Was There Ever Such a Thing as Judicial Self-Restraint?

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Richard Posner's version of judicial self-restraint implies that individual Justices who embrace restraint would tend to uphold the constitutionality of a law even if it went against their preferences or ideology. Judge Posner suggests that this form of restraint once existed but no longer does. Using a dataset of cases that considered the constitutionality of federal laws, we explore whether, in line with Judge Posner's hypothesis, the Court grew more activist (that is, more willing to strike laws) over the period between 1937 and 2009 and whether the ideological leanings of Justices, and not judicial self-restraint, better explain how they voted in cases challenging the constitutionality of federal laws. Our results answer the question we pose in the Essay's title in the affirmative: there was such a thing as judicial self-restraint, but there no longer is, just as Judge Posner suggests. Justices appointed since the 1960s were and remain ideological in their approach to the constitutionality of federal laws.

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INTRODUCTION

Richard Posner calls the term "judicial self-restraint" a "chameleon."[1] Among its many meanings, the one that interests Posner the most is the reluctance of judges to declare legislation or executive action unconstitutional out of deference to the judgments of the elected branches of government.[2] Judge Posner claims that judicial self-restraint in this form once existed but survives no longer, having been supplanted first by exuberant liberal activism and later by constitutional theory.[3]

From an empirical standpoint, Judge Posner's version of judicial self-restraint implies that the Supreme Court would be reluctant to hear cases that challenge the constitutionality of federal laws unless a lower court had already struck down the law. Posner's understanding of judicial self-restraint also predicts that when the Court does consider a law's constitutionality, it would uphold the law unless it is so clearly unconstitutional that "it is not open to rational question."[4] Finally, and related to these two claims, individual Justices who embrace judicial self-restraint would tend to uphold the constitutionality of a law even if it went against their preferences or ideology.

We are particularly interested in the last hypothesis or, more precisely, its alternative: that votes to uphold (or invalidate) government action reflect the Justices' political preferences toward the substantive policy content of the law—not an underlying taste for judicial restraint (or activism).[5] In other

1. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520 (2012)

2. *Id.* We refer here to what Judge Posner labels type (3) judicial restraint: "judges are *highly* reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional." Posner is interested in a particular version of type (3) restraint—what he terms "Thayerism." According to Posner, a Thayerian judge would only invalidate a statute if its unconstitutionality was "so clear that it is not open to rational question." *Id*. at 522 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)).

3. Posner, *supra* note 1, at 535 ("The evanescence of type (3) judicial restraint, both generally and in its Thayerian form, is related to the rise of constitutional theory—a rise stimulated to a significant degree by *Roe v. Wade* and by a conservative backlash against the Warren Court and against the follow-on rulings of the Burger Court, such as *Roe* itself . . . .").

4. Posner, *supra* note 1, at 522 (quoting Thayer, *supra* note 2, at 144).

5. Most realists would have no trouble with Posner's second hypothesis, but many political scientists with a quantitative bent would claim that judicial restraint has never existed. Recent examples (using quantitative data) that look mainly at Posner's second hypothesis include LINDA CAMP KEITH, THE U.S. SUPREME COURT AND THE JUDICIAL REVIEW OF CONGRESS 179 (2008) (finding that "a Supreme Court justice's vote on the constitutionality of a congressional statute is strongly influenced by the consistency between the policy direction of the statute and the justice's ideological preferences"); STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 59–64 (2009) (finding that the majority of Justices serving since 1953 were ideological in their approach to judicial review); Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131, 131 (2004) (many Justices "base their decisions to strike or uphold . . . laws on ideological considerations," though the Court "itself can be called restraintist [because] it never appears to strike laws sua sponte"); Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts*, 60 POL. RES. Q. 71, 72 (2007)

words, we test the hypothesis that left-leaning Justices tend to invalidate conservative laws and right-leaning Justices liberal laws, and that this may provide a non-restraint-based explanation for trends in judicial invalidations of statutes.

Using a dataset of cases that considered the constitutionality of federal laws, we test this hypothesis against the backdrop of Judge Posner's claim that judicial self-restraint once existed but no longer does. This dataset—which we describe in more detail in Part I—allows us to explore whether, in line with Judge Posner's hypothesis, the Court grew more activist (that is, more willing to strike laws) over the period between 1937 and 2009 and whether the ideological leanings of Justices, and not judicial self-restraint, better explain how they voted in cases challenging the constitutionality of federal laws.

Our results, described in Parts II and III, answer the question we pose in the Article's title in the affirmative: there was such a thing as judicial self-restraint but there no longer is, just as Judge Posner suggests. Justices appointed since the 1960s were and remain ideological in their approach to the constitutionality of federal laws.[6]

I.
THE DATA

To explore the various accounts of judicial review, we created a dataset of every orally argued Supreme Court case decided between the 1937 and 2009 Terms in which the Court *considered* a challenge to the constitutionality of a federal law.[7] The data come primarily from three sources: (1) Nicholas

[hereinafter Lindquist & Solberg, *Burger and Rehnquist Courts*] (finding that "members of both the Burger and Rehnquist Courts are responsive to a number of different factors when assessing the constitutionality of legislative enactments, including their own ideological predispositions toward the substantive policy embedded in the statute"); Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237, 237 (2006) [hereinafter Solberg & Lindquist, *Rehnquist Court*] ("[C]onservative justices as well as liberals are likely to strike down state laws when those laws fail to conform to [their] ideological preferences."); David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, 64 POL. RES. Q. 335, 335 (2011) ("The results show significant attitudinal judicial voting at each high court . . . .").

6. Still, we should note an important qualification to this conclusion. We are not claiming that even the modern-day Justices always vote their political preference; they only do so when the ideological stakes are sufficiently strong. Indeed, between 30 and 40 percent of the Court's decisions during the period between 1937 and 2009 were decided unanimously. Because of the Justices' ideological differences, this behavior would be inexplicable if ideology dominated all decisions. But it does not. The most likely explanation of unanimous decisions is that the ideological stakes in these cases are small and thus insufficient to overcome slight dissent aversion and legalistic commitments among the Justices. *See* Lee Epstein, William Landes & Richard Posner, *Unanimous Decisions in the U.S. Supreme Court*, 106 NW. U. L. REV. (forthcoming 2012) (on file with the authors).

