

Setting a Crash Course with Congress and the President: Supreme Court Agenda Setting in a System of Shared Powers

Ryan J. Owens

Harvard University*

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*Ryan Owens (ryan_owens@gov.harvard.edu) is an Assistant Professor of Government at Harvard University (1737 Cambridge Street, CGIS Knafel Building 408, Cambridge, MA 02138). I would like to thank Ryan Black, Tony Madonna, and Pablo Spiller for their helpful comments. I also would like to thank the Center for Empirical Research in the Law at Washington University in Saint Louis and the Center for American Political Studies at Harvard University for their financial support.

Abstract

I empirically examine separation of powers models to determine whether Congress and the president influence the Supreme Court's agenda. The data suggest that the Court fails to heed the preferences of Congress and the president when setting its agenda. The Court frequently grants review to cases even when it expects to make policy worse for Congress and the president than the existing status quo. Since the agenda stage is the moment in which the Court is most likely to show evidence of a separation of powers influence, these results strongly suggest that the political branches do not systematically influence the Court.

Introduction

Given the importance and controversial nature of many issues, a major conflict with Congress may sometimes be unavoidable; but, any battle, if it must be fought at all, should be fought at the time and under the political conditions most favorable to the cause of the Justice. . . (Murphy 1964, 157)

Do Congress and the president influence the United States Supreme Court? The answer, at least according to strategic separation of powers theory, is yes (Epstein and Knight 1998). Because the political branches possess various tools to reign in wayward Courts, justices will be loathe to deviate from majoritarian preferences. Violating the dominant political will could impugn the Court's legitimacy and provoke damaging repercussions (Mondak 1994). Or so the argument goes.

While strategic SOP *theory* is rich, attempts to test its propositions *empirically* have run into trouble, with most studies (Sala and Spriggs 2004; Spriggs and Hansford 2001; Segal 1997) finding little to no evidence of a separation of powers influence. Still, nearly every SOP analysis focuses exclusively on the Supreme Court's merits decisions. This is potentially problematic because the Supreme Court sets its own agenda—and does so in private, without any need to justify its decisions publicly. Accordingly, the Court might decline to review cases likely to engender hostility from the political branches. What looks at the merits stage like a Court acting without regard to legislative and executive preferences may in fact be a Court that strategically filters out cases at the agenda stage. Left open, then, is the question whether the separation of powers influences how the Court sets its agenda.

Using archival records harvested from the Library of Congress and justices' personal papers, I analyze 430 petitions for review and appeals filed with the Court between its 1953 and 1993 terms. Across every model I test, the Court fails to follow the separation of powers prediction. Simply put, the Court sets its agenda without regard to congressional and legislative preferences. Given that the agenda setting process is the place in which the Court would be most likely to show signs of backing down to Congress and the president,

these results cast serious doubt on strategic SOP theory and notions of inter-institutional dependence.

The Supreme Court's Agenda-Setting Process

When a party in a lower court loses her dispute and wants the Supreme Court to review her case, she files a petition for a writ of certiorari (“cert”) or an appeal with the United States Supreme Court Clerk. The petition is then randomly assigned to one of the law clerks in the “cert pool,” who is charged with writing a preliminary memo (a “pool memo”) which summarizes the proceedings in the lower courts, discusses all claims made in the petition, and concludes with a recommendation for how the Court should treat the petition.¹ The pool memo is distributed to the chambers of the participating justices (Black and Owens 2009).

On a rolling basis as the petitions come in, the Chief Justice—using the pool memos—will compile a “discuss list” of all the petitions that he believes are worth discussion. The Chief circulates this list to the Associate Justices who, in turn, can add petitions to the list that they think merit the Court’s discussion. A petition that makes the discuss list receives at least some form of discussion and a vote by the Court during conference, regardless of

¹The cert pool was created in 1972 as way to reduce the amount of cert petition work done in each individual chamber. Prior to its creation, each chamber independently reviewed every petition for cert (Ward and Weiden 2006, 118). At the time of the pool’s creation, William J. Brennan, William O. Douglas, Thurgood Marshall, and Potter Stewart declined to participate in the pool. With the exception of Justices John Paul Stevens and Samuel Alito, each new justice to join the Court since the pool’s creation have elected to participate in it. Justice Sotomayor, the Court’s newest member (as of this writing in October 2009), has opted initially to participate in the pool, but suggested during her confirmation hearings that she might follow Justice Alito’s path and eventually leave it (Mauro 2009).

whether it is eventually granted or denied review. A petition that does not make the discuss list, however, is summarily denied. The Court meets in private conference roughly once every two weeks to vote on which cases it will hear. Only if four or more justices vote to grant review does the case proceed to the merits stage. Cert votes are entirely discretionary and, unless divulged by the personal papers of a former justice, are completely secret. This secrecy, plus the Court's lack of formal requirements for taking cases, set the stage for strategic agenda setting (Black and Owens 2009; Caldeira, Wright and Zorn 1999; Boucher and Segal 1995; Benesh, Brenner and Spaeth 2002).²

Do the political branches influence how the Court sets its agenda? If Congress and the president influence the Court at all, evidence of such an effect would be found in its agenda decisions. For a host of reasons, the agenda stage is the best place for the Court to bow to pressure from the political branches. For starters, the Court has nearly complete discretion to determine which cases it will hear. There are very few formal requirements forcing justices to hear a case. The Court could thus exercise restraint by avoiding a case without fear of violating a formal rule of review. Relatedly, justices make their agenda decisions in complete privacy. When voting to hear cases, only the justices themselves are allowed in the conference room, thereby removing any fear of looking cowardly to the general public. Indeed, a critical difference between the Court's agenda decisions and its merits decisions is that agenda decisions need not be accompanied by a rationale. Merits decisions require legal support grounded in precedent or some other legal argument. The agenda decision, conversely, is made without any supporting rationale. Thus, justices could back down from Congress and the president but do so silently and without having to notify the public of its passivity.

Existing SOP studies, most of which find no SOP effect, focus almost exclusively on the Court's merits decisions (Segal 1997; Segal and Westerland 2005; Sala and Spriggs 2004; Spriggs and Hansford 2001). The few studies that observe an SOP influence are

²For more information on the agenda setting process see Stern et al. (2002).

limited in important ways. For example, Hansford and Damore (2000) find that justices more *conservative* than the president and both judiciary committees cast more liberal votes than expected; yet, at the same time liberal outlier justices do not moderate so as to avoid legislative rebuke.³ Spiller and Gely (1992) find that the Court renders more pro-labor decisions as Congress becomes increasingly liberal; but, the study does not include the president as a pivotal actor and relies on ADA scores as proxies of legislative ideology.⁴ Harvey and Friedman (2006) find that the 1994 Republican Revolution played a key role in the conservative Court's increased proclivity to strike federal laws after 1994; however, the substantive impact of the study's SOP variable is astonishingly weak: The predicted probability that the Court would strike a federal statute increased from 0.00036 in 1987 to 0.00137 in 2000 as the result of the Court's new position between key pivots in Congress.⁵

Only two studies have examined whether legislative and executive preferences influence the Court's agenda decisions. Epstein, Segal and Victor (2002) examined the percent of statutory interpretation and constitutional interpretation cases that made the Court's docket over time. They argued that because the Court's statutory interpretation decisions are more easily overridden by Congress than its constitutional decisions, the Court will choose to hear fewer statutory interpretation cases and more judicial review cases when it is ideologically at odds with Congress. The study finds that the Court's docket does in fact contain a

³Moreover, the study uses preference estimates for the different branches that do not scale. Justice ideology is measured as the percent of liberal votes a justice cast, while legislative and executive preferences are coded using DW-NOMINATE scores (see also Bergara, Richman and Spiller 2003).

⁴ADA scores have been attacked as poor surrogates of congressional preferences (Lynch 2005).

