

I. Literature Review

Current literature attempting to determine whether or not Supreme Court Justices are constrained by the preference of Congress overwhelmingly concludes in favor of an unconstrained Court: Justices vote their sincere policy preferences rather than adjust the expression of their political ideology in order to appease the legislative branch. In using as data only the sample of cases accepted for review by the Court, this body of literature fails to take into account a potential selection bias at the stage of acceptance. The Court, after all, must select cases from a cert pool, thereby introducing the possibility that they pick and choose cases based on which ones will result in the least backlash from Congress. Therefore, the sample of cases actually chosen will understate the Court's responsiveness to the elected branches.

In response to this problem, Anna Harvey and Barry Friedman, in a study entitled "The Limits of Judicial Independence: The Supreme Court's Constitutional Rulings, 1987-2000," take a statute-centered approach. This statute-centered or law-centered approach uses as a sample every law enacted by Congress between 1987 and 2000 and tracks their fates as their constitutionality is tested by the Court. Contra the aforementioned studies, Harvey and Friedman conclude in favor of a constrained Court, indicating the presence of evidence that laws are more likely to be struck down in certain political environments than in others. In exposing the level and nature of Court activity in different contexts, Harvey and Friedman account for the case-selection bias by demonstrating that the justifications for case-selection vary along with the political climate of the day.

Were Harvey and Friedman to replicate their study using just the sample of cases heard by the Court (mirroring other case-centered studies that include the problem of selection bias), they should not find the effects of congressional constraint that they found using the full sample of laws. However, they do not test this implication, which can function as a de-facto control for the experiment.

In order to fill this void in their research, it is necessary to replicate the law-centered study using just the sample of cases involving constitutional challenges to congressional laws between 1987 and 2000. If Harvey and Friedman are correct with regards to their statute-centered analysis, I should find no effect of congressional constraint in the case-centered analysis (thereby proving that there is a selection bias that can only be exposed through law-centered analysis). If the authors are incorrect, I will see that there is no difference across the two types of data, i.e. case-centered and statute-centered analyses will reveal equivalent degrees of constraint.

A. Background Literature: Theories of Judicial decision-making encompassing Statutory and Constitutional cases

There are varying accounts of what influences judicial behavior, three of which are legal formalism, the attitudinal model, and the strategic model. Legal formalism theorizes that Justices' decisions are firmly rooted in the letter of the law, that they simply observe precedent and align their decisions with those precedents regardless of their personal policy preferences. Both the attitudinal and strategic models are diametrically opposed to this idea of neutrality, arguing that Justices are in fact heavily influenced by preferences (Epstein et al, 2001).

The attitudinal model indicates that each Justice comes with a set of predetermined policy preferences that shape the way she views cases as well as her role as an adjudicator, and that this cannot be separated from the way in which she decides cases. In deciding cases, Justices vote these policy preferences, always envisioning and attempting to create outcomes that align themselves with their ideal points. In a 1989 study, Jeffrey A. Segal and Albert D. Cover found high degrees of correlation between measures of a justice's ideology and her votes cast in civil liberties cases between 1953 and 1988. They argue that Justices are relatively free to apply their ideological values to their decisions, demonstrating that the attitudinal model is scientifically verifiable insofar as the external limits placed upon Justices are minimal. They point out the

attitudinal model's failure to account for minimal internal and external influences on the Court, i.e. the solicitor general at the certiorari stage, but conclude that these influences are in fact, insignificant.

The strategic approach continues with the attitudinalists' assumptions that Justices are single-minded seekers of legal policy. However, the strategic model adds the assumption that Justices must pay attention to Congress and other actors due to such factors as the Separation of Powers system as well as other formal and informal rules that allow Congress to check the power of the Court. As it proceeds, the strategic argument is twofold. Not only do Justices take into consideration the preferences of other branches, but they strategically vote to best allow their policy preferences to influence public policy. In a 2001 study, Epstein, Knight, and Martin argue that Justices' decisions are heavily influenced by the ideological composition of the ruling Congress, and that they closely pay attention to the trends that occur in Congress as well as (occasionally) in the White House.

B. Background Literature: Statutory cases and theories of Judicial Decision-making

In a 1991 study of the 105th Congress, William Eskridge investigates the incidences of Congressional override on statutory cases. Eskridge studies all of the Congressional overrides during this period and concludes that eight recent interpretations by the Court had their authority blatantly undermined by the legislative branch. Even "abortive" or unsuccessful overrides illustrated Congress' attention to the Court's statutory interpretation cases. Like the others, Eskridge excludes Constitutional cases from his data and engages in an analysis of the laws at issue in statutory cases. Eskridge does not close the door entirely on the possibility of extending his causal story to constitutional cases, but fails to provide any empirical analysis on this point.