7. Utilizing this approach, the dataset consists of cases striking *and* upholding federal laws. This is an important point because examining only "strike" cases can lead to inaccurate inferences. Imagine a Justice who almost always votes with the majority when the Court strikes a law. We might

Zeppos's list of all cases reviewing the constitutionality of federal laws between the 1937 and 1991 Terms,[8] (2) Stefanie Lindquist's dataset containing cases systematically culled from the U.S. Supreme Court Database (for the 1992–2004 Terms),[9] and (3) our own search of cases from the 2005–2009 Terms (the Roberts Court).[10] Where overlaps exist among our sources, we checked them against one another.[11] We also consulted the Congressional Research Service's *The Constitution of the United States of America: Analysis and Interpretation*[12] and conducted searches using Westlaw's "unconst!" facility, though both are limited to cases invalidating federal laws.

We are reasonably confident that we have identified most, if not all, of the cases in which the Court considered the constitutionality of a federal law.[13] This amounted to 647 cases, or 5565 votes cast by the forty-four Justices serving since 1937.[14] Of the 647 cases, 119, or 18 percent, struck down the federal law in whole or in part. Of the 5565 individual votes, 29 percent were to strike the federal law and 71 percent were to uphold it.

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infer that this Justice is an activist. But now suppose the Justice almost always votes with the majority when the Court upholds a law. Would we still deem him an "activist"? Probably not. Taking into account all constitutional review cases, on the other hand, can help to distinguish between truly aggressive Justices—those willing to strike regardless of whether or not the Court does—and those who vote more meekly with the majority of their colleagues regardless of whether the majority strikes or upholds the law at issue. For other problems with examining only strike cases, see Nicholas S. Zeppos, *Deference to Political Decision Makers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 306 (1993); Tom S. Clark & Keith E. Whittington, Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789–2006 (Working Paper, May 22, 2009), *available at* http://ssrn.com/abstract=1475660.

8. Zeppos, *supra* note 7, at 335–65. We checked Zeppos's list against one provided to us by Linda Camp Keith for the 1937–1945 Terms. Keith used this data in her book, THE U.S. SUPREME COURT AND THE JUDICIAL REVIEW OF CONGRESS, *supra* note 5.

9. U.S. SUPREME COURT DATABASE, http://supremecourtdatabase.org (last visited Jan. 21, 2012). For Lindquist's procedures, see LINDQUIST & CROSS, *supra* note 5; Lindquist & Solberg, *Burger & Rehnquist Courts*, *supra* note 5; Solberg & Lindquist, *Rehnquist Court*, *supra* note 5.

10. Using the U.S. Supreme Court Database, we identified all cases in which a federal law was at issue. We then read the cases to determine whether the Court considered the constitutionality of the law in question. As with the lists developed by Zeppos and Lindquist, the consideration of the law's constitutionality need not have been the primary thrust of the Court's decision. *See* LINDQUIST & CROSS, *supra* note 5; Zeppos, *supra* note 7.

11. For example, because Lindquist's dataset goes back to the 1953 Term, we were able to cross-check it against Zeppos's list.

12. *See, e.g.*, CONG. RESEARCH SERV., S. DOC. NO. 111-39, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION (SUPP. 2010), *series since 1992 available at* http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GPO (follow hyperlink to title).

13. On the other hand, we are less confident about the overall reliability of the dataset. Determining whether the Court considered the constitutionality of a federal law (and even whether the Court struck down a federal law) is a subjective question. *See* Clark & Whittington, *supra* note 7. It is possible (actually likely) that Zeppos and Lindquist used different procedures to identify the cases in their datasets. As we explain in the text we checked sources against one another to the extent we were able, but there are likely sins of commission and omission. Eventually, we hope to create a dataset with a known reliability—a task that involves generating a protocol to identify the relevant cases and then applying the protocol to all cases decided in the 1937–2009 Terms.

14. Our dataset is limited to orally argued cases.

Before turning to the results, we should note two weaknesses with our approach. First, we examine only federal laws, while Posner's definition of (type 3) judicial self-restraint also references state and local laws and executive decisions. Existing datasets cover these other forms of government action, but only for the 1946 Term forward; collecting them for the 1937–1945 Terms would be a major task, and one we leave for another day.[15] Second, though our dataset has a sufficiently long time horizon to capture two Justices associated with judicial self-restraint (Frankfurter and the second Harlan), we miss Oliver Wendell Holmes (1902–1931 Terms) and all but two terms of Justice Louis Brandeis's tenure.[16] Assessing these Justices' behavior must also wait for another paper.

II.
TIME TRENDS

What do the data tell us? As Figure 1 reveals, the fraction of all cases in which the Court reviewed a federal law's constitutionality has remained relatively constant across time. It reached a low of 6 percent during the Warren years, when 103 of the Court's 1692 orally argued cases raised questions about the constitutionality of a federal law. The peak of the Court's volume of constitutional jurisprudence was not much higher, reaching just 9 percent during the Rehnquist and Roberts Courts. Disaggregating the data to correspond to particular Court Terms does not change this picture in any meaningful way. The range is 3 percent of cases considered (in 1966) up to a peak of 16 percent (in 1937 and 2009), and a regression yields no significant time trend.[17]

Also obvious is that the fraction is fairly low. In no single Term has it ever exceeded 20 percent; it was greater than 15 percent only three times (the 1937, 1949, and 2009 Terms). Presented another way, Congress enacted 19,579

15. For an analysis of the Court's review of federal, state, and local laws, see LINDQUIST & CROSS, *supra* note 5 (for the 1953–2001 Terms); *id.* at 85-104 (examining judicial review of executive branch decisions); Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002); John B. Gates, *Partisan Realignment, Unconstitutional State Policies and the U.S. Supreme Court, 1837–1964*, 31 AM. J. POL. SCI. 259 (1987).

