

The Supreme Court's Influence in the System of Separated Powers

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Abstract

Political scientists have long been interested in the issues of separation of powers and inter-institutional relations. Judicial scholars have primarily examined whether the Supreme Court is influenced by other institutions. We draw on alternative formal models and pose the theoretical and empirical possibility that other branches respond to the Supreme Court's decisions, due to the Court's high levels of legitimacy and support among the public. Employing time-series analyses, we find that Congress and the President espouse policies in line with those collectively preferred by the justices. The Supreme Court also is somewhat constrained by policies enacted by elected officials, as the longitudinal policy space exhibits dynamic endogeneity. Our findings lead to critical questions regarding judicial power within the system of separation of powers, which suggests that it would behoove theorists, whether formal or normative, to spend more effort considering the constraints posed by the Supreme Court on the legislative and executive branches.

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Introduction

One of the most important contributions of early American political thinkers to modern constitutionalism is the lesson that power ought to be divided into multiple institutions that share various governmental powers while checking each other. Not surprisingly, much of modern American political science has concerned itself with the implications of divided power, as well as with inter-institutional conflict. The debate has largely centered on the clash between the President (or his administrative agencies) and Congress. Judicial scholars increasingly have focused on the influence that Congress or the President may carry over the Supreme Court. Much of this research focuses on whether or not the Supreme Court acts independently of Congress. The major question currently seems to be: can justices simply translate their personal predispositions into policy (Segal and Spaeth 2002; Segal 1997), or are the justices constrained by the preferences of other institutions when they hand down their decisions (Eskridge 1991)?

Positive political theorists have taken a keen interest in the Supreme Court's place in the separation of powers, resulting in a multitude of theories and formal models of how other institutions could have an impact on the Supreme Court's policy outputs (Eskridge 1991, Ferejohn and Shipan 1990, Gely and Spiller 1990, 1992). Epstein and Knight (1998) evince that there are times in which the Supreme Court justices behave strategically when considering the preferences of other institutions. Segal (1997), however, tests these theories empirically and finds that there is no systematic evidence that the Supreme Court is affected by other institutions. In other words, justices behave according to their ideological preferences. So, this leads us to ask: what is the Supreme Court's place in the separation of powers? Moreover, how should positive political theorists proceed given the assorted empirical evidence?

Despite the current emphasis on the scope and breadth of judicial independence from other institutions, earlier applications within the separation of powers literature investigated the ability of the Supreme Court to influence Congress (Marks 1989), and more recent scholarship has emphasized the potential for judicial influence over legislatures (Flemming, Bohte, and Wood 1997, 1999; Rogers 2001; Vanberg 2005). We contribute to that portion of the debate by asking the related question: can the Supreme Court benefit from its high levels of legitimacy and support among the public to persuade other federal institutions to re-evaluate their own collective preferences in light of the preferences of the Supreme Court? If so, then the Supreme Court's power is broader than previously assumed, which leads to important conclusions regarding the study of judicial power within the system of separation of powers. In this paper, we employ time-series analyses to show empirically that the Supreme Court systematically influences both Congress and the President to move toward its ideological position on matters of public policy.

A System of Checks and Influences

Quite a bit of scholarly attention on inter-institutional influence focuses on the ability of the President and Congress to influence one another by appealing to the public (Canes-Wrone 2001; Kernell 2006). Both Congress and the President are potentially persuaded and/or constrained by each other under certain circumstances, a situation seemingly contingent on their perception of consequent electoral results based on public opinion. Congress is clearly at the mercy of its public, due to the frequency and drive of congressional elections (Mayhew 1974, 2004). Yet, presidents also appear to be responsive to the manner in which shifts in public opinion might affect their ability to effectuate preferred policies in Congress (Erikson, MacKuen, and Stimson 2002). This implies that an institution with the capability to sway the public, such as the Supreme Court, has the potential to persuade either Congress or the President to adopt or move toward its preferred position on public policies.

Despite the attention to the Supreme Court's popularity relative to other institutions (Gibson, Caldeira, and Baird 1998; Hibbing and Theiss-Morse 1995), few scholars have directed their attention to the ability of the Supreme Court to benefit from its popular appeal. Much of the focus of judicial scholars is primarily directed at whether the Supreme Court is institutionally constrained by Congress because of its ability to overturn statutory decisions (Epstein and Knight 1998, Eskridge 1991; Ferejohn and Weingast 1992) or because of the ability to punish the judiciary by passing laws that would change its institutional structure (Caldeira 1987; Martin 2006; *cf.* Gely and Spiller 1992).¹ On the other hand, scholars such as Segal (1997) and Segal and Spaeth (2002) maintain that the Supreme Court is shielded from such constraints. Despite these differences, the primary question for judicial scholars seems to be whether the judiciary – the Supreme Court in particular – is shaped by other institutions. On the other hand, the arguments that the President or Congress can affect one another by appealing to the public suggest that the Supreme Court might also benefit from its popularity. It may be, then, that the Court can benefit from its public legitimacy and support in order to gain in what Eskridge (1991) calls the Court/Congress game.

Essentially, that is what we argue here. The Supreme Court is an institution that desires its preferences be implemented into policy (Maltzman, Spriggs, and Wahlbeck 2000; Segal and Spaeth 2002), but as Hamilton advised, it “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (*Federalist Papers* 78: 402). How does the Court influence the President and Congress to effectuate its policy preferences? We contend that the Court's politically salient opinions are critical to its ability to influence policy outcomes in the political process. The rationale for this expectation is that members of Congress and the

¹ Randazzo, Waterman, and Fine (2006) make a similar argument regarding congressional influence on the Courts of Appeals; *see also* Randazzo (N.d.).

