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STRATEGIC JUDICIAL DECISION MAKING

Pablo T. Spiller
Rafael Gely

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ABSTRACT

This survey paper starts from the basic, and intuitive, assumption that judges are human and as such, can be modeled in the same fashion we model politicians, activists, managers: driven by well-defined preferences, behaving in a purposive and forward-looking fashion. We explore, then, the role politics play in judicial decision-making. We provide a brief overview of what is called the "strategic approach," compare it to alternative approaches to understand judicial behavior, and offer some concluding thoughts about the future of positive analyses of judicial decision-making.

Pablo T. Spiller
University of California
Walter A. Haas School of Business
Faculty Bldg. 593
Berkeley, CA 94720
and NBER
spiller@haas.berkeley.edu

Rafael Gely
Law School, University of Cincinnati
Clifton Avenue & Calhoun Street
Cincinnati, OH 45221-0040
rafael.gely@uc.edu

I. Introduction

> "The supreme court is a political court. The discretion that the justices exercise can fairly be described as legislative in character, but the conditions under which this 'legislature' operates is different from those of Congress. Lacking electoral legitimacy, yet wielding Zeus's thunderbolt in the form of the power to invalidate actions of the other branches of government as unconstitutional, the justices, to be effective, have to accept certain limitations on their legislative discretion. . . . They have to be seen to be doing law rather than doing politics." (Posner, 2003)

In his incomparable style, Judge Posner describes what is perhaps the issue of most interest to scholars in the strategic tradition to judicial decision-making: under which conditions do judges behave more like "legislators" or more like "judges"? Justices are, as Judge Posner says, human and as such, can be modeled in the same fashion we model other humans – politicians, activists, managers: driven by well-defined preferences, behaving in a purposive and forward-looking fashion. The strategic approach, then seeks to sort out the various competing interests faced by judges when making decisions. In essence, the strategic approach explores the role politics play in judicial decision-making. In this chapter we provide a brief overview of the strategic approach, offering some concluding thoughts about the future of positive analyses of judicial decision-making.

II. The Strategic Approach

A. Antecedents

Most of the positive literature on judicial decision-making, to which the strategic approach belongs, can be traced back to the work of political scientists such as C.

Herman Pritchett, whose analysis of Supreme Court justices is based on the understanding that, at its core, "the essential nature of the task of a Supreme Court Justice" is "not unlike that of a Congressman" (Pritchett, 1942, p. 491). According to Pritchett, both politicians and judges decide important public policy issues, formulate opinions and issue a vote, enjoying substantial discretion. In addition the work of modern congressional scholars, such as Mayhew (1974), Shepsle and Weingast (1987), Weingast and Marshall (1988) among many others, was of critical importance to the early development of the strategic approach. In particular, the concepts of rationality - each legislator acts to advance his or her own particular interest - and strategic behavior - individuals recognize the interdependency of their actions in a forward looking way – was fundamental in further developing Pritchett's notion of a judge as a politician. .

B. The First Wave

It is appropriate to place Marks (1988) as one of the pioneers of the strategic approach to judicial decision-making. Although Marks (1988) does not derive a full-fledged strategic framework, he formalizes the effect of constraints imposed on the courts by the institution of separation of powers. Marks focuses on the potential for Congress to reverse a judicial decision. Thus, he looks at the set of conditions under which Congress could not modify (reverse) a Court decision. Following congressional scholars Marks also discusses how different institutional arrangements within Congress affect the Court's flexibility to impose its preferred policy alternative.

The strategic approach assumes that judges have a sophisticated understanding of the legislative process and of congressional policy preferences (Gely and Spiller, 1990;

Eskridge and Ferejohn, 1992). This assumption provides the strategic approach with the ability to provide simple and empirically testable propositions. A fundamental early result of the strategic approach is that, in equilibrium, Congress will tend to acquiesce to judicial decisions (Gely and Spiller 1990). The rationale is simple. As long as justices' preferences are policy-based, they are better off selecting policy decisions that are reversal proof.

