MAKING **POLICY,** MAKING **LAW**

An Interbranch Perspective

MARK C. MILLER and JEB BARNES, Editors

GEORGETOWN UNIVERSITY PRESS
WASHINGTON, D.C.

10

Constitutional Interpretation from a Strategic Perspective

LEE EPSTEIN,
JACK KNIGHT, AND
ANDREW D. MARTIN

IN THE LATE 1950S, THE U.S. SUPREME COURT DECIDED TWO major constitutional cases that touched on a similar topic—the rights of witnesses to refuse to answer questions put to them by congressional committees investigating subversive activities in America. In the first, *Watkins v. United States*, 354 U.S. 178 (1957), the Court ruled in favor of the witness. But in the second, *Barenblatt v. United States*, 360 U.S. 109 (1959), it ruled against him. The majority in *Barenblatt* went to great lengths to indicate that the opinion amounted to nothing more than a clarification of *Watkins*. Many legal analysts (including the four justices who dissented in *Barenblatt*), however, have suggested that at minimum, the majority backed away from *Watkins* and, at maximum, the decision signaled a reversal from the earlier ruling.

If these analysts are right, how can we explain the shift, which occurred within a two-year period? One possibility is that *Barenblatt* constituted a "strategic" withdrawal (see Pritchett 1961). On this account, the majority sincerely preferred the policy it established in *Watkins* to that it articulated in *Barenblatt*. But, at the same time, it recognized that *Watkins* and other "liberal" decisions, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), had made the Court the target of numerous congressional proposals. A few even sought to remove the Court's jurisdiction to hear cases involving subversive activities. Therefore, in *Barenblatt* the Court had every reason to misrepresent its true policy preferences to protect its legitimacy, and reach a result that would appease Congress. Which is precisely the course of action it took.

Certainly, other possible explanations for the seeming discrepancy between *Barenblatt* and *Watkins* exist (see, e.g., Murphy 1962). But scholars have told this "strategic" story for so many years that it is now a part of Court lore, even finding a comfortable home in contemporary constitutional law case and text books (see, e.g., Ducat 2000, 146; Epstein and Walker 2004, 171; Fisher 2003, 224; and Randall 2002, 385).

And, yet, we find the near-universal acceptance of this story quite puzzling. While we believe it to be an accurate account of the *Watkins-Barenblatt* shift, we are unsure why so

many others find it plausible. That is because, for over a decade now, legal academics and social scientists alike have told one of two stories, neither of which leave room for the Court to take into account the preferences and likely actions of political actors (e.g., members of Congress and the president) when it is resolving a *constitutional* dispute (as it apparently did in *Barenblatt*). On the first story, justices simply pursue their jurisprudential or political goals in a vacuum; the views of external actors are entirely irrelevant. On the second, justices do take into account the views of external actors but only when they are *interpreting statutes*, not the *Constitution*. The rationale behind this latter claim is straightforward enough: It is within Congress's power to overturn the interpretations the Court gives to statutory law but, according to the justices themselves (see *City of Boerne v. Archbishop Flores*, 521 U.S. 507 [1997], and *Dickerson v. United States*, 530 U.S. 428 [2000]), it is not—at least not by simple majorities—within the legislature's power to overturn its constitutional decisions; that can only occur via a constitutional amendment.

Given the infrequency with which Congress passes amendments (at least relative to the frequency with which it disturbs the Court's statutory interpretation decisions),[1] we can understand why scholars argue that the justices need not be especially attentive (or, at the extreme, not attentive at all) to the desires of other government actors in constitutional disputes. But we disagree. Indeed, we believe it is entirely possible that justices feel equally (if not more) compelled in constitutional cases to take into account the preferences and likely actions of Congress, just as they do in those involving statutory interpretation.

We develop this argument in three steps. We begin by explaining the severe problems with any story holding that justices make decisions in a vacuum and by expressing our general sympathy with the second story—really, a strategic-institutional account of judicial decisions—which emphasizes the role institutional arrangements play in structuring choices made by strategic actors. Next, we attempt to make a theoretical case for applicability of this strategic account to constitutional decision making. Finally, we put our argument to a modest empirical test, assessing whether it can help account for decisions the Court reaches in constitutional disputes involving matters of civil rights.

A STRATEGIC-INSTITUTIONAL ACCOUNT OF JUDICIAL DECISION MAKING

When it comes to the question of how judges reach decisions, pockets of legal academics and political scientists offer fundamentally different responses. The former might say that judges are concerned with resolving disputes in the "right" or "correct" way—a way that conforms to their reading of existing precedent or their philosophical approaches; the latter might reply that judges are concerned with etching their politics into law.[2] When Chief Justice William Rehnquist reads a statute in a way that works adversely to a criminal defendant, law professors might argue that he does so because that reading is in line with his vision of how judges ought to interpret laws (perhaps in line with legislative intent), while social scientists may claim it is because the chief is "conservative" on matters of criminal law and desires to see his right-of-center views become the law of the land.

