REVIEW ESSAYS

THE SUPREME COURT AS A *STRATEGIC* NATIONAL POLICYMAKER

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INTRODUCTION

If the mark of a seminal study is the quantity and quality of the progeny it spawns, then Robert A. Dahl's *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*,[1] scores a bull's eye. From its publication, the Dahl Article has been cited by both social science journals and law reviews every year to date.[2] Even more important is the high quality and diversity of scholarship building on Professor Dahl's study, from research assessing the relationship between public opinion and the U.S. Supreme

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We are grateful to the National Science Foundation for supporting our work on strategic decisionmaking (SBR-9320284, SBR-9614130). We adapt several passages in this Article from some of that work. *See* Lee Epstein & Thomas G. Walker, *The Role of the Court in American Society: Playing the Reconstruction Game*, *in* CONTEMPLATING COURTS 315 (Lee Epstein ed., 1995). All data used in this Article are available at http://artsci.wustl.edu /~polisci/epstein/. We used STATA to manage the data and S-PLUS to create the figures.

[1] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279 (1957) ("*Decision-Making in a Democracy*").

[2] We discovered this via electronic searches of various databases in LEXIS-NEXIS, J-Stor, and OCLC.

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Court,[3] to the role the Justices play in facilitating partisan realignments,[4] to the Court's capacity to generate social change.[5]

No one essay could consider the debt scholars writing in these and other areas owe to *Decision-Making in a Democracy*.[6] Further, we do not try. Instead, we focus on Dahl's resolution of the "countermajoritarian difficulty,"[7] a term Alexander Bickel coined to reflect the "problem" of allowing unelected judges to strike down legislation passed by elected representatives.[8] On Dahl's account, we need not worry too much about this "difficulty" because the "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[9] This coincidence of preferences comes about, according to Dahl, because the ruling regime (i.e., the president and the Senate) has the opportunity to appoint new Justices to the Court about every two years.[10] Those new Justices, in turn, vote in accord with their sincere political preferences—or so Dahl assumes—which would coincide with the views of those who appointed them.

We argue that Dahl was right to discount the seriousness of the "difficulty" but not primarily for the reason he suggested. Rather than focusing on a correspondence of preferences among the different branches of government, we base our argument on the effects of the separation of powers system on the

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[3] *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000); James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299 (1998); William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996); James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995).

[4] *See, e.g.*, JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE (1992); David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM J. POL. SCI. 259 (1987); William Lasser, *The Supreme Court in Periods of Critical Realignment*, 47 J. POL. 1174 (1985).

[5] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE (1991); Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976).

[6] Dahl, *supra* note 1.

[7] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[8] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 984 (2000).

[9] Dahl, *supra* note 1, at 285.

[10] *Id.* at 284.

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strategic choices of U.S. Supreme Court Justices. We argue that, given the institutional constraints imposed on the Court, the Justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches. When they are attentive to external actors, Justices find that the best way to have a long-term effect on the nature and content of the law is to adapt their decisions to the preferences of these others. In this sense, the resolution of the "countermajoritarian difficulty" rests in an important effect of the separation of powers system: a strategic incentive to anticipate and then react to the preferences of elected officials.

We develop this argument in four steps. We begin with a discussion of Dahl's "ruling regime" thesis and explore a key assumption under which it operates—that judicial decisions are a direct function of the sincerely held attitudes of the Justices. We then lay out our argument, which is attentive to the strategic context in which Justices labor. In Part III, we assess several observable implications both of Dahl's and our accounts and weigh them against data derived from constitutional civil rights cases. Finally, we take stock of our results and discuss their bearing on the "countermajoritarian difficulty."

I. DAHL'S RESOLUTION OF THE "COUNTERMAJORITARIAN DIFFICULTY"

To say that *Marbury v. Madison*[11] has generated more commentary than most U.S. Supreme Court decisions is to make a rather uncontroversial claim. Judges, presidents, and scholars alike have picked apart virtually every aspect of Chief Justice John Marshall's opinion. The commentary ranges from whether the Court, once it found that it did not have jurisdiction to hear the case,[12] should have decided it at all to whether section 13 of the Judiciary Act of 1789, which the Justices declared unconstitutional in *Marbury,* actually expanded the Court's original jurisdiction.[13]

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[11] 5 U.S. (1 Cranch) 137 (1803).

[12] *See, e.g.*, THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, VOL. XV 447 (Andrew A. Lipscomb ed., 1905) (complaining that, in *Marbury v. Madison*, "[t]he Court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case . . . .").

[13] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (stating that the Act did not, in fact, expand the Court's jurisdiction, thus leaving Justice Marshall with "nothing to declare unconstitutional").

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Other debates center less on the particulars of the *Marbury* opinion and more on its larger implications for the Court's role in a democratic society. The most relevant of these debates for Dahl's and our purposes draws attention to Bickel's "countermajoritarian difficulty" argument.[14] Given America's fundamental commitment to a representative form of government, why should its citizens allow a group of unelected officials—namely, federal judges—to override the wishes of the people, as expressed by their elected officials?

Dahl addressed this question via his "ruling regime" thesis. At the core of his argument is the assertion that the political preferences of Supreme Court Justices never will be substantially out-of-line with those of the existing law-making majorities. Accordingly, the Justices' decisions usually will be consistent with the preferences of the elected branches. The primary reason for this, according to Dahl, is quite simple: on average, presidents have the opportunity to appoint two new Justices during the course of a four-year term.[15] Because presidents usually nominate Justices with philosophies similar to their own and the Senate generally confirms only nominees who have views consistent with the contemporary political mainstream, regular turnover results in a Court majority rarely holding significantly divergent political preferences from those held by the president and Congress. That is why, as Dahl explains, the Court will not often strike down federal legislation.[16] Such laws reflect the positions of members of Congress, the president, and—by virtue of the regularity and nature of the appointment process—the Justices as well. Under this logic, the Court almost never assumes an antimajoritarian role; rather, it typically will represent and, therefore, legitimize the interests of the ruling regime.

The data Dahl used *seem* to support his argument.[17] They show that between the 1780s and the 1950s the Court struck down relatively few federal laws and, when the Court did strike down a federal law, the action tended to come more than four years after the passage of the law. According to Dahl, this indicates that the Court is much more likely to strike down legislation passed by congressional majorities that are no longer in power than it is to void the acts of current legislative majorities.[18] By nullifying "old" laws, the Court

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[14] BICKEL, *supra* note 7, at 16.

[15] Dahl, *supra* note 1, at 284.

[16] *Id.* at 285.

[17] We stress "seem" because the data Dahl invoked demonstrate that the ruling regime thesis may work, but the data do not demonstrate the mechanism by which this adaptation takes place.

[18] Dahl, *supra* note 1, at 286-87.

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may be reflecting the will of the new political majority that no longer desires the legislation enacted by earlier lawmakers.

Dahl thus renders moot the normative debate over what the role of the Court should be in a democratic society. Further, under Dahl's theory, analysts no longer need worry about whether the Court should or should not act as a countermajoritarian body because it will almost never take on this role. Rather, the Court typically will represent and ultimately legitimize the interests of the ruling regime.