Hansford and Damore conclude in a 2000 study that Justices will be most sincere in their decision-making if their own policy preferences are aligned with those of the ruling regime.

Ideological outliers will be constrained out of fear of Congressional backlash. Hansford and Damore, however, focus on statutory decision-making whereas the Epstein, Lee, and Knight study contextualizes their findings in the context of Constitutional cases.

However well the Epstein et al piece compensates for the conflation of statutory and Constitutional cases in the Segal and Cover study, it still fails to engage in a law-centered analysis. By looking only at cases it is impossible to account for selection bias that underestimates the strength of constraint. It is therefore necessary to compare a case-centered analysis to the conclusions drawn by Harvey and Friedman (same years etc.) to determine the validity of any of these studies

Hansford and Damore argue that Congressional preferences do influence justices, particularly if previous congressional overrides have occurred in that area. Their study involved a logit analysis of data on all orally argued statutory cases from 1963 to 1995. It is suggested that for a chamber of Congress to initiate override legislation, the Court's ruling must deviate from that chamber's policy preferences, the chamber must be aware of that deviation, and must consider the decision to be important enough to justify the costs inherent in the legislative process (political capital, etc.) They argue that the Court will take into account the conditions ripe for override legislation and select cases accordingly. Hansford and Damore also argue that judges who are ideological outliers will be more constrained than those who fall somewhere between the legislature and the executive on political issues. The difference between their study and the one being conducted here is twofold: first, Hansford and Damore focus solely on statutory rather than Constitutional cases and second, their study focuses solely on case outcomes rather than the cert-granting stage.

C. Background Literature: Constitutional cases and theories of Judicial decision-making

Statutory cases have a lower threshold for congressional constraint given that it is easier for Congress to override decisions in these cases. In Constitutional cases, the Supreme Court is protected by Articles II and III of the Constitution, which indicate that Justices have life tenure, are protected from salary reductions, and always have at least some original jurisdiction. However, what this fails to account for is the punitive legislation that Congress can use against the Court should it not agree with the Court's decision. The Court can be stripped of its appellate jurisdiction, have its funding reduced, can be packed,¹ and Justices can be impeached, all as the result of Congressional backlash to a decision (Epstein et al, 2001). Where previous studies fall short is in their failure to engage in a comprehensive study of Constitutional cases in relation to the political preferences of the enacting and sitting Congresses.

A 1997 study conducted by James Meernick and Joseph Ignani reveals that Congress does in fact "overturn" Supreme Court decisions and may have various motivations for doing so. They find a host of motives that Congress may possess to overturn cases, which function as independent variables in a study that tests what influences the probability that attempts to reverse judicial review decisions may be made as well as the probability that these attempts are successful. First, when the Court curtails congressional power by ruling one of its actions unconstitutional, the Congress may want to fill the power vacuum that has been created. They hypothesize that the Congress will be more likely to attempt usurping Court power when a Supreme Court decision affects the distribution of Federal power. Other conditions positively influencing the probability of Congressional backlash include: when the government argues/loses a case or files an *amicus curiae* brief on behalf of a losing plaintiff in a Supreme Court decision, or the president publicly supports decision reversal legislation, when a state law is ruled

¹ This is historically demonstrated by Franklin Delano Roosevelt's Court-packing plan in which the executive branch attempted to pack the Court with Justices that would align themselves ideologically with the elected branches, ensuring that liberal New Deal legislation would not continue to be struck down by the Judiciary.

unconstitutional, if there is public opposition to a court ruling, and as the amount of *amicus curiae* briefs in favor of a law's constitutionality increase.

One implication of this study is in its provision of evidence for the claim that Congress does, in fact, have motivations to punish a Court that usurps its legislative authority by deeming its laws unconstitutional. On a broader level, this study indicates that a Supreme Court informed of Congress' ideological position and the whole spectrum of political events surrounding a specific case, will be able to take multiple factors into consideration when choosing whether or not to grant a *writ of certiorari* to a case. This ability to choose is the ability to be biased in making that choice, creating a very clear selection bias. Also, this literature in itself creates a paradoxical relationship with studies that have indicated lack of congressional constraint. If the Supreme Court must fear congressional backlash, they have reasonable motivation for curtailing or altering the influence of their political ideology in order to ensure the finality of their decisions. The motivations for judicial constraint are consistent across constitutional as well as Statutory cases, both of which can result in punitive action on behalf of a frustrated legislature. In a 1998 study, Barry Friedman argues that the political branches of the government are historically willing to utilize their abilities to put limits on the federal judiciary. Lack of public support for limiting the federal judiciary puts a limit on the implementation of these limits. Although it is impossible to verify that the legislative and executive branches pack the court with ideologically consistent judges or regularly strip the court of jurisdiction, the Supreme Court may still fear these punitive events or others of equally dubious constitutionality. (move to Constitutional Section)

