0,1]$, with 0 being conservative and 1 being liberal, when $j_5 \leq \min\{h,s,p\}$, we expect the median to act more liberal than s/he would normally be because s/he must be strategic in setting $x = \min\{h,s,p\}$. Conversely, if $j_5 \geq \max\{h,s,p\}$, we expect the median to act more conservatively. Table 1 summarizes these predictions.

Table 1: Comparative Statics for Attitudinal and Separation of Powers Models

Situation	**Attitudinal Model's Predicted Effect on Median Justice**	**Separation of Power's Predicted Effect on Median Justice**
$\min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}$	None	None
$j_5 \leq \min\{h,s,p\}$	None	$x > j_5$
$j_5 \geq \max\{h,s,p\}$	None	$x < j_5$

Note: Predictions are from Theorems 1 and 2. The SOP prediction for $j_5 \leq \min\{h,s,p\}$ assumes $(\min\{h,s,p\})\, R_{j6}\, q'$, and the prediction for $j_5 \geq \max\{h,s,p\}$ assumes $(\max\{h,s,p\})\, R_{j4}\, q'$.

In this Section, I both advance a game theoretic model that nests the SOP and Attitudinal Models within a stage game, and I derive the predictions of each. Having summarized the predictions of the two models, in Section 2 I lie the foundations for testing of these two theories.

II. Empirical Foundations

Testing the Attitudinal and SOP models is not straightforward. In this Section, I describe the procedures used to set up the empirical test performed in Sections 3 and 4. The goal of the analysis in this Section is to locate both the Justices' sincere preferences and the elected bodies' preferences on those cases in which the Court interprets federal statutes (hereafter called SI Space).[9] I consider these cases because both the Court and the elected bodies ought to care about the outcome. Hence, if the SOP thesis is correct, the Court should be responsive to the preferences of the elected bodies in SI Space.

Since I make several measurement choices, to provide a robust test of the theory, I perform the test using several different measures. Since all of the measures produce the same qualitative conclusion, for expositional clarity I present only one set of measurement choices in this Section. I footnote when and what the measurement choices are, and Section 4 replicates the analysis of Section 3 under the alternative measures.

For the elected bodies' preferences, I use the first dimension of adjusted Poole-Rosenthal NOMINATE scores (Poole-Rosenthal (1985, 1997), Poole (1997)).[10] Adjusted NOMINATE scores (hereafter called Poole-Rosenthal scores) permit direct comparisons both between elected branches and across years. I re-normalize the scores to lie between –1 (conservative) and 1 (liberal). Figure 2 presents these results by Congress. These scores are preferable to traditional ADA scores in that non-adjusted ADA scores are uncomparable across elected bodies and across time (see Groseclose et. al. (1998)).

[Insert Figure 2 Here]

Having obtained the elected bodies' preferences, it is necessary to locate them relative to the Court. Segal (1997) assumes that the mapping between the Justices' revealed preferences and non-adjusted ADA scores is one-to-one (i.e., an ADA score of 5 represents a revealed preference score of .5). It is not clear that this assumption is reasonable. For example, although it seems that the Congressional-Presidential moderation point (i.e., an ADA score of 50) should be the same as the Court's (i.e., 50% probability of voting liberal), below in equation 2, I show that a similar inference for Poole-Rosenthal scores is erroneous. Given this result, I am wary of similar assertions.

I map the elected bodies' Poole-Rosenthal scores into scores directly comparable with the Justices' revealed preferences in SI Space with the assistance of a few assumptions. First, I assume that the Solicitor Generals' preferences represent Presidential preferences. This

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9 In terms of the coding of the Spaeth dataset, this is equivalent to setting authdec1 and/or authdec2 =4.

assumption is reasonable because the Solicitor General serves at the behest of the President and is responsible for trying to implement Presidential preferences in the judicial arena.[11]

To recover the Solicitor Generals' preferences, I calculate the percentage of times that the Solicitor Generals argue for liberal outcomes in SI Space for each presidency.[12] To calculate this preference requires a second assumption: that liberal outcomes are identically liberal, and conservative outcomes are identically conservative. Although this is problematic, it is a required assumption for preference estimation absent finer measures.

I estimate the Solicitor Generals' preferences only over the set of cases in which they are the petitioner because being a petitioner unambiguously reveals an advocacy stance.[13] When Solicitor Generals are respondents, they might be forced to defend laws that they either dislike or are indifferent to, in which case their estimated preferences will be inaccurate.[14]

The assumption that Presidential preferences are implemented by the Solicitor General seems reasonable given its modest correlation with Presidential Poole-Rosenthal scores (.5), and the fact that it has most Democratic Presidents arguing for more liberal outcomes (the exception being Carter at .32), and all Republican Presidents arguing for more conservative outcomes. Figure 3 presents the correlation between a President's Poole-Rosenthal score and his petitioning Solicitor Generals' preference in SI Space.

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10 Data is from 1st Dimension Coordinate of W-NOMINATE in Common Space. Available in C75105A.CIR file on Keith Poole's web page: http://k7moa.gsia.cmu/edu/dwnl.htm.

11 Consider the fate of Rex Lee, who was Reagan's first Solicitor General and who "was forced from office after he refused to press the administration's social policies at every turn" (Hall 1992, 804)

12 One possible problem arises if the Solicitor General acts strategically in its decision as to which cases to pursue in front of the Court. In this case, we are unable to identify whether it is the Court responding to the Solicitor General, the Solicitor General responding to the Court, or both. However, since the preference estimation assumes all liberal cases are identical (and similarly for conservative cases), a strategic Solicitor General creates problems only if the direction of the cases (i.e., liberal or conservative), not the magnitude of cases (i.e., how liberal or how conservative the case is), is affected by strategic behavior.

13 It is possible that a Solicitor General will be forced to argue a case petitioned by the previous President, but there should not be enough of these cases to affect the estimation.

[Insert Figure 3 Here]

Assuming that the advocacy of a President's Solicitor Generals represent the President's preferences identifies Presidential preferences in both Poole-Rosenthal space and SI Space. The relationship between these two sets of scores recovers the mapping function from Poole-Rosenthal space into SI Space under two assumptions. First, relationships between elected bodies in Poole-Rosenthal space are preserved when transformed into SI Space (which is akin to assuming that the Poole-Rosenthal scores of the elected bodies are mapped into the SI Space by an identical function), and second, that SI Space is a linear transformation of Poole-Rosenthal space.

To recover the mapping from Poole-Rosenthal space to SI Space under these two assumptions, I perform the OLS regression described by equation 1.

$$Y_i^P = \alpha + \beta * PR_i + \varepsilon_i. \quad (1)$$

Y_i^P denotes the percentage of liberal positions argued by petitioning Solicitor Generals during i's presidency, and PR_i is President i's Poole-Rosenthal score.