A. The Role of Political Preferences in Dahl's Account

By Dahl's account, the nomination/confirmation process guarantees that the Court will operate as a majoritarian institution, thus reflecting prevailing political preferences.[19] Embedded in this claim, however, is a critical assumption Dahl makes about the nature of Supreme Court decisionmaking; namely, judicial decisions are a function of the *sincerely held* political preferences of the Justices. If the Court legitimizes the policies of the other branches of government, it is not, on Dahl's account, because they have made an *a priori* decision to do so; rather their behavior is merely a by-product of their ideologies. In other words, the Court tends to reinforce prevailing political majorities because (1) the selection process is biased in favor of choosing Justices who have political preferences consistent with those of incumbent presidents and legislators, and (2) those Justices vote in accord with their sincere preferences, which, again, coincide with those of the ruling regime.

It is not surprising that Dahl assumed that the Court would engage in "sincere" behavior. Dahl was writing at a time when the behavioralism movement of the 1950s, a movement of enormous influence, had taken hold in political science. That movement influenced the study of Court decisions through the use of the so-called "attitudinal model," which holds that Justices base their decisions solely on the facts of cases vis-à-vis their ideological attitudes and values.[20] Or, as two leading proponents of the model put it, "Rehnquist votes the way he does because he is extremely conservative;

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[19] *Id.* at 284-85.

[20] For more on the development of the attitudinal model, see SEGAL & SPAETH, *supra* note 13, at 64-73; Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625 (2000).

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Marshall voted the way he did because he is extremely liberal."[21] Based on the attitudinal model, no factors other than ideology come into play; Rehnquist will take the conservative position and Marshall will take the liberal one, regardless of where Congress or the president stand on a particular issue.

It is just this attitudinal assumption about the way Justices behave that, to reiterate, undergirds Dahl's ruling regime thesis. The president and Senate will appoint Justices who reflect their ideologies; those Justices, in turn, will vote in line with their own ideologies—which happen to be the same as the President's and the Senate's—thereby legitimizing the interests of the ruling regime.

B. Implications of Dahl's Adoption of the Assumption of Sincere Behavior

To consider the implications of Dahl's adoption of the assumption that Justices will vote in accord with their sincerely held political preferences, we offer Figures 1a and 1b, below.[22] In each, we depict a hypothetical set of preferences over a particular policy, here a civil rights statute. The horizontal lines represent civil rights policy spaces ordered from left (most "liberal") to right (most "conservative"); the vertical lines show the preferences (the "most preferred positions") of the relevant actors: the president, the median member of the Court, of Congress, and of the key committees and other legislation gatekeepers in Congress.[23] Note that we also identify the committees' indifference point (denoted with an asterisk) "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber."[24] To put it another way, because the

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[21] SEGAL & SPAETH, *supra* note 13, at 65.

[22] We adapt these figures from William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. REV. 331 (1991); *see also* William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

[23] In denoting these most preferred points, we assume that the actors prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [an actor's] ideal point, utility always declines monotonically in any direction. This . . . is known as single-peakedness of preferences." Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263 (1988). We also assume that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy making enfolds as follows: the Court interprets a law, the relevant congressional committees propose (or do not propose) legislation to override the Court's interpretation, Congress (if the committees propose legislation) enacts (or does not enact) an override bill, the President (if Congress acts) signs (or does not sign) the override bill, and Congress (if the President vetoes) overrides (or does not override) the veto. These are relatively common assumptions in the legal literature. *See, e.g.*, Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22, at 378; Eskridge, *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, *supra* note 22; *see also* Figure 2, *infra* p. 593.

[24] Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22, at 378.

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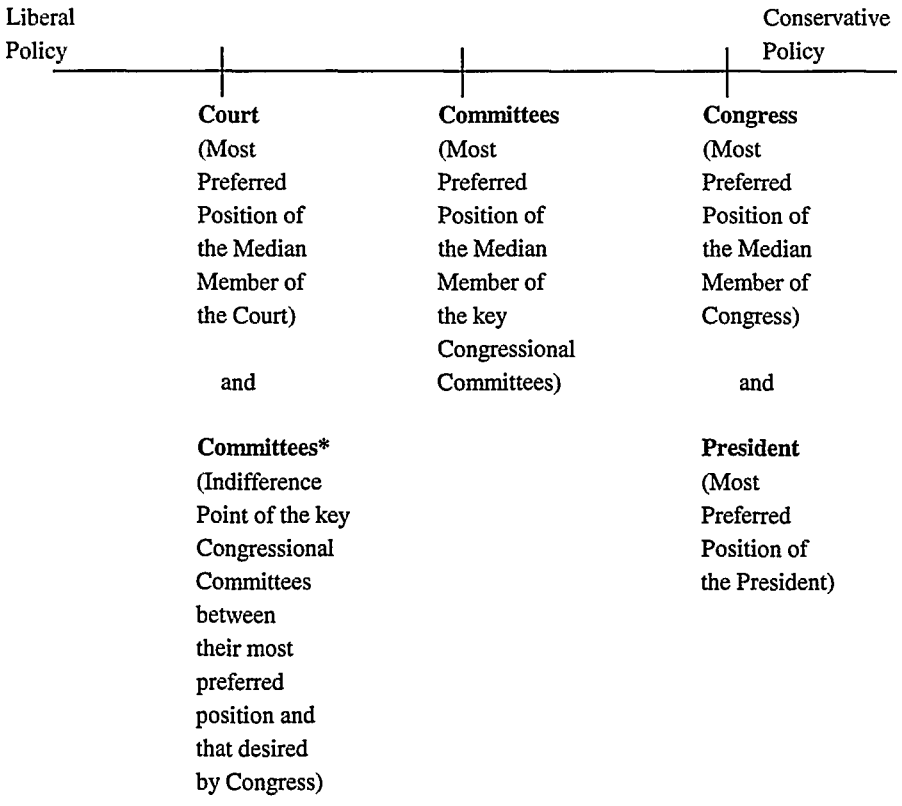
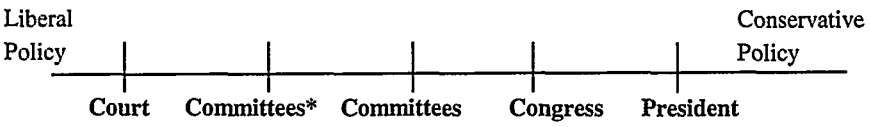
indifference point and the median member of Congress are equidistant from the committees, the committees like the indifference points as much as they like the most preferred position of Congress; they are indifferent between the two.

Figure 1. Hypothetical Distribution of Preferences

1a. Unconstrained Court



1b. Constrained Court



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As we can see, in Figure 1b the Court is to the left of Congress, the key committees, and the president. This means, in this illustration, that the Court favors more liberal policy than the other political branches. In Figure 1a, the Court also is to the left of the relevant actors but, note, the committees' indifference point is on the Court's most preferred position.

Now suppose that the Court has a civil rights case before it, one involving the claim of a black woman that her employer has refused to promote her because of her race and sex. How would the Court decide this case? Under Dahl's approach, the Justices would vote exactly the position shown on the line; they would vote their sincere "attitudes." Based on Figure 1a there would be no adverse congressional reaction to the Court's vote. If the Court votes in line with its preferences (which are comparatively liberal) and sets the policy at its most preferred position, then the relevant congressional committees would have no incentive to override the Court because the congressional committees' indifference point is the same as the Court's most preferred position. Therefore, they would be indifferent to the policy preferred by the Court. The configuration of preferences—a Court that is relatively close, ideologically speaking, to the ruling regime or close enough to vote in line with its sincere preferences without fear of provoking Congress—displayed in Figure 1a, would be common under Dahl's thesis. After all, if Dahl is correct and the president nominated and the Senate confirmed some fraction of its members, we would not expect the Court to be all that far from the appointing actors. Moreover, the outcome of the Court's decision—an interpretation acceptable to the "ruling regime"—also falls well in line with Dahl's approach.