President may believe that the public is persuaded by the Court's more significant decisions that receive public exposure (Franklin and Kosaki 1989). Alternatively, they may sense that if they choose to punish the Court or otherwise act inconsistently with its preferences on these salient cases, the issue might gain broader salience for which they would face negative electoral consequences (Vanberg 2001, 2005). Irrespective of the actual effect the Court has on public opinion, then, as long as elected officials believe that the Court has a positive impact on public opinion or that it enjoys ample public support (Caldeira, Gibson, and Baird 1998; Nicholson and Howard 2003), these elites from other institutions will take seriously the justice's collective policy preferences, even to the point of possibly being constrained by them. The consequence is that the Court is able to realize the implementation of its preferences in the policy process. Therefore, while much of the literature poses that the Supreme Court is potentially constrained to various degrees by Congress and/or the President, we believe it is theoretically justifiable to hypothesize and expect the opposite effect.²

Recent scholarship bolsters our theoretical account. For one, Vanberg (2001) developed a convincing game-theoretic model showing that legislatures would be loathe to evade judicial decisions since courts are such popular institutions; and, his empirical analysis supported his predictions in political environments that are transparent and thus easily monitored by the public. Brace and Langer (2005) formally and empirically demonstrated that state legislatures can be influenced by the ideological predisposition of state supreme courts on some policy enactments. Moving beyond decisional outcomes, Flemming, Bohte, and Wood (1997, 1999) found that the

² As Dahl (1961: 89) asserted: "To ignore indirect influence in analysis of the distribution of influence would be to exclude what might well provide to be a highly significant process of control in a pluralistic democracy."

Supreme Court partially controls policymaking in other institutions by driving and influencing the national agenda-setting process. Finally, McGuire (2004) demonstrated the Supreme Court's increasing institutional power within the federal system. As a consequence, it appears that the judiciary wields authority beyond its own institutional walls, despite the conventional wisdom that it is the least dangerous branch with little power *vis-à-vis* the other branches of government on matters of implementing public policy (Rosenberg 1991, 2008).

Measurement and Testing of Supreme Court Influence in the Separation of Powers

Our proposition is that policymaking in the political branches is endogenous to the Supreme Court, though the direction of causality is not uni-directional; that is, we assume that these governmental entities exist in a dynamic system where each responds and reacts to the others over time. As Krause (1996: 1093) contended: "Examining institutions from an aggregate perspective is desirable since a theory of institutional influence requires us to find a more persistent strand of influence that can be attributed to behavior across time" (*see also* Erikson, MacKuen, and Stimson 2002; McGuire 2004). Accordingly, we incorporate various data sources of a time-serial nature at the institutional level by utilizing proxies for annual, ideological positions on policy espoused by the Supreme Court, the President, and Congress.

Sources and Operationalization of Data

We first consider the Supreme Court's aggregate position on policy by incorporating the ideal points of the justices as determined by Martin and Quinn (2002). These scholars ascertained the probability for the posterior density of the median justice in any given term. Their code provides for the justices' ideal points on policy positions more accurately than would otherwise be available if only their votes were considered, and it does so by incorporating a dynamic nature of the justices' positions, allowing for these ideal points to vary over time. Since we are interested in the reaction of the political branches to the Supreme Court's position on

policy issues over the long term as well as the Court's response to policy outputs espoused by the political branches, the data compiled by Martin and Quinn are more appropriate than an independent or constant proxy of the Court's ideology (*e.g.*, Segal and Cover 1989).³

We next must consider which cases to include in our time series for the Supreme Court. Vanberg's analysis is instructive (2001: 355): "Some courts are highly visible institutions in their political systems (*e.g.*, the US Supreme Court or the German Federal Constitutional Court). Decisions are disseminated through the mass media and generally receive some public attention. As a result, resisting such courts is more difficult than evading the ruling of a court that lingers in obscurity. Beyond this general level of attention, the degree of actual or potential public attention in a specific case matters. Highly salient decisions with greater public awareness create a more transparent environment." Along these lines, Epstein and Segal (2000) suggest that the presence of a Court decision on the front page of *The New York Times* is a valid measure of contemporaneous evaluations of a case's political salience, in part because these cases are the ones that are most likely to be salient to the justices. Accordingly, we include salient Supreme Court cases in our time series by incorporating the Epstein/Segal measure, since the manner of operationalization they employ dovetails nicely with our theory that the justices are able to influence other elected officials to move toward the Court's policy preferences based on its

³ Martin and Quinn's (2002) measures of ideal points of Supreme Court justices are similar in spirit to Poole and Rosenthal's (1997) D-NOMINATE scores. But, they are different in that Martin and Quinn use Markov chain Monte Carlo methods to fit a Bayesian measurement model to designate ideal points of each justice that are allowed to vary in any pattern imaginable over time without restricting the movements to be linear. Utilizing a measure that allows ideal points to vary is critical because justices' ideological positions are not constant over time. *See* <http://adm.wustl.edu/> for updated data and coding information.

decisions that are widely and publicly distributed (*see* Baird 2004; Unah and Hancock 2006). That is, since the Epstein/Segal salience measure specifically includes those cases the media publicize, it provides us with an indication of when members of Congress or the President might be more likely to worry that the public is paying attention to Supreme Court decisions.

Finally, we are persuaded by the arguments made by McGuire and Stimson (2004) that the ideological direction of the Supreme Court's policies over time is most accurately captured by its reversals, not its decisions to affirm. Briefly, this dichotomy is based on rational litigants, having lost in the forum below, that are more likely to file a *certiorari* petition if they believe they will obtain a favorable reversal at the Supreme Court. Thus, decisions to reverse represent accurate estimations by lower court losers regarding the Court's ideology, and *vice versa*. "In other words, the accurate estimates [reversals] will reflect the prevailing ideology on the Court, while the inaccurate estimates [affirmances] will run counter to it" (1025). In accord with McGuire and Stimson a time series consisting only of reversals is a more valid proxy for the Supreme Court's ideological preferences than one that additionally includes affirmances.

We thus generate our data for the Supreme Court's policy positions over time by taking the mean Martin/Quinn ideal point scores for the majority coalition of each case.⁴ We then aggregate these majority coalition means for all salient cases decided by the Court that reverse the decision below. This produces a time series of annual data points encompassing 1953-1995 that we contend accurately represents the Supreme Court's dynamic policy preferences.

