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# Judicial Choice of Legal Doctrines



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Judicial Choice of Legal Doctrines

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## I. Introduction

When litigants appeal a lower court decision they typically invite the Supreme Court to decide many different issues. Some of these issues may relate to statutes, others to the constitution, and still others to other sources of law. Consider, for example, the promulgation by an administrative agency of some regulations that adversely affect a business. The business' case against the regulations might be based on the fact that 1) the regulations are arbitrary and capricious; 2) there is no substantial evidence to support the regulations; 3) the regulations were adopted according to the wrong procedures;[1] 4) the regulations violate the substantive provisions of the statute creating the agency; 5) the regulations exceed the jurisdiction of the agency; or 6) the regulations violate some provision of the United States constitution. A favorable holding on any of these issues will give the business some relief from the regulations.

The Court must figure out how to rule on the various issues.[2] If the Court believes that the business should lose, then the Court must rule in favor of the agency on each issue that it decides.[3] However, if the court is inclined to rule in favor of the business, how does the Court choose the issue upon which to rule?[4] The purpose of this paper is to provide a beginning to answering this question by focussing on some of the stylized differences between the first five sorts of issues -- issues which we term "statutory" -- and the sixth, termed "constitutional."

Constitutional scholars and policy makers alike have long recognized that statutory

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[1] We generally ignore the manifold subtleties described in McCubbins, Noll, and Weingast, (1987). But we do include the basic point that procedures must be followed.

[2] This phrase introduces what is probably our most heroic simplifying assumption -- that the Court can usefully be modelled as a rational actor. See our discussion below.

[3] In what follows we will suppress the question of how a court decides which issues to decide, as opposed to ignore.

[4] "Ruling" on an issue has a special meaning within our model. More on this below.

and constitutional decisions are very different.[5] We focus only on two of these differences: the relative durability of constitutional decisions and the differing impact of constitutional and statutory decisions upon the ensuing political game. First, on the surface, at least, a decision based on constitutional grounds is substantially more difficult to overturn than is one based on statutory interpretation. While the latter only requires an act of Congress, the former also requires support of the State legislatures. As a result, the grounds for the decision have substantial impact not only on the final policy outcome, but on its durability as well.

Second, in the United States, statutory and constitutional decisions that review the actions of administrative agencies provide different scope for discretion and strategic choices to the agency and other branches of government. In most cases constitutional decisions are broad policy guidelines. As such they do not determine what policy has to actually be undertaken, but rather determine criteria that makes an administrative agency's policy (or any congressionally enacted policy) legal. In general there would be many constitutionally acceptable policies. Statutory decisions, on the other hand, give the agency and Congress far less in the way of general constraining principles, and instead provide them with specific policy instructions.

In this paper we develop a model of the Court's choice between statutory and constitutional bases for a decision.[6] We model the Supreme Court as a self-interested, ideologically motivated institution, making its decisions subject in part to the traditional legal rules of precedent, and also to the constraints arising from the political interests of the

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[5] CITATION

[6] This paper follows the rational choice framework to judicial decision making initially developed in Gely and Spiller (1990), and further expanded in Ferejohn and Shipan (1990), Ferejohn and Weingast (1991), Gelly and Spiller (1991), Ladha (1990), Spiller and Gelly (1990 and 1991), Spiller (1990a, 1990b, 1991a, 1991b). See also Marks (1988) for the first attempt to model the impact of judicial decision making in structure-induced-equilibria models of Congressional behavior.

other institutions of government, namely Congress and the President. In this framework, then, the court faces a tradeoff. Constitutional decisions have more permanence than statutory ones, as they are more difficult to overturn. Statutory decisions, however, by being more specific may force an administrative agency to choose a policy more to the Court's liking.

We envision constitutional decisions as decisions that reduce in a non-trivial way the dimensionality of the policy space in which the political game is played, but that do not set a particular policy. There may be many policies that will satisfy a constitutional requirement. Statutory decisions, on the other hand, actually determine policy. These differences between the two decisions may explain in part the reticence of the Supreme Court to issue Constitutional decisions. If we were to focus only on the relative permanence of constitutional decisions, we would expect the Supreme Court to rely upon them far more often than on other sorts of decisions. But that does not seem to be the case at all.[7] In fact, exactly the opposite may be true. How then should one explain the Court's "unexpected" hesitancy to use the constitution? Traditional explanations have focussed on the dubious democratic legitimacy of the Court,[8] or on the appeal of the "passive virtues," reflected in the Court's oft-stated preference for nonconstitutional decisions.[9] All of these reasons may be true, in part. But our approach, which concentrates on the strategic differences between constitutional and statutory decisions, shows that it will not always pay the Court to make constitutional based decisions. While the Court may be less concerned about accommodating Congress when making a constitutional decision, the final outcome may not be as desirable

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[7] To some extent this is just the impression of the authors. There are some data suggesting that our impression is accurate. There are only _____ instances of the Court holding a (state, federal) statute unconstitutional. See Landes & Posner, (1975); Lemieux and Stewart (19xx), other stuff; **Research assistance needed here]**

[8] See Ely (1980).

[9] Hagans v. Lavine, 415 US 528, 547; 94 S.Ct. 1372, 1384 (1974); see, also Bickel (1986).

as the one that may develop from a statutory decision, even though the Court had, in principle, to be more accommodating to the political composition of Congress.

**II. The Framework.**

Our framework has three basic building blocks: the players and their preferences, the structure of the game, and the nature of Supreme Court decisions.

*Players and Preferences*

We have five types of players: the President, the two chambers of Congress, the Administrative Agency, the Supreme Court and the State Legislatures. To simplify our analysis we will assume that each of those bodies can be represented by a single individual showing well specified and convex preferences over the policy space. In particular, in a two-dimensional policy space, each of these preferences will be represented by strictly convex iso-utility contours. Let the ideal points of each of these players be represented by P, H, S, A, SC and $L_j$, j=1, ...J, with J representing the number of state legislatures.

Our preference assumptions violate the rather obvious fact that collective bodies' choices cannot, in general, be represented by stable and well specified preference orderings. We have chosen to make these assumptions, quite frankly, because they represent one of two routes to get results. One possibility is to use a single dimensional policy space (liberal to conservative) and array all actors on that dimension.[10] This approach has the advantage of allowing for the more realistic portrayal of multimember bodies as truly multimember, and then using the median voter theorem to treat the body as having that preference. Using one dimension, however, also crushes some of the life out of the political space. An

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[10] Many recent works have taken this approach. See Marks, (1988); Ferejohn & Shipan (1990); Spitzer (1990); Spiller (1990a); Ferejohn & Weingast (1991); and Lemieux and Stewart (19xx). For some cautionary comments about using this approach, see Rose-Ackerman (1990).

alternative approach is to use more than one dimension to represent policy space, and to represent bodies as unitary actors.[11] This allows us to see a more sophisticated interaction between the dimensions in policy space, albeit at a cost. We claim that the reader should suspend his disbelief for a while so as to determine for himself if 1) our approach produces some compelling results, in spite of the preference assumptions, and 2) our approach might be adapted later, in models including multimember bodies with multidimensional policy spaces. An extension of our approach might utilize, as to Congress, recent research suggesting that many of the institutional structures act as if their purpose is to avoid cyclical decision making.[12] Characterizing the internal workings of the Court, however, may require some new work.[13]

We also assume that while the preferences of politicians will in general reflect the interests of their constituencies,[14] that is not the case for Supreme Court justices. Supreme Court justices are appointed for life and thus do not feel the electoral pressure to adopt policies that reflect particular interest groups. Supreme Court justices' preferences, then, reflect the justices' view of the world, which could be termed ideology, moral theory, or preference. We will use "ideology" as a shorthand.

Some legal scholars would argue that justices' preferences have something to do with the maintenance of the Court as a viable and respected institution, with making decisions that look sound in the eyes of the legal profession, and so forth. While we believe those to

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[11] Other papers have taken this approach in modelling the judiciary and its interaction with the other branches. See Ladha (1990) and Gely and Spiller (1990), Spiller and Gely (1991), Spiller (1990b and 1991a,b).

[12] See, for example, the literature on Structure Induced Equilibria, and in particular, Shepsle and Weingast (1981), and Weingast and Marshall (1987) and references therein.

[13] See, however, Spiller and Gely (1990) for an initial attempt at modeling the voting inside the Court. See also Schwartz (1991) for an analysis of voting for *Certiorari* decisions.

[14] See Fiorina (1974), and Kalt and Zupan (1984), Kau and Rubin (1979), and Peltzman (1984), for empirical tests of this proposition.

be proper and important considerations, we want to argue that those are not sufficient to derive much of the Court's behavior. Instead, ideological motivation is needed.

