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Electing the Supreme Court

Barry Friedman
New York University School of Law, barry.friedman@nyu.edu

Anna Harvey
New York University

Electing the Supreme Court†

BARRY FRIEDMAN*
ANNA L. HARVEY**

I. INTRODUCTION

There is widespread discontent about the Supreme Court these days in certain quarters. Scholars complain, as they often do, about the outcomes of Supreme Court cases. But scholarly unhappiness transcends mere disagreement on the merits. Many authors claim that the current Supreme Court has arrogated power to itself, and that it lacks the proper respect for the coordinate branches.[1] The loudest clamor in this regard relates to the Court's recent federalism decisions, but other areas receive similar treatment.

At the heart of this criticism is the premise that the Supreme Court is interfering with congressional preferences.[2] Superficially, one can see the logic in this. It has

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* Professor of Law, New York University School of Law; A.B. 1978, University of Chicago; J.D. 1982, Georgetown University.

** Robert A. Beck Associate Professor of American Institutions and Chair, Department of Politics, New York University; B.A. 1988, Honors Tutorial College, Ohio University; M.A. 1990, Princeton University; Ph.D. 1995, Princeton University.

1. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1106 (2001) ("[T]he current Supreme Court majority has been altogether too disrespectful of democratic processes, . . . their political values are badly skewed, and . . . their invocations of text and original intention are opportunistic, ideologically biased, and self-serving."); Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Indian Tribe, 52 VAND. L. REV. 407 *passim* (1999) (discussing the Court's recent decisions stripping Congress of the power to abrogate state sovereign immunity and arrogating that power to itself); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1273-78 (2001) (arguing that the Supreme Court has softened jurisdictional requirements to increase its own power while enforcing strict restrictions on Congress's jurisdiction to act, raising serious separation of powers concerns); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 814 (2001) (arguing that *Bush v. Gore* was "an unnecessary and anti-democratic arrogation of power"); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) ("[T]his Court sees no need to accommodate the political branches at all.").

2. *See, e.g.*, Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of*

escaped no one's notice that in the last few years the Supreme Court has been unusually aggressive in striking down congressional enactments.[3] On the face of it, it appears that at no time since the New Deal has conflict between the Court and the Congress been as strong as it is today.[4]

Based on this premise of Court-Congress conflict, scholarly commentary offers solutions as to how Congress can regain the upper hand. Some authors suggest that Congress compile fuller legislative records to meet increasingly strict Supreme Court tests,[5] or they chastise the legislative record requirements being imposed on the Congress.[6] Other scholars actually propose stronger action to get the Court's attention.[7] Suggestions in print range from simply holding hearings,[8] to imposing a supermajority requirement before the Justices can strike a congressional statute.[9] At least two major conferences (this Symposium being one of them) have been held to ask the precise question: what should Congress do about the Supreme Court?[10]

Rights, 4 U. PA. J. CONST. L. 281 (2002) (arguing that in the past twenty years the Court has acted to limit the constitutional rights of minorities despite repeated attempts by Congress to expand the rights protected under the Fourteenth Amendment); Kramer, *supra* note 1, at 14 (arguing that the Rehnquist Court "increasingly ignores or affirmatively denies legitimacy to the views of other actors").

3. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001) (noting Supreme Court's recent cases limiting Congress's regulatory power); Griffin, *supra* note 2, at 301-13 (describing Rehnquist Court's invalidation of Congress's expansive civil rights legislation).

4. Balkin & Levinson, *supra* note 1, at 1058-59.

5. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

6. *Cf.* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (arguing that the Rehnquist Court's embrace of legislative record review imposes illegitimate constraints on legislative action, and suggesting ways in which Congress can develop records to survive such review).

7. *See, e.g.*, Kramer, *supra* note 1, at 157-169 ("If the problem really is Congress's failure to take the Constitution seriously enough, the solution is to put our energies into rejuvenating and improving the legislature's capacity in this regard, not to hand the matter over to a bunch of judges."); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000); *see also* Barry Friedman, *The Birth of an American Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (describing "a spate of articles decrying the inconsistency of democracy with judicial review, and calling for constitutional interpretation outside the courts").

8. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 720 (1996) ("[A] prudent Congress might wish to follow the Rome model when exercising its commerce power: articulate the judicial standard (the subject of the statute must have a substantial effect upon interstate commerce) and then document the satisfaction of that standard through facts developed in hearings and other legislative methods."); Post & Siegel, *supra* note 5, at 15-16.

9. Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule*, 78 IND. L.J. 73 (2003).

10. Equal Justice Society, The Assault of Federalism on Civil Rights: Developing New Strategies to Protect Civil Rights in a Conservative Era, Conference at Harvard Law School (Apr. 5-6, 2002).

This Article challenges the notion that Congress *wants* to do anything about the Supreme Court. The premise of this Article is that the seeming tension between the Congress and the Court rests on a misconception, to wit: because the Court is striking down congressional statutes, Congress disagrees with what the Court is doing. Despite superficial appeal, the argument here is that the premise is incorrect.

This Congress is not discontent with the Supreme Court, we hypothesize, because it does not disagree on the merits with what the Court is doing. Indeed, we contend that, if anything, the fact that the Court at present is unusually active in striking congressional statutes could be a clear signal that the Court faces an ideologically congenial sitting Congress.[11] A Supreme Court facing an ideologically distant sitting Congress has several reasons to defer to congressional preferences, even in constitutional cases.[12] But a Supreme Court that faces an ideologically congenial Congress has more freedom to strike statutes enacted by past Congresses. In short, the current Congress may not at all be displeased with the sitting Court.

This Article employs empirical analysis to explore the relationship between the ideological distance between Congress and the Court, and the Court's propensity to strike congressional statutes. We examine two kinds of ideological distance: that between the Court and the *enacting* Congress, and that between the Court and the *sitting* Congress. We find that, while some might expect the Court to be more likely to overturn statutes from ideologically distant *enacting* Congresses, there is no evidence of this effect in the data we employ. However, we do find that the Court is quite sensitive to the ideological composition of the *sitting* Congress: the closer the Congress, the more likely it is that the Court will overturn congressional statutes.

We focus here on the work of the Rehnquist Court. That Court has been notoriously conservative throughout its history. Yet, the Rehnquist Court began actively invalidating congressional statutes only after a conservative Congress was elected in 1994. In other words, even though a Court disposed to strike liberal congressional enactments was in place since 1986, it was not until the Court had allies elsewhere in the federal government that it began systematically to strike statutes enacted by past Congresses. Our data suggest that this coincidence of events may not, in fact, be coincidental.

If we are correct, then those who are looking for a remedy for the Supreme Court's current behavior are looking in the wrong direction. Rather than asking what Congress can do about the Supreme Court, the question scholars unhappy with the Supreme Court should be asking is: how can we get a Congress that will disagree with the Court? Our data suggest that the Court is sensitive to the ideological composition of the sitting Congress. We talk of "electing" the Supreme Court, because our hypothesis is that if a more liberal Congress were in place, the Court would be less aggressive in its conservative decisionmaking. Thus, if scholars are concerned about the ideological direction of the Supreme Court, perhaps they should focus on electoral politics.

This Article has three parts. First, we provide a sketch of the theory animating our project. Second, we discuss the methodology we adopted to test our hypothesis that

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11. *Cf.* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1457-58 (2001) (suggesting that if Congress is overriding the Court in statutory cases, it means the Court does not feel constrained, because if it did feel constrained then Congress would not need to override its decisions).

12. *See infra* notes 17-18 and accompanying text.

politics plays a role in the Supreme Court's willingness to strike down acts of Congress. Third, we present our results.

II. THEORY

The claim that the Supreme Court's response to congressional statutes might be determined at least partially by ideology is not a new one. Among political scientists, "attitudinalists" have long claimed that Supreme Court Justices have preferences over case outcomes that are not simply the result of the process of legal reasoning. Rather, attitudinalists suggest, Justices have "ideological" preferences that motivate their decisions.[13] Given the premise of ideologically motivated Justices, it is not a large leap to suppose that when the Court and an enacting Congress are ideologically "close," the Court should be less inclined to strike statutes enacted by that Congress than when the two institutions are ideologically distant. By the attitudinalist account, we should expect conflict between the Court and an enacting Congress (as measured, for example, by the frequency with which legislation from that Congress is overruled) to be an increasing function of the ideological distance between the two institutions.