To complete our multivariate analysis we need analogous time series for Congress and the President over this period of time, so we can analyze whether or not the Supreme Court influences policy outcomes in these branches. For the policy points of the House and Senate, we exploit the DW-NOMINATE scores compiled by Poole and Rosenthal (1997).⁵ These scores, based on an extensive analysis of roll call voting, measure the dynamic policy output of Congress, and they are particularly adept at capturing ideological changes in legislative policies over time. For the President's position on policy matters we employ the dynamic liberalism scores ascertained by Stimson, MacKuen, and Erikson (1995). Their measure of presidential policy positions "discriminates both between presidents . . . and within terms" (553). We invert and standardize these Stimson, MacKuen and Erikson (1995) measures for the President so that

⁴ While legislative scholars show that outcomes generally transpire at the chamber median, we believe the mean of the majority coalition is most valid for the policy output of the Supreme Court. First, legislative policy outcomes often shift from the chamber median due to partisan or distributive influences (Aldrich and Rohde 2000; Hurwitz, Moiles, and Rohde 2001; *see* Huber 1992 and Powell 2000 for evidence in parliamentary systems; *cf.* Krehbiel 1991). Next, the Court median has been relatively stable but ideal points of the justices have been more dynamic (Martin and Quinn 2002). Finally, scholars have appropriately utilized the central tendency of the majority coalition (Baird 2004; *cf.* Bonneau, Hammond, Maltzman, and Wahlbeck 2007). We thus operationalize the Court's policy output at the dynamic mean of the majority coalition.

⁵ See <http://voteview.edu/> for data and coding information.

the most conservative policy points are highest on a scale of -1 through $+1$, in order to be consistent with the directionality of the data for the Supreme Court and Congress in our study. With these time series denoting the policy positions of the Supreme Court, Congress, and the President in hand, we next move on to the methodological approach of our study.

Methodology

To reiterate, the separation of powers literature is generally most concerned with whether or not the Supreme Court reacts to the dictates of Congress. Some have argued that the Supreme Court is amenable to congressional suggestions or directives (Ferejohn and Weingast 1992) while others have contended that the justices are sufficiently insulated so as to avoid being coerced by Congress (Segal 1997). Somewhat related, Flemming, Wood, and Bohte (1999) demonstrated that the Supreme Court has the ability to influence the respective agendas of Congress, the President, and the media. Without lending an opinion at this time as to which of these, or perhaps others, provide the most accurate explanation, we raise these disparate findings to illustrate that no consensus exists among scholars concerning the potential influence between and among the various branches of government; indeed, even the direction of causality remains unclear and subject to theoretical and empirical debate.

This implies what some researchers have stated affirmatively, that the policy space among the several branches of government is endogenous in nature (Krause 1996; Rogers 2001). Indeed, many of the theories concerning political behavior in these areas have competing expectations, if in fact there are any specific expectations at all. “Under these circumstances a vector autoregressive (VAR) approach is appropriate” (Flemming, Wood, and Bohte 1999: 85). VAR is a statistical approach to time series that enables the researcher to “estimate large-scale macromodels as unrestricted reduced forms, treating all variables as endogenous” (Sims 1980: 15). More specifically, VAR imposes fewer identifying restrictions in an endogenous system of

equations than more traditional, reduced form methods (such as simultaneous modeling) while allowing for feedback within that system, which enables the researcher to test for causal relationships over time. As Granato and Krause (2000: 525) emphasized: “A [VAR] analysis allows us to make more accurate claims concerning the causal dynamics. . . The relatively unrestricted nature of a VAR approach has the advantage of testing for competing possibilities.” While VAR has its roots in the economic literature (Sims 1980), it has been gaining momentum in its application to various subfields of political science research (*e.g.*, Flemming, Wood, and Bohte 1999; Freeman, Williams, and Lin 1989; Granato and Krause 2000; Holian 2004; Krause 1996; Wood and Peake 1998). Accordingly, VAR is extremely well suited to our purpose of ascertaining the theoretic and causal relationships (Granato and Scioli 2004: 321) among the dynamic policy outputs of the Supreme Court, Congress, and President. In fact, since dynamic endogeneity is likely present in the policy making process (*see* Krause 1996) about which there are competing theoretical expectations, VAR is perhaps the most appropriate methodological approach to investigate the Supreme Court’s influence in the system of separated powers.⁶

VAR specifies all variables as endogenous, thus placing fewer restrictions on the data than structural equation modeling (Wood and Peake 1998); consequently, issues regarding lagged dependent variables are not a concern in VAR (Keele and Kelly 2006). The cost of this approach

⁶ We additionally ran Johansen (1991) tests for cointegration (using critical values specified by Osterwald-Lenum [1992], not Johansen and Juselius [1990]), but found no cointegrating relationships among the data series in this study. Though error-correction techniques ordinarily are employed with nonstationary, cointegrated data, scholars have recently espoused that these are appropriate whether or not unit roots are present (Keele and De Boef 2008). Regardless, these results provide further support that VAR, not error-correction modeling or some other type of time-series analysis, is the appropriate approach for this study.

is that “specific parameter estimates are collinear due to the over-parameterization” (Granato and Krause 2000: 525); thus, coefficients and standard errors such as those produced in more traditional reduced form analyses are not utilized. Instead, Sims (1980), who instigated the VAR approach among social scientists, advised that alternative tests be employed. The first of these concerns block exogeneity tests, otherwise known as Granger causality (Granger 1969; Freeman 1983; McGuire 2004), which assess pair-wise relationships to ascertain causal direction. The other alternatives uncover causal influences through the VAR techniques of impulse response functions, also known as innovation accounting, and variance decomposition (Freeman, Williams, and Lin 1989; Sims 1980). Innovation accounting traces a one standard deviation shock or impulse from each variable’s residuals through the system of variables. Such shocks are essential in VAR analysis in order to reveal the causal nature of the variables by determining whether one endogenous variable in the system has a systematic influence on any of the others.⁷ The other test, variance decomposition, yields the cumulative effect of one variable in the system on the others. Accordingly, impulse response functions and variance decomposition complement each other in the VAR approach (Granato and Krause 2000).