16. Brandeis appears in only thirty-one cases in our dataset (twenty-four in 1937 and seven in 1938).

17. The regression is:

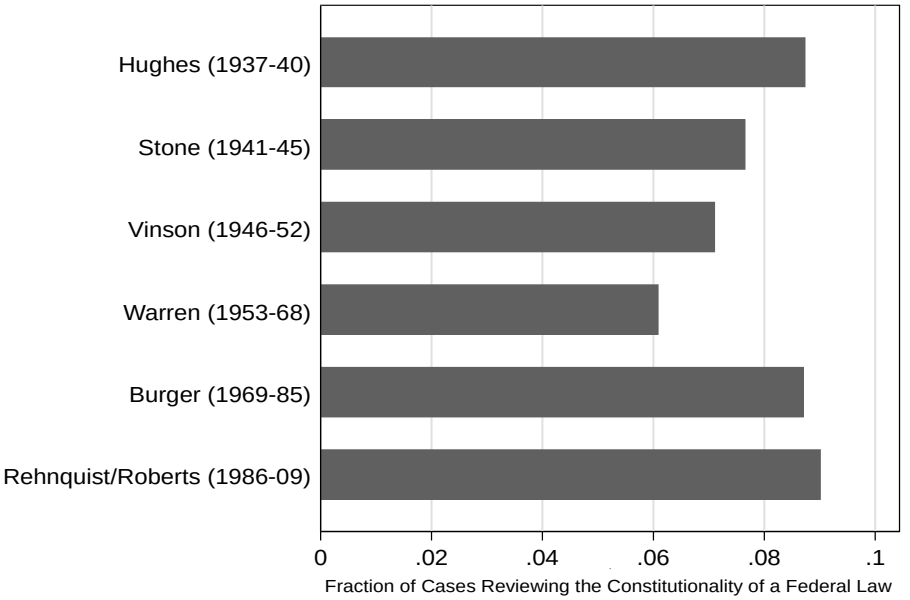
$$ln(Fraction) = -8.83 + .003Term$$
$$(1.98)\quad(1.39)$$

where *ln(Fraction)* denotes the logarithm of the fraction of cases each term that review the constitutionality of federal laws, *Term* denotes the term of the court and the t-ratios are in parentheses below the regression coefficients. Although the coefficient on Term is slightly positive (a positive time trend), it is not statistically significant.

public laws between 1947 and 2009.[18] During the same period, the Court reviewed the constitutionality of federal laws in only 516 of the 6810 cases it decided (or 7.6 percent).

These facts alone might suggest that the Justices have exercised considerable "restraint" for the last seven decades, even during the periods that Posner argues were characterized by a decline in restraint. Nonetheless, we must resist crediting this interpretation because we lack information about the pool of petitions for certiorari. It is possible that very few petitions raised questions about the constitutionality of federal laws, and the Court granted most of them. The low proportion of cases considering the constitutionality of federal laws could therefore result not from the Justices exercising restraint, but instead from the limited pool of certiorari petitions available to the Court.

FIGURE 1: Fraction of all orally argued cases reviewing the constitutionality of federal laws, by Chief Justice era (1937–2009 Terms)



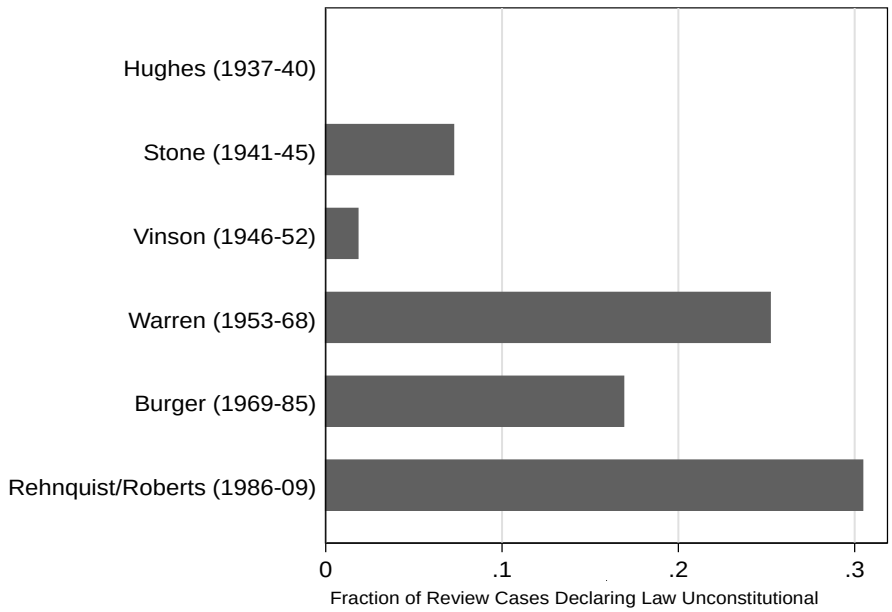
What we can examine are trends in how the Justices treat the laws they do review; that is, the fraction of cases reviewing *and* striking a federal law. These data present a picture that is more consistent with Posner's narrative about the existence and subsequent decline in judicial restraint.[19] As Figure 2

18. *Congressional Measures Introduced and Enacted, 1947–2009*, *in* VITAL STATISTICS ON AMERICAN POLITICS 2009–2010, at 198 tbls.5, 6 & 7 (Harold W. Stanley & Richard G. Niemi eds., 2009), *available at* http://library.cqpress.com/vsap/vsap09_tab5-7.xls.

19. Because our dataset begins with the 1937 Term, we cannot say much about the original rise of judicial self-restraint. For studies with longer time horizons, see Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012); KEITH, *supra* note 5; Clark & Whittington, *supra* note

demonstrates, there appear to be two different post-New Deal Courts. During the Hughes, Stone, and Vinson eras, the Justices struck down (in whole or in part) just 5 of the 174 laws they considered, or about 3 percent. Between the 1953 and 2009 Terms, however, this figure rose to 24 percent (114 of 473). The last two decades, in particular, may have been the most aggressive in the post-New Deal years—perhaps in the Court's entire history.[20] The Justices invalidated federal laws in 30 percent of cases (57 of 187).

