

CONGRESSIONAL PREFERENCES, PERCEPTIONS OF THREAT, AND SUPREME COURT DECISION MAKING

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Previous research examining the impact of extra-Court factors on Supreme Court decision making has developed conflicting theoretical perspectives supported with limited empirical evidence. In an attempt to better assess the influence of Congress on Court decisions, we develop a theoretical model specifying the conditions under which congressional preferences might constrain justices' votes on the merits. More specifically, we argue that previous congressional overrides in an issue area and case-level interest group activity make congressional preferences salient for the justices. In these threat situations, the justices will be most likely to shift their final votes on the merits in a manner congruent with the preferences of Congress. Based on our logit analysis of data on all orally argued statutory cases from 1963 to 1995, we find mixed support for our hypotheses and conclude that there are limited conditions under which congressional preferences may influence a justice's vote.

Recent research provides substantial support for the claim that Supreme Court justices act strategically in response to the presence of intra-Court constraints (e.g., Epstein & Knight, 1998; Maltzman & Wahlbeck, 1996; Wahlbeck, Spriggs, & Maltzman, 1998). There is, however, little systematic evidence suggesting the existence of external constraints on judicial decision making. While exploring the possibility that the policy preferences of other political actors might constrain the Court, scholars have developed conflicting theoretical perspectives and offered only limited empirical examinations of their models. Those who do incorporate a substantial empirical component into their research begin with differing theoretical perspectives and, not surprisingly, arrive at contradictory conclusions. For example, Spiller and Gely (1992) develop a formal rational choice model of congressional constraint and conclude that congressional preferences consis-

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tently constrain the Court, whereas Segal (1997), arguing from an attitudinal perspective, finds that justices are not significantly influenced by Congress.

Despite the insights offered by each, we contend that formal statements of the rational choice argument propose unrealistically high levels of external constraint, whereas the attitudinal model underestimates the influence that other political actors can have on judicial behavior. Our argument falls between these two positions by focusing on the *conditions* under which Congress might constrain judicial decision making. Specifically, we posit that Supreme Court justices will be most constrained by congressional preferences when they have reason to believe that Congress will alter the Court's decision in an unfavorable manner. That is, a justice will be more likely to consider the preferences of Congress when Congress poses a credible threat. Moreover, we argue that congressional threat is composed of two elements: prior congressional overrides of Court decisions and level of interest group activity at the Court.

We empirically examine these hypotheses using data on all Supreme Court statutory decisions from 1963 to 1995 in which oral arguments were heard. While also controlling for the potential effects of justice ideology and public opinion, we estimate a logit model to examine the impact of congressional preferences on the probability of a justice voting in a liberal direction. Although our hypotheses are not fully supported by our results, we find that under a specific set of conditions congressional preferences may influence justices' final votes on the merits. In other situations, however, justices appear to be relatively unconstrained by Congress.

THE SUPREME COURT AND THE SEPARATION OF POWERS

For years, judicial scholars have considered the role of the external political environment and its potential influence on Supreme Court decision making. To this end, scholars have examined the dynamic relationship between the Court and public opinion (e.g., Caldeira, 1987; Flemming & Wood, 1997; Mishler & Sheehan, 1993), the role of the Court in partisan realignments (e.g., Funston, 1975; Gates, 1987),

the potential impact of interest group participation on Court decisions (e.g., Caldeira & Wright, 1988; Songer & Sheehan, 1993), and the extent to which the Court generally supports majoritarian preferences (Dahl, 1957).

However, despite Murphy's (1964) classic discussion of the strategies that justices might pursue when facing a hostile Congress, it is only with the relatively recent emergence of rational choice explanations of judicial behavior that scholars have begun to rigorously examine how the policy preferences of Congress might directly constrain Supreme Court decision making. Rational choice theorists assert that justices are strategic and take into consideration the policy preferences of actors both internal and external to the Court (see Epstein & Knight, 1998). As a consequence, these theorists argue that justices will not vote or develop legal rules in a sincere fashion if doing so provokes Congress into overturning the Court's ruling and establishing a policy outcome least desired by the justices.

In their development of one of the first separation of power theories of statutory decisions, Gely and Spiller (1990) argue that the Court must take into account the policy preferences of the House, Senate, and president. When the ideal point of one or more of these actors changes, the Court may need to respond by altering its policy outputs to avoid having its decisions overturned. This theory is then illustrated with two cases: *Motor Vehicle Manufacturers Association of the United States, Inc. et al. v. State Farm Mutual Automobile Insurance Co. et al.* (1983) and *Grove City College v. Bell* (1984). In subsequent research, Gely and Spiller (1992) extend their theory to account for constitutional decision making and again provide case studies in support of their model.