The distinction between statutory and constitutional cases is drawn in the aforementioned 2001 study conducted by Epstein et al. They argue that although it is most straightforward to argue that Justices will find themselves constrained by other branches more frequently in statutory cases. (The warrant is simple: it is much easier for Congress to override a statutory interpretation

with a simple majority than it is to pose a constitutional amendment). Epstein, Knight and Martin echo the aforementioned studies that the Court seeks to avoid the congressional override due to the immense losses it experiences as a result; namely, the ability to affect Supreme Court legitimacy and thus also the Court's ability to affect policy outcomes. In terms of constitutional cases, given the difficulty involved in engaging in punitive action against the Court, the magnitude of that punitive action plays a role. Certainly, the Court is less likely to be punished for usurping Congressional power, but the implication is not a loss of legitimacy in this case, but rather a loss of funding, a change in Court composition, or another radical change of the structure of the Federal Judiciary and its jurisdiction. This study goes on to argue that even if there were a decreased probability for punishment in Constitutional cases, the costs that the Justices would bear from that punishment would be enormous. Epstein et al argue that Justices place a greater policy value on their constitutional decisions due to their prescriptive value. Unlike statutory decisions, constitutional ones produce the policies by which the legislative and executive branches must govern themselves. Due to the fact that it is more difficult for Congress to override a statutory interpretation, a controversial constitutional decision can only be redressed through punitive action. These punitive measures are far more damaging to the Court's credibility than a mere override. The Congress can use the Senate's confirmation power to select certain types of judges, enact constitutional amendments to reverse decisions or change Court structure or procedure, impeach justices, shrink the Court's appellate jurisdiction, alter the selection and removal process, require extraordinary majorities for declarations of unconstitutionality, allow appeal from the Supreme Court to a more "representative" tribunal, remove the power of judicial review, slash the budget, or alter the size of the Court. Credibility, reputation and legitimacy may suffer permanent damaged, regardless of whether or not the punitive action is successful.

D: Background Literature: Theories of constraint in other branches

In a 2001 study, Andrew D. Martin asks the question: to what extent does the separation of powers affect congressional roll call voting behavior? His results demonstrate that both the other legislative chamber and the Supreme Court profoundly constrain the House members and senators when casting roll call votes. He argues that this is evidence of the importance of policy outcomes to members of Congress when voting on the floor.

The implication of this final statement is clear: If members of Congress are so concerned about getting their policy outcomes on the floor, the last thing they want is to have them overturned by the Supreme Court or vetoed by the Executive. The importance Congress places upon its legislative victories is also indicative of the likelihood that they will respond negatively to any Supreme Court attempt to overturn their decisions, perhaps with the backlash that the Causal model as well as Harvey and Friedman indicate is a deterrent to sincere judicial decision making.

II. Causal Model

A. A Constrained Court

In *Marbury v. Madison*, the United States Supreme Court asserted the power of Judicial Review, making itself the only branch capable of interpreting and striking down congressional legislation as unconstitutional. Since then, the Supreme Court has struck down numerous cases based on various clauses in the Constitution. The question remains: are there patterns in how the Supreme Court strikes down cases, and if so, are those patterns linked solely to the Justices' ideologies or are they influenced by external political factors, such as the atmosphere in Congress? As evidenced in the literature review, current studies indicate the former yet fail to take into account the potential for a selection bias at the stage of writ-granting or at the stage preceding that where litigants choose whether or not to petition for cert.

In Constitutional cases, the Supreme Court is protected by Articles II and III which indicate that Justices have life tenure, are protected from salary reductions, and always have at least some original jurisdiction

Although the Supreme Court's original jurisdiction is defined by the constitution, Congress, as part of the system of checks and balances, has the right to constrain the Court's appellate jurisdiction, narrowing the scope of judicial review and, in an act of reciprocity, usurping the Court's power. Congress holds the purse-strings on the Supreme Court's budget, has the ability to change the composition of the Court, and so forth.²

Justices may have life tenure, however, this does not make them immune to impeachment by the Congress. Although the Congress must find some egregious transgression of judicial ethics and norms to justify an impeachment, an angry congress is more likely to act as a watchdog, making note of any potential justification for impeachment. Although judicial

² Meernick, James and Ignagni, Joseph. 1997. "Judicial Review and Coordinate Construction of the Constitution." *American Journal of Political Science* 41:2, 447-467

impeachments have historically been amongst the rarest of political events, it is not in the best interest of any Justice to be the next member of the select group that has been de-robed by Congress.