*The Nature of the Game*

We model the interaction among the different players as a sequential game, where at each stage each player rationally forecasts the future evolution of the game and makes decisions accordingly. Thus, subgame perfection is assumed throughout. In general, the game will consist of three or four stages. In the first stage an administrative agency takes some action. It might be an interpretation of a particular statute, or the promulgation of some regulations. This action may or may not differ from the previous policy (the status quo). In the second stage the agency decision will in turn be reviewed by the Supreme Court. The decision of the Supreme Court will in turn be reviewed in the third stage. If it is a statutory decision, then Congress and the President will consider whether to reverse it. If the Supreme Court decision is reversed, then the new decision becomes the outcome of the game. If Congress and the President cannot reverse it, then the Court's decision becomes the final outcome.

If, on the other hand, the Court reversed the decision on constitutional grounds, then Congress will consider, in the third stage, whether to start a constitutional amendment process so as to reverse the Court. For a constitutional amendment to pass it has to have the support of both houses of Congress as well as of a super-majority of the state legislatures.[15] If the amendment reversing the Court decision does not pass, then, the game starts again. The agency makes a decision that complies with the constitutional requirement, the Supreme Court now reviews the agency decision on statutory grounds, and

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[15] While in principle, constitutional amendments could be initiated at the state levels, so far all constitutional amendments have been initiated by Congress and ratified by the State legislatures. We assume, then, that only this is the relevant avenue to overturn a constitutional decision.

the game evolves as described above.

If the constitutional amendment is enacted, though, the Supreme Court has to review the agency decision again, but only on statutory grounds. The Supreme Court decision, in turn, will be reviewed by Congress and the President, and the game evolves as described above. See Figure 1 for a description of the sequencing in the game.

*The Nature of Supreme Court Decisions: Constitutional Interpretation*

Modelling constitutional decisionmaking is probably the trickiest part of our enterprise. As we discussed above, we model constitutional decisions as reducing, in a non-trivial way, the dimensionality of the policy space from which politicians and administrative agencies may actually choose policies. But this formulation is so general as to be of no help. To make things more specific, we model explicitly only that subset of constitutional decisionmaking that might be called "discrimination" law, and we describe later on ways of modeling alternative types of constitutional decision-making.

Two obvious examples of "discrimination law" include the equal protection clause of the 14th Amendment and the viewpoint discrimination component of the guarantee of freedom of speech and of the press in the First Amendment. Consider, for example, the case of Brown v. Board of Education[16] that posed the archetypal question for the interpretation of the 14th amendment. Can the state spend different amounts of resources on schooling of black and white children?[17] In Figure 2 we have put expenditures per

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[16] 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[17] We are aware that technically the "separate but equal" doctrine of Plessy v Furgeson, 16 S.Ct. 1138, a63 US 537, 41 L.Ed. 256 (1896) was overturned in Brown, and that in theory Plessy required that equal amounts be spent, or that equal facilities be provided, allowing only that the facilities could be physically separate. The reality of expenditures, however, was far different. In fact, Southern states spent far more per white pupil than per black pupil. Cumming v Board of Education of Richmond County, 20 S.Ct. 197, 175 US 528, 44 L.Ed. 262 (1899). See also Tyack, (1987), and Hochschild (1984), in particular Chapter 2, pp:42-45. We regard Brown's holding that black and white children must attend public

black pupil on one axis, and expenditures per white pupil on the other. The status quo before the case, denoted S in Figure 2, indicates that far more was being spent on each white pupil than on each black pupil. The Court's unanimous decision in Brown meant, for the purposes of our model, that the legislature had to confine its choices to the 45 degree line, where expenditures are equal. But the Court's decision did not determine exactly how much, if any, funds had to be spent. In fact, it was in theory permissible a State to shut down the public schools entirely.[18]

In our lexicon, then, making a "constitutional" decision of the "discrimination law type," means finding that the equal protection constraint applies to a given situation, and that the legislature and executive must confine themselves to the 45 degree line. A Court holding that the equal protection clause does not require that two different classes of people (old and young, US citizens and aliens, etc.) be treated equally fails to qualify as a constitutional holding for the purposes of this paper, because the holding would leave the legislature and executive free to choose a point off the 45 degree line.[19]

Parts of First Amendment doctrine can be modelled in the same fashion. For example, in Perry Education Association v. Perry Local Educator's Association,[20] two rival unions wanted access to school teachers' mailboxes, but the school district would give access only to Perry Education Association ("PEA"). When Perry Local Educator's Association

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school together as, in large part, a monitoring device for enforcing the requirement that black and white children get equal schooling resources.

[18] In fact, this was done in at least one county in Virginia. See, Griffin v. County School Board, 377 US 218, 84 S.Ct. 1226, 12L.Ed. 2d. 256 (1964). In Griffin, the Supreme Court found this action illegal for a host of reasons, including the State's continuing to give tuition grants and tax credits to white parents of children in segregated schools.

[19] Of course, many lawyers would justifiably regard it as a ruling on constitutional law because the case would tell them something about the constitution. But for our purposes, the decision will be termed "statutory" because it leaves a majority of each House, along with the President, free to choose any point in the policy space.

[20] 460 U.S. 37 (1983).

("PLEA") demanded access to the mailboxes, claiming that the First Amendment's guarantee of freedom of speech prevented the school district from discriminating between speakers, or at least between similar speakers (labor unions), the Court was faced with the question represented in Figure 3. The two axes represent the degree of access to the boxes for the rival unions (as well as others), with the status quo indicated by S. Obviously S provided for access only to PEA. The court had to decide whether the administrative agency (in this case, as in Brown, a school system) had to confine itself to the 45 degree line of equal access. When the Court decided that the First Amendment did not require equality, it refused, in the lexicon of our model, to make a constitutional decision.

Many constitutional doctrines, however, may not be modeled in this fashion.[21] Much constitutional decisionmaking revolves around defining the rules of lawmaking (such as separation of powers),[22] or preventing the government from doing any of a particular activity (such as unreasonable search and seizure),[23] or finding individual rights (which is a much slipperier category).[24] While such cases may not be of the 45 degree type, they may be analyzed in a similar fashion as restricting the dimensionality of the policy space

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[21] Even modeling the equal protection and First Amendment speaker discrimination constitutional doctrines in this fashion leaves out a great deal of possibilities, including permissible delays in enforcement, uncertainty about application of precedent, the various methods of enforcement, the difference between applying the constitution to federal, state and local governments, and so on.

[22] Bowsher v. Synar, 106 S.Ct. 3181, 92 L.Ed. 2d. 583, 478 US 714 (1986); Chadha v. INS, 462 US 919, 103 S.Ct 2764, L.Ed 2d. 317 (1983); Commodities Futures Trading Commission v. Schor, 478 US 833, 106 S.Ct. 3245, 92 L.Ed 2d. 675 (1986); Morrison v. Olsen, 108 S.Ct. 2597, 101 L.Ed 2d. 569, 487 US 654 (1988).

[23] Payton V. New York, 100 S.Ct. 1371, 445 US 573, 63 L.Ed 2d. 639 (1980).

[24] This would include, we suppose, the right to travel, Shapiro v. Thompson, 394 US 618, 89 S.Ct. 1322, 22 L.Ed 2d. 600 (1969); the right to an abortion under certain circumstances, Roe v. Wade, 410 US 113, 93 S.Ct. 705, 35 L.Ed 2d. 147 (1973): the right to bodily integrity while in prison, Washington v. Harper, 110 S.Ct. 1028, 108 L.Ed 2d. 178 (1990); and so forth. The trouble with this category is that everything in it can be redescribed as preventing the government from violating rights.

available for decision making by the polity. In section V we discuss extending our model beyond the discrimination type cases, to include prohibition of price (wages or hours) regulation, restrictions on censorship and other types of decisions.

While the 45° type decision is only one type of feasible constitutional decisions, modeling such types enables us to garner useful insights about the Court's behavior, and provides a template for modelling other constitutional doctrines.