The consequence is that VAR has the ability to estimate both the direction of causality in response to changes within each institution as well as the magnitude of the influences those dynamics have on one another. Further, because VAR makes no assumptions as to which variables are exogenous, it is a conservative test of our hypothesis. This is because a finding of influence of one institution over another in a VAR analysis signifies that this effect occurs even

⁷ These impulses in innovation accounting must not be correlated (*see* Granato and Krause 2000). We utilized EViews, a statistical software program that incorporates Choleski factorization that ensures the innovations are not correlated.

in the presence of any effects in the opposite direction. With most other methodological strategies, such conclusions would not be possible. Moreover, VAR provides valuable information in terms of statistical significance and proportional breakdown on the causal nature of dynamics within the system of equations. While the VAR alternatives “are more indicative of the dynamic sequence among endogenous variables” than Granger causality tests (Granato and Krause 2000: 525), we will report our findings from all of these alternative analyses to determine relationships between and among these branches of government.⁸

One final methodological note concerns the concept of stationarity. Conventional time-series analyses proffer that data be differenced to achieve stationarity, in order to rid the data of the influence of time and thus avoid spurious results. While differencing may be essential for more traditional analyses, such transformation destroys long-term relationships among the data. Time-series scholars have attempted to derive methodologies in which data are not differenced, so as to retain long-term information yet obtain non-spurious results.⁹ Yet, no consensus appears in the literature regarding the appropriate structure of data in VAR analyses. Sims (1980) instructed that data remain in levels so as to preserve long-term relationships without losing statistical efficiency, and several political science studies have heeded Sims’ counsel (*see*

⁸ Because formalization of VAR can be found elsewhere (*e.g.*, Flemming, Wood, and Bohte 1999; Freeman, Williams, and Lin 1989; Granato and Krause 2000; Sims 1980), we do not take up space here to repeat this literature. These sources also describe the manner in which to determine the appropriate lag length for VAR models (in our case, a 3-lag VAR system), which we employ in our analysis by incorporating Sims’ (1980) modified log-likelihood test statistic as well as the Akaike Information and Schwartz Criteria.

⁹ Examples include the Engle-Granger (1987) cointegration method, its progeny fractional cointegration (Hurwitz and Lanier 2004), and VECM modeling (Johansen 1991).

Flemming, Wood, and Bohte 1999; Freeman, Williams, and Lin 1989; Wood and Peake 1998; *cf.* Freeman et al. 1998; Granato and Krause 2000). We also follow the lead of Sims and accordingly do not difference the nonstationary data in our analysis.

Supreme Court Influence in the Separation of Powers

We are interested in determining whether the Supreme Court generally influences public policy over time. Figure 1 illustrates the dynamic nature of the Supreme Court's ideal policy points for its salient reversals from 1953-1995, while the respective policy positions of the President, House, and Senate are found in Figure 2. Ocular inspection demonstrates potentially analogous trends among these institutions, though the method by which all of these political elites attain their respective offices is very different. While interesting, this preliminary evidence provides no confirmation of whether any of these institutions systematically influence the policies of another, let alone advising of the direction of causality if there is such an effect. For that information, we now turn to the tests of our theory.

[Figures 1 and 2 about here]

We portray our Granger causality results in Table 1. There is some evidence that the Supreme Court “granger causes” policies in the Senate, as changes stemming from the Court precede those in the upper chamber at a lag of one year, while the evidence that the Supreme Court precedes changes in the House is somewhat weaker but not trivial. Similarly, significant effects arise in the direction of the President to the Supreme Court, while the Senate has minor effects on the President and House but not the Court.¹⁰ To reiterate, Granger causality does not

¹⁰ As well, there are indications of Granger causality at lag lengths longer than are indicated in Table 1, particularly when the Supreme Court is the independent variable, which further implies that changes in each variable precedes various changes in the others.

ascertain causality in the traditional sense; instead, (near) significant Granger results indicate the potential causal direction (Freeman 1983). Since the Granger findings suggest that the various branches have independent effects on changes in the others in disparate directions, two implications arise. First, there is preliminary evidence of endogeneity among these institutions, which lends credence to employing the VAR approach; second, VAR examinations provide more clarity regarding the nature of causality than Granger tests (Granato and Krause 2000). Accordingly, we now shift the analysis to the VAR tests of innovation accounting and variance decomposition, as we seek to gain more definitive leverage on these issues.

[Table 1 about here]

We present our innovation accounting results in Figure 3, which provides a series of VAR impulse response graphs depicting the influence of one institution when confronted with a shock to its system from the variables in the system. A statistically significant finding is observed in any innovation accounting graph where one of the ± 2 standard error bars (about 95%) surrounding the solid impulse response line breaks the zero (X) axis, because the influence of the variable causing the response is significantly different from zero. In this event, the interpretation is that changes in one variable influence changes in the other over time to a significant degree, whether in a positive or negative direction as provided in that graph. As is usually the case in time-series analyses, these impulse response functions show that the greatest positive effects over time concern each institution's past history.

[Figure 3 about here]

The much more interesting questions concern these institutions' influence on the others. As hypothesized, Figure 3 depicts the Court's dynamic policy outputs having significant, positive effects on all the other institutions, as the policy points of the President and Senate, and to a lesser degree the House, all respond to dynamic changes seen at the Supreme Court. This

evidences that the aggregate public policy dimension of the political branches is influenced by the policy preferences of the Supreme Court, as elected officials apparently recognize and respond to the Supreme Court's influence on public opinion or its well of public support.