Other scholars also provide anecdotal examples of strategic Supreme Court deference to congressional preferences. Epstein and Walker (1995) examine the Court's behavior in *Ex parte Milligan* (1866) and *Ex parte McCordle* (1869). Based on their analysis of these two cases, they conclude that both Congress and the president can constrain the decisions made by policy-maximizing justices. Elsewhere, Knight and Epstein (1996) also provide an example of constraint-driven strategic behavior with their game theoretic interpretation of Justice Marshall's acquiescence to Jefferson's immediate policy goals in the early 1800s.

A few studies employ more systematic tests of the impact of external constraints on judicial behavior. Of these, two are particularly notable. Spiller and Gely's (1992) game-theoretic analysis suggests that the Court will be constrained when both Congress and the president are either more conservative or more liberal than the Court. They develop three models of congressional decision making and find that for all three models the Court follows congressional preferences. Whereas these scholars do ultimately perform empirical tests with a series of econometric models, their analysis is limited to cases involving labor relations.

In contrast to Spiller and Gely's findings, Segal (1997) suggests that congressional policy preferences do not affect the justices' decisions. While also testing various models of judicial decision making under congressional constraint, Segal demonstrates that individual justices do not consistently alter their votes in accordance with the preferences of Congress. Finding no evidence of constraint, Segal concludes that the attitudinal model most accurately describes judicial behavior and that justices are not particularly responsive to the policy preferences of the other branches of government.

While distinguishing themselves by systematically testing their hypotheses, the research of Spiller and Gely (1992) and Segal (1997) is open to both theoretical and empirical criticism. Most notably, Spiller and Gely assume that justices are always both aware of and concerned about congressional preferences. These assumptions lead them to conclude that the decisions of rational, strategic justices will not be overturned—at least in the short term. However, Eskridge (1991) presents data indicating that a significant number of Court decisions are overridden by Congress. Moreover, many of these overrides occur within a year or two of the Court decision suggesting that justices do not always accurately adjust their decisions in a manner congruent with congressional preferences.

On the other hand, Segal may underestimate Congress' capability to override Court decisions. By conceptualizing Congress as not presenting a credible threat to Court decisions, the attitudinal model also ignores the frequency of congressional overrides. Surely the justices must consider multiple overrides per year to be an indication both of congressional attentiveness and capability. Moreover, Segal's specification of the rational choice hypothesis (which he seeks to discredit)

assumes that faced with a shift in congressional preferences, a justice will exhibit a statistically significant change in the percentage of annual liberal votes cast across all cases and issue areas. This approach may set an unrealistic standard, and, by aggregating votes in such a manner, it possibly overlooks strategic behavior occurring at a finer level of analysis.

In sum, while offering much insight into the potential relationship between external political constraints and Supreme Court decision making, the extant literature is characterized by contradictory theoretical models and a dearth of systematic empirical studies. To better understand the nature of the relationship between Congress and the Court, it is necessary to develop an improved theoretical explanation specifying the conditions under which justices might be constrained by congressional preferences. In the following sections, we develop a theory of external political constraint that falls between the formal rational choice and attitudinalist positions. This model is then tested with an individual-level analysis of the justices' votes in cases spanning more than 30 years and across all issue areas.

THREAT SITUATIONS AND CONGRESSIONAL CONSTRAINT

Scholars have identified several ways in which Congress might attempt to exert influence over the Supreme Court. For example, Congress can alter the Court's appellate jurisdiction, keep judicial salaries static, or initiate constitutional amendments in response to unfavorable Court decisions.¹ However, the most direct and frequent manner in which Congress alters the Court's statutory decisions is through the passage of override legislation. Through the use of overrides, Congress can supersede the power of the judicial branch and change Supreme Court statutory decisions that are incongruent with congressional preferences.

The justices sitting on the Court must be aware of the congressional power to override statutory decisions. For this reason, rational choice scholars (e.g., Spiller & Gely, 1992) contend that the Court will only put forth decisions that are compatible with the policy preferences of Congress. This argument, however, may oversimplify a more condi-

tional relationship. Specifically, we suggest that for a chamber of Congress to initiate override legislation, three conditions must be present. First, the Court's ruling must deviate from the dominant policy preference of that chamber. Second, the chamber must be aware of the deviation. Third, the chamber must consider the decision important enough to warrant expending the costs associated with the legislative process. Given the unwieldy and time-consuming nature of the legislative process, the potential for the use of overrides is limited. As Segal (1997) points out, many rational choice scholars have ignored this latter condition.