Figure 1b is less likely, but not impossible under Dahl's theory. In Figure 1b, we see a Court that, if it votes sincerely, would know the threat of congressional reaction looms large. That is because the policy articulated by the attitudinally-driven Court would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point. Congress would support such legislation because it would prefer the committees' preferred policy to the Court's. Further, the President would sign the legislation as he also prefers the position of the committee over that of the Court.

Given this situation, would the 1b Court interpret the statute differently than the 1a Court? Not under Dahl's account. Because the Justices vote their attitudes without regard to the other pertinent players in the interaction, this Court, like the 1a Court would interpret the statute in line with its preferences;

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that Congress might override its interpretation is not relevant under the attitudinal assumption.

If the Justices risked congressional reversal and merely voted their sincerely held preferences, as Dahl assumes, they would be (at least in this example) supporting an outcome that went against the interests of dominant regime. Under Dahl's theory, this can certainly happen. It is possible that the Court would be temporarily out of step with the majoritarian institutions because of some anomaly—such as an unusually long period of time without a presidential appointment to the Court, a realigning election, and so forth. In such a situation, Dahl might argue, the Justices will continue to vote their attitudes, fully aware that Congress could and probably would reverse the majority's position. In time, however, the periodic replacement of Justices would bring the Court back in line with the elected branches.

II. THE INSTITUTIONAL RESOLUTION TO THE COUNTERMAJORITARIAN PROBLEM

A natural question emerges from our discussion of Dahl's account: Why would the 1b Court take a position that Congress would overturn? The answer, again, is simple: Under Dahl's assumption of sincere behavior, Justices are "single-minded seekers of legal policy"[25] whose ideology dictates their votes. Justices are presented with legal questions about which they have attitudes. Those attitudes, in turn, dictate an automatic behavior—the vote.

Our claim is that this perspective often fails to capture the realities of Supreme Court decisionmaking and, accordingly, of the Court's role in American society. If Justices are "single-minded seekers of legal policy," would those Justices not care about the ultimate state of that policy? To rephrase the question, why would Justices who are policy-preference maximizers take a position they know Congress would overturn? To argue that Justices merely vote their attitudes is to argue that the Court is full of myopic thinkers who consider only the shape of policy in the short term. Such an argument does not square with important analysis of the Court[26] or with the way many social scientists now believe that political actors make decisions.

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[25] Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

[26] *See, e.g.*, WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22; J. Woodford Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the*

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We reject this attitudinal vision and propose a strategic one instead. The strategic approach, as we set it out,[27] starts off with the same premise as that of the attitudinal school: Justices are "single-minded seekers of legal policy."[28] From there, however, the two approaches diverge dramatically. The strategic approach assumes that if the Justices truly care about the ultimate state of the law, then they must—as Charles Fairman once put it—"keep [their] watch in the halls of Congress"[29] and, occasionally, in the oval office of the White House. Additionally, they must pay heed to the various institutions structuring their interactions with these external actors. They cannot, as the attitudinalists and Dahl suggest, simply vote their own ideological preferences as if they are operating in a vacuum; they must instead be attentive to the preferences of the other institutions and the actions they expect them to take if they want to generate enduring policy.

This claim flows from the logic of an institution underlying the U.S. Constitution, the separation of powers system. That system, along with informal rules that have evolved over time (such as the power of judicial review), endows each branch of government with significant powers and authority over its sphere. At the same time, it provides explicit checks on the exercise of those powers such that each branch can impose limits on the primary functions of the others. So, for example and as Figure 2 shows, the judiciary may interpret the law and even strike down laws as being in violation of the Constitution, but Congress can pass new legislation, which the President may choose to sign or veto.

Chief? Opinion Assignments in the Rehnquist Court, 40 AM. J. POL. SCI. 421 (1996); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996). For a review of some of this literature, see Epstein & Knight, *supra* note 20.

[27] Our theory makes the assumption that Justices primarily pursue policy goals. We are not alone. Many strategic accounts of judicial decisions assume that the goal of most Justices is to see the law reflect their most preferred policy positions. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22; Eskridge, *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, *supra* note 22; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions*, 23 RAND J. ECON. 463 (1992). But this need not be the case. Under the strategic theory, actors—including Justices—can be, in principle, motivated by many things. As long as the ability of a Justice to achieve his or her goal is contingent on the actions of others (as supposed by the strategic theory), his or her decision is interdependent and strategic. For an example of a strategic account of judicial decisions in which Justices are motivated by jurisprudential principles, see John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); for a strategic account in which institutional goals figure prominently, see Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC. REV. 87 (1996).

[28] *See supra* note 25.

[29] CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 (1987).

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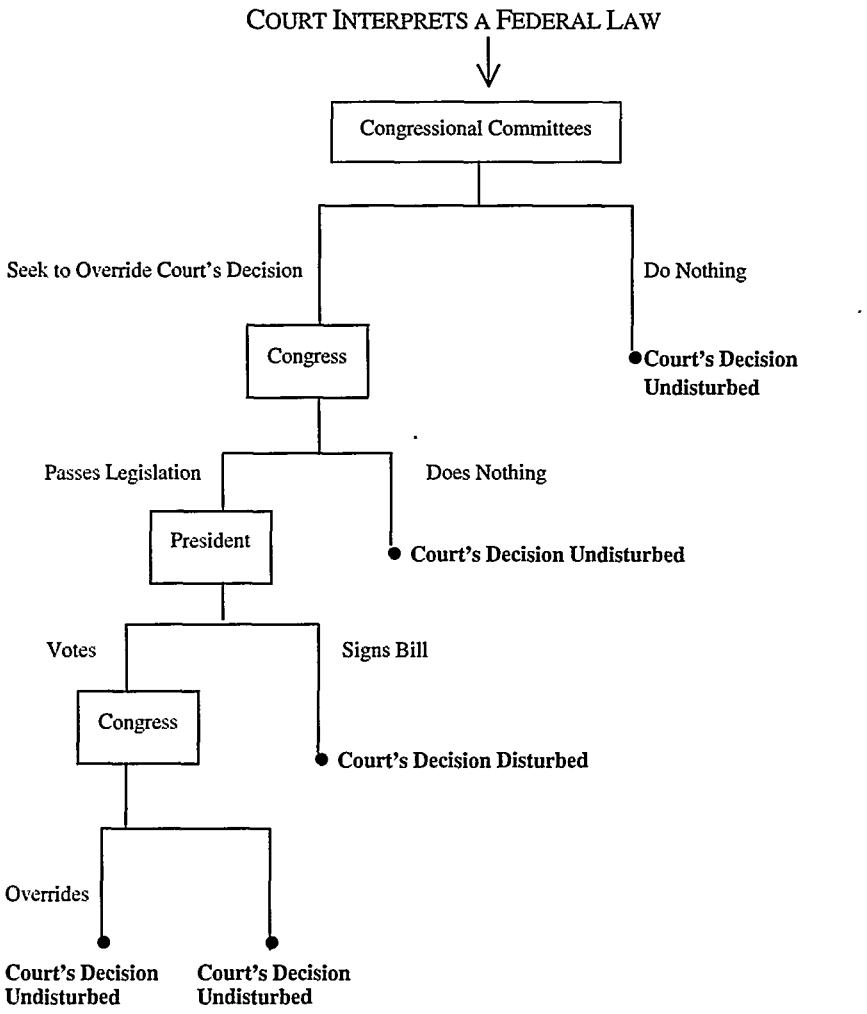
Figure 2. The Separation of Powers System in Action[30]



Seen in this way, the rule of checks and balances inherent in the system of separation of powers provides Justices (and all other governmental actors) with

[30] We adapt this figure from Eskridge, *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, *supra* note 22, at 644.

