Supreme Court Agenda Setting: Assessing Cross-Institutional Constraints

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Agendas foreshadow outcomes: the shape of an agenda influences the choices made from it... In the twentieth century, as governments have grown in size and complexity, the agenda function has become wholly apparent, so much so that making agendas seems just about as significant as actually passing legislation. —*William Riker*

Because agenda setting is one of the most important activities undertaken by political actors, it is hardly surprising to find a rather large body of literature devoted to how the various institutions go about performing this task (*e.g.,* Cobb and Elder 1983; Kingdon, 1984; Light 1982; Riker 1993; Stimson and Carmines 1989; Walker 1977).[1] Even the Supreme Court, whose members face more

[1] As a mere glance at the works cited above would attest, there is by no means agreement over the definition of "agenda setting." In this paper, we use the term as a shorthand way to describe how the branches of government go about deciding which of the issues on the "public" agenda (containing all the issues of concern to society) they will "schedule for active and series consideration" and, thus, place on their "institutional" agenda (Cobb and Elder 1983, 14; see also Kingdon 1984, 4). So, for example, most judicial specialists refer to agenda setting as the process by which the Court makes decisions over which disputes to hear and resolve. More specifically, because the vast majority of the thousands of cases that arrive at the Court each year come as requests for certiorari, we typically say that agenda setting involves selecting those cases to which the Court will grant cert and those to which it will deny cert.

We differentiate this from agenda manipulation, which usually takes place after an institution has placed an issue on its agenda (see, generally, Krehbiel and Rivers 1990). To see the distinction, again consider the Supreme Court. After the justices agree to decide a case (the agenda-setting stage), they may (and often do) neglect to resolve questions that parties have raised in their briefs (McGuire and Palmer 1995). This sort of "issue suppression" opens the door to agenda manipulation because justices may attempt to bring to the fore another dimension of a case to control the agenda in order to manipulate the outcome. As Epstein and Knight (1997) contend, Chief Justice Burger took this route during conference discussion of *Craig v. Boren* (1976), an important sex discrimination case. On the Epstein/Knight account, the Chief tried to steer conference discussion toward a procedural dimension (standing) and away from sex discrimination policy because he believed that the Court would adopt his least preferred standard on the substantive dimension of sex discrimination.

constraints than their elected counterparts in seeking to form their agendas,[2] has received substantial attention (Caldeira and Wright 1988; Perry 1991b; Tanenhaus et al., 1963). We now know that justices go about the task of "deciding to decide" with some regard to the long-term payoffs (that is, whether they will ultimately prevail at the merits stage) (Boucher and Segal 1995; Caldeira, Zorn, and Wright 1996), the significance (or lack thereof) of particular questions (Caldeira and Wright 1988), and the need to resolve divisions of opinion among other courts (Ulmer 1983, 1984).

What is surprising, however, is that the bulk of the agenda-setting literature views the branches of government in isolation, establishing their own policy priorities with little attention to preferences and likely actions of one another.[3] To see this point, we need only consider those factors

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Seen in this way, agenda manipulation is a form of sophisticated behavior. The Chief Justice presumably would not have pushed the standing alternative had he believed his most preferred position enjoyed sufficient support. But, if he perceived that he lacked a majority, it would be reasonable to eschew advocating his ideal policy in an effort to avoid adoption of his least favored alternative. (For a recent and similar example in the congressional setting, see Calvert and Fenno 1994.)

To be sure, we find the topic of agenda manipulation interesting; indeed, we hope to explore it in a subsequent essay. For this paper, though, we focus on agenda setting.

2 Some of those emanate from Article III, such as the requirement that disputes present real cases and controversies (see Epstein and Walker 1995a, ch. 2); others are norms, such as the one disfavoring the creation of new issues (see Epstein, Segal, and Johnson 1996).

3 There are, of course, exceptions but most (1) focus on Congress and (2) consider the influence of only one branch on the legislature's agenda-setting process (*e.g.,* Kingdon 1984). Typically the judiciary is the omitted branch, as in Kingdon (but see Henschen and Sidlow 1988).

Moreover, we do not mean to imply that the literature ignores all external actors. To the contrary: Many studies of agenda setting highlight the role played by interest groups (*e.g.,* Caldeira and Wright 1988; Cobb and Elder 1983). We only wish to emphasize that existing studies generally omit consideration of actors in the other branches of government.

scholars have offered to explain the Supreme Court's agenda decisions; as the above list indicates, they mostly center on intra-branch considerations.[4]

In this paper, we take a different tack.[5] Based on strategic accounts of American politics, we hypothesize that actors in one political institution should take account of the preferences and likely actions of members of the other branches when they go about setting their agendas, if those actors hope to maximize their preferences. More specifically, we assess the following prediction: Actors will avoid placing policies on their agenda— even if they believe they could obtain the necessary support for their most preferred position from within their institution—when they believe that external political actors would move policy far from their ideal points.

To test this hypothesis, we begin by reviewing the extant theoretical literature on strategic interaction among the institutions of government and, then, consider its relationship to the topic of interest to us, agenda setting. This exercise uncovers several reasons to believe that the members of one branch consider the preferences and likely actions of other relevant political actors when forming their agendas. Next we turn to assessing empirically this expectation. Although strategic accounts suggest that it ought well describe the agenda-setting behavior of actors in all three branches of government, for this paper we focus on Supreme Court justices. Our rationale for this empirical referent point is as follows: Because research conducted under the attitudinal model suggests that

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[4] It is worth noting, however, that judicial specialists have paid a good deal of attention to the impact of the Solicitor General (SG) on the Court's agenda-setting decisions. But it is unclear whether the success of the SG is due to (1) deference on the part of the justices to the wishes of the President, (2) litigation expertise on the part of the SG, or (3) other factors, such as the signal the SG's participation provides about the importance of a petition. Moreover, this literature virtually ignores the potential role of Congress in the agenda-setting process. What makes this imbalance so surprising is that the potential influence of Congress over a sitting Court should be far greater than the potential influence of the Solicitor General and/or the executive branch.