⁵What is more, since the study does not include the president as a pivotal actor (other than in the Filibuster-Veto model), it is unclear whether these results are the product of an artificially small legislative equilibrium.

higher percentage of statutory interpretation cases during periods of legislative constraint. Nevertheless, the study uses ADA scores to measure congressional preferences and focuses only on cases the Court decided to hear, leading to questions of scaling errors and selection bias. Harvey and Friedman (2009) find that the Court “ducks trouble” with Congress by avoiding cases likely to cause a rift with Congress. Yet, it fails to control for any of the variables associated with agenda setting. Most strikingly, it fails to control for the presence or absence of circuit splits or amici activity, two factors crucial to the Court’s agenda setting decisions (Perry 1991; Stern et al. 2002).⁶ In short, the question of legislative and executive influence remains unanswered.

Explaining Strategic SOP Agenda Setting

The theoretical starting point of the strategic SOP model is that justices are seekers of legal policy who want to etch their policy preferences into law but are constrained by Congress and the president (among other actors) from sincerely pursuing those goals. That is, justices must pursue their goals in an environment in which their choices are a function not only of their own preferences, but also the preferences and likely reactions of their colleagues (see, e.g. Maltzman, Spriggs and Wahlbeck 2000) and the political branches (Epstein and Knight 1998; Rosenberg 1991).⁷

The Court will buckle under congressional and executive preferences because the political branches have the constitutional authority to punish the Court and pass legislation that alters its policies (Epstein, Knight and Martin 2001). Congress can initiate and sup-

⁶Additionally, the model assumes that all statutes are at equal risk of being reviewed by the Court; this assumption, of course, need not be made since, as I point out below, scholars can examine each petition filed with the Court to determine which statute(s) are challenged.

⁷It is worth pointing out that not all advocates of the strategic model support the strategic SOP model. The SOP version is simply one version of the strategic model.

port constitutional amendments to overturn judicial decisions. It can reduce the Court's budget, alter its composition, strip it of jurisdiction, regulate Court procedure, hold judicial salaries constant, and impeach justices (George and Epstein 1992). Perhaps most importantly, Congress can pass legislation that overrides Supreme Court decisions. Since 1975, each Congress has overridden an average of roughly twelve statutory interpretation decisions and, during the same time period, nearly half of the Court's decisions received some type of congressional hearing (Eskridge 1991*b*; Ignagni and Meernik 1994).

Presidents also have influential powers. They can refuse to enforce the Court's decisions and order Cabinet Secretaries and other high-ranking officials to ignore them. They can unilaterally create their own executive policies and shift the policy status quo (Moe and Howell 1999; Black et al. 2007), mobilize interest groups to attack and undermine the Court's decisions (Peterson 1992), and use their agenda-setting power to focus public scrutiny on judicial decisions. And, of course, they can sign or veto override legislation.

The combination of these powers, the argument goes, will force the Court to anticipate how Congress and the president will respond to its decisions and make policy in compliance with majoritarian preferences. (Spiller and Gely 1992; Bergara, Richman and Spiller 2003; Harvey and Friedman 2006; Epstein and Knight 1998). If the Court (i.e., the Court median) perceives that by voting for its most preferred alternative it will create policy out of step with key policymakers, it will moderate its decision so as to make policy that is more favorable to them. Influence from the elected branches, then, forces the Court into majoritarian compliance.

Modeling a Court Constrained by Political Branches

I model the conditions under which the Court might grant or deny review to cases due to an SOP constraint. As I describe more fully below, two conditions must be met before the political branches can constrain the Court. First, the Court median must have an ideal point

outside the legislative equilibrium—the policy space in which there are no alternative points that make all legislative actors at least as well off (Harvey and Friedman 2006). Second, the Court’s decision must make Congress worse off than the existing status quo.⁸ When these two conditions are met, the Court theoretically is constrained and, if strategic SOP theory is correct, should deny review to the case.

The models make the following assumptions: All actors have continuous, single-peaked, symmetric preferences on a unidimensional policy scale and prefer policy that is closest to their ideal points (Sala and Spriggs 2004). There exists a status quo that can be measured on the same unidimensional scale. All actors know each others’ preferences and the policy location of the status quo (Harvey and Friedman 2006). Since the actors’ preferences are categorized fully by the model, they will choose equilibrium strategies even when their votes are not pivotal (Sala and Spriggs 2004). The Court can be expected to set policy at the median justice’s ideal point (Martin, Quinn and Epstein 2005).⁹ The pivotal legislative

⁸I assume that transaction costs prevent Congress and the president from overriding judicial decisions that are improvements over the status quo. This assumption addresses the fact that Congress and the president simply found themselves unable to change the status quo to a policy within the current legislative equilibrium. In other words, I assume that if Congress and the president were unable or unwilling to change the SQ to a policy within the legislative equilibrium, they would not reverse a judicial decision which brings SQ even closer to that set. Owens (Forthcoming) relaxes this assumption and examines whether legislative and executive preferences influence justices’ votes *any* time the Court would sincerely desire to set policy outside the legislative equilibrium. The results of that study are the same as the results here.

⁹The assumption that the median drives outcomes has theoretical appeal (Martin, Quinn and Epstein 2005) and empirical support (Bonneau et al. 2007). It should be noted that Bonneau et al. (2007) also propose an “Agenda Control” model which suggests that the policy content of the Court’s opinions is determined by the preferences of the opinion author,

actors will pursue override legislation only when the Court changes policy in a manner that is worse for them. And, finally, justices want to avoid legislative overrides.¹⁰

For the Court to be constrained by the separation of powers, first, the median justice must be outside the legislative equilibrium. Figure 1 provides a graphical explanation. The House, Senate, President, and Supreme Court are all placed along this spectrum. Figure 1A shows a Court that is inside the legislative equilibrium. The Court in this example is more conservative than the House (the Left Pivot) and Senate but is less conservative than the president (the Right Pivot). Under this configuration, the Court can set policy at its ideal point, J , regardless of where the status quo is located. If the House tried to pass override legislation anywhere to the left of J the president (and Senate) would block it. Conversely, if the president proposed override legislation to the right of J , the House would block it.¹¹

conditioned by the status quo location and the author's need to acquire a majority to set precedent. That model is unhelpful at the agenda-setting stage, however, because justices have no *a priori* knowledge of who will write the majority opinion (Hammond, Bonneau and Sheehan 2005, 224). Even under the Agenda Control model, the median justice's preferences play a critical role by constraining the location of the opinion to the median justice's preferred-to set of the status quo, making the median absolutely essential. In short, while the median's policy position may not—in practice—always win out (Bonneau et al. 2007; Carrubba et al. 2007), justices have good reason to expect it to win out on average. It is the best guess a justice can make at the agenda stage and, therefore, is a reasonable compromise to allow the theoretical analysis to proceed.

¹⁰This assumption accords with those made in nearly all existing SOP models (see, e.g. Segal 1997; Spiller and Gely 1992; Gely and Spiller 1990; Harvey and Friedman 2006; Sala and Spriggs 2004; Bergara, Richman and Spiller 2003). An interesting line of studies analyzes how justices might enlist the aid of Congress in the pursuit of their goals (Spiller and Tiller 1996; Hausegger and Baum 1999).

¹¹The current example ignores the veto override. I test the impact of the veto override

Figure 1B, on the other hand, represents a situation in which the Court may be constrained because the median justice is outside the legislative equilibrium. Whether the Court is so constrained, however, depends on the location of the status quo.

[Figure 1 about here]

The location of the status quo can force a Court into an unconstrained, semi-constrained, or constrained regime.¹² Figures 2 and 3 illustrate. J represents the median justice's ideal point. SQ represents the status quo policy the Court is being asked to review. L is the leftmost pivotal member of the legislative process. R is the rightmost legislative pivot. SQ_L^* represents the Left Pivot's indifference point relative to the status quo. That is, it reflects the policy that the Left Pivot enjoys just as much as the status quo. SQ_R^* is the Right Pivot's indifference point relative to the status quo. $W_L(SQ)$ is the "preferred-to set" for the Left Pivot—the set of policies that the Left Pivot prefers to SQ (Bonneau et al. 2007, 893). $W_R(SQ)$ is the "preferred-to set" for the Right Pivot.