α and β_i have straightforward interpretations. α is the normalizing factor between Poole-Rosenthal space and SI Space. Since Poole-Rosenthal scores range from –1 to 1, we would expect α to be .5 if a moderate Poole-Rosenthal score (i.e., a Poole-Rosenthal score of 0) represents a moderate position on SI Space (i.e., vote liberal with probability .5). I find that α is .437, with a standard error of .0497. Since .5 does not lie within the 95% confidence interval of α, SI Space is more conservative than Poole-Rosenthal space; an individual with a Poole-Rosenthal score of 0 votes liberal only 44% of the time in SI Space.

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[14] Section 4 examines this by estimating preferences over the set of all cases in which the Solicitor General is a party.

If there is a 1-1 mapping between Poole-Rosenthal space and SI Space, β would be .5, as Poole-Rosenthal space is twice as large as SI Space. I find that β is .204, with a standard error of .12. Differences between elected bodies in Poole-Rosenthal space will therefore be much greater than differences between elected bodies in SI Space.

Using the coefficients from equation 1, equation 2 presents the function that translates the elected bodies' preferences in Poole-Rosenthal space to SI Space.[15]

$$SI_k^i = .437 - .204 * PR_k^i \qquad (2)$$

In equation 2, SI_k^i represents elected body i's preference in SI Space for Congressional term k, and PR_k^i measures elected body i's Poole-Rosenthal score in term k.

With equation 2, I translate the Poole-Rosenthal scores of the House and Senate Median (depicted in Figure 2) into SI Space. Following the assumption noted above, I assume that Presidential preferences are represented by the Solicitor Generals' preferences.[16]

Having located the elected bodies' preferences on SI Space, I now recover the Justice's sincere preferences in SI Space. According to both the SOP and Attitudinal Models, Justices vote sincerely in issue spaces where elected bodies are unconcerned with the Court's actions. I assume that the elected bodies do not care about those cases that the Court justifies its decision on "supervisory power over the lower federal courts, including the Supreme Court's determination of its own non-statutorily mandated authority" (Spaeth 1997, 58).[17] I refer to this

[15] Since equation 2 is estimated from 9 data points (as there have been 9 Presidents since 1953), to control for mapping error, in Section 4 I calculate 95% confidence intervals around each of the translations and run Section 3's test using these expanded mappings.

[16] In Section 4, I also conduct the test using the President's translated Poole-Rosenthal scores.

[17] In terms of the coding in the Spaeth dataset, this means that either authdec1 or authdec2 = 3.

space as Judicial Oversight Space. This assumption seems reasonable because it is not clear that elected bodies are directly impacted by many of these decisions.[18]

To recover judicial preferences on Judicial Oversight Space, I use a revealed preference model. I assume that the Justices' have a continuous, monotone and latent utility function over Judicial Oversight Space. I recover this utility function using the set of observable characteristics x_v (e.g., how a Justice votes) and assuming that the unobservable components (i.e., the errors ε_v^L and ε_v^C) affect the utility function in an additive fashion. The utility for vote v is specified in the following manner:

$$U_v(\text{Voting Liberal}) = \alpha^L + \beta_v^L * x_v + \varepsilon_v^L$$

$$U_v(\text{Voting Conservative}) = \alpha^C + \beta_v^C * x_v + \varepsilon_v^C$$

I assume that $Y_v = 1$ (i.e., the vote is Liberal) if U_v(Voting Liberal) > U_v(Voting Conservative), and $Y_v = 0$ if U_v(Voting Conservative) > U_v(Voting Liberal). This yields: Y_v = U_v(Voting Liberal) – U_v(Voting Conservative) = $(\alpha^L + \beta_v^L * x_v + \varepsilon_v^L) - (\alpha^C + \beta_v^C * x_v + \varepsilon_v^C)$. Collecting terms yields $(\alpha^L - \alpha^C) + (\beta_v^L - \beta_v^C) * x_v + (\varepsilon_v^L - \varepsilon_v^C)$. Renaming the differences $\alpha = (\alpha^L - \alpha^C)$, $\beta_v = (\beta_v^L - \beta_v^C)$, and $\varepsilon_v = (\varepsilon_v^L - \varepsilon_v^C)$ results in:

$$Y_v^* = \alpha + \beta_v * x_v + \varepsilon_v.$$

Given the set-up, Y_v=1 if $Y_v^* > 0$ (i.e., U_v(Voting Liberal) > U_v(Voting Conservative)), and Y_v=0 otherwise. Assuming that the differences of the unobserved components (i.e., ε_v) are logistically distributed, the estimation of the MLE is accomplished using the standard logit model.

[18] However, as McNollgast (1995) points out, it is possible that there will be indirect responsiveness due to the elected bodies "stacking" the appointment of federal court judges to ensure the selection of the elected bodies preferences. I do not account for this possibility.

Allowing the Justices' preferences to vary by natural court, I uncover the Justices' preferences in Judicial Oversight Space by estimating equation 3.[19]

$$Y_v = \beta_j \text{(Justice J dummy)} + \beta_k \text{(natural court k dummy)} + \beta_{jk}\text{(Justice J dummy * natural court k dummy)} + \varepsilon_v \qquad (3)$$

Y_v represents the set of liberal votes on non-unanimous Judicial Oversight cases, β_k captures any natural court effects that affect all Justices equally, and the interaction term β_{jk} allows Justices' preferences to vary idiosyncratically across natural courts.[20] An insufficient number of votes for those Justices which join/leave a Court during a year motivates the decision to use natural courts rather than years.

The set of coefficients β_j, β_k, and β_{jk} enables the calculation of the probability that a Justice votes for a liberal outcome.[21] Given the specification of equation 3, the probability that the Justice votes in a liberal manner in natural court k will simply be the percentage of times that the Justice votes in a liberal fashion on Judicial Oversight cases during natural court k.

Using the assumption that a justice's preference in Judicial Oversight Space represents his/her sincere preference in SI Space (and that the mapping is 1-1), the estimates of equation 3 identifies both the set of median Justices, as well as their sincere preferences in SI Space.[22]

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[19] I omit the constant term in order to include a full set of Justice dummy variables. This allows me to recover the non-relative preferences of all of the justices. I omit case dummy variables because including them excludes the possibility of including any additional independent variables due to linear dependence between the case dummies and any additional independent variables. In estimating equation 3 (and every other result in the paper), I use case citations as the unit of analysis (i.e., analu=0), and use only non-unanimous cases (because unanimous cases will only scale the preferences of the Justices by a constant).