It then follows that Supreme Court justices must attempt to take into account the presence or absence of these conditions when ascertaining the likelihood of a congressional override effort. However, given imperfect information with regard to both the policy preferences of Congress and the level of importance of a particular Court case to Congress, a justice will behave in a relatively unconstrained manner unless they have reason to believe that Congress is likely to initiate and pass override legislation.² That is, a justice will not feel particularly constrained by congressional preferences unless the Court is operating under a cloud of congressional threat; the greater the level of perceived threat, the more constrained a justice will be. In the absence of a perceived threat, justices will feel more comfortable supporting a decision that may be incompatible with congressional preferences.

How and when will a justice feel threatened by Congress? We propose that there are two components to this concept of threat.³ First, the Court will see Congress as a threat when Congress has recently overridden Court decisions. Recent overrides provide a simple cue for justices to monitor the desire and willingness of Congress to initiate override legislation. Further, we argue that this cue will be issue area specific. For example, if Congress has overturned three decisions concerning federal taxation in the past year, the justices will feel a degree of congressional threat when considering other cases in this particular issue area. The more recent the overrides in the issue area, the greater the perceived threat.

In addition, we argue that interest group participation can increase the degree of threat that the Court faces when deciding a case. Interest groups play the critical role of information conduit between the Court and congressional committees (Henschen & Sidlow, 1989). That is,

interest groups with a stake in the outcome of a Supreme Court case are likely to lobby Congress if they are unhappy with the decision. Ignagni and Meernik (1994) find that interest group participation at the Court leads to an increased probability of congressional response (but see also Meernik & Ignagni, 1997). It follows that justices may need to be more mindful of congressional policy preferences if a case has drawn the attention of a number of organized interests. In addition, interest groups often provide information concerning congressional preferences in their amicus curiae briefs (Epstein & Knight, 1999). Therefore, interest group participation in a case might lead to a reduction in uncertainty with regard to Congress' preferences and intentions.

There is, however, one important precondition necessary for the perception of congressional threat to influence the behavior of the justices. As illustrated in Figure 1, a justice will only be constrained when he or she is either to the left or right of both Congress and the president (position J_A or J_C in Figure 1) in ideological space (see Spiller & Gely, 1992). In this situation, the Senate, House, and president will be more likely to agree to an alternative outcome to that of the Court ruling. We label a justice in this position an *ideological outlier*. On the other hand, if at least one of these actors is to the left of a justice while another is to the right (position J_{B1} or J_{B2}), then the justice will be able to pursue his or her policy goals in an unconstrained manner. In this scenario, due to the incongruence of interchamber preferences, it is unlikely that both chambers of Congress will agree on an outcome different from that preferred by the justice.⁴

When faced with an ideologically distant and threatening Congress, there are several different tactics that a policy-minded justice can pursue. Murphy (1964) suggests that when considering a case involving a potential conflict with Congress, a strategic justice might avoid granting a writ of certiorari, decide the case on narrow procedural issues, or concede to the preferences of Congress. Although it is quite likely that the first two tactics are also employed, we focus on the third. Thus, we argue that the presence of a threat situation will influence a justice's final vote on the merits. That is, if a justice is an ideological outlier (position J_A or J_C) vis-à-vis the other branches of government, then as the level of perceived threat rises, his or her vote will increasingly become a function of congressional preferences. From this, we derive the following hypotheses.

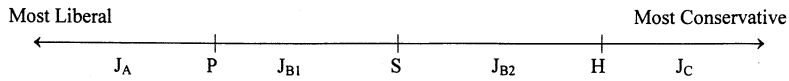


Figure 1: Spatial Model of Actor Preferences

NOTE: P = President; S = Senate; H = House; J_A and J_C = Constrained Justice; and J_{B1} and J_{B2} = Unconstrained Justice. The positions of the president, Senate, and House can be interchanged without affecting whether a justice is constrained.

Hypothesis 1: Within a particular issue area, the more recent congressional overrides of Supreme Court decisions there have been, the more an outlier justice's vote will be a function of congressional preferences.

Hypothesis 2: The greater the level of interest group participation in a case, the more an outlier justice's vote will become a function of congressional preferences.