Our own views are closer to the political scientists', but we nonetheless believe that neither tells a particularly compelling story about Supreme Court decision making. That is so, at least in part, because both assume that justices advance their

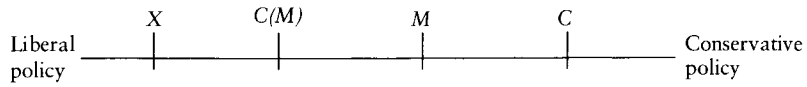

FIGURE 10.1 Hypothetical Set of Preferences over Civil Rights Policy

Note: *X* is the Status Quo (intent of Enacting Congress); *C(M)* represents the *current* committees' indifference point (between their most preferred position and that desired by *M*); *M* denotes the most preferred position of the median member of Congress; *C* is the most preferred position of the key *current* committees (and other gatekeepers) in Congress that make the decision of whether or not to propose legislation to their respective houses. 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" (Krehbiel 1988, 263). We also assume that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policymaking 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.

goals—whether philosophical or political—in a vacuum, that is, by behaving in accord with their sincerely held preferences without considering the preferences of others. To the legal academics, justices will base conclusions on principles or ideas about law (e.g., perhaps a particular mode of constitutional or statutory interpretation or precedent); to the political scientists, they will vote in ways that reflect their underlying political attitudes.

To see the implications of this assumption of purely sincere (or "naive") behavior, as well as why we find it troubling, consider figure 10.1. There we depict a hypothetical set of preferences over a particular policy, say, a civil rights statute (adapted from Ferejohn and Weingast 1992). The horizontal lines represent a (civil rights) policy space, here, ordered from left (most "liberal") to right (most "conservative"); the vertical lines show the preferences (the "most preferred positions") of the actors relevant in this example: the median member of the *current* Congress, *M*, and of the key *current* committees and other gatekeepers, *C*, in Congress that make the decision over whether to propose civil rights legislation to their respective houses. Note we also identify the current committees' indifference point, *C(M)*, "where the Supreme 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" (Eskridge 1991a, 381). To put it another way, because the indifference point and the median member of the current Congress are equidistant from the committees, the committees like the indifference point as much as they like the most preferred position of Congress; they are indifferent between the two. Finally, we locate the status quo, *X*, which represents the intent of the legislature that *enacted* the law.

Now suppose a justice has a case before her that requires interpretation of a civil rights law. Where would she place policy? If the justice believes she should interpret law in line with the preferences of the enacting legislature and if the story told by some legal academics holds, then the answer is obvious: She will place policy at *X*. If the justice votes in accord with her sincere political preferences, as some political scientists maintain, then the answer is that it depends on where her preferences lie.

If she is very liberal, she may too place policy at *X*; if she is very conservative, then she will vote *C*.

Notice, though, that neither the intent- nor policy-oriented justice takes into account the preferences and likely actions of the current Congress when they make decisions. And this is where our problems with these accounts begin, for they seem unable to address a natural, even obvious question: Why would justices who have clear preferences, whether jurisprudential or political, fail to realize that they will be unable to maximize those preferences without attending to other relevant actors? To put it in concrete terms, why would a justice whose goal is to see the law reflect the intent of enacting legislature place policy at *X* when she knows that Congress may very well override her position? (That would come about because the justice would be placing policy 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.) We could raise the same question about our liberal justice: If she is truly "a single-minded seeker of legal policy," as some political scientists maintain, why would she take a position that Congress will overturn?[3]

We believe that she would not. For to claim that she would behave in this way—merely in line with her sincere preferences (whatever they may be)—is to argue the Court is full of myopic thinkers, who consider only the shape of the law in the short term. Such an argument does not square with important analyses of the Court or with the way an increasing number of contemporary scholars, in the legal academy and in social science departments alike, believe that political actors make decisions (see, e.g., Epstein and Knight 1998; Eskridge 1991a, 1991b; Maltman, Spriggs, and Wahlbeck 2000; and Murphy 1964).

Accordingly, we reject accounts suggesting that justices always act sincerely, and adopt a strategic one instead. The strategic approach, as we set it out,[4] starts off with the same premise as do traditional political science accounts: justices are "single-minded seekers of legal policy." But, from there, the two approaches veer dramatically. The strategic approach supposes that if justices truly care about the ultimate state of the law, then they must—as Fairman (1987) once put it—"keep [their] watch in the halls of Congress" and, occasionally, in the oval office of the White House, as well as paid heed to the various institutions structuring their interactions with these external actors. They cannot, as sincere approaches 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 10.2 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 sign or veto.