Notwithstanding, causality apparently is based in more than one direction, as these results also illustrate an endogenous policy domain (Krause 1996). In particular, the Supreme Court is positively influenced by both the President (*e.g.*, Martin 2006) and the House (*e.g.*, Eskridge 1991; Ferejohn and Weingast 1992); as well, the justices seem to respond to changes in the Senate in a negative direction, suggesting that instead of minding the Senate's preferences, the Court affirmatively rules in the opposite direction of the Senate's positions on policy. As would be expected, the House, Senate, and President are variously influenced by each other, with policies stemming from the White House proving to be the most influential among them. Our findings indicate that the governmental units with the most profound inter-institutional authority are the Supreme Court and the President.

These results are confirmed by the variance decomposition graphs depicted in Figure 4. Variance decomposition measures the forecast error variance of each institution as a proportion of the variance that is being influenced by the several series within the system. "By decomposing this forecast error, we can determine the impact of one variable's forecast on the error in forecasting other variables. Thus, we can measure the effects that variables have on each other over time" (Freeman, Williams, and Lin 1989: 847). Looking at the variance decomposition graphs in Figure 4, it appears that the Supreme Court does not have much of a relative effect on the House's policy output. Yet, over time the Supreme Court exerts tremendous influence over both the Senate and the President. This is particularly the case for the Senate, where the Supreme Court cumulatively determines nearly as much of the Senate's variance as the upper legislative body does on its own. These variance decomposition graphs

suggest that the Supreme Court possesses more than a mere iota of influence over the political branches, thus confirming the impulse response findings. Even so, the Supreme Court does not appear to be impervious to influence from outside its walls, as a nontrivial portion of its own policy dimension cumulatively stems from the outside.¹¹

[Figure 4 about here]

At this point, we should discuss the implications of some of our decision rules regarding methodological and data issues, the first of which concerns the possibility that VAR findings can be influenced by variable order. We checked every permutation in terms of the order of variables (with four endogenous variables, this means 24 different order possibilities), yet our findings remain essentially the same, irrespective of the order in which we present the variables. In particular, the influence of the Supreme Court is not at all affected by its place in the analysis. Thus, we present the VAR estimations in a theoretically appropriate order, which includes placing the Supreme Court as the final variable within the system, in order to moderate its potential influence within this endogenous system. Indeed, when the Supreme Court is placed

¹¹ Our theory provides that the Supreme Court has the ability to influence the other branches based on its standing among the public. There is the possibility that it is not the Supreme Court but instead public opinion that is affecting the positions of Congress and the President. To address this issue, we ran a series of VAR models that incorporate public opinion by utilizing Stimson's (1999) updated public policy mood index. While these models showed that the influence of public opinion is strong, the Supreme Court retained its ability to inspire the policy positions of the political branches, as we found and reported in Figures 3 and 4. We do not report these extra models since they are not necessary for our theory, and to preserve degrees of freedom in the VAR models (Johnston and DiNardo 1997: 305). Nevertheless, the critical point is that the Supreme Court's influence over the other branches remained, even when we controlled for public opinion in the analyses.

first in order in the VAR models, its impact on the other branches is as powerful, perhaps even more so, than is depicted in Figures 3 and 4. Notwithstanding, the Supreme Court's influence on the other branches of government remains impressive.

A second issue relates to our decision to exploit the Supreme Court's salient cases. As stated, we believe that all of the Court's decisions are not created equal, as some cases are more salient than others in the minds of the justices and the public. We base our operationalization of this variable on the findings of Epstein and Segal (2000) in order to create an appropriate proxy for the concept that the media publicize certain judicial decisions, a process that creates a transparent political environment that informs political elites and the public of the Court's preferences (Vanberg 2001). In doing so, however, we necessarily have limited our N to a subset of salient decisions that aggregate into each annual data point. Mindful of this, we checked additional and assorted scenarios with data series that employ more than the Court's salient decisions. Yet, we essentially replicate the results of our VAR analyses when we do not limit the Supreme Court data to salient decisions, in large part because our time series of salient reversals is correlated with its non-salient counterpart at .94. That is, empirically there is little noteworthy difference in the manner Congress or the President reacts to these more essential Supreme Court decisions than otherwise. Nevertheless, we are theoretically justified in restricting our analysis to salient cases, since these are the decisions that enable the Court to inform others of its preferences. Whatever the setup of the models, our findings suggest that the Supreme Court influences the policy positions of Congress and the President over time.

Discussion

“There is a magnetic attraction to the notion of an ultimate constitutional interpreter, just as there is a magnetic pull to the idea of some passkey to constitutional interpretation that will, if properly turned, always open the door to truth, justice, and the American way. But finality, as

Disraeli reminded us, ‘is not the language of politics.’ James Madison would have agreed” (Murphy 1986: 417). While Disraeli, Madison, and Murphy may be on the same page concerning the normative concepts regarding the proper influence between and among the federal branches of government, our findings here suggest otherwise. Not only does the Supreme Court ordinarily have the final word on matters of constitutional import (Segal and Spaeth 2002), it also appears to have the ability to prod the other branches to pay attention to its decisions on policy matters. In fact, when the Supreme Court compels awareness of its preferences by issuing its opinion in salient cases, Congress and the President respond accordingly, as reflected in dynamic changes to their own policy outputs.

More particularly, the representative branches apparently recognize the Supreme Court’s legitimacy and support among the masses, such that its policy declarations influence the aggregate policy outputs of both Congress and the White House. Our models illustrate that both the Senate and President in particular respond to the policy preferences of the Supreme Court’s salient cases over time. This suggests that the judiciary brandishes more power in the policy process than is generally presumed. In this regard, we do not contend that Congress and the President fall in line with the policy behind every salient Supreme Court decision. Instead, we argue that from a macro-institutional perspective (*see* Erikson, MacKuen, and Stimson 2002; Krause 1996; McGuire 2004) the Supreme Court has the ability to influence policy outputs of Congress and the President, with the consequence that the public policies stemming from these branches over time are consistent with the Court’s preferences.

