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Congressional Control or Judicial Independence:  
The Determinants of US Supreme Court Labor Relations  
Decisions, 1949-1987

*Pablo T. Spiller*  
*Rafael Gely*

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University of Illinois at Urbana-Champaign

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Congressional Control or Judicial Independence:  
The Determinants of US Supreme Court Labor Relations Decisions, 1949/1987

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## ABSTRACT

This paper extends the approach to Congressional and regulatory institutions developed by Shepsle and Weingast by introducing an ideologically motivated Judiciary. The model yields empirically refutable implications which are then tested in the framework of modeling the Court's industrial labor relations decisions. 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, that a 10 points 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 5 percentage points. Third, that the imputed political preferences of the Court seem to be well explained simply by its political composition. Finally, while parsimonious, our model is a relatively good predictor of the Court's decisions, and substantially superior to a simple political bargaining model without institutional content. Our results, then, suggest that the Court responds, albeit indirectly, to interest group pressures.





## I. Introduction.

The importance of the Supreme Court in shaping public policy has long been recognized by scholars and politicians alike. The current academic debate concerning what the role of the Supreme Court should be in our political system, however, has been essentially normative, with little emphasis on 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 Court decision making process in isolation, without embedding it in a more general framework of political and regulatory institutions.<sup>1</sup>

This state of affairs contrasts drastically to the recent development of rational choice theories of political and regulatory institutions (e.g., Congress, the President and the administrative agencies), that followed the basic ideas developed in Stigler (1971) and Peltzman (1976), and that was further developed by the important work of Weingast, Shepsle, and Noll, among others.<sup>2</sup> In this paper we expand this framework by introducing the Supreme Court as a strategic player in the game among the different political institutions.<sup>3</sup>

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<sup>1</sup> 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 to the Supreme Court 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) and (1984) for a similar interpretation. An alternative view of the Supreme Court is provided in Adamany (1973), who claims that the Court constitute a force for instability. See, also Casper (1976).

<sup>2</sup> In particular, see Weingast and Marshall (1987), Shepsle and Weingast (1987) and (1989), Weingast and Moran (1983), McCubbins, Noll and Weingast (1989).

<sup>3</sup> We are not the first to have introduced the Court in a rational choice framework, nor to have analyzed the Court in its interaction with the other political institutions (see footnote 1). For example, Gilligan, Marshall and Weingast (1989) have observed the important role of Court decisions in the regulatory process.

Our model of Court-Congress interaction is one where 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' independent legislative outcome would be without facing a reversal.<sup>4</sup> Thus, even though Congress may not be actively legislating, it does not follow that Congress has actually relinquished legislative responsibility to the Courts, or that the Court is dictatorial. The recent debate about the welfare implications of "activist" or "restrained" Courts, is, in our framework, inconsequential, as the same Court will find it optimal to be activist at some point in times, and restrained in others. While our model is extremely simple, we see it as an initial step towards a more general analytical framework. Furthermore, even in its simplicity, our model has empirically refutable implications about the determinants of public policy by the Supreme Court, which we test in the framework of 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, that a 10 points 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 apro-union decision by approximately 5 percentage points. Third, that the imputed political preferences of the Court seem to be well explained simply by its political composition. Finally, while parsimonious, our model

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Similarly, in McCubbins, Noll and Weingast (1987) the judiciary fulfills an important role in policing the behavior of the regulatory agencies. Our framework is particularly related to Marks (1987) who observed that the Court's choices are restricted by the Congress' ability to overturn its decisions.

<sup>4</sup> We focus here on statutory decisions. For a rational choice framework to constitutional decisions, see Gely and Spiller (1989b).



is a relatively good predictor of the Court's decisions, and substantially superior to a simple political bargaining model without institutional content.

## II. A Rational Choice Model of Supreme Court Decision Making.<sup>5</sup>

Consider a single-dimensional policy issue. We claim below that labor relations is such type of issue, as by its nature labor policy is either pro-union or pro-management.<sup>6</sup> Consider also a legislature that is composed of two chambers, a House and a Senate. We assume that each has well specified, and single peaked, preferences over the issue in question, as depicted in Figure 1. The modern theory of Congressional institutions (e.g. Weingast and Marshall (1988), Shepsle and Weingast (1987, 1989)) suggests that committees have substantial power over the issues under their jurisdiction. In particular, because they have 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 will dominate issue specific legislation. Furthermore, since committee membership is not random, but rather is the result of a self-selection process (see Shepsle (1978) and Weingast and Marshall (1987)), committees will tend to be relatively more homogeneous in their issue-specific preferences than their respective chambers as a whole. Thus, our assumption about legislators' preference is equivalent to assume full control of legislature outcomes by the relevant committees. Seen in this light, these assumptions may not drastically violate reality.<sup>7</sup>

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<sup>5</sup> For a more detailed analysis of this framework, see Gely and Spiller (1989a).

<sup>6</sup> That is, we are assuming that the purpose of government, or Court, intervention is simply to redistribute bargaining power between management and the union.

<sup>7</sup> We plan to investigate the empirical implications of imperfect committee power in future research.

In the absence of a Supreme Court, and for that matter of a President and/or administrative agencies, the House and the Senate will bargain over the issue, and an outcome (weakly) in between the ideal points of the two chambers should arise as an equilibrium.<sup>8</sup> 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.<sup>9</sup>

Introduce now the Supreme Court. We assume that the Court's preferences are also well specified and single peaked over the policy issue in question. The source of the Court's preferences, however, are different from those of the legislators. While legislators "vote their district,"<sup>10</sup> Supreme Court justices are not subject to reelection. We assume, then, that the Court's preferences are essentially ideologically based.<sup>11</sup> In our empirical case, the justices' view of the world is what determine how pro-union or pro-management they are. Our assumption about the Court's preferences is similar to assume that the Court is a single individual. This is not a very drastic assumption as our assumption of single-dimensionality of the issue allows

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<sup>8</sup> The actual bargaining game played between the House and the Senate is irrelevant. All what 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.

<sup>9</sup> Depending on the nature of the bargaining game being played, there may or not exist a deterministic function relating the bargaining outcome to the ideal points of the two chambers and to the initial status quo.

<sup>10</sup> See Fiorina (1974), and Kalt and Zupan (1984), Kau and Rubin (1979), and Peltzman (1984), for empirical tests of this proposition.