The claims of attitudinalists have been challenged in the realm of statutory cases, on the ground that the Court in those cases is really engaged in a strategic interaction with the political branches. In other words, it is not just the ideological distance between the court and the *enacting* Congress that matters. Rather, in statutory interpretation cases, the ideological distance between the Court and the *sitting* Congress plays a role as well.[14] This is because if a sitting Congress does not agree with the Court's interpretation of a particular statute, it can reenact that statute while making clear its own interpretation. In statutory cases, many thus contend the Court will be constrained by ideologically distant *sitting* Congresses from acting on its own ideological preferences alone.[15] The expectation of conflict between the Court and an enacting Congress in statutory cases, then, may be affected by the ideological distance between the Court and the sitting Congress: the larger this distance, the more likely it is that the Court will temper its interpretation of legislation from more distant *enacting* Congresses (and vice versa).

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13. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Jeffrey A. Segal, *Separation of Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

14. Political scientists have long supposed that members of Congress may be characterized as possessing relatively well-defined (if electorally induced) ideological preferences as well. KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Keith T. Poole, *Recovering a Basic Space From a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998).

15. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretive Decisions*, 101 YALE L.J. 331 (1991); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 2 (1990); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND. J. ECON. 463 (1992).

Even if this strategic interaction is true in statutory cases, one might argue that in constitutional cases the Court has no need to defer to the sitting Congress. It can pursue its own ideological predilections without concern for the possible opposition of the sitting Congress. After all, the only recourse of the political branches in constitutional cases is the route of constitutional amendment, and we all know how likely that is.[16] The Court is therefore free to overturn statutes passed by enacting Congresses with whom it disagrees on ideological or policy grounds.

This sharp distinction between constitutional and statutory cases is flawed, however. As numerous commentators have observed, a sitting Congress is not without recourse if constitutional decisions are problematic in its view. There are numerous weapons a sitting Congress can apply against a Supreme Court deemed to be recalcitrant, including jurisdiction stripping, budget cutting, Court packing, and even the impeachment of Supreme Court Justices.[17] It is true that none of these have been utilized in many years, but the possibility is there, and members of Congress resort, on occasion, to threatening the Court with such actions.[18] Thus, there is reason to think that the Court might alter its behavior in the face of the possibility of political response.[19] Just as in statutory cases, then, we would expect the likelihood of constitutional conflict between the Court and an enacting Congress to be conditioned on the ideological distance between the Court and the *sitting* Congress: the greater the distance, the less likely is the Court to strike statutes from distant enacting Congresses (and vice versa).[20]

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16. Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992) (arguing that Congress's only recourse to objectionable Supreme Court decisions in constitutional cases is the amendment process); Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992) (arguing that factors other than potential opposition from the political branches must explain the rarity of constitutional overrulings by the Court). *But see* Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001) (contending that the Court has incentives to respond to congressional preferences even in constitutional cases).

17. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 72-77 (2d ed. 1991); Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 755, 758 n.97 (1998); McNollgast, *Politics and Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376-77 (1992). For a discussion of these many weapons in the context of statutory interaction, see Cross & Nelson, *supra* note 11, at 1460-71.

18. Andrew D. Martin, Statutory Battles and Constitutional Wars: Congress and the Supreme Court (Oct. 26, 2001) (unpublished manuscript, on file with author); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 145-46 (1999) (discussing "rule of anticipated reactions"); James A. Stimson et al., *Dynamic Representation*, 89 AM.. POL. SCI. REV. 543, 544-45 (1995) (discussing the rational anticipation model).

19. Epstein et al., *supra* note 16; Martin, *supra* note 18.

20. There is another variable here, often overlooked in the political science literature, which is whether the public-at-large is in agreement with the Court. Certainly public opinion has the potential to influence the political branches to act—or not to act as the case may be. *See* Gely & Spiller, *supra* note 16; *cf.* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303 (John B. Gates &

There is one more important piece to this story: the fact that despite the recent aggressiveness of the Supreme Court toward congressional legislation, and the clamor in scholarly quarters, for the most part Congress has been quiescent. What motivated us to begin our examination was the relative lack of concern we observe in congressional quarters over the Court's binge in striking congressional statutes.[21] Our premise was that given all the actions Congress could take against the Court, the fact that it was not taking those actions suggested congressional contentment with the situation.

It is worth noting here that the historical record of what we know of congressional behavior comports with our expectations. That is, history confirms the intuition that the Court will find itself under congressional attack only when there is ideological disagreement between the Court and Congress. Throughout history, there have been a number of instances of congressional attacks on judicial institutions, particularly on the Supreme Court and the power of judicial review.[22] Each of these has been the product of ideological distance between the Supreme Court and Congress. Sometimes the distance resulted in Supreme Court decisions contrary to congressional preferences; at other times, it was only anticipated disagreement that led to attacks on the courts. But we can think of no time in which the Supreme Court was attacked when the branches were aligned politically.

Classic is the case of the first major congressional attack on the judiciary, in the period following the 1800 election.[23] After Jeffersonian Republicans swept into power in that election, the Congress threatened wide scale impeachment of judges, repealed a critical piece of legislation that had increased judicial power, and the halls of Congress rang with attacks on judicial independence. Notably, however, this was a time when

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Charles A. Johnson eds., 1991); Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences (Apr. 27, 2000) (unpublished manuscript on file with Professor Barry Friedman). But here the claim would have to be that the public was discontent with the Court, and in disagreement with elected representatives. That is not an impossible state of affairs—indeed, it might be the case to a certain extent at present, if in fact the population is more liberal than the executive or critical veto gates in Congress on issues such as the constitutionality of the Violence Against Women Act, or the need for remedies against state governments under the Age Discrimination in Employment Act. However, two factors serve to diminish the likelihood that public pressure will push the Congress to respond to the Court anytime soon. First, the Court's decisions have been in complex areas like the Eleventh Amendment, which are difficult to translate into salience for the general public. Second, it likely takes a groundswell of public opinion to motivate the elected branches against the Court, especially when public opinion is contrary to the ideological beliefs of those elected representatives.

21. *See* Mark Tushnet, *Foreword: The Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 78-79 (1999) ("[T]he Court is only now confronting questions about the interpretation and constitutionality of statutes enacted during the previous constitutional regime. From the new regime's perspective these statutes—even those recently enacted—are outdated in the sense that they could not be enacted in the new regime.").

22. *See generally* Friedman, *supra* note 17.

23. *Id.* at 739-40 (describing Republican attack on Court after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

the judiciary was the haven for recently disempowered Federalists. Even then, accounts suggest the Republicans kept their hands off the Court until the Court signaled it was an actual, and not just a potential, threat, by issuing its now-famous show cause order in *Marbury v. Madison*.[24]

Events during Reconstruction were to similar effect. During that period the Court's size was manipulated three times, and its jurisdiction was stripped at one critical moment. The manipulations of size all had avowedly apolitical judicial reform motives, but it has not escaped notice how they occurred at times when changes in the composition of the Court were necessary to ensure that the Court's views were in conformity with the Republican Congress (and especially not in conformity with the despised Andrew Johnson). Similarly, jurisdiction stripping only occurred after the Republican Congress determined that it faced a real threat that the Court might invalidate its plans for Reconstruction of the South.[25]

The New Deal Court-packing plan follows the same model. The Court got into trouble when Franklin Roosevelt and the New Deal Democrats swept the Congress in 1936. The Supreme Court in 1936 largely was a holdover Court, appointed by past administrations. The Court was notably opposed to the New Deal agenda and interfered with it repeatedly. Yet, only in the face of continued intransigence did Roosevelt propose his plan to pack the Court.[26]

The last serious challenge to the Court occurred in 1957, and events here are a bit murkier.[27] The Court found itself in the face of congressional controversy after it handed down ten decisions during its Term—four on one day—upholding the rights of Communists, accused Communists, and Communist sympathizers. However, it would be naïve to suggest that this was all that motivated Congress at the time. Anger at the Court had been intense among Southern Democrats since the decision in *Brown v. Board of Education*.[28] Those Democrats were a powerful force in the 1950s Congress. But it was only after the Court also appeared to take sides with the Communists that a coalition was formed that could plausibly threaten the Court. The Congress sitting in the spring of 1957 was a fairly conservative one, facing a Court handing down liberal decisions, so it is no surprise that the Court was threatened by that Congress.