FIGURE 2: Fraction of all orally argued cases that reviewed *and* invalidated federal law, by Chief Justice era (1937–2009 Terms)



III.
IDEOLOGY AND JUDICIAL RESTRAINT

Although the data in Figure 2 seem to validate some of Judge Posner's claims, they do not tell the entire story about judicial restraint. This is because, ideologically speaking, it may have been quite easy for the liberal Roosevelt/Truman Justices to uphold laws passed by liberal Congresses. And yet, a closer look at the data suggests that judicial restraint was an important factor explaining why the Hughes, Stone, and Vinson Courts only invalidated

7; Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800–1973*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 103, 103–28 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

20. THOMAS KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY (2004) and JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 414 (2002) reach similar conclusions.

five federal laws, or less than 3 percent of the 174 cases reviewing the constitutionality of federal laws. Although none of the 115 liberal laws were declared unconstitutional (consistent with the ideological congruity argument), only five, or 8.5 percent, of fifty-nine conservative laws were declared unconstitutional.[21] While this difference is statistically significant, the data suggest that the 1937–1952 Court was committed to judicial self-restraint. If judicial self-restraint were only a minor factor in the 1937 to 1952 period, one would not expect a liberal court to uphold more than 90 percent of the conservative laws it reviewed.

Obviously, this picture is somewhat muddled. To better assess claims about the political nature of judicial self-restraint, we added two crucial pieces of information to the dataset—one on the ideology of the Justices and the other on the ideological content of the federal law at issue. To determine the Justices' ideologies, we used the means of their Martin-Quinn scores (which are based on the Justices' votes in non-unanimous cases).[22] Relative to other measures, these scores provide a more precise estimate of ideology; they are also available for all Justices and for all terms in our dataset. The lower a Justice's Martin-Quinn score, the more liberal that Justice's ideology; the higher the Martin-Quinn score, the more conservative the judicial ideology. The scores range from −4.12 (William O. Douglas) to 3.84 (Clarence Thomas). Table 1 provides other descriptive information.

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21. We provide a definition of liberal and conservative laws below. *See infra* notes 24–25 and accompanying text.

22. We computed these means from the term-by-term Martin-Quinn scores. *See* Andrew D. Martin & Kevin M. Quinn, MARTIN-QUINN SCORES, http://mqscores.wustl.edu/measures.php (last visited Jan. 21, 2012). For a technical description of how these scores are computed, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). For a more accessible description, see Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1296–1300 (2005).

One drawback of the Martin-Quinn scores is that they are endogenous. That is, because Martin and Quinn derive their estimates from Justices' votes, deploying the scores to study the effect of ideology on votes amounts to using votes to predict votes. We offer three ways to think about this problem. First, as Figure 1 suggests, the number of federal judicial review cases per term is so small that "circularity is not a practical concern." *See* Andrew D. Martin & Kevin M. Quinn, Can Ideal Point Estimates Be Used as Explanatory Variables? 3 (Oct. 8, 2005), *available at* http://mqscores.wustl.edu/media/resnote.pdf. Second, we used the career mean of the Martin-Quinn scores, not the term-by-term estimates. Finally, we estimated the statistical models to follow using three other measures of ideology: the Justice's party affiliation (Republican or Democrat), the appointing President's party affiliation, and the Justice's Segal-Cover score (derived from newspaper editorials). Jeffrey Segal, Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005 (undated) (updating and backdating Segal & Cover, *infra*), *available at* http://www.stonybrook.edu/commcms/polisci/professors/qualtable.pdf. They run from 0 (most conservative) to 1 (most liberal). For details on how Segal and Cover calculate these scores, see Jeffrey A. Segal & Albert Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Substituting the other measures for the Martin-Quinn scores does not produce substantively different results; in the one model (president's party, conservative laws) the coefficient produces a correctly signed but statistically insignificant coefficient.

TABLE 1: Description of the variables[23]

Dependent variable	Mean (Std. dev.)
Justice's vote to invalidate	.289
(invalidate = 1; not invalidate = 0)	(.454)
Independent variables	
Justice ideology	−.001
(higher numbers are more conservative)	(1.854)
Law ideology	.426
(liberal = 1; conservative = 0)	(.495)
Direction of the lower court's decision	.502
(liberal = 1; conservative = 0)	(.500)
Case came on certiorari	.674
(certiorari = 1; not certiorari = 0)	(.469)
Civil liberties case	.642
(civil liberties case = 1; non–civil liberties case = 0)	(.480)
Number of (orally argued) cases	121.8
	(28.08)
Term	1971.5
	(21.370)

We measure the ideology of the federal law based on the ideological direction of the Court's decision. Suppose the Court invalidated a law on the ground that it discriminated against gays. We would code the Court's decision as liberal and the law conservative. Likewise, if a federal law outlawed discrimination against gays and the Court invalidated it, we would code the law as liberal and the Court's decision conservative.[24] Fortunately, we did not need to make these decisions. The U.S. Supreme Court Database codes the ideological direction of every Supreme Court decision. From this variable, we constructed the ideological direction of the law (1 = liberal; 0 = conservative).[25]

23. *N* = 5477 votes. We eliminated the eighty-eight votes that the U.S. Supreme Court Database codes as "unspecifiable" on the ideological direction variable.

24. To provide examples from our dataset, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld a liberal law (the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445), and in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court upheld a conservative law (a 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act, 79 Stat. 586).

25. SUPREME COURT DATABASE, *supra* note 9. For the Database's definitions of liberal and conservative, see *Decision Direction*, SUPREME COURT DATABASE, http://supremecourtdatabase.org/documentation.php?var=decisionDirection (last visited Jan. 13, 2012). The Database goes back (at this moment) to 1946. For earlier terms, we rely on a database developed by Jeffrey A. Segal and Lee Epstein that uses the same definitions as the Supreme Court Database.