MODEL SPECIFICATION

To empirically examine these hypotheses, we gathered data on all orally argued statutory cases from 1963 to 1995. The dependent variable is a justice's final vote on the merits: coded 1 if in a liberal direction and 0 if conservative.⁵ Thus, the unit of analysis is each individual vote ($N = 15,355$). Due to the dichotomous nature of the dependent variable, we use a logit model to test our hypotheses.⁶ We estimate the model with robust standard errors that allow for nonindependent residuals associated with multiple observations on each justice.⁷

To investigate the impact of the independent variables of primary interest, it is necessary to place both chambers of Congress, the president, and the justice in question on the same ideological dimension and in the same metric. For measures of presidential and congressional ideology, we use Poole and Rosenthal's (1997) W-Nominate scores.⁸ More specifically, we employ the W-Nominate scores of the median members of the House and Senate judiciary committees as a measure of relevant congressional ideology. We use the judiciary committee medians because these committees are most often responsible for dealing with Court decisions and proceedings (Esckridge,

1991). Because the judiciary committees are much more likely to deal with Court decisions, it follows that these are the committees that the justices will pay attention to.⁹

To capture the policy preferences of the justices, we develop an issue-specific measure of ideology by using each justice's lifetime percentage of liberal votes in constitutional cases in each of Spaeth's (1997) 13 issue areas.¹⁰ We use votes in constitutional cases for two reasons. First, these votes should be a measure of sincere preferences because constitutional decisions cannot be overridden by congressional statute. Therefore, these votes should not reflect any strategic behavior due to congressional constraint. Second, this measure is derived from data different from that included in our analysis (statutory cases).¹¹

Using these measures of ideology, it is possible to determine, for each year, which justices are ideological outliers (*vis-à-vis* the president and Congress) and in which issue areas. If the preferences of the House, Senate, and president are all more conservative than those of a justice, then this justice is considered to be an ideological outlier facing a conservative Congress (Conservative Congress = 1).¹² Thus, a justice occupying position J_A in Figure 1 is coded as an ideological outlier with a conservative Congress. Past research suggests that any justice in this position will be constrained and vote more conservatively than he or she would otherwise (Spiller & Gely, 1992).

If the preferences of the House, Senate, and president are all more liberal than those of a justice, then this justice is considered to be an ideological outlier facing a liberal Congress (Liberal Congress = 1). Thus, a justice occupying position J_C in Figure 1 is coded as an ideological outlier with a liberal Congress. Previous work indicates that a justice in this position is more likely to vote liberally than they otherwise might (Spiller & Gely, 1992).

If a justice is more liberal than one actor but more conservative than another, then the justice is not considered an ideological outlier and both of the dummy variables described above will equal 0.¹³ A nonoutlier justice is expected to be unconstrained by congressional preferences. It is important to note that within a given issue area, justices move in and out of outlier status as new presidents take office and the composi-

tion of Congress changes. Also, in a given year, a justice might be considered an ideological outlier, for example, with regard to his or her preferences over civil rights cases but not an outlier with regard to his or her preferences over economic cases.

Because we hypothesize that congressional preferences will matter most when justices perceive a level of congressional threat, we develop measures for the two elements of threat that we identify. Our first indicator of threat (Overrides) is measured as the number of recent congressional overrides within the specific issue area of the case at hand.¹⁴ Specifically, we define this variable as an additive linear decay function: $y_t = x_t + .8(x_{t-1}) + .6(x_{t-2}) + .4(x_{t-3}) + .2(x_{t-4})$, where x is the number of overrides within the given issue area and within year t . For example, if Congress overturned one due process decision in 1970 and past and future Congresses overturned none, then the threat factor would be 1 in 1970, .8 in 1971, .6 in 1972, and so on. If Congress did overturn another due process decision in 1974, then the threat factor for that year would be 1.2. These scores are then standardized according to proportion of docket space allocated to that issue area.¹⁵ Data on overrides from 1967 to 1990 were obtained from Eskridge (1991). Data from 1960 to 1966 and 1991 to 1995 were gathered from *United States Code Congressional and Administrative News* in accordance with Eskridge's coding rules. To test our hypothesis concerning the impact of prior overrides, we simply interact our overrides measure with the variables designating a justice as an ideological outlier (Conservative Congress \times Overrides and Liberal Congress \times Overrides). For the former interaction term, we expect to find that it has a negative impact on the probability of a liberal vote, whereas for the latter we expect a positive effect.¹⁶

Organized interest participation at the Court (Number of Amici) is captured with a simple measure derived from Gibson's (1997) *United States Supreme Court Judicial Database—Phase II*. We take the total number of amicus curiae briefs filed with a case and then divide it by the average number of briefs filed per case for that year.¹⁷ To test our second conditional hypothesis concerning the impact of congressional preferences, we interact amicus participation with the ideological outlier variables (Conservative Congress \times Number of Amici and Lib-

eral Congress \times Number of Amici). We expect the former interaction variable to have a negative coefficient and the latter to have a positive coefficient.

In addition to the policy preferences of Congress, other factors external to the Court may influence judicial decisions. Most notable of these is public opinion. Although the dynamics of the relationship between Supreme Court decisions and public opinion have not yet been fully specified, existing empirical evidence suggests that the Court is responsive to changes in public opinion (Flemming & Wood, 1997; Mishler & Sheehan, 1993; Stimson, MacKuen, & Erikson, 1995). The influence of public opinion on Court decisions is controlled for in our model with the inclusion of Stimson's annual public policy mood measure (Public Mood) (see Stimson, 1991) lagged by 1 year. This measure increases as the liberal mood of the public increases and, thus, it is expected that there will be a positive relationship between public mood and the probability of a liberal vote.

