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Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor Relations Decisions, 1949-1988

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Congressional control or judicial independence: the determinants of U.S. Supreme Court labor-relations decisions, 1949–1988

Pablo T. Spiller*

and

Rafael Gely**

Extending the approach to congressional and regulatory institutions developed by Shepsle and Weingast, this article introduces an ideologically motivated judiciary. The model yields empirically refutable implications which are then tested in the framework of modelling the Court's decisions on industrial labor relations. Using information on politicians' ADA scores, the composition of the Court, and the decisions of the Court, we obtain estimates of (a) the position of the Court in relation to the relevant members of Congress, and (b) the determinants of labor policy through the years. We find, first, that the Court was constrained by Congress over at least half of the period. Second, a 10-point increase in the ADA rating of the relevant member of Congress, or in the imputed ADA rating of the Supreme Court, increases the probability of a pro-union decision by approximately eight percentage points. Third, the imputed political preferences of the Court seem to be well explained simply by its political composition. Fourth, the Court does not seem to defer to the NLRB. Finally, though parsimonious, our model is a relatively good predictor of the Court's decisions, and superior to both a simple political bargaining model without institutional content and a nonsophisticated or purely legalistic judicial decision-making model. Our results, then, suggest that the Court responds, albeit indirectly, to interest group pressures.

1. Introduction

■ That courts shape regulatory policy is no news to regulation scholars. A cursory look at some of the literally hundreds of articles on the political economy of regulation during the last three decades (see Noll (1989) or Joskow and Rose (1989)) will show that a large

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proportion cite court cases as important determinants of public policy. Yet this literature has paid minimal analytical attention to the role of administrative procedures and the courts (see, however, Joskow (1974)), focusing instead on analyzing the relation between interest groups, elected officials (Congress, the president), regulatory agencies, and policy outcomes. Traditional analyses of court decisions, on the other hand, have emphasized legal rather than interest group considerations. Thus it appears that scholars could choose between a legal-based or an interest group-based way of analyzing regulatory policy making. Conventional wisdom, however, suggests that court decisions are not bound exclusively by legal considerations, but that ideology and politics play an important role in judicial decision making.¹

So far there has been no attempt to develop an empirically refutable model that can improve our understanding of the systematic influence of the courts on regulatory policy and to integrate their actions with those of elected officials. In what follows we develop such a model. We implement this model to the U.S. Supreme Court's merit decisions concerning the interpretation of the National Labor Relations Act of 1935. We provide here the first systematic evidence on the role of politics and ideology in judicial decision making and on the political sophistication of the court (i.e., justices understand, and act according to, the expected evolution of the game). In particular, we are able to reject a purely legalistic view of judicial decision making. Our model suggests that justices are politically sophisticated, as they seem to take into consideration the ensuing political game that follows their decision. As a consequence, politics matter in their decision making. Furthermore, we show that for most cases in the sample, and for most of the period, court decisions have been constrained by the preferences of elected officials (i.e., legislators and the president).

In this article we implement the framework developed in Gely and Spiller (1990). We use the rational choice approach to political and regulatory institutions (e.g., Congress, the president, and the administrative agencies) developed by the important work of Weingast, Shepsle, and Noll, among others,² and expand it by introducing the Supreme Court as a strategic player in the game among the different political institutions. We model the Supreme Court as a self-interested, ideologically motivated institution, subject not to the traditional legal rules of precedent but to the constraints imposed by the political interests of the other institutions of government, namely, Congress and the president.³ We show, for a wide range of congressional behavior models, how the interaction between the judiciary and the other political institutions of government impacts upon regulation and regulatory change. These models all have a common econometric structure, which allows for testing the relevance of our model of Supreme Court behavior as well as the different models of congressional

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¹ The current public and congressional emphasis during Senate confirmation hearings on candidate justices' ideology rather than competence is consistent with this wisdom.

² To a large extent this approach develops the politics implicit in Stigler (1971) and Peltzman (1976). See, in particular, Weingast and Marshall (1988), Shepsle and Weingast (1987, 1989), Weingast and Moran (1983), and McCubbins, Noll, and Weingast (1989).

³ We are not the first to have introduced the Court in a rational choice framework or to have analyzed it in its interaction with the other political institutions (see footnote 2). For example, Gilligan, Marshall, and Weingast (1989) have observed the important role of Court decisions in the regulatory process. Similarly, in McCubbins, Noll, and Weingast (1987) the judiciary fulfills an important role in policing the behavior of regulatory agencies. Our framework is particularly related to Marks (1988), who observed that the Court's choices are restricted by Congress's ability to overturn its decisions. These works, however, have not attempted to model judicial decision making in a systematic way. Instead, they leave the Court's behavioral motivation unspecified.

behavior. Our model of Supreme Court decisions provides a straightforward empirical measure of the Court's independence from political and economic interests in determining regulatory outcomes.

The current academic debate over what the Supreme Court's role in our political system should be, however, has been essentially normative, with little attention being given to the way the Court actually interacts with the other institutions of our political system. Positive analyses of the Court, furthermore, have usually focused on the decision making process in isolation, without embedding it in a more general framework of political and regulatory institutions.⁴

In our model of Court-Congress interaction, which is developed at length in Gely and Spiller (1990), the Court is restricted in its choices by the ability of Congress to overturn its decisions. The Court, then, cannot deviate too much from what Congress's independent legislative outcome would be without facing a reversal.⁵ So even though Congress may not be actively legislating, it does not follow that it has actually relinquished legislative responsibility to the Court, or that the Court is dictatorial. The recent debate about the welfare implications of "activist" or "restrained" Courts is, in our framework, inconsequential, since the same Court will find it optimal to be activist at some times and restrained at others.⁶ Although our model is extremely simple, we see it as a first step toward a more general analytical framework. Even in its simplicity, our model has empirically refutable implications about the determinants of public policy decisions by the Supreme Court, which we test in the framework of industrial labor relations.

Using the scores of politicians' voting records compiled by the organization Americans for Democratic Action (ADA), the composition of the Court, and the decisions of the Court, we obtain estimates of (a) the Court's position in relation to the relevant members of Congress and (b) the determinants of labor policy through the years. We find first that in most of the cases the Court considered, its choice was actually constrained by Congress. Second, a ten-point increase in the ADA rating of the relevant member of Congress, or in the imputed ADA rating of the Supreme Court, increases the probability of a pro-union decision by approximately eight percentage points. Third, the imputed political preferences of the Court seem to be well explained simply by its political composition. Fourth, the Supreme Court does not seem to defer to the National Labor Relations Board. Finally, even though our econometric model imposes substantial structural form restrictions, it is a relatively good predictor of the Court's decisions, and it is slightly superior to a simple political bargaining model without institutional content.

⁴ See Rohde and Spaeth (1976), Sheldon (1974), Halpern and Lamb (1982), and Wasby (1988) for surveys of the different approaches to the analysis of the Supreme Court. Among the classic positive approaches is that of Dahl (1957), who claims that because of their recruitment, the justices are a reflection of the electorate, and they play a "legitimizing" role. Dahl's hypothesis is rooted in the "decision-making" models of the Court (see Sheldon (1974)), where, as long as its composition is given, the Court is essentially independent of the remaining parts of the political system. Dahl's hypothesis was later expanded by Funston (1975). See also Handberg and Hill (1980, 1984) for a similar interpretation. An alternative view of the Supreme Court is provided in Adamany (1973), who claims that it constitutes a force for instability. See also Casper (1976).

⁵ We focus here on statutory decisions. For a rational choice framework to constitutional decisions, see Gely and Spiller (1990).

⁶ In our framework, an "activist" Court is able to take advantage of the current political circumstances to adjust regulatory policies toward its own ideal. Such would be the case of a liberal Court following a liberal shift in the composition of Congress (or in the presidency). A "restrained" Court, on the other hand, is not able to move regulatory policy toward its preferences. In other words, a restrained Court cannot do better than the current policy. Thus, restrained Courts would follow stable periods, while activist Courts would follow changes in politics and in Court composition. Thus it is not surprising that the Court in the 1990s is seen as activist, even though the justices themselves talk about being restrained. We show, however, that activist Courts are not free to do whatever they want. They are constrained by the political composition of Congress and the presidency.

2. A rational choice model of Supreme Court decision making

■ Consider a single-dimensional policy issue. We claim below that labor relations is this kind of issue, as labor policy by its nature is either pro-union or pro-management.⁷ We are going to model, and later on estimate, a game between the Supreme Court and the legislature. There are two basic aspects to a game: preferences and sequence. (For a more general analysis of this framework, see Gely and Spiller (1990).)

□ **Preferences.** We assume that the Court's preferences are well specified and single peaked over the policy issue in question. The source of the Court's preferences, however, differs from that of legislators. While legislators "vote their district,"⁸ Supreme Court justices are not subject to reelection. We assume, then, that the Court's preferences are essentially ideologically based.⁹ In our empirical study, the justices' view of the world is what determines how pro-union or pro-management they are. Our assumption about the Court's preferences is similar to assuming that the Court is a single individual. This is not a very drastic assumption, since our assumption of single-dimensionality of the issue allows the median-voter theorem to hold in the absence of agenda control.¹⁰ We also assume that the Court is free to make its decisions on a continuum, rather than on just a yes-or-no basis.¹¹

We consider a legislature composed of two chambers, a House and a Senate. Because the issue is single dimensional, it is feasible to assume that the median-voter theorem applies to each chamber, so that the preferences of each chamber could be appropriately represented by those of its respective median legislator. Yet the modern theory of congressional institutions (e.g., Weingast and Marshall (1988) and Shepsle and Weingast (1987, 1989)) suggests that committees have substantial power over the issues under their jurisdiction.¹² In particular, because they have some amount of both gate-keeping and veto power (i.e., they may block legislation from being introduced, as well as kill or modify legislation in conference), committee members' preferences may dominate issue-specific legislation. But whether committees fully, or only partially, control Congress is an empirical matter. In the next section we develop alternative models of congressional decision making that have specific implications for the identity of the relevant members of Congress. Here, however, to simplify the exposition, we assume that the preferences of each chamber are represented by those of the median committee member, who in turn is assumed to have well-specified and single-peaked preferences over the issue in question. See Figure 1.

⁷ That is, we are assuming that the purpose of government, or Court, intervention is simply to redistribute bargaining power between management and the union.

⁸ See Fiorina (1974), Kalt and Zupan (1984), Kau and Rubin (1979), and Peltzman (1984) for empirical tests of this proposition.

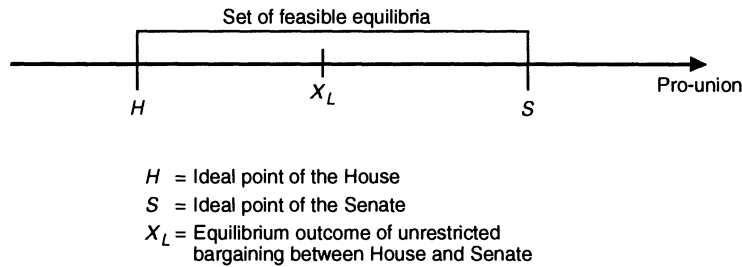
⁹ Although the justices' monetary well-being may be unrelated to the issue in question, it is reasonable to assume that they may have strong views about the substance of a case. Members of the Court are not elected and so are not under direct constituency pressure. They are, however, appointed by elected officials who do feel that pressure. Furthermore, political considerations form part of the appointment process, making it important to consider the political preferences of the justices. Thus, it is reasonable to assume that in the absence of changes in its composition, the Supreme Court has stable preferences over the policy space.

¹⁰ The relevant preferences, then, are those of the median justice. But if the justices care about precedent, the median-voter theorem may fail. For an analysis of such a case, see Schwartz (1992). In our framework, however, in the absence of uncertainty there is no role for precedent. For a detailed analysis and description of the Court decision-making process, see Spaeth (1979) and Woodward and Armstrong (1979). Observe, also, that some amount of logrolling could take place among justices. In such an event the revealed preferences of the Court in a given case would not reflect their underlying preferences, but rather would be the result of a more complex process.