*The Nature of Supreme Court Decisions: Statutory Interpretation*

Judicial review of administrative agencies may take different forms. The Court may make decisions on a yes or no basis, or may actually pick a point in the policy space. We model judicial review of administrative action on statutory grounds as a choice between affirming the action or reversing the action (and implicitly reinstating the status quo ante). We have chosen to model statutory review in this fashion for two basic reasons.[25] First, as Gely and Spiller (1990) showed, if we model the Court as choosing a point in policy space, the administrative agency is completely irrelevant within the model. This seems more than

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[25] See Gely and Spiller (1990) for a discussion of the differential impact of these two modes of judicial decision making. Spiller (1990b) provides an argument, complementary to the one in text, to justify using the (yes,no) model of statutory review. Spiller (199b) shows that the Supreme Court will make decisions on a yes or no basis only when voting inside the Court for a policy will generate a voting cycle. A necessary and sufficient condition for cycling inside the Court occur is that the intersection of the set of non-reversible judicial decisions and the core of the voting game in the Court has positive measure. In the current case, since we assume that a reversal of a Supreme Court decision has to make the President better off as well, implies that the set of non-reversible decisions (i.e. the core of the bargaining game among the House, the Senate and the President) is indeed of positive measure. As a consequence, and to simplify the discussion, we will proceed assuming that the Court can only make decisions on a yes or no basis. Later on we show that same results are carried through if the Court could pick points in the policy space. For recent analyses of statutory interpretation from an interdisciplinary legal point of view, see Farber (1989), Sunstein (1989); and Eskridge (1990).

a little strained.[26] Second, the (affirm, reverse) model we have chosen seems to accord much better with the operation of many of the legal doctrines in administrative law. For example, if an administrative regulation is tested for arbitrariness (or capriciousness or for abuse of discretion)[27], a reviewing court may affirm the regulation, or else find it arbitrary and remand to the agency for further proceedings.[28] Similarly, if a litigant claims that an administrative agency produced a regulation with improper procedures under the Administrative Procedure Act, the Court either will deny the challenge and affirm the regulation, or find that the procedures were improper, reinstate the status quo ante, and invalidate the regulation.[29] The agency will then have a chance to utilize proper procedures, and the Congress and President will also have a chance to pass a statute declaring the procedures that were used henceforth to be legitimate. Thus, when making a decision based on statutory grounds, the Court may be seen as choosing between the status quo (a No) and the administrative decision (a yes).

Of course, modelling statutory review in this way leaves out a lot. First, there are some forms of statutory review that are difficult to model in this fashion. For example, if

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[26] Spiller (1991a) has shown, however, that if making decisions is costly for the Court (i.e, its time has value), then agencies have discretion even when the Court can pick points in the policy space.

[27] See the relevant section of the Administrative Procedures Act, 5 USC sec 706.

[28] Scenic Hudson Preservation Conference v. FPC (I), 354 F.2d 608 (2d Cir. 1965); Scenic Hudson Preservation Conference v. FPC (II), 453 F.2d 463 (2d Cir. 1971), rehearing en banc denied by equally divided court, id. at 494, cert. denied, 407 U.S. 926 (1972). Of course, sometimes the Court uses the review for arbitrariness to tread close to picking a point, but even here it will usually allow the agency to reconsider the issue. See Motor Vehicle Manufacturers Assn. of the United States Inc, et al v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983), and the description of that case within the category "court's hard look" in Garland (1985), as well as Gely and Spiller (1990) for a different interpretation of the case.

[29] United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

the Court reviews an administrative agency's interpretation of its own statute, the Court is to determine whether the agency's interpretation of its statute is reasonable. If so, the agency is to be upheld.[30] But in order to make this determination, the Court must determine the set of reasonable interpretations of the statute, and the opinion may well affect the subsequent game in more ways than a simple (affirm, reverse) model would suggest. Second, this model leaves out many things, such as the occasional propensity of courts to pick certain policy outcomes as the only permissible outcome;[31] remands with specific instructions to do certain things;[32] the precedential value of both affirmances and reversals; and so on. For that reason, in Section IV we show that our main results are robust for the case when the Supreme Court can pick points in the policy space.

For the purposes of our model, judicial rulings that can be reversed by a majority vote of the House and Senate and signature of the president are "statutory," regardless of whether or not they are styled as constitutional decisions by the Court. The "dormant Commerce Clause" opinions probably provide the best example of this phenomenon. Article I of the constitution gives Congress the power to regulate commerce among the states, and the Court has ruled that this clause prevents the states from enacting statutes with the purpose and effect of preferring in-state businesses over out-of-state businesses.[33]

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[30] Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[31] For example, consider the D.C. Circuit's decision in United Church of Christ ordering the FCC to revoke the license and declare it open for new applications, 359 F2d. 994 (1966). Some have characterized the Court's decision in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 813, 28 L.Ed 2d. 136 (1971), in this fashion, as well.

[32] See the remand in Steele v. FCC, 770 F.2d. 1192 (1985).

[33] Baldwin v. GAF Seelig, Inc, 294 US 511 (1935) (making impermissible protection of local economic interests at expense of interstate commerce); Dean Milk Co. v. Madison, 340 US 349 (1951), (valid health concern "balanced" against burden on interstate commerce was found to create too great a burden); Hunt v. Washington Apple Advertising Commission, 432 US 333 (1977), (favoring local interests impermissible); Lewis v. BT Investment Managers, Inc., 447 US 27 (1980), (protecting local in-state industry impermissible).

However, the Court has also held that Congress may delegate the power to states to act in ways that would otherwise violate the dormant Commerce Clause, and this delegation can be effected by a simple act of Congress.[34] Hence, Court decisions finding state statutes in violation of the dormant Commerce Clause will be regarded as statutory within our model.[35]

**III. Solving the Model**

The core of the model is the strategic choice by the Supreme Court of the type of decision: constitutional or statutory. As discussed above, we assume that the Court is ideologically motivated, and that it can foresee the evolution of the game that will follow a particular type of decision. Thus, the Court will choose the type of decision that will make it better off. Thus, to be able to analyze the Supreme Court's choice of legal doctrine, we have to solve the model for both the optimal constitutional and the optimal statutory decision.

*Optimal Statutory Decision*

Most previous rational choice models of the Supreme Court have analyzed statutory

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[34] Gibsons v. Ogden, 22 U.S. (9 Wheat.) 1. 207, 6 L.Ed. 23, 73 (1824) ("Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject"), White v. Massachusetts Council of Constructio Employers, 460 U.S. 204, 213, 103 S. Ct. 1042, 1047, 75 L.Ed. 2d. 1, 9 (1983) ("The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body"), Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946) (upholding discriminating tax on foreign insurance companies).

[35] Similarly, "standing" decisions purport to be constructions of Article III's "case or controversy" requirement, are constitutional decisions as far as the Court is concerned. But because the Court has allowed Congress to confer standing by simple statute, we regard such holdings as statutory, Linda R.S. v. Richard D. and Texas, 410 US 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).

decisions by the Supreme Court.[36] The framework is already relatively well known, and we will summarize it here very succinctly.[37]

In solving for the optimal statutory decision by the Supreme Court, we have to model the evolution of the game following a Court decision. As described above, following a statutory decision, Congress and the President will review the decision. If the decision of the Court does not make the new status quo inside the core of the bargaining game among the House, the Senate and the President, then a bargaining process will start that will end in a policy that will make the three better off. All that we can say of this bargaining process is that it has to be efficient[38] and that it cannot make any of the three players worse off than the initial status quo. Unconstrained bargaining, then, will imply an outcome in the area delineated by the contract curves between the three players. Let, that area be W(H,S,P).

Let G(x) represent the equilibrium to the bargaining game when the status quo is x. Thus, if $y \in W(H,S,P)$, then $y=G(y)$.

When the Court considers an agency decision $x_a$, it may uphold it or reverse it. Would the Court uphold the agency decision, then $x_a$ becomes the status quo in the final bargaining game between the House, Senate and President. Further, if $x_a \in W(H,S,P)$, then $x_a=G(x_a)$ becomes the equilibrium. If, however, $x_a \notin W(H,S,P)$, then $G(x_a) \neq x_a$ becomes the equilibrium. On the other hand, would the Court reverse the agency decision, then $x_0$ becomes the status quo in the final bargaining game. As in the previous case, the outcome of the final stage is $G(x_0)$, which may be equal to $x_0$ or not depending on whether $x_0$ was or

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[36] See, for example, Gely and Spiller (1990), Ferejohn and Shipan (1990). See, however, Gely and Spiller (1991) for a different approach to constitutional decision-making.

[37] The following is taken from Gely and Spiller (1990). For further discussion of this framework, see Gely and Spiller (1990).

[38] By efficiency we mean that the players to the bargaining game exhaust all possible gains from trade. Thus, an outcome is efficient if there is no possible alternative offer that will make at least one player better off without harming any of the remaining players.

not in W(H,S,P).