<sup>11</sup> While the justices' monetary well-being may be unrelated to the issue in question, it is nevertheless reasonable to assume that they may have strong views about the substance of the case. Members of the Court are not elected and thus 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.

the working of the median voter theorem in the absence of agenda control.<sup>12</sup> Finally, we assume that the Court is free to make its decisions on a continuum, rather than just on a yes or no basis.<sup>13</sup>

There are many ways of modeling the interaction between Congress and the Court. We propose a simple bargaining framework consisting of two stages. In the first stage the Court determines the status quo. The second stage consists of bargaining between the two houses of Congress for an alternative policy outcome.<sup>14</sup> The outcome of the second stage is the final policy outcome. If the House and the Senate agree on an alternative policy to that of the Court, then the Congressional decision becomes the law. If, instead, Congress cannot agree on an alternative, then the Court's decision becomes the law. We can then see that the equilibrium to this game has to be in 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 will maximize its utility and not being reversed. In other words, the Court will pick that point in the contract set between the House and the Senate that maximizes its own utility. Would the

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<sup>12</sup> The relevant preference is, then, that of the median justice. If the Justices care about precedent, however, the median voter theorem may fail. For an analysis of such a case see Schwartz (1989). 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 it could be the case that some extent of log-rolling takes place among justices. In such a case, then, the revealed preferences of the Court in a given case will not reflect their underlying preferences, but rather the result of a more complex process.

<sup>13</sup> 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 *cert* allows the Court to choose that case that fits its preferred outcome. Finally, it can use *dicta* to call for a particular type of case.

<sup>14</sup> The Court's choice of the status quo serves, then, as the initial bargaining point for the two houses of Congress. Observe, that since the bargaining outcome is both efficient and cannot make any of the houses of Congress worse off than the status quo, then the Court's decision sets limits to the set of feasible bargaining outcomes.



Supreme Court's decision be outside the contract set between the House and the Senate, it would trigger a legislative bargaining process, with its outcome almost surely being strictly inside the contract set.<sup>15</sup> Thus, 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 not be reversed by Congress, and it will become the law.<sup>16,17</sup>

There are then three feasible types of equilibria, or regimes, according to the relative positions of the ideal points of the House, the Senate and the Court (see Figure 2). Regime 1, is when the ideal point of the Court is to the right of those of the House and the Senate. Regime 2, is when the ideal point of the Court is to the left of the House and the Senate, and Regime 3, is 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

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<sup>15</sup> To see this, consider a Court's decision outside the contract set. Call that point  $y=S+x$ , 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  $[\text{Max}(S-x,H),S]$ . 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. While  $S$  is a feasible solution to the bargaining, observe, however, 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  $S$ .

<sup>16</sup> 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 houses 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.

<sup>17</sup> In previous papers (e.g. Gely and Spiller (1989a)) we have made the technical assumption that the Court dislikes being reversed by Congress. In the current set-up, however, such an assumption is unnecessary, as the equilibrium to the game here specified is the same independently of that assumption. For a discussion of that issue, see Gely and Spiller (1989a).

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. 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 either the Court's preferences, or in the preferences of the house with the lower ideal point do not change the equilibrium. As long as the three ideal points keep their relative position, all that matters is the exact location of the higher of the two congressional ideal 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 ideal point of the Court, Congress will not be able to reverse it, and thus, it becomes the equilibrium to this game.

The Court, then, can be "activist" or "restrained" depending on its relative position vis-a-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, does not follow its own precedent.

#### *Comparative Statics*

Our framework has several empirical implications for the determination of Court's 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 in marginal changes in Court's 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 in 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 taking relatively liberal decisions, and vice-versa. A conservative Court facing an increasingly liberal Congress will have to adjust its decisions. Thus, the Court "reads the election results." That is, it follows the election results as they translate in changes in the composition of Congress and its committees.

In the next sections we explore these empirical implications for the case of the Court's decisions concerning the implementation of the National Labor Relations Act.

### III. A Brief History of Labor Relations Legislation.

In the middle of the New Deal period Congress enacted the National Labor Relations Act.<sup>18</sup> The NLRA created the National Labor Relations Board, and charged it with the authority to enforce the Act, in particular as it relates to Section 7 of the Wagner Act, which provided employees with the right to form unions.<sup>19</sup> Section 8 of the NLRA defines five types of unfair labor practices, which the NLRB was supposed to enforce.<sup>20</sup>

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<sup>18</sup> 49 Stat. 449 (1935).

<sup>19</sup> Section 7 of the Wagner Act declared "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."

<sup>20</sup> Section 8(A)(1) prohibits any attempt by an employer to "interfere with, restraint, or coerce employees in the exercise of their rights under Section 7". Second, 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

The NLRA was ineffective during the first two years. The NLRB was subject to an extensive amount of injunction litigation designed to prevent the Board from exercising its administrative mandate. In addition, the constitutionality of the Act was in dubious grounds.<sup>21</sup> It was also not clear whether the NLRA would not be rendered ineffective by a narrow reading by the Court. In particular, there was a concern as to whether or not the law could be applied to the manufacturing industry.<sup>22</sup>

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.,<sup>23</sup> the Court held that manufacturing was commerce and as such Congress had the authority to regulate it.<sup>24</sup> The Jones decision provided the necessary push for the implementation of the congressional policy favoring collective bargaining.<sup>25</sup> From then on, the NLRB was in business.

It is generally believed that, at least until War World II, the NLRB was a

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treatment of an employee who has filed charges against his employer under the Act, and finally, Section 8(A)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of his employees."

<sup>21</sup> 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' attempt to regulate labor relations in the coal-mining industry through the Bituminous Coal Act of 1936.

<sup>22</sup> In particular, a decision holding that "commerce succeeds manufacturing and is not part of it" United States v. Knight, 156 U.S. 12 (1894), would have seriously limited the effectiveness of the Act.

<sup>23</sup> 301 U.S. 1 (1937).

<sup>24</sup> In addition the Court upheld the NLRA against challenges that the act violated the due process clause of the Fifth Amendment.

<sup>25</sup> For a rational choice analysis of the 1937 change in the Supreme Court, see Gely and Spiller (1989b).



"zealously prolabor agency."<sup>26</sup> Neither Congress, the President, nor the Court, seem to have been particularly dissatisfied with the pro-labor bias of the NLRB. After World War II, however, a republican controlled Congress pushed forward for an amendment to the NLRA. In 1947, over the veto of President Truman, Congress enacted the Labor-Management Relations Act (Taft-Hartley Act).<sup>27</sup> Although it did not invalidate the Wagner Act, the Taft-Hartley Act introduced various new elements designed to "balance" the pro-labor character of the original Act.<sup>28,29</sup>

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),<sup>30</sup> was enacted with the purpose of protecting union members from improper union conduct. The focus seems to have been on the protection of the workers' constitutional rights while in the work-place.

