

# Confirmation Bias in the United States Supreme Court Judicial Database

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## **Abstract**

This paper investigates the possibility of confirmation bias in the United States Supreme Court Judicial Database (USSCJD) issue and judgment codes. We ask whether an opinion issued by a liberal Court is more likely to be assigned a USSCJD issue code that leads to a liberal judgment code, relative to an otherwise similar opinion issued by a conservative Court (and vice versa). Using a sample of cases from the USSCJD that pose comparable issue coding choices, we find that cases are disproportionately assigned issue codes that tend to lead to judgment codes confirmatory of expectations about the ideological character of the judgments typically issued by the deciding Court. We also find considerable evidence that variation in the Court's decision making as a function of congressional preferences has been "coded out" of the USSCJD as a result of confirmation bias in the issue codes. Finally, we recode a subset of the USSCJD judgment codes to eliminate confirmation bias. We find that this bias may have led many researchers using the original USSCJD judgment codes to reject the hypothesis of congressional constraint on the Court, despite compelling evidence for the existence of such constraint using the recoded judgment codes.

# 1 Introduction

In 1969, the Supreme Court issued a ruling in *Citizen Publishing Co. v. U.S.* (394 U.S. 131 (1969)), upholding the application of the Sherman Antitrust Act to a joint operating agreement formed between the only two newspapers serving Tucson, Ariz. The Court affirmed a district court order requiring the restoration of competition between the two papers.

The district court’s order had been challenged on First Amendment grounds, with the appellants arguing that the application of the Sherman Act to the Tucson papers’ agreement ran afoul of the First Amendment’s prohibition on congressional interference with the freedom of the press. The Court rejected the First Amendment challenge to the Sherman Act’s application.

In the United States Supreme Court Judicial Database (USSCJD), the primary database used by researchers to study the Supreme Court, this case is coded as involving two legal provisions: the Sherman Act and the First Amendment.<sup>1</sup>

*Citizen Publishing* also receives an “issue” code in the USSCJD. The USSCJD codebook lists approximately 260 choices for such issue codes, which themselves are grouped into 13 broader issue areas. Unlike the procedure for coding legal provisions, there are no apparent rules or guidelines for this coding decision; the USSCJD codebook acknowledges that “criteria for the identification of issues are hard to articulate.” (*USSCJD: Documentation*, 45)

There are 20 distinct issue codes involving the First Amendment (which itself constitutes its own issue area). However, *Citizen Publishing* is coded as involving the issue of antitrust, an issue category within the larger issue area of economic activity.

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<sup>1</sup> The Sherman Antitrust Act is codified as part of Title 15 of the U.S. Code, “Commerce and Trade.” The USSCJD coding of legal provisions is determined by whether any such provisions are mentioned either in the case summary provided by the *Lawyer’s Edition of the United States Supreme Court Reports*, or in the “holdings” summary provided by the official version of the latter.

Twenty-one years later, in *FTC v. Superior Court Trial Lawyers Assn. (SCTLA)* (493 U.S. 411 (1990)), the Court again upheld an application of the Sherman Act against a First Amendment challenge. In this case, a group of lawyers in the District of Columbia had refused to provide legal services to indigent criminal defendants until the District raised its rates for those services. After the District acceded to the group's demands, the Federal Trade Commission brought an antitrust complaint against the boycotting lawyers. The lawyers responded that, because the First Amendment prohibits Congress from abridging the freedom of speech or assembly, the Sherman Act could not be invoked to proscribe boycotts such as their own without violating that prohibition. The Court rejected the First Amendment challenge to the Sherman Act's application.

As in the case of *Citizen Publishing*, *SCTLA* is coded in the USSCJD as implicating two legal provisions: the Sherman Act and the First Amendment. However, unlike the case of *Citizen Publishing*, the USSCJD assigns a First Amendment issue code to *SCTLA*.

The assignment of divergent issue codes to these two cases might seem inconsequential. However, it is not. The USSCJD decision rules for coding judgments as liberal or conservative depend on the issue code or codes assigned to a case, not on the legal provisions coded for a case. Conditional on the Court's disposition of a case, these rules specify whether the judgment in that case is to be coded as liberal or conservative. For example, in cases given antitrust issue codes, judgments that are "pro-competition" are to be coded as liberal judgments. In cases given First Amendment issue codes, judgments in favor of "pro-civil liberties or civil rights claimant[s]" are to be coded as liberal judgments.

Because *Citizen Publishing* is assigned an antitrust issue code, its judgment code follows the former decision rule. The Court's rejection of the First Amendment challenge to the Sherman Act's application is presumably a "pro-competition" judgment. It is therefore assigned a liberal judgment code. Because *SCTLA* is assigned a First Amendment issue

code, however, its judgment code follows the latter decision rule. The Court’s rejection of the First Amendment challenge to the Sherman Act’s application is not a judgment in favor of a “pro-civil liberties claimant.” It is thus assigned a conservative judgment code.

There is, clearly, a certain indeterminacy to the USSCJD issue and judgment codes. Presumably *Citizen Publishing* could have been assigned a First Amendment issue code. In that case, it would also have been assigned a conservative judgment code, as the disposition of the case was not in favor of the “pro-civil liberties claimant.” Likewise, presumably *SCTLA* could have been assigned an antitrust issue code. In that case, it would also have been assigned a liberal judgment code, as the disposition of the case was “pro-competition.”

At a minimum, however, we might expect that these two cases would at least have been assigned the same issue code. Both cases involved the same statute, a challenge to that statute under the same provision of the Constitution, and the same disposition of that constitutional challenge. Presumably both cases should have been coded either as antitrust cases (leading to liberal judgment codes in both cases) or as First Amendment cases (leading to conservative judgment codes in both cases).

Our concern in this paper is whether the assignment of issue codes to these cases (and others like them) was influenced by information about the ideological preferences of the Courts that issued these judgments. The 1968 term Supreme Court that decided *Citizen Publishing* was, relatively speaking, a very liberal Court. The 1989 term Court that decided *SCTLA* was, by contrast, a very conservative court.<sup>2</sup> It seems at least plausible that the issue coding decisions for these cases were influenced by a coder’s expectations about the ideological character of the judgments typically issued by such courts. The Justices, of course, have reputations for being more liberal or more conservative; one popular measure

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<sup>2</sup> The 1968 term was the last term of the Warren Court; the Bailey (2007) estimate of the median Justice’s ideal point for this term is -.63. The comparable estimate for the 1989 term of the Rehnquist Court is .24. For reference, the range of the median Justices’ estimated ideal points from 1950-2002 is -1.01 to .41, with the scale increasing in conservatism.

of the Justices' ideologies is in fact based on editorials written about their preferences at the time of their nominations (Segal and Cover 1989; Segal et al. 1995). Moreover, there is a large literature on the associations that we should expect between the Justices' policy preferences and the Court's decisions.<sup>3</sup>

In other words, perhaps the USSCJD coder expected to find the 1968 Court issuing generally liberal judgments, and the 1989 Court issuing generally conservative judgments. These expectations might then have influenced his issue coding decisions, thereby leading to the expected judgment codes. In the field of psychology, this phenomenon is known as confirmation bias, or the practice of "seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand" (Nickerson 1998, 175). It has been characterized as "perhaps the best known and most widely accepted notion of inferential error to come out of the literature on human reasoning" (Evans 1989, 41). Typically, it is thought to involve a cognitive process that operates outside of the awareness of the subject involved: "The assumption that people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so, is fundamental to the concept" (Nickerson 1998, 175).

Yet despite the apparent plausibility of confirmation bias in the USSCJD issue and judgment codes, its possible existence has not been addressed in the voluminous literature relying on those codes.<sup>4</sup> Instead, researchers have largely accepted the USSCJD issue and judgment codes as valid measures that are exogenous to measures of the Justices' prefer-

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<sup>3</sup> Most recently, this literature includes Segal and Spaeth (2002); McGuire and Stimson (2004); Martin, Quinn, and Epstein (2005); Szmer and Songer (2005); Epstein and Segal (2006); Bonneau et al. (2007); Giles, Blackstone, and Vining (2008); and Landes and Posner (2008).

<sup>4</sup> In addition to the works cited in the previous note, this literature most recently includes Spriggs and Hansford (2002); Bergara, Richman, and Spiller (2003); Hoekstra and Johnson (2003); Collins (2004); Maltzman and Wahlbeck (2004); Bailey, Kamoie, and Maltzman (2005); Hettinger and Zorn (2005); Martin (2006); Hurwitz (2006); Epstein et al. (2007), and Scott (2008). Landes and Posner (2008) object to the USSCJD decision rules for coding judgments in several issue areas but do not question the validity of the USSCJD judgment codes more generally.

ences.<sup>5</sup>

The first section of this paper tests the assumption of exogeneity in the USSCJD issue and judgment codes. We construct a sample of cases from the USSCJD that pose comparable issue coding choices. We then model the issue coding choice as a function of both the ideological preferences of the Court deciding a case, as well as that Court's disposition of the case. We find that the probability that a case is assigned a particular issue code is indeed responsive to both these attributes: decisions issued by the relatively liberal Warren and early Burger Courts were disproportionately assigned issue codes that, conditional on the disposition of a case, tended to lead to liberal judgment codes. The reverse was true for the relatively conservative Rehnquist Court.

The apparent existence of confirmation bias in the USSCJD issue codes has significant implications for substantive analyses of the Court's decision making. We explore these implications for one area of research, namely the possible effects of congressional preferences on the Court's judgments. We find considerable evidence that variation in the Court's decision making as a function of those preferences has been "coded out" of the USSCJD as a result of confirmation bias in the issue codes. When the Rehnquist Court was experiencing liberal congressional pressure to uphold liberal statutes against constitutional challenges, the Court's decisions were overwhelmingly likely to be assigned issue codes leading to conservative judgment codes for pro-statute dispositions. However, when that constraint was removed, and the conservative Rehnquist Court was free to strike liberal statutes at will, the Court's decisions were much more likely to be assigned issue codes leading to conservative judgment codes for anti-statute dispositions.