In Regime 1, even though the median justice resides outside the legislative equilibrium, the Court is unconstrained and can render a decision at its ideal point. The Court resides within both the Left and Right Pivot's preferred-to sets relative to SQ . That is, when the Court renders its decision at J , it shifts policy *closer* to both pivots. The result is an improvement for the key legislative actors. The political actors will not respond with override legislation in such a scenario. Thus, the Court will grant review.

[Figure 2 about here]

In Regime 2, the Court is constrained and will decline to review the case. The Court is more liberal than the status quo which, in turn, is more liberal than the Left and Right

below.

¹²For a well-developed discussion of the concept of "regimes," see Moraski and Shipan (1999) and Richards and Kritzer (2002).

Pivots. If the Court granted review to the case and rendered a decision at J , the result would be a net policy loss for the key pivots. Accordingly, they will respond with override legislation that sets new policy somewhere on \overline{LR} . Because the policy resulting from this override would represent a policy loss for the Court—as well as potential damage to its legitimacy—the Court will deny review to the case.

Regime 3, found in Figure 3, shows a semi-constrained Court. In this regime, the Court’s ability to set policy is dependent on the pivots’ preferred-to sets. Look first at SQ_1 . Assume that the Court is represented by J_1 . In this example, the Court could set policy at its ideal point because its decision would be an improvement for both legislative pivots. Assume, however, that after personnel change, the Court median is represented by J_2 . If the Court tried to set policy at J_2 , its decision would be vulnerable to a legislative override. To be sure, setting policy at J_2 would make the Right Pivot better off. Nevertheless, the policy shift would be worse for the Left Pivot. In response, the Left Pivot would propose legislation somewhere on \overline{LR} that makes both it and the Right Pivot better off than J_2 . Anticipating this response, the Court would simply render its decision at $SQ_{L_1}^*$. This is the location in policy space that makes R and J_2 better off, and L no worse off than SQ . Even though the Court cannot set policy at J_2 , its policy decision at $SQ_{L_1}^*$ still reflects a net policy gain for the Court. As such, it would vote to grant review.

Now, assume that the status quo is SQ_2 rather than SQ_1 and that the Court median is again J_1 . The Court in this scenario would be forced to render a decision at R . If the Court rendered a decision at J_1 , it would, of course, improve policy for the Right Pivot but make a worse policy for the Left Pivot. In response, the Left Pivot would propose override legislation somewhere on \overline{LR} . Since the legislation L strategically proposes will always be better for R , R would agree to the override. To avoid this response, the Court would be forced to render a decision on the merits at R . As this is the Right Pivot’s ideal point, nothing L proposes would lead R to move policy away from the Court’s decision. The Court’s policy, then, survives any override attempt. In the end, while the Court cannot set policy at its ideal

point (either J_1 or J_2), the equilibrium policy it adopts nevertheless will be an improvement over the status quo for the Court. Consequently, it will grant review.

[Figure 3 about here]

Regime 4 also shows a semi-constrained Court. Look first at a Court whose median is J_1 . If the Court rendered a decision at J_1 , it would make both legislative pivots worse off than the status quo and they, in turn, would pass override legislation (which could, quite conceivably be worse than the existing status quo for the Court). The Court at J_1 , then, would be forced to render a decision at L , the point on the legislative equilibrium that is closest to it and that avoids an override. L would, of course, block any override attempt by R which seeks to move policy back to the right.¹³ Once again, while the Court cannot set policy at J_1 , its ultimate decision at L is a net gain for the Court which, in turn, will lead it to grant review to the case.

Indeed, this dynamic holds even when the Court falls within the Left Pivot's preferred-to set. Assume that Court personnel changes and J_2 becomes the new Court median. The Court still would be forced to render a decision at the Left Pivot's ideal point. While a decision at J_2 would be better than the status quo for the Left Pivot, the Right Pivot would be worse off. In response, the Right Pivot would propose override legislation either on or to the right of L , depending on where the Court set its policy. Anticipating this response, the Court would render a decision at L . This is the closest point on the legislative equilibrium that avoids an override. Nevertheless, because the Court can shift policy closer to its ideal point, it will grant review to the case.

Combined, then, these four regimes and the strategic expectations derived therefrom

¹³Note that in Regime 4, the Left Pivot *benefits* from the Court's decision. Without the Court's intervention, the status quo would be gridlocked—the pivots could not agree on a policy other than SQ . If, however, the Court gets involved, it could shift policy to the Left Pivot's ideal point.

suggest that if the Court is in an Unconstrained or Semi-Constrained Regime, it will grant review to a case; conversely, if the Court is in a Constrained Regime, it will deny review to a case.

Who Are the Left and Right Pivots? Theories of Legislative Decision Making

Defining who the pivotal legislative actors are is a complicated task. Scholars advocate equally plausible theories of congressional decision making. Some scholars argue that legislation turns on the preferences of the median legislator in each chamber. Other scholars argue that parties and committees exercise gatekeeping control over legislation. Still other scholars contend that super-majority pivots largely dictate legislative outcomes. I remain neutral as to which is correct and therefore apply each of them.

The chamber median model argues that legislative outcomes reflect the preferences of the median legislator in each chamber (Krehbiel 1991, 1995). According to this model, members of Congress are elected with concrete preferences that drive their voting behavior and, as a result, the median member of each chamber controls legislative outcomes (Lawrence, Maltzman and Smith 2006). That is, parties are simply the conglomeration of like-minded members who vote their preferences (Kingdon 1973). Thus, the Left Pivot under the Chamber Median model is the most liberal among the House chamber median, the Senate chamber median, and the president. The Right Pivot is the most conservative among the House chamber median, the Senate chamber median, and the president.

The party gatekeeping model argues that majority party leaders control voting procedures to channel outcomes that are preferred by party members (Cox and McCubbins 2005). To facilitate legislative outcomes that aid their electoral chances, legislators create party leadership, whose function is to solve coordination problems among party members and pass laws that reflect the “brand name” desired by the majority party’s median member. Under

this theory, party leadership will only allow legislation to receive an up or down vote if it will satisfy both the chamber and party medians. That is, the party will only bring legislation to a floor vote when party leaders expect to win. As Lawrence, Maltzman and Smith (2006) state: “[T]he majority party manipulates the amendment agenda so as to restrict the chamber median’s ability to move outcomes towards that legislator’s preferred point and away from the majority party median’s ideal point” (41). In the end, the majority party obtains the outcome it wants while still allowing legislators to vote their sincere preferences on final passage votes (Lawrence, Maltzman and Smith 2006, 41).¹⁴ Under the party gatekeeping model, then, the Left Pivot is the most liberal actor among the majority party medians in each chamber, the chamber medians, and the president. The Right Pivot is the most conservative among the majority party medians in each chamber, the chamber medians, and the president.¹⁵

The committee gatekeeping model argues that legislative outcomes are largely a function of committee preferences (Shepsle and Weingast 1987). When a member proposes a bill, the chamber’s presiding officer refers that bill to the committee with jurisdiction over the subject matter. For the bill to proceed, the committee must report it to the floor. Committees thus possess negative agenda control. That is, they have “the ability to successfully defend the status quo in the face of a parent-chamber majority in favor of change. . .” (Smith 1989, 171). Committees will keep the gates closed when the policy they expect the chamber median to make is worse for them than is the status quo. That is, once the committee

¹⁴The majority party can allow members to vote sincerely on final passage votes, then, because it has already siphoned out the cases in which sincere votes would make the party worse off.

¹⁵There is considerable disagreement among congressional scholars as to whether the majority party in the Senate possesses the same negative agenda control as the House majority party (Cox and McCubbins 2005; Smith 2007). This debate is irrelevant to my study, as the Senate majority party median was never the leftmost or rightmost pivot.

reports the bill to the full chamber, an open rule allows the chamber to amend it down to the median member's ideal point; the result is a bill with the policy location of the parent chamber median. Accordingly, if the committee median is closer to the status quo than to its parent chamber median, s/he will bottle up the legislation in committee. It is only when the committee median is closer to the parent chamber median than to the status quo that s/he will open the gates. Thus, the Left Pivot under the committee gatekeeping model is the most liberal among the Judiciary Committee medians, the chamber medians, each Judiciary Committee Median's indifference point vis-a-vis its parent chamber median, and the president. The Right Pivot is the most conservative among the Judiciary Committee medians, the chamber medians, each Judiciary Committee Median's indifference point vis-a-vis its parent chamber median, and the president.