Congress' 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

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<sup>26</sup> See for example Moe (1985), p. 1096.

<sup>27</sup> 49 Stat. 449 (1935), as amended by Pub. L. No. 101, 80th Congress, 1st. Sess., (1947).

<sup>28</sup> First, Section 8(B) of the new Act defined six new union unfair labor practices. Second, Section 14(b) outlawed closed shops (an arrangement providing for union membership as 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.

<sup>29</sup> See Delaney et al. for a survey of research on the NLRA.

<sup>30</sup> 73 Stat. 519 (1959).

dealt with the Board's load, more than with the Court's decisions. However, as Table 1 depicts, since World War II there have been substantial changes in the composition of Congress, as well as in the tendency of the Court to support the unions. The theory we presented in the previous section suggests that the lack of Congressional activity should reflect that the Court was not pursuing a labor relations policy too different from what the different Congress would have liked to see. In other words, the change in the Court's tendency to support the unions and in the composition of Congress must not be unrelated events.

#### IV. An Econometric Model of Supreme Court Labor Decisions.

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

$$E_i = \gamma + \alpha * P_i + \epsilon_i \quad (1)$$

where  $P_i$  reflects her pro-union bias,  $\gamma$  and  $\alpha$  are parameters, with  $\alpha \geq 0$ , and  $\epsilon_i$  representing an error term. Then, the discussion of section II implies that the equilibrium value of the Supreme Court decision,  $E$ , namely how pro-union its decision is, will then be given by

$$\text{Regime 1: } E_t = \gamma + \alpha * \text{Max}(H_t, S_t) + \epsilon_t \Leftrightarrow SC_t > \text{Max}(H_t, S_t) \quad (2a)$$

$$\text{Regime 2: } E_t = \gamma + \alpha * \text{Min}(H_t, S_t) + \epsilon_t \Leftrightarrow SC_t < \text{Min}(H_t, S_t) \quad (2b)$$



$$\text{Regime 3: } E_t = \gamma + \alpha \cdot SC_t + \epsilon_t$$

$$\Leftrightarrow \text{Min}(H_t, S_t) \leq SC_t \leq \text{Min}(H_t, S_t) \quad (2c)$$

where  $\epsilon_t$  is distributed  $N(0, \sigma^2)$ ,  $t=1, T$ .<sup>31</sup>

If we could measure perfectly the preferences of the Court, the House and the Senate, then (2a)-(2c) would represent a three-regime-switching-regressions model with known separation criteria. In our case, however, while we do have some information about the pro-union tendencies of members of Congress, we do not have such information for the Court.

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  $SC_t$  be given by

$$SC_t = X_t \beta + \mu_t, \quad (3)$$

with  $\mu_t$  being distributed  $N(0, \sigma_\mu^2)$ .<sup>32</sup> Since we do not observe perfectly the location of the Supreme Court, equations (2) and (3) imply a switching-regimes model with unknown separation criteria. Equations (2) and (3), however, imply that the probability of observing regime 1,  $f_{1t}$ , is given by:

$$\begin{aligned} f_{1t} &= \text{Prob}(\text{Regime 1}) = \text{Prob}(SC_t \geq \text{Max}(H_t, S_t)) \\ &= 1 - \Phi[(\text{Max}(S_t, H_t) - X_t \beta) / \sigma_\mu], \end{aligned} \quad (4a)$$

where  $\Phi(\cdot)$  represents the standard normal distribution function.

Similarly, the probability of observing regime 2,  $f_{2t}$ , is given by

$$f_{2t} = \Phi[(\text{Min}(S_t, H_t) - X_t \beta) / \sigma_\mu]. \quad (4b)$$

Finally, the probability of observing regime 3,  $f_{3t}$ , is simply

$$f_{3t} = \Phi[(\text{Max}(S_t, H_t) - X_t \beta) / \sigma_\mu] - \Phi[(\text{Min}(S_t, H_t) - X_t \beta) / \sigma_\mu]. \quad (4c)$$

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<sup>31</sup> If our measures of pro-union preferences were in the exact scale as pro-union support, then  $\gamma=0$  and  $\alpha=1$ .

<sup>32</sup> Our econometric modeling of the Court's preferences and decisions is similar to that of Ashenfelter and Bloom's (1984) modeling of labor arbitrator's preferences and decisions. In both cases the structural estimation of the decision maker's preferences is required.

The likelihood function of the model (2)-(4), is then given by

$$L = \prod_{t=1}^T (\mathbb{1}_{1t} * \phi_1 + \mathbb{1}_{2t} * \phi_2 + \mathbb{1}_{3t} * \phi_3) \quad (5)$$

where

$$\phi_1 = 1/\sigma * \phi((E_t - \gamma - \alpha * \text{Max}(H_t, S_t))/\sigma),$$

$$\phi_2 = 1/\sigma * \phi((E_t - \gamma - \alpha * \text{Min}(H_t, S_t))/\sigma),$$

and

$$\phi_3 = 1/\sqrt{(\alpha^2 * \sigma_\mu^2 + \sigma^2)} * \phi((E_t - \gamma - \alpha * X_t \beta) / \sqrt{(\alpha^2 * \sigma_\mu^2 + \sigma^2)}),$$

with  $\phi(\cdot)$  representing the standard normal density function. Expression (5) can be estimated by standard maximum likelihood techniques. Our assumptions concerning the distribution of  $\epsilon$  and  $\mu$ , assure us that the parameters of the model are identifiable.

The econometric model (1)-(5) provides several ways of testing our theory of the Supreme Court. First, if the model is true, then equations (2)-(4) imply that a linear regression of Supreme Court decisions on preferences of the House and Senate is misspecified. For some observations, only the preferences of the House matter, for others only those of Senate, and in other cases only those of the Supreme Court matter. Thus, such a linear regression should provide not only a worse fit than the one obtained from estimating (1)-(4), but also the standard errors of the coefficients of the variables representing the preferences of the House, Senate and the Court should be relatively large. Second, our model implies that all the coefficients  $\alpha_i$  should be positive. Finally, in each regime, given the preferences of the relevant players, no other variables should impact upon the decision of the Court. That is, assume that the preferences of the Court are more pro-union than those of the House, and in turn those are more pro-union than those of the Senate. Then, only the preferences of the House matter. Furthermore, no other macroeconomic or political circumstance should matter, as those are already reflected in the revealed preferences

of the politicians that compose the House.