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<sup>5</sup> The reliability check performed on a random sample of USSCJD cases from the Warren and Burger Courts, which resulted in relatively high rates of inter-coder reliability, does not address concerns about confirmation bias in the USSCJD (*USSCJD: Documentation*, Appendix I). Because there is no reason to believe that the second coder in this reliability check would not have shared the first coder's likely expectations about the effects of the Justices' preferences on their judgments, one would expect to find the former's coding decisions equally biased by those expectations. In this case one would, of course, still observe high inter-coder reliability.

Finally, we recode a subset of the USSCJD judgment codes to eliminate confirmation bias. We find that this bias may have led many researchers using the original USSCJD judgment codes to reject the hypothesis of congressional constraint on the Court, despite compelling evidence for the existence of such constraint using the recoded judgment codes. We conclude with thoughts on more general strategies to reduce the effects of confirmation bias in the USSCJD issue and judgment codes.

## 2 Research Design

Our research design is premised on the assumption that we can identify a sample of cases that pose comparable issue coding choices for USSCJD coders. The hypothesis of confirmation bias suggests that these issue coding choices may be conditioned on both the ideology of the Court deciding a case and on the Court's disposition of that case. That is, opinions issued by liberal courts may be disproportionately assigned issue codes that, given the Court's dispositions, lead to liberal judgment codes, while opinions issued by conservative courts may be disproportionately assigned issue codes that, given the Court's dispositions, lead to conservative judgment codes.

In order to construct a sample of generally comparable cases, we first isolated all cases in the USSCJD that were heard by the Court during the 1953-2001 terms, and that involved a constitutional challenge to a federal statute enacted between 1950-2001.<sup>6</sup> This subset of cases gives us a baseline degree of comparability.

We next identified issue areas in the USSCJD whose judgment coding decision rules generally imply divergent judgment codes for a given judgment in one of these constitutional

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<sup>6</sup> This time frame was chosen in order to take advantage of the interbranch ideal point estimates reported by Michael Bailey (2007), which are available for the period 1950-2002. The initial pool of cases was generated in the USSCJD by selecting all records wherein the authority for the decision was cited as judicial review (AUTHDEC1 or AUTHDEC2 = 1) for the 1953-2001 terms. Cases were then discarded if no entry in the LAW variable for any record referred to a federal statute.

cases. Five of the 13 USSCJD issue areas, namely criminal procedure, civil rights, the First Amendment, due process, and privacy, are governed by decision rules that generally imply liberal judgment codes for judgments that are “anti-statute,” or in favor of the party bringing the constitutional challenge against the statute. For example, in the issue area of criminal procedure, liberal judgment codes are assigned to judgments that are “pro-person accused or convicted of crime.” In the issue areas of civil rights and the First Amendment, liberal judgment codes are assigned to judgments that are “pro-civil liberties or civil rights claimant.” In the issue area of due process, liberal judgment codes are assigned to judgments that are “anti-government” (although takings clause cases are more complicated). In the context of privacy cases, liberal judgment codes are assigned to judgments that are “pro-privacy.” We refer to this set of issue areas as the civil rights/liberties set of issue areas.

By contrast, three issue areas, namely economic activity, federalism, and federal taxation, are governed by decision rules that generally imply liberal judgment codes for judgments that are “pro-statute,” or against the party challenging the statute. For example, in the issue area of economic activity, liberal judgment codes are assigned to judgments that are, variously, “anti-business,” “anti-employer,” “pro-competition,” “pro-liability,” “pro-environmental protection,” or “pro-consumer.” In the issue area of federalism, liberal judgment codes are assigned to judgments that are “pro-federal power.” In the issue area of federal taxation, liberal judgment codes are assigned to judgments that are “pro-United States.” We refer to this set of issue areas as the federal economic regulation set of issue areas.<sup>7</sup>

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<sup>7</sup> Our description of pro- and anti-statute decision rules for the judgment coding process does not fully characterize the complete set of USSCJD judgment coding decision rules for these sets of issue areas. However, we think that the exceptions to our characterization are few rather than many. Moreover, the presence of exceptions to our characterization should bias against any findings of confirmation bias. We did not include the other five USSCJD issue areas in our analysis (i.e., attorneys, unions, judicial power, interstate relations, and miscellaneous), for it is not clear that the judgment coding decision rules for these issue areas lead so clearly to divergent judgment codes for a given judgment, as in the case of the civil rights/liberties and federal economic regulation sets of issue areas.

We next identified cases in the USSCJD that pose a choice between these issue area sets for a USSCJD coder. From the set of legal provisions that are coded by the USSCJD (as reported in its LAW variable), we identified those provisions that imply the possibility of an issue code from the civil rights/liberties set of issue areas, and those that imply the possibility of an issue code from the federal economic regulation set of issue areas. For example, a case whose LAW variable contains a record for the First Amendment could presumably receive a First Amendment issue code, a code that falls into the civil rights/liberties set of issue areas. Likewise, a case whose LAW variable contains a record for a federal statute located in Title 18 of the U.S. Code, the section of the Code that deals with “Crimes and Criminal Procedure,” could presumably receive a criminal procedure issue code, an issue code that also falls into the civil rights/liberties set of issue areas.

By contrast, a case whose LAW variable contains a record for the Interstate Commerce Clause could presumably receive a federalism issue code, a code that falls into the federal economic regulation set of issue areas. A case whose LAW variable contains a record for a federal statute located in Title 15 of the U.S. Code, the section of the Code dealing with “Commerce and Trade,” could presumably receive an economic activity issue code. The complete list of these legal provisions, and the potential issue codes that they imply, is reported in Appendix A.

Within the set of cases assigned a USSCJD issue code from one of the five civil rights/liberties issue areas, we then identified all cases whose records for the LAW variable reported at least one legal provision implying a possible federal economic regulation issue code. Likewise, from within the set of cases assigned a USSCJD issue code from one of the three federal economic regulation issue areas, we identified all cases whose records for the LAW variable reported at least one legal provision implying a possible civil rights/liberties issue code.<sup>8</sup>

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<sup>8</sup> This procedure is similar to that used by Epstein and Segal (2006) in their study of First Amendment

We thus have a set of cases that pose comparable issue coding choices for a USSCJD coder. Any of these cases could presumably be assigned an issue code from either set of issue areas, with the decision rules for each set of issue areas tending to lead to divergent judgment codes for any given judgment. Should the Court rule against a challenged statute in one of these cases, for example, the case could be assigned either a civil rights/liberties issue code, generally leading to a liberal judgment code, or a federal economic regulation issue code, generally leading to a conservative judgment code. The reverse is true for case dispositions that are “pro-statute.”

In the absence of confirmation bias, we have no grounds on which to predict issue coding choices in the USSCJD. However, in the presence of confirmation bias, we would expect to find that, for liberal courts, anti-statute dispositions should be negatively related to the probability that a case is assigned a federal economic regulation issue code (relative to a civil rights/liberties issue code). An anti-statute disposition will generally lead to a liberal judgment code for a case given a civil rights/liberties issue code, while a pro-statute disposition will generally lead to a liberal judgment code for a case given a federal economic regulation issue code. Moreover, we expect to find the reverse to be true for conservative courts: anti-statute dispositions should be *positively* related to the probability that a case is assigned a federal economic regulation issue code, relative to a civil rights/liberties issue code. An anti-statute disposition will generally lead to a conservative judgment code for a case given a federal economic regulation issue code, while a pro-statute disposition will

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cases. While some cases in our sample possess issue codes from more than one issue area, none of these cases were assigned issue codes from both the civil rights/liberties and federal economic regulation sets of issue areas. For all but one of the cases in our sample with multiple issue area codes, the additional issue area code was irrelevant to our sample construction (i.e., for a case with a civil rights/liberties issue code, the legal provision implicating federal economic regulation appeared in the same record as the civil rights/liberties issue code, or vice versa). In the single more problematic case (*Weinberger v. Salfi*, 422 U.S. 749 (1975)), we read the case to ensure that it warranted inclusion as a Fifth Amendment challenge to an “economic” statute, assigned a civil rights/liberties issue code in the USSCJD. Finally, when cases were assigned more than one judgment code, we kept the judgment code assigned to the case records also coded as involving constitutional review of a federal statute. If divergent judgment codes were assigned to these records, then the case was dropped from the sample.

generally lead to a conservative judgment code for a case given a civil rights/liberties issue code.

As a result of the many constraints our research design imposes on the construction of our sample, that sample constitutes only a small fraction of the cases in the USSCJD dataset. However, this does not imply that the remaining cases in the USSCJD, those that lie outside of our sample, are likely to be free of confirmation bias. Rather, we expect confirmation bias, should it exist, to simply be less observable in those cases (at least, using our research design).

### 3 Data, Estimation, and Results

#### 3.1 Estimating Confirmation Bias

Table 1 reports the descriptive statistics for the data we use to estimate the following equations. We first estimate Equation 1, which evaluates the probability that a USSCJD coder will assign a federal economic regulation issue code to one of the cases in our sample, as a function of the ideology of the median Justice and the Court’s disposition of the case.

$$\Pr(\textit{Issue Code}_i = 1) = \Phi (\alpha + \beta_1 \textit{Median Justice}_i + \beta_2 \textit{Case Disposition}_i + e_i) \quad (1)$$

We estimate Equation 1 for two different time periods: the period encompassing the 1962-1980 terms and the period spanning the 1986-2001 terms. The former period includes the Warren Court after its move leftward in the 1962 term and the Burger Court through the last term before the Reagan appointees joined the Court. In the presence of confirmation bias, we expect a negative coefficient on the case disposition variable for this time period: when the liberal-to-moderate Warren/Burger Court strikes a statute, there should be a decreased

likelihood that these cases will be assigned federal economic regulation issue codes (that would tend to lead to conservative judgment codes). The latter period encompasses the Rehnquist Court through the 2001 term. In the presence of confirmation bias, we expect a positive coefficient on the case disposition variable for this period: when the conservative Rehnquist Court strikes a statute, there should be an increased likelihood that these cases will be assigned federal economic regulation issue codes (that would tend to lead to conservative judgment codes). In the absence of confirmation bias, we would not expect any significant relationships between case disposition and issue code assignment, for either period.<sup>9</sup>

The simplest measure of case disposition for our sample of constitutional cases is whether the Court struck a statute as unconstitutional. We use the USSCJD indicator for whether a statute was ruled unconstitutional, with 0 indicating an upheld statute, and 1 indicating a struck statute.<sup>10</sup> Because the judgment coding decision rules for federal economic regulation issue areas seem most applicable to traditionally liberal statutes (i.e., those that are anti-business, anti-employer, pro-liability, pro-consumer, etc.), we also estimate the effects of case disposition using the subset of cases involving liberal statutes only (defined as those enacted by a Congress with a majority of Democratic legislators in at least one chamber). We expect the effects of confirmation bias to be stronger when the Court is reviewing liberal statutes.