<<Insert Figure 1>>

Consider a bargaining framework consisting of three stages, in a political setting such as depicted in Figure 1. In the first stage, an agency interprets a statute. In the second stage, the Court determines the legal status quo. The final stage consists of bargaining between the two chambers of Congress for an alternative policy outcome. 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. The feasible equilibria to this game comprise the contract set between the House and the Senate (i.e., the area between their ideal points). Since the Court anticipates the bargaining outcome from any feasible decision, it will make its decision strategically, so that the median justice maximizes his or her utility and Congress does not reverse the Court. That is, the Court will pick a policy outcome in the contract curve between the House and the Senate. A decision outside the legislative contract set will trigger a legislative bargain with an outcome strictly within the contract set. So, if the ideal point of the median justice is outside the contract set, its optimal decision is the closest

boundary of the contract set. Thus, under the strategic model, one would expect the Supreme Court to hand down only decisions that, in general, Congress and the President will not overturn. That is, justices maximize their utility subject to the constraints imposed by the preferences of the relevant political players. In an early survey of congressional overrides of Supreme Court interpretations of federal statutes, Eskridge (1991) finds that in interpreting statutes the Court is more responsive to the expectations of the current Congress (as well as the Court's own preferences) than those of the enacting Congress.

A second type of fundamental result arising from this simple model of strategic judicial behavior is that judicial decisions depend on the location of the Court in relation to the position of the relevant politicians. For example, were the Court's preferences be to the right (in a policy line, such as in Figure 1) of the most liberal relevant member of Congress, the only relevant political constraint to its decision would be that politician's ideal policy outcome. Thus, as in the Congressional Dominance Hypothesis (Weingast and Moran (1983)), judicial decisions are either unconstrained – when the Court's median justice's preferences fall within the congressional contract set, or constrained by the extreme boundaries of that set. This finding is methodologically important, because it suggests that a linear empirical specification (e.g., a linear regression) will not accurately capture the dynamics of the Court – Congress interaction, as the relevant constraint varies depending on the relative location of the Court.

Spiller and Gely (1992) provide the first empirical test of the strategic approach using Supreme Court statutory decisions in the area of labor relations. Like Eskridge, Spiller and Gely find that the preferences of both legislators and justices matter. In particular, the manner in which the preferences of the Court and Congress interact is consistent with the predictions of the strategic approach.

The topic of statutory interpretation received careful consideration in the earlier years. Ferejohn and Weingast (1992a; 1992b), for example, sketch a positive theory of statutory interpretation showing the interaction between among the Court, the enacting and future legislatures.[1] McNollgast (1992 and 1994) further explore how the organization of Congress affects the ability of the Court to act strategically when engaged in statutory interpretation; the Court is able strategically to use legislative history to give a statute an expansive reading.

C. The Second Wave

Over the next several years, scholars from a variety of disciplinary backgrounds expanded the focus of the strategic approach in multiple directions. Spiller and Spitzer (1992) analyze the Court's choice between making a decision on constitutional or non-constitutional grounds.. Spiller and Spitzer use a strategic representation that includes Congress, the courts, the president, the agency and state legislatures to explain the Court's putative reluctance to base its decisions on constitutional grounds. It is not surprising, they conclude, to find that courts are reluctant to use the constitutional instrument, because the threat of statutory interpretation is generally sufficient to restrain

[1] See also Schwartz, et al (1994) and de Figueiredo, et al (1999) for related, and formal, developments.

agency decisions, and that the Court's preferences would have to be significantly different from those of the political mainstream for a constitutionally restrictive decision to constitute equilibrium (Spiller and Spitzer 1992).

Tiller and Spiller (1999:351) elaborate on the issue of choice of legal rules in analyzing why agencies might choose a particular regulatory instrument (e.g., adjudication) over another (e.g., rulemaking), and why courts of appeal might reverse agencies by focusing on procedural challenges to agency action rather than issues of statutory interpretation. They find that by strategically choosing a combination of policy outcomes and regulatory instruments, administrative agencies and lower courts impose higher decision costs on the reviewing court and thus minimize the chances of reversal.[2 1] In a related article, Cross and Tiller (1998:2159) illustrate the effects of raising decision costs within the context of intra-court of appeals panel. They find that increasing transaction costs forces court of appeals panels to act less along ideological or political lines than otherwise they would like to.

Spiller and Tiller (1997) look at the power of Congress to change the structure of interaction among agencies and the courts, and in so doing, exercise control over policy outcomes. Congress has the ability of influence the judiciary either through the manipulation of the decision-making process that the agency must follow (e.g., cost-benefit analysis) or by changing the standard of review a court must apply when reviewing an agency action (e.g., the Bumpers Amendment, 1975) Congress can influence the courts by various other means as well. De Figueiredo and Tiller (1996 and

2000) explore Congress's ability to influence the federal judiciary through the expansion of judgeships; and Toma (1991, 1996) provides evidence that Congress uses the budget appropriations as an instrument to signal its preferences to the Supreme Court, similar to what it does in its interactions with administrative agencies (Weingast and Moran, 1983).