[20] I use Spaeth's (1997) definition of a liberal vote (i.e., a vote is liberal if it is pro-accused, pro-indigent, pro-civil liberties claimant, pro-affirmative action, pro-underdog). Natural courts are defined by a period of constant membership. Thus, a natural court begins (and ends) with the addition (or subtraction) of a Justice. I use Spaeth's (1997) categorization of natural court.

[21] $\Pr\{\text{vote liberal}\} = \exp\{\beta_j+\beta_k+\beta_{jk}\}/(1+\exp(\beta_j+\beta_k+\beta_{jk})$.

[22] Although these two assumptions are extremely restrictive, a correlation of .93 between the preferences of Justices in Judicial Oversight Space and the preferences of those Justices who can vote sincerely in SI Space (i.e., all non-median Justices) suggest that it is not unreasonable.

Figure 4 shows the relationship between the sincere preferences of the median Justice and the Pareto set of the elected bodies by year.

[Insert Figure 4 Here]

Having located both the elected bodies and the Court in SI Space, in Sections 3 and 4, I test the predictions of the Attitudinal and SOP Models.

In this Section I develop a method of mapping both the median Justices' sincere preferences and the elected bodies preferences into SI Space. I first identify the preferences of the elected bodies using Poole-Rosenthal's adjusted NOMINATE Dimension 1 scores. I then assume that the Solicitor Generals' preferences in SI Space represent those of their President. Since these assumptions provide Presidential scores in both spaces, I use equation 1 to fit the two scores under the assumption that Poole-Rosenthal space is a linear transformation of SI Space. Assuming that the elected bodies' relationships are preserved when translated into SI Space, I use equation 2 to translate the elected bodies' preferences into SI Space. With this translation, the elected bodies' preferences are directly comparable to the Justices' revealed preferences in SI Space.

III. Emprical Test of the Attitudinal and SOP Models

In this Section, I use the SI Space preferences derived in Section 2 to test the implications of the Attitudinal and SOP models derived in Section 1. Theorem 2 of Section 1 establishes that if the SOP model is correct, when the median Justice's sincere preference is more liberal than the most liberal elected body, the median will decides cases more conservatively than s/he prefers. Conversely, when the median is more conservative that the most conservative elected body, the median votes more liberally than s/he desires. Table 1 of Section 1 presents these predictions.

To test this comparative statics prediction, I examine the decisions of the median justice when s/he is outside of the elected bodies' Pareto Set. Table 2 summarizes Figure 4 by classifying the location of the median Justice relative to the preferences of the elected bodies by year.[23]

Table 2: Median Justice Placement by Year

Years when $j_5 < \min\{h,s,p\}$	**#**	**Years when $\text{Min}\{h,s,p\} \le j_5 \le \max\{h,s,p\}$**	**#**	**Years when $j_5 > \max\{h,s,p\}$**	**#**
1953, 1955, 1958-60, 1969-74, 1989-93,	16	1956-7, 1964-5, 1975-80, 1987-8, 1994-5	14	1954, 1961-3, 1966-8, 1981-86	13

Note: Table is derived from Figure 4.

To determine the direction of the effect that elected bodies have (if any) on median Justices that lie outside the boundary of the elected bodies' Pareto set, I create two dummy variables: one for when the median is more conservative than the most conservative elected body (MdnCon), and one for when the median is more liberal than the most liberal elected member (MdnLib).

To test the Attitudinal and SOP Models, I use the revealed preference model specified by Equation 4.

$$Y_v^{SI} = \beta_j * (\text{Justice J dummy}) + \alpha * (\text{MdnCon}) + \phi * (\text{MdnLib}) + \varepsilon_v \quad (4)$$

Y_v^{SI} represents the direction of a vote in SI Space (i.e., Y_v^{SI}=1 if vote is liberal), the coefficient α measures the average deviation of the median Justices from their sincere preferences when they

23 In table 2a in Section 4, I do the same for the other measures I discuss. Specifically, I also: 1) assume that the mapping represented by Equation 2a is correct and use the Solicitor Generals' Preferences as Presidential Preferences, 2) assume that th2e mapping represented by Equation 2 (or 2a) is correct and use the Presidents' translated Poole-Rosenthal Scores, 3) allow for error in the mapping by using the 95% Confidence interval mappings of Equation 2 (or 2a) for the legislative branch and use Solicitor General Preferences as Presidential Preferences, and 4) allow for error in the mapping by using the 95% Confidence interval mappings of Equation 2 (or 2a) for the legislative branch and use the Presidents' translated Poole-Rosenthal scores.

are more conservative than the most conservative elected body, and the coefficient ϕ, measures the average deviation when they are more liberal than the most liberal elected body.

Recalling the predictions summarized in Table 1, if the SOP Model is correct, MdnCon's coefficient (i.e., α) should be positive, and MdnLib's coefficient (i.e., ϕ) should be negative. Since only median Justices act strategically, the coefficients on the Justice dummy variables return the sincere preferences of non-median Justices.[24]

The results of this estimation are presented in Table 3.

Table 3: Testing Separation of Powers' Predictions

Independent Variable	**Coefficient (Standard Error)**
MdnLib	-.117 (.084)
MdnCon	-.083 (.103)
Number of Observations	13995
% Correctly Predicted	67.696

Note: Table 3 presents results of estimating equation 4 using the measurements identified in Section 2. Data is from Spaeth (1997). The coefficients of the Justice dummy variables are suppressed for expositional clarity, but are available upon request.

The results are not favorable to the SOP thesis. Although the coefficient on MdnLib is correctly signed, neither coefficient is statistically significant. To strengthen this refutation of the SOP model, in Section 4 I examine the robustness of the test by examining the results under alternative measurement choices. I continue to find little support for the SOP thesis.

<u>IV. Empirical Robustness</u>

In this Section, I retest the models' implications using different measurements. In Section 3, I use the following measurement assumptions: the Solicitor Generals' preferences are revealed by only those cases they petition, the Presidents' preferences are those of the Solicitor

General, equation 2 is accurate, and the identification of the median justice is accurately made in Judicial Oversight Space. To argue for the robustness of the results I report, I re-estimate equation 4 using different measurement assumptions and show that the substantive conclusion is unchanged.

Maintaining equation 2 as the mapping function, I examine 3 alternative measurement choices. First, I use a President's translated Poole-Rosenthal score for the President's preferences in SI Space (instead of their petitioning Solicitor Generals' preferences). Second, I use equation 2 to translate from Poole-Rosenthal space to SI Space, and I calculate and use the 95% confidence intervals around the estimates.[25] Third, to allow for the possibility that the mapping between Judicial Oversight Space and SI Space may not be order preserving, I identify the median Justice using equation 3 in SI Space instead of Judicial Oversight Space.[26] The median Justice can be identified in SI Space because although the elected bodies may affect the cardinal numbers recovered by the estimation (due to strategic voting), the ordinal rankings will be preserved (i.e., the elected bodies cannot influence who the median justice is). These alternative measurements produce 6 additional regressions of equation 4.