Part of what this history establishes is that congressional action against the Court is rare. Many of the attempts described here came to naught. There are sound reasons of political economy for this. Court disciplining typically requires at least congressional action with approval by the President. There are numerous "veto gates" at which the action could be stopped.

However, it is possible that the Court also anticipates when it is likely to get into

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24. 5 U.S. (1 Cranch) 137 (1803).

25. *See generally* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 455-97 (rev. ed. 1937); Friedman, *supra* note 17, at 743-47; Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003); Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1995).

26. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000).

27. Friedman, *supra* note 7, at 195.

28. 347 U.S. 483 (1954).

trouble and avoids the fray. Indeed, that is what might distinguish the Supreme Court after 1937—or certainly 1957—from the Court before those dates. History has taught the Court that the political branches will take action when the stakes are high enough. The Justices have alluded, even in written opinions, to the events of 1937. Thus, "anticipated reaction" might temper judicial activism in the face of a hostile Congress.[29]

Relying on the intuition that the Justices frame their behavior in response to possible congressional threats, we examine whether there is any reason to think the present Court faces danger in what appears to be repeated confrontation with Congress. Our claim is this: there is no reason to talk about what Congress can do to the Court, if there is no reason to think Congress *wants* to do anything. Taking Rehnquist Court decisions as our fodder, we demonstrate that the Court's activist impulse toward congressional statutes became noticeable only when an ideologically favorable Congress took its seat. If we are correct in this, then this Symposium, and others like it, may be asking the wrong question. Those discontent with the Court's recent decisions should not spend their time asking what Congress can do. The answers are familiar and available for an unhappy Congress. Rather, political activists should spend their time working to elect a Congress sympathetic to their views, and unsympathetic to the Supreme Court's current project.[30]

III. METHODOLOGY

Our claim is that the Supreme Court is more likely to strike down congressional statutes—particularly those of ideologically distant enacting Congresses—when it faces an ideologically close *sitting* Congress. When the Court faces an ideologically distant sitting Congress, it should be more likely to refrain from striking down legislation for fear of congressional retaliation.

The hypothesis of an ideological but strategically self-restrained Court has been tested in a variety of statutory settings and has found only mixed support.[31] It has also been tested in a much more limited way for constitutional cases, and has again received only tentative or no support.[32]

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29. PERETTI, *supra* note 18, at 145-46 (identifying "anticipated reaction" sources).

30. *See* Balkin & Levinson, *supra* note 1, at 1102:

> According to our theory of partisan entrenchment, each party has the political "right" to entrench its vision of the Constitution in the judiciary if it wins a sufficient number of elections. If others don't like the constitutional vision that results, they have the equal right to go out and win some elections of their own.

31. In the statutory context, strategic behavior manifests itself not in interpreting laws in a way that will not be overruled by Congress. *See* Eskridge *supra* note 15; Ferejohn & Weingast, *supra* note 15. While Spiller and Gely, *supra* note 15, found support for the strategically self-restrained hypothesis in statutory cases involving labor relations cases between 1949 and 1988, Segal and Cover found no such support in statutory civil liberties cases. Segal, *supra* note 13.

32. Epstein et al., *supra* note 16, provide descriptive evidence which appears to support the proposition that moderate justices adjust their voting behavior in constitutional civil rights cases to take account of the preferences of presidents and median senators, but Martin, *supra* note 18, using a more sophisticated methodology, finds no such adjustment to congressional preferences in the same cases. *See also* Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L.

One problem common to all empirical testing to date of the hypothesis of a strategically restrained Court has to do with the nature of the data used in these tests. All empirical tests to date have used as their fodder the decisions of the Court in some set of orally argued cases resulting in signed opinions. The problem with using decisions in these cases (or some subset thereof) is that these cases may well be the product of prior, strategic, decisions. If it is true that the Court will refrain from striking congressional statutes when it faces a hostile Congress, then strategic litigants seeking to have such statutes overturned may refrain from incurring the costs of challenging those statutes as long as the Court and Congress are ideologically distant.[33] Even more likely, the Court may refrain from granting certiorari in such cases because it can anticipate its own deferential response.[34] Either or both of these processes could bias the sample of orally argued cases against finding evidence of strategic self-restraint in judicial decisionmaking.

One possible way to correct for this selection bias is to undertake what we call a "statute-centered" test of the hypothesis of a strategically restrained Supreme Court. That is, instead of using decisions in orally argued cases as our units of analysis, we follow the fates of all individual statutes enacted in any given year. To make this project manageable, we focus on the Rehnquist Court alone. The Rehnquist Court is a good choice because it has been relatively stable ideologically, and has faced Congresses of very different ideological compositions.

We examine the Rehnquist Court through the 1999 October Term, a period for which we have complete data.[35] We began tracking public laws enacted by the 100th Congress, elected in 1986, and continued through all public laws enacted by the end of the first year of the 106th Congress, elected in 1998.[36] Table One contains the numbers

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REV. 1100, 1104-05 (2001) (finding no effect of party change in Congress and President on behavior of D.C. Circuit in environmental cases).

33. Kevin T. McGuire et al., Ambiguities in Measuring and Modeling the U.S. Supreme Court, (Sept. 1999) (unpublished manuscript on file with Professor Barry Friedman); Revesz, *supra* note 32, at 1117-19 (describing how litigant behavior can cause case selection bias in samples).

34. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 84 (1998); Cross & Nelson, *supra* note 11, at 1476 ("A constrained Court might be limited in the decisions it makes but it alternatively might merely be limited in the cases that it takes.").

35. Although we lack the data to formally study the 2000 and 2001 Court Terms, familiarity with the Court's continued aggressive course suggests our results would be enhanced. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (holding that sovereign immunity barred federal commission from adjudicating complaint filed by private party against state port agency for alleged violation of federal maritime law); Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (striking down provision of the Americans with Disabilities Act because Congress exceeded its powers under Section 5 of the Fourteenth Amendment); Kramer, *supra* note 1.

36. Although it usually takes several years for a challenge to a statute to work its way to the Supreme Court, it can happen quite quickly. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 8 (1976) (explaining that the challenged Act, the Federal Election Campaign Act, provided for certification of constitutional questions to the en banc Circuit Court, and expedited review by Circuit and Supreme Court, and thus Supreme Court heard the case within eleven months of district court's decision). To account for this possibility we start following laws within a year of enactment.

of public laws enacted by each Congress,[37] and the number of years that the statutes are followed for each group.[38] In total, we follow the fate of 3315 statutes for an average of 7.6 years (with a range of one to thirteen years). An observation thus consists of statute *i* observed in year *t*; we have 28,001 observations in all.

We are interested in whether and when these statutes were eventually struck down by the Court. Our dependent variable is thus dichotomous: a statute survives unless and until it is struck down by the Court. Statutes still "alive" are coded as 0; struck statutes are coded as 1 in the term in which they are struck down, and are then removed from the data set. In all, eighteen of the 3315 statutes were struck between 1987 and 1999.

We hypothesize that the probability that a statute is struck down in any given Court term is a function of two variables: the ideological distance between the enacting Congress and the Court (i.e., the attitudinal hypothesis), and the ideological distance between the sitting Congress and the Court (i.e., the strategic hypothesis).[39] Our test can provide *indirect* evidence of strategic self-restraint by the Court, recognizing that direct evidence of such behavior is hard to come by. If we in fact find that the probability that a congressional statute is overturned is responsive to the ideological distance between the Court and the sitting Congress, then we will have evidence that either the Court, or actors who anticipated the Court's likely actions, was/were constrained by congressional preferences in constitutional cases.

We now turn to a discussion of our procedures for measuring our dependent and independent variables, and for conducting our analyses.

A. Unconstitutional Statutes

Our study encompasses the congressional statutes enacted between 1987 and 1999 (inclusive of the beginning and ending years), which were reviewable by the Supreme Court during the October Terms 1987-1999. Our first task was thus to determine which of these statutes had been struck down by the Court during this period. While there are a variety of sources that purport to provide this information in the form of lists of congressional statutes struck down by the Court, the lists do not necessarily agree with one another. In order to tackle this problem, we first combined several lists of cases involving struck congressional statutes to come up with the most comprehensive list possible.[40] When the lists agreed with one another, we accepted that the case identified

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37. 147 CONG. REC. D46 (2001); 145 CONG. REC. D29 (1999); 143 CONG. REC. D1 (1997); 140 CONG. REC. D690 (1994); 138 CONG. REC. D725 (1993); 136 CONG. REC. D804 (1991); 134 CONG. REC. D787 (1988).