This is not an uncommon approach to measuring the ideological content of the law. *See* LINDQUIST & CROSS, *supra* note 5, at 43; Segal & Spaeth, *supra* note 15, at 320–26. But there are other approaches. *See* Clark & Whittington, *supra* note 7, at 18 (measuring the partisan and ideological

Finally, we added five control variables suggested in previous studies (see Table 1). Most are designed to capture features of the Court's case-selection process or docket.[26] The first, *Direction of the Lower Court's Decision* (coded 1 for liberal; 0 if otherwise), accounts for the modern Supreme Court's tendency to reverse the decision of the court below (i.e., even a very liberal majority will tend to reverse a decision below that upholds a liberal law; and vice versa for a conservative majority).[27] Second, we include *Term* (a counter that increases by 1 with each passing term), which serves as a rough proxy for trends in judicial restraint, precedent, court procedures, or other factors that may influence the likelihood of invalidating federal laws. The third, *Certiorari*, controls for the means by which the case arrived at the Court (1 if the case came on certiorari; 0 if otherwise). As Clark and Whittington suggest,[28] when the Court has complete discretion over whether to hear a case (as when the Court grants certiorari), the Justices are free to focus their attention only on those that "raise serious doubts about . . . constitutional validity."[29] When the Court is more constrained (as on mandatory appeal), the challenge to the legislative action may be relatively weak.[30] Fourth, for the *Number of (Orally Argued) Cases*, we hypothesize that, with more cases, the Court is more pressed for time and less likely to take the dramatic step of striking down a federal law. Finally, we include a variable for the *Type of Statute* because the

alignment between the Court and the Congress that enacted the law); *see also* Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (analyzing the effect of the current Congress's ideology rather than that of the enacting Congress on the Court's decision to uphold or invalidate).

26. Ideally, we would also model the selection process, but for present purposes, we follow the path taken in previous studies and use proxies, such as the direction of the lower court decision. *See* Lindquist & Solberg, *Burger and Rehnquist Courts*, *supra* note 5, at 76–77 ("[W]e note that the judicial review cases heard by the Supreme Court do not arise on the Court's docket at random. Instead, the Court's certiorari process is complex and often involves strategic calculations on the part of the justices . . . . [I]f court intervention is nonrandom, ignoring this selection process raises the likelihood that conclusions about the forces affecting subsequent votes to invalidate legislation will be inaccurate.") (internal citations omitted). Along similar lines, in subsequent work we would recommend controlling for several other variables, including the number of amicus curiae briefs filed in support or in opposition to the law. *See id.* at 76 (the ideological distance between the Court and the contemporaneous Congress); *see* Segal et al., *supra* note 25, at 94 (the age of the law and its importance); Clark & Whittington, *supra* note 7, at 19.

27. Between the 1946 and 2009 Terms, the petitioning party won in 63 percent of the 4515 cases. This is computed from the U.S. Supreme Court Database (Case Centered Data Organized by Citation), using orally argued cases and the party winning variable.

28. Clark & Whittington, s*upra* note 7, at 21; *see also* Colker & Scott, *supra* note 15, at 1314 (hypothesizing that a federalist might use certiorari authority to hear and reverse cases in which lower courts invalidated state action).

29. *See* Clark & Whittington, *supra* note 7, at 21.

30. *Id.* at 21 (observing that "the modern Court largely has discretion over which cases it will choose to hear via a writ of certiorari, whereas the Court through most of its history heard most cases through mandatory appeal. This structural change may have had relevant consequences for the pool of cases in which the Court considers challenges to the constitutionality of federal policies. In particular, we might expect that the earlier Court was forced to hear many relatively weak challenges to federal laws . . . .").

Justices tend to subject laws restricting rights and liberties (coded 1) to more rigorous standards of review than others, especially economic laws (coded 0).[31]

A. All Justices

We begin our assessment of the role of ideology in judicial review by modeling the votes (to uphold or invalidate) of all forty-four Justices in two equations: one for liberal laws and the other for conservative laws. (In Section III.B, we also estimate the two basic equations but examine the Justices individually.) Table 2 (on page 568) displays the logit results; we report only the marginal effects at the means of the independent variables.[32]

The coefficients on *Justice's Ideology* are most relevant for our purposes. All four coefficients are statistically significant and correctly signed. This tells us that liberal Justices are significantly more likely to strike conservative laws, and conservative Justices are more likely to strike liberal laws.

How much more likely? Figure 3 (on page 569) provides one answer. There we display the predicted probability of upholding a federal law by the Justices' ideology, controlling for the other variables in equations 1 and 2.[33] Beginning with the left panel, the predicted probability of a very liberal Justice upholding a conservative law is a low .22; for a very conservative Justice, the prediction jumps to .95. Put another way, liberals will quite likely invalidate a conservative law (.78 probability) and conservatives are quite unlikely to do so (.05 probability). The results are slightly less stark for liberal laws. While liberals will almost always vote to uphold these laws (.96), extreme conservatives are almost as likely to strike them as they are to uphold (.46). Figure 3 also allows us to consider the voting behavior of a hypothetical "nonideological" judge (an average Martin-Quinn score of 0). That judge would be reluctant to declare a federal law unconstitutional, but more reluctant to strike down a liberal than conservative law (18 percent versus 33 percent).

31. To determine the type of statute, we used the Supreme Court Database's definitions. *Online Code Book*, SUPREME COURT DATABASE, http://supremecourtdatabase.org/documentation.php (last visited Jan. 28, 2012).

32. Because *Direction of the Lower Court's Decision* can be misleading when there is a conflict in the circuits, we also estimated the models separately for cases in which the majority opinion stated that the Court took the case to resolve a conflict (omitting the *Direction of the Lower Court's Decision*) and those in which it did not. This analysis is incomplete at best because the Court does not always or even usually provide a reason for granting certiorari and we are missing this variable altogether for cases decided in the 1937–1945 Terms. Still, it is worth noting that these models did not yield substantively different results from those reported in Table 2. *See also infra* Table 4.

33. To construct the figures, we used SPost. *See* J. Scott Long & Jeremy Freese, *Postestimation Analysis with Stata*, SPOST, http://www.indiana.edu/~jslsoc/spost.htm (last visited Jan. 13, 2011). We set all other variables at their mean or mode. For the *Direction of the Lower Court Decision*, the mode is 1 (liberal); for *Cert*, it is 1 (certiorari); for *Civil Liberties Case*, it is 1 (civil liberties case).

