Dodging Conflict:
The Supreme Court Under Threat from Congress

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Abstract of Dissertation

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In this dissertation, I explore a poorly understood aspect of judicial decision making: the Supreme Court's decision to "avoid the merits" of a case. I define avoiding the merits of a case as ruling on mootness, standing, or dismissing a case's certiorari. I incorporate threat from Congress into an analysis of the Court's decision to avoid case merits. Specifically, I argue that the Court uses threshold questions to avoid ruling in cases in which it is under threat of an override from Congress. By focusing on threshold questions rather than the merits, the Court can avoid issuing a ruling that Congress may not like, therefore protecting itself from a potential override.

Many scholars examine the question of whether the Court is influenced by congressional preferences, but they focus largely on the Court's final decisions on the merits. I change the terms of debate by arguing that if the Court is under threat from Congress, the justices may prefer not to rule on the merits. Avoiding the merits of a case provides the justices with an escape from a conflict situation.

In a three-part empirical study, I find evidence that the justices are indeed strategic relative to the preferences of Congress. I begin with a study of several stages of the Court's decision making, looking at briefs submitted to the Court, oral arguments, and the justices' private conference discussions for evidence of congressional constraint. Finding that the Court does frequently include Congress in its discussion of cases, I turn to a study of the *effect* of congressional preferences on the Court. I find evidence that both institutional-level decisions and individual-level decisions on the Court are affected

by the justices' evaluation of congressional threat. As a result of this consideration, the justices are strategic in their decisions on whether to address the merits of a case.

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Chapter 1

Introduction

On June 26, 2002, the Ninth Circuit Court of Appeals issued one of the most controversial court decisions in recent history. The ruling in *Elk Grove Unified School District v. Newdow* (328 F.3d 466) declared that the 50-year-old insertion of "under God" into the Pledge of Allegiance violated the students' First Amendment rights. Dr. Michael Newdow, an atheist, had sued his daughter's school district, arguing that his right to influence her religious views were infringed upon by the fact that she was required to recite the Pledge of Allegiance daily in school, including the words "under God." Newdow argued that this requirement constituted a violation of the constitutional protection against state-sponsored religion. Furthermore, his daughter faced the unfortunate choice of reciting "under God" or risking ostracism from her peers for refusing to say the phrase. The Ninth Circuit agreed with his argument, ruling that the phrase is unconstitutional.

The circuit court's decision led to an immediate outcry from members of Congress, the president, and the public. As the *Washington Post* reported, nearly all members of Congress, all 50 state governments, the National Education Association, the

National School Boards Association, and 91 percent of the American public supported upholding the existing pledge (Lane 2004). Immediately in Washington, the Senate passed a unanimous resolution condemning the ruling, and dozens of House members gathered on the steps of the Capitol building where they recited the pledge including the "under God" phrase and sang "God Bless America" (Nieves 2002). Under these conditions, the Supreme Court granted certiorari and agreed to take the case.

During the two years between the Ninth Circuit Court's decision and the Supreme Court's ruling on the case, several more bills were introduced into Congress that were related to the case. These bills proposed actions such as adding a constitutional amendment to protect the Pledge of Allegiance (H.R. 2028), stripping jurisdiction from the lower federal courts over any case pertaining to the flag pledge (H.J.RES 26), and a bill creating a "National Pledge of Allegiance to the Flag Day" that "strongly disapproves of the decision by the three-judge panel of the U.S. Court of Appeals for the Ninth Circuit" (S. 378). In addition, on November 13, 2002, five months after the Circuit Court's decision, Congress passed and the president signed into law a bill to reaffirm the reference to "under God" in the pledge (Public Law 107-293). Clearly, Congress was prepared to take legislative action in light of the court decision and was sending a powerful signal to the Supreme Court.

Almost two years after the Circuit Court's decision, the Supreme Court issued its ruling in the case. In a surprising and anti-climactic resolution to the controversy, the Court chose to rule on the threshold question of standing rather than addressing the merits of the case, the constitutionality of the phrase in the pledge. In its decision, 542 U.S. 1 (2004), the high court reversed the decision of the lower court, arguing that the plaintiff

did not have standing in the case.[1] As they noted in the opinion, the custody dispute between Sandra Banning, the child's mother, and Newdow rendered any judgment of the lower court invalid. The Court thereby completely dodged the merits of the case by focusing on a threshold question rather than dealing with the difficult question on the merits, the constitutionality of the "under God" phrase.

In the opinion written by Justice John Paul Stevens, the majority found that "it is improper for the federal courts to entertain a claim by the plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." Unlike Newdow, the child's mother wanted her to continue reciting the "under God" part of the phrase because the mother was not an atheist. Although the Court did not directly approve of the constitutionality of the phrase, the outcome was in her favor.

The procedural ruling was a disappointment for some who were hoping for a full endorsement of the "under God" phrase by the Supreme Court. Why, then, did the majority opinion rule on a threshold question in the case rather than make a decision on the merits? I argue that for the justices, their decision of how to rule in the case provided a way out of a difficult controversy. The decision on standing allowed them to avoid the merits of the case without dealing with the difficult legal issue. In addition, they avoided the institutional confrontation with the legislative branch that was pending if they decided in favor of the plaintiff. Congress clearly had strong preferences against the Ninth

[1] Justice Antonin Scalia recused himself from the case after having made public statements disapproving of the Ninth Circuit Court's decision. Five justices joined the majority opinion: Justices Stevens, Kennedy, Breyer, Souter, and Ginsburg. Three justices concurred with the Court's reversal of the lower court's decision, although they based the reversal on different reasoning, wanting to reverse the case on its merits.

Circuit's decision and was prepared to take action to preserve the existence of "under God" in the pledge. The many signals Congress sent to the Court could not have gone unnoticed by the justices.

Not only did Congress send signals to the Court by introducing many pieces of legislation pertaining to its upcoming decision, but at several points throughout the Court's decision making process, information about Congress was continuously brought before the justices. For example, in the petitioner's brief, the attorneys reminded the Court of the congressional action:

> "The importance of the Pledge as codified is exemplified by the national uproar caused by the Ninth Circuit's decision in the instant case. Immediately after the *Newdow I and Newdow II* opinions were published, Congress adopted multiple resolutions in support of maintaining the Pledge with the words 'under God'" (petitioner's brief in *Elk Grove v. Newdow*, 42-43).

Furthermore, responding to a question asked by Justice Ginsburg in oral arguments about whether there was a stronger case in 2004 to keep the "under God" phrase than when Congress originally inserted it, the petitioner's attorney again reminded the Court that Congress had taken action in the case: "Yes, Justice Ginsburg… because the Congress revisited this issue in 2002 after the decision below in this case" (transcript of oral argument, http://www.oyez.org/cases/2000-2009/2003/2003_02_1624/argument).

As I argue later in the dissertation, this type of information presented to the Court is very common. Furthermore, it is a necessary condition for congressional influence on

the Court that the Court has information about Congress and considers it during its decision making. Because this dissertation focuses on congressional influence on the Court, I devote one chapter to studying this type of information transmission to the Court, both in the briefs submitted and during the oral arguments. I also look at the justices' conference discussions, which are unavailable at this time for the *Newdow* case. After looking at this information transmission to the Court, in the final two empirical chapters, I study whether the Court is actually influenced in its decisions to address (or not to address) cases on their merits.

Models of Judicial Decision Making: Understanding *Newdow*

There are two components of the Court's decision in *Newdow* that are particularly puzzling. The first is that the justices who joined Stevens' majority opinion and chose to rule on standing and reverse the lower court's decision were the five most liberal justices on the Court. Furthermore, some of these justices (Stevens, Kennedy, and Souter) voted in *Lee v. Weisman* (1992), the case which the Ninth Circuit based its decision on, that a school prayer at a graduation ceremony was a violation of the Establishment Clause. That would suggest that the justices would have wanted to uphold that precedent in *Newdow* rather than ignoring it. The conservative justices that did not join the majority opinion in *Newdow*, Rehnquist, O'Connor, and Thomas, argued that rather than avoid the merits in the case, the Court should rule on the merits of the "under God" question and overturn the legal precedent in *Lee* that led to the Ninth Circuit's decision. They concurred with the Court's reversal of the lower court's decision.

Presumably, if they had followed their sincere preferences, the five most liberal justices who joined Stevens' opinion would not have chosen to reverse the Ninth Circuit's ruling, since the Ninth Circuit is well known for making liberal decisions, and this one was no exception. The outcome was undoubtedly a conservative one, despite the fact that the decision was issued by the liberal justices on the Court. This is puzzling to judicial attitudinalists, who would argue that members of the Court act to implement policy that is consistent with their own personal policy preferences. The liberal side of the Court would have most likely ruled the other way, upholding the policy established by the lower court, according to this model. Clearly this case violates the basic principles of the attitudinal model of judicial decision-making. This leads to the following question: If justices make their decisions based on their political attitudes, why did the liberal justices choose to avoid the merits in the case rather than uphold the Ninth Circuit Court's decision?

The second perplexing element of this decision is that the Court chose not to decide the case according to the legal model; that is, the Court ignored the precedent on the issue. The Ninth Circuit's ruling was based upon the Supreme Court's 1992 decision in *Lee v. Weisman*, in which the role of prayer in schools was dramatically limited. The *Lee* decision held that even if students were not required to join in a prayer, even nonreligious students might feel psychological pressure to do so from their peers and this constituted a violation of their First Amendment rights. Even Justice Thomas, who wanted the Court to overturn *Lee* outright rather than avoid the merits and rule on standing, acknowledged that the legal precedent that existed was in favor of the Ninth Circuit's decision (Lane 2004). This leads to a second question: If the Court did not

make the decision based on preferences, and it also did not make the decision based on legal precedent, then what was it that led the Court to this outcome?

I argue that neither the attitudinal nor the legal model can fully explain the Court's decision in this case. Rather, the strategic model of decision making provides the best explanation. The strategic model, as I will explain in much greater detail in the following chapter, holds that the justices take into account the preferences of individuals and institutions involved in the decision, although their primary goal is to pursue their policy preferences. That is, they may consider the preferences of their own colleagues and account for these preferences in their decisions, or they may consider the preferences of other institutions external to the Court, such as the other branches of government. In this case, members of Congress were quick to become involved, introducing a slew of legislation, and I argue that it was this consideration of the preferences of the legislative branch that led the Court to avoid the merits of the case. Because the Court found the political environment to be threatening, the justices ruled on a threshold issue in the case without addressing the merits. The occurrence of events in this case suggests that a congressional constraint over the Court does exist, providing evidence for a strategic model of decision making in with the Court is aware of and accounts for congressional preferences.

Congressional Constraint on the Court

The confluence of events in this case highlights an important institutional fact about Congress and the courts: although the Supreme Court is often considered to be the final arbiter of the law, Congress can and does have influence over the Court. Congress

has the constitutional power to overturn the Court's decisions through legislation, particularly in statutory interpretation cases. In addition, Congress has the power to limit the jurisdiction of the judicial branch. Although our separation of powers system is meant to ensure judicial independence, congressional control over and legislative responses to Court decisions suggest that this is not always the case. A court of justices with lifetime tenure and almost no political accountability should not necessarily feel beholden to the preferences of the public and the legislature, but the *Elk Grove* case suggests that the Court chose not to take the case for some strategic reason, and the eagerness of Congress to take on the issue seems a likely explanation.

Why would the Supreme Court be influenced by the preferences of Congress in a separation-of-powers system that is meant to ensure the branches are equal? I argue that the Court has several reasons to avoid a congressional override, most importantly to avoid policy loss and to maintain the Court's legitimacy in the eyes of the public and the other branches (Epstein and Knight 1998; Segal, Westerland and Lindquist 2007). Assuming that the justices are acting on their policy preferences and choose to locate their decisions in a favorable location in policy space, they will want to avoid a congressional override because such an override would mean Congress is changing the policy from the Court's preferred location. The second point, that the Court has an interest in maintaining its institutional legitimacy, rests upon the assumption that the Court wants to create efficacious policy. To do so, the Court must remain in good standing in the eyes of the public and the other branches of government.

Over the past two decades, many scholars have examined whether this congressional constraint on the Court exists. They have looked at whether the Court

moderates its decisions in the face of an ideologically opposing Congress to avoid overrides. These scholars have produced mixed results, although their studies have one major flaw: they largely only study the Court's decisions on the merits. They have argued that the justices' votes on the merits will reflect a submission to congressional preferences. I argue here that in cases in which the Court is particularly threatened by a congressional override, such as in *Newdow*, the congressional constraint on the Court will be manifested in the Court's choice not to even address the merits of the case. In other words, in some cases, rather than submit to congressional preferences on the merits, the Court would rather not decide on the case's merits at all.

This is the main argument I contribute to the literature on congressional constraint: *the Court's response to congressional constraint is not limited to its votes on the merits, but will include other stages of decision making as well, including the decision to avoid the merits of cases.* I seek to find out whether the Court is indeed influenced by Congress in its decisions to avoid case merits, which would mean that the *Newdow* case is not anomalous but is evidence of a larger pattern of strategic behavior employed by the justices.

Outline of the Dissertation

To understand the influence of Congress on the Court, I take several approaches throughout the following chapters. In this section, I briefly outline the plan for each of these chapters.

Chapter 2 presents in much greater detail the theory behind my argument. I introduce another well-known historical example of congressional constraint upon the

Court similar to the *Newdow* case in which the Court declined a case and in doing so appeared to be complying with congressional preferences. The case was *Ex parte McCardle*, a case that emerged during the post-Civil War Reconstruction era. I then discuss the role of the separation of powers model and how it fits in with the strategic model of decision making, outlining the literature that has tested the influence of the separation of powers on the Court's decisions. Again, I argue that these scholars are looking for this influence in the wrong place by focusing on case merits. I then proceed to discuss two basic assumptions I make: that the justices are policy seeking individuals and that they are strategic in their actions, considering the preferences of others throughout their consideration of cases. Finally, I introduce some behavioral expectations that I adopt based upon the existing literature.

Chapter 3 serves as an expository examination of several stages of the Court's decision making process. I choose three stages of the Court's decision making and look for discussion of congressional preferences: the submission of briefs, oral arguments, and the justices' conference discussions. Using a random sample of 100 orally argued, full-opinion cases from the Court, I look at all the briefs submitted, the oral argument transcripts, and Harry Blackmun's notes from the justices' conference discussions. I discuss the frequency of mentions of Congress in each of these places, arguing that the consistency of the justices' discussion of Congress serves as evidence that a congressional constraint exists. Because this chapter is mostly descriptive, I do not make any causal arguments about the effectiveness of these discussions of Congress at changing the justices' decisions. However, I do stress the notion that the numerous discussions of Congress at the Court suggest that at the very least, the Court is certainly

considering the legislative branch while deciding each of these cases. This is suggestive of a congressional constraint on the Court, which I test for empirically in the next two chapters.

In Chapter 4, I explore whether the Court chooses to dodge case merits as a result of threat from Congress. To do this, I look at the Court's decisions over the entire length of the Burger Court. Using an institutional-level approach, I empirically test whether the Court is responsive to threat from Congress in its decisions to rule on threshold questions or dismiss a case's writ of certiorari as improvidently granted (DIG), which removes the case from the Court's docket, often without explanation. The threat variables I test are the Court's ideological distance from Congress and the frequency with which Congress has recently overturned the Court. I do find that when the Court and Congress are more ideologically disparate, the Court is significantly more likely to avoid the merits of cases.

Chapter 5 takes a more in-depth look at voting on the Court to avoid case merits. Rather than using an institutional-level approach like I do in Chapter 4, in this chapter, I examine individual-level voting on the Court, using conference votes as the dependent variable. Again, I look at when the justices choose to avoid case merits by ruling on threshold questions or voting to DIG. In this chapter, as in the previous chapter, I find empirical evidence that the justices are strategic with their votes relative to the preferences of Congress when deciding whether to reach the merits of cases.

In Chapter 6, I wrap up the dissertation by pulling together my findings from the previous chapters and drawing conclusions. I discuss the implications of my findings for the congressional constraint literature and suggest further avenues of research that might be useful to scholars.

Chapter 2

Congress, the Court, and the Separation of Powers: Understanding Congressional Constraint on the Supreme Court

The Supreme Court case I discussed in the introduction chapter, *Elk Grove v. Newdow* (2004), was merely one example of a conflict between the Court and Congress in the separation of powers system. I argued that *Newdow* exemplifies a strategic move on the Court's part to avoid the merits of a case in which it was threatened by Congress. That is, in cases such as this one in which the Court faces an override from Congress if it rules on it preferences, the Court instead may choose to avoid an override by avoiding the merits of the case. Avoiding the merits denies Congress a chance to override the Court.

Historically, there have been many instances of the separation of powers model playing itself out between the Court and Congress with similar results. Another example is the case of *Ex parte McCardle* (1869), a case that went before the Court during the Reconstruction era. The story of *McCardle* is similar to the *Newdow* case. Immediately following the Civil War, Congress was under the control of the Radical Republicans, a group of northern Republicans who favored strong punishment of the South. William

McCardle, a journalist, was against this treatment of the South and wrote editorials opposing Congress's actions. In light of his anti-congressional writings, he was arrested and held for trial before a military tribunal. McCardle filed for a writ of habeas corpus and ultimately appealed his case to the Supreme Court under the 1867 Habeas Corpus Act, which gave the Court jurisdiction to consider the post-Civil War habeas corpus decisions.

The Court originally heard arguments in early March of 1868, and it was evident during the arguments that all of the justices were prepared to side with McCardle (Fairman 1971). This would have been consistent with the Court's decision two years earlier, *Ex parte Milligan* (1866), in which the Court ruled in favor of an individual who had been tried under military commissions created by Lincoln. Since the *McCardle* case was shaping up to be similar to that previous case, it appeared as though the Court would be consistent with its prior decision (Epstein and Walker 1995).

Immediately following the Court's oral arguments, before the Court handed down its decision in the case, Congress passed a law removing the Supreme Court's authority to hear the habeas corpus cases, the same power they had granted the Court in the Habeas Corpus Act just a year earlier. This act gave federal judges the power to grant habeas corpus to anyone who was being held for violating the Constitution. Congress also threatened to pass further legislation that would remove the Court's authority to hear all Reconstruction cases (Epstein and Knight 1998; Fairman 1971).

Rather than issuing its decision (which would likely have favored McCardle), in light of Congress's behavior, the Court chose an alternative course of action: it postponed and rescheduled the arguments in McCardle's case for the following term, further

delaying the decision. It would hear the oral arguments a year later, in March of 1969. During the second round of oral arguments in the case, the government's argument was that the Court lacked jurisdiction in the case since Congress had revoked the Court's jurisdiction over habeas corpus cases. Rather than handing down a decision that undoubtedly would have created further trouble for the Court from Congress, the Court declined to hear the case, fully conceding to Congress's wishes.

The Court's disposal of the *McCardle* case provides an example of the Court strategically protecting itself from congressional retribution (Epstein and Knight 1998). What is particularly interesting about the Court's decision in *McCardle* is that just three years earlier, in *Ex parte Milligan* (1866), the Court ruled in a very similar Reconstruction case in favor of an individual who was tried, under President Lincoln's orders, in a military commission. The Court ruled that the military commission was unconstitutional. Why did the Court shy away from deciding in a similar case the second time around? The most compelling answer is that the shift occurred because an intervening election had changed the composition of Congress, which became much more radically anti-South in between the two decisions (Epstein and Walker 1995). The Court faced an ideologically hostile Congress the second time around, but not the first, so they dodged the question and avoided a potential override in the second case, *McCardle*, by dismissing it.