## V. The Empirical Implementation.

### *The Data*

To estimate our model we need three pieces of information: 1) Supreme Court decisions, 2) measures of Congressional preferences, and 3) proxies for Supreme Court preferences.

We collected all Supreme Court decisions since 1949 that dealt with the interpretation of the NLRA.<sup>33</sup> We found 171 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. We then computed, for each year, the percentage of pro-union decisions. The first column of Table 1 presents the result of that calculation. The performance of the different courts since 1949 is presented in Table 2.

To measure the preferences of the House and the Senate, we use the ADA scores for the Chairs of the House and Senate committees with jurisdiction over the labor relations.<sup>34</sup> Columns 3 and 4 of Table 1 present the values of the ADA scores for the relevant committee chairs.

Finally, as proxies for the preferences of the Supreme Court we use the percentage of democrats in the Court (Table 1, column 5). 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 macro-

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<sup>33</sup> We chose 1949 as our starting point as before 1949 there were several years with no Supreme Court decisions taken.

<sup>34</sup> We chose the ADA scores instead of the more directly relevant COPE scores because while the ADA scores are available for the beginning of our time period, COPE scores are available only since the mid-1950s. The correlation between the two measures, however, are higher than 90%.

economic circumstances. Also, since the Court may be subject to influence from the President, we let the preferences of the court be a function of whether the current President is a democrat or not.

### *Empirical Results*

Table 3 presents simple ols estimates of a model explaining the percentage of pro-union decisions by the Court as a function of the House and Senate Committee Chair's ADA ratings (HADACH and SADACH, respectively), a dummy variable taking a value of 1 for Democratic Presidents, the share of democrats in the Supreme Court, SCPOL, the level of inflation and unemployment. The 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's decisions on the measures of Congressional pro-union preferences and of proxies for Court's preferences is the empirical representation of the Nash-bargaining solution concept.

Overall, the results are quite poor. While the preferences of the Chair of the House Labor committee seem to have an impact, no variable plays an important role.

Tables 4 and 5, however, show quite a different picture. Columns 1 and 2 of Table 4 present the estimation of the model (1)-(4) assuming that we have absolutely no information about the Court's preferences.<sup>35</sup> That is, we model the Court's preferences as a constant  $\beta$  plus an error term with mean zero and variance  $\sigma_{\mu}^2$ . Column 1 assumes that the parameters of equation (1) are the same across regimes, while in Column 2 those parameters are allowed to differ. The results of these two columns suggest that there is a positive, albeit declining, relationship between the most preferred policy outcome and our measure of pro-union support. At higher levels of

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<sup>35</sup> All estimations were performed using the GQOPT subroutine. Several starting values were tried to be sure of obtaining a global maximum.

pro-union support, however, there does not seem to be a relationship between pro-union support and percentage of pro-union decisions. A comparison of Column 2 and any of the ols regressions in Table 3 suggest that a three regime model fits the data better than a Nash-bargaining model. For example, the first two columns of Table 4 have as independent variables only functions of the Senate and the House Chairs' ADA ratings, with the same variables appearing in Column 3 of Table 3. The Akaike Information Criteria implies that the model of Column 2, Table 4, should be preferred over that of Column 3, Table 3.<sup>36</sup> Furthermore, the effect of politics and the Court's preferences on the determination the Court's percentage of pro-union labor decisions is quite important. For example, on average, a 10 point increase in the relevant congressional or Court imputed ADA ratings increases the percentage of pro-union decisions by 7 percentage points (Column 1, Table 4). Since the average imputed ADA rating for the Court is between 45 and 60, then the elasticity of judicial decisions with respect to both court preferences and political influence is almost 1. Thus, political preferences of both the Court and Congress do have an impact on the judicial decisions of the Court.

The third column of Table 4 explores the role of the political composition of the Court in the determination of its imputed pro-union preferences. Here we let the preferences of the Court be a linear function of its political composition, namely, of the proportion of Justices that were Democrats at time of their appointment to the Court. Comparing Columns 1 and 3 we find that the political composition of the Court is an important determinant of its imputed political preferences. Not only an increase in its democratic composition increases its imputed ADA rating, but at the average value of the variables, the elasticity of its imputed ADA ratings with respect to its composition is approximately 3. Furthermore, it seems that the composition of

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<sup>36</sup> Their respective AIC are -12.934 and -13.627.



the Court is quite a good indicator of regime switching. In particular, observe that while the point estimate of  $\sigma_\mu$  is relatively large, its standard error is even larger. Using the test developed in Gourieroux, et al (1982), we cannot reject that the variance of SC in (3) is zero.<sup>37</sup> Column 4 shows the result of estimating the same model imposing the  $\sigma_\mu=0$  constraint. Neither the point estimates of the parameters nor the value of the log likelihood change much from imposing the restriction, suggesting that the political composition of the Court allows us to discriminate quite well among the different regimes.

Table 5 explores the determinants of the Court's preferences in more detail.<sup>38</sup> Strictly for comparison purposes, column 1 replicates the results of column 1 in Table 4 assuming  $\sigma_\mu=1$ . Column 2 explores whether the preferences of the Court are a function of macro-economic circumstances as well as whether they are influenced by the President. In this column we restrict all parameters in equation (1) to be the same across regimes. That is, we impose the constraints that  $\gamma_i$  and  $\alpha_i$  are the same across all regimes. None of the macroeconomic conditions seem to affect the pro-union bias of the Court. Observe, furthermore, that the hypothesis that the three variables are jointly statistically significant can be rejected at more than the standard confidence levels. Column 3 explores whether, given the ADA scores of the relevant members of congress, and the imputed values for the Court, the macro-economic conditions and the

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<sup>37</sup> Since  $\sigma_\mu$  is non-negative, standard log-likelihood tests are inappropriate. Instead, Gourieroux, et al (1982) show that  $2(L^{UR}-L^R)$  is asymptotically distributed as  $(\chi^2(0)+\chi^2(1))/2$ , with the critical region at level  $\alpha$  obtained from  $P(Z>c)=2\alpha$ , where  $Z$  has a  $\chi^2(1)$ . Using this criteria, the restriction  $\sigma_\mu=0$  cannot be rejected as  $2(L^{UR}-L^R)$  equals .244, less than critical values at any standard significance levels.