B. Constraint at the Agenda-Setting Phase

At the beginning of each session, the US Supreme Court is presented with a series of cases to which it may or may not grant writs of certiorari, after which the case becomes an official part of the Supreme Court's docket. A rendered decision has the potential to drastically alter the course of American politics. Highly controversial cases such as *Roe v. Wade* (1973), which established a woman's right to have an abortion, have an undeniable political element, evoking controversy in the halls of Congress as well as within the Court. Should the Congress be ideologically distant from the Court, the Court is likely to modify its position in order to avoid backlash. Take a hypothetical case, litigated on constitutional grounds, where congressional anti-abortion legislation is placed before the Supreme Court for judicial review as per its appellate jurisdiction. The Justices, following a series of oral arguments, must decide whether or not they want to strike down the law. Should sincerely voting justices be prejudiced against anti-abortion legislation, they would want to strike the law at first opportunity. However, assuming a liberal court and a conservative congress, the ideological distance between the Court and Congress would make the Court more likely to uphold it.

In highly politically controversial cases, as Supreme Court Justices' preferences increasingly distance themselves from the preferences of Congress, it is likely that the Court will exercise increasing amounts of discretion in deciding whether or not to grant writs of certiorari. This is suggested by a study conducted by Caldiera, Wright and Zorn in 1999, wherein it was determined that Justices have enough foresight to allow the potential outcome of a case at the end of the decision-making process to influence the degree to which they act strategically in the

agenda-setting phase. If it is assumed that Justices will not modify their position when rendering a decision, it logically follows that their decision would not be well received by the oppositional Congress. Therefore, it is likely that that Court would choose not to hear that case.

Thus, taking the aforementioned constraint story as given, it must be evaluated how constraint occurs on two levels, both preceding adjudication.

In deciding whether or not to grant cert to a case that appears as part of the cert pool, the Supreme Court evaluates the political preferences of the other branches of the government and projects into the future, what the probable outcome of the case as well as reactions to it will be. Ideological distance between the Court and the sitting Congress will function as the primary cause of constraint upon the Court, given that Congress may lash out against unpopular cases.

The aforementioned example of anti-abortion legislation is demonstrative of this model. Hypothetically, a piece of conservative anti-abortion legislation (i.e. the Bush administration's highly visible partial-birth abortion ban) is passed into law and contested on constitutional grounds. A relatively liberal Supreme Court would prefer to strike this law and is fully aware that the median Justice would be like to do so given his or her policy preferences. The Court cannot perform its constraints on a case-level if it does not even hear the cases that would produce the conditions for those constraints.

Hypothesis 3: As one moves from a law-centered analysis of the Court to a case-centered analysis of the Court, one is less likely to notice statistically significant amounts of Constraint on the part of Justices.

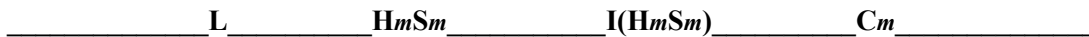
III. Empirical Model

For the purposes of testing the implications of the causal model it is necessary to first make a series of assumptions. In an accurate replication of the conditions set forth in the Harvey/Friedman study, it must first be assumed that congressional decision-makers as well as Supreme Court Justices have single-peaked preferences that can be placed and measured by their placement on a common ideological continuum. The common continuum allows for comparison of the preferences of the relevant actors to the laws at issue. Second, also mirroring the model used in the Harvey/Friedman study, each law enacted by Congress is assumed to be located at the midpoint between the ideal points of pivotal legislators in that enacting Congress. It is also necessary to discover what the ideal points of the pivotal legislators were in the sitting Congress during the time in which the Court chose to review a case. This allows for an effective comparison to be made between the magnitude of the effect of the preference of the sitting Congress versus the effect of the enacting Congress on Judicial constraint. Third, the ideological continuum will be used to demonstrate that the larger the distance between a standard of constitutionality as chosen by the court's median Justice and the ideological makeup of the law at hand, the more likely that that law will be struck down.

A. Models and Measures of Constraint.

In this model, the law at issue has been denoted "L", pivotal Congressional decision-makers "HmSm," the median legislator's indifference point "I(HmSm)" and the median Supreme Court Justice "Cm," and they have been placed on a hypothetical ideological continuum³.