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 important

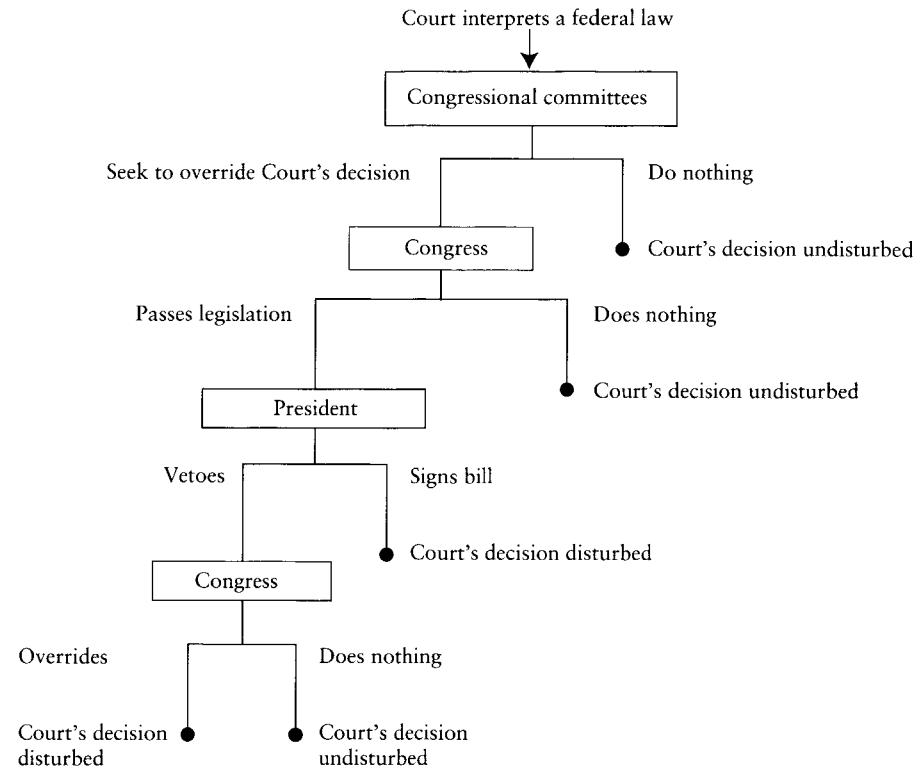

FIGURE 10.2 The Separation of Powers System in Action
Source: Adapted from Eskridge (1991b, 644).

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 account of 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.

IMPLICATIONS OF THE STRATEGIC-INSTITUTIONAL ACCOUNT

To see the implications of this argument, return to figure 10.1. Given the distribution of the most preferred positions of the actors in this figure, a strategic justice with liberal policy preferences—unlike a "naive" liberal policy seeker—would not be willing to take the risk and vote her sincere preference: She would see that Congress could easily override their position (the same holds for a justice whose preference is follow the intent of the enacting legislature). In fact, in this instance the rational course of action—the best choice for justices interested in maximizing their political preferences—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 would have no incentive to introduce legislation to overturn a policy set at the indifference point.

Thus, the Court would end up with a policy close to, but not exactly on, their ideal point without risking congressional reaction.

This does not mean, however, that justices can never vote their sincere preferences. Figure 10.1 shows how this could occur. Given the displayed distribution of preferences a conservative justice would be free to set policy in a way that reflects his raw preferences—as long as his preferences are within the *C(M)*–*C* interval, and not to the right of *C*. If he were to interpret laws within that interval, an override attempt would be unlikely. Even if his preferences fell on *C(M)*, the relevant congressional committees would have no incentive to waste precious legislative resources to overturn his decision. Because the committees' indifference point equals his most preferred position, they would be indifferent to his policy.

In short, the strategic model suggests that judicial decisions are 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 doing so the ultimate state of the law could end up farther away from their ideal points than is necessary.

CONSTITUTIONAL VS. STATUTORY INTERPRETATION

Thus far, we have focused attention on differences in the implications of various accounts for statutory interpretation. That we have done so is no accident. With only limited exceptions (e.g., Fisher 2003; Meernick and Ignagni 1997; Murphy 1964; and Rosenberg 1992), the 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 than on those asking the Court to assess a law's constitutionality.

The rationale behind this claim, as we noted at the onset, is simple: It is far more difficult for the elected branches of government to override a constitutional decision than a statutory one. Indeed, recent cases make quite clear that, as a matter of constitutional law, it is not—at least not by simple majorities—within the legislature's power to overturn its constitutional decisions (as it may with interpretations the Court gives to its laws); Congress must propose a constitutional amendment. In *Boerne v. Flores*, for example, the Supreme Court rejected Congress's attempt to dictate the level of scrutiny that the Court should apply to state laws that burden religious exercise. The Court had held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that such laws do not receive heightened scrutiny. Congress then passed the Religious Freedom Restoration Act (RFRA), which mandated strict scrutiny review. The Court's decision to invalidate the statute included the following strong statement of judicial supremacy in constitutional matters:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must

> be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Three years later, the Court reiterated this message in *Dickerson v. United States*, 530 U.S. 428 (2000). At issue was a law Congress enacted in 1968 that was designed to overturn the Court's decision in *Miranda v. Arizona*, 384 U.S. 4360 (1966). Once the justices held that *Miranda* announced a constitutional rule, they concluded that the 1968 congressional law was unconstitutional ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

It is these sorts of decisions that give rise to the near-unanimous scholarly view that the justices need not be especially attentive (or, at the extreme, not attentive at all) to the preferences and likely actions of other government actors in constitutional disputes. After all, why should they? Congress apparently cannot overrule these decisions by passing simple legislation and it virtually never takes the alterative route of proposing constitutional amendments.

Is there thus any reason to suppose that the strategic institutional account, as developed here, applies to cases involving constitutional questions? Conventional wisdom, of course, suggests that there is not, that justices should feel free to ignore other relevant political actors in these disputes and vote in accord with their sincerely held preferences, because the risk of reversal is trivial. 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 10.1—follows from a consideration of the institutional costs and policy benefits of both types of decisions.

Let us begin with the benefits. Assuming that Congress does not (at least in the short term) respond adversely to a statutory interpretation decision, the Court accrues a policy benefit: It is able to read its preferences into law and, perhaps, fundamentally change the course of public policy. But that impact may be transitory because it is possible that future presidents and Congress will amend the statute in question to override the Court's interpretation. If Congress and the 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, they 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 with which the contemporaneous Congress and president—as well as their successors—must comply.