[5] Epstein and Knight (1997) initially proposed this tack. This paper is an effort to develop their ideas and systematically assess them.

institutional protections granted to the justices (*e.g.,* life tenure) allow them to vote their sincere preferences (Rohde and Spaeth 1976; Schubert 1959; Boucher and Segal 1995), the Court may be the least likely of all the branches to make strategic calculations over its agenda and plenary decisions.[6] Accordingly, our findings—either in support of the prediction or of the null hypothesis (that the Court does not take into account the preferences/likely actions of the members of the elected branches when forming its agenda)—allow us to speak to the larger debate about Supreme Court decision making. Moreover, since evidence of sophisticated behavior on the part of justices is more ambiguous than it is, say, for members of Congress, data confirming the expectation would, perhaps, allow for a more general inference of inter-branch strategic agenda setting.

Strategic Accounts of Policy Making

As all students of U.S. politics know, two key concepts undergird our constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second is the notion of checks and balances: each branch of government imposes limits on the primary function of the others.

Political scientists have, of course, taken the separation of powers doctrine quite seriously. At least since the 1950s, scholarship has highlighted and elucidated the internal politics of Congress, the Executive, and the Court. With this attention to the individual branches, however, has come a neglect of the interaction among them. We have learned that the legislature is full of single-minded seekers of reelection (Mayhew 1974) but not how a body so composed goes about interacting with a Court replete with policy-minded politicians (Rohde and Spaeth 1976) and an equally goal-driven executive (Neustadt 1960, 1980).

This emphasis began to change in the late 1980s, with the highly influential work of Marks (1988, 1989). In trying to understand why Congress did not override the Court's decision in *Grove*

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6 Plenary decisions are those the Court makes on the merits of cases, that is, on those cases it has agreed to decide.

City College v. Bell (1984),[7] Marks focused only on the interaction between two branches of government. Even so, his studies created something of a cottage industry of research going under the general rubric of separation of powers (SoP) games.[8] Building on his general approach, scholars have now modelled formally the relations between the Court and Congress (Ferejohn and Weingast 1992; Friedman 1996; Spiller and Gely 1992; Zorn and Caldeira 1995); Congress and the Executive branch (Ferejohn and Shipan 1989; Hammond and Knott 1996; Knight and Epstein 1996; McCubbins, Noll, and Weingast 1989); the Court and administrative agencies (McCubbins, Noll, and Weingast 1990); and, most relevant to us, among the three branches (Cohen and Spitzer 1994; Epstein and Walker 1995b; Eskridge 1991a, 1991b; Eskridge and Ferejohn 1992; Ferejohn and Shipan 1990; Gely and Spiller 1990; Rodriguez 1994; Segal 1997; Spiller and Gely 1992).

While these works differ at the margins, they share three important features. First, they generally operate under the same assumptions:

1. Political actors make choices in order to achieve certain goals; for example, it is typically supposed that Supreme Court justices pursue policy (that is, they want the ultimate substantive content of law to reflect as closely as possible their preferred policy positions) and they will take actions to advance this objective.

1. Political actors act strategically in the sense that their choices depend on their expectations about the choices of other actors.

1. The choices political actors make are structured by the institutional setting in which they make their choices.

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[7] In *Grove City,* the Court held that Title IX of the 1972 Educational Amendments (which prohibits sex discrimination in any "program or activity" that receives federal money) applies only to the specific program receiving aid, and not to every program within the institution.

[8] In our view, this name is something of a misnomer since SoP studies largely play off the notion of checks and balances, rather than the separation of powers.

Epstein and Knight (1997), among others, call this a strategic account because the key ideas it contains are derived from the rational choice paradigm,[9] on which strategic analysis is based and as it has been advanced by economists and other social scientists.

Second, these SoP works tend to limit their scope by focusing on (1) policy decisions on their "merits," to use the language of judicial scholars, rather than on agenda-setting decisions;[10] and (2) non-constitutional decisions, when the Court is included in the analysis.[11] The first point is a mere fact but the second deserves some attention. Specifically, why do scholars who model interactions among the three branches tend to center their inquiries on, say, statutory civil rights policy and not on Fourteenth Amendment equal protection issues? The answer is simple enough: The constraint of the separation of powers/checks and balances system operates to a greater extent in statutory cases than in constitutional ones because Congress can far more readily overturn the Court's construction of its statutes than it can constitutional provisions. Accordingly, justices are

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[9] See Ordeshook (1992). We refer to non-parametric or strategic choice accounts. Under these, individuals make rational decisions but the rational course of action is contingent upon their expectations about what other players will do unless they have a dominant strategy (that is, a particular strategic choice that will produce the best outcome regardless of what the others do).

[10] Several scholars imply that the agenda-setting decision may be contingent on other governmental actors but, like Cohen and Spitzer (1994, 97), they tend to view this as "beyond the scope" of their studies. Two important exceptions are Brace et al. 1996, who apply the logic of SOP analysis to agenda setting by state courts; and Eskridge (1991a, 1991b) and others (*e.g.,* Epstein and Walker 1995), who note that congressional committees, in deciding whether to propose legislation to override Supreme Court decisions, take into account the preferences and likely actions of other governmental actors. Since Brace et al. focus on state court judges, who, if elected, operate under very different institutional constraints than their federal counterparts, we view their findings as less relevant to our argument than Eskridge's.