¹¹ There are several reasons why this assumption may be proper. First, the Court is free to interpret in its own way each case that comes to it. Second, the decision to grant *certiorari* allows the Court to choose the case that fits its preferred outcome. Finally, it can use *dicta* to call for a particular type of case.

¹² See, however, Gilligan and Krehbiel (1989, 1990) and Krehbiel (1991) for a different view of committee composition.

FIGURE 1
REPRESENTATION OF CONGRESSIONAL PREFERENCES



In the absence of a Supreme Court, and for that matter of a president or administrative agencies, then, the House and the Senate will bargain over the issue: an outcome (weakly) in between the ideal points of the two chambers should arise as an equilibrium.¹³ That is, bargaining between the House and the Senate will bring about a legislative outcome, X_L , in the contract set between the House and the Senate, as in Figure 1.¹⁴

□ **The sequence of the game.** There are many ways of modelling the interaction between Congress and the Court. We propose a simple bargaining framework consisting of three stages. In the first stage, an agency makes a statutory interpretation.¹⁵ In the second stage, the Court determines the status quo. The final stage consists of bargaining between the two chambers of Congress for an alternative policy outcome.¹⁶ The outcome of the final stage is the final policy outcome. If the House and the Senate agree on an alternative to the Court's policy, then the congressional decision becomes the law. But if Congress cannot agree on an alternative, then the Court's decision becomes the law. We can see that the set of feasible equilibria to this game is the contract set between the House and the Senate (i.e., in between their ideal points). Since the Court anticipates the bargaining outcome arising from any feasible decision, it will make its decision strategically, such that it maximizes its utility and is not reversed by Congress. In other words, the Court will pick that point in the contract set between the House and the Senate that maximizes its own utility. Were the Supreme Court's decision to be outside the contract set between the House and the Senate, it would trigger a legislative bargaining process, with the outcome almost surely being strictly inside the contract set.¹⁷ So if the ideal point of the Court is outside the contract set, its optimal decision point is the closest boundary of the contract set. Thus, its decision will

¹³ The actual bargaining game played between the House and the Senate is irrelevant. All we assume is that the outcome will be Pareto efficient and that the bargaining process cannot make any player worse off as compared to the status quo.

¹⁴ Depending on the nature of the bargaining game being played, there may or may not exist a deterministic function relating the bargaining outcome to the ideal points of the two chambers and to the initial status quo.

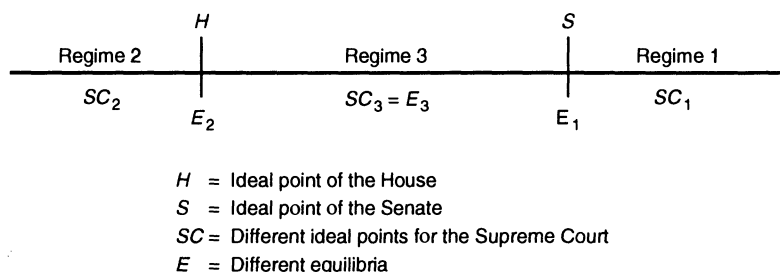
¹⁵ In our empirical application, the agency can be either the NLRB or a federal or state district court.

¹⁶ The Court's choice of the status quo serves, then, as the initial bargaining point for the two chambers of Congress. Observe that since the bargaining outcome is efficient and cannot make either of the chambers of Congress worse off than the status quo, the Court's decision limits the set of feasible bargaining outcomes.

¹⁷ To see this, consider a Court's decision outside the contract set. Call that point $y = S + x$ and assume $x > 0$ and $S > H$. Assuming symmetric utility functions, the outcome to the bargaining game between the House and the Senate has to be in the set $[\max(S - x, H), S]$. For exposition, assume $S - x > H$. That the outcome cannot be to the left of $S - x$ arises from the symmetry of the Senate's preferences and from the fact that the bargaining cannot make the Senate worse off than the status quo, $y = S + x$. That it cannot be more than S arises from the efficiency of the bargaining process. Although S is a feasible solution to the bargaining, observe that the Senate's initial offer would most certainly be S , while the House's initial offer would most certainly be $S - x$. Thus, it is reasonable to expect the bargaining outcome to be less than S .

FIGURE 2

EQUILIBRIA IN A SINGLE DIMENSION



not be reversed by Congress and will become the final policy outcome.^{18,19} Finally, observe that in the absence of deference to administrative agencies, the agency decision at the initial stage is inconsequential.²⁰ In this simple framework, the Court can always undo any administrative decision.²¹

There are then three feasible types of regimes, according to the relative positions of the ideal points of the House, the Senate, and the Court, each with a different equilibrium policy (see Figure 2):

$$\begin{aligned}
 \text{Regime 1: } E_1 &= \max(H, S), & \text{for } SC > \max(H, S) \\
 \text{Regime 2: } E_2 &= \min(H, S), & \text{for } SC < \min(H, S) \\
 \text{Regime 3: } E_3 &= SC, & \text{for } \min(H, S) \leq SC \leq \max(H, S),
 \end{aligned} \tag{1}$$

where SC , H , and S represent the ideal points of the Supreme Court and of the relevant members of the House and the Senate.

Regime 1, then, is the relevant one when the ideal point of the Court, in the single-dimensional space, is higher than (i.e., to the right of) those of the House and the Senate. Regime 2 occurs when the ideal point of the Court is to the left of the House and the Senate, and regime 3 occurs when the ideal point of the Court is located between those of the two houses of Congress. The equilibrium in regime 1, E_1 in Figure 2, is given by the higher of the ideal points of the House and the Senate. If the Court tries to implement a policy outcome to the right of the ideal points of the House and the Senate, it will be reversed. Thus, the point that maximizes the Court's preferences is the higher of the two ideal points.

¹⁸ Observe that the equilibria with and without the Court are quite similar. In both cases the equilibria are (weakly) in between the ideal points of the two chambers of Congress. With the Court, however, the nature of the bargaining game between the House and the Senate is inconsequential, as the outcome is a function only of the Court's preferences.

¹⁹ In a previous article we have made the technical assumption that the Court dislikes being reversed by Congress. In the current setup, however, such an assumption is unnecessary, as the equilibrium to the game here specified is the same independent of that assumption. For a discussion of this issue, see Gely and Spiller (1990).

²⁰ By "deference to administrative agencies" we mean that the Supreme Court in making its decision takes into account not only its own preferences over policies and the policy implications of its decision, but also the opinion of the administrative agency.

²¹ The reader may find the absence of a president puzzling in this framework. Gely and Spiller (1990) show, however, that in the absence of veto power the president has no policy role, apart from recommending justices to the Supreme Court. Without veto power, all a president can do is influence the performance of administrative agencies. But as the previous paragraph has shown, in the current framework there is no agency discretion left (see Gely and Spiller (1990) and Spiller (forthcoming) for a similar framework in which agencies may have discretion). Thus, the president has no power. Presidential veto power, however, confers the ability to block congressional reversals of Supreme Court decisions. In the next section we develop such a case.

Observe that in this regime, the actual value of the lower of the two congressional ideal points is of little relevance. All that matters is the higher of the two. Marginal changes in the preferences of either the Court or the chamber with the lower ideal point do not change the equilibrium. As long as the three ideal points keep their relative positions, all that matters is the exact location of the higher of the two congressional points. Similarly, the equilibrium in regime 2, E_2 , is given by the lower of the two ideal points. Finally, the equilibrium in regime 3, E_3 , is given by the position of the ideal point of the Supreme Court. In this case the Court can actually implement its most preferred outcome. Since bargaining between the House and the Senate cannot provide a Pareto-superior point to the Court's ideal point, Congress will not be able to reverse it, and thus it becomes the equilibrium to this game.

We see that the Court can be "activist" or "restrained" depending on its position vis-à-vis the houses of Congress. In regime 3, for example, the Court behaves in a restrained fashion. Marginal changes in the political circumstances have no impact on the Court's decisions. The Court follows its own precedent. In regimes 1 and 2, however, the Court is activist. Marginal changes in the composition of Congress are translated into changes in the Court's interpretation of the law. The Court then may not follow its own precedent.

□ **Comparative statics.** Our framework has several empirical implications for the determination of Court decisions. First, the composition of Congress and of its relevant committees matter. Holding constant the preferences of the Court, marginal changes in the composition of Congress will usually translate into marginal changes in Court decisions (unless regime 3 is the relevant one). Second, holding constant the composition of Congress, marginal changes in the preferences of the Court will translate into marginal changes in its decisions as long as its preferences are not extreme (that is, as long as regime 3 is the relevant one). Thus, it is not unreasonable to observe a conservative Court making relatively liberal decisions, and vice versa. A conservative Court facing an increasingly liberal Congress will adjust its decisions accordingly: the Court "reads the election results" as it follows the changes in the composition of Congress and its committees. Our model reconciles the empirical evidence on the relation between interest groups and regulatory policy with the conventional wisdom and anecdotal evidence that the Court matters in the determination of regulatory policy.

In the next sections we develop alternative models of legislative decision making, and we explore the empirical implications discussed above for the case of the Court's decisions concerning the implementation of the National Labor Relations Act.

3. Extensions: alternative models of congressional decision making

■ As is clear from Section 2, our model of Supreme Court decision making is imbedded in a model of congressional behavior. So in attempting to estimate our model, we need to make assumptions about congressional behavior. There is, however, no model of legislative behavior that has universal support among political scientists. Accordingly, in the empirical part of the article we report estimates of our Supreme Court model for a variety of congressional behavior models. We find that our model of the Supreme Court is reasonably robust to the different congressional models considered below.

In this section we develop alternative models of congressional decision making that are econometrically tractable. These models are variations to the "full committee power/committee median" model of Section 2.

□ **Variation 1. Controlling the committee: chairs, majority parties, or median voters.** In our first type of variation we assume, as in Section 2, that committees control their relevant

chambers. Here we consider whether it is the committee chair or the median of the majority party that controls the committee.²² These two variations, which we will call the “committee chair” and the “committee majority party median” models, are straightforward extensions of the “committee median” model of Section 2. In equation (1), which determines the equilibrium in the different regimes, H and S have to be replaced by the preferences of the committee chairs or of the committee majority party medians in their respective chambers.

□ **Variation 2. Reversals need support from the floor: the floor median and committee gate-keeping power under the open and closed rule models.** A second kind of variation takes into consideration the fact that bills have to gather a majority in their respective houses. The simplest model to consider is one where committees have no power, and hence the relevant players are the floor medians of each chamber. Thus, in (1) we replace H and S by the floor medians of the House and the Senate. We call this the “floor median” model.

A more sophisticated version of committee power models is one that gives committees only gate-keeping powers. To reverse a Supreme Court decision, committees have to gather a majority in each chamber. But committees will introduce legislation to reverse the Court only if they expect the legislative outcome to supply a higher utility than the Court’s decision does. The legislative outcome, however, depends on how the vote actually takes place on the floor. If the vote is taken without amendments (closed rule), then committees have to introduce a bill that both floor medians will prefer to the Court’s decision. It is straightforward to see that in such a case the set of nonreversible decisions is the set $[\min(H_C, S_C, H_M, S_M), \max(H_C, S_C, H_M, S_M)]$, where H_C (H_M) represents the ideal point of the relevant committee (floor median) in the House. Similar notation applies to the Senate (see Spiller (forthcoming)). Thus, equation (1), which determines the equilibria in the three regimes, can be represented by

$$\begin{aligned} \text{Regime 1: } E_1 &= \max(H_C, S_C, H_M, S_M), & \text{for } SC > \max(H_C, S_C, H_M, S_M) \\ \text{Regime 2: } E_2 &= \min(H_C, S_C, H_M, S_M), & \text{for } SC < \min(H_C, S_C, H_M, S_M) \\ \text{Regime 3: } E_3 &= SC, & \text{for } \min(H_C, S_C, H_M, S_M) \leq SC \leq \max(H_C, S_C, H_M, S_M). \end{aligned} \quad (1a)$$

If, on the other hand, amendments are allowed without restrictions (e.g., under the open rule), then the legislative outcome in each chamber will simply be its floor median. Committees will compare the (average) of the floor medians to the Supreme Court decision and will decide whether to reverse it or not. Let F be the average of the floor medians.²³ Then, the set of nonreversible decisions, assuming symmetric preferences, is given by $[H_C, S_C] \cup H_C(F) \cup S_C(F)$, where $H_C(F)$ and $S_C(F)$ represent the set of legislative outcomes that the committees of the House and Senate, respectively, prefer to the legislative vote (F) (see Spiller (forthcoming)).²⁴

□ **Variation 3. Presidential veto.** Our final variation consists of introducing the presidential veto. The use of the presidential veto can affect the final outcome only if committees do not have full control over their respective chambers. Otherwise, they could always override a veto. Here we consider a model where committees have only gate-keeping power.