The separation of powers system has led to other interesting and significant confrontations between Congress and the Court. Many case outcomes the Court handed down during the Civil Rights era, for example, can best be understood by looking at the preferences of Congress at the time (Eskridge 1991). Eskridge argued, for example, that

the Burger Court, treated constitutional and statutory cases differently during this time period. While statutory cases are fairly easy for Congress to override with legislation, constitutional cases are much more difficult for Congress to override, since they require a constitutional amendment. During the Civil Rights period, the Court regularly handed down decisions in constitutional cases that were more conservative than many of their decisions in statutory cases. He argued that this was because the Court was more conservative than Congress, and the Court is less threatened by overrides in constitutional cases. On the other hand, in statutory cases, which are easier for Congress to override, the Court was more compliant with congressional preferences in its decisions.

Giving in to Congress's preferences by altering its decisions on the merits is one way the Court can deal with the separation of powers when it is under threat from Congress. Rohde (1972), introducing the concept of congressional threat, argued that it was this extra-institutional threat that caused the "switch in time that saved nine" during the New Deal era, resulting in the Court giving into congressional and presidential preferences. I argue that another option for the Court, rather than giving in to congressional preferences, is to avoid ruling on the merits of the case. This is how the Court dealt with the questions in *Newdow* and *McCardle*. In this dissertation, I explore congressional threat on the Court to see whether these cases are anomalous or whether they typify behavior that the Court engages in regularly.

I begin the remainder of this chapter by discussing the separation of powers model. I introduce a more recent Court case, *Ledbetter v. Goodyear Tire & Rubber Company* (2007), in terms of the separation of powers and the strategic model of decision making. This discussion leads to a discussion of the two major assumptions in this

dissertation: that the justices are policy-seeking and that they behave strategically. Because the justices are strategic, a number of scholars have found that the Court moderates its decisions in some cases in accordance with congressional preferences. I discuss this literature, as well as some of the opposing literature that argues that there is no such influence on the Court. I argue that these mixed findings are a result of scholarly focus on the wrong place: the Court's decisions on the merits.

If the Court is going to be influenced by Congress, there must be a reason for which it wants to avoid an override. I offer two such reasons: to prevent policy loss and maintain institutional legitimacy. After a discussion of these reasons, I re-state my research question and introduce some behavioral expectations based upon the information I have presented here in this chapter.

The Separation of Powers and the Strategic Model of Decision Making

One central question in the judicial politics literature is whether and how the Court is strategic relative to the actors and the institutional or political environment surrounding its decisions. This responsiveness to the preferences of others is known as the strategic model of decision making. The congressional constraint literature fits into the strategic body of literature because its basic question is whether the Court is considering congressional preferences in its decisions. The implication is that the Court would alter its decisions from its most preferred outcome if Congress' preferences were different from its own. This would be an example of strategic behavior.

The strategic model assumes that the justices act on their own preferences, but they are aware of and responsive to the preferences of those around them. In order to

maximize their own policy gain, they take others' choices into account, and this in turn influences their behavior. The decisions justices face are therefore governed, at least in part, by the broader context in which they act. In the words of Epstein and Knight (1998), the strategic account of judicial behavior holds that justices "realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act" (xiii). For example, if the Court rules one way in a case and Congress subsequently overrules their decision, the Court has failed to successfully implement its own policy preferences; this is precisely what happened in the *Ledbetter v. Goodyear* (2007) case, which I discuss at length below. In cases where the Court perceives a congressional threat, the Court will modify its decision, aligning it closer to congressional preferences to avoid an override. Although that outcome may not be the Court's sincere preference, it is closer to the its sincere precedent than if Congress chose to locate the policy at *its* sincere preference.

One of the original proponents of using the strategic model in studying the Court, Murphy (1964) argued that the justices are cognizant of the responses and preferences of those around them. This includes their colleagues on the Court as well as other relevant political actors. The justices take into account the preferences of others and maximize their own preferences by locating policy as close to their own ideal point as possible. A justice prefers to have the policy located at a point close to his or her own preferences than to have a disfavored majority on the Court move the policy further away from those preferences. Similarly, if the Court faces an ideologically hostile Congress, the Court may choose to moderate its position in a case so as to avoid a congressional override of

the decision. Assuming such an override would move the policy location away from the Court's preferred location, the Court should willingly give up some ideological ground to Congress, rather than allowing Congress to select the policy's eventual location through legislation.

An important element of the strategic model that differentiates it from other models of decision making is that to understand the strategic decisions of actors, those actors must be understood in terms of the institutional context in which they act. These institutions structure the choices they make, sometimes forcing them to alter their decision from their most preferred outcome, but other times supporting their sincere preference (Maltzman, Spriggs, and Wahlbeck 1999). Again, the separation of powers is one example of this: if the Court shares the same ideological preferences as the other branches, they can act upon their most sincere preferences. If their own preferences are radically different, however, they may have to compromise their most sincere preferences to accommodate the others' preferences.

One example of a situation where the Court did *not* behave strategically is the Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Company* (2007), which was ultimately followed by a congressional override. Lilly Ledbetter, a 19-year employee at Goodyear Tire Company, sued the company for gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The question arose as to whether she could sue for disparate pay resulting from decisions made outside of the statute of limitations period. The case was appealed to the Supreme Court, who issued a narrow reading of the statute. The Court ruled that her claim was barred by the limitations period. Two years later, Congress passed the Lilly Ledbetter Fair Pay Act (P.L. 111-2),

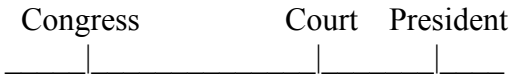
which once again broadened the ability of workers to sue for gender discrimination. Assuming the Court preferred a narrow reading of the Civil Rights Act, they should have acted strategically by anticipating congressional preferences on the matter and therefore avoiding the override.

I argue that it was the political environment that allowed the Court to make this decision. Though there was a Democratic Congress at the time that most likely was in Ledbetter's favor, there was still a Republican president who would likely have vetoed a congressional override. Therefore, the conservative Court was protected in its decision by the president's ideology. Once President Obama took office, which happened after the Court's decision in the case, the Court did indeed get overturned. If the Court had heard the case in 2009, when the presidency and Congress were controlled by the same party and were quite ideologically distant from the Court itself, perhaps the decision would have been different.

These two scenarios can be portrayed as follows. The political environment in 2007, when the Democrats were in control of Congress, is portrayed by Figure 2.1; the congressional ideal point is to the left of both the Court and the president. The Court median is more conservative than Congress, and President Bush's ideal point is more conservative than the Court median (these approximations are roughly based on Bailey and Maltzman 2009). Because the president is located ideologically to the right of the Court while Congress is to the left, the Court's preferences are protected. If the Court issues a conservative ruling, which it did in *Ledbetter*, the president will likely veto a congressional override that tries to re-locate the policy to the left, closer to the Court's

ideal point. The president will prefer the Court's established policy to any point along the scale that is closer to Congress's ideal point.

Figure 2.1: The Political Environment in 2007



On the other hand, Figure 2.2 portrays the institutional positioning after the Obama election and further Democratic gains made in Congress in 2008. The president and Congress now essentially shared an ideal point, and the Court was located much further to the right than either of the elected branches. This made the situation for the Court much more threatening, as the president and Congress now shared an ideal point. The Court's preferences were no longer protected by a possible presidential veto as in 2007, and President Obama signed into law the Ledbetter Act.

Figure 2.2: The Political Environment in 2009

As I suggested above, had the *Ledbetter* case come before the Court in 2009 rather than in 2007, perhaps the outcome would have been different because the Court may have expected an override of its decision. This visual portrayal of the chain of events in *Ledbetter* surely suggests that at the very least, the Court should be aware of what Congress and the president might do, as the Court appeared to be in *Newdow*.

The section on the *Ledbetter* case leads me to a discussion of two important assumptions I make in this chapter and throughout the rest of this dissertation. The first

assumption is that justices are primarily motivated by their own personal policy goals. The second assumption builds upon the first: given that the justices are motivated by policy, they attempt to secure those policy goals by anticipating the actions and preferences of those around them, including their colleagues on the Court as well as other institutions.

Justices as Policy-Seeking, Strategic Individuals

My dissertation rests on some basic and important assumptions about the Court and its behavior, as well as the behavior of the individual justices. In this section, I explain the two major assumptions. The first assumption I make is that justices are motivated primarily by policy. Most scholars of judicial behavior will concede that justices are motivated, at least in part, by their own political and policy preferences. Because the justices enjoy lifetime tenure on the Court, they are able to pursue their own beliefs in their decisions.

The second major assumption is that Supreme Court justices behave strategically. I have already introduced the strategic model of decision making in the SOP context. The strategic model has major principle of the attitudinal model at its core: that is, the justices are policy-driven, goal-oriented individuals. That being said, however, they are somewhat constrained and influenced by the positions of their colleagues as well as the political environment in which they are making their decisions. In this section, I introduce and discuss these two assumptions in depth.

Justices as Policy-Seeking Individuals

The first and perhaps most fundamental assumption to my work is that the justices are policy-seeking individuals. The first scholars to propose and argue that the justices are policy motivated were the legal realists. Often considered to be the pioneer of legal realism, Oliver Wendell Holmes (1881) argued that experience, not legal reasoning, was the driving force behind legal decisions. Justices' decisions are shaped by their world view, not by rational consideration of the law. Frank (1950) also argued that the justices are influenced by their socialization during childhood, during which they adopt certain values and attitudes. In other words, judges and legal professionals are not immune to the influences that so strongly impact people's views in their everyday lives. Pritchett (1948) is usually credited with bringing legal realism to political science with his book *The Roosevelt Court* (Epstein and George 1992). Others who followed the original legal realists incorporated the basic principle of his model, that the justices largely followed their policy preferences in their decisions, and added their own similar contributions to the literature (Schubert 1959; Dahl 1957; Spaeth 1961; Ulmer 1960).

After the principles of the legal realist model were adopted by political scientists, a new extension of the model emerged, known as the attitudinal model. Originally, the attitudinal model was highly psychological in nature, arguing that the justices have attitudes that are evoked as a result of certain stimuli in cases (Rohde and Spaeth 1976). Later, the attitudinal model became focused solely on the preferences of the justices, positing that preferences are the sole explanation behind justices' decisions. Segal and Cover (1989), for example, argued that the high correlation between the justices' values and voting patterns provides evidence for the attitudinal model. The purest form of the attitudinal model argues that the justices are unconstrained on the bench and given their

lifetime tenure, they are able to pursue their policy goals as they choose (Segal and Spaeth 1993; Segal et al. 1995; Segal 1997). As they argued, conservative justices cast conservative votes, and liberal justices cast liberal votes; their choices are simply a matter of preference.

Further evidence that the justices' main goals tend to revolve around policy can be found in places other than their votes on the merits of cases. For example, consider the judicial nomination process. Although the justices themselves may insist during their confirmation hearings that they can completely separate their own politics from the decisions they face on the bench, the partisan fervor that surrounds nominations suggests otherwise. There is no shortage of literature on the consideration of ideology and partisanship during judicial nominations. Many students of the judicial appointments process have emphasized the importance of partisan considerations during the judicial selection process (Segal 1987; Cameron, Cover and Segal 1990; Allison 1996; Nixon and Goss 2001; Bell 2002; Binder and Maltzman 2002; Epstein et al. 2006; Epstein, Segal and Westerland 2008). Other scholars argued that the president has to be strategic in his selection relative to congressional preferences and/or veto points to ensure a successful nomination (Moraski and Shipan 1999; Johnson and Roberts 2005; Nemacheck 2006; Rohde and Shepsle 2007; Primo, Binder and Maltzman 2008).

These studies all revolve around the assumption that because judicial nominations are partisan in nature, the ensuing confirmation battles inherently are focused on the candidate's ideology. If Congress, presidents, and the public all truly believed that the justices' decisions were based upon law, the main concern during confirmation hearing would probably be qualifications rather than ideology. However, the preoccupation with

the nominees' ideology strongly suggests that this is not the case.[2] Rather than deciding the cases based upon facts and precedent, most scholars and public policy officials alike have agreed that the justices are largely motivated by their own ideologies.

In addition to the nominations literature, other literatures have pointed to the importance of the justices' policy goals as well, remaining consistent with the main principle of the attitudinal model. For example, the literature on certiorari has shown that the justices' policy goals impact the cases that they will select for the Court to hear. In one early example, Schubert (1959) argued that cert choices among the justices were rooted in the justices' ideology, as evidenced by the cases he examined dealing with workers' rights. Some have argued that the direction of the lower court's decision is one factor that can be used to predict a certiorari decision, again emphasizing the importance of ideological considerations (Caldeira and Wright 1988; Perry 1991). Those who support the strategic model relative to cert decisions, as I will explain below, also have policy preferences as the underlying assumption (Palmer 1982; Brenner and Krol 1989; Boucher and Segal 1995; Caldeira, Wright and Zorn 1999; Benesh et al. 2002).

In addition, scholars have also shown the importance of policy goals when it comes to opinion assignment. Rohde (1972) argued that the justices are rational actors

[2] The legal model of decision making, the school of thought that contends the Court bases its decision upon precedent, has largely given way to the attitudinal and strategic models. The original argument was that the justices are completely constraint by legal precedent and case facts (Segal 1984). There are certainly those who think that precedent does have an effect, but that it merely serves as a constraint on justices' policy preferences. That is, the justices would like to vote on policy preferences alone, but their ability to do this is mitigated by the existence of a norm of *stare decisis* or the use of precedent (Epstein and Knight 1996; Epstein and Knight 1998).

Furthermore, if the justices were completely constrained by precedent, it would be much harder to explain why they sometimes choose to overrule precedent (Spriggs and Hansford 2001; Hansford and Spriggs 2006). Furthermore, Pritchett (1941) argued that the legal model cannot be the justices' main model of decision-making, or else we would never see split decisions among the justices. Perhaps the legal model is applied in cases that produce unanimous outcomes, but surely cases with split outcomes cannot reflect a legal model of decision-making.

who want to locate policy as close to their own preferences as possible; this plays out in opinion assignment because the opinion assigner tends to assign the opinion to the justice whose policy preference matches his own on the relevant issue. Other researchers found similar results in studies of opinion assignment (Danelski 1968; Ulmer 1970; McLaughlan 1972), although Brenner (1982) argued that these scholars were actually uncovering fluidity effects in which the opinion assigner was attempting to solidify a pivotal or uncertain vote. Maltzman and Wahlbeck (2004) and Wahlbeck (2006) also argued that the chief justice has the advantage of using opinion assignment to ensure policy maximization, although there are also other considerations such as solidifying fragile conference majorities and addressing organizational needs. Though Maltzman and Wahlbeck (2005) found Rehnquist's use of the opinion assignment power to be fairly equitable, they did point out that for some types of opinions, including important cases in which Rehnquist was in the majority, he tended to assign the opinion to colleagues to whom he was more ideologically congruent.

Furthermore, policy preferences have even been shown to matter in the justices' decisions to write separately in cases. Data from the Burger Court suggest that the pursuit of policy goals, though constrained by institutional and strategic factors, is an important factor in explaining when justices decide to join a dissent or a concurrence (Wahlbeck, Spriggs, and Maltzman 1999).

Based upon the evidence presented here, I move forward with the assumption that the justices are policy-seeking, goal-oriented individuals. However, the justices are not completely free to act upon their preferences. As I discuss below, the strategic model

argues that the justices are also constrained by the positions of their colleagues as well as the political environment.

Justices as Strategic Decision-Makers

The second major assumption I make, in addition to the assumption that the justices are acting upon their preferences, is that the justices are strategic in their actions. Stemming from the attitudinal model, which places justices' policy preferences as their primary motivations, is the strategic model. Like the attitudinal model, the strategic model posits that the justices are primarily motivated by their preferences. However, the strategic model also assumes that the justices are aware of and responsive to the preferences of those around them. These preferences of others essentially act as a constraint upon their actions.

There are two main branches of the strategic model of decision-making. The first posits that members of the Court are aware of and influenced by the positions of their colleagues. In their quest to secure their policy preferences, they base their decisions in part on the preferences of their peers on the Court. Their interactions on the Court and decisions in cases are influenced by their knowledge of each others' preferences and expectations of others' behavior.

The second branch of the strategic model holds that members of the Court are aware of the external institutions that make up the political environment in which they exist, and they are responsive to the preferences of Congress and the executive in the pursuance of their policy goals. I briefly discussed this part of the strategic model above as it pertains to the congressional constraint literature. Again, the idea is that because the

justices face potential overrides from Congress, they may moderate their decisions in the face of an ideologically hostile Congress to prevent this from happening.

In this dissertation, I concentrate on this second subset of the strategic model, the external influences on the Court, since my focus is on congressional constraint. In this chapter, however, I discuss both the strategic model in terms of when the justices use it among themselves and also when the Court considers external actors. The discussion here serves to emphasize the importance of the strategic model to our general understanding of Court behavior as well as to my dissertation.

Since Murphy's introduction of the strategic model to students of the Supreme Court decades ago, scholars have explored many stages of the Court's decision-making and have found a great deal of evidence that the justices do indeed behave strategically. To begin with, the justices make strategic choices relative to which cases they will take. The idea behind the strategic certiorari studies is that the justices may have an interest in a particular case reaching (or not reaching) the Court, and often their vote reflects this. That is, the justices can choose to deny cert in cases in which they want to uphold the status quo, or grant cert to cases in which they want to establish a particular policy. Perry (1991), for example, argued that the justices are forward thinking and engage in defensive denials and aggressive grants. Defensive denials are when a justice votes to deny cert in order to uphold the status quo; aggressive grants are when a justice votes to grant cert with the hope of overturning the lower court's decision. These actions reflect a consideration by the justices of their colleagues' preferences and the likely case outcomes. Others similarly argued that the justices were reversal oriented and strategic in their cert decisions (Palmer 1982; Brenner and Krol 1989). Boucher and Segal (1995)

also found evidence of forward thinking justices at the cert decision, as did Schubert (1959), Caldeira, Wright and Zorn (1999) and Benesh et al. (2002).

Once the Court has granted cert in a case, the justices still have several options for how to deal with the case strategically. Occasionally, they will issue a dismissal as improvidently granted, or a DIG. Hendrickson (2003) found evidence for strategic uses of the DIG on the Burger Court. He found that the Court is more likely to DIG when there are fewer *amici curiae* in the case, when the lower court ruled in a more liberal direction, when the vote to grant cert in the first place was close, when the justices split their votes at conference for different dispositions on the merits, and finally, if the case is a judicial power case.

The next step of the Court's decision process once it has granted cert is to hear oral arguments. Johnson (2004) argues that the oral arguments are too often overlooked and that one use of the arguments for the justices can be to learn about the preferences of other actors, including various publics and even the justices' own colleagues. Following oral arguments, the justices have conference discussions, where strategic behavior has been documented as well. For example, Chief Justice Warren Burger often used passing at conferences strategically (Woodward and Armstrong 1979; Epstein and Knight 1998; Johnson, Spriggs and Wahlbeck 2005).