Finally, the veto-filibuster model argues that the veto and filibuster pivots may control legislative outcomes. The presidential veto and senate filibuster are potential obstacles to the legislative process that any successful legislation may need to overcome (Krehbiel 1998; Primo, Binder and Maltzman 2008). Legislative overrides of presidential vetoes require the consent of two-thirds of both houses. Additionally, individual senators may filibuster legislation until stopped via cloture, which requires the consent of 60 senators.¹⁶ Because these pivots are important actors to assuage, policy change typically requires large, bipartisan coalitions (Krehbiel 1998). The relevant pivots under this model depend on political circumstances. For Democratic presidents, the left pivot is the most liberal of the 146th Representative, the 34th Senator, the House and Senate medians, while the right pivot is the 60th Senator. For Republican presidents, the left pivot is the 40th Senator while the right pivot is the most conservative among the chamber medians, the 290th representative, and the 67th senator.

¹⁶In 1975, the Senate lowered the number of votes needed to invoke cloture from $\frac{2}{3}$ to $\frac{3}{5}$. Prior to that change, the filibuster pivots were the 34th Senator and the 67th Senator.

Data and Methods

To test my hypothesis, I examined 430 paid certiorari petitions and appeals that made the Supreme Court’s discuss list¹⁷ between the 1953-1993 terms in which the petitioner requested the Court either to engage in statutory interpretation over a federal statute or to exercise judicial review by striking one down.¹⁸ My tests of strategic behavior require three sources of data—a measure of the status quo and a measure of each pivotal actor’s preferences (all of which must be on the same scale), and a source to code the relevant factors present at the agenda stage.

To measure the status quo in each case, I followed two different strategies. The first strategy involved locating the status quo by examining the legislative coalition that voted

¹⁷I obtained the Court’s discuss lists from the papers of former Justices Blackmun, Brennan, Burton, Warren, and Douglas. Note that the “discuss list” came about in the early 1970s. Previous to the discuss list, justices relied on the “special list.” All cases were deemed worthy of review unless put on the special list. Special list cases were summarily denied review. Thus, when I state that I analyze all cases that made the discuss list over this time period, I mean simply that I analyze all cases the Court discussed at conference.

One potential concern is that by sampling from the discuss list, my data suffer from selection bias—that strategic justices may refuse to put a case on the discuss list if they expect Congress to override the Court’s decision. This concern is unwarranted. First, numerous justices have stated that nearly all petitions off the list are frivolous (Brennan 1973; Ginsburg 1994, 479). There is little reason to expect the Court to strategically deny review based on the separation of powers in such cases. Second, it takes only one justice to place a case on the discuss list. While one justice might strategically refrain from putting a case on the discuss list, others are likely to be able to vote sincerely and, thus, put the case on.

¹⁸I analyze cases dealing with federal statutes because Congress is most likely to care about them, having already once overcome its collective action problems to pass the legislation.

to pass a bill (i.e., the subsection of the bill being challenged in Court). The second focused on the coalition of judges in the lower court that decided the appealed case. To determine the status quo under the first strategy, I began by reading the “Questions Presented” in over three thousand cert petitions and appeals.¹⁹ If the petitioner requested the Court to interpret a federal statute or exercise judicial review over it, I retained the case. If not, I discarded it.²⁰ After reviewing roughly 3,000 paid cert petitions and appeals, I retained 863 usable dockets.

Once I determined the primary statutory subsection at issue in the case, I analyzed its legislative history to determine the most recent bill that created or modified it. I then entered each bill number into Poole and Rosenthal’s “Vote View” software to determine (1) whether there was a recorded vote on the bill and, (2) if so, what the roll call number of that vote was.²¹ Bills that passed via voice vote were excluded from the analysis, as were bills passed

¹⁹The Questions Presented explain which precise subsection the petitioner has invoked for review. When the Questions Presented was not clear on the subsection, I looked to the “Constitutional and Statutory Provisions Involved” section, which often quotes the main statute at issue.

²⁰To mitigate against the threat of multiple issues involved in a case, I included only those petitions or appeals in which the petitioners invoked one primary statute or subsection thereof.

²¹If the bill went to conference and both chambers recorded a vote on the conference report, I coded *SQ* as the average common space score between the two chambers. When only one chamber recorded a vote on the conference report, I coded *SQ* as the common space score retrieved for it. Since both chambers are voting on the exact same bill (the conference report), the cutpoints for the two chambers theoretically should be identical. If there was no conference report (i.e. the final passage vote was the last vote), I looked to see if there was a recorded final passage vote on the bill. If so, I coded *SQ* as the average of the final passage votes for both chambers. If there was a recorded final passage vote

unanimously, since there is no usable roll call data to determine their policy in common space. In total, out of the 863 petitions and appeals involving a federal statute, I was able to retain 430 observations with usable roll call data. Following Sala and Spriggs (2004, 202) I then located the relevant DW-NOMINATE roll call coordinates for each recorded bill and linearly transformed those coordinates into Common Space.²² This gave me a measurement of the status quo in the same policy space as the ideal points of justices, legislators, and presidents.

As an alternative way of measuring the status quo, I examined the Judicial Common Space scores of the judges presiding over the dispute in the federal court below (Epstein et al. 2007). The Judicial Common Space maps lower court judges' ideological preferences on to the same scale as members of Congress and the president (and the Supreme Court). That is, using the preferences of appointing presidents and senators, the JCS estimates the ideal points of lower court judges in a policy space that scales across institutions. Thus, when the petition arose from a federal circuit court or a three-judge district court panel, I coded the status quo as the JCS score of the median judge on the panel. In cases where a lower court judge filed a dissent or special concurrence I coded the status quo as the midpoint between the two judges in the majority. If the lower court reviewed the case en banc, I coded the status quo as the median judge in the en banc majority.²³

To code the preference of justices, members of Congress, and the president, I relied on Poole and Rosenthal's Common Space data and the Judicial Common Space (Poole

in only one chamber, I coded *SQ* with that score The VoteView software can be found at <http://www.voteview.com/>.

²²I regressed each member's DW-NOMINATE scores for the Congress in which the roll call vote was held. I then used the parameters estimated from this model to linearly transform the DW-NOMINATE coordinates into Common Space (Sala and Spriggs 2004, 202).

²³When the case was appealed from a one-judge district court, I followed the coding methodology of Giles, Hettinger and Peppers (2001) and Epstein et al. (2007).

and Rosenthal 1997; Epstein et al. 2007). These data place actors in the same ideological space and provide measures of actors' policy preferences that are directly comparable across institutions (i.e. between Congress and the Court) and over time. By coding the status quo as discussed above, I can directly compare the status quo with the policy location of the Supreme Court and the legislative pivots.

My dependent variable looks at whether the Court granted review to the docketed case. It takes on a value of 1 if the Court granted review to the case and 0 if it did not grant review. My key covariate is *Constrained Court*, which takes on a value of 1 when the Court is constrained (i.e., in Regime 1 or its mirror), and takes on a value of 0 when the Court is semi-constrained or unconstrained (i.e., in Regimes 1,3, and 4 or their mirrors). I control for a host of additional factors that might lead the Court to grant or deny review to a case. My source for these data are the preliminary cert pool memos written in each case which I obtained by traveling to the Library of Congress and searching through the papers of former Justices Blackmun, Brennan, Burton, Douglas, and Warren.²⁴ These data span the 1953-1985 Court terms. My source for the 1986-1993 terms come from Epstein, Segal and Spaeth (2007).