In addition, given the importance of the mapping function (i.e., equation 2), I also estimate the mapping function by using Solicitor Generals' preferences in every case they are involved in. Doing so produces a high (.74) correlation between the Solicitor Generals' preferences and Presidential Poole-Rosenthal scores, but not a single Democratic President

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[24] Non-median Justices vote sincerely because their vote is simply between the status quo and the proposal made by the median Justice. There is no reason to expect why they would vote anything but their sincere preferences (i.e., vote for the closest alternative).

[25] To construct these I follow standard procedure. For equation 5, the mapping functions are .437+(1.98)*(.0497)+ (-.204+(1.98)*.12)*(Poole-Rosenthal Score) for the upper 95% confidence bound, and .437-(1.98)*(.0497)+ (-.204-(1.98)*.12)*(Poole-Rosenthal Score) for the lower 95% confidence bound.

[26] Although Goldberg is the median Justice from 1961-63, because that was the only natural court on which he served, I cannot estimate an affect of elected bodies on Goldberg.

argues for more liberal outcomes than conservative ones (the highest is Kennedy at .426). The new translation function is given in equation 2a, where SI_k^i is the SI Space preference of elected body i for congressional term k, and PR_k^i is the Poole-Rosenthal score for elected body i in congressional term k.

$$SI_k^i = .305 - .1 * PR_k^i \qquad (2a)$$

Estimating equation 2 using the Solicitor Generals' activity on all cases yields an α of .305 with a standard error of .01, and a β of -.10 with a standard error of .035, again indicating that the assumption that a moderate Congressman is a moderate Justice is violated.

Using the alternative mapping function 2a, I estimate equation 4 using the measurement choices described in Section 3. In addition, I examine the 3 variations discussed above using the mapping function 2a. Table 2a both summarizes these alternative measurement choices and locates the median Justice relative to the elected bodies for each case.

[Insert Table 2a here]

I now estimate re-equation 4 once for each unique preference mapping presented in Table 2a (for a total of 15 estimations).[27] Table 3a presents the results.

[Insert Table 3a Here]

The results in Table 3a are not promising for the SOP Model. Recalling the predictions summarized in Table 1, if the SOP thesis was correct, MdnCon's coefficient would be positive and MdnLib's coefficient would be negative. Only 2 out of the 29 unique variables estimated produces a statistically significant confirmation of the theory's comparative statics. 7 statistically significant effects run counter to the predictions of SOP, and 20 predict no statistically significant effect at all.

Since these results allow for variation in: the function that maps the elected bodies from Poole-Rosenthal Space into SI Space (i.e., equation 2 or 2a), the error made in the mapping (i.e., examining the 95% Confidence intervals for the estimates), the preferences attributed to the President (i.e., the translated Poole-Rosenthal score, the Solicitor Generals' preferences over the set of all cases, and the petitioning Solicitor Generals' preference), and the dimension over which the median Justice is selected (i.e., Judicial Oversight Space or SI Space), there seems to be little room in which to salvage the SOP thesis as it is currently understood, while still permitting it to be empirically verifiable.

V. Conclusion

There are two main theories about judicial decision-making in Political Science: the Attitudinal Model and the SOP model. Determining which model is correct is a critical task if we wish to understand the workings of the Court, as it has implications for all other aspects of Judicial studies. For example, if the Court decides cases irrespective of elected bodies' preferences, then judicial appointments are critical. However, if the Court defers to the elected bodies' preferences, appointments are less important given the Court's limited discretion.

This paper attempts to identify which theory best describes the behavior of the Justices. Ultimately, I find no conclusive evidence under any of the measurements I employ supporting the SOP model: median Justices do not systematically deviate from their sincere preferences based on their relative location to the preferences of the elected bodies.

In addition to failing to find confirmatory evidence for the SOP model, this paper advances the literature in three additional ways. First, Section 2 provides a way of computing preferences for elected bodies and Justices that are directly comparable. This has immediate

[27] A total of 15 estimations are run because two cases (i.e., 5 and 6 using the median Justice identified in SI

applications in other areas (e.g., the Appointment literature). Second, in Section 1 I provide a model that summarizes the current theories about the Court. By making the model (as well as the assumptions) explicit, future work can examine alterations to the basic model. Third, the results in Appendix A suggest that the Court's policy space is largely uni-dimensional.

Although the Court may be a political body, it apparently does not respond to political bodies. The evidence I present consistently rejects the current SOP Model. Although the number of statistically significant coefficients in Section 4 makes me hesitant to conclude that the Attitudinal Model explains the Court's actions, this paper cannot conclusively deny its explanatory power. Thus, at least for now, it appears that the Supreme Court truly is a separate and independent judiciary.

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space) are identical.

Appendix A: Theoretical Preliminaries

In this appendix, I examine the applicability of the Median Voter Theory to the Supreme Court by justifying my assumption that the policy space over which Justices interpret federal statutes is largely uni-dimensional.

Assuming a uni-dimensional policy space is unproblematic if: the policy space is actually uni-dimensional, or the policy space is multi-dimensional and the Justices' preferences over the policy dimensions are highly correlated. If preferences over the two dimensions are highly positively correlated, the preferences will be located close to the 45 degree line that intersects the origin. Since the median Justice's identity will be identical in both issue dimensions, assuming a uni-dimensional policy space does not mis-identify the median Justice.[28]

I estimate the Justices' preferences over several possible issue dimensions to test the dimensionality of the issue space underlying the interpretation of federal statutes. Specifically, I estimate the Justices' preferences over: federal statutes that deal only with civil rights issues, federal statutes that deal only with economic issues, federal statutes that deal only with criminal issues, the set of all federal statutory interpretation cases, and the set of cases heard under original jurisdiction.[29]

[28] Since each dimension is a linear combination of the other, the relative positions of the justices will be invariant.

[29] The classification of cases into these categories is obtained using Spaeth's (1997) categorizations. To identify the set of federal statutory interpretation cases (authdec1 or authdec2=4), I use those cases where the Court rests its legal decision on "the interpretation of a federal statute, treaty or court rule" (Spaeth 1997, 58) The set of original jurisdiction cases (authdec1 or authdec2=3) is identified using those cases that the Court justifies its ruling based on judicial review at the national level. To identify the issue associated with each case, I again rely on Spaeth's (1997) value classification. The Civil rights issue space is the subset of the statutory interpretation dimension composed only of cases that involve the issues of civil rights, the First Amendment, or privacy (value 2,3 or 5). The Economic issue dimension the subset comprised only of cases relating to unions, economic activity or federal taxation issues (value 7,8,12). The Crime issue dimension is the subset involving only cases dealing with criminal activity or due process concerns (value=1 or 4).