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 (by overriding the Court's interpretation), the Court will certainly

TABLE 10.1. A Comparison of the Costs and Benefits to the U.S. Supreme Court in Cases Involving Statutory and Constitutional Interpretation

		Costs[b]	
Court Action	**Benefits[a]**	**Cost of Unsuccessful Congressional Response**	**Cost of Successful Congressional Response**
Court interprets a statute	Policy benefit (Court reads its policy preferences into existing law, though perhaps only a transitory one)	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	Infinite

Source: Adapted from Martin (1998).
[a]Assuming Congress or the president do not respond adversely to the Court's decision
[b]Assuming Congress or the president respond adversely to a statutory decision by passing a new law, and to a constitutional decision by attacking the Court

pay a policy price: its interpretation of the statute no longer stands, thereby robbing it of the opportunity to affect public policy. It also may bear a cost in terms of its legitimacy, at which every successful override chips if even marginally so. Given that the justices' ability to achieve their policy goals hinges on their legitimacy—after all, they lack the power to enforce their decisions—any erosion of it is of nontrivial concern to them.

Let us now consider constitutional cases, and begin with a simple fact: Though 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. Rosenberg outlines a few possibilities, all of which Congress, the president, or both have attempted to deploy (Rosenberg 1992, 377; Murphy 1962):

(1) using 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; and
(10) altering the size of the Court.

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, Congress has attempted to respond to constitutional decisions in the form of ordinary legislation. Fisher (2001, 28) makes this point when he writes, "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." Fisher goes on to provide a few illustrations, including an 1862 law prohibiting slavery in the territories that was designed to "repudiate the main tenets" of *Dred Scott v. Sandford*, 19 How. 393 (1857), and the Fair Labor Standards Act of 1938 outlawing child labor that the Supreme Court upheld in *United States v. Darby Lumber*, 312 U.S. 100 (1941), despite its earlier ruling in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). More generally, as Meernik and Ignagni (1997, 458) 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. . . . We 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 constitutional, 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. . . . We 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.

What does the ability of the ruling regime to attack—through overrides or other means—constitutional court decisions 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 irrevocably, harm its reputation, credibility, and legitimacy—thereby imposing a potentially infinite cost on the institution. But even if the attack attempt 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 *Scott v. Sandford* to find examples; *Bush v. Gore*, 531 U.S. 98 (2000), may provide one. To be sure the new president and Congress did not attack it but other members of government did—unsuccessfully, of course, at least in terms of the ruling's impact. And yet there seems little doubt that the critics (not to mention the decision itself) caused some damage to the reputation of the Court, the effects of which the justices may eventually feel.[5]

Taken collectively, we are left with the following picture: The benefits to the Court of reaching a (successful) constitutional decision are roughly the same as (if not marginally greater than) those of reaching a successful statutory decision, but 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 strategic 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—as the weight of the literature suggests is the case—then they have good, if not better, reasons to do so in constitutional cases.

This leads us to the following testable propositions. If our account applies to constitutional cases, then we should expect to observe strategic behavior on the part of the justices. Specifically, (1) when the justices hold preferences close to relevant political actors, they will behave in a sincere fashion, that is, placing policy on their most preferred position but (2) when they hold preferences distant from the regime in power, they will behave in a sophisticated 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. If, however, more conventional accounts—whether those holding that justices behave in line with their sincere preferences regardless of the desires of other relevant actors or those suggesting that justices behave strategically but only in cases calling for the interpretation of statutes—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 Congress and the president.

ASSESSING THE PROPOSITIONS

To assess these propositions, we require data to animate the dependent variable—the vote of each justice in cases involving a particular type of policy—and measures of and data on the independent variables, the preferences of the Court, the president, and Congress with regard to that policy. We chose constitutional civil rights as the policy on which to focus our inquiry because that area of the law has (1) generated sufficient cases for meaningful analysis and (2) 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 (e.g., Eskridge 1991a, 1991b; Segal 1997). Whether this holds 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 U.S. Supreme Court Judicial Data Base for 1953 to 1992;[6] we measured the preferences of the median members of Congress and the president with, respectively, Poole and Rosenthal's (1997) NOMINATE Common Space Dimension One and their NOMINATE Common Space, which is estimated using announced presidential vote intentions. To assess the preferences of the justices, we relied on scores created by Segal and Cover (1989)—scores that many scholars have invoked. To derive them, the researchers content-analyzed newspaper editorials written between the time of justices' nomination to the U.S. Supreme Court and their confirmation. From this analysis, they created a scale of policy preferences, which ranges from −1 (unanimously conservative) to 0 (moderate) to +1 (unanimously liberal). For the purposes of presentation and analysis, we have rescaled the scores from 0 (most liberal) to 1 (most conservative). Table 10.2 displays the results.

With the data now in hand, we turn to assessing the propositions above. Let us begin with the one emanating from most existing accounts; namely, that justices

Table 10.2. Measuring the Policy Preferences of Supreme Court Justices Serving between 1953 and 1992: The Segal-Cover Scores

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

Note: The Segal and Cover (1989, 560) scores, as represented here, range from 0.000 (most liberal) to 1.000 (most conservative).

place policy (whether *always* as some political scientists suggest or *only in constitutional disputes*, as those who acknowledge strategic behavior in statutory cases suggest) on their ideal point regardless of how far that point may be from the most preferred positions of relevant members of the ruling regime.

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 10.3 displaying the results. Note that if extant accounts are correct, 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) in fact explain their votes in the civil rights cases of interest. That many are quite close suggests that this argument seems to rest on solid ground; indeed, the most conservative justices vote conservatively 80 percent of the time; that figure for liberals is 20 percent.