To control for the political salience of the case, I examined the activity of organized interests at the Court's agenda stage. That is, *Amici* is a count of the total number of amicus curiae briefs filed both in support of and in opposition to the petition for certiorari (Caldeira and Wright 1988). *Dissent Below* takes on a value of 1 if the pool memo in the case notes a dissent in the court below; 0 otherwise. *Reverse Below* equals 1 if the intermediate court reversed the trial court; 0 otherwise. Additionally, I code *Conflict Below* as 1 if the cert pool writer noted a conflict in the lower courts over the correct interpretation and/or application of federal law; 0 otherwise. I also controlled for the position of the Solicitor General. If the SG requests review be granted (either as petitioner or as an amici advocating the grant of

²⁴For terms prior to the adoption of the cert pool, I read through the cert memos written by Justices Burton's and Douglas's law clerks.

review), *US Support* takes on a value of 1; 0 otherwise. If the SG was respondent or filed an amicus brief opposing review, *US Oppose* takes on a value of 1; 0 otherwise.²⁵ Finally, I examine whether the lower court struck down the federal statute at issue. If so, *Lower Court Strike* takes on a value of 1; 0 otherwise.

Results

Figure 4 presents the results of the SOP model for each theory of legislative decision making. The solid circles are the parameter estimates and the horizontal lines represent the 95 percent confidence intervals for those estimates based on robust standard errors. The controls perform largely as expected. As Figure 4 shows, the coefficient on *Constrained Court* in every model of legislative decision making fails to achieve statistical significance. Take first the Chamber Median model. This model argued that when the Court was more liberal than the status quo, the House and Senate chamber medians, and the president, it would strategically decline to review the case. The results, however, do not support such an inference. While the coefficient on *Constrained Court* in the Chamber Median model is negative, it does not approach conventional levels of statistical significance. To underscore this point, I calculated the predicted probability the Court would grant review to a case, depending on whether it was constrained or not. The difference in the predicted probabilities of granting review between a constrained Court and an unconstrained or semi-constrained Court in each legislative model are never significant. For example, under the Chamber Median model, the predicted probability that the Court will grant review to a case if it is unconstrained or semi-constrained is 0.116 [0.050, 0.183]. The predicted probability that a constrained Court will grant review to the case is 0.0806 [0.024, 0.1368]. While the

²⁵The Court sometimes calls for the views of the Solicitor General at which point the SG's office essentially is forced to make a recommendation in the case. Controlling for invitations does not change my results.

difference of -0.036 [-0.102, 0.029] reflects a decrease in the predicted probability of a grant vote, the interval around the average difference between the predicted probabilities contains 0, which means that I cannot reject the null hypothesis that there is no separation of powers influence.²⁶

What is more, in the Party Gatekeeping model, Committee Gatekeeping model, and Filibuster-Veto model, the coefficient (while not statistically significant) is signed in the *positive* direction, suggesting that the Court is more likely to grant review to a case when theoretically constrained by the separation of powers. In short, the Court made its agenda decisions without regard to how a shift in the status quo would effect Congress and the president—and it did so in every model of legislative decision making I tested.

[Figure 4 about here]

Models that employ my second method of coding the status quo produce similar results. Figure 5 presents the difference in predicted probabilities of a constrained Court voting to review a case versus an unconstrained or semi-constrained Court electing to review that case. As Figure 5 shows, the difference between the predicted probability of a constrained Court and unconstrained or semi-constrained Court voting to review is *never* statistically significant in any of the legislative models.²⁷ That is, the interval around the average difference between the predicted probabilities contains 0, which means that I cannot reject the null hypothesis that there is no separation of powers influence. Simply put, there are no systematic differences between the probability that a constrained or non-constrained Court will grant review to cases.

[Figure 5 about here]

²⁶Predicted probabilities calculated while holding all other variables at their median or modal values.

²⁷These results also hold up under alternative specifications of the standard errors.

To check the robustness of these findings, I engaged in a number of analyses. First, I refit all of my models using alternative specifications of the standard errors. I re-estimated every model using asymptotic standard errors instead of robust standard errors. None produced results supportive of the SOP model. Second, I refit all the models comparing only the constrained Court with the unconstrained Court (i.e. omitting observations where the Court was semi-constrained). The results still did not support the SOP prediction.²⁸ Third, I estimated the Bayesian Information Criterion (BIC) for every model, comparing the BIC in the SOP model to the BIC in a controls-only model.²⁹ The model with the smallest BIC is the best model given the data (Primo, Binder and Maltzman 2008). In every comparison of SOP models to controls-only models, the controls-only BIC was at least 4.352 smaller than the SOP model, providing positive support for a non-SOP model of agenda-setting (Long and Freese 2006, 113).

Finally, I re-estimated each model using a Bayesian probit model and received similar results. I estimated each model in R using the `MCMCprobit` command as implemented by Martin, Quinn and Park (2008). The model was run for 10,000 Gibbs iterations after a burn-in period of 1,000 iterations. The posterior distributions reveal no separation of powers influence on the Court, as the 95% credible intervals for *Constrained Court* always contain 0.

In the end, no matter the test, the results lead to the same inference—legislative and executive preferences do not play a systematic role in how the Court shapes its agenda. The SOP model performs no better empirically at the agenda stage than it does at the merits

²⁸I refit these models as well using asymptotic standard errors. The results were equally unresponsive.

²⁹As Bonneau et al. (2007, 901) explain, the BIC “compares two nonnested models by looking at the Bayes Factor, which reduces to the ratio of posterior odds.” The BIC, in essence, compares non-nested by “comparing the probability that each model is the true model given the observed data” (Bonneau et al. 2007, 901).

stage.

Discussion

The data presented here suggest that the Court fails systematically to heed the preferences of key pivots in Congress and the executive when setting its agenda. Perhaps this finding should come as no surprise. After all, the transaction costs Congress must incur to pass legislation—let alone legislation that overturns the decision of an esteemed coordinate branch—are steep, and justices know it (Segal 1997). The process is riddled with nuanced veto pivots that even scholars have only recently begun to understand. If dedicated scholars lack a full understanding of the complexities of the legislative process, surely justices do as well. Indeed, given the uncertainty around a legislative response, perhaps the most rational decision a justice might make is one that ignores legislative preferences and focuses instead on judicial colleagues.

Of course, it is possible that the models used in this analysis and in other SOP studies are simply too blunt to detect SOP behavior. Perhaps justices play the SOP game using instruments heretofore unstudied. Perhaps our measures of preferences are correlated with the same factors that lead justices and members of Congress to vote, biasing the studies against finding an effect. Still, that numerous studies nearly all arrive at the same conclusion suggests that SOP models do not explain how the Court actually behaves.

How might scholars and policymakers respond to a Court potentially out of line with majoritarian preferences? One response is to do nothing. An independent Court, after all, may provide a safeguard against the misguided actions of current interests. Anti-majoritarian behavior from the Court may provide a “credible commitment” (Miller 2000) to the rule of law and reign in wayward politicians. An alternative response, however, might provide stiffer challenges to the Court’s anti-majoritarian ways. Since “a central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences

of citizens,” (McCubbins, Noll and Weingast 1987, 243) the Court’s counter-majoritarian behavior may need to be reconciled against evolving concepts of democratic rule. One option suggested by legal scholars is to impose term limits on Supreme Court justices (Calabresi and Lindgren 2006*a,b*) to ensure frequent rotation in office. If members of the dominant political coalition have a greater opportunity to sit on the Court, the argument goes, the Court will be less likely to deviate from the majoritarian will.

While the normative arguments about judicial independence remain volatile, the empirical results have become quite stable: An overwhelming number of studies now find that Congress and the president do not systematically influence the Supreme Court. This study adds to them in a unique way by examining whether the political branches influence the Supreme Court’s agenda. In many respects, the agenda stage is the stage in which the Court is most likely to show evidence of a separation of powers influence. As such, its absence speaks volumes. Indeed, combined with existing work which finds little to no evidence of an SOP influence during the Court’s merits decisions (Segal 1997; Sala and Spriggs 2004) and work (Hettinger and Zorn 2005; Eskridge 1991*a,b*) that highlights legislative overrides of Supreme Court decisions—actions that should never happen if the Court acted strategically to avoid overrides—these results question whether scholars should move on to more profitable approaches that can explain institutional behavior on the Court. The Court, it would appear, is perfectly willing to set a crash course with Congress and the president when setting its agenda.