To estimate the Justices' preferences over these issue dimensions, I estimate equation 5 for each issue dimension separately.[30]

$$Y_v = \beta_j(\text{Justice J dummy}) + \varepsilon_v \quad (5)$$

The dependent variable Y_v measures if a Justice's vote is liberal in non-unanimous cases.

[Insert Figure 5 Here]

The scatterplot matrix in Figure 5 presents the set of binary relationships between the five sets of β_j produced by equation 5. The correlation between the coefficients in these issue dimensions is high, ranging from .6 to .93. Given the high degree of correlation, the assumption of uni-dimensionality does not seem problematic.

[30] Equation 5 assumes that a Justice's preferences within an issue space are stable across time because data availability limits the estimates' reliability in some issue dimensions for some natural courts.

Appendix B: Proofs of Section 1

Lemma 1: *If min {h,s,p}$\leq x \leq$max {h,s,p}, x' = x" = x = z.*

Proof:
If min{h,s,p} $\leq$ x $\leq$ max {h,s,p}, ~$\exists$ x' (or x") $\neq$ x s.t. x' $R_{min\{h,s,p\}}$ x and x' $R_{max\{h,s,p\}}$ x. If x'= x+ε, then x $R_{min\{h,s,p\}}$ x', but if x'= x-ε, then x $R_{max\{h,s,p\}}$ x'. Since x' R x iff x' $R_{min\{h,s,p\}}$ x and x' $R_{max\{h,s,p\}}$ x by construction, and ~$\exists$ x' s.t x' $R_{min\{h,s,p\}}$ x and x' $R_{max\{h,s,p\}}$ x, ~$\exists$ x' s.t. x'Rx. Thus, x = z. Q.E.D.

Lemma 2: *If x$\notin$ [min {h,s,p},max {h,s,p}], {x',x"}$\in$ [min {h,s,p},max {h,s,p}] and z $\in$ {x',x"}.*

Proof:
WLOG, let x < min{h,s,p}. By backwards induction, in the last move, x"R_Px iff x"$\in$ [x, 2p-x]. In the conference stage, for x" to pass, x"R_hx iff x"$\in$ [x, 2h-x], and x"R_sx iff x"$\in$ [x, 2s-x]. Thus, x"Rx iff x"$\in$ [x, min{(2p-x),(2h-x),(2s-x)}]. WLOG, let H<S. There are three cases to consider:

Case I: Suppose h<s<p.

x"Rx iff x"$\in$ [x, 2h-x]. Given this condition, S offers x" = s if s < 2h-x and x" = 2h-x else. Now, in the first move of the second half, since sP_Hx because s<2h-x, and (2h-x)I_Hx, by subgame perfection, H proposes x'=s if s<2h-x, or x = 2h-x otherwise. Thus, z $\in${(2h-x),s}. Since 2h-x chosen iff s> 2h-x, and since 2h-x>h $\forall$x<h, min{h,s,p}<x< max{h,s,p}

Case II: Suppose h<p<s.

x"Rx iff x"$\in$ [x, 2h-x]. The same logic as case I holds.

Case III. Suppose p<h<s.

x"Rx iff x"$\in$ [x, 2p-x]. Given this condition, S offers x" = s if s < 2p-x and x" = 2p-x else because s > p, 2p-x < 2s-x $\rightarrow$ (2p-x) P_S (2s-x) I_S x, (2p-x) P_S x. Because x < p, it is obvious that s P_S x. Given this, in the previous move, H proposes x'=s if s<2p-x, or x = 2p-x otherwise by subgame perfection. Why? If 2p-x is chosen, since h > p, 2p-x < 2h-x. Since (2p-x) P_H (2h-x) I_H x, (2p-x) P_H x. If s is chosen, since it is chosen only when s < 2p-x, and h < s by assumption, h < s < 2p-x. But if (2p-x) P_H x, then s P_H x as well. Thus, z $\in$ {s, (2p-x)}. Since 2p-x is chosen iff s > 2p-x, and since 2p-x>p $\forall$x<p, min{h,s,p} < x < max{h,s,p}. Q.E.D.

Theorem 1. *Assuming the Attitudinal Model is correct, x = z = j_5.*

Proof: There are two cases to consider:

Case I: q'<j_5.

j_5R_{j5}q' and j_5R_iq' $\forall$ i > 5, as $|j_i-j_5| < |j_i-q'|$. Since j_5R_iq' for at least 5 members, j_5Rq'.

Case II: q'>j_5.

j_5R_{j5}q' and j_5R_iq' $\forall$ i < 5, as $|j_i-j_5| < |j_i-q'|$. Since j_5R_iq' for at least 5 members, j_5Rq'.
Q.E.D.

Theorem 2: *Assuming the SOP Model is correct,*

$x = z = j_5$	if $\min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}$
$x = z = \min\{h,s,p\}$	if $q' \leq j_5 \leq \min\{h,s,p\}$ and $(\min\{h,s,p\})\, R_{j6}\, q'$
$x = z = \min\{h,s,p\}$	if $j_5 \leq q' \leq \min\{h,s,p\}$ and $(\min\{h,s,p\})\, R_{j6}\, q'$
$x = z = \max\{h,s,p\}$	if $q' \geq j_5 \geq \max\{h,s,p\}$ and $(\max\{h,s,p\})\, R_{j4}\, q'$
$x = z = \min\{h,s,p\}$	if $j_5 \geq q' \geq \max\{h,s,p\}$ and $(\max\{h,s,p\})\, R_{j4}\, q'$
$x = \varnothing,\ z = q'$	else.

<u>Proof:</u> There are several cases to consider.

Case I: $\min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}$.

By backwards induction, in the second half, by Lemma 1, if $\min\{h,s,p\} \leq x \leq \max\{h,s,p\}$, $z = x$. Given this, in the first half, J_5 will set $x = j_5$. Will the case be heard? If $q' < j_5$, then $j_5\, R_{j6}\, q'$ and it will be heard. If $q' > j_5$, then $j_5\, R_{j4}\, q'$ and it will be heard. WLOG, suppose $x < \min\{h,s,p\}$. Then there are three additional cases to consider.

Case II: Suppose $q' < j_5 < \min\{h,s,p\}$.