TABLE 2: Logistic regressions of the probability of voting to invalidate a federal law, forty-four Justices in the 1937–2009 Terms[34]

Independent variable	Conservative law (1)	Liberal law (2)
	Marginal effects at mean values	
Justice's ideology	−.118**	.053**
	(10.87)	(4.80)
Direction of the lower court's decision	−.063**	.041*
	(3.01)	(2.13)
Certiorari	−.067**	−.029
	(2.73)	(1.62)
Civil liberties case	.189**	.009
	(5.78)	(.057)
Number of orally argued cases in term	−.001	−.001
	(1.82)	(1.82)
Term	.002*	.001
	(2.07)	(1.44)
N of observations	3143	2334

Turning briefly to the other variables in Table 2, we find that a lower court's liberal decision is significantly more likely to decrease the probability of invalidating a conservative law (equation (1)) and to increase the probability of invalidating a liberal law (equation (2)). These results are consistent with the well-known tendency of the Court to reverse about two-thirds of the cases it decides.[35] We also find that the Justices are significantly more likely to invalidate conservative than liberal civil liberties laws (see the positive and significant coefficient on the civil liberties variable in equation (1)) and a slight tendency to reduce the probability of striking down federal legislation in response to a greater number of cases decided each term. The negative coefficient on this variable, however, is significant only in equation (2).

34. ** $p \leq .01$; * $p \leq .05$. t-statistics in parentheses.

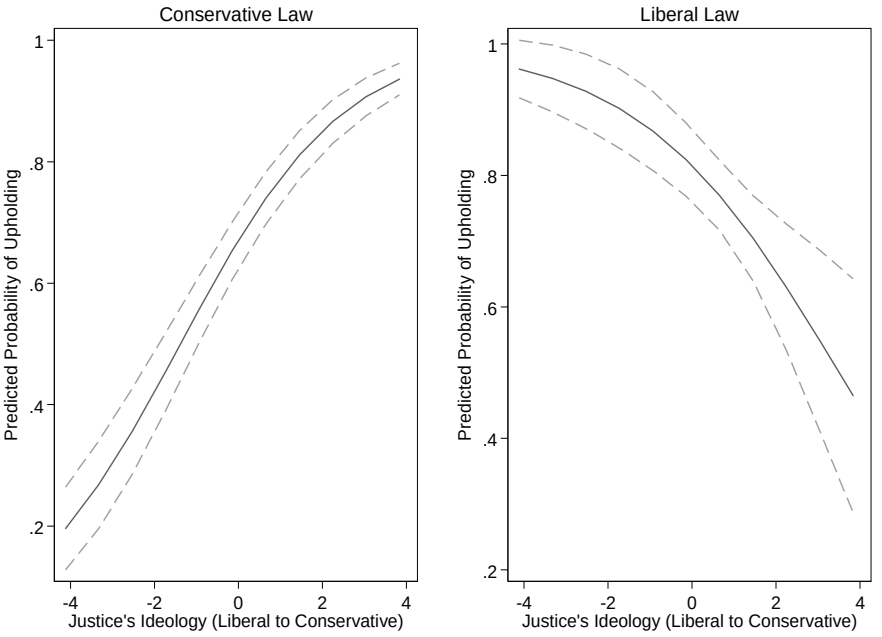
Standard errors are clustered by Justice. For conservative laws, the number of Justices is 43, not 44. (Byrnes did not participate in a case reviewing a conservative law.)

To check the robustness of the results, we used random effects logistic regression (with justice as the "panel" variable). In equation 2, *Cert.* is significant at $p \leq .05$. Otherwise, the results do not change.

The dependent variable, the Justice's vote in each case, is coded 1 (a vote to invalidate) or 0 (a vote to uphold).

35. Segal & Spaeth, *supra* note 20, at 317 (noting "the Court's tendency to reverse the decisions it reviews").

FIGURE 3: Predicted probability of voting to uphold a federal law by the Justice's ideology[36]



B. Individual Justices

When assessing the behavior of the individual Justices, we consider two separate but related questions. First, are Justices unlikely to strike down a federal law independent of whether it is liberal or conservative? If so, we call these Justices restraintists. Second, if Justices do strike down a law, are they much more likely to invalidate a liberal than conservative law or vice versa? If the answer is yes, the Justice has a strong ideological preference for either conservative or liberal outcomes. It is conceivable Justices could be both restraintists and ideologues. These Justices would strike down a relatively small fraction of laws they review but would show strong preferences for upholding laws that are consistent with their ideology and striking down those that are not. We call these Justices "opportunistic" restraintists or "closet" activists. Opportunistic restraintists are faux restraintists. They appear to be restraintists only because they have reviewed a disproportionate number of cases that were consistent with their ideology. Hence, they face relatively little temptation to be activists.

Across the seven-decade period between the 1937–2009 Terms, there appears to be an ideological structure to judicial self-restraint. In the 1937–1946 period (when fifteen of the eighteen Justices were appointed by

36. We generated the predictions using equations 1 and 2 (see also *supra* note 33). The solid line is the predicted probability; the dashed lines are 95% confidence intervals.

Democratic Presidents and overall the Court invalidated only 5 of the 174 laws they reviewed), most of the individual Justices could be termed restraintists. Column (3) of Table 3 shows that eleven of the eighteen Justices voted to invalidate a federal law less than 20 percent of the time and thirteen of eighteen less than 25 percent of the time.

In contrast, only three of the twenty-four Justices appointed after 1952 (Whittaker, White, and Burger) could be deemed restraintists striking down less than 20 percent of the federal laws they reviewed.[37] We do not think Judge Posner would find any of this surprising; after all, he argues that judicial restraint existed only for the first few decades in our study;[38] only in the later years does the decline begin. Drilling down into the data, historically and by the individual Justice, confirms that Judge Posner is right.

The first two columns in Table 3 reveal information about the ideological leanings of the Justices. Of the eighteen pre-Eisenhower appointees,[39] thirteen exhibit no statistically significant ideological bent (72 percent)[40]—including two who figure prominently in Posner's account of the rise of judicial restraint, Brandeis and Frankfurter.[41] This was true throughout their careers. Frankfurter did not approach federal laws with a heavier touch as the Court's leadership changed hands from Hughes to Stone to Vinson to Warren.[42] Ten of the thirteen nonideological justices were also highly reluctant to strike down statutes (striking down less than 23 percent of federal laws they reviewed) but three were not. McReynolds, Butler, and Jackson voted to strike down 38 percent or more of the federal laws they reviewed. Of the three, only Jackson could be truly termed "nonideological" since the other two struck down a much larger proportion of conservative than liberal laws (though the differences were not significant because the number of votes were relatively small).

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37. If we set the restraintist limit at 25 percent, we would add five more Justices to the restraintist category (Harlan, Blackmun, Powell, Rehnquist, and Alito).