The strategic approach to the study of judicial behavior, and in particular, to judicial independence, outside the U.S. has received substantial recent attention.[3] Spiller (1996) developed the basic comparative logic to understand the raise of the doctrine of judicial independence. In environments characterized by a strong and unified polity - such as in two-party parliamentary systems - attempts to exercise judicial independence will trigger political conflict and retaliation. When it is difficult for the polity to overturn or to retaliate against the judiciary a doctrine of judicial independence would naturally evolve.

This insight has been applied to a multiplicity of political environments across almost all continents. Cooter and Ginsburg (1996), for example, followed this approach by examining the impact of political institutions on judicial independence across 21 countries. Consistent with the basic precepts of the strategic approach, they find that, when it is easier for the legislature to override the court and when a "dominant disciplined party" controls the governing coalition, the discretion of the courts is limited. Epstein et al. (2001) also apply this framework to understand the behavior of European Constitutional Courts in their interaction with the relevant political actors. They analyze, for example, why the Russian Constitutional Court's decisions in the 1992-93 period

[3] State Courts have also provided a natural comparative setting for rational choice analyses. See, for example, Spiller and Vanden Bergh (2003) and references therein.

were strategically problematic in entering into conflict with the President. Following this early period – and the political retribution inflicted on the Court by President Yeltsin - the Court's decisions were consistent with the expectations of strategic behavior and reflected its adaptation to the new political environment.

Garrett et al. (1998) apply the strategic approach to the European Court of Justice (ECJ). The ECJ is in the difficult position of "being seen as enforcing the law impartially by following the rules of precedent" and at the same time not making "decisions that litigant governments refuse to comply with" (174). They identify the conditions under which the ECJ is more likely to rule against a litigant government and, in turn, those conditions when member governments are likely to respond to the ECJ's rulings.

In his study of three Asian countries Ginsburg (2003) reach similar conclusions. In the context of constitutional design, increased political uncertainty leads to the adoption of judicial review as a form of protecting the constitutional bargaining. In a comparative study of Japan and the U.S., Ramseyer (1994) finds that independent courts are likely to be supported by elected officials when they believe they are likely to lose in a future election. Under such conditions, it is in the interest of the existing ruling elite to create independent courts to protect the policy that has just been enacted into law. Similarly, Ramseyer and Rasmusen (1997, 2006) in studying judicial independence in Japan conclude that, in Japan, politicians seek to achieve the "ideal judge" by exercising more control over judges during their careers, rather than at appointment time, finding evidence that political bias played a role in the career advancement of judges.

Iaryczower et al. (2002) find that, despite an inhospitable environment, the judiciary in Argentina has shown some measure of judicial independence. Similar to Ramseyer and Rasmusen (2006), the authors find that judicial independence depends on the political environment, and that in periods with a more fragmented polity, the Court is more willing to challenge legislative and executive actions.[4]

III. The Attitudinal Approach

A. The Basic Hypothesis

At its most basic level, the attitudinal approach holds that judges decide disputes based on their "sincere" ideological preferences and values, unconstrained by outside or inside institutions (Segal and Spaeth 2002, 86). Because various institutional devices insulate them from outside influences, scholars working within this framework model justices' behavior as influenced by their sincere ideological preferences.[5] Scholars in this tradition have provided evidence that both case-facts and justices' attitudes play a significant role in justices' decisions. Segal and Cover (1989), for example, reports a 80% correlation between their measure of justices' attitudes and their measure of aggregated voting tendencies in civil liberties cases (Segal, et al., 1995, extended the study to include economic cases), suggesting that attitudes are good predictors of their decisions in the two areas that constitute a significant portion of the Supreme Court's docket (Segal 1997).

[4] See, also, Helmke (2002) for a related result.
[5] Going back to Figure 1 above, the attitudinal approach operates in an environment in which the Court is always located within the contract set of the legislature – i.e., the court is always in the political mainstream, while the strategic approach becomes relevant when the Court's preferences deviate from the political mainstream.