The Supreme Court, then, will choose between the agency decision and the previous status quo depending on whether or not $G(x_a)$ provides the Court with a higher utility level than $G(x_0)$. Lemma 1 provides the conditions for the Court to affirm the agency decision:

**Lemma 1:**

> Let $U^{SC}(x)$ represent the utility level the Court obtains from policy x, and $SC(y)=\{x \mid U^{SC}(x) \geq U^{SC}(y)\}$ be the set of policies the Court (weakly) prefers to policy y. There are two possibilities: If $G(x_a) \in SC(G(x_0))$, then the Supreme Court will uphold the agency decision, and $G(x_a)$ will become the final policy outcome. If, however, $G(x_a) \notin SC(G(x_0))$, then Supreme Court will reverse the agency decision, and $G(x_0)$ will become the final policy outcome.

Observe that $G(x_a)$ and $G(x_0)$ are in W(H,S,P). Thus, the final policy outcome is necessarily in the intersection of W(H,S,P) and $SC(G(x_0))$.

Figure 4 shows two different agency decisions $x_{a1}$ and $x_{a2}$. Both are inside the core of the legislative bargaining game, but $x_{a2}$ makes the Supreme Court better off than the status quo $x_0$, while $x_{a1}$ makes it worse off (observe that in the Figure, $x_0$ is outside the core of the bargaining game, so that the relevant "status quo" is $G(x_0)$). Thus, in the case of $x_{a1}$ the Court will reverse the agency decision with the equilibrium becoming $G(x_0)$, while in the case of $x_{a2}$, the court will uphold the agency decision, and it becomes the final policy outcome.

The Court's ability to reverse the agency restricts the agency's ability to implement policy outcomes in W(H,S,P). In Figure 4, the agency cannot deviate too much from the status quo, $G(x_0)$, without triggering a reversal by the Court, which will be sustained by Congress and the President. The agency, though, has some discretion. The Court will not support the legislative status quo in all cases, as changes away from the status quo may make the Court (and the Agency) better off. The Court, on the other hand, will sustain the status quo when the agency decision will move the policy away from the direction most

preferred by the Court.

*Optimal Constitutional Decision*

Consider now the case when the Court envisions making a constitutional decision. Assume, further that the Court has only a single constitutional rationale on which to base a constitutional decision: equal protection. That is, following a constitutional decision all feasible policy outcomes have to be located on the 45° line.[39]

Let the Court confront an agency decision, $x_{a0}$. As described in the previous section, the Court may reverse it or let it stand. But if the Court reverses the agency decision on constitutional grounds, and a constitutional amendment fails, then a new game starts where the agency will choose a new policy that satisfies the constitutional requirements. The Court will then review it based on statutory grounds, and finally Congress and the President will consider whether to sustain or reverse the Court's statutory decision. If, on the other hand, a constitutional amendment passes, then the Court will review the agency's original decision again but this time only on statutory grounds.

Observe that subgame perfection and perfect information rules out constitutional decisions that are later reversed by a constitutional amendment. Thus, all constitutional decisions have to be amendment-free. If there are no constitutional decisions that are amendment free, then, the Court will not reverse the agency on constitutional grounds. To solve the game, then, we have to consider its evolution following a constitutional decision which is amendment-free.

The outcome to the game that will evolve following a constitutional decision is similar to that described by Lemma 1, where now the core of the bargaining game is the segment of the 45° line that is in between the projection onto that line of the three ideal

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[39] We discuss in Section V a case when the Court could make constitutional decisions of a different nature.

points of the House, the Senate and the President.[40] Let that segment be called W*(H,S,P). In Figure 5, for example, the boundaries of W*(H,S,P) are given by the projections of H and S (H* and S* respectively). Call G*(x) the equilibrium to the bargaining game that brings an initial status quo x onto W*(H,S,P) (Observe that this is not necessarily the projection of x onto W*(H,S,P)). Following the constitutional decision by the Supreme Court, the new agency decision, $x^*_a$ will be affirmed by the court only if $G^*(x^*_a) \in SC(G^*(x_0))$. Once again, observe that G*(x*a) is defined to be in W*(H,S,P), so this condition implies that the final outcome ($G^*(x^*_a)$) will be contained in $W^*(H,S,P) \cap SC(G^*(x_0))$. Since the agency can always make itself at least as well off by choosing $x^*_a$ in W*(H,S,P) rather than by choosing $x^*_a$ not in W*(H,S,P), we will assume that $x^*_a$ will in fact be in W*(H,S,P). The equilibrium following a constitutional decision is then that point in $W^*(H,S,P) \cap SC(G^*(x_0))$ that maximizes the agency's utility. Point $x_{a1}$ in Figure 5.

For $x_{a1}$ to be the equilibrium, however, it has to be the case that either one of the houses of Congress or at least 26% of state legislatures prefer $x_{a1}$ to the equilibrium that will follow a constitutional amendment.[41] Following a constitutional amendment, the

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[40] Assuming away corner solutions, the most desired point on the 45° line for each player is the tangency point between the 45° line and the iso-utility preference contour of that player. Since we are assuming strictly convex iso-utility curves, each individual has a unique ideal point on the 45° line.

[41] We model a constitutional amendment as one which removes the 45° constraint, and allows the rest of the game to proceed. This conflicts with the nature of some of the very few constitutional amendments which reverse Court decisions. The 13th and 14th amendments should probably be regarded as reversals of Dred Scott, 60 US 393 (1856), but effectively imposed constraints. On the other hand, the 16th amendment, which reversed Collector v. Day, II Wall (US) 113,114 (1870), and Springer v. United States, 102 US 586 (1880), removed a constraint against the income tax. The 19th and 26th amendments, extending the right to vote to women and 18 year olds, reversed judicial precedent allowing state governments to deny these groups the right to vote (for the 26th Amendment see Lassiter v. Northampton County Bd. of Elections, 360 US 45 (1959)) [for the 19th amendment see XXX]. Of course, a constitutional amendment could pick any point in policy space and make that the law of the land. There is no reason, in principle, why a constitutional amendment could not provide that the government must use an income tax, and even set the rates, with or without indexing. This would provide a very different model. But if a constitutional amendment may do so, then so could, in principle, the

Court will review $x_{a0}$ exclusively on statutory grounds. As discussed above, $x_{a0}$ will be reversed only if $U^{SC}(G(x_{a0})) < U^{SC}(G(x_0))$. Since the agency could have forecast the evolution of the game, $x_{a0}$ should be that point in $W(H,S,P) \cap SC(G(x_0))$ that maximizes the agency's preferences.

Whether $x_{a1}$ is an equilibrium, then, depends on whether at least one of the houses of Congress prefer $x_{a1}$ to $x_{a0}$, or if that is not the case, whether 26% of state legislatures prefer $x_{a0}$ to $x_{a1}$. Figure 5 provides a case where while both houses of Congress will be made better off by passing a constitutional amendment, the state legislatures will block it. Thus, $x_{a1}$ becomes the equilibrium. The following lemmas formalize our previous results:

**Lemma 2:**

> The equilibrium following an amendment-free constitutional decision is that point in $W^*(H,S,P) \cap SC(G^*(x_0))$ that maximizes the agency's utility.

**Lemma 3:**

> The equilibrium following a constitutional decision that is not amendment-free is that point in $W(H,S,P) \cap SC(G(x_0))$ that maximizes the agency's utility.

Figure 5 presents an initial agency decision $x_{a0}$ which is reversed by a constitutional decision based on equal protection. That constitutional decision is amendment-free and triggers $x_{a1}$ as the final equilibrium.

*Choosing Between Statutory and Constitutional Grounds*

Lemmas 1 to 3 provide the basis for analyzing the optimal choice of the Supreme Court between statutory and constitutional grounds. Simply stated, the Court will choose a constitutional decision if and only if the equilibrium that will evolve following such decision makes the Court better off than the equilibrium that will evolve following its

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Supreme Court. We plan to analyze such constitutional decision making in future research.

optimal statutory decision. The following Proposition states the conditions for a constitutional decision to be optimal:

**Proposition 1:**

> Let $x^*_a = \{X | X=\text{Argmax } U^A(x) \text{ subject to } x \in W^*(H,S,P) \cap SC(G^*(x_0))\}$ and $x_a = \{X | X = \text{Argmax } U^A(x) \text{ subject to } x \in W(H,S,P) \cap SC(G(x_0))\}$ represent the final equilibria following a constitutional and statutory decision respectively. If $x^*_a$ is amendment free, then the Supreme Court will choose constitutional over statutory grounds if and only if $U^{SC}(x^*_a) > U^{SC}(x_a)$. If, however, $x^*_a$ is not amendment-free, then the Court can only make statutory decisions, and the equilibrium to the game is $x_a$.