While our paper concerns dynamics at the macro level, perhaps an example of a single Supreme Court case that produced specific policy change would help to drive home the validity of our aggregate findings. In *Cruzan v. Director, Missouri Dept. of Health* (1990), the Supreme Court held that while individuals could choose to refuse medical treatment, laws requiring clear

and convincing evidence that an incompetent individual would have wanted life support removed were not unconstitutional. In response, Congress passed the Patient Self-Determination Act of 1990, which requires that patients be informed about the right to refuse medical treatment, living wills, power of attorney, and similar issues concerning the decision to withdraw life support. In other words, whereas Congress had not previously attended to issues concerning the right to die, soon after the Supreme Court's decision in *Cruzan* Congress passed legislation largely in accord with the preferences expressed by the Court.¹²

Notwithstanding the Supreme Court's influence, we find endogeneity in this policy space, since the Court likewise reacts to presidential and congressional outputs, most particularly from the President and the House. This demonstrates that the justices are constrained to a degree by these other branches, and perhaps public opinion (*see* Mishler and Sheehan 1993). Whether those constraints stem from a fear of punishment or otherwise, it appears that the Court is not quite so independent as some pundits and scholars fear, hope, or expect, since it is compelled to confront and eventually embrace policies stemming from other branches. Yet, because the justices do not seem to heed the Senate's preferences, it cannot be said that the Court's policies are entirely, or even largely, a function of outside constraints.

While our paper primarily addresses the Supreme Court's effect on the other branches, we would be remiss not to mention the authority the President boasts in terms of his ability to influence the policy process. Our findings demonstrate that the President has an impressive effect on the policies espoused by all the other institutions in our analysis. Yet, these effects usually are short term, lasting for just one annual time period, or two at the most. This suggests

¹² Glick (1994) showed that many States that had not previously addressed right to die issues subsequently passed similar laws in accord with the Supreme Court's *Cruzan* decision.

that, while he is able to see his preferences materialize elsewhere as scholars such as Kernell (2006) and Canes-Wrone (2001) have maintained, the President must continually rely on the bully pulpit or other mechanisms to compel adoption of his policies, as long-term legitimacy and clout do not seem to apply to the President.

The implications of our results are two-fold, one methodological, the other substantive. First, we show that the policy process is dynamic and endogenous. These findings, along with insufficient theoretical justifications in the literature to identify particular influences as exogenous, provide us with ample confidence regarding the appropriateness and utility of employing the time-series approach of VAR. That is, we believe that ours is exactly the type of study in which the adeptness of VAR is evident. This is not to say that our research design is always preferred to studies that rely on different data or exploit other methodological approaches. To the contrary, we consider ours a preliminary step in the scientific process of ascertaining whether the Supreme Court can influence public policies, while contemporaneously discovering if the Court in turn is swayed by its counterparts in the federal government. Accordingly, we present an assessment with respect to the endogeneity of the dynamic policy process, one which includes the Supreme Court in the analysis, and VAR is particularly suitable for suggesting initial answers to these questions.

Second, and perhaps more importantly, on a substantive level our findings reveal that Supreme Court decisions have clear import and influence, not only with respect to the state of the law, but also as concerns the public policies that subsequently stem from the political branches. While there has been much debate and interest regarding constraints, or lack thereof, on the Court, our results suggest that the Court is a key player in the policy process, and not simply as an interpreter of the law. As Chief Justice Marshall espoused in *Marbury v. Madison* (1803), it is

the province and duty of the judicial department to say what the law is. Apparently, however, the Court's influence is not limited to this intellectual pursuit.

This has significant implications for the suggested direction of positive political theory with regard to the Court's place in the separation of powers. While most scholars have focused on the question about whether the Court is constrained by other branches, few theorists have considered the possibility that there may be reasons to focus on the mechanisms by which the Supreme constrains other institutions. The notable exception to this is Vanberg (2001, 2005), who argues that this mechanism may be the relatively high public support for the Court compared to other institutions. Nevertheless, there may be alternative or additional mechanisms that have gone unnoticed because of the assumption the Court is the "least dangerous branch," and because it has few powers of the purse or sword, making it a relatively impotent institution because of its dependence on other branches for policy implementation. Our findings suggest that the reality may be more complicated (*see* McGuire 2004).

We have posited that the Supreme Court should be able to effectuate its preferred positions on public policy by espousing salient decisions that consequently influence the political branches to enact policies in line with the justice's collective preferences. We believe our findings are consistent with that supposition. In the end, Supreme Court decisions matter; indeed, they carry quite a bit of weight, and not solely within the judicial branch. For this reason, the justices likely are aware of the significance of their place in the policy process, because the Court's influence can be seen beyond the nature of judicial policy espoused in its decisions. In particular, over time both Congress and the President respond in kind by espousing public policies in harmony with those preferred by the Court. It additionally appears that the Court is not entirely immune to influence from the political branches' preferences as revealed in the policies they promote. Nevertheless, the Constitution isolates the Supreme Court from

democratic processes, yet the Court has the ability to influence public policy within the representative branches of the federal government, reaching far beyond its institutional foundation. Our results therefore present intriguing implications for issues of democratic theory as well as for scholars like us who are interested in the dynamics of inter-institutional politics within the system of separated powers.