However, we encounter a problem of perfect prediction for the Warren/Burger Court period: every single case in this period wherein the Court struck a statute was assigned a civil rights/liberties issue code in the USSCJD. While this is relatively powerful evidence of confirmation bias, it prevents the estimation of coefficients and standard errors for the case disposition variable for this period. We therefore developed two alternative measures of case disposition that allow for some variation across cases, and permit estimation to proceed. Our

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<sup>9</sup> As reported in Table 1, the means of the Bailey (2007) estimates of the ideal points of the median Justices are -.18 across the 1962-1980 terms, and .24 across the 1986-2001 terms.

<sup>10</sup> Cases involving multiple statutes were divided into separate observations, one for each statute.

measurement strategy for these measures of case disposition, which incorporate information about the ideology of the challenged statutes, is detailed in Appendix B. For these two measures, smaller values indicate pro-statute dispositions for more liberal statutes; larger values indicate anti-statute dispositions for more liberal statutes. We thus preserve the same expectations for the coefficients on these measures that we have for the “pure” case disposition measure.

The first column in Table 2 reports estimates for the “pure” case disposition measure using all the cases in our sample; the second column reports the results for this measure using only the cases involving liberal statutes; both estimates are available for the Rehnquist Court only. The third and fourth columns report the results for the case disposition measures that incorporate information about the ideology of the challenged statutes; these estimates are available for both periods. We control for the ideology of the median Justice using the median Bailey (2007) ideal point estimate for the sitting Justices.<sup>11</sup> The estimates provide consistent evidence of confirmation bias in the USSCJD issue codes. The positive and significant coefficients on the “pure” case disposition measure for the Rehnquist Court indicate that when this conservative Court struck a federal statute, those cases were disproportionately likely to be assigned federal economic regulation issue codes. Conversely, when the Rehnquist Court upheld a federal statute against a constitutional challenge, those cases were disproportionately likely to be assigned civil rights/liberties issue codes. Given the judgment coding rules, these issue coding decisions imply that judgments issued by this Court would disproportionately have been assigned conservative judgment codes, irrespective of the divergence in the Court’s actual case dispositions.

Moreover, and also consistent with our expectations, the Rehnquist Court results demonstrate that the effects of confirmation bias appear to be sharper for cases involving liberal statutes. For example, the coefficient on the “pure” case disposition measure increases

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<sup>11</sup> Omitting this control variable makes little difference to the results for the case disposition variables.

by approximately 50% when we restrict the sample to cases involving liberal statutes only, while the standard error remains relatively unchanged.

Table 3 reports simulated probabilities for these estimates, holding the ideology of the median Justice at its mean. For the “pure” measure of case disposition using all statutes, there was a 59% chance that a Rehnquist Court case striking a statute would be assigned a federal economic regulation issue code; this probability increases to 72% for cases involving liberal statutes only. However, there was only a 23% chance that a case upholding a statute would be assigned that issue code (21% for cases involving liberal statutes only).

We also see positive and significant coefficients for the Rehnquist Court on the two measures of case disposition that incorporate information about statute ideology. The simulated probabilities for these estimates reported in Table 3 tell us that, should the Rehnquist Court have struck the most liberal statute in our sample, that case would have had an 81-82% chance of being assigned a federal economic regulation issue code. A case upholding such a statute would have had only a 10-11% chance of being assigned that issue code.

By contrast, the negative and significant coefficients on these two measures of case disposition for the Warren/Burger Court period indicate that, when the relatively liberal Warren and early Burger Courts struck more liberal statutes, these cases were more likely to be assigned civil rights/liberties issue codes. Conversely, when these Courts upheld more liberal statutes, those cases were more likely to be assigned federal economic regulation issue codes. Given the judgment coding rules, these issue coding decisions imply that judgments issued by these Courts would disproportionately have been assigned liberal judgment codes, irrespective of the divergence in the Court’s actual case dispositions.

Again, Table 3 reports simulated probabilities for these estimates. Should the relatively liberal Warren or Burger Courts have struck the most liberal statute in our sample, there was a simulated probability ranging from only 1% to 5% that the case would have been

assigned a federal economic regulation issue code. Should these Courts have upheld such a statute, however, that probability increases to between 36% and 67%.

Figures 1 and 2 plot the predicted probabilities that a case will be assigned a federal economic regulation issue code over the full range of values for the DW-NOMINATE measure of case disposition, for both time periods, holding the ideology of the median Justice at its mean. These figures display quite clearly the presence of confirmation bias in the USSCJD issue codes: issue code assignment is conditional on both the ideology of the Court deciding a case and the disposition of that case, such that liberal courts are disproportionately assigned issue codes tending to lead to liberal judgment codes, and conservative courts are disproportionately assigned issue codes tending to lead to conservative judgment codes.

In sum, the results reported in Tables 2 and 3 are consistent with the hypothesis of confirmation bias. USSCJD coders, perhaps having *ex ante* expectations that liberal Courts will make liberal judgments and that conservative Courts will make conservative judgments, appear to have disproportionately selected issue codes that tend to lead to judgment codes confirmatory of those expectations. Despite the small samples, in all models these results are statistically significant with more than a 90% level of confidence; in several of the models the estimated relationship is even more pronounced.

### 3.2 Testing Models of Congressional Constraint

The apparent confirmation bias in the USSCJD issue codes would seem to have the potential to derail many substantive analyses of the Court's decision making. One potential problem area lies in testing models of congressional constraint on the Court's decisions.<sup>12</sup> In the constitutional context, these models generally predict that the Court will condition its de-

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<sup>12</sup> The possible effect of congressional preferences on the Court's judgments has been the subject of numerous empirical studies (Segal 1997; Hansford and Damore 2000; Spriggs and Hansford 2001; Segal and Spaeth 2002; Friedman and Harvey 2003; Sala and Spriggs 2004; Martin 2006; Harvey and Friedman 2006, 2009).

cisions on the preferences of pivotal congressional legislators in order to avoid congressional sanctions.<sup>13</sup> A conservative court confronting a liberal Congress, for example, may moderate its decisions in a liberal direction. Should that same Court at some point face a more conservative Congress, models of congressional constraint predict that the Court will shift its decisions back in a more conservative direction.

Empirical tests of these models have generally failed to find evidence of congressional constraint, however, leading many to dismiss the models as incorrectly specified (Segal 1997; Hansford and Damore 2000; Spriggs and Hansford 2001; Segal and Spaeth 2002; Sala and Spriggs 2004; Martin 2006). But these published null results have all been obtained using the USSCJD judgment or vote codes as the dependent variable or variables, giving rise to the question whether another explanation for the empirical failure of models of congressional constraint may lie in the USSCJD issue coding decisions.

An example may illustrate the problem. Both *Touby v. United States* (500 U.S. 160 (1991)) and *United States v. Lopez* (514 U.S. 549 (1995)) involved individuals convicted under criminal provisions of federal regulatory statutes. In the former case, Daniel and Lyriisa Touby were convicted of violating provisions of the Controlled Substance Act prohibiting the manufacture of or the conspiracy to manufacture controlled substances. In the latter case, Alfonso Lopez, Jr. was convicted of possessing a firearm in a school zone, in violation of the Gun-Free School Zones Act of 1990.

In both cases the defendants challenged their convictions on the grounds that the enabling federal statute lacked constitutional sanction. In the former case, the Toubys argued that Congress, in an effort to more effectively regulate the swiftly evolving market in phar-

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<sup>13</sup> The congressional sanctions contemplated typically include the powers of Congress to alter the Court's appellate jurisdiction, manipulate the number and composition of the lower federal courts, control the Court's budget, change the size and composition (via impeachment) of the Court, and refuse to implement Court decisions (Nagel 1965; Landes and Posner 1976; Stone et al. 1991; Rosenberg 1991, 1992; Fisher 1993; Mcnollgast 1995; Epstein, Knight, and Martin 2001; Cross and Nelson 2001; Segal and Spaeth 2002; Martin 2006).

maceuticals, had delegated too much authority to the Attorney General to add new drugs to the schedules of controlled substances. In the latter case, Lopez argued that Congress did not have the constitutional authority under the Interstate Commerce Clause to regulate the possession of guns in school zones.

The Court rejected the constitutional challenge to the Controlled Substances Act, upholding the defendants' convictions, but accepted the challenge to the Gun-Free School Zones Act, reversing Lopez's conviction. The Court thus issued divergent judgments in relatively similar cases. Presumably we would expect to see divergent USSCJD judgment codes in these two cases. However, this is not what we observe.

*Touby* is coded as involving the issue of statutory construction of narcotics statutes, an issue code within the larger issue area of criminal procedure.<sup>14</sup> As noted earlier, the USSCJD codebook specifies that, in the context of issues pertaining to criminal procedure, judgments that are “pro-person accused or convicted of crime” are to be coded as liberal judgments. Because the judgment in *Touby* was not in favor of the criminal defendants in the case, the case is assigned a conservative judgment code.<sup>15</sup>

By contrast, *Lopez* is coded as involving miscellaneous economic regulation, an issue code within the larger issue area of economic activity, as well as miscellaneous constitutional conflict over national supremacy implicating *inter alia* the Interstate Commerce Clause, an issue code within the larger issue area of federalism. As also noted earlier, the USSCJD assigns liberal judgment codes to judgments that are “pro-statute” in the area of economic regulation. Following this decision rule, *Lopez* is given a conservative judgment code for this issue code. Likewise, in the federalism issue area, judgments that are “pro-federal power”

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<sup>14</sup> Given that *Touby* involved a constitutional challenge, this issue coding choice is somewhat odd since the codebook states that this issue code “by definition exclude[s] the constitutionality of these laws” (*USSCJD: Documentation*, 45).