Since $j_5 < \min\{h,s,p\}$, $\min\{h,s,p\} P_{j5} (\min\{h,s,p\}+\varepsilon\}$. By Lemma 1, in the second half, if $\min\{h,s,p\} \leq x \leq \max\{h,s,p\}$, $x = z$. Since $\min\{h,s,p\} P_{j5} (\min\{h,s,p\}+\varepsilon\}$, $(x = \min\{h,s,p\}) R_{j5}\ (x \leq \min\{h,s,p\})$ because by Lemma 2, if $x < \min\{h,s,p\}$, then $z \in [\min\{h,s,p\}, \max\{h,s,p\}]$ in the second half. Clearly $x = \min\{h,s,p\}) R_{j5}\ (x > \min\{h,s,p\}$. Thus, in the first half, $x = \min\{h,s,p\}$, and the elected bodies will defer to the Court. Given this, the case will be heard if $(\min\{h,s,p\})\, R_{j6}\, q'$.

Case III: Suppose $j_5 < q' < \min\{h,s,p\}$.

The same logic as case II applies, except now the case will be heard if $(\min\{h,s,p\})\, R_{j6}\, q'$, as $q' R_{j6} (\min\{h,s,p\})$.

Case IV: Same logic as case III. Q.E.D.

Theorem 3: *If unanimous implementation is required (i.e., $z = x$ iff xR_Hq', xR_Sq', and xR_Pq'):*

$x = z = 2*\min\{h,s,p\}-q'$	if $q' < \min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}, 2*\min\{h,s,p\}-q' < j_5$
$x = z = j_5$	if $q' < \min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}, 2*\min\{h,s,p\}-q' \geq j_5$
$x = z = \min\{h,s,p\}$	if $j_5 \leq \min\{h,s,p\}$ and $q' \notin [\min\{h,s,p\}, \max\{h,s,p\}]$
$x = z = \max\{h,s,p\}$	if $j_5 \geq \max\{h,s,p\}$ and $q' \notin [\min\{h,s,p\}, \max\{h,s,p\}]$
$x = z = 2*\max\{h,s,p\}-q'$	if $\min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\} < q'$ and $2*\mathrm{Max}\{h,s,p\}-q' > j_5$
$x = z = j_5$	if $\min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\} < q'$ and $2*\max\{h,s,p\}-q' \leq j_5$
$x = \varnothing,\ z = q'$	else.

<u>Proof:</u>

Since unanimous consent required to implement, in second half, $z = x$ (or x") $\neq q'$ iff xR_Hq', xR_Sq', and xR_Pq'. This requires $x \in [h, 2h-q'] \cap [s, 2s-q'] \cap [p, 2p-q']$. There are several cases to consider. WLOG suppose $q' < \max\{h,s,p\}$

Case I: $q' < \min\{h,s,p\} \leq j_5 \leq \max\{h,s,p\}$

By lemma 1, J_5 determines the outcome. To get everyone's vote, in the first half, J_5 sets $x = 2*\min\{h,s,p\}-q'$ if $2*\min\{h,s,p\}-q' < j_5$, and $x = j_5$ otherwise. If $2*\min\{h,s,p\}-q' < j_5$, $x = 2*\min\{h,s,p\}-q'\ I_{\min\{h,s,p\}}\ q'$, and if $j_5 < 2*\min\{h,s,p\}-q'$, $x = j_5\ P_{\min\{h,s,p\}}\ q'$. Hence, $x =$ $x\ R_{\min\{h,s,p\}}\ q'$. Since $q < \min\{h,s,p\} \leq \max\{h,s,p\}$, $[\min\{h,s,p\}, 2\min\{h,s,p\}-q'] \subseteq$

[max {h,s,p}, 2*max {h,s,p}-q']. Hence, if x $R_{\min\{h,s,p\}}$ q', x Rq'. Given this, in the first half, J_5 sets x=j_5, and since q'< $j_5 \leq j_6$, the case is assuredly heard.

Case II: min {h,s,p}≤ {j_5,q'} ≤ max {h,s,p}

Since min {h,s,p}≤ q' ≤ max {h,s,p}, ~∃ x s.t. x $R_{\min\{h,s,p\}}$ q' and x $R_{\max\{h,s,p\}}$ q'. If x'= q'+ ε, then q' $R_{\min\{h,s,p\}}$ x', but if x'= q'-ε, then q' $R_{\max\{h,s,p\}}$ x'. Thus, no decision of the Court will be implemented. Given this, in the first stage, the Court will not hear the case.

Case III: q' < j_5 < min {h,s,p}.

The proof in Theorem 2, case II provides the result.

Case IV: j_5 < q' < min {h,s,p}

The proof in Theorem 3, case III provides the result.

Case V: j_5 < min {h,s,p} ≤ q' ≤ max {h,s,p}.

The logic is identical to Case II. Q.E.D.

Theorem 4: *Theorem 2 and Theorem 4 are observationally equivalent in terms of the test performed in Section 3.*

Proof:

Theorems are observationally equivalent if the predictions are identical. The predictions are $j_5 \leq$ min{h,s,p}→ j_5≤x, and max{h,s,p} ≤ j_5 → x≤j_5. Furthermore, it assumes min {h,s,p} ≤ j_5 ≤ max {h,s,p} → x = j_5. Given that we observe action by the Court, either zR_{j4}q' or zR_{j6}q'.

There are three cases to consider.

Case I: j_5≤min{h,s,p}

If j_5≤min{h,s,p}, Theorem 2 and Theorem 3 both predict j_5≤z= min{h,s,p}.

Case II: j_5≥min{h,s,p}

If j_5≥min{h,s,p}, Theorem 2 and Theorem 3 both predict j_5≥z=z min{h,s,p}.