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important information: *policy in the United States emanates not from the separate actions of the branches of government but from the interaction among them.* Thus, it follows that for any set of actors to make authoritative policy—be they Justices, legislators, or executives—they must take into account this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices.

A. Implications of the Strategic Account of Judicial Decisions

To see the implications of the strategic argument, return to Figure 1b above. Given the distribution of the most preferred positions of the actors in this figure, strategic Justices—unlike those Dahl depicts—would not be willing to risk voting their sincere preferences. Instead, they would see that Congress could easily override their position and that the president would support Congress. In this instance the rational course of action—the best choice for Justices interested in policy—is to place policy near the committees' indifference point. The reason is easy to see: Because the committees are indifferent between that point and the most preferred position of the median member of Congress, they have no incentive to introduce legislation to overturn a policy. Thus, the Court would end up with a policy close to, but not exactly on, its ideal point without risking congressional reaction.

Accordingly, the strategic argument has an important implication for empirical and normative debates over the role of the Court in American society. It suggests that the Court will not often be significantly out of step with the other branches, but for reasons different than those offered by Dahl. Recall that Dahl argues that the Court will rarely strike down congressional legislation because the majority of the Court, the median member of Congress, and the president generally share the same values. We argue, in contrast, that because the separation of powers system requires Justices, who are interested in affecting the nature of the law, to take into account the preferences of the ruling regime, the Court's decisions typically will never be that far removed from what other relevant contemporaneous actors desire.

This does not mean, however, that the Court can never vote its sincere preferences. Figure 1a shows how this could occur. Given the displayed distribution of preferences, the Court would be free to set policy in a way that reflects its raw preferences. If the Court voted its preferences (which are comparatively liberal) and set policy based on its preferences, the relevant con-

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gressional committees would have no incentive to waste precious legislative resources to override the Court. Because the committees' indifference point equals the Court's most preferred position, the committees would be indifferent to the policy preferred by the Court.

In short, the strategic model suggests that the role of the Court in American society is not simply a function of the preferences of the Court but of the other relevant institutions as well. The Court—comprised of strategic "single-minded seekers of legal policy"—prefers to avoid reaching decisions considerably outside the range acceptable to the legislature and the president. As strategic actors, the Justices realize that by acting outside of the acceptable range, the law could end up farther away from the their ideal points than is necessary.

Seen in this way, Dahl's thesis and our institutional theory accord in one fundamental respect: the Court will not, in the main, issue decisions that are unacceptable to the ruling regime. Where these two accounts differ is over the mechanisms: Dahl argues that it is the nomination/confirmation process that ensures the selection of Justices who agree with the preferences of the ruling regime and the assumption of sincere behavior that guarantees that these Justices will vote in accord with the preferences of contemporaneous actors.[31] We argue that the coupling of the Justices' desire to see their preferred policy positions etched into law and the institution of separation of powers generates the legitimizing effect.

B. Constitutional Versus Statutory Interpretation

Thus far, we have focused our attention on differences between the implications of the two accounts for statutory interpretation. That we have done so is no accident. Virtually all existing literature exploring the constraint imposed on Justices by the separation of powers system asserts that the constraint is far more—or, at the extreme, exclusively—operative in cases calling for the Court to interpret a law rather than on cases asking the Court to assess a law's constitutionality.[32] The rationale behind this claim is straight-

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[31] *See* Dahl, *supra* note 1, at 284-85.

[32] Exceptions, to lesser and greater extents, are EPSTEIN & KNIGHT, *supra* note 27; MURPHY, *supra* note 26; Louis Fisher, *Congressional Checks on the Judiciary*, *in* CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 21 (Colton C. Campbell & John F. Stack Jr. eds., 2001); James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447 (1997); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

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forward. It is within Congress's power to overturn the interpretations the Court gives to statutory law but, according to the Supreme Court, it is not—at least not by a simple majority—within Congress's power to overturn the Court's constitutional decisions; Congress must propose a constitutional amendment.[33] Given the infrequency with which Congress takes this step, coupled with the frequency with which it disturbs the Court's statutory interpretation decisions,[34] many scholars have argued that the Justices need not be especially attentive (or, again at the extreme, not attentive at all) to the preferences and likely actions of other government actors in constitutional disputes.

Thus, is there any reason to suppose that the institutional account, as we have developed here, applies to cases involving constitutional questions? This is a critical question to ask, for the empirical test of Dahl's ruling regime thesis rests exclusively on constitutional cases, specifically on a demonstration that the Court does not often strike down legislation passed by contemporaneous Congresses. If our theory is not applicable to constitutional cases,[35] then it is Dahl who may offer the more plausible explanation, at least with regard to constitutional disputes.

Conventional wisdom, as we note above, suggests as much but we take issue with that wisdom. In fact, we might go so far as to argue that the Justices feel more compelled in constitutional cases than in statutory ones to take into account the preferences and likely actions of the relevant actors. This argument—the contours of which we outline in Table 1—follows from a consideration of the institutional costs and policy benefits of both types of decisions.

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[33] The Court's most recent statements on this issue came in *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) and *Dickerson v. United States*, 530 U.S. 428 (2000).

[34] Between 1967 and 1990, Congress overrode 121 Court decisions. *See* Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22, at 344.

[35] This would be the case if, in fact, Justices are free to ignore the preferences and likely actions of other relevant actors in these disputes and vote in accord with their sincerely held preferences.

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Table 1. A Comparison of the Costs and Benefits to the Supreme Court in Cases Involving Statutory and Constitutional Interpretation[36]

	Benefits (Assuming Congress/ President does not respond adversely to the Court's decision)	**Costs** (Assuming Congress/President responds adversely to a statutory decision by passing a new law, and to a constitutional decision by attacking the Court)	
		Cost of Unsuccessful Congressional Response	*Cost of Successful Congressional Response*
Court Interprets a Statute	Policy Benefit (Court reads its policy preferences into an existing law, though perhaps receives only a transitory benefit)	None	No policy benefit accrues; potential harm to the legitimacy of the Court
Court Interprets The Constitution	Policy Benefit (less transitory) and Prescriptive Benefit (Court prescribes standards for future government action)	Potential harm to the legitimacy of the Court	∞

Let us begin with the benefits. If Congress does not (initially) respond adversely to the Court's statutory interpretation, the Court accrues a policy benefit; it is able to read its preferences into law and, perhaps, fundamentally change the course of public policy. Such impact may be transitory, however, because it is possible that future presidents and Congresses will amend the statute in question to override the Court's interpretation. If Congress and the

[36] We adapt this table from Andrew D. Martin, Strategic Decision Making and the Separation of Powers (1998) (unpublished Ph.D. dissertation, Washington University) (on file with Dept. of Political Science, Washington Univ. and with the authors).