[11] There are, of course, some exceptions. For a recent one, see Friedman 1996, who goes so far as to argue that strategic approaches have "much to add to our reading of constitutional cases."

freer to make decisions in line with their sincere preferences in constitutional disputes (*e.g.,* Eskridge 1991a, 651-652).[12]

Finally, with only scattered exceptions (see, *e.g.,* Segal 1997), the SoP studies have reached the same general conclusion, namely, the rule of checks and balances inherent in the system of separation of powers provides both governmental actors *and* scholars with important information: Policy in the United States emanates not from the separate actions of the branches of government but from the interaction among them. Thus, it follows that for any set of actors to make authoritative policy, be they justices, legislators, or executives, they must take account of this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices. It also follows that for scholars to understand fully policy, they must consider all three branches. For, on the strategic account, if we are interested in explaining democratic politics in general and the development of specific policies in particular, we ignore any one branch of government at our own peril.

Supreme Court Justices as Strategic Actors

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[12] This is not to say that the constraint is totally inoperative in constitutional cases; indeed, Epstein and Knight (1997) offer a number of reasons why justices might feel constrained by the other branches even in constitutional litigation. For example, if the other branches of government possess the power to alter constitutional policy established by the Court (*e.g.,* Congress can propose constitutional amendments; and it has even passed legislation to override constitutional decisions), we would not necessarily expect the Court to ignore completely the external constraint imposed by the separation of powers system in constitutional cases.

Still, it is worth noting, Congress does not often propose legislation or even constitutional amendments to override the Court. This is an important point because the mere infrequency of congressional responses to constitutional decisions (coupled with the difficulty involved in overturning them) means that justices can be less attentive to the preferences and likely actions of other governmental actors in constitutional disputes than in statutory ones. At the very least, this is the lesson of virtually all of the SoP studies.

Although these general claims quite clearly apply to elected political actors, they may be less applicable to justices, at least according to advocates of the attitudinal model of Supreme Court decision making. Because justices lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction, these scholars argue that the constraints on the ability of justices to pursue their policy goals are far fewer than are those operating on Members of Congress (see, *e.g.,* Rohde and Spaeth 1976; Segal and Spaeth 1993).

Moreover, attitudinalists point out that SoP theorists ignore the following rules and structures when modelling constraints on the Court (see Segal 1997 for more details):

1. the transaction and opportunity costs to Congress of passing override legislation;

2. the incomplete knowledge by the Court as to the preferences of Congress (but see Martin 1996)

3. the incomplete knowledge by the Court as to the salience of various issues by Congress

4. the Court's ability to mitigate the likelihood of override by opting into a constitutional mode of interpretation (but see Spiller and Spitzer 1992);

5. the Court's ability to bundle issues so as to protect them from override;

6. a decentralized congressional decision making structure that often allows for multiple veto points, thus greatly expanding the set of irreversible decisions for the Court;

7. the Court's ability to respond in kind to attacks on its decisions by Congress, for example, by ruling on the constitutionality of override legislation.

Due to these factors and others, attitudinalists argue that median justices are rarely outside the set of Pareto optimals; that even when they are, they are unlikely to believe in most cases that Congress is likely to respond effectively to their decisions; and that therefore the rational course of action in almost every case is to vote their sincere preferences (Segal 1997).[13]

Strategic Agenda Setting

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[13] Segal (1995) suggests the possibility of one set of circumstances under which this would not happen: when Congress has already taken explicit action against the Court's institutional authority. This would explain well known "turnabouts" by the Court, such as *Ex parte McCardle* (1869), the New Deal cases, and *Barenblatt v. United States* (1959).

We do not wish to enter directly this controversy, at least as it pertains to Court votes (or those of the other institutions, for that matter) on issues already on the institutional agenda.[14] Rather we wish to push the debate back one step, to the agenda-setting stage; and determine whether actors will avoid placing policies on their agenda— even if they believe they could obtain the necessary support for their most preferred position from within their institution—when they expect other political actors to move policy far from their ideal points.

Certainly, there is some evidence to believe that members of congressional committees behave in this way. As Van Doren (1991) and Eskridge (1991a) note, these political actors do the obvious: they consider likely outcomes on the floor and the preferences/likely actions of the President when considering whether to pass legislation.

What of Supreme Court justices? Nothing close to a consensus exists. Despite tremendous scholarly interest (see Perry 1991a), award winning books (Perry 1991b), clever research strategies (Brenner 1979), and sophisticated statistical analyses (Palmer 1982), scholars do not agree on the factors that influence the granting of certiorari. Some view the process as essentially legalistic (Perry 1991; Provine 1980) while others see it as essentially political- or policy-based (*e.g.,* Brenner 1979; Palmer 1982; Schubert 1959). Furthermore, among members of the policy-based school, there is dissensus over whether justices are strategic in their certiorari votes, *i.e.,* whether they consider the likelihood that they will win on the merits when voting to grant review. For example, Krol and Brenner (1990) claim that their research "buttresses the view that...error-correction...is extant in certiorari voting but undermines the perception that the prediction strategy is also present" (1990, 342). On the other hand, Schubert (1959), Segal and Spaeth (1993), Boucher and Segal (1995), and Caldeira, Wright and Zorn (1996) all find evidence that justices consider likely outcomes on the merits when deciding to grant cert. This last study is particularly instructive. Unlike many past

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[14] But we do note that SoP advocates have argued that even if Segal (1997) is correct about rationally sincere behavior vis-à-vis Congress on the merits, the reason might be that the Court filters out potentially troublesome cases (from the perspective of congressional overrides) at the agenda-setting stage.

efforts in this area, the researchers went to great lengths to include variables to account for the ideological preferences of the individual justices *along with* those of their colleagues. The results are clear: While Caldeira and his colleagues find evidence of policy voting (defined in the study as voting to grant or deny cert based on ideological preferences), they show that there is equally strong support for strategic behavior (defined as voting to grant or deny inconsistently with one's ideal policy point).[15]

To be sure, these certiorari studies only consider strategic interaction among colleagues and not the sort of inter-branch calculations that are of interest to us. But the documentation they offer is suggestive: If justices are strategic with regard to their colleagues, it may not be much of a leap to argue that they also take into account the preferences and likely actions of external political actors.