Finally, the justices have been shown to exhibit strategic behavior when it comes to many elements of the opinion writing stage, including the process of bargaining and accommodation (Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 1998; Maltzman, Spriggs, and Wahlbeck 2000). As I mentioned above, the chief justice will sometimes engage in pursuing his own goals when it comes to opinion assignment, but it

is a strategic pursuit of those preferences because it is conditional upon a number of other factors (Maltzman and Wahlbeck 2004, Maltzman and Wahlbeck 2005; Wahlbeck 2006). The justices respond to majority opinion drafts in a manner that will help them secure their own policy goals. Furthermore, when the justices are writing opinions, their willingness to accommodate other justices' requests can be influenced by strategic concerns such as the size of the majority conference coalition and the ideological distance of the author from the coalition (Wahlbeck, Spriggs and Maltzman 1998). Furthermore, the justices' decisions to switch their votes in a case also stems from strategic considerations (Maltzman and Wahlbeck 1996), as does the decision to write or join a separate opinion (Wahlbeck, Spriggs and Maltzman 1999). Even the decision to hold reargument stems from strategic considerations, since justices choose to hold cases over more frequently when they are uncertain about case outcomes (Hoekstra and Johnson 2003).

In sum, a great deal of attention has been given to the justices' strategic decisions from granting cert to its decisions on the merits. Most of this literature has explored the role of the strategic model on the Court itself, when the justices are considering the positions of their colleagues. However, some of the literature on the strategic Court explores the roles of the other branches. Some of this literature focuses on the role of the executive branch when it comes to constraint over the Court (Gely and Spiller 1990; Eskridge 1991; Eskridge and Frickey 1994; Epstein and Walker 1995; Bailey, Kamoie and Maltzman 2005).

Most of the institutional constraint literature, however, has focused on the role of Congress in affecting the Court's decision-making. Because Congress does pass

legislation to override the Court somewhat frequently (Eskridge 1991), these scholars argue that the Court wants to minimize the likelihood of a congressional override and therefore is attentive to the preferences of Congress. In the next section, I focus on the literature that explores congressional constraint on the Court, which is a further extension of the strategic model of decision making. I argue that the literature certainly points to the existence of such a constraint, since the majority of the existing literature has found empirical evidence. However, I also argue that looking at other, non-merits decisions the Court makes is equally as important for finding whether the separation of powers influences the Court's behavior.

Congressional Constraint on the Court

Though there has been some disagreement among scholars, most of the work that has been done on congressional influence on the Court has found evidence that an SOP constraint exists. As I explained above, a number of scholars have presented evidence that the Court modifies its decisions on the merits in the face of opposing congressional preferences to avoid getting overridden by Congress. In this section, I outline the literature, arguing that because the majority of work has pointed to evidence of the SOP model, the separation of powers probably is a constraint upon the Court. However, the sole focus of the scholars I discuss here is on case merits. Again, I argue that looking at the final merits decision of the Court is not the best place to look for evidence of constraint.

If congressional constraint exists upon the Court, it is most likely to be primarily conditioned by ideology. That is, when the institutions are of opposing ideologies, that is

when the Court should be most fearful of Congress. Harvey and Friedman (2004, 2006) found that the Court was much more willing to strike down federal legislation after the Republican Revolution of 1994. They argued that this was because Congress became more ideologically congruent with the Court during the 1994 elections and therefore the Court was less fearful of an override. This electoral realignment of the legislative branch led to significant changes in the Court's behavior.

Other scholars also demonstrated that the Court responds to the ideological preferences of Congress. Rohde (1972) argued based upon an empirical study that in situations of threat from Congress, the Court tends to have different types of coalitions due to its strategic decisions. Gely and Spiller (1990) found that the Supreme Court is responsive to the preferences of both Congress and the president, using two cases as illustrations, *Motor Vehicle Manufacturers Association v. State Farm Insurance* and *Grove City College v. Bell*. Subsequently, Spiller and Gely (1992) found that the Supreme Court was constrained by Congress in its industrial labor relations decisions. Epstein, Knight and Martin (2001) argued that the justices could not effectively implement their own policy goals in a sustainable way without taking into consideration the preferences of the other branches. They performed a study of constitutional cases at the Court, finding that ideologically extreme justices are less responsive to the preferences of Congress, but that moderate justices are somewhat accommodating of congressional preferences.

Although these scholars have all found evidence of a model of congressional constraint based upon ideological differences, others have produced evidence to the contrary, arguing that no such constraint exists. Segal (1997) found that congressional

preferences do not seem to exert any constraint over the justices' decisions and, rather, the location of the justices' ideological preferences is what determines their votes (but see Bergara et al. 2003, who use a different econometric model with Segal's dataset and found support for the SOP model). Sala and Spriggs (2004) tested competing hypotheses based upon the attitudinal model and the SOP model, but their results rejected the SOP model. In their study of overruling precedent, Spriggs and Hansford (2004) also rejected the SOP constraint upon the Court, finding instead that the Court tended to be more responsive to certain characteristics about the precedent itself. Hansford and Damore (2000) also found mixed results for whether the Court responds to congressional preferences in their study of congressional threat, although they did find evidence of some constraint in some cases.

I argue that one reason for which these scholars may be producing mixed findings is that they only look for constraint over the Court in one place: its decisions on the merits, the final stage of decision-making on the Court. If congressional constraint over the Court does exist, it may not be most evident at the merits stage. As Cross (1998) argued, it does not make sense for the Court to grant cert to a case if it is simply going to default to congressional preferences. I argue that while the Court may not grant cert in some cases of threat, in others, they do grant cert for various reasons. These reasons could include uncertainty about its own preferences or Congress's preferences, or they may also grant cert in a case because of political pressures (this explanation was likely the case in *Newdow*). In addition, once the Court grants cert to a case, as I argue throughout this dissertation, there are other ways for the Court to still avoid deciding on the case's merits, so the Court does not have to screen all cases of threat at the cert stage.

The major flaw in the literature examining the Court for evidence of congressional constraint is its focus on decision on the merits. I offer a contribution by expanding this literature beyond its focus on the merits. I argue that while these scholars think the Court will make decisions that compromise its preferences, I ask whether the Court will make a decision on the merits at all if it will have to compromise. These scholars only offer one way for the Court to avoid congressional override, which is to alter its decision on the merits. I argue that there is more than one way for the Court to avoid an override, which in some cases will involve not deciding in a case or avoiding the merits entirely by ruling on a threshold question.

In the following section, I turn to a discussion of *why* the Court might be fearful of an override. This leads to the final section, in which I revisit the premise of my dissertation and introduce some brief behavioral expectations based upon what I have discussed in this chapter.

Congress, the Court, and Legislative Overrides

At the heart of any study of congressional constraint on the Court is that the Court has a fear of a congressional override. If the Court were completely free from any concerns about congressional action, it would have little or no reason to be responsive to congressional preferences. Congressional overrides of the Court are not infrequent; one well-known study of the Court's statutory decisions found an average of ten overrides per Congress (Eskridge 1991). Overrides are largely a product of such pressures as public opinion, concerns about federal power, and the position of the president relative to Congress (Ignagni and Meernik 1994; Clark and McGuire 1996; Meernik and Ignagni

1997). In its decision on whether to issue an override, Congress also pays attention to the ideological fragmentation of the Court in its original decision (Eskridge 1991).

In addition to the *Ledbetter* example, another example of Congress re-locating a policy that the Court established can be found in the Partial Birth Abortion Ban Act of 2003. Following the Court's decision in *Stenberg v. Carhart* (2000), which struck down a partial birth abortion ban in the state of Nebraska, the Republican-controlled Congress took up a bill in 2003 to overturn the Court's decision. The text of the bill argued that:

> "Under well settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg*… Rather, the United States Congress is entitled to reach its own factual findings… and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable interest based upon substantial evidence."

In this case, Congress was not only directly affronting the Court with its disapproval of the Court's decision, but it completely changed the location of the policy with its new bill, outlawing the very policy that the Court had upheld. The first several pages of the bill very clearly explained that Congress believed the Court was mistaken in *Stenberg* and therefore the Court should defer to Congress' judgment on the matter. Whether the Court felt its institutional legitimacy was attacked here is hard to know, but

in this case Congress was rather blatantly attacking the decision of the Court by focusing on the Court's wrongful decision for several pages in the beginning of the bill.[3]

To assume that the Court is responsive to the preferences of Congress is to assume that they *know* the preferences of Congress. Members of the Court obtain information about the preferences of Congress from various sources. The justices are likely to be aware of congressional overrides and congressional preferences relative to the Court based on sources such as the media and the briefs of the parties and *amici* in the case (Epstein and Knight 1998). Additionally, members of the Court gain information about the political environment during oral arguments (Johnson 2004).

The literature on congressional constraint has largely focused on two main reasons why the Court would want to avoid a congressional override. The first is that once the Court locates a decision at its ideal policy, it prefers to keep the policy there rather than have Congress move the policy. If Congress re-interprets a policy that the Court has already decided, they are inherently re-locating the policy from where the Court had established. This results in policy loss for the Court, which is why its members would prefer not to be overridden by Congress.

The second explanation for why the Court would want to avoid a legislative override is to maintain its institutional integrity. Segal, Westerland and Lindquist (2007) argued that the Court's image could be tarnished when Congress passes an override. This is especially threatening to the Court in constitutional cases, so in these cases, they argue, the Court has a particular interest in being responsive to legislative preferences.

[3] Interestingly, the constitutionality of the Partial Birth Abortion Ban Act was challenged soon after its passage. In 2006 the Supreme Court agreed to hear the case, and in 2007 they upheld the ban. This was probably due to the fact that the membership on the Court had changed between *Stenberg v. Carhart* and *Stenberg v. Gonzales*, which was the challenge to the ban. Justices Rehnquist and O'Connor were replaced by Justices Roberts and Alito.

Related to the issue of the Court's integrity and image is its ability to create efficacious policy. Scholars have argued that the Court should be concerned with the other branches' attentiveness and willingness to follow its decisions to ensure that its decisions are respected and followed (Epstein and Knight 1996; 1998). As the literature on implementation of Court decisions has pointed out, the policy preferences of varying populations affect the likelihood that the policy will be implemented. This includes officials who are charged with carrying out the Court's policies (Johnson and Canon 1984, 1998). Rosenberg (1991) argued that the Court has difficulty actually implementing its policies, especially when it faces resistance from a number of places, including Congress and other elected officials. The Court's interest in creating efficacious policy therefore gives it another incentive to maintain attentiveness to the other branches' preferences.

In sum, Congress is not afraid to override the Court. This is the basis for any SOP model: Congress is willing to override the Court, and therefore the Court, attempting to avoid a congressional override, is accommodating to congressional preferences. This may be out of fear of policy loss or in the interest of maintaining institutional legitimacy. Furthermore, in the interest of creating efficacious policy and conditions for successful implementation of judicial policy, the Court has further incentive to concern itself with the preferences of the legislative branch.

Dodging Conflict: Explaining Constraint through Avoiding Case Merits

As I have explained, there is a dearth of literature exploring congressional constraint on the Court in any place other than on case merits. To date, there are only

three empirical studies that have looked at any pre-merits stage of decision making for evidence of the SOP model of congressional constraint. Each of these three studies focused on the certiorari stage, making a similar argument to mine: that focusing on the merits decisions is not the optimal place to find evidence of constraint.

First, Epstein, Segal, and Victor (2002) posited that because overriding constitutional decisions is harder for Congress than overriding statutory interpretation cases, the justices flip into "constitutional mode" when they face an ideologically hostile Congress. That is, the justices accept more constitutional cases to act defensively because they have a lower likelihood of getting overridden by Congress in those cases. On the contrary, the Court takes more statutory interpretation cases when Congress' preferences are congruent with its own, since there is less of a threat of an override.[4]

Second, Harvey and Friedman (2009) modeled the effect of congressional preferences on the Court's decision to grant cert, and they found that the Court's agenda, specifically in constitutional cases, is influenced by the preferences of Congress. They argued, like I do, that the Court's discretionary docket gives the justices a lot of leeway when they are under congressional constraint, and therefore the existing studies of congressional constraint are subject to selection bias since they only focus on the merits, the final stage of decision making on the Court.

Finally, Owens (forthcoming) also argued that the literature inadequately explores congressional constraint since it is limited to merits decisions. He also studied the Court's cert decisions, although his findings did not produce support for the SOP model.

[4] Harvey and Friedman (2009) reproduced the Epstein et al. (2002) study using different measures of ideology and found that their results did not hold up.

Rather than following these studies and focusing on the cert decisions, I look at stages in between the cert stage and the merits stage. In the next chapter, I look at the submission of briefs, the transcripts of the Court's oral arguments, and the justices' conference discussions for evidence of congressional constraint. The following chapter looks at the Court's decision to avoid case merits once it has granted cert, and the final chapter looks at the individual conference votes of the justices to avoid the case merits. Sometimes the Court will rule on a threshold question, like it did in *Newdow* with the standing question. I argue that some instances of this behavior occur because the Court has granted cert to a case, but due to the threat from Congress, the Court ultimately would prefer to dismiss the case or issue a decision based on a judicial question rather than the case's merits.

Behavioral Expectations

The main contribution of my study is to add further understanding to the literature on congressional constraint by not looking at the merits of cases, but rather looking at other places. Most scholars who study the SOP model argue that the Court is influenced by congressional preferences in its decisions on the merits. I argue that rather than allowing itself to be influenced on the merits, the Court may choose not to make a decision under these conditions. This argument is based upon the assumptions I offered above: that the justices are policy-seeking, strategic actors who want to maximize the policy output of the Court.

The argument I present here and the assumptions upon which it is based lead me to a set of behavioral expectations. In this final section, I outline these expectations. In

the chapters that follow, I offer more specific hypotheses regarding the manifestation of these expectations.

The first expectation is based upon my first assumption, that the justices are motivated by their own policy goals. I argued above that this is the primary motivation for the choices that justices make. Even when they are behaving strategically and changing their behavior based upon others' preferences, the ultimate goal is still to maximize the implementation of their policy goals. This is the basis for my first behavioral expectation.

Expectation 1: Justices are ideological in nature and seek to implement their policy goals. In order to maximize these policy goals, they consider congressional views throughout their decision making process.

Based upon this first assumption, I also assume that this desire on the part of the justices to achieve their policy goals will impact their behavior at many stages throughout the decision making process, not just in their decisions on the merits. The Court changes its behavior in accordance with the information it has about congressional preferences, acting in a strategic manner.

Expectation 2: The justices obtain information at various stages of the Court's decision making process and subsequently may adjust their behavior. This will impact institutional level decisions and individual level decisions.

These assumptions mirror the assumptions I discussed above: that the justices are policy-seeking and that they are strategic. In the succeeding chapters, I explore various stages of the Court's decision making process to test whether my expectations are correct.

The following chapter looks for discussions of congressional views at various stages of the Court's decision process. Just because the Court has information about Congress, however, does not necessarily mean that it allows the information to affects its decisions. The two subsequent chapters explore whether this information about Congress has an actual effect on the Court's behavior.

Chapter 3

Uncovering Congressional Constraint on the Court

In Chapter 1, I discussed the Court's recent case in *Elk Grove v. Newdow* (2004). During my description of the sequence of events in the case, I pointed out that in both the petitioner's brief and during the oral arguments, the attorneys reminded the Court of the recent legislation passed by Congress essentially overturning the Ninth Circuit Court's decision. I argued that this type of transmission of information about congressional views is very common. In this chapter, I offer a deeper examination of this suggestion, that the Court considers congressional views throughout its decision making process.

As I explained in the preceding chapters, the main argument of this dissertation is that a congressional constraint upon the Court exists, and that rather than looking for this constraint on the merits of cases, scholars should instead look at the Court's decision on whether to reach the merits of a case. In my brief introduction chapter and the theory chapter that followed, I presented the idea that the Court has a propensity to behave strategically, and therefore the justices may often be considering the preferences of Congress in their decisions. The Court does this in order to maximize its own policy

preferences while avoiding a congressional override of its decision, which threatens the Court because of the separation of powers. I argue that scholars have often looked for evidence of this but have focused largely on the wrong place: decisions on the merits. If there is truly a congressional constraint on the Court, it will be present at many stages of the Court's decision process, and especially when the Court is deciding whether to reach the merits of a case in which it feels under threat from Congress.

One assumption that the strategic model makes is that the Court explicitly considers congressional views *and* the probability of congressional reactions to its decisions. In their quest to find evidence of congressional constraint on the Court, scholars largely bypass any search for evidence that this is actually true: that the Court indeed considers congressional preferences along the way. In this chapter, I present an expository glimpse into several stages of the Court's decision making, taking note of the times when it was documented that the Court is considering congressional views. I look at three stages of decision making on the Court, noting when such mentions of Congress are made. First, I look at the briefs submitted to the Court to see how often the parties or *amici* mention Congress in their arguments. Second, I turn to the Court's oral arguments and record instances of congressional mentions during the arguments. Third, I use Justice Harry Blackmun's notes to search records of the Court's conferences to see when the justices discuss Congress in conference.

The purpose of this chapter is to demonstrate that the Court is at least thinking about some elements of congressional preferences during its deliberations. I find that there is evidence in all of these stages of the Court's decision making process that the Court is considering Congress. I argue that the frequency of congressional mentions in

the Court's briefs, oral arguments, and conference discussions suggests that there is indeed a congressional constraint upon the Court. Consideration of Congress is a necessary (though not sufficient) prerequisite for the Court's behavior to be influenced by congressional views. In other words, consideration of congressional views alone does not prove that the Court is under any influence from Congress. However, it is necessary, if congressional views are going to influence the Court, that the Court at least consider Congress when making decisions. This is why I argue that consideration of the legislative branch is a prerequisite for influence. In this chapter, I show that that prerequisite does exist.

Constraint and the Court

As I stated above, the main argument of this chapter is that there is strong evidence that the Court considers the views or possible reaction of Congress. I show that that there are many instances where a discussion of Congress takes place at the Court, arguing that this evidence suggests the existence of a constraint from Congress upon the Court. I point to several occasions when Congress is mentioned, suggesting that these mentions are evidence of constraint.

Other scholars have used a similar approach to the approach I take here, an evidence-based expository approach, to point out other constraints upon the Court. For example, one such study is Knight and Epstein's (1996) examination of the norm of precedent, or *stare decisis*. Based upon a collection of evidence from different points in the Court's decision making process, they argue that *stare decisis* is essentially a

normative constraint upon the members that keeps them from making decisions based entirely upon their political preferences.

To perform the analysis, they select one case, *Edelman v. Jordan* (1974) and its progeny and then look for evidence of the constraint of precedent in a number of places.[5] They look at the attorney's briefs submitted in each case, Justice Brennan's records of the justices' conference discussions, and the opinion itself for discussions of or references to precedent. In each of these stages, they find many appeals to precedent, citing this as evidence of a constraint upon the Court. For example, in the 26 attorneys' briefs submitted in the 13 cases, they found that 20 of them included references to precedent. Looking at Justice Brennan's notes of conference discussions in the same 13 cases, they found that all but one of the cases had at least one reference to precedent in the justices' remarks. Finally, they looked at the *Edelman* progeny's opinions and pointed out that the number of citations to cases was greater than citations to other authorities in all but three opinions. Furthermore, 80 percent of the arguments used by Brennan and Rehnquist in their opinions were based on precedent.