Finally, the factor usually held most responsible for determining final votes on the merits is the attitudinal predispositions of the justices. Abundant evidence of this influence on judicial behavior has been provided repeatedly (for a summary, see Segal & Spaeth, 1993). We control for the effect of justices' policy preferences by including the issue-specific measure of justice ideology described above. The coefficient for this variable (Justice Ideology) should be positive in direction.

RESULTS

The results of our logit model of the probability of a justice voting liberally in a statutory case are presented in Table 1. The chi-squared statistic is highly significant, indicating that the model has more explanatory power than a model with only a constant term included. Thus, we can conclude that the independent variables add to the fit of the model. The control variables conform to expectations and are highly statistically significant. Not surprisingly, a justice's ideological predispositions exert a positive and statistically significant effect on the probability of casting a liberal vote. This simply means that liberal justices are more likely to vote liberally and vice versa. Public

TABLE 1
Logit Model of the Probability of a
Justice Voting Liberally in a Statutory Case

<i>Independent Variable</i>	<i>Estimated Coefficient</i>	<i>Robust Standard Error</i>
Conservative congress	-.318***	.092
Conservative Congress × Overrides	.579	.465
Conservative Congress × Number of Amici	-.020	.043
Liberal congress	.002	.095
Liberal Congress × Overrides	.903*	.549
Liberal Congress × Number of Amici	-.083	.028
Justice ideology	.030***	.003
Public mood	.022***	.006
Constant	-2.617***	.336
Number of observations	15,355	
χ^2 (10 degrees of freedom)	493.05***	

NOTE: The component variables of the interaction terms listed above (i.e., Overrides, Number of Amici) are also included in the model separately, but their estimates are not reported here. These estimates are available from the authors.

* $p \leq .05$. ** $p \leq .01$. *** $p \leq .001$ (all one-tailed tests).

opinion also exerts a substantial effect on a justice's vote suggesting that increases in public liberalism lead to an increase in the probability of a liberal vote. This is an interesting finding considering that much of the prior research examining the impact of public opinion has not controlled for the possible effects of congressional preferences. Our results here indicate that public opinion has a direct effect on the votes of the justices—even after controlling for possible congressional influence.

The theoretical arguments and empirical findings of Spiller and Gely (1992) suggest that outlier justices respond to changes in congressional policy preferences. On this issue, our results are mixed. When both chambers of Congress (and the president) are more conservative than a justice, the justice is more likely to vote in a conservative manner. However, the estimate for the impact of a more liberal Congress (and president) on outlier justices is in the expected direction but is not statistically significant.

Do congressional preferences matter more when Congress is a credible threat? The results here are mixed as well. The estimate for

the interaction effect of an outlier justice facing a more liberal Congress and a recent history of congressional overrides is positive and significant. This indicates that when an outlier justice is faced by a liberal Congress, he or she becomes more likely to vote in a liberal manner as the number of recent overrides in the relevant issue area increases. In this scenario, the preferences of Congress matter more and more as it demonstrates its desire and capability to override the Court's statutory decisions. Surprisingly, the estimate for the interaction of conservative congressional preferences and the number of recent overrides is not in the expected direction.

Neither of the interaction terms involving the number of amicus curiae briefs filed with the case is statistically significant based on a one-tailed test. The estimate for the effect of amicus curiae briefs on the relevance of a liberal Congress for an outlier justice is not even in the predicted direction. From this, we infer that the number of amicus curiae briefs filed in association with a particular case does not cause the justices to be more mindful of congressional preferences.

Interpreting the substantive meaning of interaction terms (particularly in the nonlinear setting of a logit model) is not always particularly straightforward. Therefore, we illustrate the findings of our model by presenting predicted probabilities of a justice voting liberally in a statutory case.¹⁸ A nonoutlier justice, one who falls within the policy preference bounds set by Congress and the president, has a 58.8% likelihood of voting liberally in a statutory case. If the political environment changes and the other branches of government become more conservative than the justice, then the likelihood of a liberal vote from this outlier justice decreases to 51.0%. At this point, counter to our expectations, recent overrides do not make these conservative congressional preferences more relevant to this outlier justice. Increasing the value of the overrides measure from 0 (lowest value) to 1.05 (mean value) results in a 54.7% likelihood of a liberal vote.