Figure 1: A constrained Court



³ In this case, the median members of the House and the Senate are assumed to be the pivotal members of Congress

In this model, the law at hand reflects the preferences of the House and Senate more accurately than it does the Court's, in fact the median Justice " C_m " is located at the furthest ideological distance from the law. Were the median Justice to choose C_m (her ideal point) as the standard of constitutionality in this case, the legislature would support punitive legislation aimed at the Court. The constitutional standard that will be chosen instead is one at the indifference point between the standard embodied by the law at issue and that preferred by the Court. Because the Justice is an ideological outlier in this case, he or she would abandon his or her most desired Constitutional standard and place it where it can most effectively represent the preferences of all three players involved. Congress has a high threshold for punishing the Court insofar as *all pivotal* legislators (and not just a majority) must prefer the constitutional standard reflected by the law to that standard chosen by the Court. If so much as one pivotal legislator is more closely aligned with (or equidistant from) the Court's ruling than to the original law, that legislator will block any retaliatory legislation.⁴

The constrained Court hypothesis indicates that the Court will do its best to optimize its position, to gain the best of both worlds, so to speak, by choosing a standard of constitutionality that best embodies the median Justice's own preferences yet still avoids retributive congressional action. That is, the median Justice will do her best to achieve the arrangement presented in *Figure 2: An Unconstrained Court* by choosing a standard of constitutionality that will not elicit punitive actions on the part of Congress. The standard of constitutionality that is chosen will attempt to approximate the indifference point of the median legislator, in this case labeled as $I(HmSm)$. In doing this, the Justice ensures herself that at least one legislator will block punitive legislation.⁵

⁴ How to determine the pivotal legislator will be discussed later on in this work.

⁵ Because one legislator is a sufficient condition for avoiding punitive legislation, it is necessary only that the Justice approximate the indifference point of that pivotal legislator. It is not necessary that the indifference point embody the preferences of both the House and the Senate. Harvey and Friedman, for instance, use the Senate median to illustrate this concept.

Measuring the distance between the compromised standard of constitutionality chosen by the median Justice and the authentic standard that she is predicted to choose under the assumptions made above is the measure of constraint that Congress has imposed upon the Court. In *Figure One*, the distance is represented by $|C_m - I(HmSm)|$. The greater the distance between the two, the more that she is constrained in her decision-making. If the constrained Court hypothesis is correct, a negative relationship between the increasing distance of this measure and the probability that the Court overrules congressional legislation is expected. That is, the larger the ideological distance between the standard of constitutionality chosen by the median justice and his or her actual preferences, the probability that the Court should strike down a law decreases. Should the unconstrained hypothesis be correct, this measure provides no useful information about a Court's propensity to strike a law and no significant relationship between the two variables should be expected.

Figure 2. An Unconstrained Court

_____ L _____ HmSm _____ C_m _____ I(HmSm) _____

The second case, or unconstrained case, is as follows: Congress's Ideal Point "HmSm" is located in between the ideal point of the median Justice and the Law itself. That is, although the median Justice's position relative to the law has remained the same, the Court is free to strike because it is more closely located to the indifference point of the median legislator than it is to the law. In this situation the Court will hear the case and strategic litigants will be willing to petition for writs of certiorari. Here, the median Justice can feel comfortable implementing his or her genuine preference for Constitutionality, given that he or she will be protected by the median legislator, who will block any punitive legislation.

The unconstrained hypothesis indicates that the distance between the Court median and the law at issue is critical in determining the Court's propensity for overruling a law: $|C_m - L|$. Given that this factor does not vary between *Figure 1* and *Figure 2*, one would not expect to see variation in the probability that the Court strikes a law.

Under the constrained hypothesis, the mathematics produces a very different result. It was previously mentioned that the distance between the Court median and the constitutional standard chosen by the median justice in the constrained hypothesis *Figure One* was $|C_m - H_m|$. This contrasts with figure two, where the distance between the Justice's preferences and the chosen constitutionality standard is $|C_m - C_m|$, and therefore 0. Therefore, according to the constrained Court hypothesis, the likelihood that the law will be overruled increases as we move from *Figure 1* to *Figure 2*.

B. Theories of Legislative Behavior

In determining who dictates the method by which constrained Justices choose a standard of constitutionality that most effectively avoids punitive action by the Congress it is necessary to understand who the pivotal legislators are, which whom the median Justice compromises. Multiple theories have arisen in an attempt to describe pivotality.