STRATEGIC ANALYSIS

Although this simple test seems to lend support to the assumption of sincere behavior on the part of justices (again, whether always or only in constitutional disputes), the analysis cannot end there. That is because our account also acknowledges the possibility of sincere behavior. Recall that when a justice (say, the median member of the Court) holds preference close to contemporaneous elected actors, the account predicts that she will place policy on her ideal point; it is only when she holds a preference distant from the ruling regime that she will behave in a sophisticated fashion, that is, placing policy not on their 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.

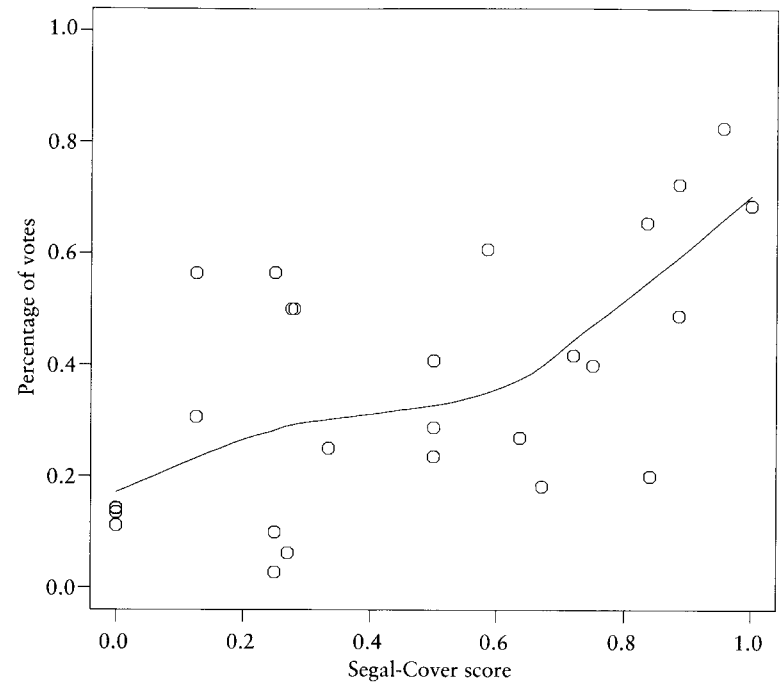

FIGURE 10.3 Scatterplot of the Percentage of Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, 1953–92

Note: 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.

To assess expectations generated by the strategic approach, we thus must disaggregate judicial behavior and study it over time, under periods of liberal and conservative regimes. We take two approaches to so doing. First, we consider the votes of several individual justices disaggregated by president. 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 White and Black.[7] For both, we constructed figures (figures 10.4 and 10.5) displaying 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, the 95 percent 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. Our expectations are straightforward enough: (1) Under the strategic account, we should observe Black and White voting in a more conservative direction when a Republican is in the White House; (2) under strictly sincere voting models, we should observe no change in their behavior.

As figures 10.4 and 10.5 reveal, sophisticated strategic decision making characterizes the behavior of both justices. Note that Black was more conservative—

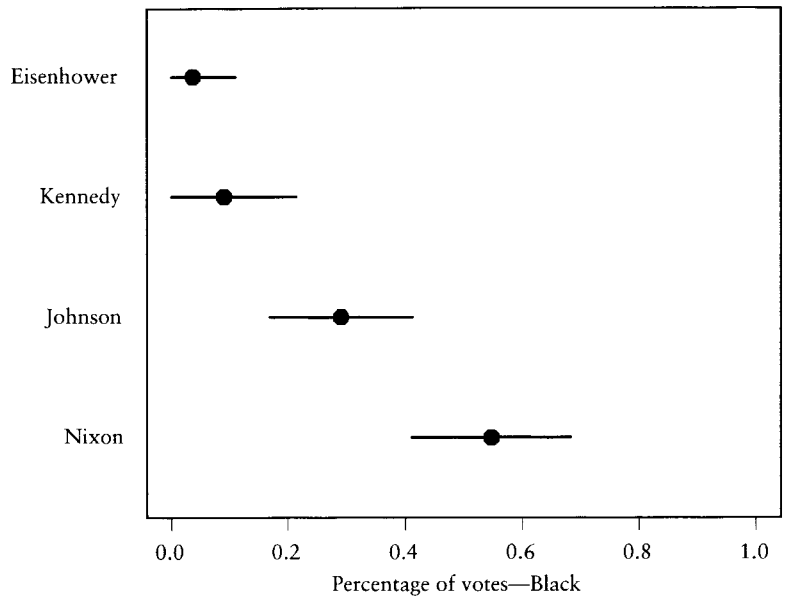

FIGURE 10.4 Dot Plot of the Percentage of Conservative Constitutional Civil Rights Votes Cast by Justice Black, Disaggregated by President

Note: In both figures 10.4 and 10.5, the error bars depict the 95 percent confidence intervals of the percentage.