<sup>38</sup> All estimates in Table 5 are obtained assuming  $\sigma_\mu=1$ . These estimates are preferred because the assumption of  $\sigma_\mu=0$  is quite extreme, and for some of the specifications the estimated standard errors of the parameters of the SC function were extremely small. See, for example, the unusual standard errors of the point estimates of  $\beta_1$  and  $\beta_2$  in column 4 Table 4. Overall the values of the log likelihood were approximately equal, usually differing by  $\pm 0.01$  to  $\pm 0.04$ .

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 actually measuring properly the pro-union tendencies of the relevant members of Congress. This hypothesis, however, is also soundly rejected.<sup>39</sup> Finally, Column 4 explores whether it is proper to assume that  $\alpha$ 's and  $\gamma$ 's of equation (1) are the same across regimes, given that the Court' political preferences are a function of all the macroeconomic and political variables. That is, whether the function relating ADA ratings to preferred Supreme Court mix of pro-union decisions is linear over the whole range of ADA values. Comparing columns 1 and 4 we can see that, as in Table 4, the restriction that all coefficients are alike across regimes is rejected at more than the 1% confidence level.<sup>40</sup> Column 4 supports our framework. Increases in the relevant ADA scores in regimes 2 and 3 imply significant increases in the predicted percentage of pro-union decisions (of 1 or 2 percentage points). On the other hand, a similar increase in regime 1 implies a statistically insignificant reduction in the predicted percentage of pro-union decisions of approximately half a percentage point. While this result could reflect a non-linear relationship between preferred pro-union mix and ADA ratings, it could also be the result of potential model misspecification. We discuss this issue in the next section.

To summarize, our results suggest that modeling the Court as a totally unconstrained institution or as an institution that makes decisions exclusively based on legal precedent is inappropriate. Congress' preferences matter. Perhaps the most surprising result is that the way Congressional interests matter are consistent with the predictions of the model developed above. That is, the constraints faced by the

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<sup>39</sup> Observe, however, that now the Court seems to be more pro-union when facing a democratic president.

<sup>40</sup>  $\chi^2_{.01}(4) = 13.28 < 2 * (\text{Log likelihood ratio}) = 20.74.$



Court vary across the different regimes, with only one house of Congress becoming the relevant constraint (if at all) at each point in time.

The results we just presented have several implications for the understanding of the behavior of the Court. First, using the results of column 4, Table 5, we find that the Court was free to make decisions based only on its own preferences 50% of the times, while 20% of the times it was constrained by a conservative committee chair, and 30% of the times by a liberal committee chair. See Figures 3 and 4. Second, our model seems to explain the behavior of the Court quite well. For example, using the imputed ADA ratings from Table 5 we can calculate the share of the variance that is explained by the model. They are reported in Table 5 as the R-squared of the model. The model in Column 4, Table 5, seems to fit the data quite well, as it explains 49% of the variance of the dependent variable. The models presented in Table 4, however, explain at most 14% of the variance.

## VI. Extensions and Final Comments.

In this paper we extend the modern theory of Congressional institutions to account for an independent judiciary. Our current model, however, is quite simple, and it could be extended in several directions. First, the model in this paper is a single period model. The Justices, as well as Congress, are assumed to make their decisions based exclusively on the current political situation. While this is a useful methodological assumption, it is not unreasonable to think, however, that at least the Justices have a longer horizon into account, and that their decisions may not be affected so much by temporary political considerations. This would suggest that the relevant constraints on the Justices are not the current political composition of Congress, but its expected future composition. Second, in our model there is no role for either the President or the Agency. The fact that we find that

the pro-union preferences of the Court increase when facing a Democrat as President may suggest that the Court may actually defer, to some extent, to the NLRB. Modeling the interaction between the Court and the agency should provide an answer to this question. Third, we assume that committees have total control over the legislative outcome, that is, that only the preferences of the committee chairs are relevant. If committees did not have full control, then the set of feasible judicial decisions will be larger than the one we use in this paper, as it will take into account the relative position of the median voters of each house.<sup>41</sup> Consequently, we will be wrongly classifying regimes, and this may actually explain the negative, albeit insignificant, coefficient of the Chair ADA rating for regime 1 obtained in Column 4, Table 5. Finally, we assume that the Court does not care about reversing itself. While the Court has on several occasions reversed itself, it is reasonable to presume that Justices may actually dislike such reversals as they may reduce the legitimacy of the institution. Modeling the cost of reversing prior decisions may improve our understanding of the determinants of the Court's decisions. We plan to consider some of these extensions in future research.

While derived from a simple theoretical framework, however, our empirical results show the potential usefulness of a rational choice theory of the Courts, as they raise questions about the belief on a truly independent judiciary, following the rules of precedent without regard to the political considerations of the times or to its own political preferences. Instead, 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. Furthermore, we find that half of the times the Court was actually constrained by the political composition of Congress. Also, when the Court was free to decide based only on its own political preferences (mostly in the 1960s

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<sup>41</sup> See, Spiller (1989).

and 1980s), Congress seems to have been quite at odds on what labor relations policy should be, hence it would have been illusory to expect Congress to have formulated a radically different labor policy. Finally, the results in this paper provide further support to the basic idea of the economic theory of regulation (e.g. Stigler (1971)), as not only Congress responds to interest group pressure, but so does the Court.

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TABLE 1

Year	Perct. Pro Union	House Comm Chair ADA	Senate Comm Chair ADA	Pres. Dem	Perct. Democratic Justices
1949	0.25	38	93	1	88.88
1950	0.66	6	80	1	88.88
1951	0.40	8	66	1	88.88
1952	0.00	0	71	1	88.88
1953	0.50	27	40	0	77.77
1954	0.66	11	38	0	77.77
1955	0.50	20	70	0	66.66
1956	0.57	14	71	0	66.66
1957	0.72	0	58	0	55.55
1958	0.20	0	67	0	55.55
1959	1.00	0	54	0	55.55
1960	0.71	11	17	0	55.55
1961	1.00	100	80	1	55.55
1962	1.00	87	17	1	66.66
1963	0.57	100	44	1	66.66
1964	1.00	100	11	1	66.66
1965	0.67	84	12	1	66.66
1966	1.00	88	10	1	66.66
1967	1.00	73	15	1	66.66
1968	0.50	57	13	0	66.66
1969	1.00	40	78	0	66.66
1970	0.00	49	65	0	55.55
1971	0.50	57	93	0	55.55
1972	0.50	59	87	0	55.55
1973	0.33	60	80	0	55.55
1974	0.40	43	90	0	55.55
1975	0.75	58	89	0	44.44
1976	1.00	60	85	1	44.44
1977	0.00	40	85	1	44.44
1978	0.40	45	80	1	44.44
1979	0.60	58	74	1	44.44
1980	0.33	59	77	0	44.44
1981	0.75	60	0	0	44.44
1982	0.67	70	5	0	44.44
1983	0.33	85	8	0	44.44
1984	0.00	75	8	0	44.44
1985	0.67	85	10	0	44.44
1986	0.00	85	5	0	44.44
1987	1.00	85	95	0	33.33