The Floor Median Model indicates that all legislative decisions are made by the floor median voters of the House and the Senate. This model is that which is seen in both *Figures 1 and 2*. The details of this model surround the majority's ability to order a committee to discharge a bill to the floor and thus prevent committee gate-keeping. Any restrictive voting must be approved by majority votes, and committees have no veto power at the conference stage.^{6 7}

Harvey and Friedman make a series of assumptions regarding this model, which are replicated here. The law at hand is assumed to embody the midpoint between the floor median of

⁶ Krehbiel, Keith. 1997. "Restrictive Rules Reconsidered," *American Journal of Political Science* 41: 914-44 and

⁷ Krehbiel, Keith. 1995. "Cosponsors and Wafflers from A to Z," *American Journal of Political Science* 39: 906-23

the two enacting houses. The Court's constraint set is defined by three points: when a law comes up for judicial review, the ideological position of the law itself, the sitting House median's indifference point, and lastly, the indifference point of the sitting Senate median. The boundaries of this set are defined on the left by the minimum of these three factors and on the right by the maximum. If the Court median is within the boundaries of this set, it is unconstrained and the standard of constitutionality that is chosen will reflect the ideal point of the median Justice. If the Court median lies outside of the set, the Court is constrained and will set the standard of constitutionality at the minimum (if it lies to the left) and at the maximum (if it lies to the right), for these points represent the point at which the Court could avoid retaliatory action by Congress.

Committee gate-keeping models take on many different forms. These models assume that congressional committees have the power to prevent legislation from reaching the floor.⁸ Following Harvey/Friedman, I have assumed that once legislation reaches the floor, the House and Senate floor medians are the pivotal decision-makers. Therefore, the assumption that the law embodies the midpoint between the floor medians of the Senate and House is retained.

The three-point definition of congressional constraint is expanded under the Committee Gate-keeping Model to a total of five points: the law itself, the sitting House and Senate medians respective indifference points, as well as the indifference points of the sitting House and Senate Judiciary Committee medians.⁹ The leftmost and rightmost boundaries of the set are once again defined as the minimum and maximum of the (five) points, respectively. If the Court median is within the boundaries of this set, it is unconstrained and the standard of constitutionality that is chosen will reflect the ideal point of the median Justice. If the Court median lies outside of the set, the Court is constrained and will set the standard of constitutionality at the minimum (if it lies

⁸ Ferejohn, John and Charles Shipan. 1990. "Congressional Influence on Bureaucracy," *Journal of Law, Economics, and Organization* 6: 1-20

⁹ Harvey/Friedman as well as this study assume that any punitive legislation will lie within the jurisdiction of these Judiciary Committees.

to the left) and at the maximum (if it lies to the right), for these points represent the point at which the Court could avoid retaliatory action by Congress.

Additionally, if any one of the outermost boundaries is constituted by a Judiciary Committee indifference point, and the Court median lies between it and the next largest or smallest point in the set, the Court will be unconstrained because of gate-keeping by that house's Judiciary Committee.¹⁰ Every other key legislator will want to punish the Court (because it lies outside of their minimum or maximum), but the Judiciary Committee protects it by refusing to allow Court-attacking legislation to leave the committee. In this case, outcomes will differ from those predicted by the Floor Median Model.

Majority party models indicate that congressional parties can pull votes away from the floor medians¹¹. There are two different approaches that Harvey and Friedman use in modeling majority party influence. The first assumes that the majority party can gatekeep, but once legislation reaches the floor, it faces open rule. The second assumes that the party influences the votes of party caucus members and thus effects a closed rule on the floor.

The former of the two models indicates that legislative party leaders pack committees with preference outliers who then act as agents for the principals of the majority party medians. In other words, the majority party committee members hold back legislation when this ensures that majority party medians will get better outcomes than those which would be attained on open floor votes. Just as in the aforementioned models, the "open rule" portion of this model requires the assumption that the House and Senate floor medians will function as the pivotal players on final floor votes. The law once again embodies the midpoint between the floor medians of the House and the Senate.

¹⁰ In this situation, the Court would always be unconstrained because it lies within the boundaries. However, this argument is significant in that the justifications for an unconstrained Court have changed from mere inclusion in the set to gate-keeping. In other words, the actor imposing constraint on the Court has changed.

¹¹ Dion, Douglas and John Huber. 1996. "Party Leadership and Procedural Choice in Legislatures," *Journal of Politics* 58: 25-53.

The Majority Party Gatekeeping Model's constraint set is defined by: the law, the sitting House and Senate medians' indifference points, the House and Senate majority party medians' indifference points, with the left and rightmost boundaries being defined by the maximum and minimum from amongst these five points. If the Court median is within the set, the Court is unconstrained and the median Justice chooses his or her own ideal point as the constitutional standard in the case. If the median lies outside of the boundaries, the constrained court sets the constitutional standard at that boundary.

Should the outermost boundary be constituted by the majority party median's indifference point, and the Court median lies between that boundary and the next largest or smallest point in the set, then the Court is unconstrained because gate-keeping by the majority party forecloses the possibility of retaliatory legislation by preventing Court-attacking legislation from reaching the floor.