B. The Attitudinal and Strategic Approaches Face Each Other

In a series of papers beginning in the late 1990s scholars in both the strategic and attitudinal camps carefully explored the claims made by each model. Thus, in 1997, Segal compared the attitudinal (sincere) and strategic (sophisticated) approaches. Although Segal does not reject the strategic account outright, he concludes that the evidence unambiguously favors the attitudinal model: "If the overwhelming majority of statistical models find no support for the separations-of-powers model, if the few statistical models supporting the separations-of powers model are seriously flawed, and if the model's foremost advocate [William Eskridge] concludes that the Warren, Burger and Rehnquist courts all ignored legislative preferences, there is little need to say more." (2002:349)

Segal and Spaeth, however, go on to say more: "one might imagine a spectrum along which the separation-of-powers model might be relatively true" and "it should hardly be surprising that institutional structures matter" (2002:349-50). These statements are interesting because they are consistent with Spiller and Gely (1992) who suggest that there are ranges in which the Court is constrain and ranges in which the Court is not, and in the latter, thus where the justices are able to impose their own preferences.

In fact, Bergara et al. (2003) apply Spiller and Gely (1992)'s model to Segal's (1997) data. Consistent with both the attitudinal and strategic approaches, they find that justices' ideologies matter. Consistent with the strategic approach, they find that the Court is often, but not always, constrained by Congress and the extent to which the Court is

constrained by politics varies significantly over time, a finding consistent with that of Rosenberg (1992). Finally, and also consistent with the strategic model, Bergara et al. (2003) find that when the Court is constrained by politics, it seems to respond strategically. The point is, as Jacobi (2006, 265) puts it: "If judges are policy-motivated individuals, why would they not pursue those policies in a sophisticated manner?"

IV. Strategy in the Chambers

A. Brief Overview

Another interesting stream is what we call the "Internal Strategic Approach." This approach focuses on the decision-making process within the Court.[6] Until fairly recently, scholars applying strategic models to judicial decision-making have focused primarily on the final vote on the case. With a few exceptions (e.g., Schubert, 1962; Provine, 1982) scholars have generally ignored the strategic implications of judicial decisions made prior to the final outcome of the case. Justices can behave strategically at any of the following five stages: on certiorari; at the "conference vote," where a preliminary vote on how the case should be decided takes place; in the assignment, by the Chief Justice or by the most senior associate justice in the majority, of the writing of the majority opinion; in the writing itself, so as to garner majority support; and finally, at the decision to join, concur, or dissent.

[6] The hierarchy of the court has been also extensively analyzed. For example, Songer et al (1994) analyzed the incentives of appeal courts to follow supreme court policies. Spiller (1992) analyzes agency independence given the hierarchy of judicial review. He shows how the judicial hierarchical process further limits agency independence. The strategic choice of cases has been analyzed by, among others, Cameron, et al (2000) and Lax (2002).

Since justices have the opportunity to engage in strategic behavior at each stage, failure to model these stages might result in incomplete understanding of judicial behavior. Epstein and Knight (1998, 65) find evidence of strategic behavior at the certiorari stage, particularly with the use of the dissent of cert tool. Modeling yet a different stage, Hammond et al (2005) find that, under some conditions, it is optimal for the opinion assigner "to assign the opinion to some justice who is not the closest ideologically." This result may explain why Chief Justice Burger systematically assigned opinions to less ideologically compatible colleagues.

B. Strengths

The Internal Strategic Approach presents a number of exciting opportunities to the study of judicial-decision making. Not only can we focus on the various stages of the internal game, but we can also model legal issues and policies. Lax (2006), for example, has transformed Kornhauser's (1992) mostly normative work on legal rules into analyses of doctrine as equilibrium to internal games. Lax (2006) analyzes rule based games, showing that equilibrium to rule games have more robust properties than equilibrium to policy games. There is always a median rule equilibrium; there may not be a median justice. Doctrine can also be seen as a means of political control, both in the game between a Supreme Court and lower courts (Cohen and Spitzer, 1994), or between the Court and politicians (Spiller and Spitzer 1995).

Refocusing the discussion on the various stages of decision-making, should motivate the collection and codification of new sources of data, such as court's procedures that, although obscure or rarely used (e.g., an order by the Court dismissing a writ of certiorari

as improvidently granted, i.e., a DIG), may be used by justices in a strategic manner (e.g., Solimine and Gely, 2005).