38. The Congress also enacts an increasingly small number of private bills every legislative session; these bills concern topics of very narrow interest to individual members. Private bills are not included in our data set.

39. In order to allow each measure to have an independent impact on the outcome, we do not combine these into a single variable.

40. Ultimately the three fullest sources were the following: (1) CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION–ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1992, S. DOC. NO. 103-6, at 2001-31 (Johnny H. Killian & George A. Costello eds., 1996 & Supp. 2000) (listing acts of Congress that the Supreme Court

by the various lists was one that struck down a congressional statute (although, as we explain in a moment, there was further refinement beyond this point). When the lists disagreed, we examined the relevant Supreme Court precedent to determine which of the sources was correct.[41]

A difficult question was whether to focus only on instances in which the Supreme Court actually invalidated a statute, or to be concerned with judicial construction that rendered the statute inconsistent with its original meaning. After all, the Court essentially can gut a statute without formally overruling it.[42] However, it was practically and jurisprudentially impossible to consider every judicial modification of a statute in conducting our analysis. On the practical side, the number of statutes is too great to permit us to research what the enacting Congress actually meant a statute to be, and what the Court made of it. But to pose the practical question this way is to underscore the futility of such an endeavor even if we had the resources. The very nature of legal disagreement, especially among cases that work their way to the top of the judicial system, is such that it is simply impossible to measure deviation between what Congress originally intended and what the Court did, at least in many cases.

Finally, from the cases of congressional overruling we identified, we had to determine the year in which the statute at issue was enacted. Despite its apparent simplicity, there are a number of problems that complicate this task. The lists that compile cases striking down statutes often indicate the year of the enactment invalidated. When those sources agreed, we accepted their determination. But disagreement was frequent, which likely is because of some thorny problems in reaching this determination. Perhaps this also is why in its written decisions the Supreme Court often does not identify the year of enactment of a statute it is reviewing.

The biggest stumbling block to identifying year of enactment is that statutes are frequently reenacted or updated, posing the question of which year is the relevant one. We assume that if a Congress reenacts a statute, it is ideologically supportive of that statute. Therefore we report and use the most recent plausible date of enactment. We recognize that our assumption will not always be correct, as with the wholesale reenactment or recodification of statutes. Yet, the reenactments we encountered were

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has held unconstitutional in whole or in part); (2) Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, app. A at 335-45 (1993) (listing Supreme Court invalidations and interpretations of federal legislation using constitutional norms, decided from 1939 to 1992); *see also id.* at 309-10 (discussing methodology used to identify these cases); and (3) LEE EPSTEIN, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS (3d ed. 2002). We found the criterion used to determine overruling in the U.S. Supreme Court Database, compiled by Harold Spaeth, far narrower than those used in the previous sources.

41. Compilers would, on occasion, include a case that struck down a state statute. *E.g.*, Saenz v. Roe, 526 U.S. 489 (1999) (involving the constitutionality of a California statute limiting the maximum welfare benefits available to newly arrived residents), included in the SUPREME COURT COMPENDIUM, *see* EPSTEIN, *supra* note 40. Compilers would also exclude cases that struck down congressional statutes. *E.g.*, United States v. Bajakajian, 524 U.S. 321 (1998) (involving a challenge to a federal forfeiture statute on grounds that forfeiture would violate the Excessive Fines Clause of the Eighth Amendment), excluded by the Library of Congress list. *See generallysupra* note 38.

42. Zeppos, *supra* note 40, at 309-10.

statute-specific enough that we felt comfortable holding to our supposition.

Somewhat trickier were amendments of statutes. If the amendment was the portion of the statute struck down by the Court, there was no problem in identifying the relevant enacting Congress. If the amendment was not at the heart of the judicial overruling, then it was necessary to determine whether the prior or later Congress should be designated as the enacting Congress. Our determination of this issue essentially asked: "Did the fact of amendment show support for (or suggest disagreement with) the part of the statute later invalidated by the Supreme Court?" If the fact of amendment showed support for the part of the statute later invalidated by the Court, then we used the amending Congress as the enacting Congress. For example, in *Greater New Orleans Broadcasting Ass'n v. United States*, the Supreme Court invalidated a congressional statute prohibiting advertisement of casinos.[43] That statute was enacted in 1934.[44] A 1988 amendment added the words "or television," thus including television broadcasting as a medium through which casino advertising was prohibited.[45] This amendment clearly signaled congressional support for the thrust of the original statute, and thus we felt comfortable using the later Congress as the enacting Congress.

Table Two reports the years in which, and the Congresses by which, the eighteen struck statutes were enacted, as determined by the foregoing decision rules. Table Two also reports the name of the statutes, as well as the years and cases in which they were struck by the Court.

B. The Ideological Measures

Several measures of congressional and Supreme Court ideology exist. Perhaps the most frequently used measure of congressional ideology, developed by Keith Poole and Howard Rosenthal, estimates ideological "ideal points" for members of the House, the Senate, and the Presidency in the same ideological "space" between 1937 and1999.[46] Using a similar estimation methodology, Andrew Martin and Kevin Quinn use Supreme Court Justices' votes on cases to estimate term-by-term ideological ideal

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43. 527 U.S. 173, 176 (1999) (holding, on First Amendment grounds, that 18 U.S.C. § 1304 and 47 CFR § 73.1211 (1998), may not be applied to "advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal").

44. Communications Act of 1934, ch. 662, §316, 48 Stat. 1088.

45. 18 U.S.C. §1304 (2000) reads:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

The language is as amended in 1988, by Pub. L. No. 100-625, § 3(a)(4), and in 1994, by Pub. L. No. 103-322, §330016(1)(H), substituting "under this title" for "not more than $1,000."

46. POOLE & ROSENTHAL, *supra* note 14.

points for Supreme Court Justices during the same period.[47]

In these measures, increasing positive scores indicate increasing conservatism, while increasing negative scores indicate increasing liberalism. Table Three reports, from Poole and Rosenthal, the House and Senate medians between 1937 and 1999, presidential ideal points between 1953 and 1999, the midpoints between the House and Senate, and the midpoints between the Senate and the President. Table Three also reports the Martin-Quinn Court medians between 1937 and 1999.

There are two problems with these measures. First, we are interested in observing strategic behavior by the Court, or by actors anticipating strategic behavior by the Court. Ideally we would like to have some measure of Court ideology which is itself untainted by possible strategic behavior by either set of actors.[48] Because the Martin-Quinn scores are based on actual votes in decided cases, the same problem described earlier arises: the selection of cases resolved by the Supreme Court itself could be influenced by the composition of Congress. There is an alternative measure of Court ideology, namely the Segal-Cover ideological scores, which are calculated from editorial coverage prior to a Justice's confirmation to the Supreme Court.[49] Some argue, however, that these scores also are inappropriate for computing the Court median over time, because Justices' ideological preferences change over time.[50] It may be impossible to develop a measure of Supreme Court ideology that sidesteps both of these difficulties. We run our tests using both of these measures, and find commonality of results. To conserve space we report only the results obtained from the Martin-Quinn scores; the results obtained from the Segal-Cover scores are available from the authors.

The second problem with these measures is that while the political branches are measured in the same ideological space, the Court is measured only in its own ideological space.[51] That is, the measures of the ideology of the political branches will accurately capture the movement of those branches over time relative to each other. However, the measure of Court ideology will capture the movement of the Court over time only *relative to itself.*

Because we are interested in measuring the ideological "distance" between the Court and Congress, this is an important issue. Even though we only need to measure "relative" distance, and not "actual" distance, we must be certain we correctly place

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47. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

48. We note that this is much less of a concern for the congressional ideology scores. Enacting Congresses know that their legislation may be reviewed by all future courts, not just the present sitting Court. It is obviously difficult for enacting Congresses to anticipate the ideological composition of all future Courts.

49. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 562-63 (1989).