The Majority Party Median Model differs from the Majority Party Gate-keeping Model insofar as it assumes that legislative party organizations can influence floor votes as well as committee votes. Legislative party organizations ensure that party members always vote for party sponsored measures by pulling legislative outcomes to the medians of the majority party caucuses, rather than floor medians.¹²

When a congressional law comes before the court, the constraint set is defined once again by three points: the law, the sitting House majority party median's indifference point, and the sitting Senate majority party median's indifference point. The minimum and maximum values of these three points define the boundaries of the set. Once again, if the Court median lies within the set, it is unconstrained, and the constitutional standard embodies the median Justice's ideal point. If the Court median lies external to the set, the Court is constrained and sets the constitutional standard at the closest boundary.

¹² Dion and Huber 1996, 1997 see n8 and n9

IV. Data

As noted in the literature review and introduction, this study employs a case-centered analysis of congressional laws challenged on constitutional grounds. The analysis begins with a review of Supreme Court cases heard in October of 1987, the second term of the Rehnquist Court. All cases not involving congressional laws will be discarded as irrelevant to the data pool. Cases involving statutory interpretation will be placed in a pool separate from Constitutional cases, the latter of which constitutes the data pool that will be investigated in this study. Court decisions will be taken from the Findlaw Online Database.¹³

Cases involving congressional laws will be ferreted out by searching for specific references to the United States Code within the body of the opinion. The methodology that will be used in distinguishing between statutory interpretation cases and those involving constitutionality of a federal law are as follows: It is usually clear from the holding, which appears at the top of the opinion, whether or not the case is an interpretation of a federal or a state statute, a case of pure constitutional interpretation, i.e. petition for a writ of habeas corpus, or a constitutional evaluation of a federal law. For example, in *Atchison T. & S.F.R. Co. v. Buell* (1987)¹⁴, the law at issue was clearly stated as the Federal Employer's Liability Act (FELA), which allows railroad workers to sue employers for personal injuries on the job. The question at hand was whether or not the Railway Labor Act, in providing for the submission of minor labor disputes in the railroad industry to binding arbitration, precluded action under FELA in the case of emotional injury.¹⁵ The Court's holding determined that the fact that an injury caused by conduct subject to arbitration under the RLA does not deprive an employee to the right to bring an FELA suit. The Court refuses to read the RLA as repealing any part of the FELA. It is this

¹³ FindLaw for Legal Professionals, Case Code Search <<http://www.findlaw.com/casecode/>>

This database catalogs all Supreme Court decisions from 1893 to the present as well as many petitions for Certiorari. Also available is a search engine for specific provisions of the United States Code.

¹⁴ 480 U.S. 557 (1987)

¹⁵ 45. U.S.C. 51, 44 Stat. 577

“reading” of the laws that indicates statutory interpretation. The way the law is applied is clarified and determined by the Court within the holding.

On the contrary, a constitutional evaluation of a federal law proceeds in a different manner. In *City of Boerne v. Flores, Archbishop of San Antonio* (1997)¹⁶, a suit challenging the denial of a permit to expand a church was brought to the Court under the Religious Freedom Restoration Act of 1993. The District Court concluded that Congress had exceeded the scope of its enforcement power under article 5 of the 14th Amendment to the Constitution. The Fifth Circuit Court of Appeals reversed the decision, finding RFRA to be constitutional. The Supreme Court reversed the decision. In this case it is clearly a Congressional issue at hand, namely, whether or not Congress has overstepped its boundaries as defined by the Constitution. The holding of the case does not interpret what RFRA means in the context of the case presented, but rather focuses on a discussion of congressional powers and how RFRA violates them. A specific citation from the case is that “RFRA is not a proper exercise of Congress’ Article 5 enforcement power because it contradicts vital principles necessary to maintain the separation of powers (and federalism.” It is also of note that there is no “amendment” of the law at hand but rather a simple “reversal” of the Court of Appeals’ decision.

No database existed to determine the exact enacting year of every portion of the U.S. Code, in this case, the Religious Freedom Restoration Act. To determine the enacting Congress it was necessary to find out exactly what year the RFRA was enacted. It is possible to search the United States Code at the Office of the Law Revision Counsel of the House of Representatives¹⁷. This site does not reveal the enacting Congress, however it does reveal what year the law was enacted in. From there, it is possible to find the corresponding enacting Congress at the Office of the Clerk of the U.S. House of Representatives.¹⁸

¹⁶ 521 U.S. 507 (1997)

¹⁷ [United States Code Search](http://uscode.house.gov/usc.htm) US House of Representatives, Office of the Law Revision Council.
<<http://uscode.house.gov/usc.htm>>

¹⁸ [Congressional History](http://clerk.house.gov/histHigh/Congressional_History/index.html). Office of the Clerk, U.S. House of Representatives,
<http://clerk.house.gov/histHigh/Congressional_History/index.html>

B. Independent Variables

The independent variables for this study comprise the ideological distances between the Court and various pivotal members of Congress. I will be using the measures from the Harvey/Friedman study. These estimates of ideological positions that will be used on this study are those developed by Bailey and Chang in 2001, and updated by Bailey in 2003. The Bailey Senate estimates between 1987 and 2000 were used to transform Poole's House common space estimates into Bailey space (Poole, 1998).