V. The State of the Strategic Approach

To some extent, we have just started to develop comprehensive, and empirically testable, theories of judging (e.g., Hammond et al. 2005). Although perhaps no model will ever be able to capture the complexities of judging the strategic approach, as it has evolved provides a useful general framework to study judicial decision-making.

The strategic approach generalizes the attitudinal model. That there is a range of policy over which justices may vote their preferences without the fear of reversal is part of the essence of the strategic approach (Spiller and Gely 1992). It provides room for other forces (e.g., judicial norms) to affect judicial decision-making process. The possibility of greater integration between the two approaches is perhaps at its apex now, as scholars have began to explore more carefully the internal strategies justices engage in as they decide cases. In particular, it is likely that, in some stages, the justices have more room to impose their preferences and in others might be more constraint by political forces. Similarly, the type of case (e.g., statutory v. constitutional) might influence the justices' calculus and even within a given type of case, the cases' salience may affect other political actors' response, and thus the ability of justices to impose their own preferences

In sum, the strategic approach to judicial decision making, rooted in rationality and sophistication, is alive and well. It has evolved from a relatively simple framework to

include concepts such as doctrines, rules, internal decision making, vertical relations among levels of the judiciary, and it has traveled overseas and brought back fascinating ideas about the impact and growth of judicial institutions.

We have pried open the lid on knowledge about how justices make decisions in the United States, at least at the federal level; but we still have very little systematic knowledge about their strategic choices in other developed countries and, more fundamentally, in emerging and developing economies where institutions are more varied and where the impact of institutions on judicial decision-making can sometimes be more starkly.

References

Becker, G. 1983. ‘A theory of competition among pressure groups for political influence.’ *Quarterly Journal of Economics*, 98:371-400.

Bergara, M., Richman, B., and Spiller, P.T. 2003. ‘Modeling Supreme Court strategic decision making: The congressional constraint.’ *Legislative Studies Quarterly*, 28:247-80.

Cameron, C.M., Segal, J.A. and Songer, D. 2000. “Strategic auditing in a political hierarchy: An informational model of the Supreme Court's certiorari decisions.” *The American Political Science Review*, 94(1): 101-116.

Cohen, L. and Spitzer, M. 1994. 'Solving the *Chevron* puzzle.’ *Law and Contemporary Problems*, 57(2):65-110

Cooter., R. D. and Ginsburg, T. 1996 ‘Comparative judicial discretion: An empirical test of economic models.’ *International Review of Law and Economics*, 16:295-313.

Cross, F.B. and Tiller, E.H. 1998. ‘Judicial partisanship and obedience to legal doctrine: Whistleblowing on the federal courts of appeals.’ *Yale Law Journal*, 107: 2155-76.

de Figueiredo, J.M. and Tiller, E.H. 1996. ‘Congressional control of the courts: A theoretical and empirical analysis of expansion of the federal judiciary.” *Journal of Law and Economics*, 39:435-62.

de Figueiredo, J.M. and Tiller, E.H. 2000. ‘Congress and the political expansion of the U.S. District Courts.’ *American Law and Economics Review*, 2:107-25.

de Figueiredo, R., Spiller, P.T., and Urbiztondo, S. 1999. ‘An informational perspective on administrative procedures.’ *Journal of Law, Economics & Organization*, 15:283-305.

Epstein, L., and Knight, J. 1998. *The Choices Justices Make*. Washington: CQ Press.

Epstein, L., Knight, J. and Shvetsova, O. 2001. ‘The role of constitutional courts in the establishment and maintenance of democratic systems of government.’ *Law & Society Review*, 35(1):117-164.

Eskridge, W.N. 1991. ‘Overriding Supreme Court statutory interpretation decisions.’ *Yale Law Journal*, 101:331-455.

Eskridge, W.N. and Ferejohn, J. 1992. ‘Making the deal stick: Enforcing the original constitutional structure of lawmaking in the modern regulatory state.’ *Journal of Law, Economics, and Organization*, 8:165-189.

Ferejohn, J. and Weingast, B. 1992a. 'Limitation of statutes: Strategic statutory interpretation.' *Georgetown Law Review*, 80:565-582.

Ferejohn, J. and Weingast, B. 1992b. "A positive theory of statutory interpretation.' *International Review of Law and Economics*, 12:263-279.