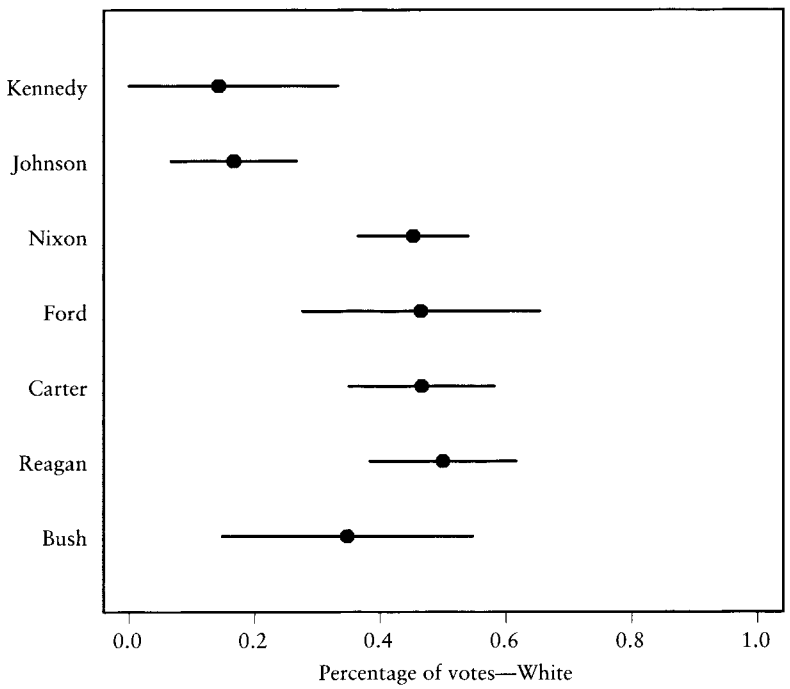

FIGURE 10.5 Dot Plot of the Percentage of Conservative Constitutional Civil Rights Votes Cast by Justice White, Disaggregated by President

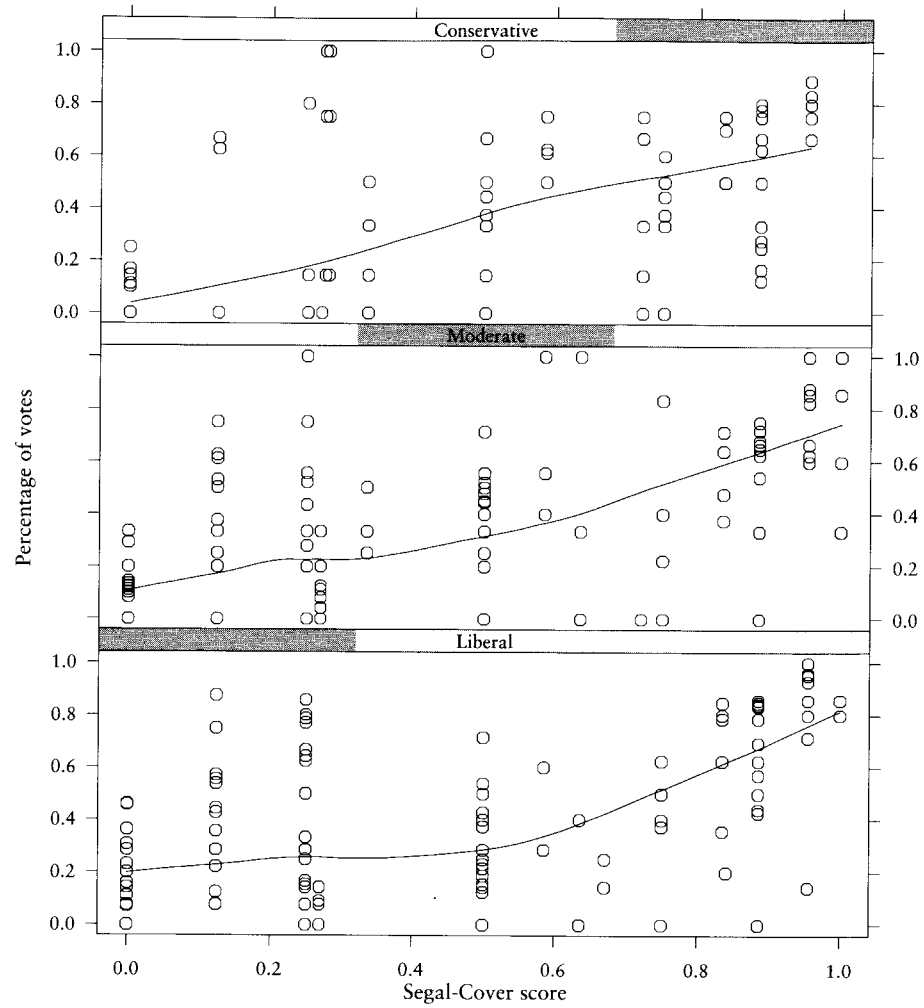

FIGURE 10.6 Scatterplots of the Percentage of Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, Conditioned on the Preferences of the President

Note: 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. In each cell, a local regression (loess) curve is imposed to illustrate the relationship between the variables.

significantly so—in his voting during the Nixon administration than he was during the more liberal Kennedy and Johnson presidencies. 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 eras. These patterns, we believe, suggest strategic adaptation, and precisely the sort of adaptation we would anticipate if justices are behaving in a sophisticated fashion with regard to the existing political regime: altering their decisions to reflect the preferences of that regime. What is more, it is precisely the adaptation we would not expect to observe if the assumption of sincere behavior rested on a firm empirical basis.