References

- Benesh, Sara C., Saul Brenner and Harold J. Spaeth. 2002. "Aggressive Grants by Affirm-Minded Justices." *American Politics Research* 30(3):219–234.
- Bergara, Mario, Barak Richman and Pablo T. Spiller. 2003. "Modeling Supreme Court Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28(2):247–280.
- Black, Ryan C., Anthony J. Madonna, Ryan J. Owens and Michael S. Lynch. 2007. "Adding Recess Appointments to the President's 'Tool Chest' of Unilateral Powers." *Political Research Quarterly* 60(4):645–654.
- Black, Ryan C. and Ryan J. Owens. 2009. "Agenda-Setting in the Supreme Court: The Collision of Policy and Jurisprudence." *Journal of Politics* 71(3):1062–1075.
- Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman and Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51(4):890–905.
- Boucher, Jr., Robert L. and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57(3):824–837.
- Brennan, William J., Jr. 1973. "The National Court of Appeals: Another Dissent." *University of Chicago Law Review* 40(3):473–485.
- Calabresi, Stephen G. and James Lindgren. 2006*a*. The Problem of the Prolonged Tenure of Justices. In *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger C. Cramton and Paul D. Carrington. Carolina Academic Press.
- Calabresi, Stephen G. and James Lindgren. 2006*b*. "Term Limits for the Supreme Court: Life Tenure Reconsidered." *Harvard Journal of Law and Public Policy* 29:770–877.

- Caldeira, Gregory A. and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82(4):1109–1127.
- Caldeira, Gregory A., John R. Wright and Christopher J.W. Zorn. 1999. "Sophisticated Voting and Gate-Keeping in the Supreme Court." *Journal of Law, Economics, & Organization* 15(3):549–572.
- Carrubba, Clifford, Barry Friedman, Andrew D. Martin and Georg Vanberg. 2007. "Does the Median Justice Control the Content of Supreme Court Opinions?" Presented at the Second Annual Conference on Empirical Legal Studies.
- Cox, Gary W. and Mathew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. New York: Cambridge University Press.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23(2):303–325.
- Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press.
- Epstein, Lee, Jack Knight and Andrew D. Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50(2):583–612.
- Epstein, Lee, Jeffrey A. Segal and Harold J. Spaeth. 2007. "Digital Archive of the Papers of Harry A. Blackmun." Available online at <http://epstein.law.northwestern.edu/research/BlackmunArchive/>.
- Epstein, Lee, Jeffrey A. Segal and Jennifer Nicoll Victor. 2002. "Dynamic Agenda Setting on the U.S. Supreme Court: An Empirical Assessment." *Harvard Journal on Legislation* 39(2):395–433.

- Eskridge, Jr., William N. 1991*a*. “Overriding Supreme Court Statutory Interpretation Decisions.” *Yale Law Journal* 101(2):331–455.
- Eskridge, Jr., William N. 1991*b*. “Reneging on History? Playing the Court/Congress/President Civil Rights Game.” *California Law Review* 79(3):613–684.
- Gely, Rafael and Pablo T. Spiller. 1990. “A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases.” *Journal of Law, Economics, & Organization* 6(2):263–300.
- George, Tracey E. and Lee Epstein. 1992. “On the Nature of Supreme Court Decision Making.” *American Political Science Review* 86(2):323–337.
- Giles, Michael W., Virginia A. Hettinger and Todd Peppers. 2001. “Picking Federal Judges: A Note on Policy and Partisan Selection Agendas.” *Political Research Quarterly* 54(3):623–641.
- Ginsburg, Ruth Bader. 1994. “Address to the Annual Dinner of the American Law Institute—May 19, 1994.” *American Law Institute Proceedings* 71:324–331.
- Hammond, Thomas H., Chris W. Bonneau and Reginald S. Sheehan. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court*. Stanford University Press.
- Hansford, Thomas G. and David F. Damore. 2000. “Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making.” *American Politics Quarterly* 28(4):490–510.
- Harvey, Anna and Barry Friedman. 2006. “Pulling Punches: Congressional Constraint on the Supreme Court’s Constitutional Rulings, 1987-2000.” *Legislative Studies Quarterly* 31(4):533–562.

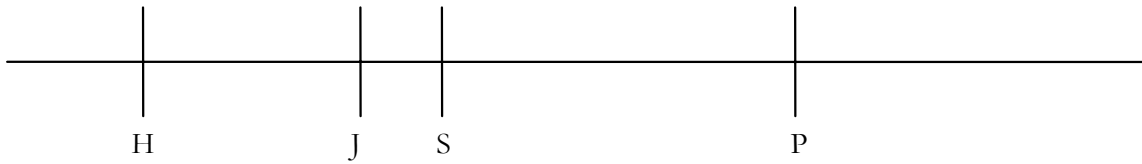
- Harvey, Anna and Barry Friedman. 2009. "Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda." *Journal of Politics* 71(2):574–592.
- Hausegger, Lori and Lawrence Baum. 1999. "Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation." *American Journal of Political Science* 43(1):162–185.
- Hettinger, Virginia A. and Christopher Zorn. 2005. "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court." *Legislative Studies Quarterly* 30(1):5–28.
- Ignagni, Joesph and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47(2):353–371.
- Kingdon, John. 1973. *Congressmen's Voting Decisions*. Harper and Rowman & Littlefield.
- Krehbiel, Keith. 1991. *Information and Legislative Organization*. Ann Arbor: University of Michigan Press.
- Krehbiel, Keith. 1995. "Cosponsors and Wafflers from A to Z." *American Journal of Political Science* 39(4):906–923.
- Krehbiel, Keith. 1998. *Pivotal Politics*. University of Chicago Press.
- Lawrence, Eric D., Forrest Maltzman and Steven S. Smith. 2006. "Who Wins? Party Effects in Legislative Voting." *Legislative Studies Quarterly* 31(1):33–69.
- Long, J. Scott and Jeremy Freese. 2006. *Regression Models for Categorical Dependent Variables Using Stata*. 2nd ed. College Station, TX: Stata Press.
- Lynch, Michael. 2005. Are They Asking the Right Questions? Assessing Interest Group Scores Using Item Response Theory. In *Annual Meeting of the Midwest Political Science Association*.

- Maltzman, Forrest, James F. Spriggs, II and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
- Martin, Andrew D., Kevin M. Quinn and Jong Hee Park. 2008. "MCMCpack for R." Software package available for download at <http://www.mcmcpack.wustl.edu>. Version 0.9-4 (released 3/8/08).
- Martin, Andrew D., Kevin Quinn and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83(5):1275–1322.
- Mauro, Tony. 2009. "The Supreme Court Cert Pool: Sotomayor Joins It, Lawyers Attack It." *The National Law Journal* September 22. URL: <http://www.law.com/jsp/article.jsp?id=1202433962900>.
- McCubbins, Mathew, Roger Noll and Barry Weingast. 1987. "Administrative Procedures As Instruments of Political Control." *Journal of Law, Economics, and Organization* 3:243–277.
- Miller, Gary. 2000. "Above Politics: Credible Commitment and Efficiency in the Design of Public Agencies." *Journal of Public Administration, Theory, and Practice* 10:289–327.
- Moe, Terry M. and William G. Howell. 1999. "The Presidential Power of Unitary Action." *Journal of Law, Economics, & Organization* 15(1):132–179.
- Mondak, Jeffrey J. 1994. "Policy Legitimacy and the Supreme Court: the Sources and Contexts of Legitimacy." *Political Research Quarterly* 47(3):675–692.
- Moraski, Bryon J. and Charles R. Shipan. 1999. "The Politics of Supreme Court Nominations: A Theory of Neoinstitutional Constraints and Choices." *American Journal of Political Science* 43(4):1069–1095.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

- Owens, Ryan. Forthcoming. "The Separation of Powers and Supreme Court Agenda Setting." *American Journal of Political Science* 54(2). American Journal of Political Science.
- Perry, Jr., H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Peterson, Mark A. 1992. "The Presidency and Organized Interests: White House Patterns of Interest Group Liaison." *The American Political Science Review* 86(3):612–625.
- Poole, Keith and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. Oxford University Press.
- Primo, David A., Sarah A. Binder and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52(3):471–489.
- Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96(2):305–320.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Sala, Brian R. and James F. Spriggs, II. 2004. "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* 57(2):197–208.
- Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1):28–44.
- Segal, Jeffrey A. and Chad Westerland. 2005. "The Supreme Court, Congress, and Judicial Review." *North Carolina Law Review* 83:101–166.
- Shepsle, Kenneth A. and Barry R. Weingast. 1987. "The Institutional Foundations of Committee Power." *American Political Science Review* 81(1):85–104.