38. Also, we have collaborated on a book with Judge Posner that describes the strong relation between ideology and the votes of Supreme Court Justices. Lee Epstein, William M. Landes, & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (unpublished manuscript) (on file with the authors).

39. The table eliminates Sutherland and Cardozo. They participated in only four cases each.

40. Butler, one of two of the four horsemen in our dataset (the other is McReynolds), is not statistically significant likely due to the small number of cases. Even including him as an ideologue, the percentage remains under 50 (14 / 23 = .61).

41. This finding may come as a surprise to some political scientists who have long argued that Frankfurter was a faux restraintist. *See* Segal & Spaeth, *supra* note 20; Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality?*, 8 MIDWEST J. POL. SCI. 22, 38 (1964) ("Not only for Frankfurter, but for all the Warren Court justices, the concept of judicial restraint is an effective means of rationalizing response to policy-oriented values."); Harold J. Spaeth, *Warren Court Attitudes Toward Business: The "B" Scale*, *in* JUDICIAL DECISION-MAKING 79, 98 (Glendon A. Schubert ed., 1963) ("Although Frankfurter is staunchly restraint-oriented in those relatively few cases in which the propriety of exercising Supreme Court power appears in isolation from economic liberalism and civil liberties values, his voting behavior in the cases involving administrative agency regulation of business is hardly compatible with the image his apologists would have us accept . . . .").

42. There is no significant difference under any Chief Justice.

Turning to the five highly ideological pre-Eisenhower Justices, Black, and Douglas were clearly nonrestraintists, but Murphy, Rutledge, and Clark were restraintists, invalidating less than 24 percent of the federal laws they reviewed. But Murphy and Rutledge should be viewed as opportunistic restraintists because they voted to strike down the majority of conservative laws but rarely the liberal laws they reviewed.

TABLE 3: Comparison of votes to invalidate liberal versus conservative federal laws for forty-two Justices, 1937–2009 Terms[43]

Justice, listed chronologically (appointing President)	**Fraction to invalidate (*N* of cases reviewing the constitutionality of federal laws)**		
	Conservative laws	***Liberal laws***	***All laws***
McReynolds (Wilson)	.17[§] (12)	.44 (45)	.39 (57)
Brandeis (Wilson)	.00 (7)	.00 (24)	.00 (31)
Butler (Harding)	.14 (7)	.47 (32)	.41 (39)
Stone (Coolidge; Roosevelt)	.07 (27)	.05 (84)	.05 (111)
Hughes (Hoover[44])	.00 (13)	.04 (50)	.03 (63)
O. Roberts (Hoover)	.20 (25)	.18 (77)	.19 (102)
Black (Roosevelt)	.67** (135)	.08 (157)	.35 (292)
Reed (Roosevelt)	.11 (70)	.06 (104)	.08 (174)
Frankfurter (Roosevelt)	.27 (89)	.18 (107)	.22 (196)
Douglas (Roosevelt)	.80** (152)	.17 (128)	.51 (280)
Murphy (Roosevelt)	.63** (19)	.11 (65)	.23 (84)
Byrnes (Roosevelt)	— (0)	.11 (9)	.11 (9)

43. ** $p \leq .01$; * $p \leq .05$; [§] $p \leq .10$. We exclude Sutherland and Cardozo. They participated in only four cases in our dataset.

44. Appointed associate in 1910 by Taft. Our data cover only his years as Chief.

Jackson (Roosevelt)	.41 (44)	.35 (46)	.38 (90)
W. Rutledge (Roosevelt)	.52* (21)	.00 (36)	.19 (57)
Burton (Truman)	.16 (55)	.07 (44)	.12 (99)
Vinson (Truman)	.03 (30)	.13 (23)	.08 (53)
Clark (Truman)	.16** (67)	.00 (40)	.10 (107)
Minton (Truman)	.09 (35)	.13 (15)	.10 (50)
Warren (Eisenhower)	.65** (63)	.05** (57)	.43 (100)
Harlan (Eisenhower)	.25 (71)	.21 (38)	.24 (109)
Brennan (Eisenhower)	.68** (193)	.07 (100)	.47 (293)
Whittaker (Eisenhower)	.18 (22)	.10 (10)	.16 (32)
Stewart (Eisenhower)	.29 (134)	.25 (63)	.28 (196)
White (Kennedy)	.22* (180)	.11 (97)	.18 (277)
Goldberg (Kennedy)	.88** (8)	.11 (9)	.47 (17)
Fortas (Johnson)	.77** (13)	.00 (10)	.43 (23)
Marshall (Johnson)	.68** (155)	.04 (73)	.48 (228)
Burger (Nixon)	.11* (122)	.23 (57)	.15 (179)
Blackmun (Nixon)	.30** (162)	.08 (74)	.23 (236)
Powell (Nixon)	.23 (116)	.19 (54)	.22 (170)
Rehnquist (Nixon; Reagan)	.13** (200)	.44 (103)	.23 (303)
Stevens (Ford)	.48** (187)	.09 (107)	.34 (294)

O'Connor (Reagan)	.24** (122)	.43 (76)	.31 (198)
Scalia (Reagan)	.23** (115)	.53 (64)	.34 (179)
Kennedy (Reagan)	.31 (105)	.44 (59)	.36 (164)
Souter (G.H.W. Bush)	.52** (82)	.11 (45)	.38 (127)
Thomas (G.H.W. Bush)	.25** (85)	.66 (50)	.40 (135)
Ginsburg (Clinton)	.54** (78)	.11 (46)	.38 (124)
Breyer (Clinton)	.46** (72)	.11 (45)	.32 (117)
Roberts (G.W. Bush)	.25 (20)	.33 (12)	.28 (32)
Alito (G.W. Bush)	.11[§] (19)	.40 (10)	.21 (29)
Sotomayor (Obama)	.57* (7)	.00 (5)	.33 (12)

A very different picture emerges for the appointees since Eisenhower. Only seven of the twenty-four (29 percent) exhibit no significant difference in their voting based on the ideology of the law. This group includes Harlan, Whittaker, Stewart, Powell, and Kennedy but surprisingly also Roberts and Alito (both of whom had a relatively small number of votes and hence the difference between their votes on conservative and liberal laws was not statistically significant). Except for Kennedy (and possibly Stewart and Roberts) these judges are clear restraintists.