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president respond in this manner, they may render the Court's decision, and its effect, meaningless. In contrast, owing to the difficulty of altering them both in the short and long terms, constitutional decisions (at least those that fail to generate a negative response from the relevant actors) are less permeable. Accordingly, constitutional decisions have greater policy value to the Justices. They also have prescriptive benefits that statutory decisions do not. When the Court determines that a law is or is not constitutional, its decision does not merely hold for the particular law under analysis but is binding on all future action. Constitutional decisions set the parameters within which the contemporaneous Congress and president—as well as their successors—must act.

What costs do the Justices bear if the ruling regime has an adverse reaction to their decision? If the president and Congress are unsuccessful in their attempt to override an opinion interpreting a law, then no harm comes to the Court. If, however, they succeed in overriding the Court's interpretation, the Court will certainly pay a policy price. The Court's interpretation of the statute no longer stands, thereby robbing the Court of the opportunity to affect public policy. The Court also may bear a cost in terms of its legitimacy. Every override of the Court's interpretation will chip away at its legitimacy even if only marginally. Given that the Justices' ability to achieve their policy goals hinges on their legitimacy, because they lack the power to enforce their decisions, any erosion of the Court's legitimacy is a concern.

Let us now consider constitutional cases, and begin with a simple fact: while Congress and the president may be unable to overturn these decisions with ease, they have a number of weapons they can use to attack the Court. Gerald Rosenberg outlines the following possibilities, all of which Congress, the president, or both have attempted to deploy:

> (1) [U]sing the Senate's confirmation power to select certain types of judges; (2) enacting constitutional amendments to reverse decisions or change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal process; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more "representative" tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court.[37]

[37] Rosenberg, *supra* note 32, at 377 (emphasis removed); *see also* WALTER F. MURPHY, CONGRESS AND THE COURT 50-51, 57-63 (1962).

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In addition, and this is worthy of emphasis, however much the Justices have stressed in recent cases they are the final arbiters of the Constitution,[38] Congress has attempted to respond to constitutional decisions in the form of ordinary legislation. Louis Fisher makes this point saying, "If the Court decides that a government action is unconstitutional, it is usually more difficult for Congress and the president to contest the judiciary.... But even in this category, there are examples of effective legislative and executive actions in response to court rulings."[39] Fisher provides a few illustrations, including an 1862 law prohibiting slavery in the territories that was designed to "repudiate the main tenets"[40] of *Dred Scott v. Sandford,*[41] and the Fair Labor Standards Act of 1938 outlawing child labor that the Supreme Court upheld in *United States v. Darby Lumber*[42] despite its earlier ruling in *Hammer v. Dagenhart.*[43] More generally, as James Meernik and Joseph Ignagni assert:

> An examination of the frequency of reversal attempts and successes reveals that contrary to popular and scholarly opinion, the Congress can and does attempt to reverse Supreme Court rulings. Judicial review does not appear to be equivalent to judicial finality.... [W]e find that the Congress repeatedly voted to reinterpret the Constitution after a High Court ruling of unconstitutionality. Although in 78% of the cases (444 out of 569) where the Supreme Court ruled some federal law, state law, or executive order unconstitutional, the Congress made no attempt to reverse its ruling; on 125 occasions, either the House or the Senate voted on legislation that would modify such a ruling. While many scholars have argued in the past that for all intents and purposes, judicial review is final, our results would seem to indicate that Congress is willing to challenge the power of the High Court.... [W]e find that in 33% of the cases (41 out of 125) where the Congress did attempt to reverse the Court's decision, it was successful in passing legislation.[44]

What does the ability of the ruling regime to attack constitutional court decisions—through overrides or other means—imply in terms of the costs the Justices bear? If an attack succeeds (and the Court does not back down), it effectively removes the Court from the policy game and may seriously or, even

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[38] *See supra* note 33.

[39] Fisher, *supra* note 32, at 28.

[40] *Id.* at 29.

[41] 60 U.S. 393 (1856).

[42] 312 U.S. 100, 115 (1941).

[43] 247 U.S. 251 (1918), *overruled by Darby*, 312 U.S. at 115. Congress passed both the legislation at issue in *Hammer* and the Fair Labor Standards Act under its power to regulate interstate commerce.

[44] Meernik & Ignagni, *supra* note 32, at 458.

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irrevocably, harm its reputation, credibility, and legitimacy—thereby imposing a potentially infinite cost on the institution. But even if the attempted attack is unsuccessful, the integrity of the Court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. We do not have to peer as far back as *Dred Scott v. Sandford* to find examples; *Bush v. Gore* may provide one.[45] The new president and Congress did not attack it but other members of the government did—of course, unsuccessfully at least in terms of the decision's impact. Yet there seems little doubt that the critics (not to mention the decision itself) caused some damage to reputation of the Court, the effects of which the Justices may feel in the not-so-distant future.[46]

Taken collectively, we are left with the following picture: the benefits to the Court of reaching a successful constitutional decision are roughly the same, if not marginally greater, as those of reaching a successful statutory decision. The costs of a challenge from members of the ruling regime, regardless of whether that challenge is successful or not, are far greater. Seen in this way, it seems to us quite reasonable to suppose that the institutional account is equally applicable (and, again, perhaps even more so) to cases involving constitutional and statutory questions. That is, if the Justices pay heed to the preferences and likely actions of relevant external actors in statutory cases, then they have good, if not better, reasons to do so in constitutional cases.

This leads us to following testable propositions. If our account applies to constitutional cases, then we should expect to observe strategic behavior on the part of the Justices. When the Justices hold preferences close to the ruling regime, they will behave in a sincere fashion, that is, placing policy on their most preferred position (see Figure 1a above). However, when they hold preferences distant from the ruling regime, they will behave in a sophisticated

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[45] 531 U.S. 98 (2000).

[46] For example, Democrats in the Senate have already suggested that President Bush's nominees to the federal bench will face especially close scrutiny. Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee, said, "I think the closeness of the election and the ill will engendered by the Supreme Court is going to make it difficult for the new administration to make some clear ideological stamp on the courts." *See* Neil A. Lewis, *Hurdles to Agenda: Democrats & Evenly Split Senate May Stall Bush on Reshaping Courts*, N.Y. TIMES, Jan. 2, 2001, at A10. Moreover, in a Gallup poll conducted on December 13, 2000, roughly one-third of those surveyed said that the *Bush v. Gore* decision led them to lose confidence in the Supreme Court. In surveys conducted several days later (December 15-17), fifty percent responded, "yes, influenced" to the following Gallup poll question: "Overall, do you think the Justices on the US Supreme Court were influenced by their personal political views when deciding this case, or don't you think so?" *See* Gallup Poll Organization, *The Florida Recount Controversy from the Public's Perspective: 25 Insights* (Dec. 22, 2000), *available at* http://www.gallup.com/poll/releases/Pr001222bii.asp.

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fashion, that is, placing policy not on their ideal point but rather on the point as close as possible to their most preferred position that will not unleash a congressional or presidential attack (in Figure 1b, the committees' indifference point). If, however, Dahl's ruling regime thesis applies to constitutional cases, then we should observe the Justices always placing policy on their ideal point regardless of how far that point may be from the most preferred positions of relevant members of the ruling regime.