- Smith, Steven S. 1989. *Call to Order: Floor Politics in the House and Senate*. Washington, D.C.: Brookings.
- Smith, Steven S. 2007. *Party Influence in Congress*. Cambridge University Press.
- Spiller, Pablo T. and Emerson H. Tiller. 1996. "Invitations to Override: Congressional Reversal of Supreme Court Decisions." *International Review of Law and Economics* 16(4):503–521.
- Spiller, Pablo T. and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *RAND Journal of Economics* 23(4):463–492.
- Spriggs, II, James F. and Thomas G. Hansford. 2001. "Explaining the Overruling of U.S. Supreme Court Precedent." *Journal of Politics* 63(4):1091–1111.
- Stern, Robert L., Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller. 2002. *Supreme Court Practice*. 8th ed. Washington, D.C.: The Bureau of National Affairs.
- Ward, Artemus and David L. Weiden. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York University Press.

(A) NO SOP CONSTRAINT



(B) SOP CONSTRAINT

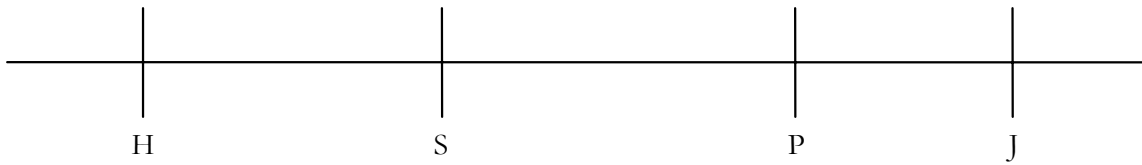


Figure 1: Context and the Separation of Powers. H =House. S =Senate. P =President. J =Supreme Court. In this Figure, the House is the Left Pivot and the President is the Right Pivot.

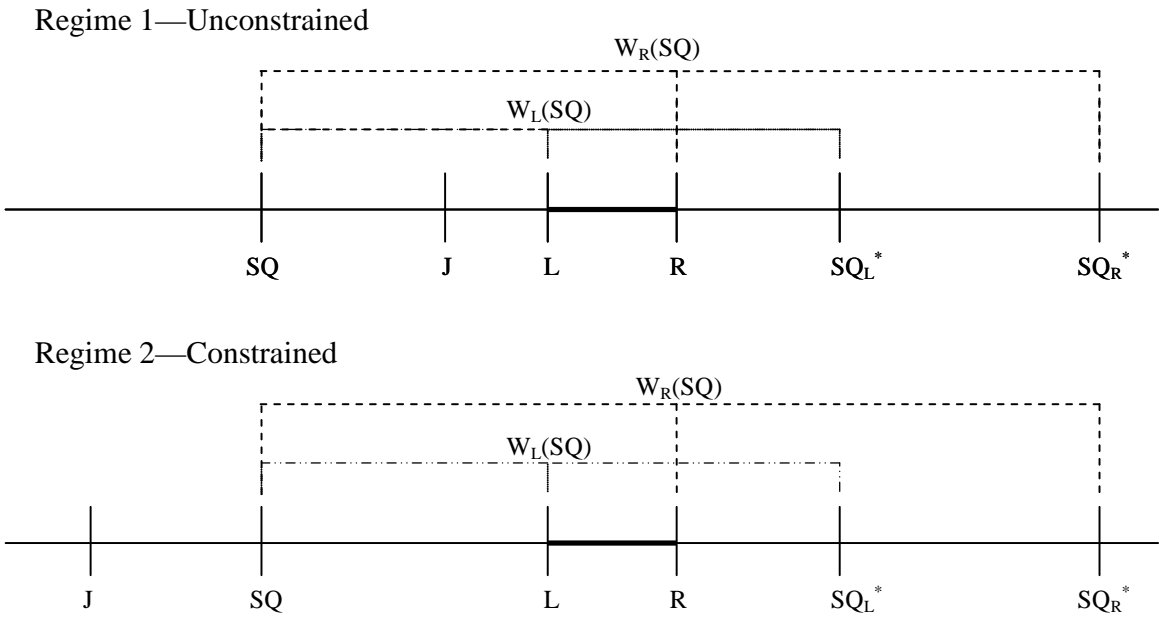
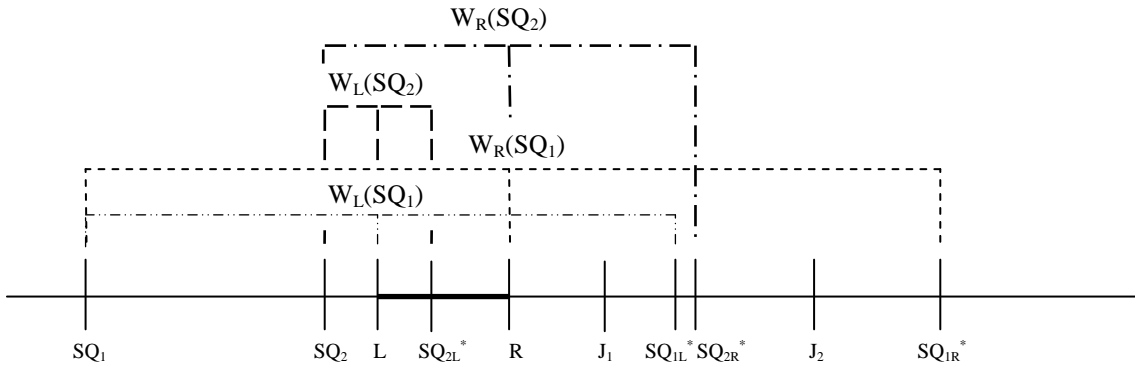


Figure 2: Context and the Separation of Powers. J =Court Median. SQ =Status Quo. L =Left Pivot. R =Right Pivot. SQ_L^* =Left Pivot’s Indifference Point Vis-a-vis SQ . SQ_R^* =Right Pivot’s Indifference Point Vis-a-vis SQ . $W_L(SQ)$ is the “preferred-to set” of SQ for the Left Pivot. $W_R(SQ)$ is the “preferred-to set” of SQ for the Right Pivot.

Regime 3—Semi-Constrained



Regime 4—Semi-Constrained

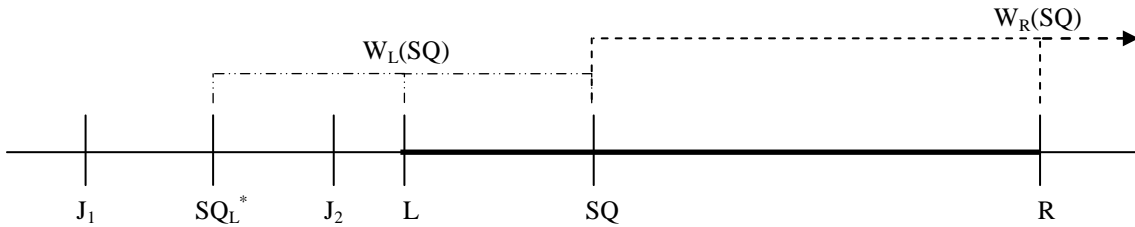


Figure 3: Context and the Separation of Powers. J =Court Median. SQ =Status Quo. L =Left Pivot. R =Right Pivot. SQ_L^* =Left Pivot's Indifference Point Vis-a-vis SQ . SQ_R^* =Right Pivot's Indifference Point Vis-a-vis SQ . $W_L(SQ)$ is the "preferred-to set" of SQ for the Left Pivot. $W_R(SQ)$ is the "preferred-to set" of SQ for the Right Pivot.