<sup>15</sup> In terms of legal provisions, *Touby* is coded as involving the constitutional provisions involving the delegation of powers by Congress and the separation of powers, as well as the Controlled Substances Act (part of Title 21 of the U.S. Code, “Food and Drugs”).

are to be coded as liberal judgments; because the judgment in *Lopez* was not in favor of federal power, the case is assigned a conservative judgment code for this issue code as well.<sup>16</sup>

The 1990 and 1994 term courts that decided *Touby* and *Lopez* were similarly conservative courts.<sup>17</sup> However, the 1990 term Court lay considerably to the right of the then Democratic Congress, while the 1994 term Court saw Congress shift significantly to the right as a result of the 1994 congressional elections.<sup>18</sup> If the hypothesis of congressional constraint on the Court is correct, then we would expect the Rehnquist Court to have issued more liberal decisions when it was constrained by more liberal congressional preferences (e.g., by upholding the regulatory statute at issue in *Touby*) and to have issued more conservative decisions when it was unconstrained by those preferences (e.g., by striking the regulatory statute at issue in *Lopez*). However, in the presence of confirmation bias we would expect to see issue coding decisions that tend to lead to conservative judgment codes for Rehnquist Court decisions, irrespective of the variation in the Court's dispositions.

In other words, confirmation bias in the USSCJD issue codes may work to leech out any variation in the Court's decisions that was not expected by USSCJD coders. Those coders appear to expect a conservative Court to issue largely conservative judgments (e.g., by limiting the power of Congress to enact economic regulatory statutes). Should the Court issue a more liberal judgment (e.g., by upholding the power of Congress to enact economic regulatory statutes), there appears to be a high probability that that case will be assigned an issue code that will nonetheless lead to a conservative judgment code for the case. The analyst who relies on the USSCJD judgment codes in his tests of models of congressional

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<sup>16</sup> In terms of legal provisions, *Lopez* is coded as involving the Interstate Commerce Clause and the Gun-Free School Zones Act (part of Title 18 of the U.S. Code, "Crimes and Criminal Procedure").

<sup>17</sup> The Bailey (2007) estimate of the median Justice's ideal point for the 1990 term is .23, and for the 1994 term is .21.

<sup>18</sup> A floor median model of congressional constraint generates a value of congressional constraint for the 1990 term Court of -.27 in Bailey (2007) space, meaning the Court would have to locate its decisions .27 units to the left in order to avoid congressional reprisal, while the 1994 term Court was unconstrained by congressional preferences.

constraint, then, may not observe any variation in the character of the Court’s decisions as a function of that constraint. Such variation may largely have been coded out of the USSCJD database.

In order to explore these possible effects of confirmation bias on tests of models of congressional constraint, we first estimated whether there are any effects from congressional constraint on the USSCJD issue coding process. That is, when a conservative Court faces no congressional constraint, presumably it is free to dispose of constitutional challenges to regulatory statutes as it pleases (i.e., to strike such statutes). Given confirmation bias in the USSCJD issue codes, we would expect such cases disproportionately to be assigned federal economic regulation issue codes, thereby leading to conservative judgment codes. Suppose that Court comes under pressure from a more liberal Congress to issue more liberal judgments, however (i.e., to uphold challenged regulatory statutes). We might then expect there to be an increased likelihood that those cases will disproportionately be assigned civil rights/liberties issue codes, that will nonetheless continue to lead to conservative judgment codes.

Table 4 reports the estimates from Equation 2, which evaluates the likelihood that a USSCJD coder will assign a federal economic regulation issue code to one of the cases in our Rehnquist Court sample, as a function of the preferences of the median Justice and congressional constraint on the Court.<sup>19</sup>

$$\begin{aligned} \Pr(\textit{Issue Code}_i = 1) &= \Phi (\alpha + \beta_1 \textit{Median Justice}_i \\ &+ \beta_2 \textit{Congressional Constraint}_i + e_i) \end{aligned} \quad (2)$$

The measurement of the three *Congressional Constraint* variables is detailed in Ap-

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<sup>19</sup> We are unable to estimate this model on the Warren and Burger Court cases due to insufficient variation in congressional constraint during this period. Tables 3 and 4 thus report results from the sample of Rehnquist Court cases only.

pendix C; all three measures are decreasing in liberal congressional constraint on the Rehnquist Court. The hypothesis of confirmation bias thus implies an expectation of positive coefficients on all three variables: as liberal congressional constraint decreases, we expect to see an increase in the probability that the Court's decisions are assigned federal economic regulation issue codes. These issue codes will generally imply conservative judgment codes when the Court strikes regulatory statutes. By contrast, as liberal congressional constraint on the Court increases, we expect to see an increase in the probability that the Court's decisions are assigned civil rights/liberties issue codes. These issue codes will generally imply conservative judgment codes when the Court *upholds* regulatory statutes.

Across all three measures of congressional constraint, the results are consistent with these expectations. For all three measures of congressional constraint, a decrease in liberal congressional constraint on the Rehnquist Court is associated with an increase in the probability that the Court's decisions are assigned federal economic regulation issue codes; these coefficients are all significant at a 90% confidence level.

Table 5 reports simulated quantities of interest for these models. When the Rehnquist Court was facing the maximum level of liberal congressional constraint during the 1986-2001 terms, its decisions had a predicted probability of being assigned a federal economic regulation issue code that ranged from only 9% to 13%, depending on the measure of congressional constraint. But when that Court was free of congressional constraint (i.e., after the 1994 congressional elections), this probability increased to between 55% and 64%. In other words, during the period of liberal congressional constraint, when the Court was presumably under pressure to uphold regulatory statutes against constitutional challenges, the Court's decisions were overwhelmingly likely to be assigned issue codes leading to conservative judgment codes for *pro*-statute dispositions. However, when that constraint was removed, and the conservative Rehnquist Court was free to strike such statutes at will, the Court's decisions were much more likely to be assigned issue codes leading to conservative judgment codes for

*anti*-statute dispositions.

These results become even sharper when we restrict the sample to cases involving challenges to liberal statutes only. For this sample, a case decided during the period of maximum liberal constraint on the Rehnquist Court had a predicted probability of being assigned a federal economic regulation issue code ranging from only 5% to 8%. This probability increases to between 73% and 80% for cases decided during the post-1994 period, when the Court faced no congressional constraint on its decisions. Figure 3 plots the predicted probability that a case will be assigned a federal economic regulation issue code over the full range of values of congressional constraint for the floor median model using liberal statutes only.

These results are consistent with the hypothesis that confirmation bias in the USSCJD issue codes may have an impact on our analyses of models of congressional constraint. Tables 4 and 5 suggest that even if the Court behaves in a manner predicted by those models, empirical analysts relying on the USSCJD judgment codes might not *observe* that behavior. While the Court might in fact issue more liberal judgments when it faces liberal congressional constraint, relative to its decisions when it faces no congressional constraint, an analysis using the USSCJD judgment codes may instead report a relatively constant pattern of conservative judgments by the Court. Many analysts might then conclude, incorrectly, that the Court does not respond to congressional constraint.

We test the extent of the problem that confirmation bias may pose for analyses of congressional constraint by comparing the results from such an analysis using two different versions of the USSCJD judgment codes: the original judgment codes and a version of those codes that was recoded to eliminate (or at least substantially reduce) confirmation bias.

Our recoding strategy takes advantage of the fact that the cases in our sample were selected because they could be assigned issue codes from either of two alternative sets of issue areas. The possibility of confirmation bias arises because these two sets of issue areas

generally imply divergent judgment codes for the same judgment, and because a USSCJD coder has discretion in the choice of issue codes. In order to eliminate (or at least reduce) the possibility of confirmation bias in the judgment codes, we eliminated this choice over issue codes. That is, we assigned to all cases in our Rehnquist Court sample an issue code from the federal economic regulation set of issue areas. If a case had originally been assigned a federal economic regulation issue code in the USSCJD, then we left its judgment code alone. If a case had originally been assigned a civil rights/liberties issue code, then we recoded its judgment code to follow the decision rules for cases falling into the federal economic regulation set of issue areas.<sup>20</sup>

Table 6 reports the probit estimates for Equation 3, which is a simple separation of powers model. That is, the probability that the Rehnquist Court will issue a judgment coded as liberal in the USSCJD is modeled as a function of the preferences of the median Justice, as well as the direction and magnitude of congressional constraint.

$$\begin{aligned} \Pr(\textit{Judgment Code}_i = 1) = & \Phi (\alpha + \beta_1 \textit{Median Justice}_i \\ & + \beta_2 \textit{Congressional Constraint}_i + e_i) \end{aligned} \quad (3)$$

We employ the same three congressional constraint variables that were used to estimate Equation 2; all three measures are decreasing in liberal congressional constraint on the Rehnquist Court. The hypothesis of congressional constraint predicts negative coefficients on all three constraint variables: decreasing liberal congressional constraint should lead to a decrease in the probability that the Court issues liberal judgments.

Using the original USSCJD judgment codes as the dependent variable, the top set of results in Table 6 paints a picture consistent with the bulk of the empirical literature

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<sup>20</sup> This recoding procedure was also used by Epstein and Segal (2006) in their study of First Amendment cases. Of the 26 observations in our Rehnquist Court sample with civil rights/liberties issue codes, the recoding resulted in 23 judgment codes changing direction (i.e., from liberal to conservative, or vice versa).

on this question: there is no relationship between congressional constraint and the Court's judgments in any of the three models estimated.

The bottom set of results reported in Table 6 uses the recoded judgment codes as the dependent variable. As this second set of estimates indicates, the first set of results appears to be a product of confirmation bias in the USSCJD issue codes. Across all three measures of congressional constraint, the coefficients on this variable are in the predicted direction and are significant at greater than a 99% confidence level.

Table 7 demonstrates the substantive import of this second set of results using simulated probabilities. According to the results using the recoded USSCJD judgment codes, when the Rehnquist Court was facing the maximum degree of liberal congressional constraint, the predicted probability that it would issue a liberal judgment lay between 99.3% and 99.7%. When this congressional constraint disappeared after the 1994 congressional elections, the probability that the Rehnquist Court would issue a liberal judgment dropped to between 11% and 25%.

Figure 4 graphs the predicted probabilities that a case will be assigned a liberal judgment code, as a function of congressional constraint in the floor median model, for both the original USSCJD judgment codes and the recoded version of those codes. This figure nicely demonstrates the danger for the analyst in testing models of congressional constraint using the USSCJD judgment codes.