Even more to the point, although scholars have not explicitly tested the prediction that flows from the SoP studies—that justices make calculations about the preferences/likely actions of other political actors when setting their agenda—they have provided sufficiently tantalizing bits and pieces of evidence to support its plausibility. Some of these are, admittedly, spotty, even anecdotal; yet they are potentially illuminating.

We know, for example, that there are many salient and seemingly certworthy petitions that the Court has denied over the years, at least in part because it desired to avoid collisions with Congress and the President. Along these lines, the justices never resolved the question of the constitutionality of the Viet Nam war, despite its obvious importance and many requests to do so (see Provine 1980, 54 for examples). Further, Supreme Court clerks (who make recommendations to the justices regarding cert) occasionally point out the political consequences of accepting petitions. By way of illustration, consider the following piece of advice. It was proffered by Justice Burton's clerk on a miscegenation petition (*Naim v. Naim),* which arrived at the Court's doorstep

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15 Of course, both types of behavior may be forms of strategic voting. But only the second type can be explained solely in strategic terms.

the very year after it issued its highly controversial decision in *Brown v. Board of Education* (1954):[16]

> In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for the time being...[but] I don't think we can be honest and say that the claim is unsubstantial... It is with some hesitation...that I recommend that we NPJ ["note probable jurisdiction," the functional equivalent of granting review]. This hesitation springs from the feeling that we ought to give the present fire a chance to burn down.

Burton declined to take his clerk's advice, voting instead to dismiss. But four others (Douglas, Reed, Black, and Warren) wanted to resolve the dispute. Despite the existence of a sufficient number of votes to review, the Court put the case on hold. On the next vote, only Douglas, Reed, and Black agreed to note jurisdiction and, at the final conference, the justices unanimously agreed to issue a vacate and remand order. Why the change? According to Justice Clark, the author of the published order in the case, the probability of a negative reaction to a decision on the merits "had been an important consideration in the decision."

There is also more systematic evidence, albeit of a limited nature. Provine (1980, 60) shows that between 1954 (after *Brown)* and 1957, the Court received at least 5 petitions involving "major" segregation issues, in addition to *Naim*; it granted cert in just one, *Holmes v. City of Atlanta* (1955), only to vacate the lower court's ruling without a full hearing on the merits. Invoking more recent data on cases involving equal employment practice, Epstein and Knight report that during the 1978 term, when the (Republican) Court was more conservative than the (Democratic) Congress and the President, the justices rejected nearly 90% of these petitions, with many of those they denied presenting seemingly important (and certworthy) issues.[17] When the political landscape changed in the early 1980s, what with all three branches moving in a more conservative direction (all majority

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[16] This example comes from Provine 1980, 59-60.

[17] *Westinghouse v. State Human Rights Appeal Board* is a case in point. It involved a highly salient issue, the exclusion of pregnancy-related disability benefits from an employer's disability plan, and one that had created conflict among the Nation's state courts. The International Union of Electrical, Radio, and Machine Workers even filed an amicus curiae brief at the review stage, further underscoring the case's importance.

Republican except for the House), so too did the Court. During the 1982 term, it agreed to hear 28 % of the employment cases, nearly 15% more than it did in 1978 and over 4 times its average acceptance rate (6%) for that term. Finally, there is Friedman's (1996, 797-798) analysis of *United States v. Lopez* (1995), in which the Court (for the first time in 60 years) struck down an act of Congress as a violation of the commerce clause. In speculating on why the justices have, since *Lopez,* denied cert to several similar cases, he suggests that "Court, having made its views know in *Lopez*, simply is biding it time, watching to see what a very different Congress might do with regard to new legislation."

Research Design

As the above discussion indicates, we are, to be sure, capable of telling stories consistent with the expectations of the separation-of-powers model at the certiorari stage. What we do not know is whether these anecdotes represent systematic behavior that can be uncovered using accepted standards of social scientific inquiry. Do Supreme Court justices, who clearly (at least to us) engage in forward thinking with regard to their colleagues at the agenda-setting stage, also take into account the likely reactions of other relevant actors (*e.g.,* the Congress and the President)—as the SoP literature would predict? Or do even strategic justices find that the institutional rules and structures (which make override difficult), combined with imperfect information, allow them to look no further than the likely reactions of their colleagues—as other accounts might suggest?

There are no shortage of ways to answer these questions—really to test the prediction from the SoP literature that justices engage in inter-branch strategic agenda setting. We could, for example, follow the leads of Provine (1980) or Epstein and Knight (1997) and consider particular areas of the law. But this approach can only tell us whether the Court is engaging in strategic agenda setting over that legal issue, and not in the main.

Since we are interested in making general claims, we take another route: We consider the percentage of constitutional and non-constitutional cases that the justices have agreed to hear since 1946, hypothesizing that the percentage of constitutional cases will increase in times when the justices and external political actors are far apart in policy terms and decrease in times when they are

close. In other words, the more constrained the Court is, the more constitutional cases it should agree to hear.

Before turning to measurement issues, we ought comment on the assumptions embedded in this operational rephrasal of our prediction. The first is obvious: We believe that most justices, in most cases, pursue policy, that is, they want to move the substantive content of law as close as possible to their preferred policy position. To be sure, justices may have goals other than policy, but no serious scholar of the Court would claim that policy isn't prime among them. Indeed, this is perhaps one of the few things over which almost all students of the judicial process agree. Second, we assume that justices are freer to pursue their sincere preferences in constitutional cases than in non-constitutional ones. We realize this assumption is not perfect; in fact, some of the examples we used above, such as *Lopez* and *Brown*, suggest that the constraint imposed by the SoP system, to the extent that it exists, may also be operative in constitutional cases. Still, in the main and for the reasons we provide above, this is an assumption that has guided most SoP work, and one we think plausible to make in our study of agenda setting. Finally, we assume that there are a sufficient number of constitutional and statutory cases each term such that the Court would be able to fill its plenary docket with one or the other. Given that it receives 5,000-7,000 cases per term, and decides only 3-5 percent, we do not think that this is a particularly onerous assumption to meet.