TABLE 2

PERCENTAGE OF PRO-UNION DECISIONS  
BY COURT 1949 TO PRESENT

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COURT	PERCENTAGE
Vinson (1946-1952)	50%
Warren (1953-1969)	73
Burger (1969-1985)	70
Rehnquist (1985-1987)	50

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TABLE 3

DEPENDENT VARIABLE: PERCENTAGE OF PRO-UNION SUPREME COURT DECISIONS

YEARS: 1949 - 1987

METHOD: ORDINARY LEAST SQUARES

VARIABLE	I	II	III
Constant	.434 (1.14)	1.166 (1.83)	.475 (3.02)
HADACH	.002 (.88)	.002 (.83)	.002 (1.26)
SADACH	-.00 (-.32)	-.00 (-.19)	-.00 (-.24)
DEM PRESIDENT	.08 (.62)	.106 (.79)	-- --
SCPOL	.000 (.10)	-.006 (-.92)	-- --
INFLATION	-- --	-.02 (-.96)	-- --
UNEMPLOYMENT	-- --	-.051 (-1.15)	-- --
R-SQUARED	.075	.134	.057
DURBIN-WATSON	2.13	2.22	2.10
LOG LIKELIHOOD	-9.24	-7.95	-9.617

TABLE 4

DEPENDENT VARIABLE: PERCENTAGE OF PRO-UNION SUPREME COURT DECISIONS  
 YEARS: 1949 - 1987  
 METHOD: MAXIMUM LIKELIHOOD

PARAMETER VARIABLE	I	II	III	IV
$\beta_1$ CONSTANT	45.68 (5.22)	58.11 (9.57)	-129.55 (-1.27)	-129.00 (-103.22)
$\beta_2$ SCPOL	-- --	-- --	3.27 (1.90)	3.25 (144.71)
$\gamma_1$ CONSTANT Regime 1	.203# (.77)	.69 (5.55)	.288 (1.74)	.286 (2.33)
$\alpha_1$ ADA SCORE Regime 1	.007 (1.50)	-.001 (-.54)	.005 (1.95)	.005 (2.50)
$\gamma_2$ CONSTANT Regime 2	-- --	-1.103 (-3.91)	-- --	-- --
$\alpha_2$ ADA SCORE Regime 2	-- --	.025 (6.61)	-- --	-- --
$\gamma_3$ CONSTANT Regime 3	-- --	-.91 (-1.25)	-- --	-- --
$\alpha_3$ ADA SCORE Regime 3	-- --	.025 (2.18)	-- --	-- --
$\sigma$	.299 (6.41)	.099 (3.84)	.293 (8.59)	.296 (8.83)
$\sigma_\mu$	12.82 (1.08)	12.84 (2.30)	9.78 (.50)	0.00* --
LOG LIKELIHOOD	-9.701	-3.934	-7.739	-7.861

Note: Asymptotic t-statistics in parentheses.

\* Column 4 is estimated assuming  $\sigma_\mu=0$ .

#  $\gamma_j=\gamma_1$ ,  $\alpha_j=\alpha_1$ , for  $j=2,3$ .

TABLE 5

DEPENDENT VARIABLE: PERCENTAGE OF PRO-UNION SUPREME COURT DECISIONS  
 YEARS: 1949 - 1987  
 METHOD: MAXIMUM LIKELIHOOD

PARAMETER	VARIABLE	$(\sigma_{\mu}=1)$			
		I	II	III	IV
$\beta_1$	CONSTANT	-120.08 (-1.99)	-161.39 (-1.04)	-120.45 (-1.53)	-60.47 (-1.60)
$\beta_2$	SCPOL	3.13 (3.19)	3.32 (1.99)	2.78 (3.43)	1.71 (4.30)
$\beta_3$	UNEMPLOYMENT	-- --	4.31 (.40)	-.58 (-.09)	-1.32 (-.73)
$\beta_4$	INFLATION	-- --	.92 (.20)	2.95 (1.59)	2.51 (1.32)
$\beta_5$	DEM PRES	-- --	17.79 (1.17)	21.74 (2.51)	14.71 (2.63)
$\gamma_1$	CONSTANT REGIME 1	.27 (1.81)	.25 (1.51)	.08 (.29)	.78 (3.66)
$\alpha_1$	ADA SCORE REGIME 1	.005 (2.20)	.005 (2.16)	.007 (2.53)	-.005 (-1.63)
$\delta_0$	UNEMPLOYMENT ALL REGIMES	-- --	-- --	.03 (1.07)	-- --
$\delta_1$	INFLATION ALL REGIMES	-- --	-- --	-.01 (-.93)	-- --
$\delta_2$	DEM PRES ALL REGIMES	-- --	-- --	-.07 (-.62)	-- --
$\gamma_2$	CONSTANT REGIME 2	-- --	-- --	-- --	-.77 (-2.38)
$\alpha_2$	ADA SCORE REGIME 2	-- --	-- --	-- --	.022 (4.11)
$\gamma_3$	CONSTANT REGIME 3	-- --	-- --	-- --	.23 (1.61)
$\alpha_3$	ADA SCORE REGIME 3	-- --	-- --	-- --	.01 (3.45)
$\sigma$		.296 (8.83)	.294 (8.83)	.288 (8.83)	.226 (8.82)
	LOG LIKELIHOOD	-7.851	-7.654	-6.816	2.523
	R-Squared	.14	.15	.18	.49

Note: Asymptotic t-statistics in parentheses.