Fiorina, M.P. 1982. 'Legislative choice of regulatory forms: Legal process or administrative process.' *Public Choice*, 39:33-66.

Garrett, G., Kelemen, R.D., and Schulz, H. 1998. 'The European Court of Justice, national governments, and legal integration in the European Union.' *International Organization*, 52:149-176.

Gely, R. and Spiller, P.T. 1990. 'A rational choice theory of Supreme Court statutory decisions with applications to the *State Farm* and *Grove City* cases.' *Journal of Law, Economics, and Organization*, 6: 263-300.

Ginsburg, T. 2003. *Judicial Review in New Democracies*. New York: Cambridge University Press.

Hammond, T.H., Bonneau, C.W., and Sheehan, R.S. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court.* Stanford: Stanford University Press.

Helmke, G. 2002. 'The logic of strategic defection: Judicial decision-making in Argentina under dictatorship and democracy.' *American Political Science Review* 96(2):291-30.

Iaryczower, M., Spiller, P.T. and Tommasi, M. 2002. 'Judicial independence in unstable environments, Argentina 1935-1998.' *American Journal of Political Science*, 46:699-716.

Jacobi, T. 2006. 'The impact of positive political theory on old questions of constitutional law and the separations of powers.' *Northwestern Law Review*, 100:259-278.

Kornhauser, L.A. 1992. 'Modeling collegial courts II: Legal doctrine.' *Journal of Law, Economics and Organization*, 8: 441-70.

Lax, J.R. 2002. 'Certiorary and compliance in the judicial hierarchy: Discretion, reputation and the rule of four.' *Journal of Theoretical Politics*, 15(1):61-68.

Lax, J.R. 2006. 'Median rules with a median judge: The collegial politics of legal doctrine.' mimeo, Columbia University.

Marks, B. 1988. 'A model of judicial influence on congressional policy-making: *Grove City College v. Bell.*' *Working Paper in Political Science P-88-7*, Hoover Institution.

Mayhew, D.R. 1974. Congress: The Electoral Connection, New Haven: Yale University Press.

McNollgast 1992. 'Positive cannons: The role of legislative bargains in statutory interpretation.' *Georgetown Law Journal*, 80:705-42.

McNollgast 1994. 'Legislative intent: The use of positive political theory in statutory interpretation.' *Law and Contemporary Problems*, 57: 3-37

Posner, R. 2003. 'The Anti-Hero', *The New Republic*, February 24, review of B.A. Murphy, 2002. *Wild Bill: The Legend and Life of William O. Douglas*, New York: Random House.

Pritchett, C.H. 1942. 'The voting behavior of The Supreme Court, 1941-42.' *Journal of Politics*, 4: 491-506.

Provine, D.M. 1980. *Case Selection in the United States Supreme Court*. Chicago: University of Chicago Press.

Ramseyer, J.M. 1994. 'The puzziling (In)dependence of courts: A comparative approach.' *Journal of Legal Studies*, 23: 721-747.

Ramseyer, J.M. and Rasmusen, E.B. 1997. 'Judicial independence in a civil law regime: The evidence from Japan.' *Journal of Law, Economics and Organization*, 13:259-86.

Ramseyer, J.M. and Rasmusen, E.B. 2006. 'The case for managed judges: Learning for Japan after the political upheaval of 1993.' *University of Pennsylvania Law Review* 154:1879-1930.

Rosenberg, G.N. 1992. 'Judicial independence and the reality of political power.' *The Review of Politics*, 54:369-398.

Schubert, G. 1962. 'Policy without law: An extension of the certiorari game.' *Stanford Law Review*, 14:284-327.

Schwartz, E.P. 1994. 'Policy, precedent, and power: A positive theory of Supreme Court decision-making." *Journal of Law, Economics and Organization*, 8(2):219-252.

Segal, J.A. 1997. 'Separation-of-Powers games in the positive theory of Congress and courts.' *American Political Science Review*, 91: 28-44.

Segal, J.A. and Cover, A.D. 1989. 'Ideological values and the votes of U.S. Supreme Court Justices.' *American Political Science Review*, 83: 557-65.

Segal, J.A., Epstein, L., Cameron, C.M., and Spaeth, H.J. 1995. 'Ideological values and the votes of U.S. Supreme Court Justices revisited.' *Journal of Politics*, 57:812-23.

Segal, J. and Spaeth, H. 2002. *The Supreme Court and the Attitudinal Model Revisited.* New York: Cambridge University Press.