²² On the role of parties in the workings of committees, see Cox and McCubbins (1989).

²³ Since legislation has to pass both houses of Congress, the average of the floor medians would represent, in the absence of committee control, a natural compromise between the two chambers.

²⁴ Below we report estimates for the “closed rule” model. We were unable to estimate the “open rule” model, since for most observations the set of nonreversible decisions included almost the whole range of feasible outcomes, implying that the only relevant regime was regime 3.

That is, to override a veto, committees need to accumulate at least two-thirds of the members of each house. Votes, however, are assumed to be taken under the closed rule (see footnote 24). Three cases have to be considered. In the first, the president's ideal point (P) is to the right of the maximum of the two houses' supermajority upper limits (i.e., $P > \max(H_{2/3}, S_{2/3})$, where $H_{2/3}$ and $S_{2/3}$ represent the House and Senate legislators for whom two-thirds of the members of their respective chambers are to their left in the single-dimensional issue). In the second case, the president's ideal point is to the left of the minimum of the two houses' supermajority lower limits (i.e., $P < \min(H_{1/3}, S_{1/3})$). In the third case, $\min(H_{1/3}, S_{1/3}) \leq P \leq \max(H_{2/3}, S_{2/3})$.

Assuming that committees introduce legislation (under the closed rule) only if they can override a veto, then the set of nonreversible decisions in the first case is given by $[\min(H_C, S_C, H_M, S_M), \max(H_{2/3}, S_{2/3}, H_C, S_C)]$.²⁵ For the second case, the set of nonreversible decisions is given by $[\min(H_{1/3}, S_{1/3}, H_C, S_C), \max(H_C, S_C, H_M, S_M)]$. For the third case, though, the set of nonreversible decisions actually depends on the specific location of the president. Observe, however, that the ideal point of the president is unobservable, or at best measurable with substantial error. Much of our econometrics deal with the fact that the Supreme Court's own ideal point is unobservable. The introduction of an unobserved presidential ideal point that stochastically changes the boundaries of the set of feasible judicial decisions would make the econometrics unmanageable. Thus, for this particular model we assume that Democratic (Republican) presidents are more liberal (conservative) than the relevant legislators of each house.

Thus, there are now two sets of regimes, one for Democratic presidents and another for Republican ones. The three regimes in (1) for a Democratic president are given by

$$\begin{aligned} \text{Regime 1: } E_1 &= \max(H_{2/3}, S_{2/3}, H_C, S_C), & \text{for } SC > \max(H_{2/3}, S_{2/3}, H_C, S_C) \\ \text{Regime 2: } E_2 &= \min(H_C, S_C, H_M, S_M), & \text{for } SC < \min(H_C, S_C, H_M, S_M) \\ \text{Regime 3: } E_3 &= SC, & \text{for } \min(H_C, S_C, H_M, S_M) \\ & & \leq SC \leq \max(H_{2/3}, S_{2/3}, H_C, S_C). \quad (1b) \end{aligned}$$

A similar set of three regimes can be derived for a Republican president. Comparing (1a) with (1b), we can observe the power of the veto. First, for presidential veto to influence the outcome, it has to be the case that the preferences of the president and the Court are aligned vis-à-vis Congress. In particular, a liberal president facing a conservative Court would have no impact on policy, and the ensuing equilibrium will be given by regime 1 in equation (1a) (or regime 2 in equation (1b)). Thus, the ability of the president to veto legislation is inconsequential. Only when the president and the Court are aligned will that veto power influence regulatory outcomes.²⁶ That would be the case if the Court is very liberal and faces a Democratic president. Comparing regimes 1 in equations (1a) and (1b),

²⁵ To see this, assume that $H_{2/3} > S_{2/3} > H_C > S_C$ and that $H_M > S_M > H_C > S_C$. That is, the House is more liberal than the Senate and the committees are more conservative than their respective medians. Now assume that both the Supreme Court and the president are more liberal than the House's supermajority median, with $SC > P > H_{2/3}$. If the Court makes the decision equal to P , then Congress can always pass legislation equal to $H_{2/3}$ that the president will not be able to veto, as more than two-thirds of the legislators prefer Congress's bill to the Court decision. Thus, the equilibrium outcome is $H_{2/3}$. Now assume that the Supreme Court is very conservative, i.e., $SC < S_C$. If the Court's decision equals its own ideal point (SC), then Congress can pass more liberal legislation (which the president will not veto) reversing the Court decision, making the Court worse off. Instead, if the Supreme Court makes its decision S_C , then the Senate committee will use its gate-keeping power to prevent any reversal of the Court decision. Thus, we show that the set of feasible equilibria is as described in the text.

²⁶ Kiewiet and McCubbins (1988) present a similar result for a single-dimensional policy game between Congress and the president. In this case, veto power matters only if the reversion point (i.e., the status quo *ante*) is on the same side of Congress as the president.

we find that if the composition of the relevant committees is not too extreme, then the equilibrium with presidential veto power will be given by the highest of the veto thresholds in the House and the Senate, which will exceed the equilibrium in (1a). Thus, only presidents with the same ideological tendencies as the Supreme Court will be able to affect regulatory policy. Otherwise, presidents have little effect on regulatory policy.

We have, then, six alternative models of legislative behavior: committee median, committee chair, committee majority party median, floor median, closed rule, and veto power. These different models of legislative behavior have different implications for the determinants of the boundaries of the set of feasible equilibria. Full committee control implies that they are given by the maximum and the minimum of the ideal points of the relevant committee members; no committee control implies that they are given by the maximum and the minimum of the House and Senate floor medians; and so forth. The estimation of our model of the Supreme Court, however, has to be conditioned on a particular theory of legislative behavior. Thus, a test of our theory is a joint test of a particular theory of congressional behavior. While these alternative models do not exhaust all the feasible models of congressional behavior, they are among the most widely used models of congressional decision making. These are nonnested models, but they all have a very similar econometric formulation. Comparison of their performance may provide some evidence on their relative relevance.²⁷

4. A brief history of labor relations legislation

■ In the middle of the New Deal period, Congress enacted the National Labor Relations Act (NLRA).²⁸ The NLRA created the National Labor Relations Board (NLRB) and empowered it to enforce the Act, particularly as it relates to Section 7 of the Wagner Act, which gave employees the right to form unions.²⁹ Section 8 of the NLRA defines five types of unfair labor practices, which the NLRB was supposed to enforce.³⁰

The NLRA was ineffective during its first two years. The NLRB was subject to an extensive amount of injunction litigation designed to prevent it from exercising its administrative mandate. In addition, the constitutionality of the Act was in doubt.³¹ It was also not clear whether the NLRA would be rendered ineffective by a narrow reading by the

²⁷ One could think, in principle, of nesting all these models in a general model. But as will become clear once we develop their econometrics, such an attempt would make the econometrics intractable.

²⁸ 49 Stat. 449 (1935).

²⁹ Section 7 of the Wagner Act declared that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

³⁰ Section 8(A)(1) prohibits any attempt by an employer to "interfere with, restrain, or coerce employees in the exercise of their rights under Section 7." Section 8(A)(2) outlaws domination or interference with the formation and administration of a labor organization. Section 8(A)(3) makes it an unfair labor practice for employers to discriminate "in regard to hire or tenure of employment, on any term or condition of employment to encourage or discourage membership in a labor organization." Section 8(A)(4) outlines the protection against dismissal or disparate treatment of an employee who has filed charges against his employer under the Act. Finally, Section 8(A)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of his employees."

³¹ For example, a few months before the enactment of the NLRA, the Supreme Court, in *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), invalidated a similar federal statute. The Court held that the National Industrial Recovery Act constituted an abuse of congressional power under the commerce clause. Also, in *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), the Supreme Court raised additional questions over the constitutionality of the NLRA by invalidating Congress's attempt to regulate labor relations in the coal mining industry through the Bituminous Coal Act of 1936.

Court. In particular, there was a concern as to whether or not the law could be applied to the manufacturing industry.³²

In 1937, the Supreme Court put to rest any questions as to the power of Congress to regulate labor relations. In *NLRB v. Jones & Laughlin Steel Corp.*,³³ the Court held that manufacturing was commerce and as such Congress had the authority to regulate it.³⁴ The *Jones* decision provided the necessary push for the implementation of the congressional policy favoring collective bargaining.³⁵ From then on, the NLRB was in business.

It is generally believed that, at least until War World II, the NLRB was a "zealously prolabor agency" (see, for example, Moe (1985)). Neither Congress, the president, nor the Court seems to have been particularly dissatisfied with the prolabor bias of the NLRB. After World War II, however, a Republican-controlled Congress pushed for an amendment to the NLRA. In 1947, over the veto of President Truman, Congress enacted the Labor-Management Relations Act (Taft-Hartley Act).³⁶ Although it did not invalidate the Wagner Act, the Taft-Hartley Act introduced various new elements designed to "balance" the prolabor character of the original Act.³⁷

In 1959, Congress again intervened directly to regulate labor relations. This time, however, the focus was on regulating internal union practices. The Labor-Management Reporting and Disclosure Act (the Landrum-Griffin Act),³⁸ was enacted with the purpose of protecting union members from improper union conduct. The focus seems to have been on the protection of the worker's constitutional rights while in the workplace.

Congress's legislative action on the labor relations front has been sporadic. Following the passage of the NLRA, there were just two amendments to the Act. Apart from the legislative hearings involved in the passage of these two pieces of legislation, there does not seem to have been other important legislative action concerning labor relations. While there were many hearings on the NLRB, most of them dealt with the Board's load, not the Court's decisions. However, as shown in Appendix A, since World War II there have been substantial changes in the composition of Congress as well as in the Court's tendency to support the unions. The theory we presented in the previous section suggests that the lack of congressional

³² During the 1888–1936 period, the Court moved back and forth between two concepts of constitutional interpretation, "dual federalism" and "stream of commerce." Under the dual federalism approach, the Court limited federal commerce power by requiring Congress to show a direct connection between the activity being regulated and interstate commerce before an act could be held constitutional. See, for example, *United States v. Knight*, 156 U.S. 12 (1894), holding that the Sherman Act could not be applied to manufacturing since "commerce succeeds manufacturing and it was not part of it." Under the stream of commerce approach, the Court allowed Congress to regulate intrastate activity connected to the interstate movement of goods and services. See, for example, *Swift & Co. v. United States*, 196 U.S. 375 (1905). A decision concerning the NLRA based on *Knight* would have seriously limited the Act's effectiveness. Although there were precedents that might have supported the application of the Act to manufacturing (e.g., *Shreveport Rate Case*, 234 U.S. 342 (1914), upholding the federal regulation of railroad rates), it was not altogether clear that such would be the case.

³³ 301 U.S. 1 (1937).

³⁴ In addition, the Court upheld the NLRA against challenges that it violated the due process clause of the Fifth Amendment.

³⁵ For a rational choice analysis of the 1937 change in the Supreme Court, see Gely and Spiller (1990).

³⁶ 49 Stat. 449 (1935), as amended by Pub. L. No. 101, 80th Congress, 1st. Sess., (1947).

³⁷ First, Section 8(B) of the new Act defined six new union unfair labor practices. Second, Section 14(b) outlawed closed shops (an arrangement making union membership a condition for employment). Third, Section 8(c) established the employer's right of free speech, under which the employer's right to express his view during an organizing campaign was assured. Finally, the Act provided for the safeguard of certain individual employee freedoms in their dealings with labor organizations. Observe that, as mentioned in the text, this Congress was a Republican one, while the original legislation was enacted during the New Deal period. See Delaney, Lewin, and Sockell (1985) for a survey of research on the NLRA.