Observe that the power of constitutional decisions is that they shift the area where bargaining over policies can take place. In particular, constitutional decisions may shift the bargaining toward policies closer to the ideal point of the Court. In some cases, however, the Court cannot be made better off by introducing constitutional considerations. For example, consider a situation where the ideal point of the Supreme Court is already in the core of the legislative bargaining set (i.e. $SC \in W(H,S,P)$). Then, from Lemma 3 we know that the equilibrium to the game is relatively closer to the ideal point of the Court. Furthermore, if the 45° line does not intersect W(H,S,P), then, the Supreme Court will almost always be better off with statutory than constitutional decisions.[42] Also, if the ideal point of the Supreme Court is closer to W(H,S,P) than to W*(H,S,P), then, in general, constitutional considerations will not be worthwhile as they will move the equilibrium further away from the ideal point of the Court.

This result seems to fit the perceived wisdom that the Supreme Court will make more prevalent use of constitutional decisions following important political realigments, as was

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[42] To see this, observe that if the agency foresees that a statutory decision will be optimal, then the agency decision will be in $W(H,S,P) \cap SC(G(x_0))$, which is relatively close to the ideal point of the Court. In particular, it could be the case that $SC(G(x_0))$ is contained in W(H,S,P). If that is the case, then no constitutional decision can make the Supreme Court better off, as it would require the equilibrium to be outside $W(H,S,P) \cap SC(G(x_0))$.

in the case in the 1930s and in the 1960s. To see this, observe that over time, if the political composition of Congress and the Presidency is relatively stable, we would expect that the appointment procedure of Supreme Court Justices will make the ideal point of the Court to be close to W(H,S,P), and in particular to the (S,P) boundary. Political realignments, though, do not initially involve the Court, as appointment to the Supreme Court naturally take time. It will be in those times, then, when the use of the constitutional weapon may provide largest benefits to the Court, as its ideal point may lie well outside the set of feasible statutory outcomes.

**IV. Extensions.**

In this section we briefly sketch the case where the nature of statutory interpretation allows the Court to choose any point in the policy space. That is, the Court is not constrained to chose between upholding and reversing the agency's decision. Gely and Spiller (1990) show that when the Court is able to make decisions in this way, there is no agency discretion.

Now the Court's calculus is simplified. Were it to make a constitutional decision, then the equilibrium following its decision is that point in W*(H,S,P) that maximizes the Court's utility, call it $x^*_{sc}$. If the Court's decision is reversed by a constitutional amendment, then, the equilibrium will be that point in W(H,S,P) that maximizes the Court's utility. Call it $x_{sc}$. The Court's constitutional decision would be amendment free if either one of the houses of Congress prefer $x^*_{sc}$ to $x_{sc}$, or if at least 26% of the states legislatures prefer $x^*_{sc}$ to $x_{sc}$. Otherwise, a constitutional decision is untenable.[43] Thus, we can state:

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[43] Observe that the Supreme Court cannot commit not to choose $x^*_{sc}$ following a constitutional decision. Thus, even though there may be points in the 45° line that would be amendment-free, if $x^*_{sc}$ is not amendment-free, then following a constitutional decision that restricts the policy space to the 45° line, it will be reversed.

**Proposition 1a:**

> Assume that Supreme Court statutory decisions consist of choosing points in the policy space. Let $x^*_{sc} = \{X|X=\text{Argmax } U^{sc}(x) \text{ subject to } x \in W^*(H,S,P)\}$ and $x_{sc} = \{X|X = \text{Argmax } U^{sc}(x) \text{ subject to } x \in W^*(H,S,P)\}$ represent the final equilibria following a constitutional and statutory decision respectively. If $x^*_{sc}$ is amendment free, then the Supreme Court will choose constitutional over statutory grounds if and only if $U^{SC}(x^*_{sc}) > U^{SC}(x_{sc})$. If, however, $x^*_{sc}$ is not amendment-free, then the Court can only make statutory decisions, and the equilibrium to the game is $x_{sc}$.

Figure 6 presents a case where $x_{sc}$ is the final equilibrium as $x^*_{sc}$ is not amendment-free. We see then, that when the Court can make statutory decisions on a continuum, the empirical implications derived for the discrete choice framework discussed in the previous section are sharpened, as the Court will now never use the constitutional weapon when its ideal point is inside the core of the congressional bargaining game. To see this, observe, that in this case the Court can interpret the statute to mean its own ideal point. Congress and the President will not be able to reverse it, as such reversal will make at least one of the three worse off. Furthermore, with circular iso-utility contours, a sufficient condition for the Court to prefer a constitutional over a statutory interpretation is that the 45° line separates the ideal point of the Court from those of the House, the Senate and the President.[44]

## V. Qualifications, Implications and Variations

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[44] This result arises because with circular iso-utility contours, the points H',S', and P' are simply the perpendicular projection onto the 45° line of points H,S and P. If $x^*_{sc}$ is an internal solution (i.e. it is a tangency between the 45° line and an iso-utility contour of the Court), then it is straightforward to see that $\|SC\text{-}x^*_{sc}\| < \|SC\text{-}x_{sc}\|$. Consider now the case when $x^*_{sc}$ is a corner. The angle formed by the segments $[SC,x^*_{sc}]$ and $[x^*_{sc},x_{sc}]$ is necessarily obtuse (if $x_{sc}$ was also a corner, then $x^*_{sc}$ would be the projection onto the 45° line, and hence the angle was a right angle, but if $x_{sc}$ is an internal solution, then the measure of the angle must be more than 90°). Then, it is straightforward to see that $\|SC\text{-}x^*_{sc}\| < \|SC\text{-}x_{sc}\|$. This result, however, may not hold for other type of preferences implying convex, but not circular, iso-utility contours.

There are many different ways to model the various doctrines in constitutional law. A couple of examples drawn from first amendment jurisprudence should demonstrate how richly varied the models might be, and in turn how many games between A, SC, H, S, P, and the L's there can be. First, consider FCC v. League of Women Voters of California[45], in which the Supreme Court struck down the part of the Communications Act of 1934 that forbade editorializing by any public broadcasting station that received funds from the Corporation for Public Broadcasting. The majority and dissent tussled over the question of whether this prohibition on editorializing was a narrowly tailored means of assuring that the Congress did not improperly control the content of public broadcasting. But for our purposes, we would model the dispute as one involving two dimensions -- the political "pitch" of editorials on public broadcasting, and the level of funding for the Corporation for Public Broadcasting. We have depicted the situation in Figure 7.

The prohibition on editorializing was an attempt to guarantee that there was a politically neutral tone. The "natural" political pitch of public broadcasters is denoted by the dashed line intersecting the vertical axis at a liberal value. The ideal points of P, H, and S are indicated. By passing the prohibition on editorializing, the branches had agreed to set to "neutral" the political content of public broadcasting. When the Court ruled the prohibition a violation of the first amendment, it removed from the set of policy instruments the setting of the political tone of public broadcasting editorials. That is, it reduced the dimensionality of the policy space to simply the budget. Thus, all future bargaining among the houses of Congress and the President (and the Court) will have to be undertaken on a line parallel to the x axis (the budget dimension) at the level of "unregulated" (or "liberal") political pitch.

We have labelled the ideal points on the "unregulated" dashed line S', P' and H' in

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[45] 468 US 364, 104 S.Ct. 3106, 82 L.Ed 2d. 278 (1984).

Figure 7, and bargaining over the budget should produce an outcome somewhere within the segment defined by the most extreme of the ideal points. Would the Court be able to make statutory decisions that pick points in the policy space, then the final equilibrium to this game is that point in the segment [S',H'] that maximizes the utility of the Court. If, instead, the Court can only make decisions on a yes/no basis, then the equilibrium will depend on the particular location of the President and of the FCC. Assuming that the President preferred less funding for a more liberal pitch,[46] and that Kieweit and McCubbins (198_) are correct when they assert that Presidents can reduce funding levels. Then the decision may not only have reduced actual funding levels for the CPB, but it would have been rationally anticipated to do so. The Court's choice was then to decide whether it would prefer the status quo ante (neutral tone, greater funding) to the new equilibrium (liberal tone, reduced funding), and then decide the constitutional issue accordingly.

There are two types of cases where the Supreme Court would find a constitutional interpretation worthwhile. First, if as depicted in Figure 7 its ideal point is separated from W(H,S,P) by the horizontal line at the level of "liberal" (unregulated) political pitch. Alternatively, it will also find it profitable if while its ideal point is on the same side of the horizontal line as W(H,S,P), it is closer to the "liberal" line than to W(H,S,P). The relative position of the Court vis-a-vis Congress and the President is not so strained once we recall that during the time of the case both the Presidency and the Senate were in Republican hands.