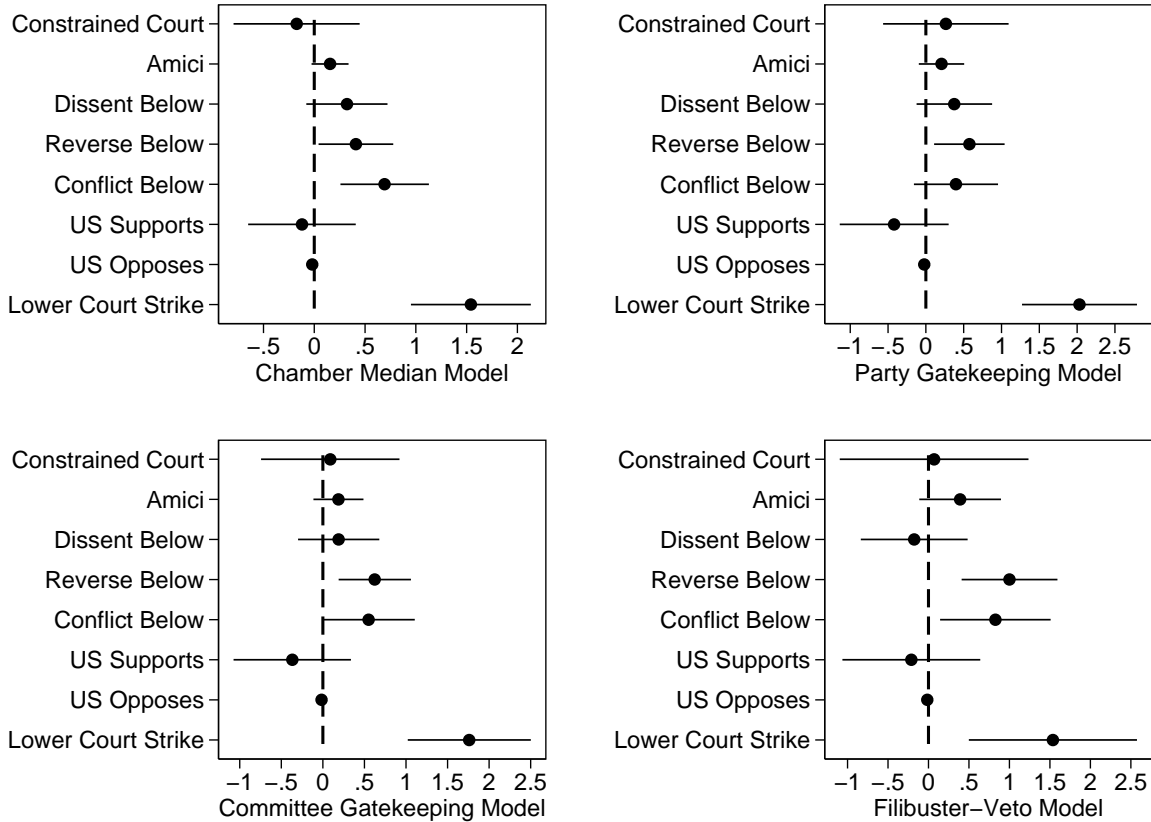


Figure 4: Probit model estimates of Court’s decision to grant review to a case. Dependant variable in each model is whether Court grants review. The solid circles are the parameter estimates and the horizontal lines represent the 95 percent confidence intervals for those estimates based on robust standard errors. Coefficient on *US Oppose* is negative and statistically significant in Party Gatekeeping and Committee Gatekeeping models. The parameter estimate for the constant term in the chamber median model is -1.242 [-1.577, -.907], -1.386 [-1.828, -.943] in the party gatekeeping model, -1.360 [-1.752, -.976] in the committee gatekeeping model, and -1.574 [-2.103, -1.046] in the Filibuster-Veto model. $N=264$ in the Chamber Median model, 180 in the Party Gatekeeping model, 191 in the Committee Gatekeeping model, and 117 in the Filibuster-Veto model. Different number of observations are the result of unique legislative equilibria under each legislative model. Wald $\chi^2=50.53$ for the Chamber Median model, 49.05 for the Party Gatekeeping Model, 45.96 for the Committee Gatekeeping model, and 33.17 for the Filibuster-Veto model, all of which are significant at the .001 level.

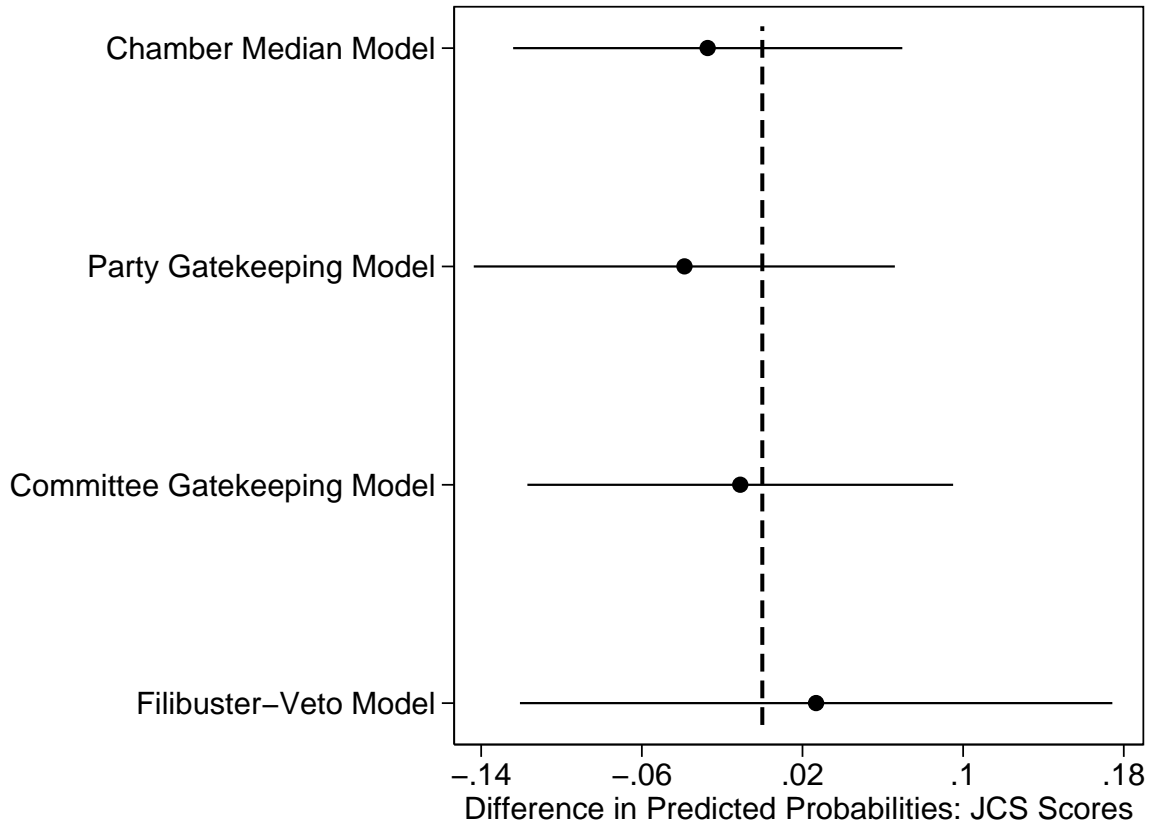


Figure 5: Predicted probabilities in the difference between Constrained Court and Unconstrained and Semi-Constrained Court per legislative model using the Judicial Common Space scores of lower court judges to determine the status quo. The solid dot is the point estimate and the vertical whiskers represent 95 percent confidence intervals around that estimate. These values were calculated using `prvalue` in the `SPost` series of commands implemented in `Stata 10` by Long and Freese (2006). All other variables are held at their mean or median values. $N=426$ in the Chamber Median model, 278 in the Party Gatekeeping model, 299 in the Committee Gatekeeping model, and 203 in the Filibuster-Veto model. Different number of observations are the result of unique legislative equilibria under each legislative model.