Based upon all of the evidence they present from the many stages of the Court's decision making, they argue that the behavior they document, consistent references to precedent by the members of the Court, is consistent with a norm favoring the use of precedent. Their approach and evidence is comparable to what I present here in this chapter, making a similar argument based upon data similar to theirs.

My argument in this chapter is similar to the argument Knight and Epstein present in this article. As they consistent point out, the certain behaviors they uncover with their

[5] The progeny cases are Segal and Spaeth's (1996) formula for testing for *stare decisis* on the Court. Their method takes one case and then looks at the cases that follow that are similar and that use the findings of the first case as the basis for their decisions.

collection of evidence are consistent with a norm favoring the use of precedent. I argue here throughout this chapter that the behavior I discuss is consistent with the existence of a congressional constraint upon the Court. I do not make any causal arguments yet about whether this constraint affects the Court's behavior, but I simply argue that it exists. The two chapters that follow do empirically test whether the constraint exists and how it impacts the Court's behavior. This chapter, however, is simply expository.

In order for Congress to have any influence on the Court, at the very least, a necessary condition is that the Court considers Congress in its decisions. If the members of the Court are not considering Congress whatsoever, then we cannot expect congressional views would have any influence on the Court's decisions. This consideration of Congress can either be explicit or implicit. Implicit considerations by the justices would be nearly impossible to uncover. Explicit considerations are those, like the instances Knight and Epstein highlight, that actually document such considerations by the justices. I argue that the places I examine in this chapter contain explicit considerations of congressional views, as documented by the explicit discussion of Congress. In other words, my goal here is to uncover some evidence of the necessary condition for congressional influence on the Court: discussion and consideration of Congress.

There are many constraints and factors that go into the Court's decision making, such as political preferences, *stare decisis*, and strategic considerations such as colleague preferences and preferences of other branches. In this chapter, I focus on the Court's consideration of Congress by looking for simple evidence that Congress is a part of the Court's discussion in some of its cases. Similarly to the approach Knight and Epstein

take, the three sections I present discuss the three stages where I take note of behavior that is consistent with the existence of congressional constraint.

Behavior Supporting a Congressional Constraint

I drew a random sample of cases from 1979 to 1993.[6] Of the 3,325 orally argued, full-opinion cases before the Court in Spaeth's dataset from this time period, I chose 100 cases.[7] I chose the sample size of 100 cases based on Mannheim and Rich (1995).[8] They stated that statistics from a population of this size can be generalized from a sample size of 95 cases with about a 10 percent margin of error.[9]

I limited my sampling of cases to this time frame because of data availability. Briefs for all Court cases are located electronically on Lexis Nexis beginning in 1979, and oral arguments transcripts are transcribed and electronically housed on the Oyez Project's website, also beginning in 1979. I relied upon Justice Blackmun's notes for the Court's conference discussions, and he was on the Court through the 1993 term. The notes from his final term on the Court contain considerably less information in his conference notes. Therefore, I chose to end the sample during the 1992 term, before he announced his retirement from the Court. My 100 cases are therefore all from this 14

[6] I performed the random sample using Stata 10.1's "sample" command.
[7] This meant I kept the observation if analu was equal to 0 or 1 and if the dec_type was equal to 1, according to Spaeth's coding scheme.
[8] In case any of the sources I used were missing any of the data, I chose to collect 100 cases rather than 95. This did turn out to be the case: two of the cases did not have any briefs located in Lexis Nexis, and one of the cases was missing both its oral argument transcript and conference notes from Blackmun's file. Therefore, I ended up with a sample size of 98 or 99 rather than the full 100 cases.
[9] As I explained above, to examine the appeals to precedent in their article on *stare decisis*, Knight and Epstein picked one case, *Edelman v. Jordan* (1974), and its progeny. Their total sample size was Edelman and its 12 successors, which gave them 13 cases all together. In each subsequent section of their paper, they used these same 13 cases to look for appeals to precedent at various stages of the process. Rather than focusing on a single case and its progeny, I choose to focus on a larger sample size and to select the sample randomly, making the conclusions more generalizable.

year period. The number of cases from each term range from five cases from the 1982, 1988, and 1990 terms to 16 cases from the 1983 term.

The first focus in looking at the briefs, oral arguments, and conference discussions was to simply count the number of cases out of the 100-case sample in which Congress was mentioned. I do present more detailed statistics below, but first I offer a general overview in Figure 3.1.

[Insert Figure 3.1 Here]

The place with the most frequent discussion of Congress is in the briefs. Almost every case in my sample had at least one brief with a mention of Congress. Oral arguments also have a high frequency of discussion of Congress. Finally, conference discussions feature a regular discussion of Congress, although not to the same extent as the other two places. I will discuss these results in much more specific detail in the sections that follow.

One potential argument that could be made here is that the mentions of Congress are actually mentions of congressional intent, rather than discussion of current congressional preferences or likely congressional action. While I think this is largely true, I argue that these cases are not black and white, and often a discussion of congressional intent may be implicitly a discussion of whether Congress may react if they see the Court interpreting a bill in a way they did not intend for it to be interpreted. I discuss this issue more at length in the conclusion section.

Briefs

I expect to find evidence of congressional constraint on the Court in the briefs submitted in the case. As many scholars have argued, briefs are an important source of information for the justices. This includes both the parties' briefs as well as amicus briefs. Those who have studied party briefs at the Court argue that they provide information to the Court that the Court sometimes incorporates into its opinions (Spriggs and Wahlbeck 1997), attempting to influence what facts and legal rules the Court considers while it is deciding a case outcome (Knight and Epstein 1996).

Few scholars have examined the role of party briefs at the Court. More frequently, students of the Court chose to look at the effect of amicus briefs on the Court.[10] Scholars who studied amicus briefs mostly argued that the purpose served by amicus briefs is to provide information to the Court (McGuire and Caldeira 1993; Spriggs and Wahlbeck 1997; Hansford 2004; Collins 2004). Similarly, others also took the position that amicus briefs can provide important cues to the justices regarding the legal and societal importance of cases (Tanenhaus et al. 1963; Ulmer 1984), particularly in the civil rights cases, in which the affected parties often do not find success in the elected branches (Vose 1959; Cortner 1968). Finally, amicus briefs play an important informational role at the Court, providing information to the justices such as the preferences of enacting legislatures, the states, the president, the American public, an/or current legislations (Barker 1967; Epstein and Knight 1998; Epstein and Knight 1999).

This last point is especially important because of its implication for my argument. Beyond simply providing information to the Court, the briefs, whether they are attorneys'

[10] I choose to include both *amicus* briefs and party briefs in my analysis. Since the members of the Court presumably read all briefs associated with a case, it is important to include both types.

briefs or amicus briefs, also might be signaling to the justices information about congressional preferences.

One example of a party sending a signal to the Court is in *Wisconsin v. Mitchell* (1993), a case dealing with the legality of increasing sentencing for hate crimes. Of the 30 briefs submitted in the case, 21 mentioned Congress. One of these briefs was actually submitted by several members of Congress, led by Rep. Charles Schumer (D-NY). In the first line of the brief, the members told the Court that they were considering a bill that was relevant to the topic of the case. The brief started by announcing that "The United States Congress is now considering legislation that would enhance the sentences of criminals who commit hate crimes." Even some of the other parties' briefs, such as one submitted by the Anti-Defamation League and other interest groups, made mention of the legislation under consideration in Congress: "The Mitchell decision, which improperly relies upon *R.A.V. v. City of St. Paul*, *Minnesota*, U.S., 112 S. Ct. 2538 (1992), has cast doubt, not only on similar penalty enhancement statutes now in effect in 25 other states and the District of Columbia, but also on proposed federal hate crime legislation presently under consideration in Congress." A third brief, this one filed by several states, reminded the Court that Congress had recently legislated on this issue: "Congress itself responded to this phenomenon when it enacted the Hate Crime Statistics Act of 1990." Presumably, they added this information into their briefs because they think it may have impacted the decision made in the case.

When parties and *amici* mention Congress in their briefs, they must expect that there is at least potential for the Court to be influenced by this information they are transmitting about Congress, or they would not bother to include the information. I do

not argue that this transmission automatically has the effect that they want it to, but rather, it is a sign that the Court may ultimately be influenced by this information.

To gather the data from the briefs in these cases, I performed a search for all the briefs in each case in Lexis Nexis Academic. The Lexis Nexis database has all the briefs submitted to the Court in major cases before 1979 and all the briefs from every case since 1979. I searched under each case name, counted the number of briefs in each case, and then performed a search within those results for mentions of Congress. I took note of both how many briefs were filed in each case as well as how many of those briefs had a mention of Congress.[11] This allowed me to create another observation recording the proportion of briefs in a case that mentioned Congress. The search includes all briefs in a case, including the attorneys' briefs as well as amicus briefs. Briefs were missing in Lexis Nexis in two cases, leaving me with a 98-observation dataset.

In the 98-case sample of cases with briefs, the total number of briefs submitted in the cases ranged from one to 53, with an average of ten briefs submitted per case. There were two cases with only one brief submitted in my sample: *Lyng v. Payne* (1986), a case about farmers' eligibility for emergency government loans, and *Sullivan v. Hudson* (1989), a case about awarding attorney's fees in a Social Security case. The case with the highest number of briefs submitted (53) was *Sony Corporation v. Universal City Studios* (1984), which dealt with the question of copyright infringement involving Sony's newest video tape recorders. The second highest number of briefs submitted was 30 in *Wisconsin v. Mitchell* (1993), a case questioning the constitutionality of increased

[11] The search term I used was "Congress." This also pulled up the word "congressional." I did not perform searches for mentions of either chamber individually, thinking that the real threat to the Court comes from Congress as a whole, not from either house in isolation. I assumed it was unlikely that the Court would be considering either chamber in isolation.

sentences for hate crimes. The wide range in the number of briefs submitted makes sense due to the range in salience of the cases.

The first interesting thing to note is that of all the briefs I examined here, only five of the cases had *no* mention of Congress in any of the briefs. That is, out of 98 cases total, 93 of the cases mentioned Congress in at least one of the briefs submitted. This is a substantial majority with some mention of Congress. Furthermore, all five of these cases were constitutional cases. This makes sense given that much of the discussion of Congress in the briefs is probably about congressional intent.

In addition to looking at the total number of briefs with mentions of Congress, I also recorded the total number of briefs that mentioned Congress as a proportion of all the briefs submitted in the case. I divided the number of briefs that mentioned Congress by the total number of briefs submitted in each case. The resulting number ranged from zero (in five cases) to 100 percent (in 25 cases). In about a quarter of the sample, in other words, every brief submitted made a mention of Congress. On average, the proportion of briefs in a case that mentioned Congress was about 71 percent.

One factor that is important to consider is whether statutory and constitutional cases might be different from one another with regard to the number of mentions. To overturn the Court's decision in a statutory case, Congress has to simply pass further legislation. To overturn the Court's decision in a constitutional case, however, the burden is much higher because it would require amending the Constitution. Because the Court is more likely to feel under constraint from Congress in statutory interpretation than in constitutional cases, therefore, I divided the sample into constitutional and statutory cases. Figure 3.2 shows the breakdown of the proportion of briefs submitted in

statutory vs. constitutional cases. Of the constitutional cases, which comprised 27 cases out of the 98, the average proportion of briefs with congressional mentions in a case was 53 percent, or just a little over half. Out of these 27 cases, 22 had at least one brief submitted with a mention of Congress. In the statutory cases, the average proportion of briefs per case with a mention of Congress was 78 percent.

[Insert Figure 3.2 Here]

In addition, 100 percent of the statutory cases had at least one brief submitted with a mention of Congress. To test whether there was a statistical difference between the proportion of briefs with a mention of Congress in statutory vs. constitutional cases, I performed a difference of proportions test.[12] The p-value was .018, meaning that there is indeed a significant difference in the mentions of Congress in briefs in statutory cases vs. constitutional cases.

This is not a surprising finding that the briefs in statutory interpretation cases rely more heavily on references to Congress. This makes sense given that the Court is probably more likely to refer to congressional intent in statutory interpretation cases, since in constitutional cases, the Court is not necessarily beholden to congressional intent in the same way that it is in statutory cases. Still, however, the fact that the average constitutional case has mentions of Congress in over 50 percent of its briefs suggests that the references may not be just to congressional intent, but also to congressional preferences more generally.

[12] To perform this test, as well as difference of proportion tests I use later in this chapter, I used Stata 10.1's "prtest" command.

Finally, to test whether the ideological distance of Congress from the Court affected the number of briefs with a mention of Congress, I ran a simple correlation between the ideological distance between Congress and the Court (using Bailey's 2007 cross-branch ideology scores) and the proportion of briefs with a mention of Congress. I expected that as the ideological distance was higher, there might be more mentions of Congress in the briefs, with the relevant parties mentioning Congress to remind the Court of the potential for an override. The correlation was .20, with a significance of .046.[13] This is consistent with what I would have expected: the ideological distance between Congress and the Court appears to have an effect on how frequently the briefs submitted to the Court mention Congress.

In sum, the consistency with which parties and *amici* mention Congress in their briefs submitted to the Court certainly suggests that a congressional constraint exists. The fact that the mentions appear in so many briefs is a strong sign that the parties do think the Court considers Congress in its decisions.

Oral Arguments

In addition to looking at the briefs submitted in each case, I also argue that another place where evidence of congressional constraint might be found is in the Court's oral arguments. Some work has already been done on this topic, primarily by Johnson (2004). Johnson argues that oral arguments serve several purposes for the justices, including, for example, exploring their options for building winning coalitions in cases. Furthermore, the justices use the oral arguments to discover the preferences and likely reactions of other institutions, such as Congress and the executive branch. Johnson

[13] I tested this by using "pwcorr, sig" in Stata 10.1.

comes to this conclusion by examining oral argument transcripts and noting when Congress or the executive branch is mentioned during the arguments. He provides several examples from the oral argument transcripts of the justices and the attorneys discussing the legislative branch.

At the heart of this analysis is an assumption that the Court is seeking information about Congress because the justices want to avoid a potential conflict with Congress, who might ultimately react to the Court's decision. Because the justices are wary of a potential reaction from Congress or the executive branch, they will try to learn about the preferences of these outside actors, taking those preferences into account while they make a decision in each case. Because there is a great deal of information presented to the justices during oral arguments, this is the perfect opportunity for them to obtain this information.

I argue that oral arguments are yet another place where we might find the justices inquiring about congressional preferences, or where the parties will choose to submit information regarding Congress to the justices because they think it might influence the Court's decision. The arguments are the second place I analyze, using the same sample of 100 cases I discussed in the briefs section. One of the cases was missing its oral argument transcript on the Oyez website, so this section has a sample size of 99. I recorded an indicator variable for cases in which "Congress" was mentioned at least once.[14]

[14] For the oral arguments data, I searched for each case on the Oyez Project's website, http://www.oyez.org/, where transcripts of the Court's oral arguments post-1979 are housed, then I searched the transcripts for at least a single appearance of the word "Congress," which also pulled up the word "congressional." Again, I did not search for mentions of either chamber separately, but rather Congress as a whole.

Out of the 99 cases in the sample, 71 had at least one mention of Congress during its oral argument, either by one of the attorneys arguing the case or by one of the justices. This constitutes a clear majority. These findings echo the findings from looking at the briefs: in most cases, the Court is at least considering congressional views during oral arguments.

Like in the previous section, I broke the sample into constitutional and statutory cases and found that again, the tendency to discuss Congress during oral arguments was higher in statutory cases. Of the 71 cases where Congress was discussed at oral arguments, 57 of these were statutory interpretation cases. The remaining 14 cases were constitutional cases. This was out of a total 27 constitutional cases, meaning that Congress was mentioned in about half the constitutional cases. Given what I discussed previously, this is not surprising: the Court is more likely to discuss congressional intent in statutory cases than in constitutional cases. This is made clear by Figure 3.3, which shows the number of mentions of Congress during arguments in constitutional vs. statutory cases.

[Insert Figure 3.3 Here]

As I did in the briefs section, I also performed a difference of proportions test to test for whether the mentions of Congress during oral arguments in constitutional vs. statutory cases were statistically significant. The p-value was .018, meaning the difference is significant. Again, this is not surprising that discussion of Congress in

statutory cases is significantly higher, since the potential threat for override is higher in statutory cases.

Finally, I tested the correlation between the number of mentions of Congress during arguments and the ideological distance from Congress. I expected that as the distance between the Court and Congress grew larger, the parties and justices would be more likely to discuss Congress during arguments. This expectation is based on an assumption that the Court fears congressional overrides when Congress is more ideologically distant. The correlation was .148, which is the direction I would have hypothesized, but is not significant (p=.14).[15]

The search I performed in the oral arguments transcripts included comments made during arguments by the parties' attorneys themselves as well as the justices. Since it has been shown that the Court uses oral arguments primarily for information gathering, if there is a congressional constraint on the Court, it would not be surprising to find the justices asking questions during arguments about Congress. Similarly, the parties would be likely to mention Congress during the arguments if they think it might help sway the justices' ultimate decision in their favor. The consistency of discussion of Congress during oral arguments, then, is highly suggestive of this constraint upon the Court.

I do not argue here that the use of information regarding Congress was particularly effective at persuading the justices, but at least that the presence of such consistent discussion of Congress is strongly suggestive of a congressional constraint upon the Court.

Conference Discussion

[15] I tested this using "pwcorr, sig" in Stata 10.1.

The final place I look for evidence of a congressional constraint is in the private conference discussions of the justices. In conference, which takes place following oral arguments, the justices discuss the major points in the case and each of them says how they will tentatively vote, although sometimes they may choose to pass instead of cast a vote if they are unsure about their vote (Johnson, Spriggs, and Wahlbeck 2005). The established norm for conference voting is that the chief justice discusses the case and casts a tentative vote first, with the most senior justice following, and continuing around all the justices in order of seniority down to the most junior justice (Perry 1991; Johnson, Spriggs, and Wahlbeck 2005). The justices take notes on each other's points and expected votes.

As I discussed above, Knight and Epstein (1996) incorporate conference discussions into their analysis of *stare decisis*. They argue that the justices' incorporation of precedent into their arguments during conference provides evidence for the norm of *stare decisis*. Johnson (2004) dovetails off of this discussion to argue that incorporation of material that the justices heard in oral arguments into conference discussion means that the oral arguments are indeed useful as an informational tool for the justices.

I offer a similar argument, asserting that if the justices incorporate information about Congress into their discussion in conference, it provides further evidence of congressional constraint. In conference, the justices are in private and formulate their own arguments and discussion, unlike during the briefs stage and in oral arguments, when the arguments are often formulated by others and the justices may or may not take them into account. In the conferences, on the other hand, any discussion of Congress was instigated by the justices themselves as part of their argument or their discussion of the

case. The fact, then, that they are discussing Congress there certainly is in line with the existence of some congressional constraint.

For the data from the justices' conference discussions, I relied upon Harry Blackmun's notes, which are located at the Library of Congress. Blackmun took notes at each conference onto a sheet of paper that was divided into sections, each labeled with another justice's name. In each case and under each justice's name, he recorded the initial vote of the justice to affirm "+", reverse "-", or other ("DIG" or "moot", for example). He also recorded the main points of each justice's comments. Sometimes, if a justice agreed with a justice who spoke before him or her, the notes would say "agree with WJB" or another justice, for instance. This would simply mean that the justice was echoing what had been said before by another justice.