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Figure 1.
Ideal Policy Points of Supreme Court in Salient Reversals

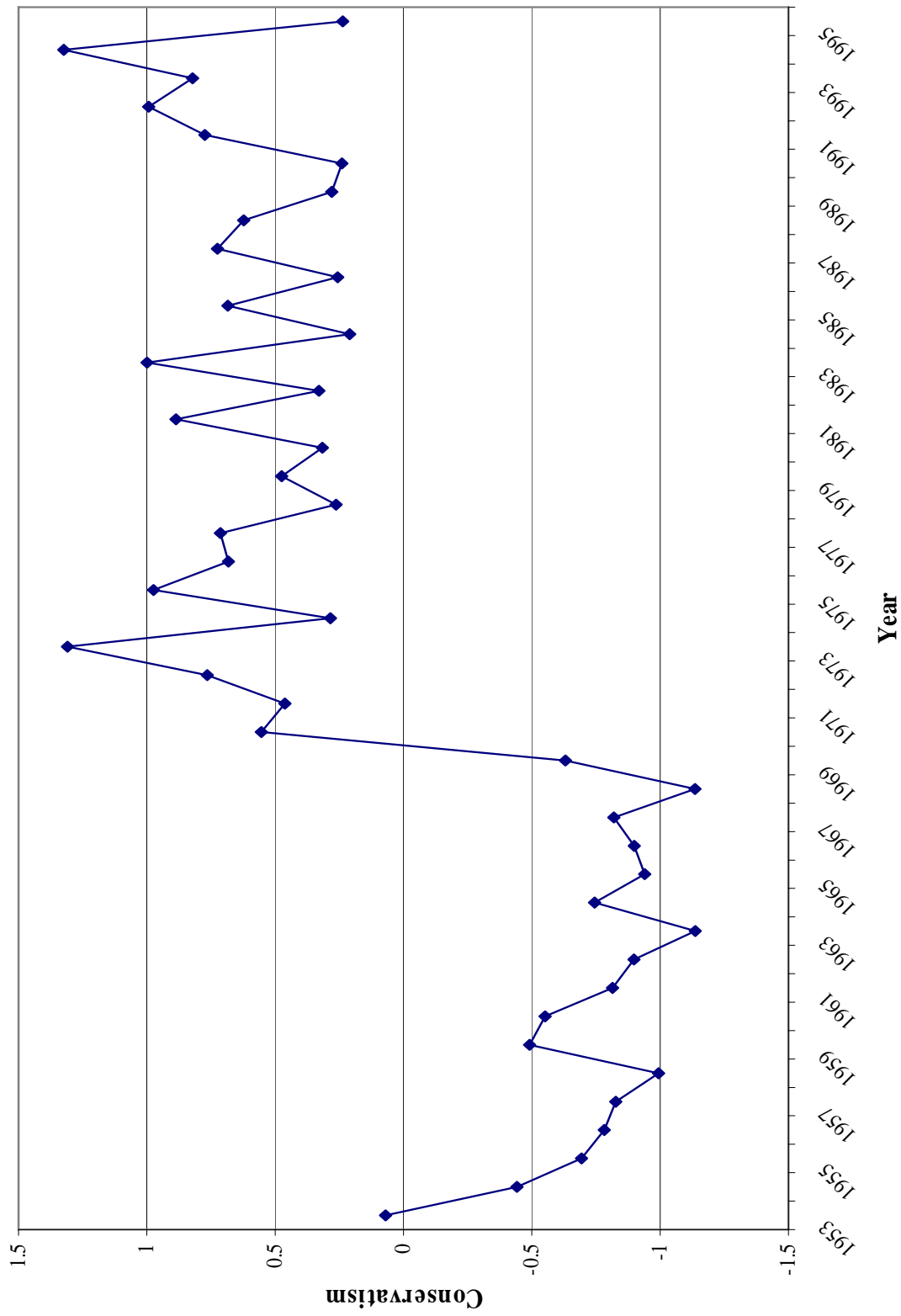
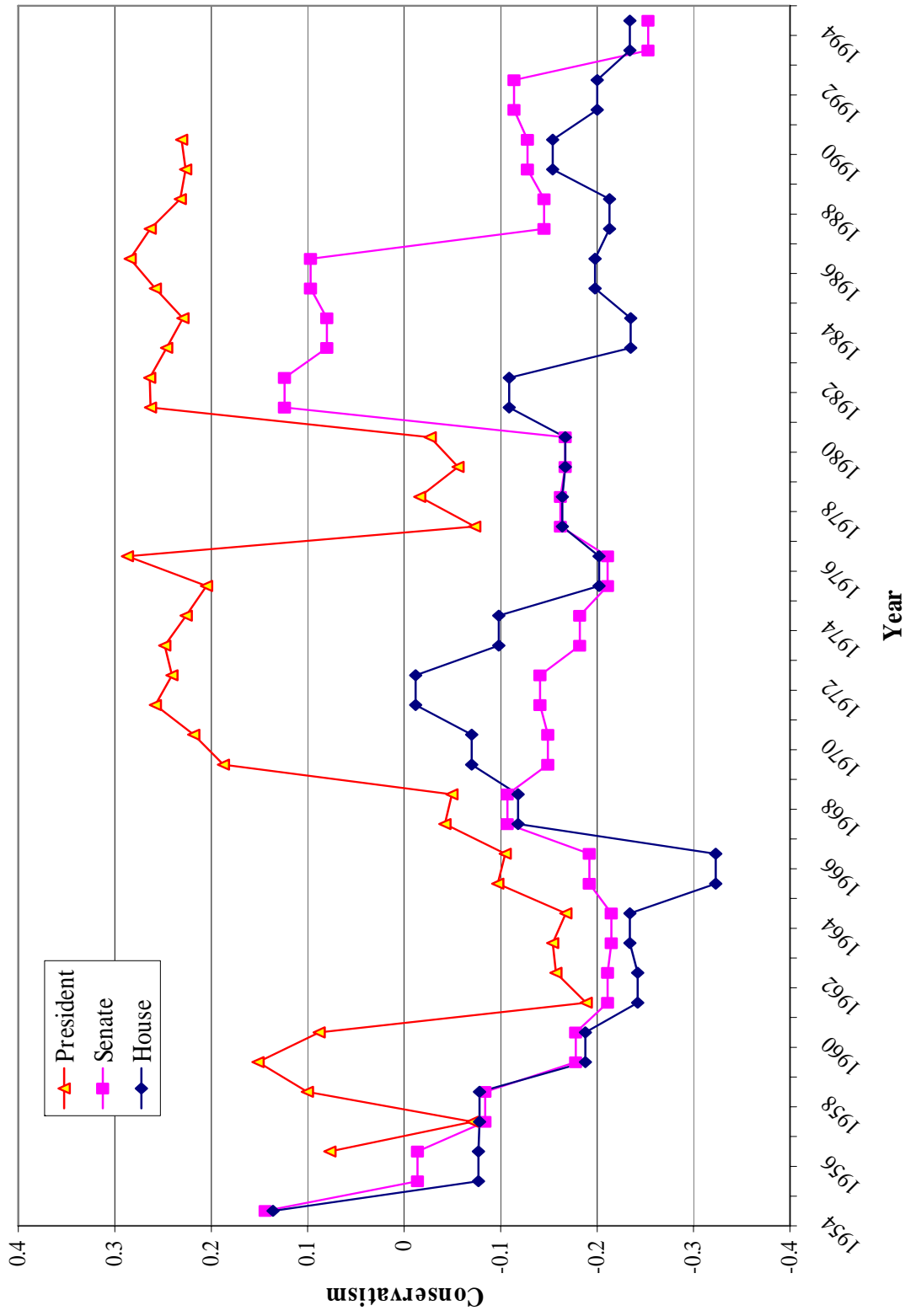