50. Lee Epstein and Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 281-84 (1996).

51. *But see* Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation*, 17 J.L. ECON. & ORG. 477 (2001). Bailey and Chang estimate a common ideological space for the President, Senate, and Supreme Court. However, their estimates are available only through 1995, an insufficient span of time for the present Article.

the Court to the right or left of Congress at any given moment. For example, the scaling of the Martin-Quinn scores places the Court to the right of the Poole-Rosenthal House/Senate midpoints between 1987 and 1999. If we were confident that the Congress lay to the left of the Court during this entire period, then we could use these scores unaltered and simply measure the relative movement of the branches towards and away from each other over time. (Again, this is because we are only interested in measuring relative distance, not actual distance. It is change over time that is significant to us.) However, if at some point the Congress "jumped" to the right of the Court, then increasing conservatism by the Congress after that point would move the Congress *away* from the Court, not towards it. Similarly, increasing liberalism by the Court would indicate movement away from rather than towards the newly conservative Congress.

We use two different tactics to deal with this issue, which result in three different measures of Court ideology based on the Martin-Quinn scores.[52] The first tactic is to observe where the Court and the Congress are during the period with which we are concerned, in relation to their long term ideological distributions. Between 1987 and 1994, the Congress is at the moderate to very liberal end of its long-term distribution. House/Senate midpoints between 1987 and 1994 are exceeded in liberalness only by the extremely liberal Congresses of 1937 to 1938, 1965 to 1966, and 1975 to 1978. During the same years, the Court, on the other hand, is clearly located at the very conservative end of its long-term distribution. At no other period in time do Court medians consistently exceed in conservatism the medians during this period, although they are in the same range for 1949 to 1952, 1971 to 1973, and 1983 to 1986. Prior to the 1994 congressional elections, then, it is relatively straightforward to assume that the Court is located to the right of Congress. Because the Martin-Quinn ideological scores are scaled such that the Court is already located to the right of the Congress during this period, we can use the unaltered Martin-Quinn scores to capture the relative movement of the Court and Congress toward and away from each other.

After the 1994 congressional elections—our primary focus—matters are slightly more complicated. Between 1994 and 1999, the Congress is moderately to very conservative. The 104th Congress's midpoint is exceeded in conservatism only by the Congresses of 1947 to 1948 and 1953 to 1954, that of the 105th Congress is not exceeded by any other Congress, and that of the 106th Congress is exceeded only by the Congress of 1947 to 1948. The Court, on the other hand, while still conservative, is somewhat more moderately conservative. It is possible, then, that the Congress is located either to the right or to the left of the Court for the post-1994 Congresses. We therefore allow for two possibilities. To allow for the possibility that the Congress remains to the left of the Court after the 1994 elections, we use the unaltered Martin-Quinn scores for the entire period of 1987 to 1999. To allow for the possibility that the Congress shifts to the right of the Court after the 1994 elections, we rescale the Martin-Quinn medians so that the post-1994 Congresses lie to the right of the Court. Table Four reports the original (Court 1), as well as the rescaled Martin-Quinn medians (Court 2). Our first tactic for dealing with the issue of a common ideological space thus yields two different measures of Court ideology.

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52. We also transformed the Segal-Cover scores using the same three scaling techniques; results are available from the authors.

The second tactic we take to address this issue of common ideological space is to note that Supreme Court Justices who are appointed by Presidents and confirmed by Senators will presumably, over the long run, share the same ideological space as members of those two institutions. When the Supreme Court is at the center of its long run distribution, in other words, there is presumably some sense in which this is comparable to the center of the long run distribution of the President/Senate midpoints. Similarly, the variance around those means must presumably also be comparable.

Building on the intuition that over the long run these series must occupy the same ideological space, given the institutional mechanism of the appointment process, we rescale the distribution of the Court medians to the same mean and variance of the distribution of the midpoints between the Senate and the Presidency. This technique preserves the movement of the Court over time relative to itself, as estimated by Martin and Quinn, but places the Court in the same ideological space as the political branches. The rescaled Court medians (Court 3) are reported in Table Four. This measure of Court ideology differs from the previous two in that the Court is to the right of the Congress prior to the 1994 elections, just to the left of the Congress for the 1995 term, moves back to the right of Congress for the 1996 term, is to the left of the Congress after the 1996 elections (in which the Senate moves to the right), and moves back to the right of Congress after the 1998 elections.

In the subsequent analyses we use the three versions of the Martin-Quinn medians as alternative measures of Court ideology in any given term, and the midpoints between the House and the Senate as a measure of congressional ideology in any given Congress. Again, while the scaling differs for each measure of Court ideology, this is not an important issue because we are interested in the *relative* movements of the Court and Congress. The measures differ significantly only with respect to the positioning of the Congress and the Court after the 1994 elections. As we shall see, even these differences across the measures do not matter because of the magnitude of the ideological jump made by Congress after the 1994 congressional elections.

C. The Tests

For each of our three pairs of Court/Congress ideological scores we measure the ideological "distance" between the Court and the *enacting* Congress, and between the Court and the *sitting* Congress. We follow each statute enacted from 1987 to 1999. In every year each statute is associated with a measure of the ideological distance between the (time invariant) enacting Congress and the (time-varying) Court whose October Term begins in that year. Each statute in any given year is also associated with a time-varying measure of the distance between the ideology of the Court whose October Term begins in that year, and the ideology of the Congress sitting as of the January subsequent to that October. We use this latter convention to allow for the impact of early November election results on the Court's decisions throughout its term. This is particularly important when there are large changes as the result of a congressional election (e.g., the 1994 congressional elections), of which the Court is surely likely to be aware as of the second week in November. This also makes sense because the vast majority of Court decisions come out in the second half of the Term.

Table Five reports the measures of ideological distance between the enacting Congresses and the Court during this period, while Table Six reports the measures of distance between the sitting Congresses and the Court. As is readily apparent from both tables, while the three different measures of Court ideology generate different

orderings of the ideological distances between the Court and Congress, all the orderings in both tables are dominated by the large jump in the magnitudes of the distances after the 1994 congressional elections.

IV. ANALYSIS[53]

Table Seven reports the summary statistics for all struck statutes compared to all unstruck statutes. As can be seen in Table Seven, none of the three measures of the ideological distance between the *enacting* Congresses and the Supreme Court appear to be related to the probability that the Court overturns a congressional statute. For all three measures, the differences between the mean ideological distances for statutes that are struck and statutes that are not struck are so small as not to be distinguishable from random variation. Our data thus do not provide any support for the hypothesis that the ideological distance between the enacting Congress and sitting Court affects the likelihood that a statute will be struck down. Of course, this does not mean that the hypothesis is not true, but rather that we find no evidence for it in these specific data.

On the other hand, all three measures of the ideological distance between the *sitting* Congresses and the Supreme Court demonstrate clear and strong relationships with the probability that the Court overturns a congressional statute. For all three measures, the mean ideological distance between the Court and the sitting Congress is significantly smaller for statutes that are struck than for statutes that are not struck. The probability that these differences in means are not due to random variation is at least ninety-five percent in all three cases. In other words, it appears to be very clear from these data that the Court is significantly more likely to overturn congressional statutes when it faces an ideologically congenial Congress.[54]

We can get a sense of the magnitude of the Court's responsiveness to the sitting Congress by looking at these data from another angle. The average frequency with which a congressional statute was overturned by the Rehnquist Court prior to the 1994 elections was .0002. The average frequency with which the Court overturned a congressional statute *after* the 1994 congressional elections was .0009, an increase of 450 percent. It is true that the frequency of overturning congressional statutes is extremely low in either event, but that is common knowledge. What matters is the significant increase in frequency when the Supreme Court faces a friendly Congress. This difference is distinguishable from random variation with a probability of .98. The change in congressional ideology as a result of the 1994 elections appears to have had an enormous impact, both substantively and statistically, on the likelihood that the Court would overturn congressional statutes.

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53. A fuller event history analysis of these data, which controls for any temporal dependence in the data and which permits interaction between the two measures of ideological distance, may be found in the authors' working paper, Court/Congress Strategic Interaction in Constitutional Cases: A Statute-Based Analysis (unpublished manuscript on file with authors, Mar. 15, 2003).

54. We obtained qualitatively similar results using the measures based on the Segal-Cover scores and subsequent rescalings of those scores.