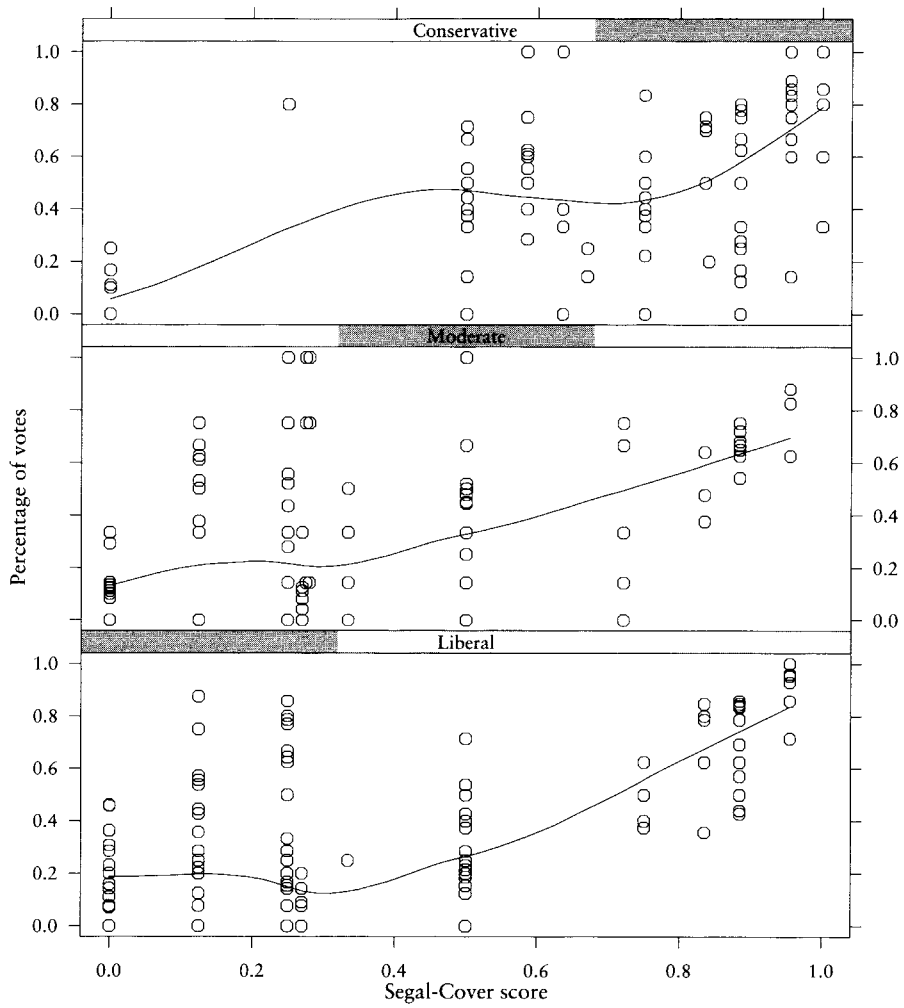

FIGURE 10.7 Scatterplots of the Percentage of Conservative Votes in Constitutional Civil Rights Cases on Justices' Preferences, Conditioned on the Median Member of the Senate

Note: 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. In each cell, a local regression (loess) curve is imposed to illustrate the relationship between the variables.

Do these same results hold at the Court level? To address this question, we constructed two plots (figures 10.6 and 10.7), both of which illustrate the relationship between voting in constitutional civil rights cases and preferences but which condition that relationship differentially. Figure 10.6 conditions it on presidential preferences, whether conservative, moderate, or liberal; and figure 10.7, on Senate preferences, again whether conservative, liberal, or moderate.

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 lends support to an assumption of sincere voting. But—and this is a big but—moderate justices do not behave in this way. In figure 10.5, the 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.

We interpret these tests to lend support both to sincere voting accounts and to our institutional approach. Both predict that justices will vote their sincere preferences when they hold preferences similar to those of the members of the other branches of government. And the empirical evidence is that they generally do so. But the empirical evidence also demonstrates sophisticated decision making in which the justices deviate from their personal preferences when those preferences are not shared by the members of the elected branches. Tests at both the individual and the aggregate levels support the proposition that justices adjust their decisions in anticipation of the potential responses of the other branches of government. This is behavior that is consistent with our institutional approach, but that accounts that predict sincere behavior in constitutional disputes (or in all disputes) cannot explain.

DISCUSSION

Let us end this chapter precisely where we begin it—with *Watkins* and *Barenblatt*, two cases decided in the 1950s that were similar in many important regards, except that one led to a ruling against the government and the other, to one in its favor. Recall that scholars explain this apparent shift with a strategic account—one that we now elaborate in figure 10.8, which depicts the ideal points of the key players. Notice that at the time the cases were decided the Court was to the left of (more liberal than) Congress, the president, and the relevant congressional committees. Given this configuration, the Court's holding in *Watkins*, which amounted to putting policy on its ideal point, provided the committees with every incentive to override, in one way or another, its decision. The reason is that the committees preferred any point on the line between *C(M)* and *M/P* to *J*. Congress and the president would have favored legislation to derail the decision because they too preferred *M/P* to *J*. In fact, responding to *Watkins* and other "liberal" rulings, members of Congress proposed numerous Court-curbing laws, including some that would have removed the Court's

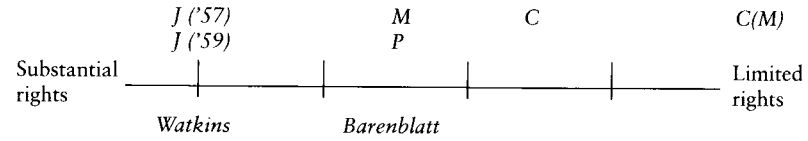

FIGURE 10.8 Approximate Distribution of Preferences over the Right of Witnesses in Subversive Activities Cases, 1957–59

Note: *J ('57)* is the most preferred position of the majority of the Court in 1957; *J ('59)* is the most preferred position of the majority of the Court in 1959; *M* denotes the most preferred position of the median legislator in Congress; *C* is the most preferred position of the relevant congressional committees; *P* is the most preferred position of the president; and *C(M)* is the indifference point of the congressional committees (between their most preferred position and that desired by *M*).

jurisdiction. It is hardly surprising thus that the Court, feeling the heat, acceded to congressional pressure—and acted in a sophisticated fashion in *Barenblatt*. Or at least this is the story scholars have told over and over again to explain the seeming discrepancy between the two cases.