³⁸ 73 Stat. 519 (1959).

activity should reflect that the Court was not pursuing a labor relations policy too different from what Congress would have liked to see. In other words, the changes in the Court's tendency to support the unions and in the composition of Congress must not be unrelated events.³⁹

5. An econometric model of Supreme Court labor decisions

■ In this section we explore the determinants of Supreme Court labor relations decisions. What we are interested in explaining is the movement over time of the pro-union bias of the Court's decisions. Thus, our measure of policy outcome is the percentage of pro-union decisions in a given year. The model developed in Sections 2 and 3 assumes that we can locate the ideal points of the relevant members of the House, the Senate, and the Court on the policy line.⁴⁰ It is reasonable to assume that there is a one-to-one relationship between an individual's pro-union preferences and her most preferred probability of a pro-union decision by the Supreme Court concerning case i . Let that relationship be given by

$$E_{ia}^* = \gamma + \alpha P_{ia}, \quad (2)$$

where E_{ia}^* represents individual a 's most desired probability of a pro-union decision by the Court in case i , P_{ia} reflects individual a 's pro-union preferences in case i , and γ and α are parameters, with $\alpha \geq 0$. While we may observe the political tendency of a particular individual, we cannot observe her most desired probability of a pro-union decision. If our model is correct, though—if individual a is the relevant individual—then E_{ia}^* should be an unbiased predictor of the actual decision.

Let the actual decision on case k be represented by E_k . Then, if our model is correct, it should be the case that

$$E_k = E_{ka}^* + \epsilon_{ka}, \quad (3)$$

where a reflects the relevant player (i.e., the House, the Senate, or the Supreme Court), with ϵ_{ka} being a prediction error with zero mean. Furthermore, the variance of ϵ_{ka} is given by (eliminating the subscript a for notational simplicity) $\sigma_{ek}^2 = (1 - E_k^*)E_k^*$. Substituting (3) into (2), we obtain

$$E_k = \gamma + \alpha P_k + \epsilon_k, \quad (4)$$

where P_k represents the political tendency of the relevant individual. Observe, however, that the error in (4) is heteroskedastic. Define, instead, $v_k = \epsilon_k / \sigma_{ek}$. If our model is correct, then v_k is an error term with zero mean and unit variance. Thus, we can write (3) in terms of the homoskedastic error v_k :

$$E_k = \gamma + \alpha P_k + v_k \sigma_{ek}. \quad (4a)$$

The discussion of Sections 2 and 3 implies that whether the decision of the Supreme Court is pro- or anti-union depends on the relative position of the Supreme Court vis-à-vis

³⁹ The absence of congressional reversals of Supreme Court labor decisions should not be too surprising, as the percentage of decisions reversed by Congress is very low in general. Our framework, however, predicts no reversals being undertaken by the incumbent Congress. Only new and differently composed Congresses would find it in their interest to reverse Supreme Court decisions. Gely and Spiller (1990) report two such examples.

⁴⁰ This assumption implies that the only role of labor law is to distribute bargaining power between the union and the employer. This is quite a narrow view of labor law, as it does not take into account its role in facilitating and enforcing labor contracts, but it is a reasonable first approximation and in tune with the academic and policy discussion surrounding the Wagner Act as amended. See Campbell (1986) for an in-depth discussion of the economics of labor law.

the relevant members of Congress (and the president in the presidential veto model). In particular, for the committee median, committee chair, committee majority party median, and floor median models, whether the decision is pro- or anti-union in case k , E_k will be given by

$$\text{Regime 1: } E_k = \gamma + \alpha \max (H_k, S_k) + v_k \sigma_{ek} \leftrightarrow SC_k > \max (H_k, S_k) \quad (5a)$$

$$\text{Regime 2: } E_k = \gamma + \alpha \min (H_k, S_k) + v_k \sigma_{ek} \leftrightarrow SC_k < \min (H_k, S_k) \quad (5b)$$

$$\text{Regime 3: } E_k = \gamma + \alpha SC_k + v_k \sigma_{ek} \leftrightarrow \min (H_k, S_k) \leq SC_k \leq \max (H_k, S_k), \quad (5c)$$

where v_k has a zero mean and unit variance, and H_k and S_k represent the ideal points of the relevant legislators of the House and Senate respectively. Now let us list the regimes for the closed rule and Presidential veto models. For the closed rule model, whether the decision is pro- or anti-union in case k , E_k will be given by

Regime 1:

$$E_k = \gamma + \alpha \max (H_C, S_C, H_M, S_M) + v_k \sigma_{ek} \leftrightarrow SC > \max (H_C, S_C, H_M, S_M) \quad (5d)$$

Regime 2:

$$E_k = \gamma + \alpha \min (H_C, S_C, H_M, S_M) + v_k \sigma_{ek} \leftrightarrow SC < \min (H_C, S_C, H_M, S_M) \quad (5e)$$

Regime 3:

$$E_k = \gamma + \alpha SC + v_k \sigma_{ek} \leftrightarrow \min (H_C, S_C, H_M, S_M) \leq SC \leq \max (H_C, S_C, H_M, S_M). \quad (5f)$$

For the presidential veto model, whether the decision is pro- or anti-union in case k , when the Court and Congress face a Democratic president, will be given by

Regime 1D:

$$E_k = \gamma + \alpha \max (H_{2/3}, S_{2/3}, H_C, S_C) + v_k \sigma_{ek} \leftrightarrow SC > \max (H_{2/3}, S_{2/3}, H_C, S_C) \quad (5g)$$

Regime 2D:

$$E_k = \gamma + \alpha \min (H_C, S_C, H_M, S_M) + v_k \sigma_{ek} \leftrightarrow SC < \min (H_C, S_C, H_M, S_M) \quad (5h)$$

Regime 3D: $E_k = \gamma + \alpha SC + v_k \sigma_{ek} \leftrightarrow$

$$\min (H_C, S_C, H_M, S_M) \leq SC \leq \max (H_{2/3}, S_{2/3}, H_C, S_C). \quad (5i)$$

Finally, when facing a Republican president, whether the decision is pro- or anti-union in case k will be given by

Regime 1R:

$$E_k = \gamma + \alpha \max (H_C, S_C, H_M, S_M) + v_k \sigma_{ek} \leftrightarrow SC > \max (H_C, S_C, H_M, S_M) \quad (5j)$$

Regime 2R:

$$E_k = \gamma + \alpha \min (H_{1/3}, S_{1/3}, H_C, S_C) + v_k \sigma_{ek} \leftrightarrow SC < \min (H_{1/3}, S_{1/3}, H_C, S_C) \quad (5k)$$

Regime 3R: $E_k = \gamma + \alpha SC + v_k \sigma_{ek} \leftrightarrow$

$$\min (H_{1/3}, S_{1/3}, H_C, S_C) \leq SC \leq \max (H_C, S_C, H_M, S_M). \quad (5l)$$

If we could measure perfectly the preferences of the Court, the House, and the Senate, then the relevant set of equations (5) would represent a three-regime-switching-regressions model with known separation criteria. While the error terms v_k in each equation obviously are not normally distributed, significance tests for the ordinary least squares estimates can be performed in the usual manner, since the point estimates are approximately normally

distributed in large samples, as long as the right-hand-side variables are also normally distributed (see Maddala (1983) and Aldrich and Nelson (1984)). Thus, a test of our approach could be undertaken by separating the sample appropriately and estimating the parameters of (5).

In our case, however, although we do have some information about the pro-union tendencies of members of Congress,⁴¹ we do not have such information for the Court, so we cannot make a deterministic sample separation. In particular, observe that, if our model is correct, attempts to construct liberalism indices (à la ADA ratings) for the individual justices are basically flawed, since a "liberal" justice may in fact be a conservative facing a very liberal Congress. Thus, our model implies that justices' preferences cannot be derived in isolation from voting records, but have to be derived from the model.⁴²

We model the preferences of the Court as a latent variable in the same dimension that we measure pro-union biases for the House and the Senate. Let SC_k be given by

$$SC_k = X_k\beta + \mu_k, \quad (6)$$

with μ_k being distributed $N(0, \sigma_\mu^2)$. Thus, $X_k\beta$ is our model's imputed ADA ratings for the Court. Since we do not observe perfectly the location of the Supreme Court, equations (5) and (6) imply a switching-regimes model with unknown separation criteria. Equations (5) and (6), however, imply that the probability of observing regime 1 in case k , $\mathbf{1}_{1k}$ is given by⁴³

$$\begin{aligned} \mathbf{1}_{1k} &= \text{prob}(\text{regime 1}) = \text{prob}(SC_k \geq \max(H_k, S_k)) \\ &= 1 - \Phi[(\max(S_k, H_k) - X_k\beta)/\sigma_\mu], \end{aligned} \quad (7a)$$

where H_k and S_k represent the ideal points of the relevant legislators in the House and Senate, and $\Phi(\cdot)$ represents the standard normal distribution function. Similarly, the probability of observing Regime 2, $\mathbf{1}_{2k}$, is given by

$$\mathbf{1}_{2k} = \Phi[(\min(S_k, H_k) - X_k\beta)/\sigma_\mu]. \quad (7b)$$

Finally, the probability of observing regime 3, $\mathbf{1}_{3k}$, is simply

$$\mathbf{1}_{3k} = \Phi[(\max(S_k, H_k) - X_k\beta)/\sigma_\mu] - \Phi[(\min(S_k, H_k) - X_k\beta)/\sigma_\mu]. \quad (7c)$$

The likelihood function of the model (5)–(7) is given by

$$L = \prod_{i=1}^T (\mathbf{1}_{1k}\phi_1 + \mathbf{1}_{2k}\phi_2 + \mathbf{1}_{3k}\phi_3), \quad (8)$$

where

$$\begin{aligned} \phi_1 &= (1/\sigma_v)\phi[(E_k - \gamma - \alpha \max(H_k, S_k))/\sigma_v], \\ \phi_2 &= (1/\sigma_v)\phi[(E_k - \gamma - \alpha \min(H_k, S_k))/\sigma_v], \end{aligned}$$

⁴¹ Our assumption that we measure congressional preferences without error is not essential to the model. Measurement errors in congressional preferences would require the development of a switching regression model with stochastic thresholds. While such a model is feasible in principle (see Spiller and Wood (1988) for models of this type), it will make the econometrics unnecessarily more complicated.

⁴² Even attempts to build justices' preferences based on information revealed from confirmation proceedings may be biased, as justices' records may be tainted by the politics of the time when they served in the lower courts. See Spiller (1992a, 1992b) for hierarchical models of judicial behavior.

⁴³ In the text we derive the regimes probabilities and likelihood function for a generic model that captures the first four models, namely, the committee median, committee chair, committee majority party median, and floor median models. The regimes probabilities and likelihood function for the closed rule and veto power models can be derived analogously, so we do not provide them here.

and

$$\phi_3 = (1/\sigma_v)\phi[(E_k - \gamma - \alpha X_k\beta)/\sigma_v],$$

with $\phi(\cdot)$ representing the standard normal density function; σ_v is the standard deviation of the error term v . Observe that in (8) we assume that the error terms in (5) are normally distributed. Since, as discussed above, assuming normality does not affect the significance tests of the estimated parameters in a deterministic switching regime model, such an assumption can be carried over to the stochastic switching framework. Observe, furthermore, that if our model would be misspecified, σ_v would be estimated to be different from 1. Thus, unit tests on σ_v could represent a test of our distributional assumptions.

Expression (8) can be estimated by standard maximum likelihood techniques. Our assumptions concerning the distribution of μ assure us that the parameters of the model are identifiable.

The econometric model (5)–(8) provides several ways of testing our theory of the Supreme Court. First, if the model is true, then equations (3)–(8) imply that a linear regression of Supreme Court decisions on preferences of the House and Senate (and president, for the veto power model) is misspecified. For some observations only the preferences of the House matter, for others only those of the Senate matter, and in still others only those of the Supreme Court matter. Thus, such a linear regression should provide a worse fit than the one obtained from estimating (5)–(8). Second, our model implies that the coefficient α should be positive. If α is estimated to be zero, then politics will not matter in the legal decision-making process. Third, our model implies that α should be independent of who the relevant actor is (House, Senate, or Supreme Court) in each case. Thus, a test of our model can be performed by testing whether α varies across regimes. Fourth, our model implies that σ_v should be equal to 1. Finally, in each regime, given the preferences of the relevant players, no other variables should affect the decision of the Court. That is, assume that the preferences of the Court are more pro-union than those of the House, and that those in turn are more pro-union than those of the Senate. Then, only the preferences of the House matter. No other macroeconomic or political circumstance should matter, as they are already reflected in the revealed preferences of the politicians that compose the House.