V. CONCLUSION

Given the Supreme Court's continuing conservative activism,[55] we can expect a constant stream of criticism about the Court and its ideological direction. In light of the Court's willingness to strike congressional statutes, we also can expect that scholars will suggest Congress take some action to constrain the Court. But should we expect Congress to respond?

Our data suggest that the answer to this will depend heavily on who is sitting in Congress. Indeed, if the data do support our hypothesis, as they seem to, it may mean Congress is not likely to do anything. What we find is that the Supreme Court is more likely to strike congressional statutes when it is facing a friendly Congress. If this is true, what may be necessary to obtain greater deference to Congress by the Court is to elect a Congress opposed ideologically to the Supreme Court. In other words, the Court does defer to Congress, we believe, but it is more probably the sitting Congress rather than the enacting one. The sitting Congress has ample tools to discipline the Court, should Congress truly believe this is necessary.[56] But our hypothesis is that Congress will not need to do anything in this situation. The very fact of its existence will, we suggest, cause the Supreme Court to act with greater caution toward congressional statutes.

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55. Editorial, *The Court's Troubling Term*, N.Y. TIMES, July 3, 2002, at A22 ("In decision after decision this term, the Court, often by a 5-to-4 majority, pushed the law rightward.").

56. We do not purport to touch at all upon the normative questions regarding the independence of the Supreme Court from congressional control.

TABLE 1

Public Laws, 1987-1999

Congress	Years	Number of public laws enacted	Number of years laws are followed	Number of observations
100	1987-1988	713	13	9269
101	1989-1990	650	11	7150
102	1991-1992	590	9	5310
103	1993-1994	465	7	3255
104	1995-1996	333	5	1665
105	1997-1998	394	3	1182
106	1999	170	1	170
Total	1987-1999	3315	1-13	28001

TABLE 2

Struck Congressional Statutes, 1987-1999

Statute (Name and Pub. L. No.)	Year Enacted/ Amended	No. of Enacting Congress	Name of Case Striking Statute	Date Decided	Oct. Term
Indian Gaming Regulatory Act/Act of Oct. 17, 1988 (Pub. L. 100-497, § 11(d)(7)) 102 Stat. 2475, 25 USC § 2710(d)(7)	1988	100	Seminole Tribe of Florida v. Florida	27-Mar-96	1995
Act of June 19, 1934, ch. 652, 48 Stat. 1088, § 316, 18 USC § 1304 (§ 316 of the Communications Act of 1934) as amended in 1988 (Pub. L. 100-625, § 3(a)(4))	1988	100	Greater New Orleans Broadcasting Association v. United States	14-Jun-99	1998
Act of Nov. 18, 1988 (Pub. L. 100-690) 102 Stat. 4502, 47 USC § 223(b)(1) (amendment to Communications Act of 1934)	1988	100	Sable Communications of California v. FCC	23-Jun-89	1988
Flag Protection Act/Act of Oct. 28, 1989 (Pub. L. 101-131) 103 Stat. 777, 18 USC § 700	1989	101	United States v. Eichman	11-Jun-90	1989
Ethics Reform Act of 1989/Act of Nov. 30, 1989 (Pub. L. 101-194) 103 Stat. 1716, 5 USC App. § 501(b) (Amendment to Ethics in Government Act of 1978)	1989	101	United States v. National Treasury Employees Union	22-Feb-95	1994
Gun-Free School Zones Act of 1990/Act of Nov. 29, 1990 (Pub. L. 101-647) 104 Stat. 4844, 4856, 4857, 4924, 18 USC § 922q	1990	101	United States v. Lopez	26-Apr-95	1994

Federal Deposit Insurance Corporation Improvement Act of 1991 (§476, which became Section 27A of the Securities Exchange Act of 1934)/Act of Dec. 19, 1991 (Pub. L. 102-242, § 476) 105 Stat. 2387, 15 USC § 78aa-1	1991	102	Plaut v. Spendthrift Farm, Inc.	18-Apr-95	1994
Provisions of Cable Television Consumer Protection and Competition Act of 1992/Act of Oct. 5, 1992 (Pub. L. 102-385, §§ 10(b) and 10(c)) 47 USC § 532(j) and § 531 respectively	1992	102	Denver Educational TV Consortium v. FCC	28-Jun-96	1995
Criminal forfeiture provision of the Anti-Drug Abuse Act, as amended on Oct. 6, 1992 (Pub. L. 102-393, § 638(e)) 106 Stat. 1788, 18 USC §982	1992	102	United States v. Bajakajian	22-Jun-98	1997
Coal Industry Retiree Health Benefit Act of 1992/Act of Oct. 24, 1992, (Pub. L. 102-486, Title XIX, § 19143(a)) 106 Stat. 3037, 26 USC §§ 9701-9722	1992	102	Eastern Enterprises v. Apfel	25-Jun-98	1997
Trademark Remedy Clarification Act/Act of Oct. 27, 1992 (Pub. L. 102-542) 106 Stat. 3567, 15 USC § 1122 (Addition to Act of 1946)	1992	102	College Savings Bank v. Florida Prepaid Education Expense Board	23-Jun-99	1998
Patent and Plant Variety Remedy Clarification Act/Act of Oct. 28, 1992 (Pub. L. 102-560) 106 Stat. 4230 (Addition of subsection to Act of 1952)	1992	102	Florida Prepaid Education Expense Board v. College Savings Bank	23-Jun-99	1998

Religious Freedom Restoration Act/Act of Nov. 16, 1993 (Pub. L. 103-141) 107 Stat. 1488-89, 42 USC §§ 2000bb-2000bb-4	1993	103	City of Boerne v. Flores	25-Jun-97	1996
Interim provisions of the Brady Handgun Violence Prevention Act/Act of Nov. 30, 1993 (Pub. L. 103-159) 107 Stat. 1536	1993	103	Printz v. United States	27-Jun-97	1996
Violence Against Women Act/Act of Sept. 13, 1994 (Pub. L. 103-322, § 40302) 108 Stat. 1941, 42 USC § 13981	1994	103	United States v. Morrison	15-May-00	1999
Provisions of the Communications Decency Act/Act of Feb. 8, 1996, (Pub. L. 104-104, Title V, § 502) 110 Stat. 56, 133-134, 47 USC §§ 223(a) and 223(d)	1996	104	Reno v. ACLU	26-Jun-97	1996
Telecommunications Act of 1996 (also known as the Communications Decency Act of 1996)/Act of Feb. 8, 1996 (Pub. L. 104-104, § 505) 110 Stat. 136, 47 USCA § 561 (Amendment to Act of 1934)	1996	104	United States v. Playboy Entertainment Group	22-May-00	1999
Line Item Veto Act/Act of Apr. 9, 1996 (Pub. L. 104-130, §2(a)) 110 Stat. 1200, 2 USC § 691 et seq.	1996	104	Clinton v. New York City	25-Jun-98	1997