When an outlier justice faces a more liberal Congress, the baseline likelihood of his or her voting liberally is 58.9%. It is interesting to note that this is virtually the same likelihood as for a nonoutlier justice (58.8%). However, the addition of recent overrides raises this probability substantially. As the value of the overrides variable is increased from 0 to 1.05, the likelihood of a liberal vote increases to 70.0%. This

shows how overrides might act to increase the impact of a liberal Congress' policy preferences on a justice's vote on the merits of a statutory case.

To further illustrate these findings, we graph the probability of a justice voting liberally in Figure 2. This graph indicates that, regardless of political environment, as the ideology of a justice moves from most conservative to most liberal (from 0 to 100), the probability of a liberal vote increases substantially. Curve C captures the voting tendency of an outlier justice facing a liberal environment when the prior overrides variable is set at its midpoint. As discussed above, the presence of a threatening, liberal environment increases the probability of a liberal vote. The conditional relationship between the policy preferences of Congress and the vote of a justice is demonstrated by comparing curve C with curves A and B. Curve A represents the probability of a nonoutlier justice (a justice who is unconstrained by Congress) voting liberally, whereas B represents the probability associated with an outlier justice facing a liberal, but nonthreatening, Congress. The presence of a liberal Congress alone does not influence the vote of a justice—this is clearly demonstrated by the virtually complete overlap of curves A and B. As curve C shows, however, when there is a degree of threat the presence of a liberal Congress corresponds with a greater likelihood of a liberal vote.

Curve D demonstrates the probability of a liberal vote for an outlier justice facing a conservative Congress. According to the results of our logit model, the relationship between the preferences of a conservative Congress and a justice's votes is not conditional. Threat is not required to make these congressional preferences relevant.

In summary, these results suggest that when an outlier justice is faced with a liberal Congress, it takes some degree of threat before Congress' preferences factor into the justice's vote in a statutory case. This threat takes the form of recent overrides within the issue area in question, not interest group participation. When an outlier justice is faced with a conservative Congress, the Congress' preferences have an impact on the justices' votes, regardless of the presence or absence of recent overrides and interest group participation. In this setting, our indicators of threat do not substantially increase the effect of Congress' policy preferences on the justices' votes.

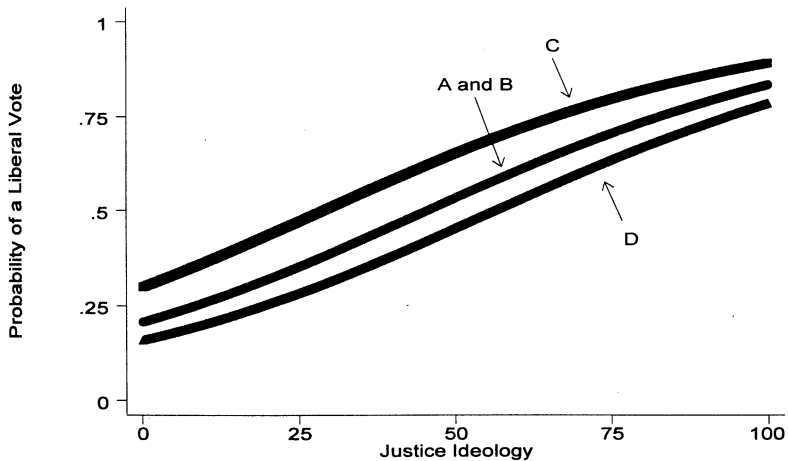


Figure 2: Probability of a Justice Voting Liberally in a Statutory Case

NOTE: Justice ideology ranges from 0 (*most conservative*) to 100 (*most liberal*). Curve A represents the probability of a nonoutlier justice (a justice unconstrained by Congress) voting liberally. Curve B represents the probability of a liberal vote for an outlier justice facing a liberal Congress. Curve C represents the probability of a liberal vote for an outlier justice facing a liberal Congress that has been overriding Court cases. Curve D represents the probability of a liberal vote for an outlier justice facing a conservative Congress.

DISCUSSION AND CONCLUSION

Do congressional preferences constrain or influence Supreme Court statutory decision making? Previous scholarship has found either significant judicial deference to Congress (Epstein & Walker, 1995; Gely & Spiller, 1990; Spiller & Gely, 1992) or a near complete lack of any sort of systematic congressional constraint on the Court (Segal, 1997). The results presented here should not be seen as strongly supporting either of these competing conclusions. Our empirical analysis points toward the conclusion that Supreme Court justices may sometimes incorporate congressional policy preferences into their decision-making calculus when voting on the merits of statutory cases. Justices may view recent overrides as a signal of congressional attentiveness and capability and thus factor in congressional preferences when there have been recent overrides. However, the organized

interest participation that Ignagni and Meernik (1994) found led to an increased probability of congressional involvement does not seem to make justices any more likely to factor congressional preferences into their votes.