FIGURE 1

REPRESENTATION OF CONGRESSIONAL PREFERENCES  
ON THE PRO-UNION LINE

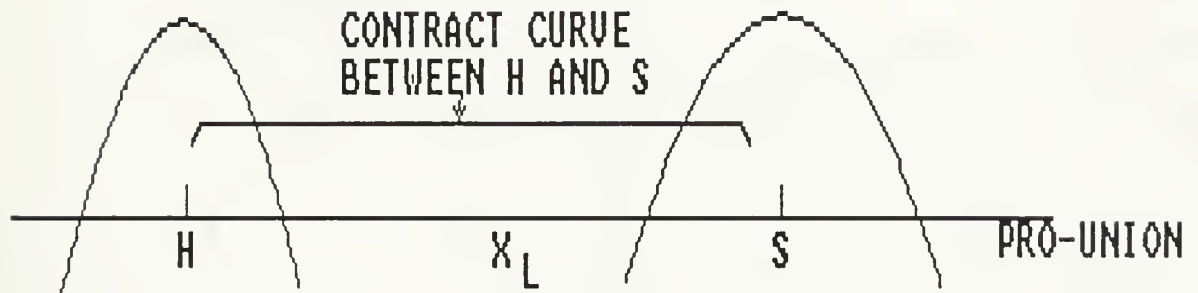
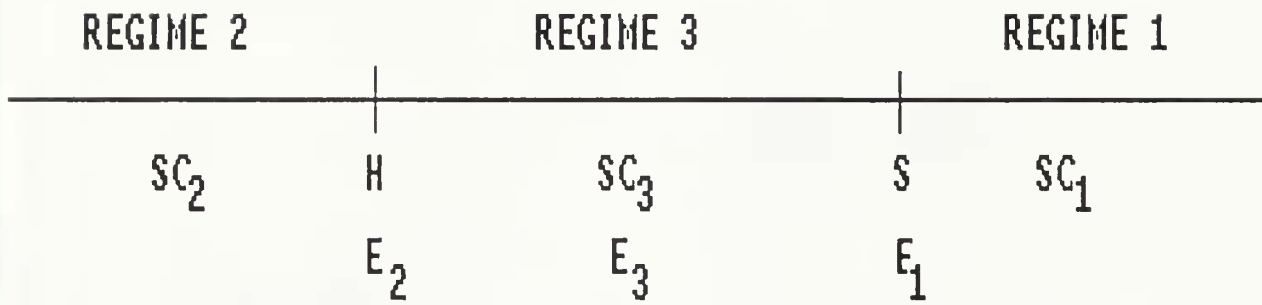