TABLE 3

Ideological Medians/Ideal Points, 1937-1999

Congress	Year	House Median	Senate Median	President's Ideal Point	House/ Senate Midpoint	President/ Senate Midpoint	Supreme Court Median
75	1937	-0.146	-0.136		-0.141		-0.4609235
	1938	-0.146	-0.136		-0.141		-0.635377
76	1939	-0.064	-0.066		-0.065		-0.9763043
	1940	-0.064	-0.066		-0.065		-0.5673199
77	1941	-0.0685	-0.0795		-0.074		-0.129125
	1942	-0.0685	-0.0795		-0.074		0.0920328
78	1943	0.0555	0.01		0.03275		-0.0270937
	1944	0.0555	0.01		0.03275		-0.2113936
79	1945	0.002	0.019		0.0105		-0.0206869
	1946	0.002	0.019		0.0105		0.2172668
80	1947	0.151	0.133		0.142		0.4787284
	1948	0.151	0.133		0.142		0.564818
81	1949	-0.028	0.039		0.0055		0.8858961
	1950	-0.028	0.039		0.0055		0.9203925
82	1951	0.078	0.076		0.077		0.9099572
	1952	0.078	0.076		0.077		1.020089
83	1953	0.116	0.09	0.166	0.103	0.128	0.5632772
	1954	0.116	0.09	0.166	0.103	0.128	0.3240383
84	1955	0.085	0.076	0.166	0.0805	0.121	0.5121759
	1956	0.085	0.076	0.166	0.0805	0.121	0.1315669
85	1957	0.078	0.077	0.166	0.0775	0.1215	0.5162186
	1958	0.078	0.077	0.166	0.0775	0.1215	0.5090429
86	1959	-0.046	-0.08	0.166	-0.063	0.043	0.4161009
	1960	-0.046	-0.08	0.166	-0.063	0.043	0.5330229
87	1961	0.005	-0.066	-0.535	-0.0305	-0.3005	0.1574795
	1962	0.005	-0.066	-0.535	-0.0305	-0.3005	-0.7666757
88	1963	0.0075	-0.163	-0.535	-0.07775	-0.3115	-0.7945322
	1964	0.0075	-0.163	-0.385	-0.07775	-0.3115	-0.5253094
89	1965	-0.135	-0.19	-0.385	-0.1625	-0.2875	-0.5832792
	1966	-0.135	-0.19	-0.385	-0.1625	-0.2875	-0.3211881
90	1967	0.017	-0.142	-0.385	-0.0625	-0.2635	-0.8329517
	1968	0.017	-0.142	-0.385	-0.0625	-0.2635	-0.7676015
91	1969	0.0135	-0.07	0.388	-0.02825	0.159	0.1795842
	1970	0.0135	-0.07	0.388	-0.02825	0.159	0.4653865
92	1971	-0.015	-0.0545	0.388	-0.03475	0.16675	0.7765934
	1972	-0.015	-0.0545	0.388	-0.03475	0.16675	1.025547
93	1973	-0.013	-0.115	0.388	-0.064	0.129	0.6600894
	1974	-0.013	-0.115	0.358	-0.064	0.129	0.6309868

Congress	Year	House Median	Senate Median	President's Ideal Point	House/ Senate Midpoint	President/ Senate Midpoint	Supreme Court Median
94	1975	-0.165	-0.16	0.358	-0.1625	0.099	0.606708
	1976	-0.165	-0.16	0.358	-0.1625	0.099	0.4801745
95	1977	-0.155	-0.1475	-0.51	-0.15125	-0.32875	0.2122797
	1978	-0.155	-0.1475	-0.51	-0.15125	-0.32875	0.1284089
96	1979	-0.12	-0.095	-0.51	-0.1075	-0.3025	0.152034
	1980	-0.12	-0.095	-0.51	-0.1075	-0.3025	0.0765303
97	1981	-0.026	-0.006	0.568	-0.016	0.281	0.0138643
	1982	-0.026	-0.006	0.568	-0.016	0.281	0.4625926
98	1983	-0.087	-0.006	0.568	-0.0465	0.281	0.7182555
	1984	-0.087	-0.006	0.568	-0.0465	0.281	0.6567533
99	1985	-0.073	-0.006	0.568	-0.0395	0.281	0.7802198
	1986	-0.073	-0.006	0.568	-0.0395	0.281	0.7525003
100	1987	-0.081	-0.0685	0.568	-0.07475	0.24975	0.9019312
	1988	-0.081	-0.0685	0.568	-0.07475	0.24975	1.012665
101	1989	-0.081	-0.08	0.546	-0.0805	0.233	0.7976547
	1990	-0.081	-0.08	0.546	-0.0805	0.233	0.8583701
102	1991	-0.11	-0.1	0.546	-0.105	0.223	0.6632063
	1992	-0.11	-0.1	0.546	-0.105	0.223	0.712914
103	1993	-0.12	-0.095	-0.456	-0.1075	-0.2755	0.692304
	1994	-0.12	-0.095	-0.456	-0.1075	-0.2755	0.5779997
104	1995	0.178	0.012	-0.456	0.095	-0.222	0.5227687
	1996	0.178	0.012	-0.456	0.095	-0.222	0.6446047
105	1997	0.1725	0.1275	-0.456	0.15	-0.16425	0.6226252
	1998	0.1725	0.1275	-0.456	0.15	-0.16425	0.6522644
106	1999	0.146	0.1005	-0.456	0.12325	0.17775	0.7369668

TABLE 4

Original and Rescaled Court Medians

Congress	Year	Court Median 1	Court Median 2	Court Median 3	House/ Senate Midpoint
75	1937	-0.4609235	-0.0658462	-0.325231	-0.141
	1938	-0.635377	-0.0907681	-0.4006076	-0.141
76	1939	-0.9763043	-0.139472	-0.5479128	-0.065
	1940	-0.5673199	-0.0810457	-0.371202	-0.065
77	1941	-0.129125	-0.0184464	-0.1818701	-0.074
	1942	0.0920328	0.0131475	-0.0863139	-0.074
78	1943	-0.0270937	-0.0038705	-0.1377852	0.03275
	1944	-0.2113936	-0.0301991	-0.2174161	0.03275
79	1945	-0.0206869	-0.0029553	-0.135017	0.0105
	1946	0.2172668	0.0310381	-0.0322038	0.0105
80	1947	0.4787284	0.0683898	0.0807665	0.142
	1948	0.564818	0.0806883	0.1179634	0.142
81	1949	0.8858961	0.1265566	0.2566924	0.0055
	1950	0.9203925	0.1314846	0.2715973	0.0055
82	1951	0.9099572	0.1299939	0.2670885	0.077
	1952	1.020089	0.145727	0.3146734	0.077
83	1953	0.5632772	0.0804682	0.1172977	0.103
	1954	0.3240383	0.0462912	0.0139292	0.103
84	1955	0.5121759	0.073168	0.0952182	0.0805
	1956	0.1315669	0.0187953	-0.0692324	0.0805
85	1957	0.5162186	0.0737455	0.096965	0.0775
	1958	0.5090429	0.0727204	0.0938646	0.0775
86	1959	0.4161009	0.059443	0.0537069	-0.063
	1960	0.5330229	0.0761461	0.1042256	-0.063
87	1961	0.1574795	0.0224971	-0.0580362	-0.0305
	1962	-0.7666757	-0.1095251	-0.4573381	-0.0305
88	1963	-0.7945322	-0.1135046	-0.4693741	-0.07775
	1964	-0.5253094	-0.0750442	-0.3530504	-0.07775
89	1965	-0.5832792	-0.0833256	-0.3780975	-0.1625
	1966	-0.3211881	-0.045884	-0.2648552	-0.1625
90	1967	-0.8329517	-0.1189931	-0.4859741	-0.0625
	1968	-0.7676015	-0.1096574	-0.4577381	-0.0625
91	1969	0.1795842	0.0256549	-0.0484854	-0.02825
	1970	0.4653865	0.0664838	0.0750018	-0.02825
92	1971	0.7765934	0.1109419	0.2094657	-0.03475
	1972	1.025547	0.1465067	0.3170317	-0.03475
93	1973	0.6600894	0.0942985	0.1591275	-0.064
	1974	0.6309868	0.090141	0.1465531	-0.064

Congress	Year	Court Median 1	Court Median 2	Court Median 3	House/ Senate Midpoint
94	1975	0.606708	0.0866726	0.1360629	-0.1625
	1976	0.4801745	0.0685964	0.0813913	-0.1625
95	1977	0.2122797	0.0303257	-0.0343586	-0.15125
	1978	0.1284089	0.0183441	-0.0705968	-0.15125
96	1979	0.152034	0.0217191	-0.0603891	-0.1075
	1980	0.0765303	0.0109329	-0.0930121	-0.1075
97	1981	0.0138643	0.0019806	-0.1200884	-0.016
	1982	0.4625926	0.0660847	0.0737947	-0.016
98	1983	0.7182555	0.1026079	0.1842595	-0.0465
	1984	0.6567533	0.0938219	0.1576861	-0.0465
99	1985	0.7802198	0.11146	0.2110326	-0.0395
	1986	0.7525003	0.1075	0.1990557	-0.0395
100	1987	0.9019312	0.1288473	0.2636207	-0.07475
	1988	1.012665	0.1446664	0.3114657	-0.07475
101	1989	0.7976547	0.1139507	0.2185657	-0.0805
	1990	0.8583701	0.1226243	0.2447992	-0.0805
102	1991	0.6632063	0.0947438	0.1604743	-0.105
	1992	0.712914	0.1018449	0.1819516	-0.105
103	1993	0.692304	0.0989006	0.1730466	-0.1075
	1994	0.5779997	0.0825714	0.1236589	-0.1075
104	1995	0.5227687	0.0746812	0.0997951	0.095
	1996	0.6446047	0.0920864	0.152437	0.095
105	1997	0.6226252	0.0889465	0.1429403	0.15
	1998	0.6522644	0.0931806	0.1557466	0.15
106	1999	0.7369668	0.105281	0.1923442	0.12325