Figure 2.
Ideal Policy Points of the President, Senate, and House



**Table 1. Granger Causality Results:
Pair-Wise Relationships Among Policy Positions of the
President, Congress, and Supreme Court.**

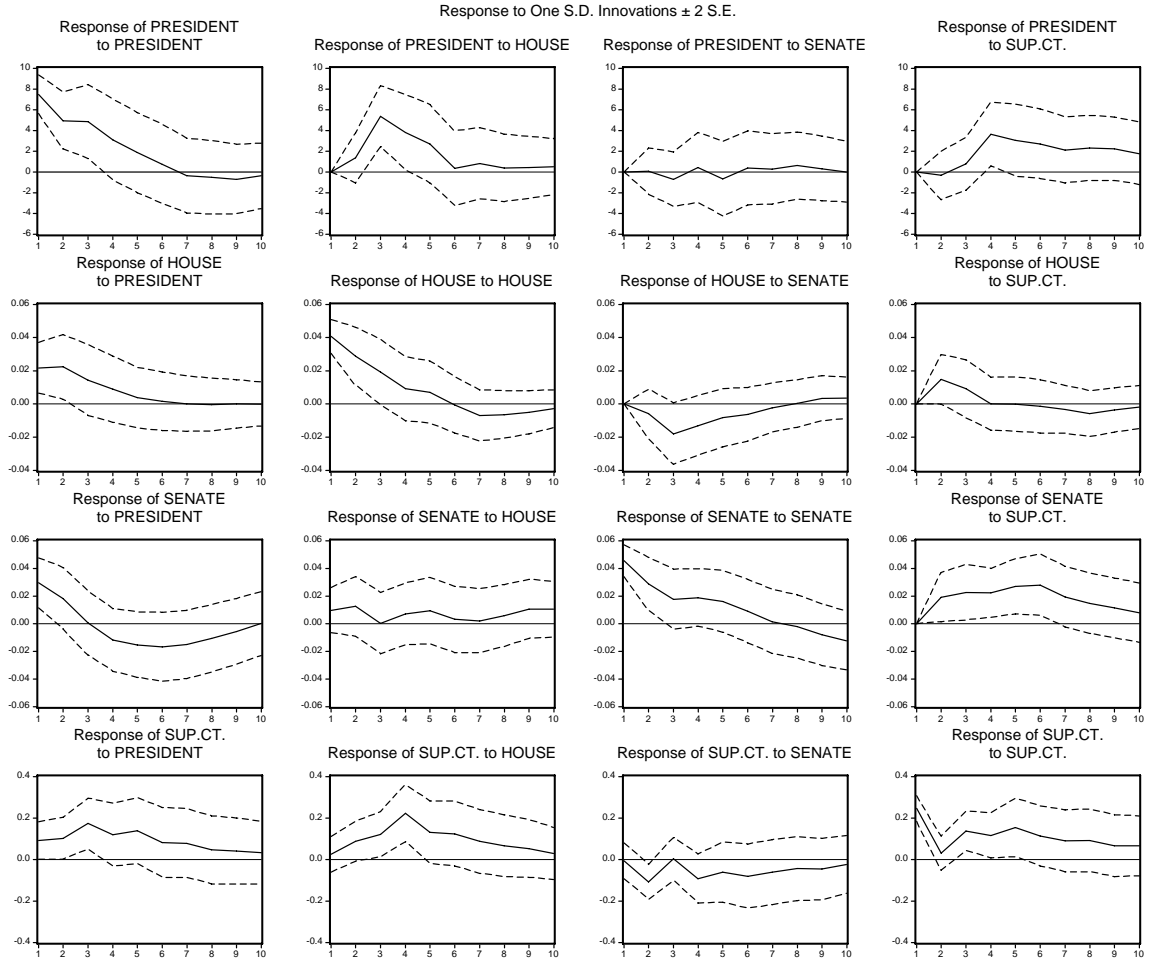
Independent Variable	Dependent Variable	F-stat	p-value	N
Supreme Court	President	.89	.35	34
Supreme Court	House	2.14	.15	41
Supreme Court	Senate	3.11	.09	41
President	Supreme Court	5.61	.02	34
President	House	.02	.88	34
President	Senate	.28	.60	34
House	Supreme Court	.97	.33	41
House	President	1.70	.20	34
House	Senate	1.16	.29	41
Senate	Supreme Court	.01	.91	41
Senate	President	1.76	.19	34
Senate	House	1.82	.19	41

Notes:

Lag structure = 1.

H_0 : Granger causality not present; H_A : Granger causality is present (*see* Freeman 1983 for technical explanation of Granger causality).

**Figure 3. VAR Results:
Innovation Accounting of Policy Positions of the
President, Congress, and Supreme Court**



**Figure 4. VAR Results:
Variance Decomposition of Policy Positions of the
President, Congress, and Supreme Court**