I recorded which cases featured at least one justice mentioning Congress in his or her discussion of the case. I also recorded which justices were the ones who actually made the comment. Figure 3.4 breaks down the number of mentions of Congress by each justice. Some of the justices mention Congress more than others; Justice Stevens in particular mentioned Congress more than any other justice. Justice Marshall, on the other hand, did not mention Congress in any of the cases in my sample. The rest of the justices fell somewhere in between those two, with both chief justices and Justice Brennan following Stevens for most frequent mentions. Again, the time frame here is from 1979-1993.

[Insert Figure 3.4 Here]

The data from the conference discussions are as follows. Out of the same 100-case random sample, 99 of the case files in Harry Blackmun's papers contained his notes from the justices' conference.[16] In 23 of these 99 cases, Blackmun recorded at least one justice mentioning Congress. This is almost a quarter of the sample. Of these 23 cases, only two are constitutional cases. This follows the trend that we have seen in the first two sections: in statutory cases, the justices discuss Congress more than they do in constitutional cases. The difference in proportions test for discussions in these two types of cases produced a p-value of .013, again emphasizing this difference. The difference can further be understood by looking at Figure 3.5, which against breaks the cases down in statutory and constitutional cases. This graph shows the total number of mentions during conference in each type of case. Consistent with what we have seen before and what I have discussed here, it is unsurprising that it is higher for statutory cases than constitutional.

[Insert Figure 3.5 Here]

Finally, I tested the correlation between the ideological distance between the Court and Congress and whether the justices discussed Congress in conference. Once again, I expected that perhaps when the Court and Congress were more ideologically opposed, the Court would discuss Congress more frequently due to its fear of an override. The correlation was .085, with a p-value of .4.[17] The lack of significance here, however,

[16] The same case was missing Blackmun's notes from the conference as well as the transcript from the oral arguments. This case was *Harlow v. Fitzgerald* (1982).
[17] I tested this using Stata 10.1's "pwcorr, sig" function.

could be due in part to the small sample size of cases in which the justices actually talked about Congress.

The fact that the justices did not tend to discuss Congress as frequently during conference as during the other two stages is not surprising. By the time they get to conference, they have been provided with all of the information in the case, and have at least tentatively decided how they will vote in the case. It may be that they have already been influenced by Congress' preferences, which they learned about from reading the briefs as well as during the oral arguments.

Before concluding the section on conference discussions, I should note that the number of times the justices talked about Congress during conference is probably underrepresented here. This may be why I did not find a significant relationship between the ideological distance variable and the discussion of Congress in conference. There are several reasons for which the deck is stacked against finding discussion of Congress in Blackmun's conference notes. The first is that the notes provide what is probably a minimal representation of topics actually covered in the conference. Although Blackmun's notes are rather thorough, at times he only wrote a "+" or "-" under a justice's name as shorthand for whether the justice initially voted to affirm or reverse, without further discussion of that justice's argument. Presumably, then, the discussion was more at length than Blackmun's notes suggest, and it is possible that some of these topics of omission included a discussion of Congress.

The second reason for which my use of the conference notes may under-represent the discussion of Congress is that because the notes are Blackmun's notes, his own comments are left out from conference notes. This is why Blackmun does not appear on

Figure 3.4. As I explained above, each piece of paper on which he took notes at conference is divided into eight sections, one for each of the other justices, where he recorded the main points of each justice's discussion. He did not take notes on his own comments, so they are not included on this sheet.

A third reason is that several times Blackmun would note during a discussion that the justice is "with CJ" or "with WJB," meaning that justice agreed with whatever points the Chief Justice or Justice Brennan had just made, for example. In some of these cases, the justice had made several points, including a point about Congress, so it was difficult to tell whether the follow-up comment had to do with Congress. I noted a couple of occurrences where this was probably the case, but to avoid making any false assumptions I did not include those in the figures I report in Figure 3.4.

Discussion

The account that I provide here of the amount of attention that the Court pays to Congress is meant to highlight the possibility of a congressional constraint. My argument came in three parts: first, the fact that almost all the cases in my 100-case random sample had briefs in which the parties and *amici* discussed Congress is highly suggestive of a congressional constraint upon the Court. We can conclude at the very least that because the parties include information about Congress in their briefs, they at least hope this information might help to sway the Court. If they expected information about Congress to have no impact, there would be no reason for them to include this information with such regularity.

Second, during oral arguments, there was also a great deal of discussion of Congress. Here, my argument echoed that of Johnson (2004), that the Court uses oral arguments to obtain information about Congress. Both the justices asked questions and the parties offered information about Congress, suggesting that this would at least be a component of their decision calculus in the case.

Third, in the conference discussions, the justices continued to have discussions about Congress. Because the conference discussions are private and all points and arguments are brought up by the justices themselves, this may be the strongest argument for the congressional constraint. This shows that the justices incorporated the information they had obtained about Congress and brought it into their own calculations in the case. This evidence is highly suggestive that the Court indeed does take Congress into account when making its decisions.

One argument that could be made, as I briefly mentioned earlier, is that when the justices mention Congress in these different places, they are talking about congressional intent, which would mean their discussion is of a previous Congress's preferences rather than the current Congress's. This is probably true for some, and perhaps even most of, the mentions of Congress. However, I do not believe that a discussion of whether they are talking about intent or whether they are talking about current preferences can be portrayed as black and white. It is highly plausible that when the Court talks about intent, they are afraid that if they interpret the law in a different way than the way that Congress intended, then Congress might react. In this case, the discussion of concern over congressional reaction is implicit in the discussion of congressional intent.

The blurred line between intent and congressional preferences is especially likely in two situations: first, if Congress passed the law recently, it therefore might be likely to react again. This would be consistent with Hansford and Damore's (2000) argument that the likelihood of Congress reacting to a Court interpretation of one of its laws decreases over time. Second, if the current Congress and the Congress that passed the law originally are of approximately the same ideology, it might also be more likely that Congress will react if it sees the Court interpreting the law in a way that it does not agree with. It would be as though the current Congress its past ideological counterpart by ensuring the Court is interpreting the bill as it intended. Testing either of these hypotheses is beyond the scope of this chapter, but it would be an interesting avenue for further research.

I would like to stress again that I am not arguing that the Court is effectively swayed or influenced by the many discussions of Congress along the way. The methodology I have in this chapter is expository and is not sufficient to draw any conclusions about how the Court reacts to or is affected by the information they received about Congress. A more empirical, causal analysis is necessary to draw these conclusions, which is what follows in the next two chapters. Rather, the argument I make here is that the evidence I present in this chapter is strongly suggestive that there is a congressional constraint upon the Court.

Figure 3.1. Summary Statistics: Mentions of Congress in Briefs, Conference, and Oral Arguments Out of 100 Cases

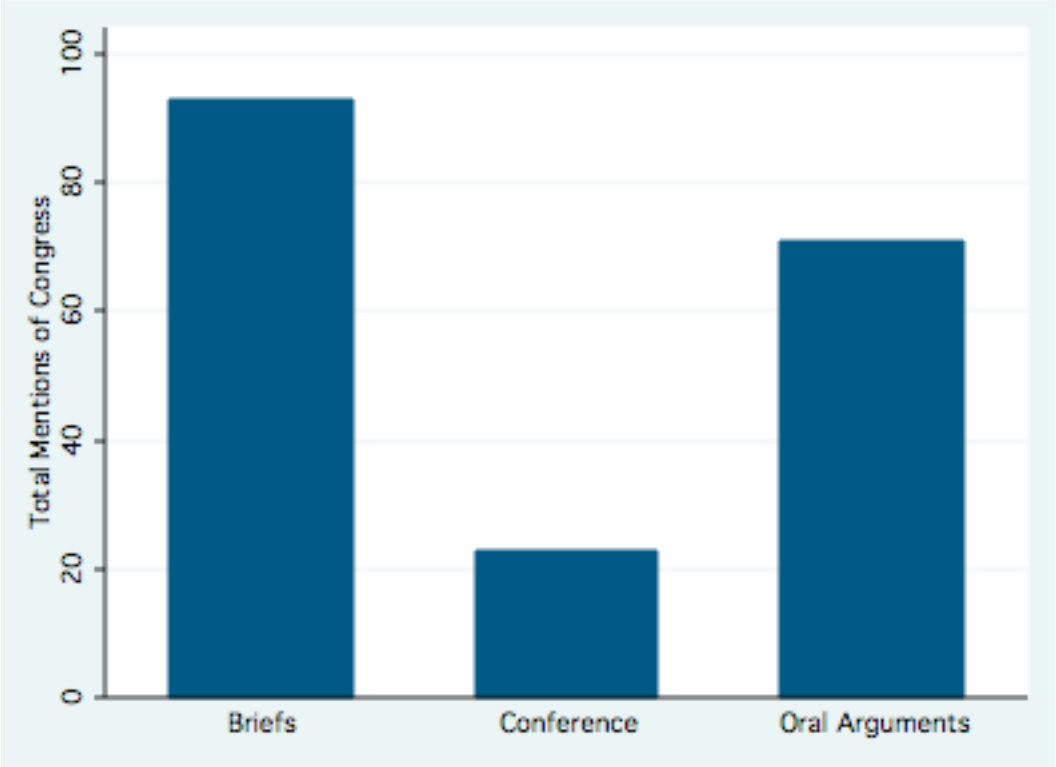


Figure 3.2: Average Proportion of Briefs with Mention of Congress

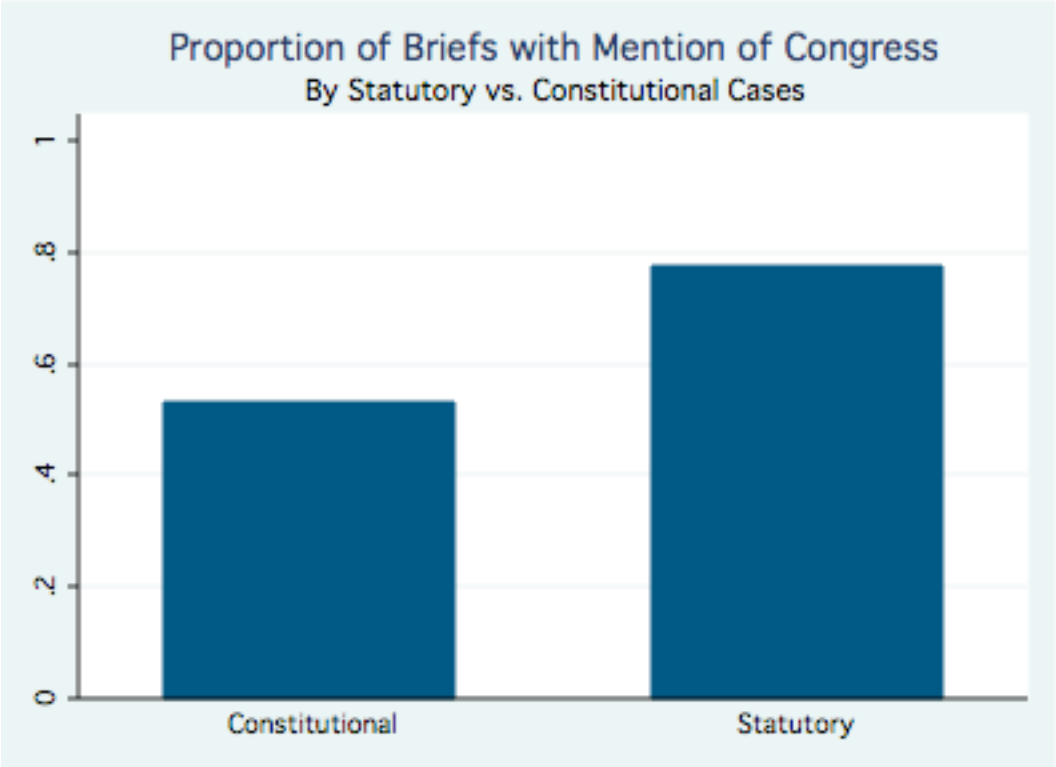


Figure 3.3: Proportion of Cases That Mention Congress During Oral Argument

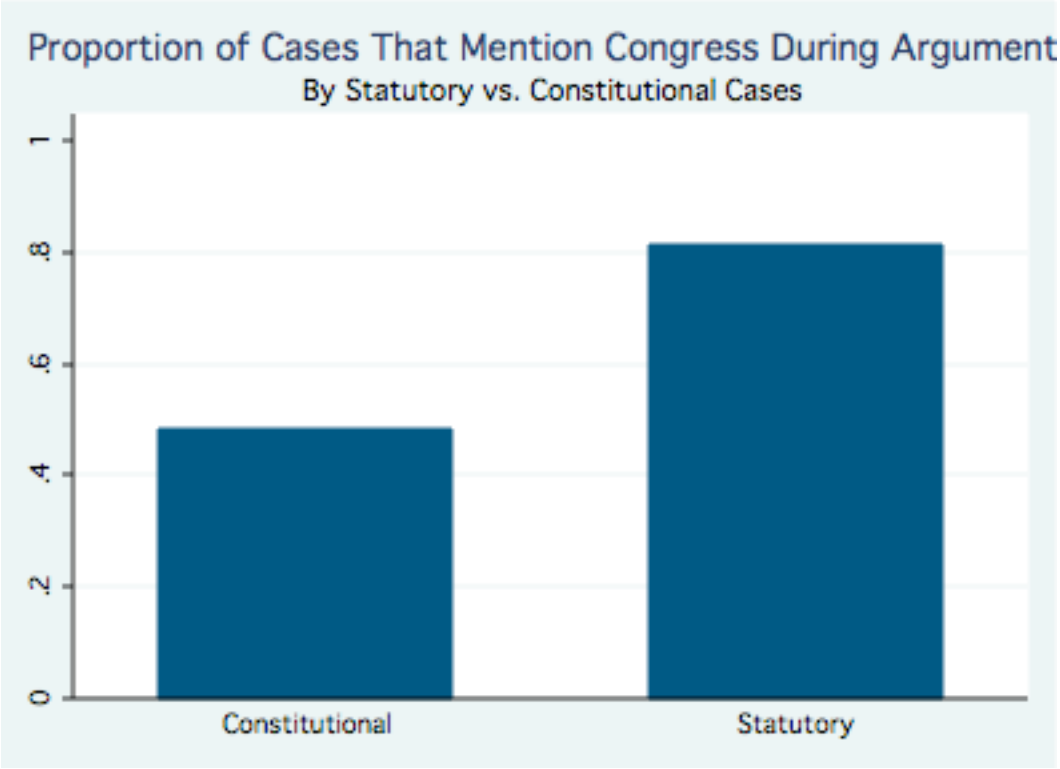


Figure 3.4. Mentions of Congress by Individual Justices in Conference Discussion, According to Justice Harry Blackmun's Conference Notes

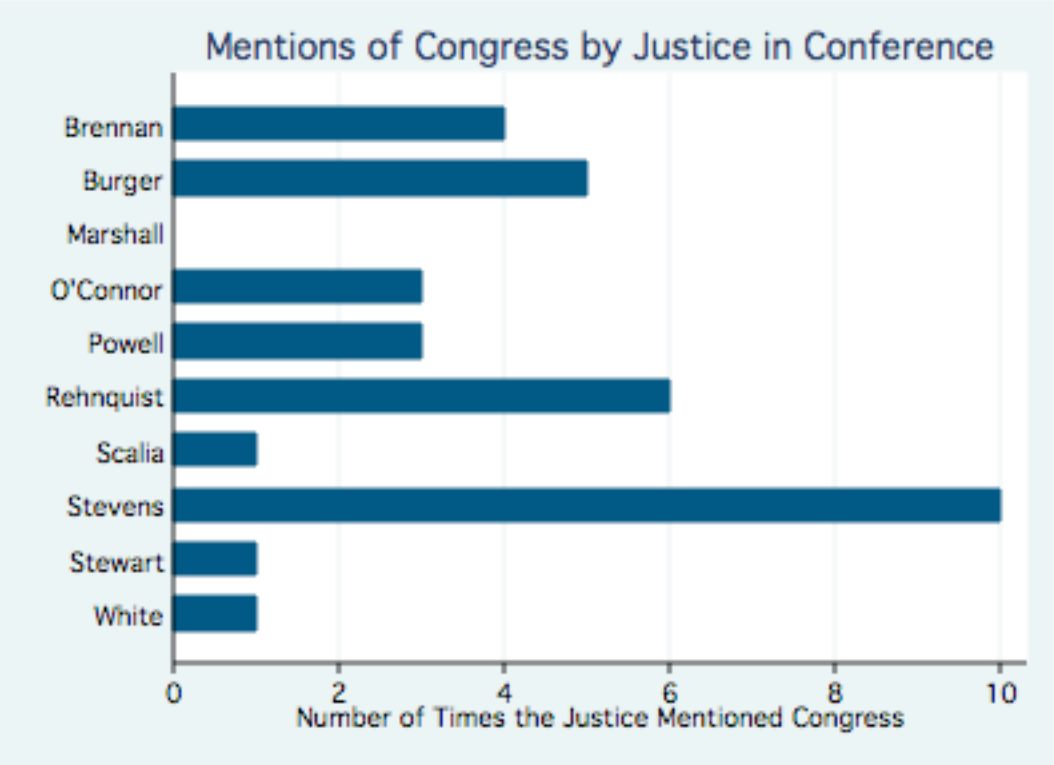
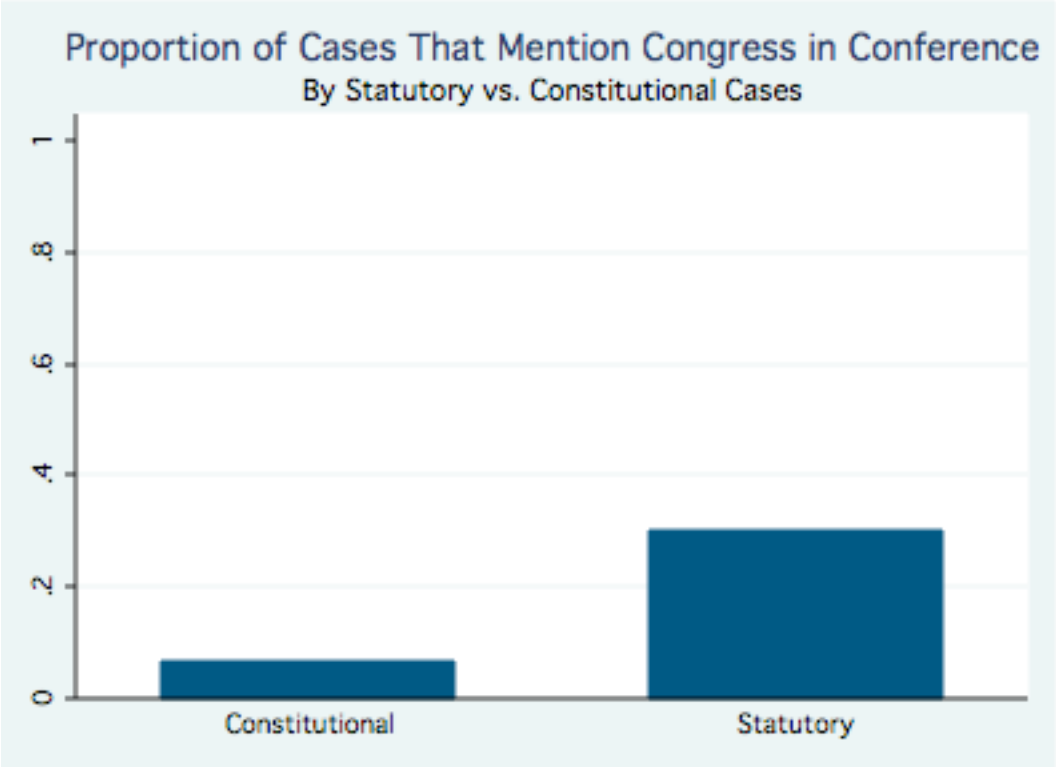


Figure 3.5: Proportion of Cases That Mention Congress in Conference



Chapter 4

Institutions in Conflict:
Examining Court Decisions to Avoid Case Merits

As I have discussed in earlier chapters, most scholars who study congressional influence on the Supreme Court look for evidence only at the merits stage of the Court's decisions. These separation of powers (SOP) studies look at whether the preferences of Congress influence the Court's decisions on the merits. These examinations have found mixed results as to whether the Court accounts for legislative preferences. The evidence I provide in this chapter changes the terms of the debate from final decisions on the merits to preliminary decisions. I argue that if congressional preferences are a component of the Court's decision making on the merits, then this will be true for earlier stages of the Court's decision making as well. The fact that scholars completely ignore the earlier stages may explain why they have found mixed results on whether congressional constraint exists.