## 4 Conclusion

The USSCJD has proven to be a valuable resource for the study of the Supreme Court. It has been used to produce numerous studies of Supreme Court decision making; its coding procedures have also been replicated in the United States Courts of Appeals databases.

Many of the variables reported in the USSCJD may be entirely unproblematic. Our results indicate, however, that the USSCJD issue and judgment codes should perhaps not be accepted without considerable caution. Not only does there appear to be substantial confirmation bias in those codes in our sample of USSCJD cases, but also that bias is large enough to significantly affect analyses of the Court's decision making using that sample.

One possible strategy for dealing with the apparent presence of bias in the USSCJD issue codes is to pursue the same recoding strategy used in Tables 6 and 7. That is, suppose an analyst wanted to ask a question involving the Court's criminal procedure cases. Were that analyst to construct her sample using only those cases categorized as "criminal procedure" cases by the USSCJD, she would run the risk of considerable selection bias in her sample. The cases assigned "criminal procedure" issue codes are disproportionately likely to be those cases whose dispositions, following the judgment coding rules for this issue area, tend to lead to judgment codes confirmatory of expectations about the ideological character of judgments issued by the deciding Court. Cases whose dispositions do not tend to lead to such judgment codes, under the judgment coding rules for the criminal procedure issue area, are disproportionately likely to be assigned different issue codes, ones more likely to lead to confirmatory judgment codes.

To address this issue, the analyst could add to her sample all cases with an entry in the USSCJD LAW variable that appears to be related to criminal procedure. These entries could include the Fourth Amendment and Title 18 of the U.S. Code, as well as any other federal statute whose criminal provisions were at issue (these statutes would be harder to find). The analyst would then want to recode the judgment codes for the resulting sample of cases, using the judgment coding rules from a single issue code.

The primary problem with this strategy is the incomplete coding of the LAW variable. This variable is only coded for constitutional provisions, federal statutes, and court rules.

Since it is not coded for state or local legislative enactments, among other omissions, a recoding strategy for reducing confirmation bias will miss a large fraction of the Court's cases.

A second strategy may be to develop alternative measures of the Court's judgments. It is worth noting that other subfields largely eschew the subjective coding of policy decisions. For example, in the field of congressional politics, current research seeks to improve the accuracy of measures of bill location estimated from roll call votes (e.g., Clinton (2008)). It may well be time for students of judicial politics to explore similar strategies.

## Appendix A

### Laws Implying Civil Rights/Liberties Issue Areas

#### Acts and U.S. Code Provisions

Americans with Disabilities Act  
Age Discrimination in Employment Act  
Civil Rights Act of 1964  
Civil Rights Act of 1957  
Civil Rights Act of 1991  
Equal Access to Justice Act  
Freedom of Information, Sunshine, or Privacy Act  
Education of the Handicapped, or Education for All Handicapped Children Acts  
Jencks Act  
Reconstruction Civil Rights Acts  
Smith, Subversive Activities Control, or Communist Control Acts  
U.S. Code Title 18 (Crimes and Criminal Procedure)  
Voting Rights Act of 1965  
28 U.S.C 2241-2255 (Habeas Corpus)

#### Constitutional Provisions

Bills of Attainder Clause  
Exclusionary Rule  
State Bills of Attainder Clause  
Writ of Habeas Corpus Clause  
1st Amendment  
2nd Amendment  
3rd Amendment  
4th Amendment  
5th Amendment  
6th Amendment  
7th Amendment  
8th Amendment  
9th Amendment  
13th Amendment  
14th Amendment  
15th Amendment  
24th Amendment

### Laws Implying Federal Economic Regulation Issue Areas

#### Acts and U.S. Code Provisions

AFDC provisions of the Social Security Act  
Atomic Energy Act  
Bankruptcy Code, Bankruptcy Act or Rules, or Bankruptcy Reform Act of 1978  
Clayton Act  
Clean Air Act  
Employee Retirement Income Security Act

Federal Communication Act of 1934  
Federal Employees' Compensation Act  
Federal Employers' Liability Act  
Federal False Claims Act  
Federal Food, Drug, and Cosmetic Act, and related statutes  
Federal Insecticide, Fungicide, and Rodenticide Act  
Federal Power Act  
Federal Tort Claims Act

Federal Trade Commission Act  
Federal Water Pollution Control Act  
Interstate Commerce Act  
Internal Revenue Code  
Longshoremen and Harbor Workers' Compensation Act  
Medicaid provisions of the Social Security Act  
Medicare provisions of the Social Security Act  
Miller Act  
Motor Carrier Act  
National Environmental Policy Act  
Natural Gas, or Natural Gas Policy Acts  
Public Utility Regulatory Policy Act  
Robinson-Patman Act  
Securities Act of 1933, Securities and Exchange Act of 1934, or Williams Act  
Sherman Act  
Submerged Lands Act  
Social Security Act, including Social Security Disability Benefits Reform Act  
Supplemental Security Income Act  
Truth in Lending Act  
Tucker Act  
U.S. Code Title 7 (Agriculture)  
U.S. Code Title 11 (Bankruptcy)  
U.S. Code Title 12 (Banks and Banking)  
U.S. Code Title 15 (Commerce and Trade)  
U.S. Code Title 16 (Conservation)  
U.S. Code Title 17 (Copyrights)  
U.S. Code Title 19 (Customs Duties)  
U.S. Code Title 21 (Food and Drugs)

U.S. Code Title 23 (Highways)  
U.S. Code Title 26 (Internal Revenue Code)  
U.S. Code Title 27 (Intoxicating Liquors)  
U.S. Code Title 30 (Mineral Lands and Mining)  
U.S. Code Title 31 (Money and Finance)  
U.S. Code Title 33 (Navigation and Navigable Waters)  
U.S. Code Title 35 (Patents)  
U.S. Code Title 38 (Veterans' Benefits)  
U.S. Code Title 45 (Railroads)  
U.S. Code Title 46 (Shipping)  
U.S. Code Title 47 (Telegraphs, Telephones, and Radiotelegraphs)  
U.S. Code Title 48 (Territories and Insular Possessions)  
U.S. Code Title 49 (Transportation)

#### Constitutional Provisions

Bankruptcy Clause  
Contracts Clause  
Direct Tax Clause  
Export Tax Clause  
Export/Imports Clause  
Guarantee Clause  
Interstate Commerce Clause  
Patent and Copyright Clause  
Port Preference Clause  
Supremacy Clause  
10th Amendment  
11th Amendment  
16th Amendment  
21st Amendment

## Appendix B

### Measures of Pro- and Anti-Statute Dispositions

As noted in the text, we require a measure or measures of case disposition that will permit estimation of the effects of case disposition on issue code assignment for the Warren/Burger Court period. Fortunately, we can acquire additional information about the challenged federal statutes in our sample, and use this information to construct such measures.

For each observation, we identified the Congress that enacted the statute or part of a statute whose constitutionality was at issue. These statutes have been frequently amended. The decision rule used was to first identify the specific section or sections of the statute actually being reviewed by the Court, and then to identify both the original enacting date and all reenactments of or amendments to this section or sections. As long as the challenged language of the statute remained substantially intact through all amendments and/or reenactments, the most recent reenacting or amending Congress was adopted as the enacting Congress.

We then constructed two measures of the ideology of the challenged statutes, at the level of the enacting Congress.<sup>21</sup> We constructed these measures for “liberal” statutes only (i.e., those enacted by a Congress with at least one chamber a majority of whose seats were held by Democratic legislators).

Our first measure of statute ideology is the average of the DW-NOMINATE estimated bill locations in the enacting House. While the bill-specific locations estimated in DW-NOMINATE are not well-identified, the average of these locations for an entire Congress is a reasonably reliable estimate of the policy impact of that Congress (Poole and Rosenthal

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<sup>21</sup> Currently, there exist no reliably estimated measures of the policy location of a federal statute, akin to the ideal point estimates available for members of Congress. Some recent papers have used the DW-NOMINATE estimated bill location as a measure of policy location (e.g., Sala and Spriggs (2004)). Poole and Rosenthal (1997) advise against this strategy, however.

1997). This measure is increasing in conservatism.

Our second measure of statute ideology is derived from the Common Space inter-institutional ideal point estimates (Poole 1998). Three prominent models of congressional behavior, namely a floor median model, a committee gatekeeping model under an open rule, and a party gatekeeping model under an open rule, model the chamber medians as the pivotal legislators in determining the policy location of legislation (Krehbiel 1998). We can then take the midpoint between the chamber medians' estimated ideal points as a proxy for the policy impact of the statutes enacted by that Congress. This measure is also increasing in conservatism.

The Court's disposition of the challenge to each statute's constitutionality was then identified using the USSCJD binary code for whether a statute was struck or upheld in a particular case. The original measure of statute ideology was preserved when the Court upheld a statute, and was multiplied by -1 when the Court struck a statute.

Each measure thus reaches its minimum when the Court upholds the most liberal statute in the sample of upheld statutes, and reaches its maximum when the Court strikes the most liberal statute in the sample of struck statutes. These measures are highly correlated with the "pure" case disposition measure for liberal statutes; for the Warren/Burger Court period the correlation coefficients are .45 and .41, while for the Rehnquist Court period the correlation coefficients are .92 and .91 (all correlations are significant at the level of .001 or less).

## Appendix C

### Measures of Congressional Constraint

We measure congressional constraint on the Court under three different models of the legislative process: a floor median model, an open rule committee gatekeeping model, and an open rule party gatekeeping model. The floor median model is motivated by three institutional details of the House and Senate: a majority may order a committee to discharge a bill to the floor, thus preventing committee gatekeeping (Krehbiel 1995, 1997, 1998), any restrictive voting rules must be approved by majority vote, thus ensuring open rules (Krehbiel 1997, 1998), and committees do not possess *ex post* vetoes in the conference stage (Krehbiel 1997, 1998). According to proponents of this hypothesis, these institutions imply that all legislative decisions will be made by the floor medians of both houses of Congress (Krehbiel 1987, 1995, 1997, 1998; Krehbiel and Rivers 1988).