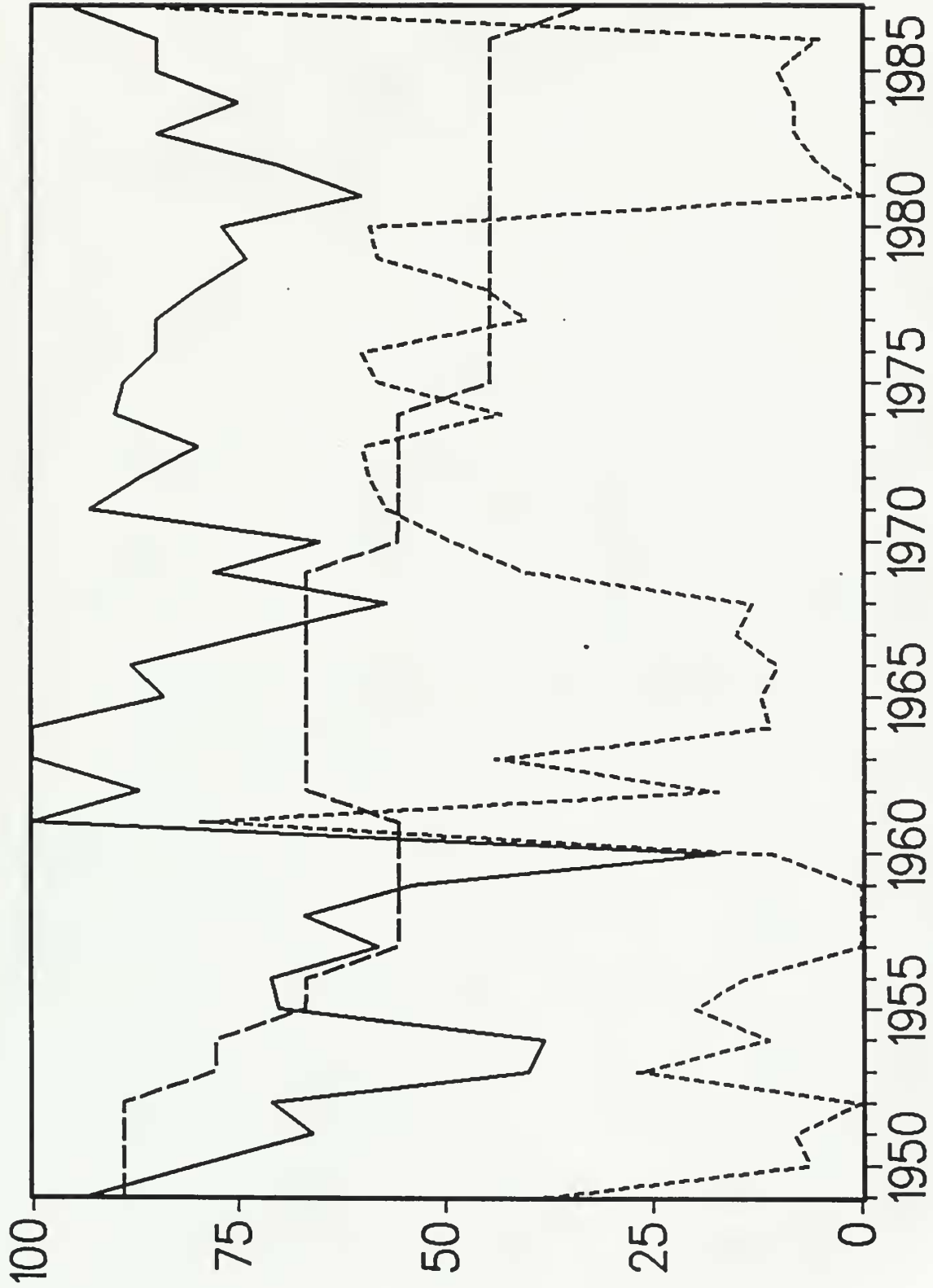
FIGURE 2

SINGLE DIMENSIONAL REPRESENTATION



— MAX ADA    - - - - MIN ADA    - - - - SC COMP

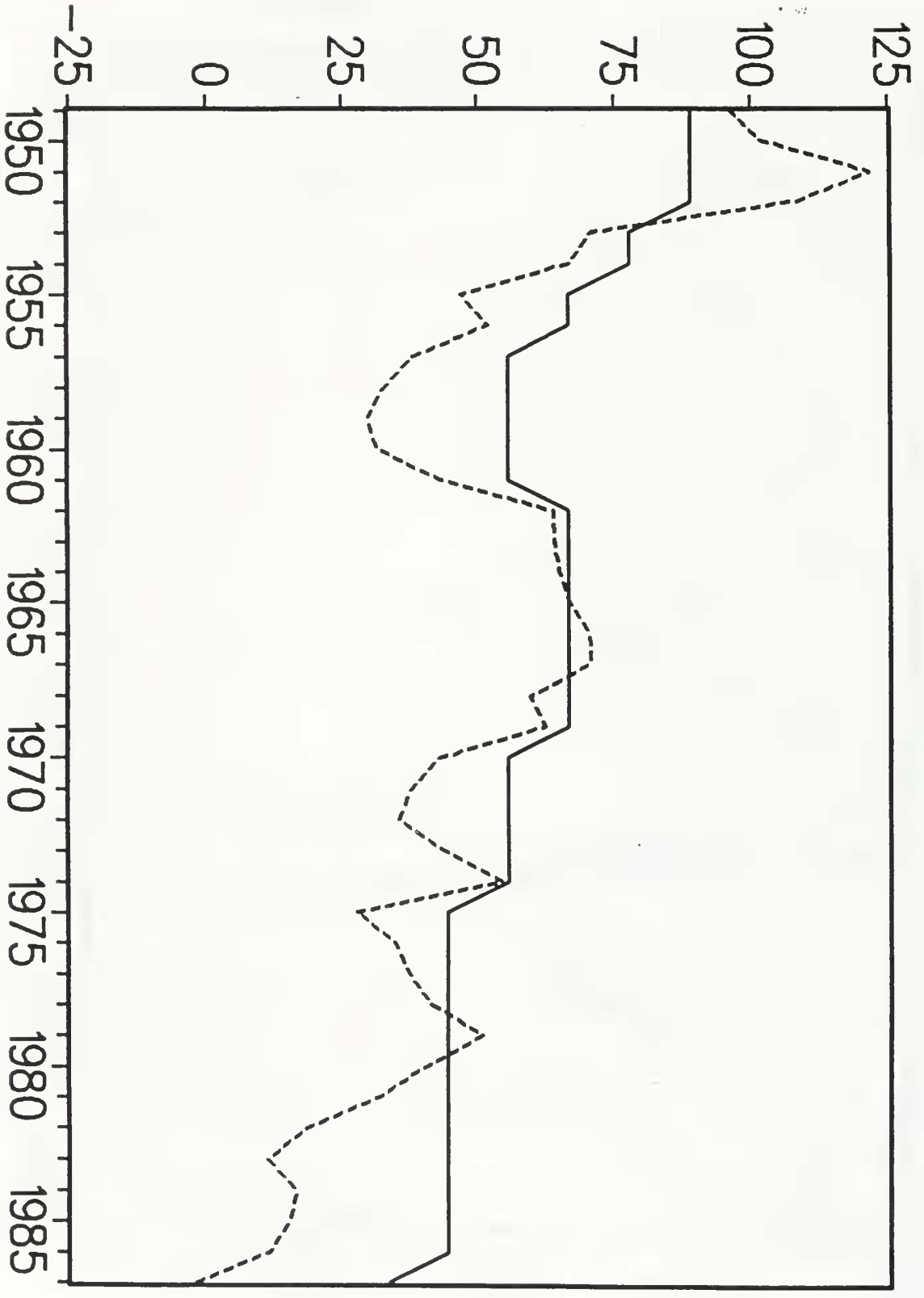
# COMMITTEE CHAIR'S ADA SCORES AND COURT POLITICAL COMPOSITION



— MAX ADA    - - - - MIN ADA    . . . . SC COMP



# SUPREME COURT POLITICAL COMPOSITION AND IMPUTED ADA SCORES



— SUPREME COURT COMPOSITION    - - - - - IMPUTED ADA SCORES

- No. 1 Susan I. Cohen. "Pareto Optimality and Bidding for Contracts" Working Paper # 1411
- No. 2 Jan K. Brueckner and Kangoh Lee. "Spatially-Limited Altruism, Mixed Clubs, and Local Income Redistribution" Working Paper #1406
- No. 3 George E. Monahan and Vijay K. Vemuri. "Monotonicity of Second-Best Optimal Contracts" Working Paper #1417
- No. 4 Charles D. Kolstad, Gary V. Johnson, and Thomas S. Ulen. "Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?" Working Paper #1419
- No. 5 Lanny Arvan and Hadi S. Esfahani. "A Model of Efficiency Wages as a Signal of Firm Value" Working Paper #1424
- No. 6 Kalyan Chatterjee and Larry Samuelson. "Perfect Equilibria in Simultaneous-Offers Bargaining" Working Paper #1425
- No. 7 Jan K. Brueckner and Kangoh Lee. "Economies of Scope and Multiproduct Clubs" Working Paper #1428
- No. 8 Pablo T. Spiller. "Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation (or "Let Them Be Bribed" Working Paper #1436
- No. 9 Bhaskar Chakravorti. "Asymmetric Information, 'Interim' Equilibrium and Mechanism Design" Working Paper #1437
- No. 10 Bhaskar Chakravorti. "Mechanisms with No Regret: Welfare Economics and Information Reconsidered" Working Paper #1438
- No. 11 Bhaskar Chakravorti. "Communication Requirements and Strategic Mechanisms for Market Organization" Working Paper #1439
- No. 12 Susan I. Cohen and Martin Loeb. "On the Optimality of Incentive Contracts in the Presence of Joint Costs" Working Paper #1445
- No. 13 Susan I. Cohen and Martin Loeb. "The Demand for Cost Allocations: The Case of Incentive Contracts Versus Fixed-Price Contracts" Working Paper #1455
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- No. 18 Larry DeBrock. "Joint Marketing Efforts and Pricing Behavior" Working Paper #1500
- No. 19 Frank A. Wolak and Charles D. Kolstad. "A Model of Homogenous Input Demand Under Price Uncertainty" Working Paper #1502
- No. 20 Susan I. Cohen. "Reputation, Intertemporal Incentives and Contracting" Working Paper #1511
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