Although this scenario shares many features with our model, there are also some striking differences. First, the clarity of the statute made agency (Federal Communication Commission) action virtually irrelevant. The FCC had no effective discretion to exercise. Second, the clarity of the statute also made statutory interpretation by the court very

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[46] That is, the President's iso-utility contours can be represented by a negatively sloped ellipse.

difficult. Hence, all that was left was constitutional adjudication. Last, the reaction of the broadcasters to the freedom played a crucial role in the preferences of H, S, and especially P. If broadcasters had had a naturally neutral or conservative pitch, the outcome of the game might have been very different.

A second example, Texas Monthly, Inc. v. Bullock,[47], reveals more variations on our theme.[48] This time, the Court reduced the dimensionality of the policy space from (at least) three to (at least) two. In Texas Monthly a Texas statute exempted religious publications[49] from sales and use taxes. The Texas Monthly, a secular publication, sued Texas for a refund of the more than $149,000 in taxes the magazine paid under the statute. The magazine claimed that the exemption was void because it violated the prohibition of laws "respecting an establishment of religion." The majority held that broadly based sales tax exemptions that incidentally benefit religious organizations are legal, but that the tax exemption at issue here lacked "sufficient breadth to pass scrutiny under the Establishment Clause."[50] The majority rejected Texas' contention that the Free Exercise clause required the exemption for religious publications.[51] In the course of its opinion, however, the majority expressly affirmed a tax that had an exemption for all nonprofit institutions, religious or otherwise.

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[47] 489 U.S. 1 (1989).

[48] It should be noted that this case does not properly fit the current model as it is a State rather than a Federal case. As such, the interaction among the Court, the State Legislature, the Congress and the President will naturally differ from the one modeled in the paper. Nevertheless, the case is useful to show the way that Constitutional decisions may change the nature of the policy space left open to the polity.

[49] The actual language was "[p]eriodicals . . . published or distributed by a religious faith . . . consist[ing] wholly of writings promulgating the teachings of the faith and books . . . consist[ing] wholly of writings sacred to a religious faith." Id. 5-6. This seems to be an exemption tailored for bibles.

[50] 489 U.S. 14.

[51] Id. at 18.

We can then model the issue here as a three dimensional one: sales taxes on religious institutions, sales taxes on other non-profit institutions, and sales taxes on all private institutions. See Figure 8. The initial status quo was one where all institutions paid the same sales tax. That point is labeled $x_0$ in Figure 8, corresponding to a tax of $t_0$ to all institutions. The Texas law, depicted as $x_a$, set a zero tax for religious institutions while keeping the same tax for both all other non-profit and for-profit institutions.

The Court's decision determined that $x_a$ was unconstitutional. It went further in determining that constitutional taxes must treat religious and other non-profit institutions alike, but these may be treated differently from private institutions. Thus, the initial status quo, $x_0$, is constitutional as well as all other points in the plane going through the origin, C and $x_0$. Thus, it is clear that the Establishment Clause does not actually require that the tax rate be on the "equal treatement to all institutions" ray of Figure 8 (the three dimensional parallel to a 45° line in a two dimensional policy space).

This case points out a truth that practicing lawyers have long known -- defining the issue to be decided is often the most crucial part of a case. Once the issue has been defined, or, in the lexicon of our model, once the axes have been defined, the conclusions are often straightforward.

### B. Qualifications and Implications

The need to deal with many different types of models of constitutional decisionmaking should not detract from our central point. Courts can choose strategically between different modes of decisionmaking -- in this model Constitutional or statutory -- as well as between different outcomes within a particular mode of legal analysis. Further, in many (perhaps most) forms of Constitutional decisionmaking, the Court does not make its

decision as a specific policy outcome, but rather it leaves a great deal of discretion to the other branches.[52]

A reader might be tempted to ask, at this point, why the Court bothers at all with different forms of judicial review, some of which leave great discretion to coordinate branches. After all, the Court could just pick its favorite policy and declare that policy, and only that policy, to be "the law." We think this sort of question implicitly gives insufficient weight to the traditional concerns of lawyers -- the written words of the Constitution, framers' intent, precedent, and widely held legal norms. Courts are not free to do "whatever they want," but must operate with tools and within spaces that are defined for them by various sources of authority.[53] Our models of judicial review advance the state

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[52] As we indicated above. most of the exceptions to this statement involve "rights" rather than "discrimination" litigation. Even in discrimination cases, however, the Court sometimes comes close to picking a specific policy point. For example, the recent case of Missouri v. Jenkins, 110 S. Ct. 1651 (1990) involved the legality of a District Court order detailing a desegregation remedy and the financing necessary to implement it. The District Court found that state law prevented the Kansas City, Missouri School District (KCMSD), the offending party, from raising any money to remedy the discrimination, and ordered the KCMSD property tax increased. The Court of Appeals ruled that the District Court had authority both to enjoin the state laws that prevented the KCMSD from submitting a levy to state authorities and to order the KCMSD to submit a levy, but that ordering the tax increase by itself violated principles of comity and federalism. A five member majority of the Supreme Court affirmed the Court of Appeals, holding, among other things, that (i) the District Court should have directed the local government to devise and implement the appropriate remedy to the problem of segregation in the KCMSD; (ii) the Court of Appeals order did not exceed the judicial power under Article III, in that a court can direct a local governmental body to levy its own taxes. The dissent (Kennedy, Rehnquist, O'Connor, and Scalia) claimed that the ability to raise taxes is not judicial. Ordering a municipal body that lacks the power to tax to do so is essentially the same thing, said the dissent. Clearly, the degree of discretion that must be left to the other branches is at the core of this 5 to 4 decision. And it is in circumstances where state authorities are trying to thwart Federal Court orders, orders that gain power from clause 5 of the 14th Amendment, that Courts will be on the strongest footing to order exact compliance. But even here, only a bare bones majority upheld the Court of Appeal.

[53] See, in particular, Kennedy (1986); Moore (1981); and Radin (1989). The institutional constraints built into our model are probably a bit less confining than the models of stare decisis in Kornhauser (1989) and Macey (1989). Of course, we cannot always distinguish between constraints and equilibrium phenomena just by looking at a system. But we strongly suspect that we are dealing with constraints here. For a strong statement of the ineffectiveness of legal rules to provide constraints without some animating vision of

of the art precisely because we incorporate some of these notions of jurisprudential limits on the Court.

Our approach to modelling Court behavior is, in one sense, quite new, but in another sense is already well established. For some time scholars in law and economics have contended that judges should take into account the reaction of markets to their decisions. So, for example, judicial decisions finding a warranty of habitability in rental housing,[54] approving strict liability and other doctrines in products liability,[55] and validating defensive tactics to tender offers[56] have been strongly criticized for their tendency to produce adverse reactions in markets. Sometimes judges explicitly acknowledge the (presumed) reaction of markets to their decisions when they justify the decisions.

Our model asks what happens if the Court takes into account the reaction of political institutions, rather than market institutions. We trace out the implications of the Court acting in such a fashion. Our model is purely positive, however, and unlike the traditional market-oriented literature, we do not contend that the Court ought to behave in this way. On some jurisprudential views, it probably ought to do so. For example, some writing in the law and society vein suggested that litigation over the "man in the house rule" for AFDC recipients was misguided because even if the rule were struck down, Congress need not increase appropriations to AFDC, and might even reduce them.[57] Perhaps a forward-looking, well-intentioned, politically correct court should think this way. On the

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political morality, see Tushnet (1988). See also D'Amato.

[54] Becker v. IRM Corp, 38 Cal 3d 454, 698 P.2d 116, 213 Cal.Rptr. 213 (1985), Hinson v. Delis, 26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972), Green v. Superior Court, 10 Cal3d 616, 517 P.2d 1168, 111 Cal.Rptr 704 (1974); Komesar.

[55] See, Schwart (1990); ALI report

[56] See Easterbrook and Fischel (1980), and Schwartz (19xx).

[57] See, Simon (19xx).

other hand, we could imagine someone calling such judicial behavior a cowardly abdication of the law to politics.[58]

The analysis of these difficult normative questions, as well as the extension of our positive model to multimember political bodies, multimember Courts, new doctrines in Constitutional Law, and so forth, lie well beyond the scope of this article. Instead, this article finishes, as do most other papers, with a call for future research.

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[58] There is a parallel question about the extent to which one ought to even talk about the Court in the way we do. Perhaps such talk degrades public faith in the rule of law and in the judicial system. Perhaps the degradation of public faith is so bad that our model, and others like it, should be suppressed. We do not provide any extended discussion of such arguments at this point, but instead rely on the analogous arguments in favor of continuing the literature on the rational choice analysis of Congress contained in Mashaw (1998) and Farber (1989). See also Mikva (1988); and Kelman (1987). See generally Altman (1990).