Data and Measurement

Animating our research design requires us to obtain data on the dependent variable—the Court's case mix (specifically the percentage of constitutional and non-constitutional cases it decides each year); and to create measures of the preferences of the various institutions. The first chore is easy enough. We define constitutional cases as those where the primary authority for the Court's decision, according to Harold J. Spaeth's Supreme Court Database, is judicial review at the national or state level. Statutory decisions are those in which the Court interpreted a federal statute, treaty, court rule, executive order, administrative regulation, or administrative rule.

(Figure 1 about here)

Figure 1 depicts the dependent variable. As we can see, a great deal of variance exists in the percentage of constitutional cases heard in any term. The figures range from a high of 59.5% in the 1976 term to a low of 22.4% in the 1956 term. Moreover, there does not appear to be a long term secular increase or decrease in the data.

The second task, determining the constraints placed on the Court by the other branches is more complex. We begin by taking seriously the models established by the separation-of-powers school, which suggest that the Court foresee what Congress and the President would do if the Court heard a case and decided it in any given direction. This essentially requires that the justices either have, or act as if they have, an intuitive model of national lawmaking.

Since there is no agreement among political scientists on how best to model the legislative process, we begin by testing three separate accounts, hoping to find consistent results regardless of which model we use. The first, the committee-gatekeeping model, requires that committees report legislation to the floor for consideration under open rule, closely resembling the SoP model developed by Ferejohn and Shipan (1990). The multiple-veto model grants extensive veto power over the consideration of legislation to committee chairs and the majority party leaders. Finally, the party-caucus model assumes that majority party leaders, committee chairs, and even majority party committee members, act as relatively faithful agents of their party caucus (see Segal 1997 for further discussion of these models).

Testing the Models

The tests for each model follow a similar procedure. We attempt to place the Supreme Court (as measured by the median justice) and members of Congress on a consistent ideological dimension and measure the preferences of the Court vis-à-vis the set of Pareto optimals established by the relevant model. For each year, we measure whether, under each model, the Court is constrained and, if so, by how much and in which direction. We then use those data in a time-series analysis to determine whether those constraints influence the Court's relative share of constitutional and statutory cases.

We measure (revealed) ideological preferences of members of Congress using the support scores provided by the Americans for Democratic Action. While ADA scores have noted deficiencies (*e.g.,* the fact that non-voting members are counted as voting against the ADA position), this should have very little influence on chamber and committee medians. Moreover, recent research demonstrates the reliability, validity and stability of ADA scores as a measure of congressional ideology (Herrera, Epperlein, and Smith 1995). Finally, unlike NOMINATE scores, ADA scores are available throughout the entire period of study.

Assuming that ADA scores measure preferences on a liberal-conservative dimension, we thus require a measure of Supreme Court preferences that does the same and is independent of the preferences of Congress. In previous work, Segal (1997) used two separate measures of the justices' preferences: an inferential measure—the Segal-Cover scores (Segal and Cover 1989)— and a more direct "constitutional" measure—predicted, annual, liberalism support scores in non-unanimous civil liberties constitutional cases, as derived from the U.S. Supreme Court Judicial Database. But, because our focus here is solely on the median justice and because the Segal-Cover scores fail miserably at finding that justice (Epstein and Mershon 1996), we rely on the more direct measure.[18] From these we derive the median justice and, thus, our measure of the Court's ideal point.

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[18] We do, however, go to extraordinary lengths to ensure that these scores are independent of congressional preferences. First, and for obvious reasons, we exclude statutory decisions. While others have argued that the justices' votes in *all* past cases are the best measure of their sincere preferences (Epstein and Mershon 1996), this can only be true if the separation-of-powers argument is false. Thus, the Epstein/Mershon measure is not an appropriate one for testing the SoP hypotheses. Second, we use only civil liberties cases because the House and Senate Judiciary Committees have jurisdiction over almost all of the Court's civil liberties decisions (Segal 1995). While this decision might limit generalizability, it does so over an area that encompasses a large proportion of the Court's docket. Third, we select nonunanimous decisions only. We do so to enhance the ability to scale these decisions with the ADA measure of congressional preferences (for more on this point, see below). Fourth, we use annual support scores, not aggregates across an entire career. As recently demonstrated, a fair number of justices

We next determine for each model the set of Pareto optimals that the Court faced for each year, such that decisions mapping within that set could not be reversed. From these we calculate the constraints facing the Court each year. If the Court's predicted preference falls within the set of Pareto optimals, the constraint is zero and the Court can safely act on its sincere policy preferences. If the Court's predicted preference falls above the maximum (below the minimum), then its constraint is the distance from the Court to the maximum (minimum). The larger the distance, the more likely the Court should be to hear constitutional cases over statutory cases.

The Committee-Gatekeeping Model. For eras with a Republican President, the minimum of the set is the minimum of the 33rd percentile House member, the 33rd percentile Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the

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demonstrate long-term changes in their sincere preferences (Epstein, Hoekstra, Segal, and Spaeth 1995). Fifth, we use OLS regression predicted annual support scores, not actual annual support scores. This further helps insure that these votes are independent of short-term contemporary congressional preferences. It also has the added advantage of eliminating short-term fluctuations due to changes in case stimuli (Baum 1988).

After taking these steps, we scale the scores for their comparably to ADA scores. Because there is no clear way of so doing, we followed Segal's approach. He sought expert judgments from four highly regarded public law colleagues, asking them how these scores related, in their judgments, to ADA scores. For example, is 93.3 (Douglas' score) about where Douglas would be if he had real and comparable ADA scores, or is it too high, or two low? Is 5.0 (Rehnquist's score) about where Rehnquist would be if he had real and comparable ADA scores, or is it too high, or too low? The three scholars who answered Segal's query unanimously stated that it was preferable to use the scores "as is" rather than rescaling them higher, lower, more toward the middle, more toward the extremes, or any combination thereof.