TABLE 5

Congress/Court Ideological Distances, *Enacting* Congresses

Congress	Court Term	Enacting House/ Senate Midpoint	Court 1	Distance 1	Court 2	Distance 2	Court 3	Distance 3
100	87	-0.07475	0.9019312	0.9766812	0.1288473	0.2035973	0.2636207	0.3383707
100	88	-0.07475	1.012665	1.087415	0.1446664	0.2194164	0.3114657	0.3862157
100	89	-0.07475	0.7976547	0.8724047	0.1139507	0.1887007	0.2185657	0.2933157
100	90	-0.07475	0.8583701	0.9331201	0.1226243	0.1973743	0.2447992	0.3195492
100	91	-0.07475	0.6632063	0.7379563	0.0947438	0.1694938	0.1604743	0.2352243
100	92	-0.07475	0.712914	0.787664	0.1018449	0.1765949	0.1819516	0.2567016
100	93	-0.07475	0.692304	0.767054	0.0989006	0.1736506	0.1730466	0.2477966
100	94	-0.07475	0.5779997	0.6527497	0.0825714	0.1573214	0.1236589	0.1984089
100	95	-0.07475	0.5227687	0.5975187	0.0746812	0.1494312	0.0997951	0.1745451
100	96	-0.07475	0.6446047	0.7193547	0.0920864	0.1668364	0.152437	0.227187
100	97	-0.07475	0.6226252	0.6973752	0.0889465	0.1636965	0.1429403	0.2176903
100	98	-0.07475	0.6522644	0.7270144	0.0931806	0.1679306	0.1557466	0.2304966
100	99	-0.07475	0.7369668	0.8117168	0.105281	0.180031	0.1923442	0.2670942
101	89	-0.0805	0.7976547	0.8781547	0.1139507	0.1944507	0.2185657	0.2990657
101	90	-0.0805	0.8583701	0.9388701	0.1226243	0.2031243	0.2447992	0.3252992
101	91	-0.0805	0.6632063	0.7437063	0.0947438	0.1752438	0.1604743	0.2409743
101	92	-0.0805	0.712914	0.793414	0.1018449	0.1823449	0.1819516	0.2624516
101	93	-0.0805	0.692304	0.772804	0.0989006	0.1794006	0.1730466	0.2535466
101	94	-0.0805	0.5779997	0.6584997	0.0825714	0.1630714	0.1236589	0.2041589
101	95	-0.0805	0.5227687	0.6032687	0.0746812	0.1551812	0.0997951	0.1802951
101	96	-0.0805	0.6446047	0.7251047	0.0920864	0.1725864	0.152437	0.232937
101	97	-0.0805	0.6226252	0.7031252	0.0889465	0.1694465	0.1429403	0.2234403
101	98	-0.0805	0.6522644	0.7327644	0.0931806	0.1736806	0.1557466	0.2362466
101	99	-0.0805	0.7369668	0.8174668	0.105281	0.185781	0.1923442	0.2728442
102	91	-0.105	0.6632063	0.7682063	0.0947438	0.1997438	0.1604743	0.2654743
102	92	-0.105	0.712914	0.817914	0.1018449	0.2068449	0.1819516	0.2869516
102	93	-0.105	0.692304	0.797304	0.0989006	0.2039006	0.1730466	0.2780466
102	94	-0.105	0.5779997	0.6829997	0.0825714	0.1875714	0.1236589	0.2286589
102	95	-0.105	0.5227687	0.6277687	0.0746812	0.1796812	0.0997951	0.2047951
102	96	-0.105	0.6446047	0.7496047	0.0920864	0.1970864	0.152437	0.257437
102	97	-0.105	0.6226252	0.7276252	0.0889465	0.1939465	0.1429403	0.2479403
102	98	-0.105	0.6522644	0.7572644	0.0931806	0.1981806	0.1557466	0.2607466
102	99	-0.105	0.7369668	0.8419668	0.105281	0.210281	0.1923442	0.2973442
103	93	-0.1075	0.692304	0.799804	0.0989006	0.2064006	0.1730466	0.2805466
103	94	-0.1075	0.5779997	0.6854997	0.0825714	0.1900714	0.1236589	0.2311589
103	95	-0.1075	0.5227687	0.6302687	0.0746812	0.1821812	0.0997951	0.2072951
103	96	-0.1075	0.6446047	0.7521047	0.0920864	0.1995864	0.152437	0.259937
103	97	-0.1075	0.6226252	0.7301252	0.0889465	0.1964465	0.1429403	0.2504403

Congress	Court Term	Enacting House/ Senate Midpoint	Court 1	Distance 1	Court 2	Distance 2	Court 3	Distance 3
103	98	-0.1075	0.6522644	0.7597644	0.0931806	0.2006806	0.1557466	0.2632466
103	99	-0.1075	0.7369668	0.8444668	0.105281	0.212781	0.1923442	0.2998442
104	95	0.095	0.5227687	0.4277687	0.0746812	0.0203188	0.0997951	0.0047951
104	96	0.095	0.6446047	0.5496047	0.0920864	0.0029136	0.152437	0.057437
104	97	0.095	0.6226252	0.5276252	0.0889465	0.0060535	0.1429403	0.0479403
104	98	0.095	0.6522644	0.5572644	0.0931806	0.0018194	0.1557466	0.0607466
104	99	0.095	0.7369668	0.6419668	0.105281	0.010281	0.1923442	0.0973442
105	97	0.15	0.6226252	0.4726252	0.0889465	0.0610535	0.1429403	0.0070597
105	98	0.15	0.6522644	0.5022644	0.0931806	0.0568194	0.1557466	0.0057466
105	99	0.15	0.7369668	0.5869668	0.105281	0.044719	0.1923442	0.0423442
106	99	0.12325	0.7369668	0.6137168	0.105281	0.017969	0.1923442	0.0690942

TABLE 6

Congress/Court Ideological Distances, *Sitting* Congresses

Congress	Court Term	Sitting House/ Senate Midpoint	Court 1	Distance 1	Court 2	Distance 2	Court 3	Distance 3
100	1987	-0.07475	0.9019312	0.9766812	0.1288473	0.2035973	0.2636207	0.3383707
101	1988	-0.0805	1.012665	1.093165	0.1446664	0.2251664	0.3114657	0.3919657
	1989	-0.0805	0.7976547	0.8781547	0.1139507	0.1944507	0.2185657	0.2990657
102	1990	-0.105	0.8583701	0.9633701	0.1226243	0.2276243	0.2447992	0.3497992
	1991	-0.105	0.6632063	0.7682063	0.0947438	0.1997438	0.1604743	0.2654743
103	1992	-0.1075	0.712914	0.820414	0.1018449	0.2093449	0.1819516	0.2894516
	1993	-0.1075	0.692304	0.799804	0.0989006	0.2064006	0.1730466	0.2805466
104	1994	0.095	0.5779997	0.4829997	0.0825714	0.0124286	0.1236589	0.0286589
	1995	0.095	0.5227687	0.4277687	0.0746812	0.0203188	0.0997951	0.0047951
105	1996	0.15	0.6446047	0.4946047	0.0920864	0.0579136	0.152437	0.002437
	1997	0.15	0.6226252	0.4726252	0.0889465	0.0610535	0.1429403	0.0070597
106	1998	0.12325	0.6522644	0.5290144	0.0931806	0.0300694	0.1557466	0.0324966
	1999	0.12325	0.7369668	0.6137168	0.105281	0.017969	0.1923442	0.0690942

TABLE 7

Summary Statistics

	Mean distance, Statutes not struck (N=27921)	Mean distance, Struck statutes (N=18)	Probability difference is not random
Enacting distance 1	.75	.72	.62
Enacting distance 2	.17	.16	.58
Enacting distance 3	.23	.22	.49
Sitting distance 1	.64	.56	.95
Sitting distance 2	.10	.05	.97
Sitting distance 3	.13	.06	.97