**Figure 1**
**Sequencing of the Game**

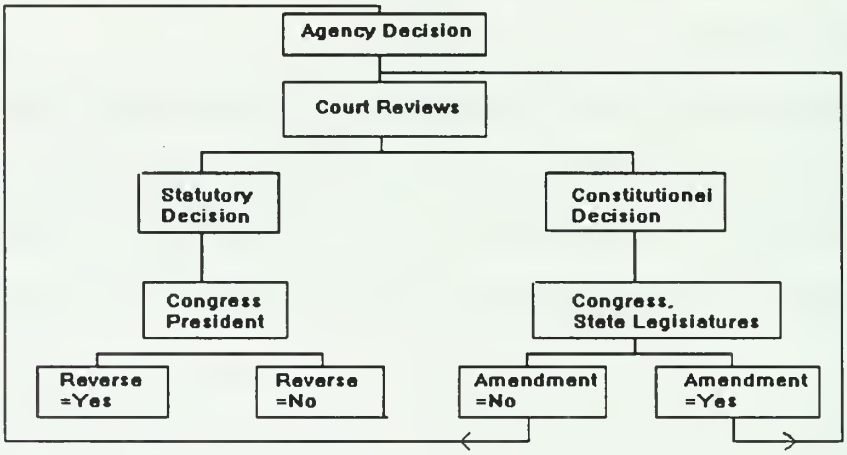



**Figure 2**
**Equal Protection Constitutional Decision**

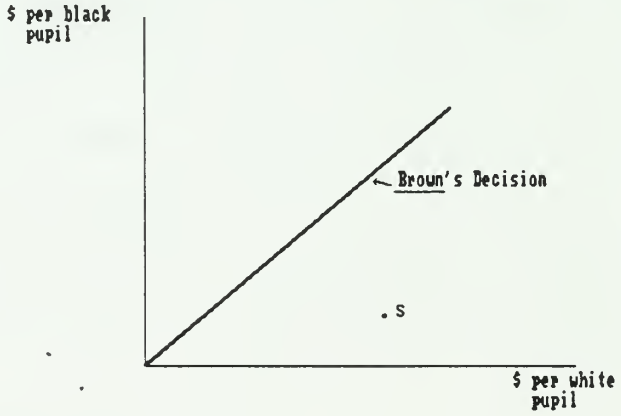


**Figure 3**
**PEA v. PLEA: Court Refuses to Make A Constitutional Interpretation**

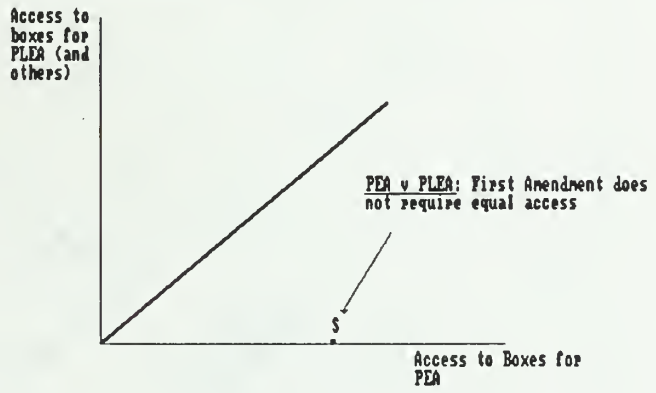



FIGURE 4
OPTIMAL SUPREME COURT STATUTORY DECISION

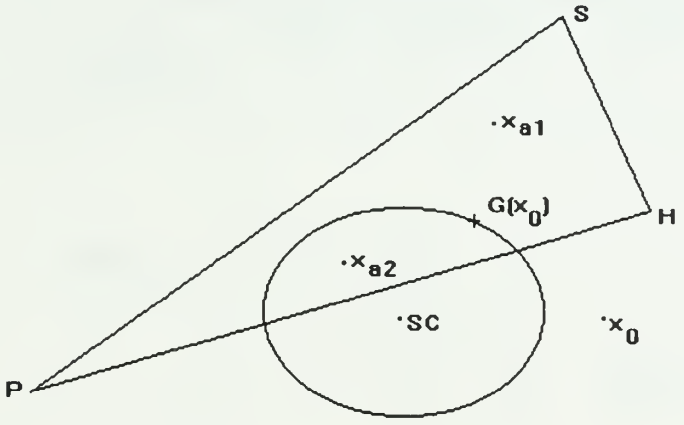


**Figure 5**
**Optimal Supreme Court**
**Constitutional Decision**

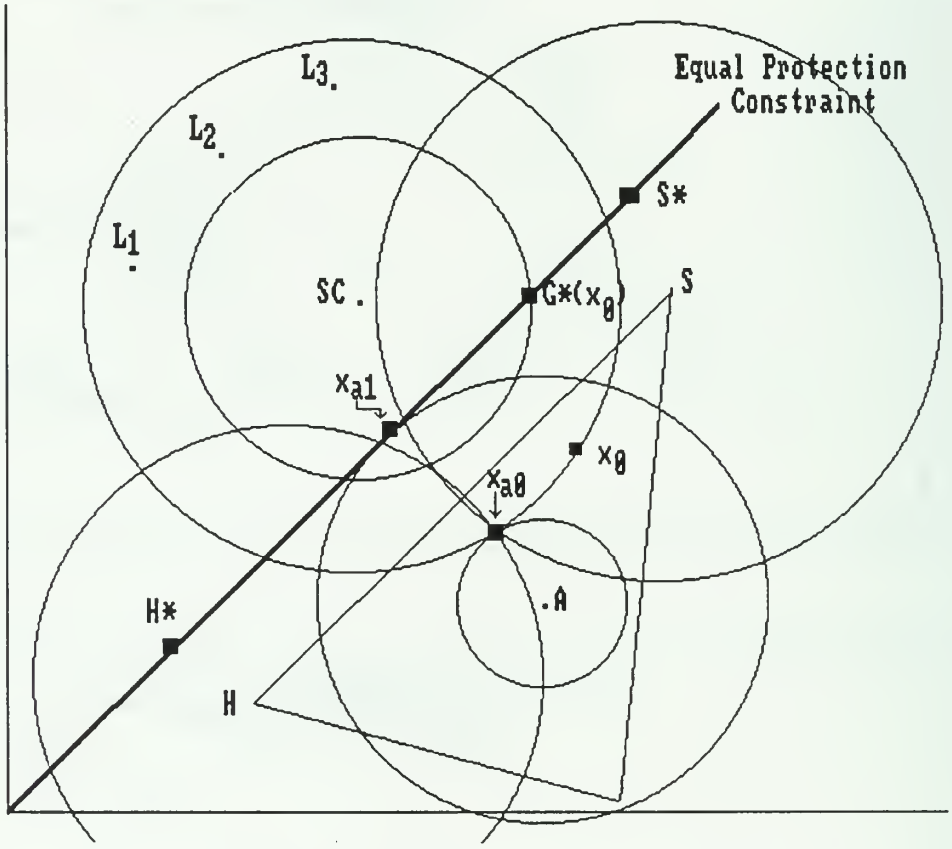


FIGURE 6
OPTIMAL SUPREME COURT CONSTITUTIONAL DECISION
when statutory decisions are made in a continuum