As this is our view as well, we use the scores as is. While this is obviously not a textbook example of scaling, the results have, we believe, a fair amount of face validity, and are certainly less arbitrary than the placement of players that one sometimes finds in the separation-of-powers literature.

House Judiciary indifference point, and the Senate Judiciary indifference point.[19] The maximum of the set is the maximum of the House median, the Senate median, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point. For eras with a Democratic President, the minimum of the set is the minimum of the median House member, the median Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point. The maximum of the set is the maximum of the 67th percentile House member, the 67th percentile Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point.

The Multiple-Veto Model. If multiple players can prevent legislation from being voted on, it may be necessary to include the preferences of the House Rules Committee median (R), the House Rules Committee Chair (R_C), the House and Senate Judiciary Committee Chairs (J_C^H, J_C^S) the Speaker of the House (*Sp*) and the Senate Majority Leader (*SML*) in the model. *R*, R_C, J^H, J^S, J_C^H, S_C^H, *Sp,* and *SML* should only support remedial legislation if they prefer the expected outcome of the Conference Committee (*CC*=[*H*+*S*]/2]) over the Court's position (X_{ct}).[20] Thus, under a Republican President, the set of Pareto optimals is given by [min*(*H_{33}, S_{33}, J^H, J^S, J^H*(CC), J^S(CC), R(CC),* R_C*(CC),* J_C^H*(CC),* J_C^S*(CC), Sp(CC), SML(CC))*, max(*H, S,* J^H, J^S, J^H*(CC),* J^S*(CC), R(CC),* R_C*(CC),*

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[19] These are the points on the other side of the committee from the legislature where the committees are indifferent to the legislative outcome. In the unilateral case this equals 2L-G, where L is the legislative median and G is the gatekeeping median. But in the bicameral case the committees must look forward to the ultimate 2-chamber outcome, not the parent chamber outcome. Though the final outcome could obtain anyplace between H(ouse) and S(enate), we use the midpoint between the two.

[20] While the Rules Committee can enforce a closed rule on the House floor, it cannot enforce one on the Conference Committee. Thus the Rules committee cannot guarantee that it can obtain the Judiciary Committee result if it prefers that to the House median.

$J_C^H(CC)$, $J_C^S(CC)$, *Sp(CC), SML(CC))*]. Under a Democratic President, the set of Pareto optimals is given by [min(*H, S,* J^H, J^S, $J^H(CC)$, $J^S(CC)$, *R(CC),* $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, *Sp(CC), SML(CC))*, max(H_{67}, S_{67}, J^H, J^S, $J^H(CC)$, $J^S(CC)$, *R(CC),* $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, Sp(CC), *SML(CC))*].[21]

The Party-Caucus Model. Recent models of congressional lawmaking provide theoretical and empirical evidence that policymaking typically represents neither independent committee preferences nor independent leadership preferences, but the preferences of the majority party caucus (Kiewiet and McCubbins 1991; Cox and McCubbins 1993). Under such models, the type of legislation that can come to a vote and be approved by a chamber moves to the left when the chamber switches from Republican control to Democratic control and moves to the right when control passes from Democrats to Republicans. For example, the takeover of the Senate by Republicans, as in the 1980 elections, moves the balance of power in that chamber and in its Judiciary Committees to the right.

To test the party-caucus model, we operationalize potential gatekeepers (the Judiciary committees and chairs, as well as majority party leaders) as representing the preferences of the median member of the House and Senate majority party caucus (MPC^H and MPC^S). Under a Republican President, the set of Pareto optimals is given by [min(H_{33}, S_{33}, MPC^H, MPC^S, $MPC^H(CC)$,

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[21] One problem in deriving the set of Pareto optimals for this model is that in any given year, a large number of missed votes can skew the ADA scores for any individual who was ill, running for President, or for other such reasons. For example, in 1980, Judiciary Committee Chair Ted Kennedy registered an ADA score of but 33 as he sought delegates to the Democratic convention. A larger measurement problem surrounds the Speaker, who rarely votes, except in the case of a tie. As such, ADA does not provide scores for him. For relevant members other than the Speaker, large numbers of missed votes affect the scores of Rules Chairman Sabath (D, IL) in 1952, House Judiciary Chair Rodino (D, NJ) in 1978, Senate Judiciary Chair Kennedy (D, MA) in 1980, Senate Judiciary Chair Biden (D, DE) in 1988, and Senate Majority leader Mansfield (D, MT) in 1968. For each of those years we use the person's ADA score from the previous year. For the Speakers, we use their average for the years prior to them becoming Speaker.

$MPC^S(CC)$), max(H, S, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$)]. Under a Democratic President, the set of Pareto optimals is given by [min(H, S, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$), max(H_{67}, S_{67}, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$)].

Results

Unfortunately for the SoP account, if the Court takes seriously any of these leading models of congressional decision making, then it is almost never constrained. In the 46 years of our study, the median justice falls outside the set of Pareto Optimals only three times under the Committee-Gatekeeping model, three times under the Multiple-Veto model, and six times under the Party-Caucus model. So, even if there were no transaction or opportunity costs to legislation, even if the Court had perfect information about congressional preferences, even if the Court couldn't opt into constitutional mode or bundle issues, the Court would still be free (almost all the time) to choose cases without fear of eventual override.

Statistically, the results bear this out. Table 1 presents maximum likelihood estimates for each legislative model on the percent of constitutional cases the Court hears each term.[22, 23] The independent variable is the distance from the Court to the set of Pareto optimals. According to the prediction flowing from the strategic account, as the constraint increases, so should the percent of constitutional cases, as the Court wishes to avoid eventual overrides on statutory cases. This is not the case. In none of the models is the coefficient close to significant. In sum, we present a conundrum: if the SoP model is correct, the Court virtually never needs to show constraint in choosing cases, and there is no systematic evidence that it ever does.