An open rule committee gatekeeping model assumes that congressional committees possess special parliamentary powers that allow them to prevent legislation from reaching the floor, but that once released from committee, bills will be amended to the ideal point of the floor median (Ferejohn and Shipan 1990). An open rule party gatekeeping model assumes that the majority party medians act as gatekeepers. Majority party committee members, acting as agents of the majority party medians, hold back legislation when such action gets the majority party medians better outcomes than would be attained on open floor votes (Krehbiel 1998). However, once released from committee, legislation again is assumed to be located at the ideal point of the floor median.

All three models predict that legislation enacted in a one dimensional policy space will be located in the interval between the ideal points of the House and Senate floor medians. We assume that each law ( $L$ ) enacted by a given Congress may be represented by the midpoint

between the ideal points of the chamber medians in that Congress. We assume further that both Justices and members of Congress have symmetric single-peaked preferences over a common left-right policy continuum.

Should the Court review the constitutionality of a statute  $L$ , its median Justice will select a point on the policy continuum ( $L'$ ) as the standard of constitutionality against which the statute  $L$  will be judged. The median Justice's utility from  $L'$  is a decreasing function of the distance between it and her ideal point ( $C$ ) :  $U(L') = -|C - L'|$ . In the absence of any institutional constraint, the median Justice will select  $C$  as the constitutional standard applied to the statute. If the Court faces institutional constraints, however,  $L'$  may not equal  $C$ . In this case, after the Court chooses  $L'$ , the Congress can choose to punish the Court with retributive legislation. We assume that the Congress will punish the Court only if all pivotal legislators prefer  $L^*$ , or the best constitutional standard they can enact, to  $L'$ . Should at least one pivotal legislator be closer to (or equidistant from)  $L'$  than to  $L^*$ , that member will choose either not to introduce, or to block, legislation disciplining the Court. However, if the pivotal members are all closer to  $L^*$  than to the Court's chosen constitutional standard, those members will act to ensure passage of punitive legislation.

In this constrained case, the median Justice will set  $L'$  as close to her ideal point as possible, while yet forestalling congressional action. The equilibrium location of  $L'$  can be found by constructing a constraint set for each legislative model being considered. For the floor median model, the constraint set consists of the chamber medians and their indifference points with respect to the inter-chamber midpoint. For the gatekeeping models, the constraint set is defined by the chamber medians' and gatekeepers' indifference points with respect to the inter-chamber midpoint.<sup>22</sup>

If the Court median lies within the appropriate constraint set, then the Court is un-

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<sup>22</sup> In the committee gatekeeping model, the gatekeepers are the median members of both chambers' Judiciary Committees; in the party gatekeeping model, the gatekeepers are the majority party medians in both chambers.

constrained and  $L'$  will be set at the ideal point of the median Justice. The congressional constraint variable in this case takes on a value of zero. If the Court median lies to the left (right) of the leftmost (rightmost) point in this set, then the Court is constrained and will set  $L'$  at this leftmost (rightmost) point. The value of the constraint variable then takes on the value of  $L' - C$ . If the Court lies to the left of the constraint set, then this value is positive, and we expect it to have a negative relationship with the judgment variables: the Court is being constrained in a conservative direction, which should lead to a greater probability of a conservative judgment. If the Court lies to the right of the constraint set, then this value is negative, and we also expect it to have a negative relationship with the judgment variables: the Court is being constrained in a liberal direction, which should lead to a greater probability of a liberal judgment. Finally, because models of congressional influence on the Court assume that the Justices and the Congress are interacting in the same one dimensional policy space, we measure the congressional constraint variable using the Bailey (2007) inter-institutional estimates of congressional and judicial ideology.

## References

- Bailey, Michael A. 2007. "Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51 (3): 433–48.
- Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49: 72–85.
- Bergara, Mario, Barak Richman, and Pablo T. Spiller. 2003. "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28: 247–80.
- Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51: 890–905.
- Clinton, Josh. 2008. "Congress, Lawmaking, and Political Failure? The Case of the Fair Labor Standards Act." Working paper. Princeton University.
- Collins, Paul M. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law & Society Review* 38: 807–32.
- Cross, Frank B., and Blake J. Nelson. 2001. "Strategic Institutional Effects on Supreme Court Decisionmaking." *Northwestern University Law Review* 95: 1437–93.
- Epstein, Lee, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal. 2007. "Ideological Drift among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101: 1483–542.
- Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50: 583–611.
- Epstein, Lee, and Jeffrey A. Segal. 2006. "Trumping the First Amendment?" *Journal of Law and Policy* 21: 81–121.
- Evans, Jonathan St. B. T. 1989. *Bias In Human Reasoning: Cause and Consequences*. Hillsdale, N.J.: Lawrence Erlbaum.
- Ferejohn, John, and Charles R. Shipan. 1990. "Congressional Influence on Bureaucracy." *Journal of Law, Economics and Organization* 6: 1–20.
- Fisher, Louis. 1993. "The Legislative Veto: Invalidated, It Survives." *Law and Contemporary Problems* 56: 273–92.

- Friedman, Barry, and Anna Harvey. 2003. "Electing the Supreme Court." *Indiana Law Review* 78: 123–51.
- Giles, Micheal W., Bethany Blackstone, and Richard L. Vining, Jr. 2008. "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making." *Journal of Politics* 70: 293–306.
- Hansford, Thomas G., and David F. Damore. 2000. "Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making." *American Politics Quarterly* 28: 490–510.
- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31: 533–62.
- Harvey, Anna, and Barry Friedman. 2009. "Ducking Trouble: Congressionally-Induced Selection Bias in the Supreme Court's Agenda." *Journal of Politics* . Forthcoming.
- Hettinger, Virginia A., and Christopher Zorn. 2005. "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court." *Legislative Studies Quarterly* 30: 5–28.
- Hoekstra, Valerie, and Timothy Johnson. 2003. "Delaying Justice: The Supreme Court's Decision to Hear Rearguments." *Political Research Quarterly* 96: 351–60.
- Hurwitz, Mark S. 2006. "Institutional Arrangements and the Dynamics of Agenda Formation in the U.S. Supreme Court and Courts of Appeals." *Law & Policy* 28: 321–44.
- Krehbiel, Keith. 1987. "Why are Congressional Committees So Powerful?" *American Political Science Review* 81: 929–35.
- Krehbiel, Keith. 1995. "Cosponsors and Wafflers from A to Z." *American Journal of Political Science* 39: 906–23.
- Krehbiel, Keith. 1997. "Restrictive Rules Reconsidered." *American Journal of Political Science* 41: 919–44.
- Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.
- 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: 1151–74.
- Landes, William M., and Richard A. Posner. 1976. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18: 875–901.

- Landes, William M., and Richard A. Posner. 2008. "Rational Judicial Behavior: A Statistical Study." University of Chicago Law and Economics, Olin Working Paper No. 404. Available at SSRN: <http://ssrn.com/abstract=1126403>.
- Maltzman, Forrest, and Paul J. Wahlbeck. 2004. "A Conditional Model of Opinion Assignment on the Supreme Court." *Political Research Quarterly* 57: 551–63.
- Martin, Andrew D. 2006. "Statutory Battles and Constitutional Wars: Congress and the Supreme Court." In *Institutional Games and the U.S. Supreme Court*, ed. James R. Rogers, Jon R. Bond, and Roy B. Flemming. Charlottesville: University of Virginia Press, pp. 3–23.
- Martin, Andrew D., Kevin M. Quinn, and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83: 1275–321.
- McGuire, Kevin T., and James A. Stimson. 2004. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 66: 1018–35.
- McNollgast. 1995. "Politics and Courts: A Positive Theory of Judicial Doctrine and the Rule of Law." *Southern California Law Review* 68: 1631–83.
- Nagel, Stuart S. 1965. "Court-Curbing Periods in American History." *Vanderbilt Law Review* 18: 925–44.
- Nickerson, Raymond S. 1998. "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises." *Review of General Psychology* 2: 175–220.
- Poole, Keith T. 1998. "Recovering a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42: 964–93.
- Poole, Keith T., and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University Press.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power." *Review of Politics* 54: 369–88.
- Sala, Brian R., and James F. Spriggs, II. 2004. "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* 57: 197–208.
- Scott, Kevin M. 2008. "Judicial Behavior and the Rehnquist Court's Federalism Revolution." *American Politics Research* 36: 85–107.
- Segal, Jeffrey A. 1997. "Separation of Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91: 28–44.

- Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557–65.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57: 812–23.
- Spaeth, Harold J. 2008a. *United States Supreme Court Judicial Database, 1953-2007 Terms*. Distributed by the University of South Carolina. Judicial Research Initiative. Accessed on August 5, 2008.
- Spaeth, Harold J. 2008b. *United States Supreme Court Judicial Database, 1953-2007 Terms: Documentation*. Last accessed on March 16, 2009. Available at [http://www.cas.sc.edu/poli/juri/allcourt\\_codebook.pdf](http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf).
- Spriggs, II, James F., and Thomas G. Hansford. 2001. "Explaining the Overruling of U.S. Supreme Court Precedent." *Journal of Politics* 63: 1091–111.
- Spriggs, II, James F., and Thomas G. Hansford. 2002. "The U.S. Supreme Court's Incorporation and Interpretation of Precedent." *Law and Society Review* 36: 139–159.
- Stone, Geoffrey R., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. 1991. *Constitutional Law*. 2d ed. Boston: Little, Brown and Company.
- Szmer, John, and Donald R. Songer. 2005. "The Effects of Information on the Accuracy of Presidential Assessments of Supreme Court Nominee Preferences." *Political Research Quarterly* 58: 151–60.