III. ASSESSING THE PROPOSITIONS

Assessment of these propositions required data to animate the dependent variable, which is the vote of each Justice in cases involving a particular type of policy. Further, we needed measures of and data on the independent variables, the preferences of the Court, the president, and Congress over that policy. We chose constitutional civil rights as the policy on which to focus our inquiry because that area of the law has generated sufficient cases for meaningful analysis and has served as an empirical reference point for work concluding that the Justices engage in sophisticated behavior with regard to other political actors when they interpret statutes.[47] Whether this holds true for constitutional interpretation is a question of extreme interest here.

We obtained data on the Justices' votes and the direction of those votes (liberal or conservative) in civil rights cases involving constitutional issues from the Supreme Court Judicial Databases for the years 1953 to 1992.[48] We

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[47] *See generally* Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 22; Eskridge, *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, *supra* note 22; Spiller & Gely, *supra* note 27.

[48] *U.S. Supreme Court Databases, available at* http://www.ssc.msu.edu/~pls/pljp/sctdata1.html (last modified Mar. 6, 2001). We used the following selection commands to generate the data for analysis:

keep if ANALU==. | ANALU==1 (each docket number included)

keep if VALUE==2 (civil rights)

keep if DEC_TYPE==1 | DEC_TYPE==2 | DEC_TYPE==5 | DEC_TYPE==6 | DEC_TYPE==7 (oral and signed opinion, per curiam, variant of formally decided cases, judgment of the court)

keep if TERM>52 & TERM<92 (53 to 91 terms)

keep if AUTHDEC1<3 (the primary authority for decision is constitutionality of federal or state action)

Given the selection, the data set was expanded from the case being the unit of analysis to the vote being the unit of analysis. Other measures were merged on to this new data set. These were matched by calendar

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measured the preferences of the median members of Congress and the President with, respectively, Poole and Rosenthal's NOMINATE Common Space Dimension One scores, which are estimated using roll call votes and announced presidential vote intentions.[49] To assess the preferences of Supreme Court Justices, we relied on scores created by Jeffrey A. Segal and Albert D. Cover—scores that many scholars have invoked.[50] To derive the scores, the researchers content-analyzed newspaper editorials written between the time of Justices' nominations to the Supreme Court and the Senate vote over their confirmations.[51] Specifically:

> [W]e trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as *liberal, moderate, conservative,* or *not applicable.* Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[52]

They then measured judicial policy preferences by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate.[53] Their resulting scale of policy preferences ranges from -1 (unanimously conservative) to 0 (moderate) to +1 (unanimously liberal).[54] For purposes of presentation and analysis we have rescaled the scores from 0 (most liberal) to 1 (most conservative). Table 2 displays the results.

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year. Thus, the Congress and President measures from 1960 were matched to the 1959 term of the Court, and so on.

[49] *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 11 (1997).

[50] Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); *see, e.g.*, Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 260 (1996); Jeffrey A. Segal et al., *Idealogical Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995).

[51] *Id.* at 559.

[52] *Id.*

[53] *See id.*

[54] *Id.*

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Table 2. Measuring the Policy Preferences of Supreme Court Justices Serving between 1953 and 1992: The Segal-Cover Scores[55]

Justice	Segal-Cover Score
Brennan	0.000
Fortas	0.000
Jackson	0.000
Marshall	0.000
Harlan	0.125
Black	0.125
Goldberg	0.250
Stewart	0.250
Warren	0.250
Douglas	0.270
Reed	0.275
Minton	0.280
Frankfurter	0.335
White	0.500
Clark	0.500
Whittaker	0.500
O'Connor	0.585
Kennedy	0.635
Souter	0.670
Burton	0.720
Stevens	0.750
Powell	0.835
Thomas	0.840
Blackmun	0.885
Burger	0.885
Rehnquist	0.955
Scalia	1.000

[55] The Segal-Cover values depicted here are from 0.000 (most liberal) to 1.000 (most conservative). For the original Segal & Cover scores, see Segal & Cover, *supra* note 50, at 559-60.

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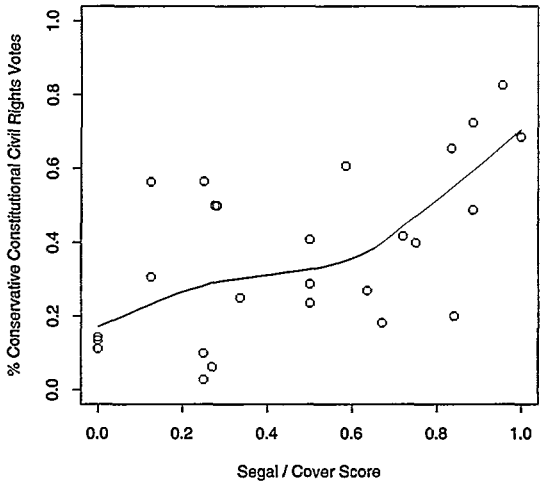
A. Baseline Results: Dahl's Assumption of Sincere Behavior

With the data now in hand, we assess the propositions above. We start by examining the one that follows from Dahl's account; namely, that Justices place policy on their ideal point regardless of how far that point may be from the most preferred positions of relevant members of the ruling regime.[56]

To appraise this, we simply compare the preferences of the Justices (as measured by the Segal-Cover scores) and their votes in constitutional civil rights cases, with Figure 3 displaying the results. If Dahl is correct, then we should see the Justices (represented as circles in the figure) falling near the curve imposed on the data, meaning that their sincere preferences (again, as measured by the Segal-Cover scores) explain their votes in the cases. That many are quite close suggests that Dahl's argument seems to rest on solid ground. Indeed, the most conservative Justices vote conservatively 80% of the time; that figure for liberals is 20%.

Figure 3. Scatterplot of Percent Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, 1953-1992[57]



[56] *See* Dahl, *supra* note 1, at 285 ("The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.").

[57] The Segal-Cover scores are rescaled from 0 to 1, with a high value representing a more conservative Justice. A local regression ("loess") curve is imposed to illustrate the relationship between the two variables.

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B. Strategic Analysis

While this simple test seems to lend support to Dahl's assumption of sincere behavior on the part of the Justices, the analysis cannot end there. That is because our account also acknowledges the possibility of sincere behavior. Recall that when the median Justice holds preference close to the ruling regime the account predicts that she will place policy on her ideal point. It is only when her preference is distant from the ruling regime that she will behave in a sophisticated fashion, that is, placing policy not on the ruling regime's ideal point but rather on the point as close as possible to her most preferred position that will not unleash a congressional or presidential response.

To assess expectations generated by the strategic approach, we must disaggregate judicial behavior and study it over time, under periods of liberal and conservative regimes. We take two approaches. First, we consider the votes of several individual Justices disaggregated by the president (a reasonable surrogate, at least under Dahl's analysis, for the ruling regime). Second, we explore the behavior of the Court as a whole disaggregated by the president and Congress.

Let us begin with the individual Justices, two of whom we have chosen for in-depth analysis—Justices Black and White.[58] For both, we constructed figures (Figures 4 and 5), which display the relationship between their votes in constitutional civil rights cases by presidential administration. The points on each of these plots represent the percentage of conservative votes cast, and the error bars represent the 95% confidence interval. If two error bars do not overlap, a statistically significant difference exists in voting between particular presidencies. If an overlap occurs, no significant difference exists. Under the strategic account, we should observe Justices Black and White voting in a more conservative direction when a Republican is in the White House; under Dahl's theory, we should observe no change in their behavior.