In the previous chapter, I introduced a necessary condition for congressional influence on the Court: there is a consistent discussion at the Court of the legislative

branch. This is true in most briefs submitted to the Court, during the oral arguments, and even during the justices' private conference. In this chapter, I introduce a multivariate examination of the Court's decisions, looking for statistical evidence of an effect of congressional constraint on the Court's decisions. Now that I have shown that the Court does consider Congress consistently in its consideration of a case, I answer the question that follows: does this consideration actually lead the justices to alter their behavior in the face of an oppositional Congress?

Specifically, I look at Supreme Court cases that the Court has granted cert to see if the Court follows through and actually decides the case on the merits. Once the Court has granted cert to a case, it has several options for how and even whether it will decide the case on the merits. Some instances of Court behavior (for example, the *Newdow* case discussed in the introduction chapter) suggest ulterior motives for the Court's decisions at this stage. I explore this stage of decision making to see if there is systematic evidence that the Court considers more than the legal issues at stake when it decides on a case. I empirically test to see under which circumstances the separation of powers system may influence the Court to change its behavior.

I argued previously that the Supreme Court, when under threat from Congress, may be likely to use agenda setting powers to avoid a situation in which Congress might override its decision. The Court's ability to set its own agenda is one of the most important policy-making powers that it has. Thanks to the Judiciary Act of 1925, members of the Court have a discretionary docket, allowing them to select which cases they will decide each year. Furthermore, once the Court has granted certiorari to a case,

they can dismiss the case as improvidently granted (DIG) and effectively toss out the case, despite having granted cert.

In addition, the Court decides which issue(s) it will address in each case. The Court can select which of the issues on the merits of the case it will decide, and it can also decide not to reach the merits of a case, but instead to rule on a threshold question. The *Newdow* case, as I explained earlier, provides an example of this: the Court chose to rule on the issue of standing rather than addressing the merits of the "Under God" phrase in the pledge. In *McCardle*, the Court chose to dismiss the case entirely, not issuing any ruling in the case at all. Through its ability to DIG a case or rule on judicial power rather than merits, the Court still can sidestep the merits of a case it does not want to address at any time, regardless of whether it has already granted cert in the case. This is the focus of this chapter: the Court's decisions to sidestep cases in which it has already granted review. I offer one explanation that has not yet been explored in the literature: the Court chooses to strategically dodge cases in which it fears an override or a rebuttal from Congress.

This chapter begins with a discussion of another Court case where the Court chose to avoid the merits of a case, *DeFunis v. Odegaard* (1974). I argue that the Court feared a backlash and dodged the merits, hoping to avoid a highly controversial ruling. I then present an empirical study of decisions on the Burger Court in which the Court sidestepped the merits of a case by DIGing or ruling on a threshold question. Finally, I discuss and interpret the results.

Dodging Conflict: The Supreme Court and *DeFunis v. Odegaard*

In 1974, the Supreme Court issued its holding in *DeFunis v. Odegaard*, another example of a high-profile, controversial case in which the Court chose to avoid ruling on the merits. Marco DeFunis was a white applicant to the University of Washington law school in 1971. The class had roughly 1,600 applicants, of which 150 were admitted. During the first step of the admissions process, the admissions committee calculated a grade-point average for each individual based upon his or her college grades and LSAT results. The top applicants according to this test were automatically admitted, comprising part of the admitted class. After that, the remaining applicants were divided into two groups: minorities and non-minorities. Because the law school wanted to increase the proportion of minority students in its student body to ultimately help increase the representation of minorities in the legal profession, a number from each of these two groups was selected without comparing performances across groups (Posner 1974). That is, the admissions committee took the top applicants from each of the groups, minorities and non-minorities.

DeFunis was one of the individuals who was not automatically admitted in the first round of admissions, was a part of the non-minorities group, and then was rejected. From the group of minorities, the school selected 37 students, 36 of whom had a lower expected grade-point average than DeFunis. Following this decision, DeFunis sued the law school, arguing their admission process violated the Equal Protection Clause of the Fourteenth Amendment and gave preferential treatment to minorities. DeFunis brought suit for injunctive relief against the university, and the trial court agreed with him, issuing an order for his admission to the first-year class. After a lengthy appeals process, including a reversal by the Washington Supreme Court, the case was granted cert by the

United States Supreme Court. By the time the Court took the case and heard oral arguments, DeFunis was in his last year of law school and was just a few months away from graduating. Furthermore, the university was prepared to let him graduate after he completed his final term, since he had completed all of the requirements for graduation (Posner 1974).

At oral arguments, counsel for the university told the justices that regardless of the outcome in the case, DeFunis would be permitted to graduate. In light of this information, the Court's ruling in the case was that due to the fact that the university was about to grant DeFunis a diploma, the courts no longer had jurisdiction over the case because it was moot. There was no longer a dispute between the petitioner and the law school that the courts needed to resolve. The majority, comprised of justices Burger, Stewart, Blackmun, Powell, and Rehnquist, delivered a per curiam opinion.

There were two dissenting opinions filed in the case: one written by Justice Brennan and joined by Justices Douglas, White and Marshall, and the other written by Justice Douglas. In his dissent, Justice Brennan argued that because the case held great social significance, the Court should still issue a ruling on the merits rather than on the mootness question. Furthermore, he argued that failure to adjudicate the matter would surely result in another similar case eventually returning to the Court. This turned out to be correct, as it was only a few years before the Court issued its famous ruling in *Regents of the University of California v. Bakke* (1978). Justice Douglas filed a second dissenting opinion arguing that the case should be remanded for a trial on another question: whether the law school aptitude test was unfairly discriminatory against disadvantaged minorities.

This occurrence of events at the Supreme Court exposes the fact that there is often ambiguity in the Court's decisions when it comes to the issue of mootness, just as there was with the issue of standing in *Newdow* as I previously discussed. How does the Court decide when to issue a ruling on the merits or when to rule on a judicial power issue such as mootness? As Perry (1991) argued, "The concepts of mootness, ripeness, and standing are surely among the most poorly defined, imprecise, and easily ignored concepts in jurisprudence" (107). Whether or not a case should be considered moot can often be uncertain; the fact that the dissenting opinions in *DeFunis* and *Newdow* called for a ruling on the merits while the majority opinion ruled on mootness and the question of standing, respectively, demonstrates that even within cases, the answer is not always clear. The justices sometimes disagree among themselves as to whether a case should be decided on a threshold issue rather than the merits.

In some cases before the Court, it is probably more evident when a party lacks standing or when the case is moot. The fact that the case could even make it to the Supreme Court, however, strongly suggests that there is some ambiguity in whether the case is justiciable. Furthermore, the process by which the Court takes a case involves a filtering of all the cert petitions through the justices' law clerks. Therefore, presumably, any cases that are not justiciable will be highly unlikely to make it before the Court for considerations.

In this chapter, I argue that the Court sometimes uses its leeway when it comes to threshold questions such as these to avoid conflicts with Congress. Like *Newdow* in which the Court ruled on the standing of the petitioner rather than the merits and *McCardle* in which the Court ultimately dismissed the case entirely, *DeFunis* presented

the Court with a difficult question that had the potential for a public or congressional backlash, and the mootness question presented an easier way out for the majority of the Court. I argue that this behavior is evidence of strategic behavior that the Court employs as a result of external pressures, especially those from Congress.

Strategic Behavior on the Court

Perhaps the most well known account of strategic behavior on the Supreme Court is Murphy's *Elements of Judicial Strategy* (1964), which I discussed briefly in Chapter 2. In this book, Murphy introduced the idea of strategic decision-making on the Court. He painted the justices as strategic actors for whom policy-making is inevitable. The policy decisions the justices make range from which cases to take to how to vote in each case. Furthermore, along the way, the justices take into account the preferences of other actors, both internal and external to the Court. That is, justices are constrained in their actions by the preferences of other justices on the Court, as well as the preferences of (and potential action by) Congress, the president, and the public. He argued that justices will want to adopt a "strategic plan" to avoid or minimize conflict with these other actors (156). For example, justices could be sure to write "carefully written and reasoned opinions" in cases where the justice is hoping to influence Congress (125). This kind of tactic is especially important in cases where a majority of Congress is opposed to the justice's policy preferences, because if the justice can successfully persuade them through a well-written opinion, Congress may be more likely to support his decision.

One significant place in which the Court can engage in strategic behavior is in its case selection. Provine (1980) discussed a number of activities in which the Court can

prevent final review of a case it may want to avoid. The most flexible one is simple case selection, or denying cert. As evidence, she cited a number of clerks' memos that strongly advise the Court to avoid certain issues because they anticipate a potential for public backlash. Tools such as these that give the Court full discretion over its agenda can sometimes allow the Court to bend to external pressures. A number of other instruments exist, including dismissals after granting review and choosing to rule on a threshold issue such as mootness, as I argue here.

In this chapter, I look for evidence that the Court does use these tools as a way to avoid a potential conflict with Congress. Braman (2006) argued that before a justice faces a decision on the merits, there are a number of threshold issues in each case including jurisdiction and issues relating to justiciability. In an experimental test of the attitudinal model of decision-making, she explored whether individuals' preferences toward certain issues impacted their decisions on these threshold issues. She found that in some issue areas, preferences did influence decisions on threshold issues, providing evidence for the attitudinal model.

I argue that attitudinal preferences may not be the only influences over a justice's consideration of threshold issues. It is highly possible that in addition to preferences on issues, knowledge about other institutions' preferences may impact the justices' reasoning on threshold issues as well. Again, they may see a ruling on these threshold issues as a possible way out of deciding in a case. Based upon the *Newdow* and *DeFunis* examples, I hypothesize that the Court sometimes takes into account Congress's preferences and wishes to avoid an institutional confrontation, sometimes choosing to avoid the merits of a case to avoid this confrontation.

Because, as Perry argued, the concepts of mootness, ripeness, and standing are so fluid, ruling on these provide an ideal way for the justices to avoid deciding in a case. Perhaps the use of these threshold cases to avoid case merits can be considered to be a "strategic plan," in Murphy's words, to avoid a congressional overruling of the Court's decision. In this chapter, I empirically test whether this does happen.

Explaining Court Behavior

I derive a number of hypotheses from the above explanations of Court behavior. I seek to explain what drives the Court to avoid the merits of a case. The first several hypotheses reflect strategic decisions that the Court may be making, and they are the hypotheses that are of particular significance to my argument. The last few hypotheses control for legal reasons the Court may vote a certain way in a case.

Strategic Explanations

If the Court is truly under constraint from Congress and wishes to prevent a legislative override of its decision, the first thing it will probably consider is the ideological preferences of the current Congress. As Congress becomes ideologically further from the Supreme Court, the likelihood that Congress will override a Court decision will probably increase. Simultaneously, the Court will become more fearful of an override, wanting to avoid policy loss, and will be more likely to avoid the merits. Therefore, I suspect that ideology will factor into decisions of when to avoid the merits of a case for fear of an override.

Hypothesis 1: As the ideological distance between Congress and the Court increases, the likelihood the Court will dodge a case's merits also increases.

Another important indicator for whether Congress is willing to overturn the Court is whether the current Congress has a history of overturning Court decisions. I assume that the Court is aware of Congress's recent history of overturning Court decisions, and hypothesize that they will factor that into their decision-making. Therefore, I expect that the Court will be more fearful of an active Congress when it comes to overturning the Court. This will play out in the Court's likelihood of dodging a case's merits.

Hypothesis 2: The Court will be more likely to dodge a case's merits if the current Congress has a history of overturning Court decisions.

It is possible is that the previous two hypotheses may be conditional. If the current Congress is ideologically divergent from the Court, but doesn't have a history of overrides, then the Court is probably less threatened if the current Congress is ideologically distant *and* has shown a willingness to override the Court.

Hypothesis 3: The effects of the ideological distance between Congress and the Court and Congress's recent history of overrides are conditional.

The Court may not only be considering its ideological distance from Congress, but from the location of the president as well (Segal, Westerland and Lindquist 2007; Bailey, Kamoie and Maltzman 2005; Gely and Spiller 1990). The president's legislative power is limited to a veto that is subject to a congressional override. However, if the president's policy preferences are located close to Congress's preferences, they present a greater threat to the Court because a president who is ideologically distant from Congress is probably more likely to veto an ideologically distant bill. As the president's ideology

moves toward Congress's, it becomes less likely that the president would use his veto and becomes more likely that the president will approve of whatever bills Congress passes. Therefore, the Court would probably be under the greatest threat from a president whose preferences are close to those of Congress. When that is the case, the Court will be more likely to want to dodge a case's merits to avoid an override.

Hypothesis 4: The Court will be more likely to dodge the merits of a case when the president's preferences are closely aligned with Congress's preferences.

Scholars have also argued that the Court takes into account the location of the current policy status quo when making its decisions. Most scholars treat the decisions that the justices face as dichotomous: they are presented with two sides of a case and choose between them. But as Bonneau et al. (2007) argued, the location of the status quo is also relevant, as justices will make their decisions relative to the status quo. For example, they quoted a memo written by Justice Brennan about the opinion in *Pennsylvania v. Muniz* (1990) that said, "in my view it leaves the law no worse off than it already was before…" (quoted in Bonneau et al. 2007, 892). Clearly, Justice Brennan was considering the location of the policy status quo.

I expect that in cases in which the majority of the Court approves of the status quo, the Court will be more likely to avoid the merits of a case so as to avoid changing the current legal policy. This might especially be manifested by the Court choosing to issue DIGs, which dismiss the case and therefore do not change the status quo at all.

Hypothesis 5: When the Court likes the current status quo, it will act in defense of the status quo by avoiding the merits in the case, thereby not changing the actual policy.

Some scholars have argued that the Supreme Court may approach constitutional and statutory interpretation cases differently. According to Epstein et al. (2002), the Court alters its docket to include more constitutional cases when it faces an ideologically distant Congress, as it is less likely to be overridden by Congress in constitutional cases. Specifically, the Court reduces the number of statutory interpretation cases on its docket in anticipation of potential congressional override, going into "constitutional mode" to protect its institutional legitimacy.[18] Segal et al. (2007) also argued that the Court may feel that a congressional override in a statutory interpretation case is Congress trying to re-establish policy at a location it prefers, but a congressional override in a constitutional case is more of an impingement on the Court's institutional authority.

If these scholars are correct and the Court approaches its decisions in these two types of cases differently, then it will be more likely to avoid case merits in statutory cases. The Epstein et al. (2002) argument asserted that the Court goes into "constitutional mode" to avoid possibly getting overridden. I argue that another possible way to avoid overrides is to avoid case merits, so maybe the Court is more likely to avoid case merits in statutory cases, just as it is likely to diminish the number of statutory cases on its docket.

Hypothesis 6: The Court will be more likely to avoid case merits in statutory interpretation cases in an attempt to avoid overrides.

Legal Explanations

[18] Harvey and Friedman (2009) replicated this study using Bailey's ideal point estimates rather than ADA scores to measure congressional preferences and Segal-Cover scores to measure the Court's preferences. The Epstein et al. (2002) results did not hold up using the updated data.

The next several hypotheses encompass a number of legal hypotheses to explain the Court's decisions. The first legal hypothesis deals with the parties in the case. The literature on certiorari demonstrates that the Court takes into account whether the United States is a party to a case in its cert decisions (Tanenhaus et al. 1963; Caldeira and Wright 1988; Ulmer et al. 1972). These scholars found that if the U.S. is a party, the Court is more likely to grant cert. I expect this will also affect the Court's decisions to address the merits of a case. If the U.S. is a party, the Court will be more likely to address the merits of the case rather than dismiss or avoid the merits.

Hypothesis 7: The Court will be less likely to avoid the merits of a case if the United States is a party to the case.

Another factor I expect to affect the Court's decision is the complexity of the case. Presumably, in cases that are more complex, the Court will be more likely to address the merits in at least one of the issues at hand. Case complexity matters in other aspects of judicial decision-making, such as dissenting behavior and the bargaining process (Hettinger, Lindquist, and Martinek 2001, 2004; Spriggs and Hansford 2001; Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1999). I expect it to matter here as well.

Hypothesis 8: In cases that are more complex, the Court will be more likely to address the merits.

The certiorari literature has also found that the Court is more likely to grant cert in cases that have a higher number of *amicus curiae* briefs (Caldeira and Wright 1988). This is true for briefs in opposition to and in support of cert. Since this is the case, I expect the number of amicus briefs also to impact the Court's decision to rule on the

merits of a case. The Court may consider it a priority to address cases with conflict, and amicus briefs often "pique the Court's interest in a case" as well as provide information to the Court about the practical importance of a case (Caldeira and Wright 1988, 1119). Athough these studies looked at amicus briefs' effect on cert, I argue that briefs may affect the Court's decisions in other stages as well. I expect that the presence of amicus briefs will therefore make it less likely that the Court will avoid ruling on the merits.

Hypothesis 9: As the number of amicus briefs increases, the Court will be less likely to dodge the merits of a case.

Finally, the Court's workload each term may impact the probability that the Court will not address the merits. This especially has the potential to increase the number of cases the Court DIGs each term. Since DIGs are included in my dependent variable as instances in which the Court dodges the merits of a case, this is important to control for.

Hypothesis 10: During terms in which the Court has a higher workload, there is a higher likelihood of dismissals or avoidance of the merits.

Data and Methods

I examine the Court's decision to avoid making decisions on the merits. Using all decisions at the Supreme Court from 1969 to 1985, the duration of the Burger Court, I identify all the cases in which the Supreme Court does not address the merits (Spaeth 2007). From these data, I create a dichotomous dependent variable indicating when the Court chooses to dodge the merits of a case. The cases I add to the "non-merits" category were those dealing with the following issues: mootness, dismissed cases (DIGs), and

standing.[19] The non-merits cases were coded as 1, while all others were coded as 0. Figure 4.1 presents the number of non-merits rulings issued by the Court each year.