# Tables and Figures

**TABLE 1. Data Summary Statistics**

	<i>N</i>	<i>Mean</i>	<i>Stand. Dev.</i>	<i>Min</i>	<i>Max</i>
<b><i>Warren/Burger Courts</i></b>					
<b><i>(1962-1980 Terms)</i></b>					
<u><i>Liberal Statutes Only</i></u>					
Issue code*	60	.200	.403	0	1
Median justice	60	-.183	.312	-.885	.061
House winning policy mean	60	-.040	.075	-.221	.221
Common space chamber midpt.	60	-.060	.078	-.172	.165
<b><i>Rehnquist Court</i></b>					
<b><i>(1986-2001 Terms)</i></b>					
<u><i>All Statutes</i></u>					
Issue code*	41	.366	.488	0	1
Judgment code*	41	.366	.488	0	1
Recoded judgment code*	41	.634	.488	0	1
Median justice	41	.241	.049	.200	.380
Strike/Uphold	41	.366	.488	0	1
House winning policy mean	41	-.016	.110	-.202	.202
Common space chamber midpt.	41	-.015	.107	-.172	.163
Median model constraint	41	-.158	.128	-.410	0
Comm. gatekeeping model constraint	41	-.181	.150	-.460	0
Party gatekeeping model constraint	41	-.164	.165	-.460	0
<u><i>Liberal Statutes Only</i></u>					
Issue code*	35	.400	.497	0	1
Judgment code*	35	.314	.471	0	1
Recoded judgment code*	35	.657	.482	0	1
Median justice	35	.243	.052	.200	.380
Strike/Uphold	35	.343	.482	0	1
House winning policy mean	35	-.017	.095	-.095	.172
Common space chamber midpt.	35	-.018	.104	-.172	.163
Median model constraint	35	-.176	.131	-.410	0
Comm. gatekeeping model constraint	35	-.203	.151	-.460	0
Party gatekeeping model constraint	35	-.192	.163	-.460	0

\* *Dependent variable, depending on model.*

**TABLE 2. Probit Estimates of Effect of Case Disposition on USSCJD Issue Codes, by Court Ideology**

	<u>All Statutes</u>		<u>Liberal Statutes Only</u>	
	<i>Strike/Uphold</i>	<i>Strike/Uphold</i>	<i>House Winning Policy Mean</i>	<i>Common Space Chamber Midpt.</i>
<b>Warren/Burger Courts (1962-1980 Terms)</b>				
Median justice	--	--	.797 (.709)	.201 (.671)
Case disposition	--	--	-8.280*** (3.159)	-4.753* (2.704)
Constant	--	--	-1.186*** (.292)	-1.147*** (.324)
N	--	--	60	60
LR $\chi^2$	--	--	8.70***	4.06
Pseudo R <sup>2</sup>	--	--	.145	.068
<b>Rehnquist Court (1986-2001 Terms)</b>				
Median justice	9.144** (4.642)	10.607** (4.888)	10.837** (4.948)	10.749** (4.978)
Case disposition	.995** (.453)	1.477*** (.520)	7.280*** (2.762)	6.946*** (2.663)
Constant	-2.968** (1.226)	-3.418*** (1.317)	-2.820** (1.230)	-2.830** (1.248)
N	41	35	35	35
LR $\chi^2$	7.04**	10.65***	9.68***	9.88***
Pseudo R <sup>2</sup>	.131	.226	.206	.210

\* p ≤ .10; \*\* p ≤ .05; \*\*\* p ≤ .01 (two-tailed)

Note: Coefficients reported with standard errors in parentheses. Dependent variable is 1 if case was assigned a federal economic regulation issue code and 0 if case was assigned a civil rights/liberties issue code.

**TABLE 3. Probability of Federal Economic Regulation Issue Code, by Case Disposition and Court Ideology**

<b>Court</b>	<b>Measure of Case Disposition</b>	<b>Disposition</b>	<b>Pr(Fed. Econ. Reg. Issue Code)<sup>a</sup></b>		
Warren/Burger (1962-1980)	House Winning Policy Mean	Pro-Statute	.671	[.367	.916]
		Anti-Statute	.009	[0	.036]
	Common Space Chamber Midpoint	Pro-Statute	.359	[.170	.574]
		Anti-Statute	.051	[.001	.201]
Rehnquist (1986-2001)	Strike/Uphold (All Statutes)	Pro-Statute	.234	[.114	.384]
		Anti-Statute	.593	[.382	.784]
	Strike/Uphold (Liberal Statutes)	Pro-Statute	.211	[.081	.381]
		Anti-Statute	.723	[.491	.896]
	House Winning Policy Mean	Pro-Statute	.101	[.011	.274]
		Anti-Statute	.824	[.551	.978]
	Common Space Chamber Midpoint	Pro-Statute	.105	[.013	.285]
		Anti-Statute	.807	[.548	.962]

*Note:* Probabilities simulated using Clarify, setting Median Justice at its mean.

<sup>a</sup> Mean probability reported, with 90-percent confidence intervals in brackets.

**TABLE 4. Probit Estimates of Effect of Congressional Constraint on USSCJD Issue Codes, 1986-2001**

	<b>All Statutes</b>		
	<i>Median Model</i>	<i>Committee Gatekeeping Model</i>	<i>Party Gatekeeping Model</i>
Median justice	15.775** (6.516)	14.549** (6.378)	12.948** (5.845)
Congressional constraint	5.000** (2.429)	3.828* (2.031)	3.07* (1.693)
Constant	-3.411*** (1.355)	-3.205** (1.335)	-3.007** (1.281)
N	41	41	41
LR $\chi^2$	6.51**	5.76*	5.44*
Pseudo R <sup>2</sup>	.121	.107	.101
<b>Liberal Statutes Only</b>			
	<i>Median Model</i>	<i>Committee Gatekeeping Model</i>	<i>Party Gatekeeping Model</i>
Median justice	19.348*** (6.951)	18.042*** (6.748)	17.391*** (6.434)
Congressional constraint	6.978*** (2.685)	5.575*** (2.237)	5.130*** (1.991)
Constant	-3.789*** (1.411)	-3.566*** (1.384)	-3.556*** (1.364)
N	35	35	35
LR $\chi^2$	9.22***	8.57***	9.06***
Pseudo R <sup>2</sup>	.196	.182	.192

\* p ≤ .10; \*\* p ≤ .05; \*\*\* p ≤ .01 (two-tailed)

*Note:* Coefficients reported with standard errors in parentheses. Dependent variable is 1 if case was assigned a federal economic regulation issue code and 0 if case was assigned a civil rights/liberties issue code.

**TABLE 5. Probability of Federal Economic Regulation Issue Code, by Congressional Constraint (1986-2001)**

<b>Observations</b>	<b>Model of Congressional Constraint</b>	<b>Liberal Constraint</b>	<b>Pr(Fed. Econ. Reg. Issue Code)<sup>a</sup></b>	
All Statutes	Median Model	Max	.089	[.003 .300]
		Min	.641	[.399 .860]
	Committee Gatekeeping Model	Max	.109	[.006 .340]
		Min	.610	[.349 .820]
	Party Gatekeeping Model	Max	.131	[.015 .360]
		Min	.549	[.334 .743]
Liberal Statutes	Median Model	Max	.051	[.001 .189]
		Min	.796	[.550 .956]
	Committee Gatekeeping Model	Max	.067	[.002 .248]
		Min	.780	[.526 .952]
	Party Gatekeeping Model	Max	.079	[.005 .258]
		Min	.731	[.502 .910]

*Note:* Probabilities simulated using Clarify, setting Median Justice at its mean.

<sup>a</sup> Mean probability reported, with 90-percent confidence intervals in brackets.

**TABLE 6. Probit Estimates of Effect of Congressional Constraint on USSCJD Judgment Codes, 1986-2001**

	<i>Median Model</i>	<i>Committee Gatekeeping Model</i>	<i>Party Gatekeeping Model</i>
<b><i>USSCJD Judgment Codes</i></b>			
Median justice	7.357 (6.183)	7.095 (6.051)	7.822 (5.665)
Congressional constraint	-.169 (2.290)	-.271 (1.929)	.068 (1.622)
Constant	-2.153* (1.282)	-2.112* (1.263)	-2.227* (1.236)
N	41	41	41
LR $\chi^2$	3.25	3.27	3.25
Pseudo R <sup>2</sup>	.060	.061	.060
<b><i>Recoded Judgment Codes</i></b>			
Median justice	-13.204 (10.333)	-11.296 (9.700)	-6.445 (10.523)
Congressional constraint	-12.422*** (3.240)	-9.577*** (2.647)	-8.306*** (2.188)
Constant	1.835 (2.197)	1.578 (2.067)	.823 (2.334)
N	41	41	41
LR $\chi^2$	24.59***	21.99***	23.36***
Pseudo R <sup>2</sup>	.457	.408	.434

\* p ≤ .10; \*\* p ≤ .05; \*\*\* p ≤ .01 (two-tailed)

*Note:* Coefficients reported with standard errors in parentheses. Dependent variable is 1 if DIR variable is coded as liberal and 0 if conservative. Results in table were estimated with all statutes in sample. Estimates using only liberal statutes produced similar results.

**TABLE 7. Probability of a Liberal Judgment using Recorded Judgment Codes, by Congressional Constraint (1986-2001)**

Model of Congressional Constraint	Liberal Constraint	Pr(Liberal Judgment) <sup>a</sup>		
Median Model	Max	.997	[.987	1]
	Min	.114	[.017	.310]
Committee Gatekeeping Model	Max	.993	[.966	1]
	Min	.148	[.025	.336]
Party Gatekeeping Model	Max	.993	[.962	1]
	Min	.254	[.085	.482]

*Note:* Probabilities simulated using Clarify, setting Median Justice at its mean.  
<sup>a</sup> Mean probability reported, with 90-percent confidence intervals in brackets.  
 Results in table were estimated with all statutes in sample. Estimates using only liberal statutes produced similar results.