The important implication is that, contrary to Segal's (1997) argument, there appear to be situations in which Supreme Court justices act as if they are somewhat constrained by Congress. Nevertheless, our theoretical model receives less than full empirical support, and it seems safe to conclude that much of the time the justices are relatively unconstrained by the preferences of Congress. It is likely that the impact of congressional preferences on judicial decision making is highly conditional and that we have not fully captured the nuances of this relationship.

Although our results are not particularly conclusive, we believe our research makes several important contributions to the separation of powers literature. First, we develop a more sophisticated theoretical model that emphasizes the conditional nature of strategic behavior on the Court. Second, this is one of only a few large-scale empirical analyses of the impact of external actor preferences on the Court's policy decisions. We examine votes in all issue areas across time and thus present a rigorous test of our hypotheses and generate generalizable findings. In addition, instead of considering the Supreme Court as a unitary actor, we treat the justices as individual decision makers. This improves on much of the game-theoretic research that typically conceptualizes the Court as the unit of analysis. Finally, we use a finer level of analysis and study the impact of external actors on the individual votes of the justices (as opposed to aggregate voting patterns for the justices) in each orally argued case.

We conclude by noting that although our analysis focuses on the justices' final votes on the merits, it is quite possible that the justices consider congressional preferences in other aspects of their decision making. For example, congressional preferences might influence certiorari voting. For the cases that are heard and decided, it is quite conceivable that the nature of the legal rules developed is influenced by the threat of congressional retaliation. Future research into the impact of the congressional policy preferences on judicial behavior should investigate these possibilities.

NOTES

1. These tools have been used very infrequently by Congress.

2. When we refer to constraint here we are concerned only with the impact of external constraints on the Court. Regardless of the political environment, there will be intra-Court constraints associated with the internal dynamics of the decision-making process (see Wahlbeck, Spriggs, & Maltzman, 1998).

3. The concept of congressional threat is not new to judicial scholars. Rohde (1972) argues that coalition formation at the Supreme Court is influenced by whether or not Congress is a threat to the Court. However, Rohde conceptualizes threat as being equivalent to issue salience and assumes that civil liberties issues are more salient than others. This is directly contradicted by the nature of congressional overrides in the past three decades. Congress does not appear to favor overriding cases dealing with issue areas traditionally considered salient by Court scholars. Many overrides, for example, deal with jurisdictional questions, bankruptcy law, and antitrust regulation (Eskridge, 1991).

4. Although there are anecdotal examples of presidents exerting significant influence over specific Court decisions (e.g., Knight & Epstein, 1996), the president can normally be expected to act either as an ally of the Court or a nonplayer (for a much more detailed discussion of this point, see Spiller & Gely, 1992). That is, if Congress accepts the Court's decision but the president prefers another outcome, there is little that the president can do. If the president prefers the outcome of the Court's decision to that of the congressional override, he or she can veto the override and restore the Court's policy. If the president prefers the override, he will not have to take any action at all. Thus, the president's policy preferences will not influence a justice's vote except by helping to determine whether or not the justice is an ideological outlier vis-à-vis the other branches.

5. The ideological direction of the justices' votes was taken directly from the *United States Supreme Court Judicial Database, 1953-1995 Terms* (Spaeth, 1997). We eliminated from our data set the handful of decisions for which no ideological direction could be assigned.

6. Viewed as an index function model, the logit model assumes that there is a continuous, underlying dependent variable that cannot be fully observed. All that can actually be observed is a discrete, binary choice (Greene, 1997). In our case, the underlying variable is the propensity of a justice to vote liberally, whereas the observable variable is whether or not the justice voted in a liberal direction.

7. There are several other ways in which cross-sectional time-series data can be handled to minimize the adverse effects of correlated residuals. We also employed fixed and random effects probit models and obtained very similar results to those presented here.

8. Nominate scores are generated through the scaling of virtually all congressional roll call votes and are a valid and reliable measure of congressional ideology (see Poole & Rosenthal, 1997). Whereas Nominate scores correlate very highly with the more traditional ADA scores (Poole & Rosenthal, 1997, p. 168), mounting evidence suggests that Nominate scores are superior to ADA scores (see Poole & Rosenthal, 1997, pp. 186-187). Snyder (1992) finds that ADA scores (as well as other interest group ratings of members of Congress) tend to produce bimodal distributions, even when the true underlying distribution is unimodal. For this reason, Snyder (1992) concludes that Nominate scores are "probably superior to interest group ratings as estimates of the ideological positions of members of Congress, because of both the method and set of votes used" (p. 320). In addition, Londregan and Snyder (1994) determine that Nominate scores have relatively little measurement error. Thus, we believe that Nominate scores are the preferable measure of congressional ideology. To make these scores comparable with our mea-

sure of justice ideology, we rescale the scores so that they range from 0 (*most conservative*) to 100 (*most liberal*).