The econometric model (5)–(8) also provides a way to test the alternative models of decision making. Since, as discussed above, all have the same econometric formulation and the same number of parameters, straightforward nonnested tests can be used to draw inferences about the relative relevance of the different congressional models.

6. The empirical implementation

■ **The data.** To estimate our model we need three pieces of information: (a) Supreme Court decisions, (b) measures of congressional preferences, and (c) proxies for Supreme Court preferences.

We collected all Supreme Court decisions from 1949 to 1988 that dealt with the interpretation of the NLRA.⁴⁴ We found 249 Court cases that were granted *certiorari* and that the Court has also acted upon. Each decision, in turn, was categorized according to whether or not it was a pro-union decision. Appendix A provides a summary of the dataset.

To measure the preferences of the House and the Senate, we use ADA scores for the relevant House and Senate members.⁴⁵ Appendix A provides summary statistics on the

⁴⁴ We chose 1949 as our starting point because before 1949 there were several years with no Supreme Court decisions taken.

⁴⁵ We chose the ADA scores instead of the more directly relevant COPE (Committee on Political Education) scores because the latter are not available before the mid-1950s. The correlation between the two measures, however, is higher than 90%.

ADA scores for the committee medians, committee majority party medians, the floor medians, and the supermajority (upper and lower threshold) medians.

As a proxy for the preferences of the Supreme Court we use the percentage of Democrats in the Court (see Appendix B). Since the Court may also respond to changes in the economic climate in considering whether to grant a pro-union decision, we use inflation and the civilian rate of unemployment as proxies for macroeconomic circumstances. Also, since the Court may be subject to influence from the president, we let its preferences be a function of whether the current president is a Democrat or not.

Equation (6) can be used to assess to what extent the Court defers to administrative agencies. Deference to administrative agencies means that in making its decision the Court weights heavily the administrative agency's finding. Thus, if the Court does defer to an administrative agency, then a pro-union decision at the NLRB should make the Court's decision more pro-union than it would have been had the NLRB decided against the union.⁴⁶ Not all cases come to the Court from the NLRB, however; some are filed by private individuals in federal and state district courts. So, by comparing the extent to which the Court's pro-union bias is a function of the NLRB's and the other lower courts' decisions, we can ascertain the extent to which the Court defers to administrative agencies. In particular, deference to administrative agencies would mean that the Court is influenced more by the NLRB than by a lower federal or state district court, since these are not specialized on labor issues.

Before discussing the empirical results, we should address several potential sources of selection bias. First, all cases in our sample reflect the fact that at the initial stage the parties, say the firm and the union, were not able to settle. This type of bias should have no effect on our estimates, as the initial decision to litigate is quite remote from the Court's decision. A second source of bias is the fact that not all NLRB decisions are appealed, and not all decisions by the court of appeals are in turn appealed to the Supreme Court. Once the NLRB makes a decision, though, the losing party can appeal. Since, in general, these cases do not involve monetary awards but rather bargaining issues, in most cases the winning party will not find it worthwhile to settle once it has won in the lower court. Thus, the decision to appeal is related only to the losing party's expectations of reversing the NLRB's decision at the higher level. Even if the parties have rational expectations, the errors in those expectations may be substantially large, to make, in principle, this source of bias less important.

We believe that the main source of bias in this dataset arises from the fact that only the Supreme Court, not the NLRB or the lower federal courts, can decide which cases to take. That is, the granting of *certiorari* is a potentially important source of bias. To understand the way this bias works, consider the following sequence of decisions starting at, for simplicity, the NLRB level. Given a certain case, each level (i.e., the NLRB, the court of appeals, and the Supreme Court) can make a pro- or anti-union decision. Let Y represent for and N against. Were the Court to consider all cases, there would be eight feasible decision sequences: (Y, Y, Y) , (Y, N, Y) , (Y, N, N) , (Y, Y, N) , (N, N, N) , (N, N, Y) , (N, Y, N) , and (N, Y, Y) . The first argument represents the decision at the lower level, the second the decision at the appeals court level, and the third the decision of the Supreme Court.

⁴⁶ In *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), for example, the Court set the standard that when it (or a lower 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 it is reasonable, then the agency is to be upheld, even if it is not "the best" interpretation. Unreasonableness, then, becomes the rationale for not deferring to administrative agencies. Thus, for *Chevron* to be empirically relevant, we have to find that the Court actually defers to the NLRB.

If the Court has no deference to the NLRB, then as long as taking cases is costly to the Court, the Court will not grant *certiorari* to cases in which it will uphold the decision of the court of appeals. Thus, cases characterized by (\cdot, N, N) or (\cdot, Y, Y) should not appear in the data. Thus, most cases should be (\cdot, Y, N) or (\cdot, N, Y) . In other words, the Court should be seen as being more pro- (anti-) union when facing a case in which the appeals court level decided against (in favor of) the union. Thus, if there is a significant statistical correlation between the decisions at the NLRB and at the court of appeals, then the estimated coefficient of the Court's deference to the NLRB may be subject to selection bias.⁴⁷ Including the decision of the court of appeals in the Court's preference function should correct for this potential selection bias.⁴⁸

A third potential bias arises from the fact that we are looking at a time series rather than a cross section of cases. Over time, changes in the composition of the Court and Congress may also change the type of cases that are appealed to the Court. That is, facing a very conservative Congress and Supreme Court, a blatantly liberal interpretation of the statute by the NLRB will most certainly be reversed by the appeals court, and if the NLRB (or the union) appeals to the Court, the Court most certainly will not grant *certiorari*. Thus, the cases that the Court will have to decide will be biased toward more conservative readings of the statute. But this change in the nature of cases would, in some so-far unresolved way, affect the proportion of pro-union decisions that the Court will make. A similar bias also appears in the ADA measures for members of Congress. As the average member becomes more conservative, the bills presented to the legislature will be, on average, more extreme. Some may be so extreme that even conservative legislators will vote against them, increasing their ADA ratings. Thus, the same type of bias is at work with the computation of liberal indexes for members of Congress. Unfortunately, we do not yet know how important these biases are, or how to correct for them. The reader thus should take our results with those potential biases in mind.

□ **Empirical results.** We present in this section the results of estimating different models of Supreme Court/congressional interaction. We are interested in undertaking a test of our framework as well as drawing inferences about the role of politics and ideology in Supreme Court decision making. Because we discuss in this section a fair amount of empirical results and tests, we begin with a road map to the detailed discussion to follow.

We start in Table 1 by presenting least squares estimates of the probability of a pro-

⁴⁷ The sample correlation between NLRB and appeals court decisions is $-.32$. On the other hand, the correlation between lower federal and state district courts and the court of appeals is $.41$.

⁴⁸ To see this, consider the following *certiorari* rule: grant *cert.* only when given that $appeal = N$, $E^* > T$, and when given that $appeal = Y$, $1 - E^* > T$, where T is some arbitrary number between 0 and 1. In particular, we would expect $T \geq .5$. It can be seen that if we had perfect knowledge of the position of the Court, then there would not be any selection bias, as the decision to grant *cert.* will be uncorrelated with the prediction error term ϵ in (2). We do not know, however, the actual location of the Court. In particular, consider regime 3, where SC is the actual determinant of E^* . The decision to grant *cert.* given a No decision at the appeal level is given by $\gamma + \alpha SC + \alpha \mu > T$ (where SC corresponds to the deterministic part of the location of the Court). Thus, in the observed data, $E(\mu/appeal = N) > (T - \gamma - \alpha SC)/\alpha$. Similarly, given a Yes decision at the appeal level,

$$E(\mu/appeal = Y) < (1 - T - \gamma - \alpha SC)/\alpha.$$

Thus, if $T \geq .5$, we obtain that $E(\mu/appeal = N) > E(\mu/appeal = Y)$. In other words, because of the process of *certiorari*, the distribution of the error term μ in the data is conditioned on the decision at the appeal level. So, including the decision at the appeal level as a determinant of SC should largely correct the selection bias that may exist in the sample. Observe, however, that a complete treatment of this selection bias problem would require the estimation of the actual *certiorari* process, which would increase the data requirement by tenfold. Such estimation is left for future research.

TABLE 1 **Linear Probability Models: Dependent Variable: Pro-union Supreme Court Decision**
(Number of observations: 249; method: weighted least squares)

| Variable | Committee Median | Committee Majority Median | Committee Chair | Committee Median with Closed Rule | Floor Median Voter | Committee Median with Presidential Veto |
|---|---------------------|---------------------------------|--------------------|---|--------------------------|---|
| Constant | -.35 (1.40) | .16 (0.68) | .42 (2.35) | -.05 (-0.19) | -.183 (-0.63) | -.433 (-1.57) |
| <i>SCDEM</i> | .005 (2.09) | .002 (0.88) | .004 (1.76) | .007 (2.51) | .004 (1.48) | .009 (3.09) |
| House committee median ADA | .011 (6.44) | — | — | .014 (5.83) | — | .015 (6.51) |
| Senate committee median ADA | .0002 (.07) | — | — | -.006 (-1.40) | — | -.005 (-1.76) |
| House median ADA | — | — | — | -.009 (-2.02) | .006 (1.68) | — |
| Senate median ADA | — | — | — | .004 (0.92) | .008 (2.32) | — |
| House committee chair ADA | — | — | .002 (2.24) | — | — | — |
| Senate committee chair ADA | — | — | -.003 (-2.99) | — | — | — |
| House committee majority median ADA | — | .005 (2.10) | — | — | — | — |
| Senate committee majority median ADA | — | -.0006 (-0.44) | — | — | — | — |
| House supermajority veto median ADA | — | — | — | — | — | -.013 (-2.90) |
| Senate supermajority veto median ADA | — | — | — | — | — | .013 (2.96) |
| R^2 | .293 | .031 | .207 | .299 | .073 | .356 |
| S.E. of regression | .997 | 1.007 | 1.006 | 1.002 | 1.007 | .988 |
| Log likelihood | -350.599 | -353.123 | -352.793 | -350.721 | -352.941 | -347.177 |

Note: regressions were performed weighting the observations by the inverse of the square root of $(1-pred)*pred$, where $pred$ is the predicted probability from the original ordinary least squares equation.

union decision. These estimates will serve as a benchmark against which our more sophisticated econometrics has to stand up. In particular, the specifications in Table 1 are in accordance with models of judicial decision making that depict the Court either as ideological but not politically sophisticated or as involved in a simple Nash bargaining with elected officials (the houses of Congress and the president) without any institutional content. Table 1 is also useful for testing the pure legalistic view of judicial decision making. In Table 2 we present our basic model, in which the preferences of the Supreme Court are given just by its political composition. Comparing the results of Tables 1 and 2 we can reject two models of judicial decision making: the first sees the Court as not politically sophisticated and the second is a simple bargaining model between the elected officials and the Court with no institutional content. Our basic model is augmented in Table 3 by allowing macroeconomic circumstances to enter the pro-union preferences of the Supreme Court. In Table 4 we test the extent to which our ADA measures of congressional preferences are a proper representation of pro-union behavior. In Table 5 we explore the extent to which the Supreme Court defers to the NLRB. Finally, in Table 6 we test whether the model is stable across regimes.