### Warren and Burger Courts, 1962-1980 Terms

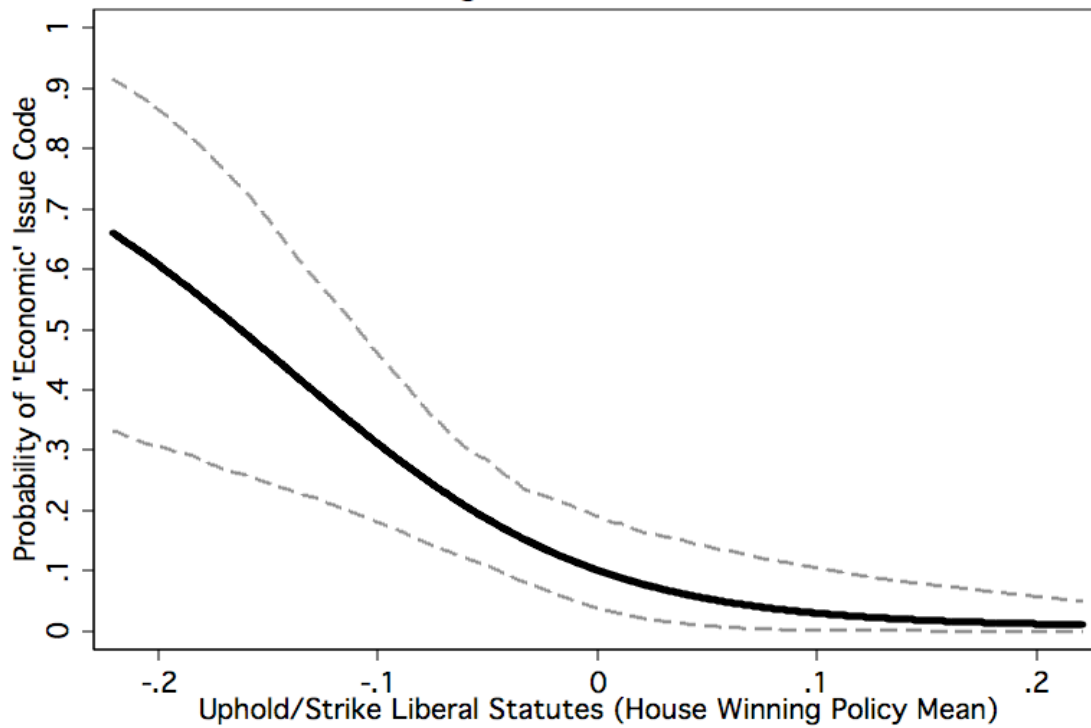


Figure 1: Predicted probability of an “economic” issue code, by case disposition, 1962-1980 terms (liberal statutes only)

### Rehnquist Court, 1986-2001 Terms

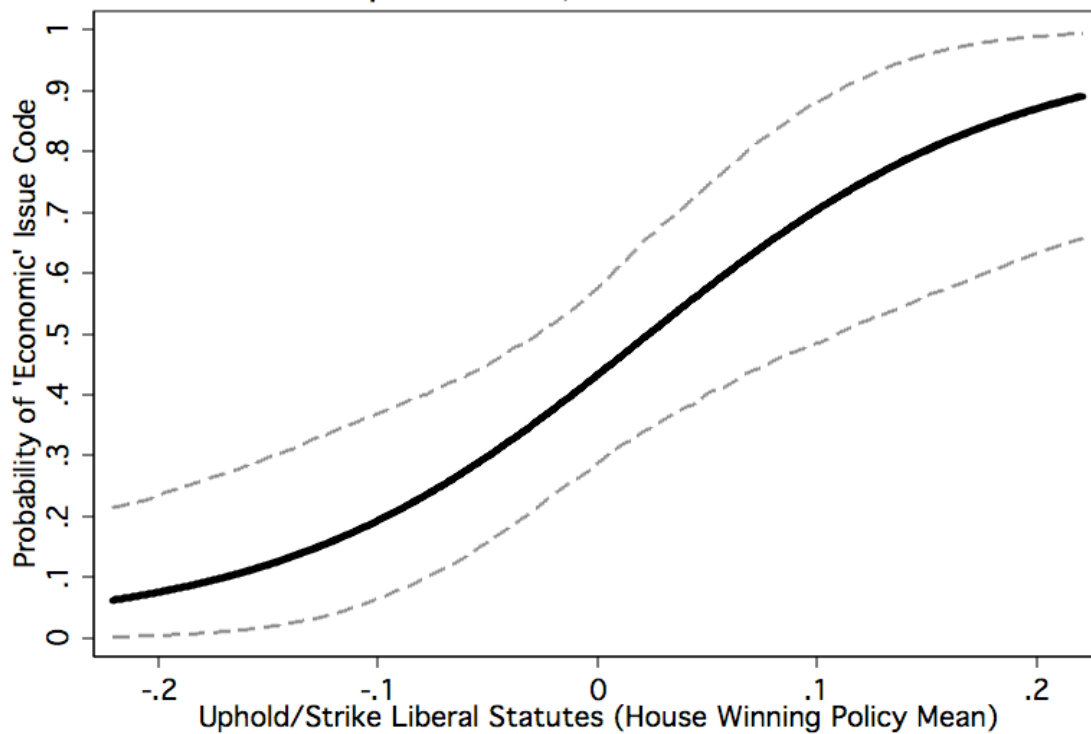


Figure 2: Predicted probability of an “economic” issue code, by case disposition, 1986-2001 terms (liberal statutes only)

### Rehnquist Court, 1986-2001 Terms

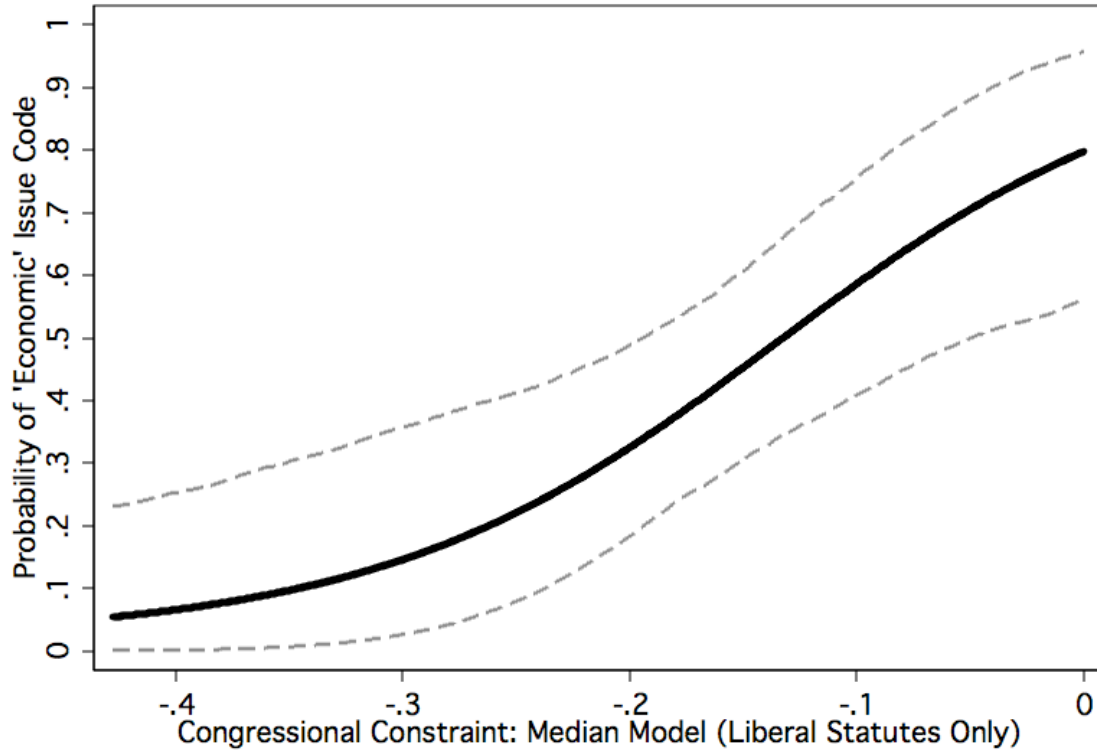


Figure 3: Probability of “economic” issue code, by congressional constraint (median model), 1986-2001 (liberal statutes only)

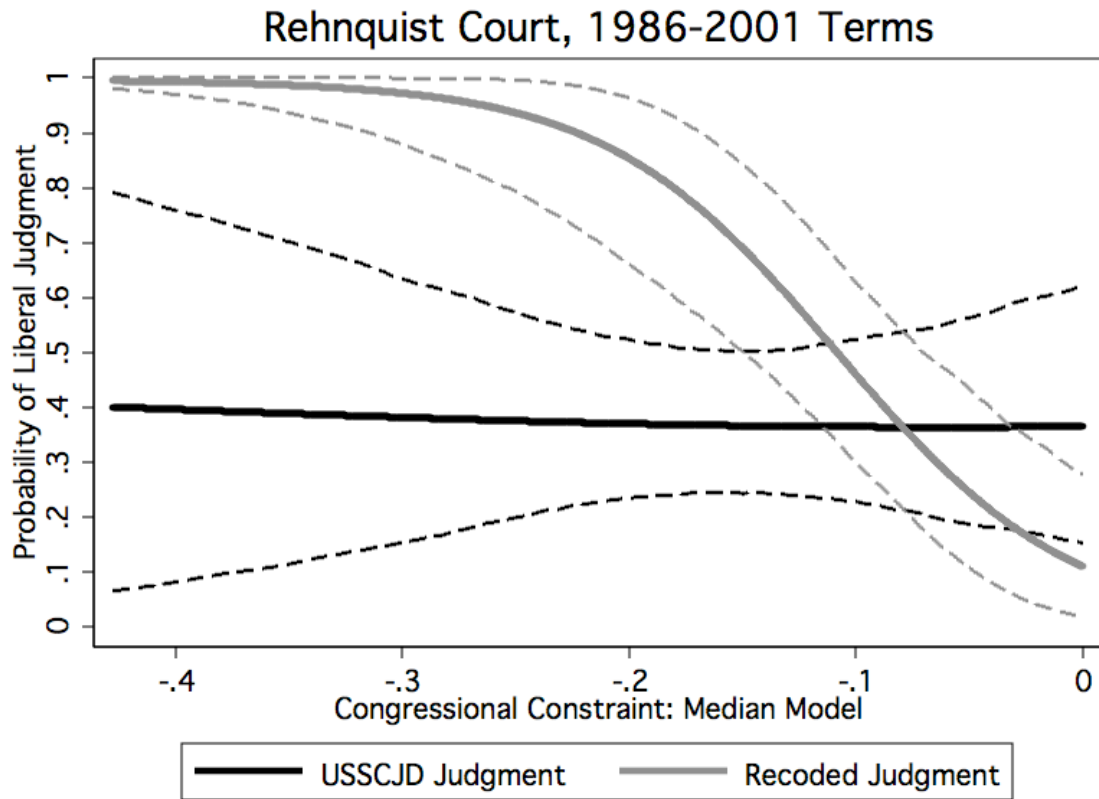


Figure 4: Predicted probability of a liberal judgment code, for both the original USSCJD and the recoded judgment codes, by congressional constraint (floor median model, 1986-2001 terms)