9. Another option would be to use the floor median of each chamber. Although we believe that the judiciary committee medians are a more appropriate measure, we also estimated our model with the floor median measures for congressional policy preferences. The results are very similar to those obtained when using the judiciary committee medians. The only difference is that the estimate for the Liberal Congress \times Overrides interaction term decreases slightly in magnitude (from .903 to .753), reducing the level of statistical significance to $p = .075$ (one-tailed test). Otherwise, the substantive results remain the same.

10. If a justice had less than 20 votes in a particular issue area, we use the aggregate percentage liberal across all issue areas for that justice.

11. Although this measure of justice ideology is not perfectly analogous to the W-Nominate scores, we feel that it is the best available option for two reasons. First, the distributions of the measures are quite comparable and the means are relatively similar (House Judiciary Committee = 55.41, Senate Judiciary Committee = 52.96, President = 46.31, Justice = 57.23). Although this by no means is proof of the compatibility of these measures, it is comforting to see that average ideological score of a justice does not fall far from that of the other political actors of interest. Second, our approach is relatively consistent with the most recent systematic study of the effect of congressional preferences on judicial decision making, as Segal (1997) also uses voting patterns in constitutional cases to derive measures of justice ideology comparable to measures of congressional ideology.

There are two main alternatives to our approach. First, we could employ Segal and Cover (1989) scores as our measure of judicial ideology instead of percentage liberal voting. The central problem with the Segal and Cover scores is that they appear to be inappropriate for use outside of civil liberties cases (Epstein & Mershon, 1996). Nevertheless, while limiting our analysis to civil liberties cases, we also estimated our model using the Segal and Cover measures of judicial ideology (rescaling them to range from 0 to 100). The results of this model differ only slightly from estimates obtained when analyzing civil liberties cases using the percentage liberal measures. Specifically, when using Segal and Cover scores, the estimate for Liberal Congress is somewhat larger and just obtains conventional statistical significance ($p = .042$, one-tailed test). Otherwise, the results are very similar.

The second alternative is to use partisan identification to measure the policy preferences of the justices, Congress, and the president. Using this approach, a justice is considered an ideological outlier if he or she was nominated by a president of a different party from that of the current president and Congress. We estimated our model using this specification and again obtained results that do not substantively differ from those presented here.

12. This does not necessarily mean that Congress in this situation is conservative in absolute terms. It just means that Congress is more conservative than the justice. Thus, a very liberal justice confronted with a slightly liberal Congress and president will be coded as being an ideological outlier facing a conservative Congress.

13. Essentially, there are three conditions under which a justice casts a vote in a case: constrained by a liberal Congress, constrained by a conservative Congress, and unconstrained. We capture these three conditions with three dummy variables. To properly estimate the model, we exclude the unconstrained dummy variable and allow it to act as the baseline. Therefore, the variables Conservative Congress and Liberal Congress are not perfectly, or even highly, collinear ($r = -.43$).

14. Based on the theoretical model we have developed, we conceptualize this element of threat as the number of times the Court has recently been overridden by Congress instead of the number of times a particular justice's position has been overridden. Previous overrides demon-

strate congressional attentiveness to a particular issue, signal the direction of dominant congressional policy preferences, and indicate a willingness to incur the costs associated with the legislative process to enact these preferences. These signals will be important for all justices on the Court, and not just those that were in the decision coalition for the case that was overridden.

15. Data on the proportions of the docket space allocated to the various issue areas were derived from Spaeth (1997).

16. Hausegger and Baum (1999) argue that the Court actually invites Congress to override some of its statutory decisions. In the belief that it might not be wise to include requested overrides in our measure of congressional threat, we read the opinions from all the overridden cases in our data set. We did not find a single case in which the Court, in the majority opinion, directly requested that Congress override the decision. There are occasions in which the majority opinion indicates that Congress has the obvious authority to change a statute as it sees fit. However, we feel uncomfortable inferring that this is a direct request for an override. Therefore, we choose to include all overrides in our measure.

17. Gibson's data set only extends to 1986. Therefore, using Gibson's guidelines, we gathered amicus curiae data from 1987 to 1995 from *U.S. Reports*. We standardize Number of Amici by year because the number of amicus curiae briefs filed at the Court has risen rather dramatically throughout the time period covered by our study.

18. When calculating these probabilities, we hold judicial ideology and public mood at their means. Unless otherwise stated, the two measures of threat are held at zero.

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