Table 1 presents weighted least squares estimates of the probability of a pro-union decision by the Supreme Court.⁴⁹ Each column presents the results of linearizing the different models. Thus, each column presents the results of regressing the binary variable (pro-union Supreme Court decision) on the variables that each of the models would predict are relevant. The "committee median" column, for example, regresses Supreme Court decisions simply on the House and Senate committee median scores and on *SCDEM*, which represents the proportion of Democrats on the Court. Observe that a Nash solution to a bargaining game between Congress and the Court, with no institutional structure, implies that the bargaining outcome is a linear combination of the three ideal points of the House, the Senate, and the Court. Thus, a linear regression of Court decisions on the measures of congressional pro-union preferences and of proxies for Court preferences is the empirical representation of the Nash-bargaining solution concept. Furthermore, a pure legalistic view of judicial decision making would suggest that the composition of the Court or of Congress and the presidency should not affect judicial decisions. Table 1 thus also performs a test of the pure legalistic view of judicial decision making.⁵⁰ A pure legalistic view would be rejected if the composition of either the Court or Congress would matter in the probability of a pro-union decision. Finally, a model of judicial decision making that assumes an ideological but not politically sophisticated Court (i.e., that does not care about political responses to its actions) would suggest that the probability of a pro-union decision should depend only, at most, on the composition of the Court.

Columns 4 and 6 of the table are not self-explanatory. The linearization of the closed rule model would suggest that the floor medians as well as the composition of the committees matter. For committee composition we use the committee median, as the committee majority party medians do not seem to work as well (observe that in column 1 the point estimate of the House committee median is double that of the House committee majority median in column 2). The model with presidential veto requires using the two-thirds and one-third supermajorities discussed above. Since whether the upper or the lower supermajority is used depends on the party of the president, we use the two-thirds supermajority for Democratic presidents and the one-third for Republican presidents. Appendix A gives summary statistics on the supermajority medians.

A common result transpires from the six models.⁵¹ First, the Court's composition seems to matter, as in almost all cases an increase in the percentage of Democrats on the Court increases the probability of a pro-union decision. In general, the addition of one extra Democratic justice increases the probability of a pro-union decision by 5 percentage points. Second, not just ideology but politics matter as well, as in almost all models the ADA score of the relevant House member seems to affect the Court's probability of a pro-union decision. Observe, however, that the median member of the House committee on labor seems to be

⁴⁹ We use a two-step procedure. For each column we first run a linear regression. We then use the predicted probability of pro-union decision (*pred*) to divide all variables (including the intercept) by the theoretical standard deviation of the error term, the square root of $((1 - \text{pred})\text{pred})$. The final result is presented in Table 1. As expected, the standard error of the different regressions is 1. Also, there does not seem to be much leftover heteroskedasticity.

⁵⁰ It could be argued that changes in the composition of Congress and the presidency may also change the law and hence judicial decision making. On the other hand, as discussed in Section 4, there has been only a single piece of labor legislation during our sample, and it dealt simply with the internal organization of trade unions. Changes in elected officials did not provide a source of formal statutory change.

⁵¹ While the R^2 statistic cannot be used to test for the relevance of the right-hand-side variables in Table 1 (because of the two steps used in its computation), since the weighted residuals have a theoretical variance of 1, the sum of squared residuals are distributed as $\chi^2(N - k)$, with mean $N - k$ and variance $2(N - k)$. Thus, a t -statistic can be computed as $t = [SSE - (N - k)] / \sqrt{2(N - k)}$, where $N - k$ equals either 243 or 245. Thus, if the computed t value is very large, then we could infer that the linear models are grossly misspecified (Aldrich and Nelson, 1984). For the six models, though, all the t -statistics are between .04 and .27.

TABLE 2 **The Basic Model**
Dependent Variable: Pro-union Supreme Court Decisions Concerning the NLRA Years, 1949–1988 (Number of observations: 249; method: maximum likelihood)

| Parameter | Variable | Thresholds | | | | | |
|----------------|--------------|--------------------|---------------------------|-------------------|-----------------------------------|--------------------|---|
| | | Committee Median | Committee Majority Median | Committee Chair | Committee Median with Closed Rule | Floor Median Voter | Committee Median with Presidential Veto |
| β_1 | Constant | –15.78 (–11.71) | –16.99 (–9.04) | –96.40 (–9.98) | 19.97 (16.47) | –46.13 (–35.63) | 28.78 (1.41) |
| β_2 | <i>SCDEM</i> | 1.41 (22.97) | 1.65 (13.57) | 2.73 (9.99) | .89 (12.81) | 1.90 (15.37) | .76 (2.19) |
| γ | Constant | –.01 (–.07) | .41 (3.83) | .47 (6.99) | –.02 (–.11) | .29 (2.44) | –.01 (–.06) |
| α_1 | ADA score | .008 (3.36) | .001 (1.42) | .001 (1.35) | .008 (2.78) | .006 (2.38) | .008 (2.42) |
| σ_v | | .965 (22.19) | .982 (22.31) | .981 (22.26) | .970 (21.80) | .975 (22.80) | .971 (22.39) |
| σ_μ | | 1.40 (0.28) | 3.90 (0.50) | 12.15 (0.56) | 3.61 (0.62) | 3.01 (0.46) | 3.39 (0.53) |
| Log likelihood | | –344.46 | –348.71 | –348.80 | –345.90 | –347.05 | –346.16 |

Note: Asymptotic *t*-statistics in parentheses. Each column is estimated using the three-regime switching regression model (5)–(8). The regime thresholds are given by the relevant model of each column. See the text. The parameters β_i are the parameters of the Supreme Court preference function: $SC = X\beta + \mu$. The parameters γ and α_i are the parameters of the most desired probability function: $E^* = \gamma + \alpha P$, which relates an individual's pro-union tendency and her most desired probability of a pro-union decision by the Supreme Court. See equation (2).

relatively more important, as in columns 1, 4, and 6 an increase in the ADA score of the House committee median by 10 points increases the probability of a pro-union decision by more than 10 percentage points.

The results in Table 1, then, soundly reject the pure legalistic view of judicial decision making, as the preferences of the Court matter in determining the probability of a pro-union decision.

Table 1 represents a relevant alternative against which we can compare our model. If our switching regime model is grossly misspecified, then we should obtain adjusted likelihood function values lower than those in Table 1. Higher adjusted values for the likelihood function provide some support to our framework. Furthermore, comparing Tables 1 and 2 would allow us to perform further tests of the nature of judicial decision making.

Table 2 presents the estimation of our basic model, where the political preferences of the Court are given simply by its political composition. These estimates were obtained by maximizing the likelihood function (8).⁵² Table 2 shows that the imputed preferences of the Court are quite sensitive to its political composition. Each additional Democratic justice increases the imputed ADA by approximately 14 ADA points. At average values, the elasticity of the imputed ADA of the court with respect to its political composition is approximately 1.^{53,54}

⁵² All estimations were performed using the GQOPT DFP subroutine. Several starting values were tried, to be sure of obtaining a global maximum.

⁵³ From Appendix A, observe that the average *SCDEM* is 61. The average imputed ADA for the court is 73.87, and the average β_2 from Table 2 is 1.33.

⁵⁴ It seems, also, that the composition of the Court is quite a good indicator of regime switching. Since the

Table 2 also shows that politics are important in determining the Court's decision. A 10-point increase in the ADA rating of the relevant political institution (the House, the Senate, or the Court) implies an increase in the probability of a pro-union decision of 6 to 8 percentage points (except for the committee chair and committee majority median models). Observe that our estimates of the effects of Court preferences are substantially higher than those derived from Table 1. For example, column 1 of Table 1 implies that a 10-point increase in the proportion of Democrats on the Court increases the probability of a pro-union decision by half a percentage point. On the other hand, using the estimates of column 1, Table 2, we obtain that in regime 3, a 10-point increase in the percentage of Democratic justices increases the probability of a pro-union decision by one full percentage point ($1.41 \times .008 = .011$).

It is now interesting to compare the results across models. Except for the committee majority median and the committee chair models, the other four models provide very similar implications. Not only Court composition matters, so does politics. For those two models, though, while Court preferences are functions of their own composition, preferences or politics do not matter too much, as the estimated α is small and insignificant.⁵⁵ Interestingly, Table 2 would suggest—albeit not too strongly—that a simple model of full committee power, with both gate-keeping and veto power, seems to fit the data at least as well as more complex models, like those that give committees only gate-keeping power (i.e., the closed rule model) and those that take into account presidential vetoes.⁵⁶

Furthermore, the point estimates of σ_v in all models are above .965 and are all statistically indistinguishable from their theoretical value of 1. Thus, there does not seem to be serious misspecification in our framework. Finally, the values of all the likelihood functions in Table 2 are higher than their respective values in Table 1. In particular, the Akaike Information Criteria imply that all models of Table 2 (except perhaps for the committee chair and veto power models) should be considered superior to their counterparts in Table 1. So, we can reject two hypotheses about judicial decision making. First, the game between the Court and elected officials is not an unstructured bargaining game. Instead, our sequential model of decision making seems to be superior to a simple bargaining model. Second, we can reject a model of politically unsophisticated Courts (Table 1), as it is outperformed by one that assumes sophistication (Table 2).

likelihood function is not defined for $\sigma_\mu \leq 0$, the standard error of σ_μ cannot be used to perform tests on $\sigma_\mu = 0$. Instead, Gourieroux, Holly, and Monfart (1982) developed a likelihood ratio test for boundary conditions. The restricted estimation is carried assuming perfect switching. That is, the imputed ADA is assumed to be exactly $X\beta$, and for every value of β , regimes can then be classified accordingly. Gourieroux, Holly, and Monfart (1982) show that the likelihood ratio, for one restriction, is distributed as $.5(\chi^2(0) + \chi^2(1))$, where $\chi^2(0)$ represents the unit mass at the origin. For column 1, for example, the computed likelihood ratio is .18, well below the crucial value for standard confidence levels. Thus, for this specification we are unable to reject the null hypothesis that σ_μ is actually zero.

⁵⁵ These two models, however, are the ones with the lowest likelihood values. While the differences are not great, given that they have the same number of parameters, the Akaike Information Criteria suggests that higher likelihood models are more appropriate.

⁵⁶ Observe that if the floor medians are, in general, between the two committee medians, then the closed rule model will collapse into the committee median model. This, however, is not the case, as the committees tend over the years to have been more liberal than their respective floors (except in 1952, when the House committee was unusually conservative: ADA = 10.2—). The difference has narrowed in recent years, though. Similarly, given that the House and Senate committee medians are above the upper supermajority medians, the presidential veto model can contribute only during Republican presidencies, more than half the observations. The Court, however, became conservative only at the end of the period. Thus, it is reasonable to expect that the veto model would not trigger regime 2 (i.e., when SC is less than the lower bound) too often. Instead, regime 3 will be triggered more often. This may explain the fact that a more sophisticated model, like the veto power model, actually does not perform better than a more simple-minded one like pure committee power.

TABLE 3 **The Determinants of Supreme Court Preferences**
Dependent Variable: Pro-union Supreme Court Decisions Concerning the NLRA Years,
1949–1988 (Number of observations: 249; method: maximum likelihood)

| Parameter | Variable | Thresholds | | | | | |
|----------------|---------------------|---------------------|---------------------------------|--------------------|---|--------------------------|---|
| | | Committee Median | Committee Majority Median | Committee Chair | Committee Median with Closed Rule | Floor Median Voter | Committee Median with Presidential Veto |
| β_1 | Constant | -16.20 (-12.90) | -17.03 (-16.74) | -97.70 (-53.21) | 27.97 (1.53) | -46.72 (-37.81) | 33.18 (3.90) |
| β_2 | <i>SCDEM</i> | 2.22 (2.56) | 1.73 (3.57) | 2.58 (4.73) | .74 (2.33) | 2.86 (2.07) | 0.45 (3.78) |
| β_3 | <i>UNEMPLOYMENT</i> | -1.67 (-0.29) | -.31 (-0.06) | 2.71 (0.71) | 3.25 (1.24) | -3.04 (-0.78) | 5.34 (3.20) |
| β_4 | <i>INFLATION</i> | -8.10 (-1.31) | -.70 (-0.36) | -1.67 (-1.16) | -25.81 (-2.22) | -11.74 (-0.99) | -3.19 (-3.79) |
| β_5 | <i>DEM PRES</i> | 3.04 (0.37) | .83 (0.51) | 14.03 (0.83) | -.65 (-.07) | -2.59 (-0.89) | -.42 (-1.70) |
| γ | Constant | .05 (0.39) | .41 (3.77) | .46 (7.41) | -.09 (-.43) | .24 (2.41) | -.05 (-0.25) |
| α_1 | ADA score | .007 (3.59) | .001 (1.44) | .001 (1.77) | .009 (2.88) | .007 (3.26) | .008 (3.57) |
| σ_v | | .956 (22.24) | .981 (22.86) | .979 (22.09) | .959 (22.30) | .966 (22.49) | .956 (22.49) |
| σ_μ | | 10.59 (0.56) | 4.07 (0.44) | 7.30 (2.04) | 1.33 (0.14) | 3.80 (0.57) | 4.13 (0.51) |
| Log likelihood | | -342.22 | -348.62 | -348.35 | -343.19 | -344.69 | -342.74 |

Note: Asymptotic *t*-statistics in parentheses. See also the note to Table 2.