(Table 1 about here)

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[22] Since the overwhelming majority of the Court's decisions for a given term come down the following year, we match decisions from, say, the 1978 term, with ADA scores from 1979. Though this requires the Court peer a bit into the future when choosing its docket, this is exactly what backward induction requires. We relax this requirement below.

[23] Given a high degree of first order autocorrelation, we estimated an AR(1) model.

Alternative Models

At this point we could claim that no evidence of strategic inter-branch agenda setting by the Court exists, and call it a day. But we recognize that the informational requirements of the SoP account are heavy (indeed, that is one of the fundamental flaws of the model). Perhaps the justices, who have shown time and again limits to their understanding of statistical materials,[24] have no greater ability, intuitively or otherwise, of understanding indifference points, the set of Pareto optimals or, on a more practical level, that a gatekeeping committee moving to the left might actually free them to move further to the right (Ferejohn and Shipan 1990). Perhaps they use simple heuristics to help them decide when they might be constrained (Simon 1957). One such heuristic might simply be the number of institutions, between the House, Senate, and President, that are controlled by the opposite party that controls the Court. If two or three of the institutions fit this criterion, then the Court may feel constrained by the political environment and opt to hear a smaller percentage of statutory cases.

To test this we added a dummy variable for those years in which a majority of the justices were of a different party than the majority in two or more of the other three institutions. The results are presented in the Partisan Control column of Table 1. The slope coefficient, .77, means that if the Court finds itself in a hostile political environment, it increases its relative amount of statutory cases by less than one percent. With a standard error of 3.06, the result is both statistically and substantively insignificant.

Though the partisan-control model requires less of the justices than the standard SoP account, it still requires the Court to make decisions based on a sense of what Congress is likely to do. While any definition of strategic choice requires this, perhaps the best signal to the Court of

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[24] See, for example, the Court's discussion of a "2% correlation" in *Craig v. Boren* (1976), or its unwillingness to accept extraordinarily clear-cut statistical evidence in *McCleskey v. Kemp* (1987).

Congress' future intentions is Congress' past behavior. One signal the Court might have of the threat posed by Congress is the number of laws passed overriding Court decisions that year.[25]

We obtained data on the annual number of laws passed overriding Supreme Court decisions from Paschal 1991. These range from a low of 0, the modal response, to a high of 9 in 1986. (See Figure 2). Does the Court respond to such reversals by hearing a higher percentage of constitutional cases in the upcoming term? If 1986 is any indication, the answer in no. While 48.1% of the Court's relevant cases were constitutional in the 1985 term, the Court responded to Congress' 1986 reversals by hearing essentially the same percent of constitutional cases in the 1986 term: 49.6. Moreover, as the column labeled "Overrides" in Table 1 demonstrates, the Court does not shift its likelihood of taking constitutional cases in response to the number of congressional overrides in a given year.

(Figure 2 about here)

Finally, we examine whether the Court responds to an adverse political environment by lowering the absolute number of statutory cases, rather than by lowering the relative number. We present the absolute number of statutory cases heard per term in Figure 3.

(Figure 3 about here)

These tests, unlike the previous ones, do not require that the Court be relatively more constrained in statutory cases than constitutional cases; they merely require that the Court be constrained in statutory cases. Simply put, the more constrained the Court is, the fewer statutory cases it should hear in a term. Using the independent variables from Table 1, we present these results in Table 2.

(Table 2 about here)

Because the dependent variable is the number of statutory cases heard per term, we expect this to decrease as the Court's constraints increase. Table 2 provides little evidence of this. Four of

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[25] Here we match Court decisions from, say, the 1979 term, with Supreme Court decisions passed into law in 1979.

the five slope coefficients are positive, all but two are dwarfed by their standard errors, and none are statistically significant at conventional levels. We are no closer to rejecting the null hypothesis than we were before.

Summary and Conclusions

In this paper, we attempted to test a notion derived from the Separation-of-Powers school: Supreme Court justices would be constrained in the type of cases they hear by the political environment they faced. Since overriding constitutional decisions is far more difficult than overriding those of the statutory variety, we argued that evidence of the plausibility of this prediction would show the Court taking a higher proportion of constitutional cases as the political constraints increased.

To be sure, we have not exhausted the possible tests of this conceptual prediction[26] but the tests we have run provide little evidence of an agenda-setting constraint operating on the Court by Congress and/or the President. Even so, our results—while not consistent with the interdependence arguments offered by the Separation-of-Powers school— are consistent with this model in two broader senses. First, to the extent that the Court is capable of acting on its sincere policy preferences, that may well be the result of the very rules and institutions that advocates of strategic rationality so often discuss. Bicameralism, committee power, presidential veto, and so forth act to provide a rather broad range of Pareto optimals for the Court. Though differences exist, this result appears to hold regardless of the specific model of the legislative process used. Second, our results may be consistent with general arguments about political control: Because the President nominates and the Senate confirms Supreme Court nominees, it would be odd indeed to find median justices who are far outside the rather broad preferences of the dominant lawmaking coalition (Dahl 1957). That we almost never do suggests that political branches are quite effective at *ex ante* control, even if *ex post* control is rather limited.

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26 Others include (1) comparing Court agenda setting during periods of Court-curbing and non-curbing and (2) disaggregating to the case/issue level, as Provine (1980) and Epstein and Knight (1997) did.