Case III: min {h,s,p} ≤ j_5 ≤ max {h,s,p}

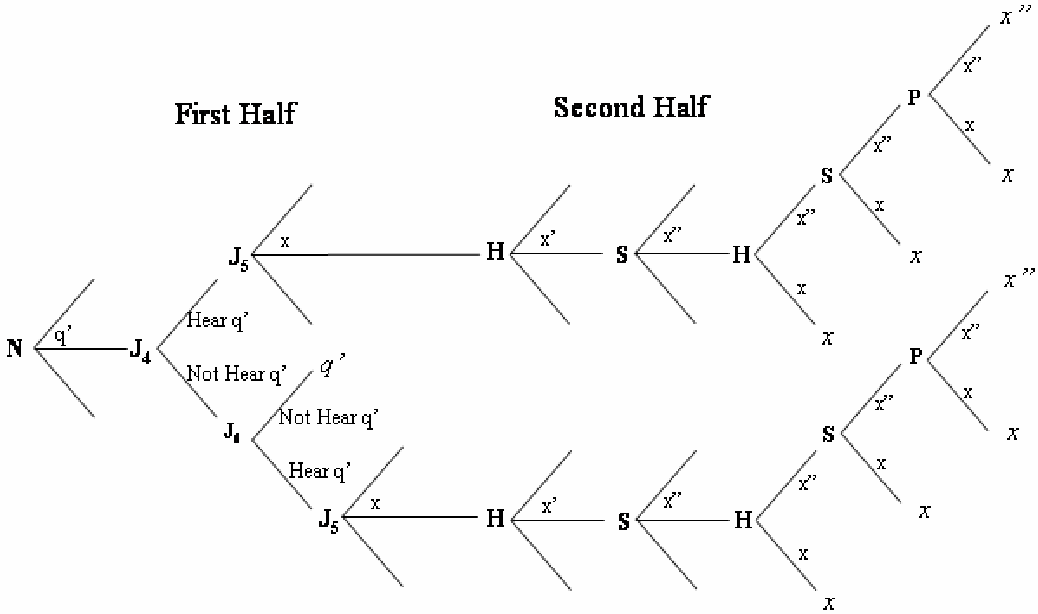
If Theorem 2 correct, x=z= j_5 ∀q'. Hence, z is independent of {h,s,p}. If Theorem 3 is correct, and since we observe action, by Theorem 3, we know that q'< min {h,s,p} or q'> max{h,s,p}. WLOG, q'< min {h,s,p}. Then, by Theorem 4, x=z=2*min{h,s,p}-q'≥j_5 if 2*min{h,s,p}-q'<j_5 or x=z=j_5 if 2*min{h,s,p}-q'≥j_5. If 2*min{h,s,p}-q'≥j_5, the results are identical. If 2*min{h,s,p}-q'<j_5, then Theorem 2's prediction does not equal Theorem 3's prediction. So long as the distribution of q' is symmetric, this discrepancy does not affect our expectations of MdnCon (Case I) and MdnLib (Case II). Q.E.D.

Theorem 5: *If the Court moves in the second half, in the first half, the elected bodies set x"=j_5, and the Court never has reason to act.*

Proof:

In last move, J_5 will set x=j_5. Given this, will the case be heard? Well, if x" ≤ j_5, $j_5 R_{j6}$x", and if j_5 ≤ x" j_5, $j_5 R_{j4}$x". Thus, the case will always be heard. Since the case will be always heard, in the first half, the elected bodies will pass a bill x" iff j_5Rq'. Thus, a bill will be proposed iff $j_5 R_P$q, $j_5 R_S$q', and $j_5 R_H$q'. By subgame perfection, since the sophisticated equivalent of x" is j_5, in the first half the elected bodies will propose x"=j_5 if a bill is proposed. But now there is no reason for the Court to act. Q.E.D.

Figure 1: Extensive Form of the Stage Game



Note: Players are denoted in bold type, actions are in normal type and outcomes are italicized. A node with three lines extending from it represents a continuous action set.

Figure 2: Adjusted NOMINATE Dimension 1 Scores for Elected Bodies: 83rd to 104th Congresses

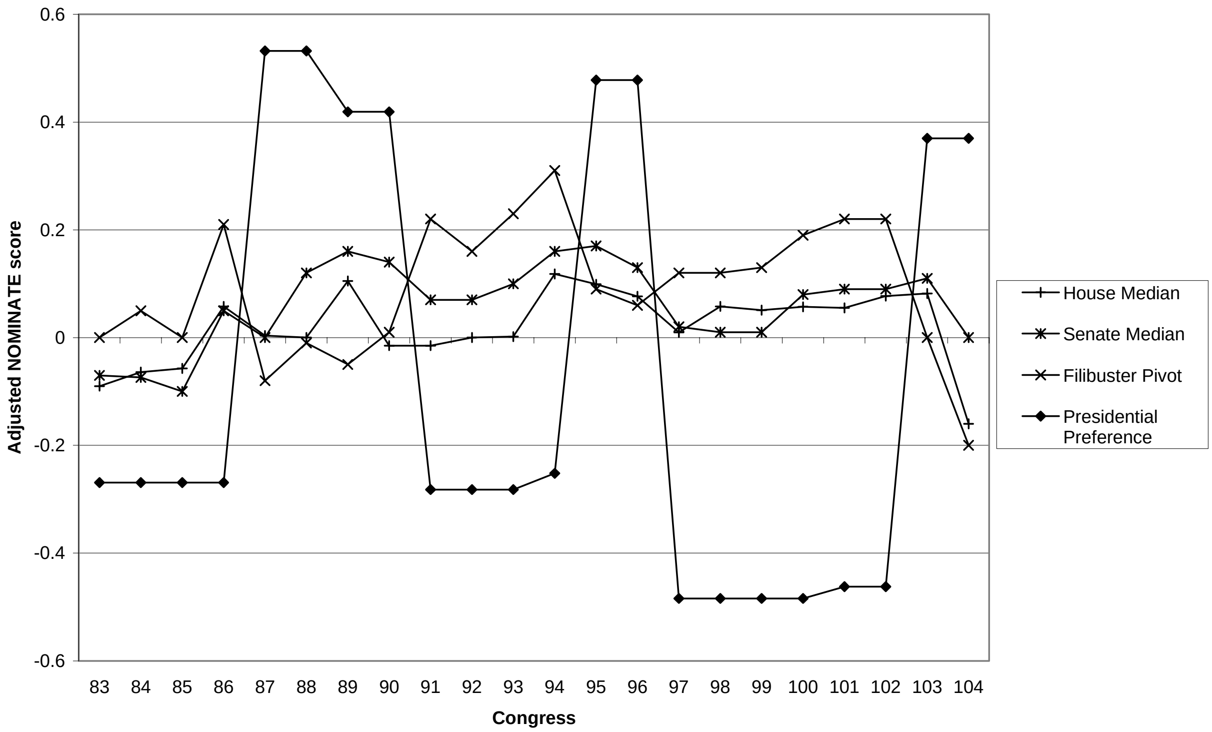


Figure 4: SI Space Relationship Between Elected Bodies' Pareto Set and Median Justice: 1953-1995