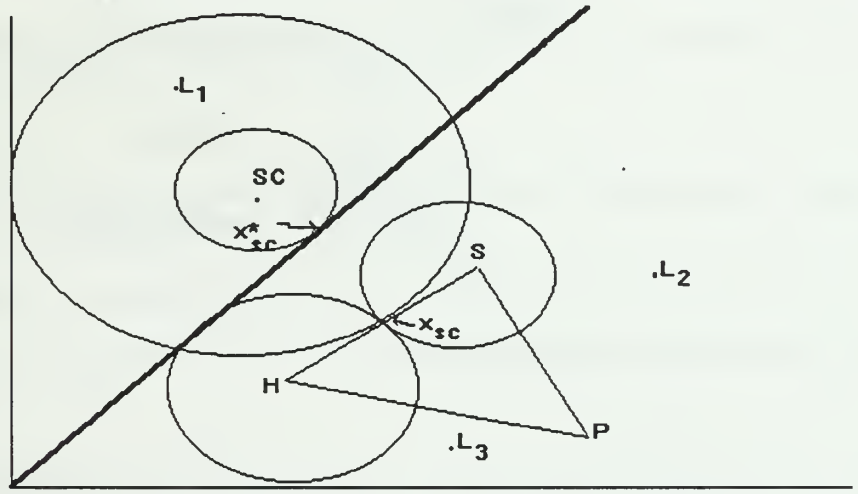



Figure 7
Prohibition on Editorializing Violates
First Amendment

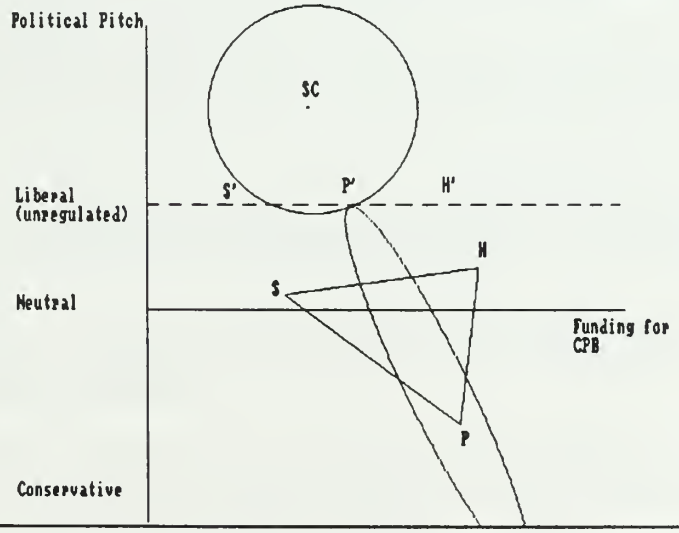
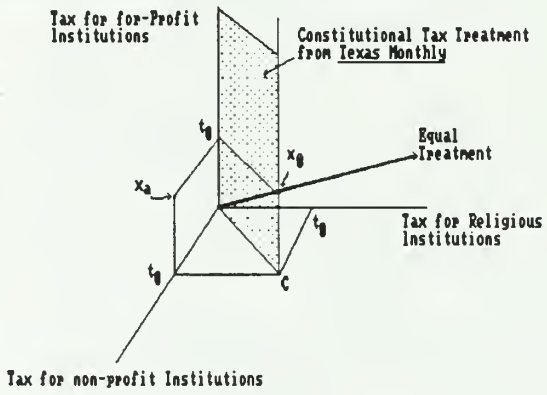


**Figure 8**
**Texas Monthly Reduces the Dimensions of the Policy Space from Three to Two**



## REFERENCES

Altman, "Beyond Candor," 89 Michigan L. Rev., 296 (1990).

Bickel, A., The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2d. Edition, New Haven: Yale University Press, (1986).

D'Amato, ""

Easterbrook and Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer", 94 Harvard. L. Rev., 1161 (1980);

Ely, J.H., A Theory of Judicial Review, Cambridge: Harvard University Press, (1980).

Eskridge, Jr., W.N., "The New Textualism," 37 University of California at Los Angeles Law Review, 621-691 (1990).

Farber, D.A., "Statutory Interpretation and Legislative Supremacy," 78 (Issue 2) The Georgetown Law Journal, 281-318 (1989);

Farber, D.A., "Democracy and Disgust: Reflections on Public Choice," 65 (Issue 1) Chicago-Kent Law Review, 161-176 (1989).

Ferejohn, J., and C. Shipan, "Congressional Influence on Bureaucracy," vol 6, special issue, Journal of Law, Economics and Organization, (1990), pp:1-20.

Ferejohn J., and B.R. Weingast, "A Positive Theory of Statutory Interpretation," forthcoming International Review of Law and Economics, (1991).

Fiorina, M., "Representatives, Roll Calls and Constituencies, Lexington, MA: Heath and Co., (1974).

Garland, M., "Deregulation and Judicial Review," 98 Harv. L. Rev. 505 (1985),

Hochschild, J.L., The New American Dilemma: Liberal Democracy and School Desegregation, New Haven: Yale University Press (1984),

Gely, R. and P.T. Spiller, "A Rational Choice Theory of Supreme Court Statutory Decisions, with Applications to the State Farm and Grove City Cases," 6 **Journal of Law, Economics and Organization**, (1990), pp:263-301.

Gely, R., and P.T. Spiller, "The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court Packing Plan," with R. Gely, forthcoming, **International Review of Law and Economics**, (1991).

Kalt, J., and M. Zupan, "Capture and Ideology in the Economic Theory of Politics," 74 American Economic Review, 279-300, (1984).

Kau, J.B., and P. Rubin, "Self Interest, Ideology and Logrolling in Congressional Voting," 22 Journal of Law and Economics, 365-384, (1979).

Kelman, S., "Public Choice and Public Spirit," 87 Public Interest, 80-_____ (1987).

Kennedy, D., "Freedom and Constraint in Adjudication: A Critical Phenomenology," 36 Journal of Legal Education, 518-62 (1986);

Kieweit and M. McCubbins, "," (19xx).

Kornhauser, L.A., "An Economic Perspective on Stare Decisis, 65 (Issue 1) Chicago-Kent Law Review, 63-92 (1989);

Ladha, K.K., "The Pivotal Role of the Judiciary in the Deregulation Battle Between the executive and Legislature," Political Economy Working Paper 147, John M. Olin School of Business, Washington University, St. Louis, MO 63130;

Landes W.M., and R.A. Posner, "The Independent Judiciary in an Interest-Group Perspective," 18 (Issue 3) The Journal of Law & Economics, 875-901, at 897 (1975);

Lemieux and Stewart, working paper

Macey, J.R., "The Internal and External Costs and Benefits of Stare Decisis," 65 (Issue 1) Chicago-Kent Law Review, 93-114 (1989).

Marks, B.A., "A Model of Judicial Influence on Congressional Policymaking: Grove City College v. Bell," Working Paper in Political Science P-88-7, The Hoover Institution, Stanford University, 1988;

Mashaw, J.L., "The Economics of Politics and the Understanding of Public Law," 65 (Issue 1) Chicago-Kent Law Review, 123-160 (1998);

McCubbins, M.D., R.G. Noll, and B. Weingast, "Administrative Procedures as Instruments of Political Control," 3 (Issue 2) Journal of Law, Economics and Organizations, 243-277 (1987).

Mikva, A., "Forward, Symposium on the Theory of Public Choice," 74 Virginia Law Review, 167-77 (1988);

Moore, M., "The Semantics of Judging," 54 So. Cal. L. Rev., 151 (1981);

Peltzman, S., "Constituent Interest and Congressional Voting," 27 Journal of Law and Economics, 181-210, (1984).

Radin, M.J., "Reconstructing the Rule of Law," 69 Boston Univ. Law Rev., (1989).

Rose-Ackerman, S., "Comment on Ferejohn and Shipan's "Congressional Influence on Bureaucracy"," 6 (Special Issue) Journal of Law, Economics and Organization, 21-28 (1990).

Schwartz, A., "The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures," 100 Yale L.J. (1990);

Schwartz, E.P., "Information, Agendas, and the Rule of Four: Nonmajoritarian Certiorari Rules for the Supreme Court, Stanford University Graduate School of Business, (1991)

Shepsle K., and B.R. Weingast, "Structure-Induced Equilibrium and Legislative Choice," 37 Public Choice, 503-19, (1981).

Spiller, P.T., "Government Institutions and Regulatory Policy: A Rational Choice Analysis of Telecommunications Deregulation," forthcoming P. Quirck and R. Rich, **Understanding and Improving Public Decision Making**, IGPA, University of Illinois (1990a).

Spiller, P.T., "Government Institutions and Policy Determination: The Role of Judicial Review," presented at CERES/Fullbright Conference on Institutions and Development, (1990b).

Spiller, P.T., "Agency Discretion under Judicial Review," (1991a).

Spiller, P.T., "A Rational Choice Theory of Certiorari: Hierarchy, Strategy and Decision Costs at the Court," (1991b).

Spiller, P.T. and R. Gely, "Understanding the Court," with R. Gely, (1990).

Spiller, P.T. and R. Gely, "Congressional Control or Judicial Independence: The Determinants of US Supreme Court Labor Decisions: 1949/1987," with R. Gely, (1991).

Spitzer, M.L., "Extensions of Ferejohn and Shipan's Model of Administrative Agency Behavior," vol 6, special issue, Journal of Law, Economics and Organization, (1990), pp:29-44.

Sunstein, C.R., "Interpreting Statutes in the Regulatory State," 103 (Issue 2) Harvard Law Review 407-508 (1989);

Tushnet, M., Red, White and Blue, (1988).

Tyack, D.B., Law and the Shaping of Public Education, 1785-1954, p.135, Madison: University of Wisconsin Press (1987),

Weingast, B.R. and W.J., Marshall, "The Industrial Organization of Congress, (or Why Legislatures, Like Firms, are not Organized as Markets," 96 Journal of Political Economy, 132-63 (1987).

No. 44 Pablo T. Spiller. "A Rational Choice Theory of *Certiorari*: Hierarchy, Strategy and Decision Costs at the Courts" Working Paper #91-0110

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