What we have argued, and have attempted to demonstrate with data, is that *Barenblatt* is not the anomaly some suggest it is; that the Court is not the unconstrained actor in constitutional litigation existing accounts make it out to be. Rather, the justices understand they will be unable to generate efficacious decisions—decisions that other actors will respect and with which they will comply—unless they are attentive to the preferences of those other actors and the institutions that structure the Court's interactions with them.

The implications of this result for the study of constitutional interpretation are many. One that deserves particular mention is its bearing on questions raised by what has been called the "countermajoritiarian difficulty" (Bickel 1962, 16). In light of 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, and render legislation unconstitutional?

Scholars have offered a range of "solutions" to this "difficulty." Of particular interest to us is one that has been quite influential in political science circles—Dahl's (1957) "ruling regime" thesis. In Dahl's account, the "difficulty" is not especially problematic because justices will vote in accord with their sincerely held preferences, which, in many eras, coincide with the ruling regime's (Congress and the president).[8] Hence, the justices will rarely thwart the actions of the regime by striking down its acts, as those acts reflect not just the preferences of Congress and the president but the Court as well.

Under Dahl's logic, then, the Court almost never assumes an antimajoritarian role; rather, it typically will represent and therefore legitimize the interests of the ruling regime. To the extent that this logic discounts the seriousness of the "countermajoritarian difficulty" we believe that Dahl got it right; to the extent that it rests on a correspondence of preferences among the different branches of government, our account suggests otherwise. Indeed, an important implication of our study is that, given the institutional constraints imposed on the Court, justices cannot effectuate their own policy goals—whether they accord or collide with the ruling regime's (as occasionally occurs; e.g., *Barenblatt*)—without taking into account the goals and preferences of the other branches. Justices find 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 "difficulty" rests not on a coincidence of preferences, as Dahl suggests, but on an important effect of the separation of powers system: a strategic incentive to anticipate and then react to the desires of elected officials.

This at least is the primary lesson scholars have taken from the *Watkins-Barenblatt* decisions, and it is one that our data on constitutional civil rights cases reinforce. Whether it will hold as analysts explore other areas of the law is a question on which we can only speculate. But, taken together, the theory and data thus far point in the same direction: If justices care about the nature and content of the law—and it is difficult to believe that justices do not—then they will adopt the most effective means to influence it, whether that law is statutory or constitutional in nature.

NOTES

We are grateful to the National Science Foundation for supporting our work on strategic decision making (SBR-9320284, SBR-9614130, SES-0135855). We have adopted and adapted several passages in this chapter from some of that work (see especially Epstein and Knight 1998; Epstein, Knight, and Martin 2001; Epstein, Segal, and Victor 2002; and Epstein and Walker 2004). All the data used in this chapter are available via http://artsci.wustl.edu/~polisci/epstein/. We used STATA to manage the data and S-PLUS to create the figures.

1. Between 1967 and 1990, Congress overrode about 120 Court decisions. See Eskridge 1991a, 344.
2. Of course, this is a generalization. Not all legal academics neglected the role of politics and not all social scientists neglected the role of principles and law. Conversely, there are still plenty of legal academics and social scientists who continue to cling to these traditional answers.
3. As we explain later in the text, a sincerely behaving conservative justice would not be overridden if he placed policy on C. But that is only because his preferences coincide with Congress's, and not that he has made a strategic calculation.
4. In our version of the strategic account, we make 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 (Epstein and Knight 1998; Eskridge 1991a, 1991b; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964; Spiller and Gely 1992). But this need not be the case. Under the strategic account, 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, whatever that may be, is contingent on the actions of others (as the strategic account suggests), his or her decision is interdependent and strategic. To see this point, return to figure 10.1, and suppose a justice's goal is to interpret the law in line with the intent of the enacting legislature but, at the same time, to avoid an override attempt by the current Congress (as the strategic account would suggest). If she were so motivated (and assuming that the president and pivotal veto player in Congress were to the right of *X*), the Court would place policy at *C(M)*.
5. In a Gallup poll conducted on December 13, 2000, roughly a third of those surveyed said that *Bush v. Gore* led them to lose confidence in the Supreme Court. In surveys conducted several days later (December 15–17), 50 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?" Gallup poll data available at: www.gallup.com/poll/releases/Pr001222bii.asp. For a different perspective, see Gillman 2001.
6. The U.S. Supreme Court Judicial Data Base is available at www.ssc.msu.edu/~pls/pljp/sctdata.html. 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 year (e.g., the Congress and president measures from 1960 were matched to the 1959 term of the Court, etc.).

7. We constructed similar figures for all the 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 extremist or did not cast pivotal votes. Moreover, because the number of constitutional civil rights cases is small, statistically significant differences are hard to come by. The key test of the mechanism is the conditional plots for the entire Court. See figures 10.6 and 10.7 above.
8. The reason for this, on Dahl's account (1957, 284–89), is that on average presidents have the opportunity to appoint two new justices during the course of a four-year term. 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 divergent political preferences from those held by Congress and the president.