Shepsle, K. and Weingast, B. 1987. 'The institutional foundations of committee power.' *American Political Science Review,* 81:85-104.

Solimine, M. and Gely, R. 2005. 'The Supreme Court and the DIG: An empirical and institutional analysis.' *Wisconsin Law Review,* 2005:1421-78.

Songer, D.R., Segal, J.A. and Cameron, C.M 1994. 'The hierarchy of justice: Testing a principal-agent model of Supreme Court-Circuit Court interactions." *American Journal of Political Sciences,* 38(3): 673-696.

Spiller, P.T. (1992). "Rationality, Decision Rules and Collegial Courts," *International Review of Law and Economics,* 12:186-190.

Spiller, P.T. 1996. 'A positive political theory of regulatory instruments: Contracts, administrative law or regulatory specificity?.' *University of Southern California Law Review*, 69:477-515.

Spiller, P.T. and Gely, R. 1992. 'Congressional control or judicial independence: The determinants of U.S. Supreme Court labor relations decisions, 1949-1988.' *Rand Journal of Economics,* 23:463-92.

Spiller, P.T. and Tiller, E.H. 1997. 'Decision costs and the strategic design of administrative process and judicial review.' *Journal of Legal Studies*, 26:347-70.

Spiller, P.T. and Spitzer, M.T. 1992. 'Judicial choice of legal doctrine.' *Journal of Law, Economics, and Organization*, 8:8-46.

Spiller, P.T. and Spitzer, M.T. 1995. 'Where is the sin in sincere? Sophisticated manipulation of sincere judicial voters (With applications to other environments).' *Journal of Law, Economics, and Organization,* 11:32-63.

Spiller, P.T. and Vanden Bergh, R.G. 2003. 'Toward a positive theory of state supreme court decision making.' *Business and Politics,* 5:7-43.

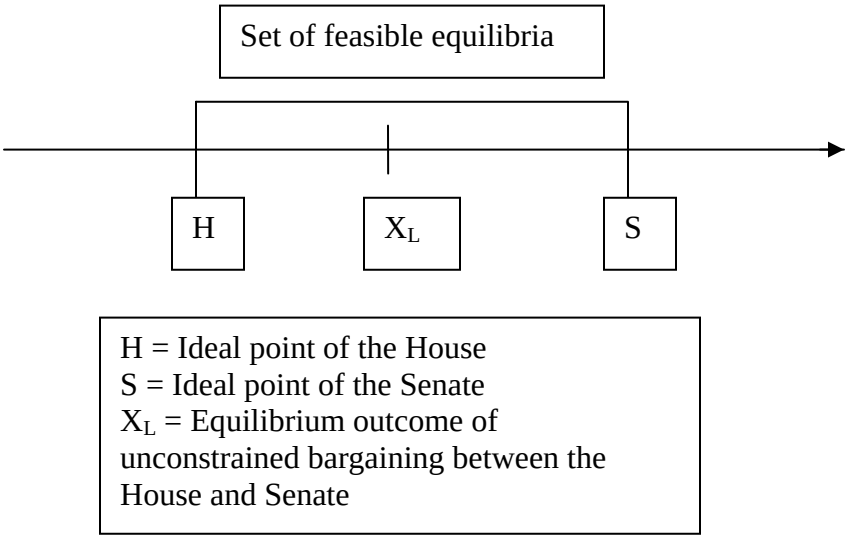
Tiller, E.H. and Spiller, P.T. 1999. 'Strategic instruments: Legal structure and political games in administrative law.' *Journal of Law, Economics and Organization,* 15:349-77.

Toma, E.F. 1991. 'Congressional influence and the Supreme Court: The budget as a signaling device.' *Journal of Legal Studies,* 20:131-46.

Toma, E.F. 1996. 'A contractual model of the voting behavior of the Supreme Court: The role of the Chief Justice.' *International Review of Law and Economics,* 16: 433-47.

Weingast, B.R. and Moran, M. J. 1983. 'Bureaucratic discretion or congressional control? Regulatory policymaking by the Federal Trade Commission.' *Journal of Political Economy*, 91:765-800.

Figure 1


Set of feasible equilibria
H
X_L
S
H = Ideal point of the House
S = Ideal point of the Senate
X_L = Equilibrium outcome of unconstrained bargaining between the House and Senate