[Insert Figure 4.1 here]

Because of the dichotomous nature of my dependent variable, I use a logit model to estimate the parameters. The frequency of the Court avoiding the merits in a case is about five percent.[20] The case selection for the dependent variable is limited to argued cases that result in a signed opinion, memorandum opinion, or an opinion announcing the judgment of the Court.[21]

As I discussed in the hypothesis section, if the Court is truly under congressional constraint, the constraint is most likely to impact its decisions during times when it is particularly threatened by Congress. I include two measures of congressional threat to indicate the perceived likelihood of Congress reacting to the Court's decision through legislation.

The first is a measure of the ideological distance between the Supreme Court and Congress (***Ideological Distance***). To measure this variable, I use Bailey's annual cross-branch data (2007).[22] Bailey estimates the ideal points of the median member of each chamber of Congress, the Court, and the presidency for each year. I create a measure of

[19] Using the Spaeth database, I coded all cases in which the "issue" variable was coded between a 731 (mootness) and 811 (miscellaneous standing) as a 1. All other cases were coded as 0. This included DIGs, even though a dismissal may not technically be considered an issue.
[20] Because the instances of a dependent variable of 1 were on the border between when it is best to use a rare events logit, I chose to use a regular logit for more straightforward post-estimation routines.
[21] These are the decisions coded in Spaeth's coding scheme as dec_type 1, 2, 3, 6, and 7.
[22] I use Bailey's data rather than Martin-Quinn scores because Bailey's scores provide a way to compare preferences across branches and across time using the same scale. He estimates ideal points for individuals and medians in each chamber or institution based upon voting data and "bridge observations" in which members of one institution took a position on an issue facing another of the institutions.

the distance of the average between the House and Senate and the Supreme Court for each year.[23]

I argue that it is best to use an average here because the Court considers the ideology of both chambers together. A bill passed by both chambers is likely to be located along a policy spectrum somewhere in between the two chambers' ideal points. Consider the following examples. As illustrated in Figure 4.2, if the Court (C) is located on one side of the political spectrum and both houses of Congress on the other (S and H are the Senate and House; the average ideology is A), this is when the distance variable will be at its highest value. The distance variable is measured as the distance between C and A. This is also probably when the Court will feel the most threatened.

If the Court is in the middle of each of the chambers, then it is unlikely that the Court would feel threatened by an override, since its ideal point is probably located somewhere close to a bill that both chambers would pass. This is illustrated in Figure 4.3. In this case, the average distance would be zero, which is probably an accurate reflection on how much threat there is on the Court. Finally, as Figure 4.4 shows, if the Court is leaning toward one chamber or the other but is located in between, they will feel a slight amount of threat from the more distant chamber, but they can rest assured that a new policy outcome would be moderated by the other chamber.

Figure 4.2: High Threat

[23] An alternative way to measure the ideological distance between Congress and the Court, rather than using an absolute measure of distance, would be to establish cut points using the ideological measures, creating a Pareto optimal set. The cut points would be the furthest left and right from the two chambers' medians as well as the president's ideal point. If the Court's ideal point falls within the set, the majority is safe from a potential override; if the ideal point falls outside of the set, there is a greater threat of override. In future versions of this work, I intend to use this alternative measure to test the ideology hypothesis.

Figure 4.3: No Threat

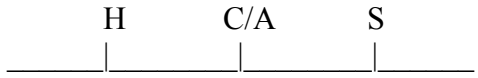


Figure 4.4: Low Threat

Bailey's dataset centers scores around zero, with conservative individuals receiving positive numbers and liberal individuals negative. The medians for the Court and both houses of Congress in the years I study is between -1 and 1, but most of the values are closer to zero than to the extremes of this range. The range of the ideological distance variable I create is from zero, which was in 1972, to .12, which was in 1975.

The second independent variable of interest is a different indicator of how likely Congress is to overrule the Court, measuring how active the current Congress is when it comes to overriding the Court. I look at the number of overrides of Court decisions Congress passed in the previous year. Using Eskridge (1991), I count the number of laws Congress passed in the previous year that overturned a federal court decision (***Previous Overrides***). This gives an estimate of how active and willing the most recent Congress was to overturn a Court decision. The range of this variable is from one override (1969) to 13 overrides (1976, 1980, and 1984). Next, I include an interaction between the previous overrides variable and the ideological distance variable to test whether the effects of these variables are conditional (***Ideological Distance x Overrides***).

As I argued above, the Court may find itself in a situation of higher threat when the president and Congress are ideologically congruent. This might make legislation more possible, since the president is unlikely to veto a bill located close to his ideal point, and it certainly makes it possible that the legislation passed would be located at the ideal point shared by the president and Congress. To measure the distance between the president and Congress, I again use Bailey's cross-branch ideological scores and take the distance between the president and Congress (***President's Distance from Congress***).

The next variable I include is an indicator for whether the Court's majority likes the current status quo (***Majority Likes Status Quo***). My measure of the status quo is the lower court's decision. I look at Spaeth's (2007) coding of the direction of the lower court's decision (liberal or conservative) as well as his coding of the direction of the majority decision on the Supreme Court (liberal or conservative). If the direction of the lower court's decision and the Court's decision is the same, the variable is coded as 1. If the direction is different, the variable is coded as 0.

To indicate whether the case is constitutional or statutory interpretation, I include a dummy variable to indicate if the case is coded in Spaeth (2007) as constitutional (***Constitutional Case***). If it is constitutional, the variable is coded as 1, and 0 otherwise. This was based upon Spaeth's auth_dec variable, which indicates whether the case is constitutional.

The above variables provide measures of the strategic factors the Court may be considering in the decision-making process. Additionally, I include a number of legal control variables that I expect will impact the Court's decision to address the merits of a

case. The first is whether the United States is a party to the case (***U.S. Party***).[24] This variable is also included in the Spaeth database (2007); I simply created a variable based upon the "party_1" and "party_2" variables, which indicated if the U.S. was a party. In roughly 18 percent of the total cases in this chapter, the U.S. was one of the parties.

I also include a control variable that indicates if more than one law is at issue in the case (***Complexity***). This is a dichotomous variable indicating whether there are at least two laws at issue, meaning the case has a higher complexity. This is based upon the "laws" variable in Spaeth (2007).

Another variable I test is the number of amicus briefs in each case (***Total Amici***). The measure I use is a count in each case of how many amicus briefs were submitted, on either side.[25] I obtained the amicus data from Collins (2007).

Finally, I include a control to measure the workload the Court has each term. I expect that in terms during which the Court has a greater workload, the Court will be more likely to dismiss a case or avoid the merits using standing or mootness to ease its workload. In other words, the workload may affect the Court's willingness to take on the merits of more cases, assuming that avoiding the merits of a case is less work than issuing a full decision on the merits. I expect the effect of this variable to be positive. To measure this, I include the number of signed opinions that the Court issues in each term

[24] Thinking that whether the U.S. was the petitioner or the respondent in the case might impact the Court's likelihood of avoiding the merits, I tested both of these hypotheses. I included a dummy variable for whether the U.S. was a petitioner as well as whether the U.S. was the respondent in the case. Each of these individual dummy variables was significant in the same direction and almost with the exact same p-value (.008 and .006, respectively). Furthermore, they provided the same results as the U.S. party variable (p-value of .005). None of the other variables' significance changed when I made this change. For simplicity, I chose the single variable rather than the two separate measures.

[25] An alternate way to test this variable would be to use an indicator for cases in which at least one amicus brief was filed. I tried this alternate specification and it did not change the results.

(***Workload***). These data are from Fowler et al.'s 2007 project examining citations of the Court's opinions.

Results

The empirical results demonstrate support for the strategic model of decision-making on the Court. Several of the hypotheses are significant, offering new contributions to the study of judicial politics and congressional constraint. The Court does engage in strategic behavior regarding congressional preferences in its decisions on whether to reach the merits of a case.

[Insert Table 4.1 here]

Because logit is a nonlinear model, the coefficients reveal significance but not substantive effects. To demonstrate the substantive effects of the variables, I calculate predicted probabilities for each of them, displayed in Tables 4.2a and 4.2b. The values shown in the tables are the predicted value that y=1, or that the Court dodges the merits of a case. The tables show the change in probability of the dependent variable as the variable moves from its minimum value to the 25^{th}, 50^{th}, and 75^{th} percentile and finally the maximum value, while holding all other variables at their median values. For the dummy variables, the values shown are the change in predicted probability that y=1 as the variable's value changes from 0 to 1, while holding all other variables constant at the median. The changes in probability are divided into two tables by the type of variable.

[Insert Tables 4.2a and 4.2b here]

The first variable of interest, the measure of ideological distance between the Supreme Court and the current Congress, is significant in the first model ($p = .012$). This means that as the Court and Congress are more ideologically disparate, the Court is significantly more likely to dismiss a case. This suggests that the Court is more threatened by an opposing Congress due to threat of an override, and is more likely to avoid the merits of cases to deny Congress the option of doing so. The substantive effect of this variable is shown in Table 4.2a, where I report the change in probability that the dependent variable equals one while moving across its entire range of values. Between the variable's minimum and maximum value (0 and .12), there is a 3.4 percent increase in the likelihood of the Court dodging the merits of a case. This is significant, given that the likelihood that the Court dodges the merits of a case is generally around 5 percent.

The second variable, the number of overrides in the previous year, is not significant. This may be in part because the composition of Congress changes every two years, and therefore the previous year's activity may not be the best proxy for activity of the current Congress. Additionally, the interaction between these two variables is also not significant.[26] This means that the effect of the previous overrides variable is not conditional on the distance between Congress and the Court.[27]

[26] One likely reason for the lack of significance here is that the interaction variable and the previous overrides variable are highly collinear (the correlation between the two is .86). Since there is not a large amount of variation in the number of overrides each year, the two are very collinear. High collinearity can lower standard errors and therefore decrease the significance of variables (Brambor et al. 2006).

[27] To further explore this variable's insignificance, I relied on Brambor et al.'s (2006) suggested method of interpreting interaction effects. I calculated the marginal effect of the distance variable at each level of the previous overrides variable, which ranges from one to 13. I then calculated the standard error of the marginal effect, and using that standard error, calculated a z-score to test whether the marginal effect at each value was significant. At the highest and lowest values of the previous overrides variable, distance is

The ideological distance variable measured the distance between the president and Congress, testing whether the Court behaved different when the president and Congress's preferences were congruent and therefore presented a greater threat. However, the variable is insignificant, meaning that the Court's decision to avoid the merits of cases does not rest upon whether the president and Congress present more of a legislative threat.[28]

Whether the majority of the Court approves of the status quo is highly significant and positive. This presents further evidence that the Court behaves strategically: when the majority likes the status quo as is, they are more likely to avoid the merits of a case. Because avoiding the merits presents the Court with one way to preserve the status quo, this finding makes sense. In Table 4.2b, which presents the substantive impact of the variable, we can see that the Court's approval of the status quo increases the likelihood that the Court will avoid the merits of a case by 4.5 percent. This implies that the Court is strategic about when to overturn the lower court's decision, since avoiding the merits of a case by DIGing or ruling on mootness or standing effectively upholds the status quo. This finding is consistent with Hendrickson's (2003) finding that the direction of the lower court's decision was statistically significant in determining when the Burger Court would employ the DIG.

Whether the case is constitutional or statutory also affects whether the Court decides to avoid its merits. If a case is constitutional, the Court is significantly less likely

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not significant. Toward the middle of the variable's distribution, the variable is slightly significant, showing that there is a conditional effect at some levels of the variable. Overall, however, the variable is insignificant.

[28] I also tried a different specification of the model that included a variable that interacted the distance between the president and Congress and the distance between Congress and the Court. This was meant to test the Court's location in the political environment relative to the other branches. The variable was also insignificant and did not change my results.

to avoid the merits, and it is more likely to decide the case on its merits. This finding echoes the Epstein et al. (2002) claim that the Court is less threatened by Congress in constitutional cases, because an override is much more difficult in constitutional cases. In statutory interpretation cases, an override is more likely, and therefore the Court is more likely to avoid case merits in order to deny Congress the chance to alter or overturn its decision. The predicted probabilities table shows that the substantive impact of this variable is a change of about two percent in the Court's likelihood of avoiding case merits.

Two of the four legal factors in the models are significant. Whether the U.S. is a party in the case is significant and negative. That means that the Court is significantly less likely to dispose of a case when the U.S. is directly involved. When the U.S. is a party to a case, the Court only has about a one percent likelihood that it will avoid the merits of the case. When the U.S. is not a party, this jumps to 4.7 percent.

Next, we see that the complexity of the case is significant and negative, implying that in more complex cases, the Court is more likely to deal directly with the merits of the case. My interpretation shows that in complex cases, the Court only has a 1.4 percent chance of avoiding the merits, but in cases that are not as complex, the likelihood is 4.7 percent.

The final two variables, the number of amicus briefs in each case and the Court's annual workload, are insignificant. The Court's decision to avoid case merits is not impacted by how many amicus briefs are submitted, nor is it impacted by how many cases the Court has each term.

Discussion and Conclusion

The results of this empirical study demonstrate that the Court's decisions in cases exhibit some congressional constraint. By expanding the cases I examine to include cases that the Court dismissed, there is an element of agenda setting in the model as well.

My results suggest some serious implications for scholars of judicial politics. In particular, the results underline the importance of the strategic model in understanding judicial behavior. Since this chapter demonstrates that the Court takes congressional preferences into account in deciding when to dodge the merits of a case such as *Newdow*, the exclusion of congressional preferences from models of judicial decision-making could be a serious mistake.

One problem with institutional-level analyses, as I discuss more at length in the next chapter, is that while they reveal information about the Court as a whole, they exclude the behavior of the justices who were in the minority. To discern more information about the motivation behind justices' votes relative to Congress, I turn from the institutional level study of this chapter to an individual level study of justice votes. The next chapter presents a similar analysis to this chapter, looking at justice votes in conference to avoid case merits.

Figure 4.1: Non-merits Rulings Issued by the Majority on the Burger Court, by Term

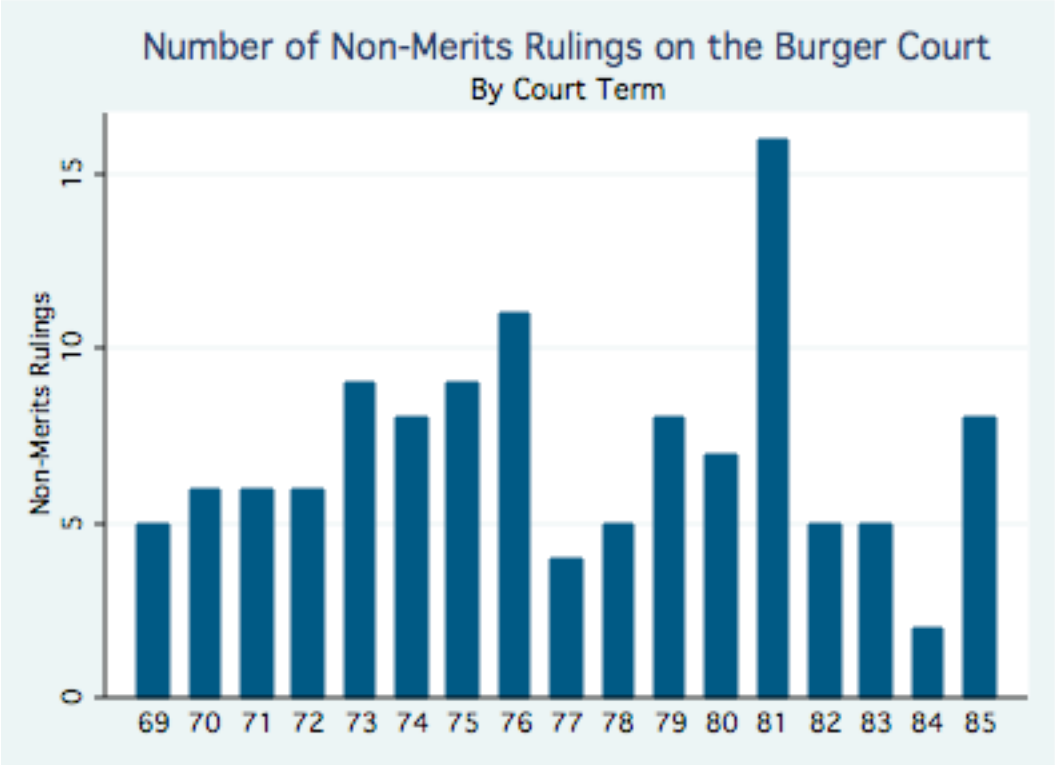


Table 4.1: Logit Results: Cases Not Decided on their Merits

Variable	Model 1(a)	Model 1(b)
Strategic Factors		
Distance to Congress	5.210* (2.599)	4.718 (7.429)
Previous Overrides	-0.007 (0.027)	-0.009 (0.043)
Distance X Overrides	- -	0.071 (1.003)
President's Distance From Congress	-0.114 (0.531)	-0.106 (0.542)
Majority Likes SQ	0.724*** (0.190)	0.725*** (0.190)
Constitutional Case	-0.486* (0.217)	-0.485* (0.218)
Legal Factors		
U.S. is a Party	-1.552*** (0.426)	-1.552*** (0.426)
Complexity	-1.211*** (0.355)	-1.211*** (0.355)
Amicus Briefs	-0.013 (0.029)	-0.013 (0.029)
Workload	0.002 (0.007)	0.002 (0.007)
Constant	-3.208*** (0.930)	-3.195*** (0.950)

Note: The dependent variable in this table is whether the Court has chosen to avoid the merits of a case by ruling on standing, mootness, or dismissing the case altogether. N= 2811; * = p<.05; ** = p<.01; ***=p<.001 (one-tailed test)

Table 4.2a: Predicted Probabilities Using Alternative Values of Continuous Variables

Variable	Min. Value	25th Percentile	50th Percentile	75th Percentile	Max. Value
Ideological Distance	4.3%	4.5%	4.7%	5.1%	7.7%
Previous Overrides	4.9%	4.8%	4.7%	4.6%	4.5%
Pres. Dist. From Cong.	4.9%	4.7%	4.7%	4.6%	4.5%
Amicus Briefs	4.8%	4.8%	4.7%	4.6%	2.4%
Workload	4.4%	4.7%	4.7%	4.8%	4.9%

Note: This table shows the change in probability of the dependent variable as each independent variable is changed from its minimum value to its maximum, also testing the 25th, 50th, and 75th percentile of each variable. In other words, the value shown is the p(y=1). The values were calculated using Stata 10.1's "mfx" function.

Table 4.2b: Predicted Probabilities Using Alternative Values of Dichotomous Variables

Variable	X=0	X=1
Majority Likes SQ	4.7%	9.2%
Constitutional Case	4.7%	2.9%
U.S. is a Party	4.7%	1.0%
Complexity	4.7%	1.4%

Note: This table shows the change in probability of the dependent variable as each dummy variable is moved from a 0 to a 1. The value shown is the p(y=1). The values were calculated using Stata 10.1's "mfx" function.