So far, then, our model of Supreme Court behavior seems to be relatively robust to the type of congressional decision making used. Courts make decisions based on their ideology but take into account the constraints imposed by Congress. While there is some evidence in favor of using a simple model of congressional behavior, more sophisticated models perform almost as well. Furthermore, our structural model is consistent with the data on two counts. First, it satisfies a simple misspecification test. Second, the imposition of a very particular structure does not seem to worsen the predictive power of the model too much.

In Tables 3 and 4 we perform two specifications tests. In Table 3 we test whether the Court's preferences are a function of macroeconomic conditions (inflation and unemployment) and whether the Court behaves differently when facing a Democratic president. Even though for some specifications individual variables may appear significant, as a set they are jointly statistically insignificant for all models.⁵⁷ Thus, this set of variables does not seem to belong in the equation explaining the Court's preferences. The introduction of the macroeconomic variables seems to have the effect of increasing the marginal effect of the Court's composition on the imputed ADA (except, though, for the presidential veto model). Otherwise, the results in Table 3 are very similar to those in Table 2.

Table 4 explores whether, given the ADA scores of the relevant members of Congress, and the imputed values for the Court, the macroeconomic conditions and the president have any effect on the percentage of pro-union decisions. Failure to reject this hypothesis would raise the question of whether the ADA ratings are measuring properly the pro-union

⁵⁷ At the 95% confidence level, the $\chi^2(3)$ statistic is 7.81, which exceeds the values for all likelihood ratio tests. These can be computed from the log likelihood values in Tables 2 and 3.

TABLE 4 Testing the Appropriateness of the ADA Measures
 Dependent Variable: Pro-union Supreme Court Decisions Concerning the NLRB Years,
 1949–1988 (Number of observations: 249; method: maximum likelihood)

| Parameter | Variable | Thresholds | | | | | |
|----------------|---------------------|---------------------|---------------------------------|--------------------|---|--------------------------|---|
| | | Committee Median | Committee Majority Median | Committee Chair | Committee Median with Closed Rule | Floor Median Voter | Committee Median with Presidential Veto |
| β_1 | Constant | -10.90 (-9.53) | -14.74 (-1.87) | -97.90 (-56.17) | 32.68 (4.27) | -47.22 (-44.97) | 24.62 (16.38) |
| β_2 | <i>SCDEM</i> | 2.97 (4.29) | .77 (2.42) | 2.68 (3.15) | .55 (1.90) | 1.53 (4.85) | .60 (3.83) |
| β_3 | <i>UNEMPLOYMENT</i> | -12.04 (-3.55) | -9.63 (-0.77) | .80 (0.09) | 3.38 (1.76) | 5.26 (3.65) | 6.92 (3.20) |
| β_4 | <i>INFLATION</i> | -12.04 (-3.55) | 30.76 (1.50) | -.53 (-0.08) | -2.19 (-1.58) | -4.15 (-0.99) | -6.21 (-3.79) |
| β_5 | <i>DEM PRES</i> | 3.86 (3.18) | -27.39 (-0.37) | 14.78 (3.26) | 7.76 (0.72) | -6.12 (-2.31) | -3.36 (-1.70) |
| γ | Constant | .04 (0.18) | .48 (3.80) | .60 (7.56) | -.02 (-0.07) | .36 (2.34) | .28 (0.13) |
| α_1 | ADA score | .007 (2.75) | .002 (1.71) | .0006 (0.49) | .009 (1.97) | .006 (2.39) | .009 (3.57) |
| α_2 | <i>UNEMPLOYMENT</i> | .004 (0.33) | -.005 (-.37) | -.007 (-0.46) | -.009 (-0.66) | -.02 (-1.14) | -.03 (-1.65) |
| α_3 | <i>INFLATION</i> | -.003 (-0.55) | -.02 (-2.49) | -.01 (-1.73) | -.003 (-0.40) | -.003 (-0.39) | -.02 (-1.78) |
| α_4 | <i>DEM PRES</i> | -.03 (-0.57) | .004 (0.09) | .01 (0.21) | -.04 (-0.54) | .02 (0.52) | -.03 (-0.55) |
| σ_v | | .947 (22.38) | .968 (22.41) | .973 (22.45) | .956 (23.19) | .962 (22.11) | .948 (22.75) |
| σ_μ | | 7.04 (0.68) | 4.47 (0.40) | 4.53 (1.80) | 2.70 (0.63) | 2.13 (0.52) | 7.05 (1.01) |
| Log likelihood | | -341.71 | -345.10 | -346.52 | -342.72 | -343.80 | -341.07 |

Note: Asymptotic *t*-statistics in parentheses. See also the note to Table 2.

tendencies of the relevant members of Congress. This hypothesis, however, is also rejected for all models at the 5% confidence level. The parsimonious model of Table 2, then, seems to be quite robust. The introduction of these variables does not appear to affect the role of the Court's preferences or of politics.

In Table 5 we explore the extent to which the Court defers to the NLRB. There are two reasons for such a tendency. First, as discussed above, the legal doctrine of deference to administrative agencies, reinforced by the *Chevron* decision, suggests that courts should not second-guess expert agencies. If this doctrine is valid for labor relations, then a pro-union finding by the NLRB should move the Court to take a more pro-union position. There is, however, an alternative reason for the Court to follow the NLRB; it has nothing to do with legal doctrines and is instead the result of misspecification. In particular, we, as econometricians, will not be able to ascertain the little details of each case. Even though we have examined each case individually, we do not have information on the "merits" of each case. On the other hand, it is reasonable to expect that a lower court decision (including the NLRB) will be a proxy for its merits. That is, if the lower court decided against a pro-union decision, there must have been some reason for it. But the lower court may have erred in interpreting the political circumstances in which the Supreme Court moves, triggering the *certiorari* decision. In general, then, it is reasonable to expect that a pro-union decision, by both the NLRB and the other lower courts, will signal a case that was, on average, more

TABLE 5 **Testing Deference to the NLRB**
Dependent Variable: Pro-union Supreme Court Decisions Concerning the NLRA Years, 1949–1988 (Number of observations: 249; method: maximum likelihood)

| Parameter | Variable | Thresholds | | | | | |
|----------------|---------------|-------------------|---------------------------|--------------------|-----------------------------------|---------------------|---|
| | | Committee Median | Committee Majority Median | Committee Chair | Committee Median with Closed Rule | Floor Median Voter | Committee Median with Presidential Veto |
| β_1 | Constant | –6.22 (–0.30) | –20.69 (–13.94) | –98.77 (–16.02) | 18.75 (8.24) | –139.78 (–18.82) | 58.68 (21.77) |
| β_2 | <i>SCDEM</i> | 1.36 (4.27) | 1.70 (11.47) | 2.74 (9.87) | .97 (10.74) | 4.07 (18.60) | .45 (4.41) |
| β_3 | <i>APPEAL</i> | –16.18 (–5.14) | –4.76 (–1.58) | 6.44 (–0.39) | –12.05 (–2.52) | –17.74 (–6.73) | –14.26 (–2.37) |
| β_4 | <i>NLRB</i> | 6.42 (3.68) | 26.23 (2.84) | 55.52 (2.92) | 5.11 (1.77) | –1.96 (–0.18) | .74 (.01) |
| β_5 | <i>OTHER</i> | 11.57 (7.49) | –2.47 (–2.01) | –11.75 (–2.61) | –1.98 (–1.07) | 26.06 (1.02) | –12.35 (–2.98) |
| γ | Constant | –.04 (–0.63) | .38 (3.98) | .44 (6.42) | .02 (0.18) | .25 (2.41) | –.02 (–0.08) |
| α_1 | ADA score | .009 (4.22) | .002 (1.95) | .001 (1.80) | .007 (3.20) | .007 (3.29) | .008 (2.97) |
| σ_v | | .955 (22.59) | .969 (35.29) | .980 (22.32) | .964 (22.17) | .968 (22.29) | .965 (22.45) |
| σ_μ | | 3.72 (0.66) | 2.44 (0.26) | 13.86 (4.54) | 1.12 (0.17) | 2.76 (0.39) | 2.18 (0.51) |
| Log likelihood | | –341.83 | –348.14 | –348.06 | –344.45 | –345.44 | –344.60 |

Note: Asymptotic *t*-statistics in parentheses. See also the note to Table 2.

pro-union. Our model, however, is based on the presumption that all cases are alike. We thus have to adjust for this shift in case nature. Otherwise, we will find that the Court will follow the NLRB quite often when it actually only takes the merits of the case into account.⁵⁸ A way to adjust for this is to let the preferences of the Supreme Court be a function of decisions by both the NLRB and by other lower courts. Since the other lower courts are not specialized courts, but rather are state or federal district courts, there is no legal doctrine suggesting that the Supreme Court should follow them. Thus, a test of deference to administrative agencies can be performed by examining whether, in the Supreme Court preference equation, the coefficient of the variable *NLRB* is significantly higher than that of the variable *OTHER*.

As discussed above, however, these estimates may be subject to selection bias if the Court chooses cases so as to reverse prior appeals court decisions. We thus have to include in the Supreme Court preference function a variable (*APPEAL*) reflecting the decisions of courts of appeal.

Table 5 estimates the extent of deference to the NLRB, correcting for the potential selection bias that may be present because of the Court's strategic choice of cases. As expected, the coefficients of *APPEAL* are negative for all models, albeit insignificantly so, in the committee majority median and committee chair models. Apart from these two models,⁵⁹

⁵⁸ In estimations that are not reported here but are available upon request, we find that if we add to the determinants of Supreme Court preferences a variable representing the decision of the lower court, whether it is the NLRB or a state or federal district court, the coefficient of that variable is large (approximately 15) and significant. Thus, we find that the Court does follow lower courts.

⁵⁹ Observe however that the joint significance of these three variables can be rejected, at the 5% confidence level, as the values of all likelihood ratio tests are less than the crucial $\chi^2(3)$ value of 7.81.

TABLE 6 **Testing the Relevance of Different Regimes**
Dependent Variable: Pro-Union Supreme
Court Decisions Concerning the NLRA Years,
1949–1988 (Number of observations: 249;
method: maximum likelihood; model:
committee median)

| Parameter | Variable | Estimate |
|----------------|---------------------|-------------------|
| β_1 | Constant | –6.095 (–1.61) |
| β_2 | <i>SCDEM</i> | .916 (16.56) |
| γ | Constant | .037 (0.26) |
| α_1 | ADA score: Regime 1 | .006 (2.57) |
| α_2 | ADA score: Regime 2 | .009 (3.77) |
| α_3 | ADA score: Regime 3 | .011 (4.15) |
| σ_v | | .948 (22.16) |
| σ_μ | | .009 (0.017) |
| Log likelihood | | –340.007 |

Note: Asymptotic *t*-statistics in parentheses. See also the note to Table 2.

there does not seem to be strong evidence to support the “deference to administrative agencies” hypothesis. For example, in the committee median model, the Court follows decisions by the NLRB by less than those originating in some other forum. Also, in contrast to the point estimates of the Court’s composition and the relevant ADA score, the parameters of *NLRB* and *OTHER* are quite unstable across congressional decision-making models. This result suggests that there does not seem to be strong evidence of Court deference to administrative agencies.