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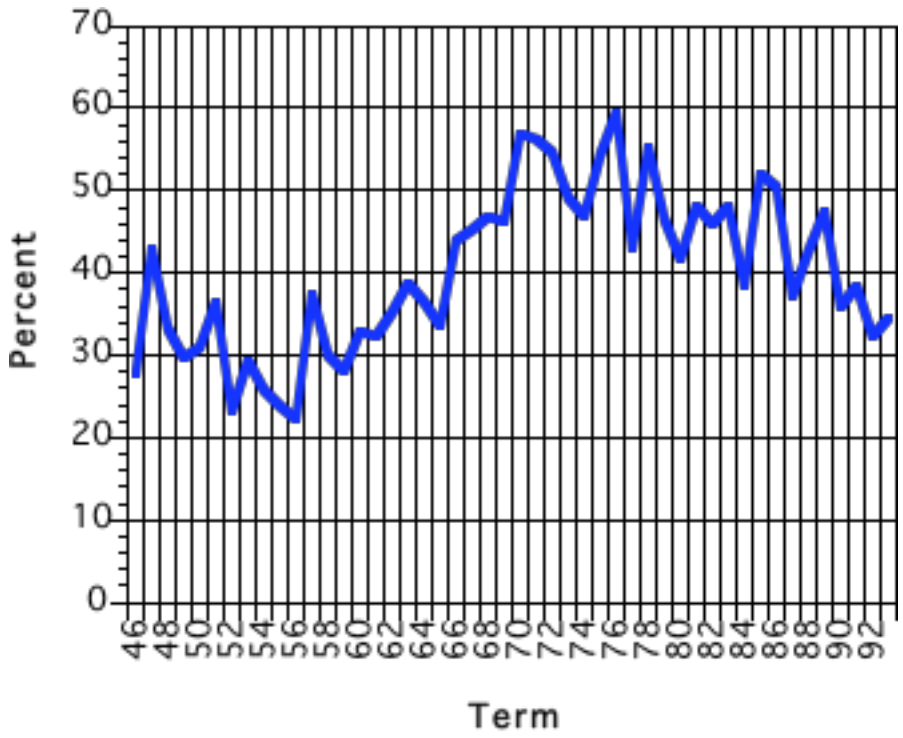
Figure 1. Percent of Court's Plenary Docket Composed of Constitutional Cases, 1946-1993 Terms



Data Source: Harold J. Spaeth's U.S. Supreme Court Judicial Database.

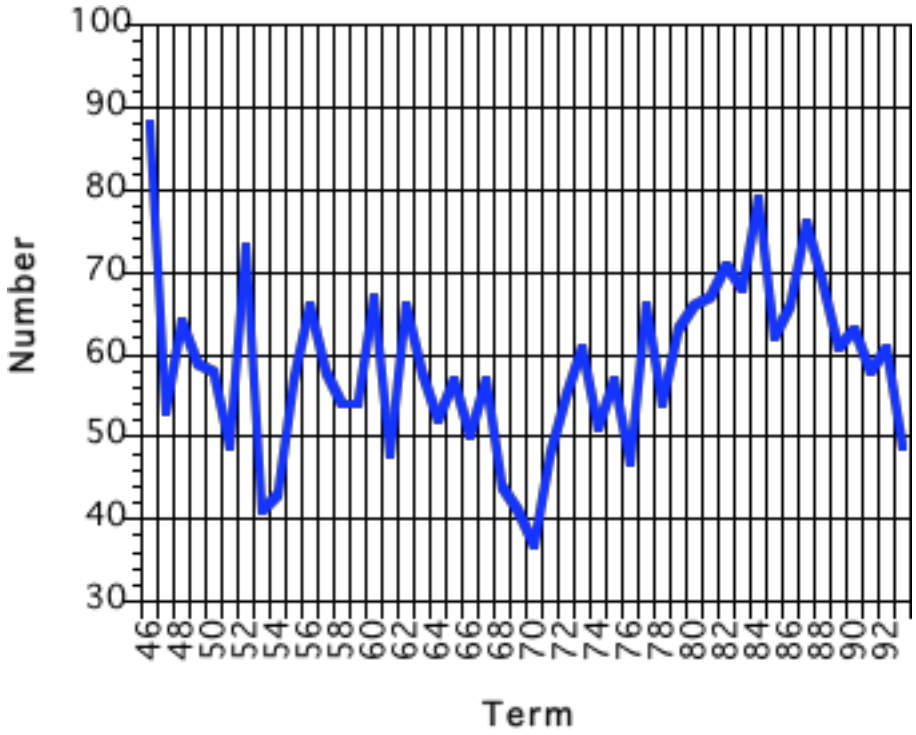
Table 1. Maximum Likelihood Estimates of Constraint Imposed by the SoP System on Percent of Constitutional Cases Decided by the Supreme Court, 1946-1993 Terms

	Committee Power	*Multiple Veto*	*Party Caucus*	*Partisan Control*	*Override*
β (S.E.)	.15 (.27)	†.15 (.56)	.11 (.25)	.77 (3.06)	.04 (.44)
ρ (S.E.)	.70 (.10)	.71 (.10)	.71 (.10)	.71 (.10)	.71 (.11)
Constant	39.14	39.29	39.27	39.05	39.59

Figure 2. Number of Congressional Overrides of Supreme Court Decisions by Year

Data Source: Paschal, 1991.

Figure 3. Number of Statutory Cases on the Supreme Court's Plenary Docket, 1946-1993 Terms



Data Source: Harold J. Spaeth's U.S. Supreme Court Judicial Database.

Table 2. Maximum Likelihood Estimates of Constraint Imposed by the SoP System on Number of Statutory Cases Decided by the Supreme Court, 1946-1993 Terms

	Committee Power	*Multiple Veto*	*Party Caucus*	*Partisan Control*	*Override*
β (S.E.)	-.45 (.33)	.11 (.85)	.05 (.42)	4.07 (3.63)	.03 (.73)
ρ (S.E.)	.24 (.14)	.32 (.11)	.32 (.14)	.26 (.15)	.31 (.14)
Constant	59.66	59.05	59.06	57.32	59.03