[58] We constructed similar figures for all Justices who served under at least three presidents. For most of the Justices, there is no statistically significant variation in their behavior, for some always voted their true preferences because they were extremists or did not cast pivotal votes. Moreover, because the number of constitutional civil rights cases are small, statistically significant differences are rare. The key test of the mechanism is the conditional plots for the entire Court. *See* Figure 6, *infra* p. 608 and Figure 7, *infra* p. 608.

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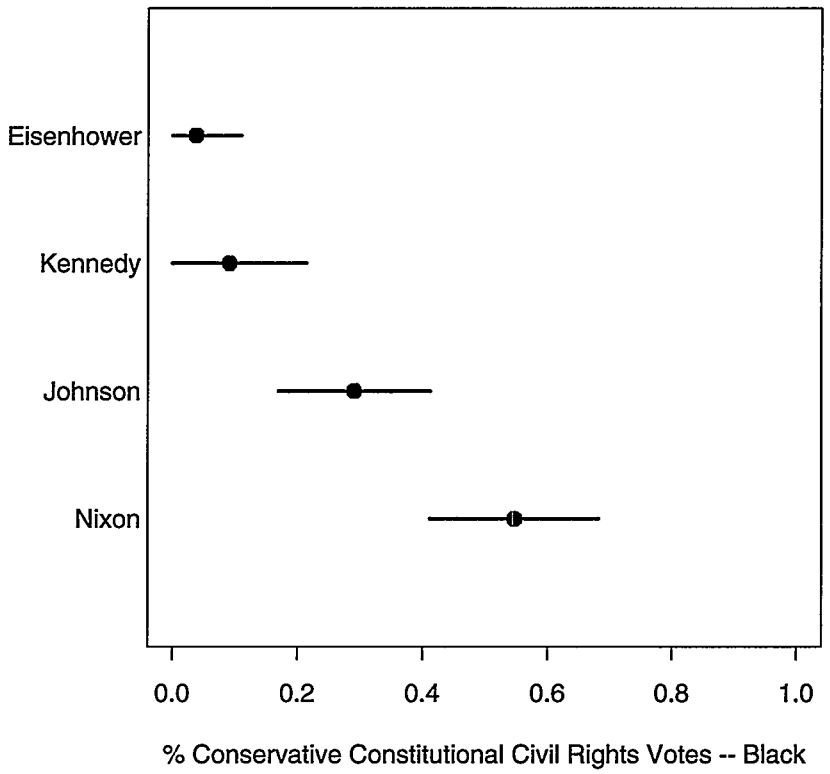
Figure 4. Dot Plot of the Percentage of Conservative Constitutional Civil Rights Votes Cast by Justice Black, Disaggregated by President[59]



[59] In both Figures 4 and 5, the error bars depict the 95% confidence intervals of the percentage.

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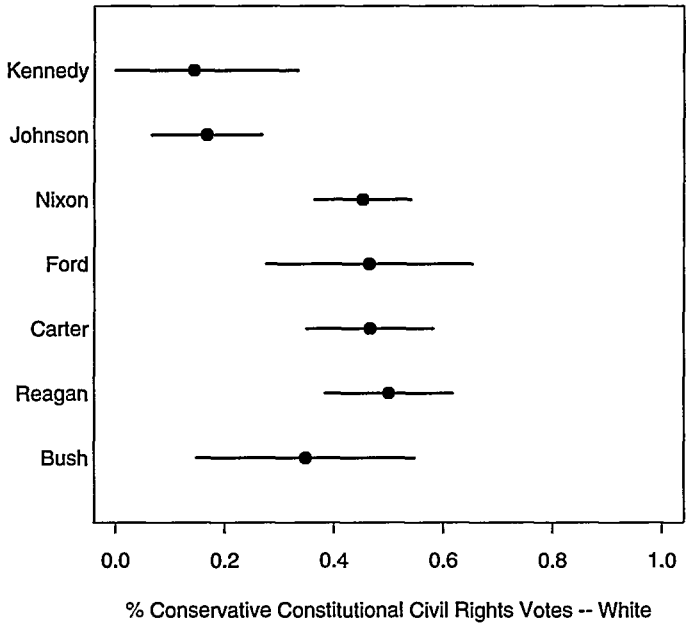
Figure 5. Dot Plot of the Percentage of Conservative Constitutional Civil Rights Votes Cast by Justice White, Disaggregated by President



As Figures 4 and 5 reveal, the voting behavior of both Justice White and Justice Black is characterized by sophisticated strategic decisionmaking. Note that Justice Black was significantly more conservative in his voting during the Nixon regime than he was during the more liberal Kennedy and Johnson presidencies; Justice White was far more liberal when the two most liberal presidents (at least during his tenure on the bench) were in office than he was during the more conservative Nixon and Reagan presidencies. These patterns, we believe, suggest strategic adaptation, and precisely the sort of adaptation we would anticipate if Justices behave in a sophisticated fashion with regard to the ruling regime: altering their decisions to reflect the preferences of that regime. It is precisely the adaptation we would not expect to observe if Dahl's assumption of sincere behavior rested on a firm empirical basis.

Do these same results hold at the Court level? To address this question, we constructed two plots (Figures 6 and 7), both of which illustrate the relationship between voting in constitutional civil rights cases and preferences.

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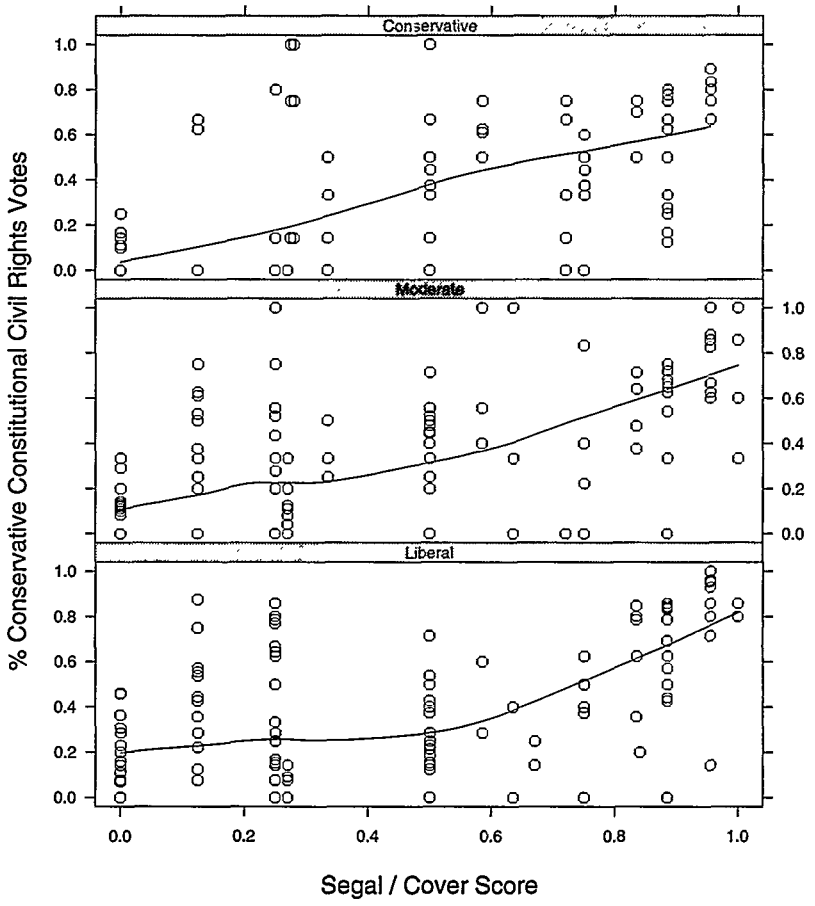
However, the two charts condition that relationship differentially. Figure 6 conditions it on presidential preferences, whether conservative, moderate, or liberal while Figure 7 conditions it on Senate preferences, again whether conservative, liberal, or moderate.