The remaining seventeen are either activists or opportunistic restraintists willing to uphold laws that are consistent with their policy preferences and strike those that are not. Of these, only four (White, Burger, Blackmun, and Rehnquist) could be deemed opportunistic restraintists since overall they struck down less than 24 percent of the federal statutes they reviewed.

Of course, it is possible that these patterns disappear once we use regression to control for other relevant variables, especially the direction of the lower court's decision. But, as the logit regressions in Table 4 show, this is not the case. In fact, taking into account the other variables strengthens the underlying historical patterns uncovered by Posner. For each Justice we include the following independent variables: the ideological direction of the law, the ideological direction of the lower court decision (1 if liberal and 0 if conservative), and a dummy variable denoting whether the law involved civil

liberties. To increase their reliability, we limit the regressions to Justices who had at least fifty votes reviewing the constitutionality of a federal law. This eliminated twelve Justices from our sample. We also excluded votes in cases where there was a conflict in the lower courts (mainly between circuit courts, but also between federal and state courts and between state courts alone) because the variable denoting the ideological direction of the lower court decision would not capture the tendency of the Supreme Court to reverse the lower court ruling.[45] Finally, we only report the marginal effect of the variable denoting the ideology of law the Court reviews.

TABLE 4: Logit regressions on the probability of invalidating a federal law for thirty Justices with fifty or more case participations, 1937–2009 Terms[46]

Justice (listed chronologically)	**Regression coefficient (marginal effect) on *Law Ideology* (1 = liberal law; 0 = conservative law)**	**Number of cases excluding lower court conflict cases**
McReynolds	.222*	57
	(2.54)	
Stone	−.009	111
	(.42)	
O. Roberts	.074	102
	(1.35)	
Black	−.445**	273
	(5.94)	
Reed	−.058*	163
	(1.98)	

45. *See supra* note 32. Estimating the regressions for all cases does not call for any changes in the interpretation of Table 4.

46. ** $p \leq .01$; * $p \leq .05$; § $p \leq .10$. Standard errors are clustered by Term.

The regressions control for the direction of the lower court decision and civil liberties case (we exclude the other variables because we cluster on term or because of collinearity in some of the individual models). In Warren's model, we exclude civil liberties cases because he never voted to invalidate a non-civil liberties law.

The regressions exclude cases in which the certiorari petition indicated a conflict in the lower courts (between circuit courts, circuit court and state court, and state courts). Data on conflicts are only available since 1946 so for the Terms before 1946 we include all cases including an unknown number of cases where there was a conflict. To deal with that problem, we split the lower court decision variable into two separate variables: lower court decisions before and since 1946. This only affects the seven Justices in our sample who voted on cases both before and since 1946 (Black, Reed, Frankfurter, Douglas, Murphy and Jackson). The regressions for both Vinson and Minton include a few lower court conflicts because otherwise, the number of observations would drop below 50.

We cannot model Hughes (he voted to strike only two laws, both liberal); Rutledge (never voted to strike a liberal law); and Clark (also never voted to strike a liberal law).

Frankfurter	.051	180
	(.79)	
Douglas	−.705**	258
	(5.45)	
Murphy	−.268*	79
	(2.26)	
Jackson	.132	83
	(.86)	
Burton	−.133	86
	(1.51)	
Vinson	.100	53/22
	(.93)	
Minton	.063	50/44
	(.064)	
Warren	−.928**	90
	(6.36)	
Harlan	.069	99
	(.73)	
Brennan	−.735**	264
	(6.73)	
Stewart	−.040	183
	(.42)	
White	−.078	248
	(1.52)	
Marshall	−.834**	204
	(6.05)	
Burger	.130*	167
	(2.19)	
Blackmun	−.198*	207
	(2.09)	
Powell	−.058	157
	(.65)	
Rehnquist	.320**	253
	(5.59)	
Stevens	−.367**	238
	(4.61)	
O'Connor	.203**	154
	(2.99)	
Scalia	.358**	131
	(4.27)	
Kennedy	.172§	119
	(1.78)	

Souter	−.331[§]	92
	(1.94)	
Thomas	.540**	99
	(3.90)	
Ginsburg	−.427**	90
	(3.09)	
Breyer	−.349**	87
	(2.83)	

For Justices who vote to promote their ideological preference, we predict that the coefficient on *Law Ideology* would be positive for conservative Justices and negative for liberal Justices. This is because a positive (negative) coefficient indicates that a change from a conservative to a liberal law will increase (decrease) the probability that the judge will vote to strike down the law. Of the twelve Justices in Table 4 who were appointed before 1952, the coefficient is significant for five (42 percent).[47] Frankfurter and Harlan, two of the Justices identified as restraintists by Judge Posner, are not among this "ideological" group. Notice also that the ideological preference is particularly strong for Black and Douglas. For example, the regression coefficient on the *Law Ideology* variable indicates that a change from a conservative to liberal law will decrease the probability of voting to invalidate the law by .73 for Douglas and .47 for Black.

By contrast, for the eighteen Justices appointed since Warren in 1953, only four appear to be clearly nonideological (Harlan, Stewart, White, and Powell), two others (Kennedy and Souter) are marginally ideological (the regression coefficients are significant at the .10 but not the .05 level), and the remaining twelve are significantly ideological (and, as expected, the liberals vote to strike down conservative laws and the conservatives the opposite). Among these twelve Justices, the most ideological appear to be three liberals (Warren, Brennan, and Marshall) and one conservative (Thomas). For example, a shift from a conservative to liberal law decreases the probability by .83 that Marshall will vote to strike down the law but increases by .54 Thomas's probability.

CONCLUSION

How can we account for this shift from Justices who seemed to subscribe to some version of judicial self-restraint to today's selective restraintists (or activists)? Judge Posner points to the turn toward liberal activism and later to the ascent of constitutional theory. Although we have not assessed these mechanisms, it does seem that today's so-called theorists (e.g., Thomas) do not

47. The five are McReynolds, Black, Douglas, Murphy, and Reed. The only conservative among the five is McReynolds.

look much different from the unabashedly liberal activists (e.g., Brennan) of yesteryear when it comes to the review of federal laws.

But, as Judge Posner would say, you knew that.