C. Dependent Variables

The dependent variable for this study is the frequency with which Justices strike down congressional laws on constitutional grounds.

V. Conclusion

The findings of this study will contribute to the existing literature in that they will demonstrate whether or not there is a distinction between constraint in the Court when one evaluates the cases as opposed to when one evaluates the laws. Should this study demonstrate that constraint is not found in the case-based analysis, it will contrast with the Harvey/Friedman findings of a constrained Court from a law-based analysis. This contrast will demonstrate that there is some bias built into how the Court chooses to grant *writs of certiorari* to cases, or that litigants may be strategic in choosing whether or not to bring cases to the Court in the first place. Although these hypotheses are not directly testable, the gap between law and case-based analyses will indicate that the failure of previous studies to find evidence for a constrained Court is because the Court does all it can in the pre-cert phases to prevent the need for constraint, i.e. by choosing cases that will not require it to adjust its position on certain issues.

Potential drawbacks of this study include the fact that it is not possible to analyze the cert-granting stage specifically for selection bias. I am also unable to gather information on strategic litigation. Both of these pools of data would be capable of demonstrating whether or not a selection bias can be observed prior to a case being heard by the court. If bias would not be found in this pool of data, it would support the unconstrained hypothesis. Due to the absence of this data, it is only possible to demonstrate whether or not there is a discrepancy between the two types of studies, but not to test the actual basis of that discrepancy.

Works Cited

Boucher, Robert L, Jr., and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision-Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics*. Volume 57. (August): 812-123

Congressional History. Office of the Clerk, U.S. House of Representatives.

<http://clerk.house.gov/histHigh/Congressional_History/index.html>

Dion, Douglas and John Huber. 1996. "Party Leadership and Procedural Choice in Legislatures," *Journal of Politics* 58: 25-53.

Dion, Douglas and John Huber. 1997. "Sense and Sensibility: The Role of Rules," *American Journal of Political Science* 41: 945-57.

Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. "The Supreme Court as Strategic National Policy-Maker." *Emory Law Journal* 50: 583

Eskridge, William N. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 331

Ferejohn, John and Charles Shipan. 1990. "Congressional Influence on Bureaucracy," *Journal of Law, Economics, and Organization* 6: 1-20

FindLaw for Legal Professionals, Case Code Search < <http://www.findlaw.com/casecode/>>

Friedman, Barry. 1998. "Judicial Review and Judicial Independence: "Things Forgotten" in the Debate over Judicial Independence." *Georgia State University Law Review* 14: 737

Friedman, Barry and Anna Harvey. 1993. "The Limits of Judicial Independence: The Supreme Court's Constitutional Rulings: 1987-2000." Draft.

Hansford, Thomas and David F. Damore. 2000. "Congressional Preferences, Perceptions of Threat, and Supreme Court Decisionmaking." *American Politics Quarterly* 28:4, 490-510

Krehbiel, Keith. 1997. "Restrictive Rules Reconsidered," *American Journal of Political Science* 41: 914-44

Krehbiel, Keith. 1995. "Cosponsors and Wafflers from A to Z," *American Journal of Political Science* 39: 906-23

Krehbiel, Keith and Douglas Rivers. 1988. "The Analysis of Committee Power: An Application to Senate Voting on the Minimum Wage." *American Journal of Political Science* 32:4, 1151-1174

Martin, Andrew D., 2001. "Congressional Decision Making and the Separation of Powers." *American Political Science Review* 95:2, 361-378

Meernick, James and Ignagni, Joseph. 1997. "Judicial Review and Coordinate Construction of the Constitution." *American Journal of Political Science* 41:2,

447-467

Poole, Keith T. 1998 "Recovering a Basic Space From a Set of Issue Scales," *American Journal of Political Science* 42: 954.

Segal, Jeffrey A., and Cover, Albert D. 1989. "Ideological Values and the Votes of US Supreme Court Justices." *American Political Science Review* 83:2

United States Code Search US House of Representatives, Office of the Law Revision Council.

<<http://uscode.house.gov/usc.htm>>

Waxman, Seth P. 2001. "Defending Congress." *North Carolina Law Review* 70:1073

Zeppos, Nicholas S. 1993. "Deference to Political Decision Makers and the Preferred Scope of Judicial Review," *Northwestern University Law Review*. 88: 296.