Figure 6. Scatterplots of the Percentage of Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, Conditioned on the Preferences of the President[60]



[60] The upper cell contains data from conservative presidents, as measured by common space Nominate scores, the middle cell, from moderate presidents, and the lower cell from liberal presidents. *See* POOLE & ROSENTHAL, *supra* note 49. In each cell, a local regression ("loess") curve is imposed to illustrate the relationship between the variables.

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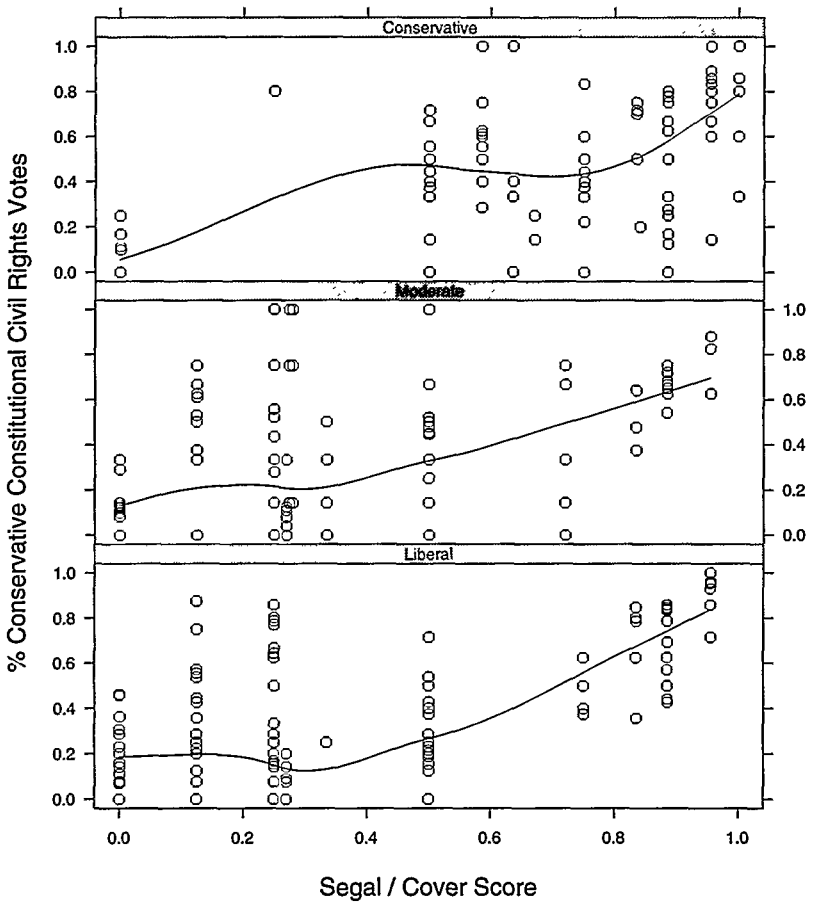
Figure 7. Scatterplots of the Percentage of Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, Conditioned on the Median Member of the Senate[61]



[61] The upper cell contains data from conservative Senates, as measured by NOMINATE common space dimension one scores, the middle cell, from moderate Senates, and the lower cell from liberal Senates. *Id.* In each cell, a loess curve is imposed to illustrate the relationship between the variables.

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The plots differ, of course, but they tend to tell a similar story. First, strong ideologues on the Court (those with Segal-Cover scores close to 0 or 1) vote in accord with their preferences regardless of the preferences of the ruling regime. This supports Dahl's assumption, but moderate Justices do not behave in this way. In Figure 5, the local regression ("loess") curve shows that those with middle-range Segal-Cover scores are more likely to vote conservatively when there is a moderate or conservative president. The preferences of the Senate also seem to affect these Justices, with voting taking a decisively more conservative turn when the Senate is right of center.

IV. DISCUSSION

We interpret these tests as lending support both to Dahl's "ruling regime" thesis and our institutional approach to resolving the "countermajoritiarian difficulty." Both accounts predict that Justices will vote their sincere preferences when they hold preferences similar to those of the members of the other branches of government. The empirical evidence indicates that this generally occurs. The empirical evidence also demonstrates sophisticated decisionmaking in which the Justices deviate from their personal preferences when those preferences are not shared by the members of the ruling regime. Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government. This behavior is consistent with our institutional approach, but Dahl's analysis cannot account for it.

We believe these results are consequential, for they carry with them implications bearing on normative questions raised by the "countermajoritiarian difficulty." The "difficulty" is, of course, embedded in a complex scheme for constitutional democracy. Under this scheme, we want the Court to safeguard the constitutionally protected rules of the democratic game while avoiding interventions that thwart the constitutionally legitimate actions of the majority. Dahl argued that the latter is not particularly problematic because of the correspondence of preferences between the members of the Court and the elected ruling regime.[62] This, however, raises an alternative normative problem for Dahl: If the ruling regime hypothesis holds, with how much confidence can we rely on the Court to check the majority's attempts to violate the rules of the game?

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[62] Dahl, *supra* note 1, at 285.

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We argue, in contrast, that the separation of powers scheme created by the Founders established an institutional interdependence among the branches that allows for the possibility that the Court might be a protector of the rules of the game without producing a substantial countermajoritarian effect. This institutional structure anticipates the possibility of differences in preferences, thereby producing a check on elected officials, but also creates institutional incentives to diminish the antidemocratic effects of those differences. We believe significant evidence exists to support the claim that it is the institutional constraints embedded in our basic constitutional scheme that should actually diminish the anxieties generated by the "countermajoritarian difficulty."

Seen in this way, Dahl was justified in discounting concerns about the "countermajoritarian difficulty," but he did not offer the most compelling justification for his position. Dahl rested his argument on the related claims that presidents select Supreme Court Justices who share their preferences and those Justices will subsequently vote in accordance with those preferences.[63] We present no evidence with regard to the first claim but it is certainly the case that history is replete with anecdotal evidence indicating that presidents occasionally make "mistakes" in their choice of judicial nominees. Our statistical evidence, as well as a growing body of related research, challenges the simplicity of the second claim. As an alternative resolution of the "difficulty," we offer an institutional account that is weaker in its assumptions and more comprehensive in its approach. Unlike Dahl's account, it does not depend on an empirical assertion about the substantive content of judicial preferences. Ours is grounded instead in the stability of the institutional scheme instantiated in the Constitution, and it rests merely on the claim that Justices care about the nature and content of the law and that they will adopt the most effective means to influence it.

[63] *Id.* at 284-85.

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