It is possible that our results are driven exclusively by a particular set of observations or regime. That is, perhaps politics matter only when the Court is very liberal or when it is very conservative. To explore this, we re-estimate column 1 of Table 2 but let the slope of the most-desired probability function (α_1) change with the regime. That is, we can postulate an equation like

$$E_k^* = \gamma + \alpha_1 P_{k1} + \alpha_2 P_{k2} + \alpha_3 P_{k3}, \quad (9)$$

where P_{kj} , $j = 1, 3$ represents the preferences of the relevant individual in case k when the regime is j , $j = 1, 3$.⁶⁰

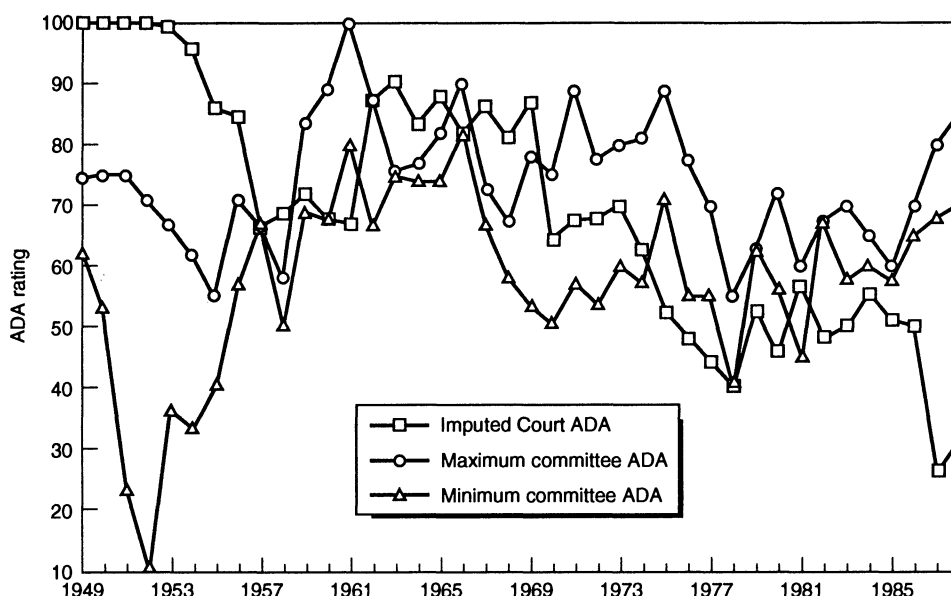
So if, for example, politics only matter when the Court is very liberal, then the slope α_1 should be positive while α_2 and α_3 should be zero. If politics always matter, then all α ’s should be positive, and if there is no misspecification in our model, they should be approximately the same.

Table 6 provides the results of estimating (9). Two main points arise in the table. First, politics always matter. Whether the Court is liberal or conservative vis-à-vis Congress, politics

⁶⁰ Observe, however, that this specification is not consistent with stable preferences, as the E^* function, which describes preferences, would be state specific.

FIGURE 3

ADA RATINGS FOR COURT AND COMMITTEES (COURT VALUES ARE IMPUTED)



still influence the Court. It seems, though, that politics matter less when Congress faces liberal courts than when it faces conservative ones. While this result may suggest that the most-desired probability of pro-union decision function is nonlinear, suggesting that our model may be empirically misspecified,⁶¹ it may also reflect that the game is substantially more complicated than the one we developed here. We leave for future research the resolution of this question.

Finally, we may wonder whether our econometrics work has improved our understanding over what Table 1 has already told us. For example, Table 1 suggests that politics indeed matter, as the composition of the Supreme Court as well as that of the House seems to affect the probability of a pro-union decision by the Supreme Court. Observe, however, that Table 1 cannot tell us when it is that Court composition matters, nor how important this is over time. Figure 3, on the other hand, tells us that all through the 1960s and early 1970s the Court was very much able to achieve its ideal policies. During the 1950s, late 1970s, and 1980s, however, the Court was constrained by Congress, in the 1950s by a “conservative” Congress and in the late 1970s and 1980s by a “liberal” one. This result has important implications for the future evolution of labor relations policy. Even though the Court is more conservative today than it was during the last 40 years, our model predicts that it will not be able to impose a much more conservative reading of the statute. Finally, Figure 3 also suggests that the equilibrium pro-union bias of labor policy should have increased during the 1950s, peaked in the early 1960s, and declined since then, a course not too different from the evolution of the percentage of unionized workers.⁶²

⁶¹ The restriction that all α 's are the same is rejected at the 5% but not at the 1% confidence level.

⁶² The proportion of union members among the nonagricultural labor force reached a maximum of 32.5% in 1953 but remained relatively stable (at 30%) until 1965. Since then it has declined continuously, reaching 16.6% by 1988.

To summarize, our results suggest that it is inappropriate to model the Court as a totally unconstrained institution or as an institution that makes decisions based exclusively on legal precedent. Congress's and the Court's own preferences matter. Perhaps the most surprising result is that the way in which congressional interests matter is consistent with the predictions of the model developed above. That is, the constraints faced by the Court vary across the different regimes, with only one chamber of Congress becoming the relevant constraint (if at all) at each point in time. Furthermore, in most of the labor-relations cases it chose to consider, the Court was actually quite constrained by Congress. Using the results of column 1 of Table 5, we find that in almost 50% of the cases (122 out of 249), the Court was constrained by a liberal committee: in 28% of the cases, a conservative committee constrained the Court. In only 22% of the cases was the Court actually unconstrained. Over the years, the Court was more liberal than the relevant committees of Congress at the beginning of the sample, and more conservative at the end (see Figure 3).

7. Conclusion

■ This article is an attempt to develop an empirically refutable model of a politically sophisticated Court interacting with elected officials (Congress and the president). We implement this model to the Supreme Court's labor-relations merit decisions. We provide the first systematic evidence on the role of politics and ideology in judicial decision making and on the political sophistication of the Court. We are able to reject a model of purely legalistic judicial decision making as well as a model of unconstrained bargaining between the Court and elected officials, in favor of a model of a politically sophisticated and ideologically motivated Court interacting, sequentially, with Congress and the president.

We provide a theory of judicial decision making that is based on simple utility maximization principles and is imbedded in a model of legislative politics. The main insight of the model is that politics matter in Supreme Court decisions, but they do so in a nontrivial way. Interest-group politics matter only when the Court's ideologically based preferences are very different from those of the relevant members of Congress (whose preferences are based on constituent or interest-group interests). In those cases, marginal changes in congressional preferences translate into marginal changes in Supreme Court decisions. For example, if the Court is more conservative than Congress, then a marginal increase in the number of pro-labor members of the relevant congressional committees would translate into a marginal increase in the probability of pro-union Supreme Court decisions. On the other hand, when the Court's preferences are middle of the road in comparison to those of the relevant members of Congress, then interest-group politics will not matter much, and the Court will vote its own preferences instead. Thus, our model reconciles the empirical evidence that both Court preferences *and* interest-group politics matter in the determination of regulatory policy.

Our empirical analysis suggests that the data do not reject our model outright. In particular, we find that the Court seems to make its decisions so as to maximize its (ideologically based) preferences, taking into account the relevant political constraints. The Court, however, was constrained by Congress during most of the period we analyzed. Also, when the Court was free to decide based on its political preferences alone (mostly in the 1970s), Congress seems to have been at odds on what labor-relations policy should be. And contrary to the conventional wisdom, the Court does not defer in a significant way to the NLRB. Furthermore, our results lend some support to the belief that committees have substantial power in Congress (Shepsle and Weingast, 1989), as the committee median model of legislative decision making seems to perform at least as well as more complex models of congressional decision making. Finally, our results suggest that the Court responds, albeit quite indirectly, to interest-group and voter pressure.

Appendix A

■ Data summary.

| Variable (Acronym) | Mean | S.D. | Maximum | Minimum |
|--|-------|-------|---------|---------|
| Pro-union Supreme Court Decision (<i>SCDEC</i>) | 0.61 | 0.48 | 1.00 | 0.00 |
| Pro-union appellate court decision (<i>APPEAL</i>) | 0.34 | 0.47 | 1.00 | 0.00 |
| Pro-union NLRB decision (<i>NLRB</i>) | 0.46 | 0.49 | 1.00 | 0.00 |
| Pro-union other forum decision (<i>OTHER</i>) | 0.09 | 0.29 | 1.00 | 0.00 |
| Supreme Court % Democrats (<i>SCDEM</i>) | 61.03 | 13.68 | 88.88 | 33.33 |
| Democrat as president (<i>DEM PRES</i>) | 0.40 | 0.49 | 1.00 | 0.00 |
| <i>INFLATION</i> | 3.77 | 3.29 | 13.50 | -1.20 |
| <i>UNEMPLOYMENT</i> | 5.47 | 1.57 | 9.70 | 2.90 |
| House floor ADA median | 40.13 | 9.35 | 57.00 | 23.00 |
| Senate floor ADA median | 42.98 | 8.79 | 60.00 | 30.00 |
| House committee ADA median | 61.12 | 16.26 | 89.00 | 10.50 |
| Senate committee ADA median | 71.19 | 11.30 | 100.00 | 40.00 |
| House committee chair ADA | 47.87 | 33.55 | 100.00 | 0.00 |
| Senate committee chair ADA | 52.87 | 31.15 | 95.00 | 0.00 |
| House committee majority median ADA | 78.95 | 16.98 | 100.00 | 22.00 |
| Senate committee majority median ADA | 74.31 | 26.60 | 100.00 | 5.00 |
| House supermajority one-third median ADA | 19.73 | 8.68 | 43.00 | 6.00 |
| Senate supermajority one-third median ADA | 22.14 | 5.83 | 67.00 | 10.00 |
| House supermajority two-thirds median ADA | 65.93 | 10.89 | 89.00 | 47.00 |
| Senate supermajority two-thirds median ADA | 63.22 | 10.41 | 80.00 | 40.00 |

Notes: 249 observations, 1949–1989. Means are calculated for the whole sample. Thus, years with more cases will weigh more heavily in the calculation of means.

Appendix B

■ Data definition and sources.

Case Data

| | |
|---------------|---|
| <i>SCDEC</i> | Supreme Court decision. A dummy variable representing the nature of the Court's decision: 1 if the decision is pro-union and 0 otherwise. Source: <i>United States Supreme Court Reports</i> , various years. |
| <i>APPEAL</i> | Appeals court decision. A dummy variable representing the nature of the court of appeals decision: 1 if the decision is pro-union and 0 otherwise. Source: <i>Federal Reports</i> , various years. |
| <i>NLRB</i> | A dummy variable representing the nature of the NLRB decision: 1 if the decision is pro-union and 0 otherwise. |
| <i>OTHER</i> | A dummy variable representing the nature of other lower courts, like state district courts or federal district courts. Source: <i>Decision and Orders of the National Labor Relations Board Reports</i> , various years. |

ADA Data

| | |
|----------------------------------|--|
| Source: | <i>Americans for Democratic Action Voting Record</i> , various years. |
| House median | Median ADA score for the House. |
| House committee median | Median ADA score for the House Committee on Labor and Human Resources. |
| House Committee chair | ADA score for the chairperson of the House Committee on Labor and Human Resources. |
| House committee majority median | Median ADA Score for the majority of the House Committee on Labor and Human Resources. |
| House supermajority veto median | Equal to the House 2/3 supermajority median ADA when president is Democrat, and House 1/3 supermajority median ADA when president is Republican. |
| Senate median ADA | Median ADA score for the Senate. |
| Senate committee median | Median ADA score for the Senate Committee on Education and Labor. |
| Senate committee chair | ADA score for the chairperson of the Senate Committee on Education and Labor. |
| Senate committee | Median ADA score for the majority of the Senate Committee on Education and Labor. |
| Senate supermajority veto median | Equal to the Senate 2/3 supermajority median ADA when president is Democrat, and Senate 1/3 supermajority median ADA when president is Republican. |

Other Data

| | |
|---------------------|---|
| SCDEM | Supreme Court political composition. Percentage of Democrat justices sitting on the Court in any given year. Source: John E. Nowak, R. D. Rotunda and J. N. Young, <i>Constitutional Law</i> , 2d ed. St. Paul: West Publishing Co., 1983. |
| DEM PRES | Political affiliation of the U.S. president: 1 if the president is a Democrat and 0 otherwise. Source: <i>Statistical Abstract of the United States</i> . |
| UNEMPLOYMENT | Unemployment rate. Source: <i>Statistical Abstract of the United States</i> . |
| INFLATION | Rate of inflation. Source: <i>Statistical Abstract of the United States</i> . |

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