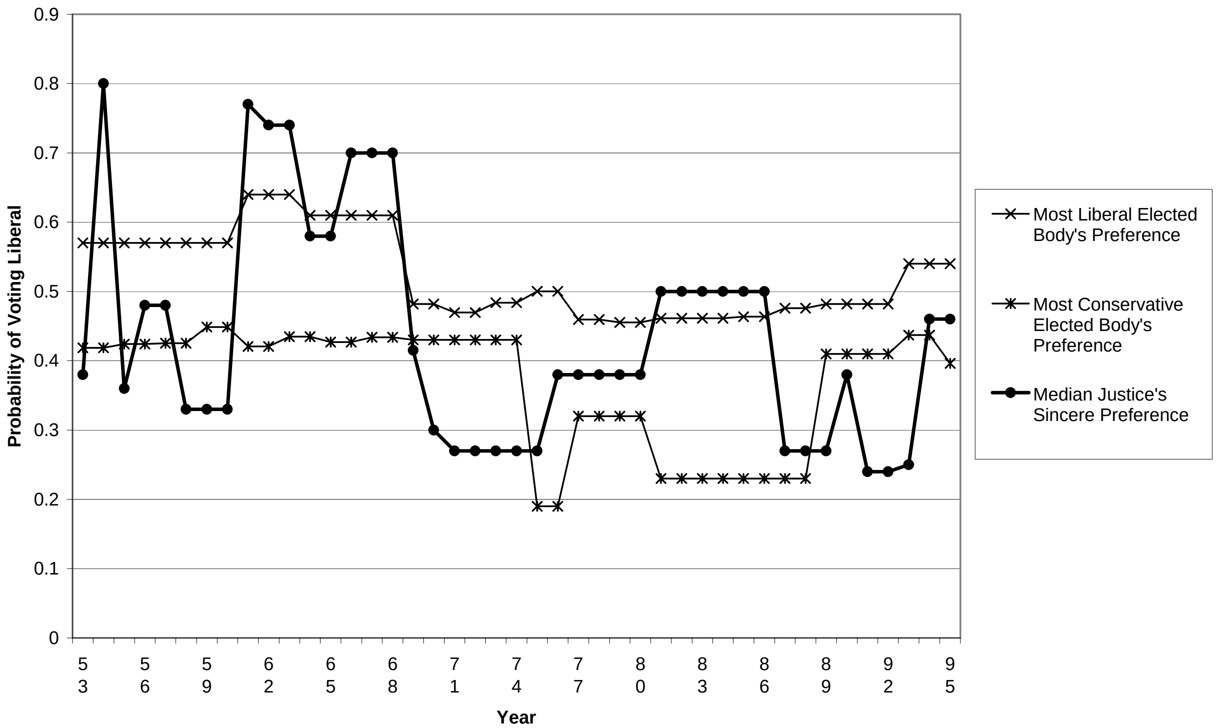


Table 3a: Regression Coefficients for Equation 4 Under Alternative Measurement Choices

	Elected Bodies' Preferences	MdnCon Coefficient (Stnd Err)	MdnLib Coefficient (Stnd Err)	% Correctly Predicted
Median Justice Identified On Judicial Oversight Space	2	-.24* (.082)	-.229* (.096)	67.696
	3	-.149 (.097)	.156 (.152)	67.696
	4	.326 (.41)	.157 (.152)	67.696
	5	-.203 (.122)	-.133* (.067)	67.696
	6	-.239 (.129)	-.133* (.067)	67.696
	7	-.202 (.122)	-.127 (.069)	67.696
	8	.31 (.41)	-.11 (.068)	67.696
Median Justice Identified On SI Space	1	-.228* (.091)	.037 (.12)	67.696
	2	-.196* (.089)	.02 (.12)	67.696
	3	-.234* (.113)	.493* (.195)	67.1
	4	-.184 (.167)	.497* (.196)	67.674
	5	-.09 (.134)	-.04 (.075)	67.696
	6	-.09 (.134)	-.04 (.075)	67.1
	7	-.249 (.153)	-.004 (.077)	67.71
	8	-.387* (.179)	-.055 (.077)	67.71

Note: There are 13995 observations for each estimation of equation 4. Elected bodies' preference numbering refers to entries in Table 2a. * denotes statistical significance at the 95% confidence interval. The coefficients of the Justice dummy variables are suppressed for expositional clarity, but are available upon request.

Table 2a: Median Justice's Relative Location to Elected Bodies by Year Under Alternative Measurement Choices

	Median Justice Identified In Judicial Oversight Dimension				Median Justice Identified in SI Space			
Elected Bodies' Preference Measurements:	**Years When $j_5 < \min\{h,s,p\}$**	**#**	**Years When $j_5 > \max\{h,s,p\}$**	**#**	**YearsWhen $J_5 < \min\{h,s,p\}$**	**#**	**Years When $j_5 > \max\{h,s,p\}$**	**#**
(1) Eqtn. 2 w/ Solicitor Generals' Prefs. For Pres. Prefs.	In Text		In Text		1953, 1955-60, 1964-5, 1969, 1971-4, 1986, 1989, 1991-3	19	1954, 1966-68, 1981-85, 1990	11
(2) Eqtn. 2 w/ Translated P-R Scores for Pres. Prefs.	1955, 1958-60, 1970-80, 1987-90, 1991-93	22	1954, 1961-68, 1981-86	15	1953, 1955-60, 1964-5, 1969, 1975, 1977-8, 1986-9, 1991-3	20	1954, 1961, 1966-68, 1981-5, 1990	11
(3) 95% Conf. Int. around Eqtn. 2 w/ Solicitor Generals' Prefs. For Pres. Prefs.	1959-60, 1970-74, 1989-93	12	1954, 1961-63, 1966-68	7	1953, 1955, 1958-60, 1964-5, 1986, 1989, 1991-3	12	1954, 1961, 1966-68, 1990	6
(4) 95% Conf. Int. around Eqtn. 2 w/ Translated P-R Score for Pres. Prefs.	1993	1	1954, 1961-63, 1966-68	7	1953, 1955, 1964-5, 1993	5	1954, 1961, 1966-68, 1990	6
(5) Eqtn. 2a w/ Solicitor Generals' Prefs. For Pres. Prefs.	1971-74, 1989, 1991-93	8	1953-69, 1976-86, 1990, 1994-95	31	1953, 1955, 1964-5, 1986, 1989, 1991-3	9	1954, 1956-57, 1959-61, 1966-85, 1990, 1994-95	29
(6) Eqtn 2a w/ Translated P-R Scores for Pres. Prefs.	1971-74, 1991-93	7	1953-69, 1976-86, 1990, 1994-95	31	1953,1955, 1964-5, 1986, 1989, 1991-3	9	1954, 1956-57, 1959-61, 1966-85, 1990, 1994-95	29
(7) 95% Conf. Int. around Eqtn. 2a w/ Solicitor Generals' Prefs. For Pres. Prefs.	1971-74, 1989, 1991-93	8	1953-58, 1961-69, 1976-86, 1990, 1994-95	29	1953, 1955, 1986, 1991-93	6	1954, 1956-57, 1961, 1966-85, 1990, 1994-95	27
(8) 95% Conf. Int. around Eqtn. 2a w/ Translated P-R Score for Pres. Prefs.	1993	1	1953-58, 1961-69, 1976-86, 1990, 1994-95	29	1953, 1955, 1986, 1993	4	1954, 1956-57, 1961, 1966-85, 1990, 1994-95	27

Note: Results are from analysis under specified measurement choices. For medians identified in SI Space, since Goldberg was the median for his entire tenure (i.e., 1962-63), I cannot estimate his deviation from his sincere preferences. Precise estimations are available from the author upon request.

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