Chapter 5

Disaggregating the Majority: Individual Justice Votes to Avoid Case Merits

In the previous chapter, I argued that scholars who look for congressional constraint upon the Supreme Court and focus only on decisions on the merits are overlooking an important component of the Court's decision-making. If the Court is influenced by congressional preferences, that influence will most likely manifest itself in earlier stages of Court decision-making. From the justices' standpoint, it does not make much sense to grant cert to a case and make a decision on the merits of the case if they will simply be giving in to congressional preferences in the decision. Rather, it may be preferable to avoid the merits of the case altogether. The empirical test from the last chapter demonstrated that indeed this is the case: when deciding whether to dispose of a case or decide on an issue other than the merits, the Court does consider the ideological preferences of Congress. The results provided evidence for a strategic separation of powers model in which the Court considers the ideology of Congress while making its preliminary decisions in each case.

In this chapter, I turn from an institutional-level study of Court decisions to an individual-level study of the justices' votes. Treating the Court as a unitary actor is one way to approach the question of constraint, but by using individual votes rather than a single Court outcome, I can lend further insight into understanding these decisions. When scholars approach the Court by looking at the majority decisions in cases, they fail to acknowledge the preferences of those members of the Court who are not in the majority. This is an especially important point for cases that are decided non-unanimously; what scholars treat to be Court preferences are really only majority preferences. In this chapter, rather than approaching my research question by looking at the majority opinion, I focus on the decisions of each individual justice in each case, whether or not they are in the majority, by looking at conference votes. Furthermore, to test for any such effects that I might have missed in the previous chapter, I include variables to indicate when the justice expects to be in the majority or the minority. Since my broader question here is how the Court behaves strategically relative to Congress, my question in this chapter is how individual justices respond to congressional preferences.

The literature on Court decisions is replete with individual-level analyses of justice behavior. Most individual-level studies have looked at the strategic behavior the justices engage in relative to the preferences of their colleagues on the Court. Very few individual-level studies of Court behavior exist that look at influences coming from outside the Court. This includes the literature on congressional influence on the Court: the constraint literature tends to take an institutional-level approach. Rather than looking at how individuals are influenced by the Court, these studies look at how the Court as a

whole is influenced.[29] As I just explained, though, this may overlook some important dynamics that occur among the justices depending on whether their position in the case. My objective in this chapter is to introduce individual-level factors into the discussion of constraint on the Court.

The chapter begins with a brief discussion of the relevant literature, then I introduce several hypotheses about what explains votes on the Supreme Court at the individual level, including why and how the justices respond to Congress. Like in the previous chapter, I explore the decision to avoid the merits of a case once it has been granted cert. I study conference votes on the Burger Court to explore when the justices might be more likely to vote to avoid the merits of a case. Finally, I interpret and discuss the results of the empirical study.

Justice Votes in the Separation of Powers System

As I mentioned above, one shortcoming of the separation of powers literature is that most of the studies use only institutional-level analyses to look for constraint. These studies treat the Court as a single unitary actor. For example, Epstein and Knight (1998) posited that because of the separation of powers system, the Court has to be attentive to the preferences of the actors around it. They suggested that the separation of powers system constrains justices from acting on their true preferences, arguing that in some cases, the Court's behavior can be better understood when one examines the preferences of Congress. Similarly, Harvey and Friedman (2006) found that after the Republican takeover of Congress in 1994, the Court was far more likely to strike down congressional

[29] Segal (1997) is an exception. Segal looked for congressional constraint upon individual justice votes and did not find any such evidence (but see Bergara et al. 2003, who use Segal's data with a different econometric specification and find evidence for the SOP model).

laws because of the changed ideological composition in Congress. This provides evidence for a constrained model of Court decision-making in which, according to their model, the Court as a whole considers the ideological preferences of Congress. In this case, the ideology of each institution came much closer together after the Republican Revolution, freeing the Court to act more sincerely based on its preferences.

Other scholars offered a similar argument, grounding their theories of the Court's fear of an override in ideological, institution-centered explanations. Eskridge (1991) argued that over the time period from 1962 to 1990, the Court's decisions in civil rights cases can best be explained by looking at the ideological preferences of Congress and other actors. Spiller and Gely (1992) used an institutional-level study of judicial independence, controlling for the political composition of the Court by using the justices' party identification. Bergera et al. (2003) also employed a macro level framework in their paper on congressional constraint, finding evidence of constraint using the Spiller and Gely (1992) model and the Segal (1997) dataset.

Although we often look at the Supreme Court as one single body, the factors that go into the justice's decisions probably vary among individual justices on the Court. They are of different ideological persuasions and often have different approaches to answering statutory or constitutional questions. Based upon these differences, it is likely that some of the justices engage in strategic behavior differently from one another. Chief Warren Burger, for example, used passing at conference in a strategic manner, sometimes to the dismay of his colleagues (Woodward and Armstrong 1979; Epstein and Knight 1998; Johnson, Spriggs, and Wahlbeck 2005). Other studies have used individual-level analysis to show that the justices engage in strategic behavior to varying extents when it

comes to decisions such as granting certiorari (Boucher and Segal 1995; Caldeira, Wright and Zorn 1999).

The institutional-level approach does make sense in some cases since only the majority opinion on the Court is what actually becomes law. However, although it is the most widely used, it is not the only way to approach the question I pose. As I mentioned above, using Court majority opinions rather than looking at the individual justices within each case essentially ignores those justices who are not in the Court's majority. It is entirely possible that justices behave differently in cases when they are on the winning or the losing side.

Consider an example in which a justice expects he or she will be in the minority in the case. The justice does not like the outcome that he or she expects the majority of the Court will reach, so rather than simply voting against the majority decision, he or she adds an alternative to the mix. DIGing a case, or dismissing a writ of certiorari, for example, might be one alternative the justice introduces.[30] This introduction of an alternative outcome is referred to as heresthetical maneuvering (Riker 1983, 1986, 1990, 1993; Epstein and Shvetsova 2002). Riker defined a heresthetical device as a move made "to divide the majority with a new alternative, one that he prefers to the alternative previously expected to win" (1986, 1). Because the Supreme Court is such a small institution where votes take place frequently, often multiple times per case, this is the type of institution in which one might expect such maneuvering to take place. Epstein and Shvetsova (2002), looking for evidence of heresthetical maneuvering on the Supreme

[30] An example of this is *Loper v. Beto* (1972). Chief Justice Burger, who would have been in the minority according to the conference votes, subsequently circulated a memo to the members of the Court suggesting a DIG. Presumably, the Chief Justice would have preferred to dispose of the case using a DIG than establish precedent in the case that he did not like (Wahlbeck 2006).

Court, found that Burger was a "Rikeresque heresthetician" who engaged in this type of strategic behavior (118).

Heresthetical maneuvering is just one type of strategic behavior. Since my empirical study looks at cases in which the Court grants cert but then does not address its merits, this type of behavior is likely to occur somewhat frequently. Once the Court has accepted a case for review, someone has to propose to not decide the case on the merits. Sometimes the justice who proposes this alternative may be acting on sincere preferences; other times the justice may introduce the idea because it is preferred to an alternative outcome. In this chapter, I test whether justices introduce an alternative outcome in order to avoid a congressional override.

Underlying the theory of heresthetical maneuvering is the assumption that justices are indeed strategic actors who act upon their own policy preferences. In Chapter 2, I discussed the centrality of these assumptions to my dissertation. In some cases, additionally, justices may be constrained by the law (Knight and Epstein 1996) or case characteristics (Segal 1984). In this chapter, I control for strategic factors and legal considerations the members of the Court may take into account, finding evidence that the Court is influenced in its decision on whether to address case merits by the political environment in which it acts.

Explaining Voting Behavior

In this section, I present a number of hypotheses to explain why individual justices vote to avoid case merits. In particular, I look for evidence of congressional constraint on their decisions, in addition to a number of other explanations.

My hypotheses fall into two major categories. The first several hypotheses encompass the strategic behavior exhibited by the justices. The strategic hypotheses I put forth explain the justice behavior in light of their understanding of the political environment. The second categorization of hypotheses is legal factors. Although the justices' decisions may be largely governed by policy preferences and strategic behavior, to some extent they may be constrained by legal factors. Finally, I present some conditional hypotheses, arguing that some of my hypotheses may have conditional effects.

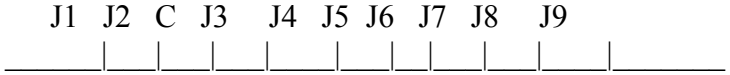
Strategic Explanations

The main reason that most scholars give for the Court's fearing an override has to do with the Court's reluctance to concede ideological ground to Congress. Most studies of constraint, as I discussed in Chapter 2, have an ideological explanation as the underpinning of their arguments, assuming that the justices are policy motivated and therefore accounting for their ideological preferences (Harvey and Friedman 2006; Gely and Spiller 1990; Spiller and Gely 1992; Epstein, Knight and Martin 2001, Bergara et al. 2003). Because the justices fear a congressional override, they will consider the location of the ideal policy preference of Congress in their voting decisions. Since Congress has the ability to re-locate a policy the Court has established by passing override legislation, the Court will be aware of Congress's preferences. For justices who are further away from Congress's ideal point, congressional overrides are more of a threat, because Congress can move the policy outcome further away from the justice and closer to its own ideal point. For justices who are closer to or who share an ideal point with

Congress, a congressional override might be more welcome, so they are not as likely to be opposed to an override.

Consider the following scenario, illustrated by Figure 5.1. The location of the nine justices is indicated below by J1-J9, while the location of the average ideology of Congress is indicated by C.[31] On the left end of the spectrum would be a liberal outcome, while an outcome all the way to the right is a conservative outcome.

Figure 5.1: Hypothetical Scenario with Individual Justices and Congress



In this scenario, J1 and J2 are going to prefer C, the congressional ideal point, to a Court opinion located anywhere to the right of C. Therefore, they are going to be less fearful of a congressional override than justices on the other side of the spectrum (J9, for example). Since I demonstrated in the previous chapter that dodging the merits of a case is one way in which the Court avoids congressional overrides, justices who are more distant from Congress's preferred point are more fearful of an override. Therefore, they are more likely to dodge the merits by voting to dismiss or rule on mootness or standing.

[31] As I discussed in the previous chapter, I consider a measure of the average of both houses of Congress to be the best measure of congressional ideology for this study. Because the Court has to calculate where an override bill would be on an ideological scale, I argue that the justices would consider the location of both houses of Congress. Since both houses have to pass the same version of the bill, the ultimate version of a bill that came out of Congress would presumably be somewhere in between the House and Senate. To approximate the ideology of the House and Senate, I use the median member of each chamber as calculated by Bailey (2007).

The *Newdow* case I discussed in the introduction chapter provides a perfect example of this. As you will recall, the justices who wanted to address the merits of the case were the most conservative justices, or those furthest on the right. Congress was also fairly conservative at that time, as both houses were under the control of a Republican majority. The other justices who were in the majority were the justices on the left of the Court, and they were the ones who wanted to avoid the merits of the case by voting to rule on standing. This can be explained by my model: the justices who share an ideology with Congress are not fearful of an override, so they are more likely to address case merits. If Congress stepped in and corrected the policy the Court established, those justices who are closest to Congress would not be threatened because their ideal points are close. Those who are located further from Congress will want to dodge the merits more often so that Congress does not feel the need to step in and overturn the Court's decision. If that happened, it would move the policy further away from their ideal point.

The justices may not only be impacted by the ideology of the current Congress, but also by their own political attitudes. In considering these factors together, the justices will consider their own distance from the current Congress.

Hypothesis 1: As the ideological distance between an individual justice's ideal point and the congressional ideal point increases, the justice will be more likely to vote to avoid the merits of a case.

I also argue that the Court will feel more under threat from Congress when Congress has shown that it is more willing to override the Court. Eskridge (1991) showed the number of bills Congress passed and the number of decisions it overrode varies quite a bit from year to year. Hansford and Damore (2000) argued that the Court

pays attention to congressional overrides and this is one way in which the Court feels threat from Congress. In the previous chapter, I controlled for the recent history of congressional overrides but did not find statistical evidence supporting the hypothesis. In this chapter, I control for it again since the focus is now on the individual level rather than on the Court majority.

Hypothesis 2: The more willingness Congress has recently shown to override the Court, the more likely the justices will be to vote to avoid the merits of the case, attempting to avoid another override.

Scholars have suggested that the Court might also be influenced by the preferences of the executive branch as well (Bailey, Kamoie and Maltzman 2005; Gely and Spiller 1990). Because the president's only legislative power is to veto or introduce legislation, and the president's veto is subject to a potential override by Congress, I argue that the constraint on the Court from the executive branch is much less than that from the legislative branch. Although an ideologically distance may present somewhat of a threat to the Court, what really matters is the congruence of the president's preferences with those of Congress. The ultimate threat to the Court would be an ideologically distant Congress who is aligned with the president. If the Court feels more threat from an aligned Congress and president, the justices will be more likely to avoid the merits of cases to avoid overrides in circumstances when the president and Congress are closer together.

Hypothesis 3: The likelihood that a justice will vote to avoid the merits of a case will increase as the president and Congress's preferences become more closely aligned.

Another possibility is that the justices may consider whether they prefer to maintain the status quo that has been established by the lower court in a case. As Bonneau et al. (2007) argued, most scholars of Court decision-making do not incorporate the status quo as a third option in addition to the two opposing sides in a case. The status quo, however, does play a role in shaping how the justices see the options before them because justices make rational decisions with reference to the location of the status quo. They defined the status quo as "the state of legal affairs that will continue if the Court either does not hear the case or fails to provide a majority opinion that does more than reiterate the current state of the law" (891). Specifically, they showed that justices are sometimes willing to diverge from their most preferred outcome if they prefer the new outcome (i.e. the majority opinion) to the location of the status quo policy. Sophisticated majority opinion authors can garner more support for their opinions when they understand their fellow justices' evaluation of the status quo relative to the location of the majority opinion (Bonneau et al. 2007).

Additionally, the literature on aggressive grants and defensive denials has also shown that justices do indeed evaluate the status quo in their decisions. Perry (1991) argued that the justices' decision on whether to grant certiorari in a case often depends upon their evaluation of the current state of the law. This results in aggressive grants, when justices want to uphold the lower court's ruling or make a definitive ruling in a particular issue area, or defensive denials, when justices look forward to the merits and deny cert because they do not think they will like the Court's ruling. Caldeira, Wright and Zorn (1999) also showed that justices look forward to decisions on the merits and

think about the potential outcome, sometimes preferring to grant cert in cases in which they want to affirm the lower court's ruling, i.e. the status quo.

In my study, consideration of the status quo is relevant because dodging the merits of a case, assuming that it does not reverse or vacate the decision of the lower court, is essentially a vote to uphold the status quo. Therefore, the justices' preferences regarding the status quo may affect their decision to vote on the case merits.

Hypothesis 4: If a justice prefers the status quo to the likely Court outcome, they are probably more likely to leave the status quo on the merits and dismiss the case or rule on a judicial power question rather than addressing the merits.

As I discussed in detail in Chapter 2, in addition to being strategic relative to the location of the status quo, justices are often strategic relative to the positions of their colleagues. I argue that justices are also aware of their own success on the Court relative to their colleagues, in terms of being a part of the majority. In particular, justices who believe they will find themselves in the minority may be more likely to cast a vote to avoid case merits. This would be because their preference would be to avoid setting precedent in the case that they did not like. They would rather avoid the merits of a case than reach an undesirable outcome. I explained the introduction of such alternative choices above in my discussion of heresthetical maneuvering on the Court (Epstein and Shvetsova 2002). Justices who expect to be in the minority, then, are more likely to cast merits-avoiding votes.

Hypothesis 5: Justices who expect to be in the minority will be more likely to vote to avoid the merits of cases, since they will prefer to avoid case

merits rather than to have the Court establish a legal precedent they do not like.

Another factor I test for is whether the justices see a difference between constitutional and statutory interpretation cases. I lump this into the strategic category of hypotheses because the Court may be under varying levels of threat from Congress whether the case is statutory interpretation or a constitutional case. Segal et al. (2007) argued that in statutory interpretation cases, the Court tends to be more concerned with policy than institutional concerns. On the contrary, in constitutional cases, the Court tends to be more concerned with its institutional integrity. The advantage for the Court in constitutional cases is that it is much more difficult for Congress to overturn its decisions, since it would essentially require amending the Constitution rather than simply passing a bill. Therefore, I would expect that the justices treat these two kinds of cases differently, expressing more sincere preferences in constitutional cases since an override is less likely. On the other hand, in statutory interpretation cases, they may be more wary of congressional preferences since an override is more likely.

Hypothesis 6: Justices will be less likely to avoid the merits in constitutional cases because there is a lower threat of an override in constitutional cases.

Legal Explanations

The next several hypotheses are legal factors that I expect the justices will take into account. First, as the certiorari literature has demonstrated, the Court takes a greater interest in cases in which the U.S. is a party (see discussion in

previous chapter). I expect that will be true for the Court's willingness to address the merits of a case as well.

Hypothesis 7: When the U.S. is a party to the case, justices will be less likely to avoid the merits.

In the previous chapter, we saw that the number of laws in a case had a significant and negative effect on the likelihood of justices to avoid case merits. I used the laws variable to indicate complexity in each case. The greater the complexity is in a case, the more likely the Court will be to address the merits in the case. This may be because the Court has to invest more time in understanding the details of complex cases, and therefore once they have done that, they are more likely to address the merits.

Hypothesis 8: Justices are less likely to avoid case merits in cases that are more complex.

As the certiorari literature suggests, the Court may be influenced in its certiorari decisions by the submission of one or more amicus briefs. Because the cert literature suggests that the justices have a higher interest in cases with amicus briefs, and the literature on the effect of amicus briefs further suggests that briefs provide information to the justices (Caldeira and Wright 1988; Tanenhaus et al. 1963; Ulmer 1984; Spriggs and Wahlbeck 1997; Epstein and Knight 1999; Hansford 2004; Collins 2004), I argue that in cases with a higher number of briefs submitted, the justices are less likely to avoid the merits.

Hypothesis 9: Justices are less likely to avoid case merits in cases that have a higher amount of amicus briefs submitted.

Finally, the justices may be influenced by the amount of work they face each term. If the justices have a greater number of opinions to write and more work in a given term, they may feel constrained by their workload, causing them to be more likely to avoid the merits of a case or to DIG the case.

Hypothesis 10: Justices are more likely to avoid case merits in terms when they have a higher workload.

Conditional Explanations

The final three hypotheses I introduce are interactions. I expect that some of the hypotheses I explained above may be conditional on one another. The first conditional hypothesis looks at the interaction between the effects of congressional ideology and willingness to override the Court. In other words, the ideological distance of a justice from Congress might be of less importance when Congress does not seem particularly likely to override the Court. That is, justices are going to feel more threatened when Congress is more active *and* are more ideologically distant.[32] The effect of justice ideology might therefore be conditional on congressional override activity.

Hypothesis 11: The likelihood that an individual justice's distance from Congress's ideal point will influence his or her decision to avoid case merits is conditional on whether Congress is more active with regards to overturning Court decisions.

The next conditional hypothesis elaborates further on the constitutional vs. statutory interpretation question. Because I suggest that justices are more free to vote

[32] Epstein and Knight (1998) argue that the Court obtains its information from two places: the media and the briefs submitted in each case. Johnson (2004) adds that the justices use oral arguments as a way of gathering information about Congress.

their sincere preferences in constitutional cases, but they are not as free to do so in statutory cases, this opens up the possibility of strategic behavior. Furthermore, as I mentioned, the advantage of looking at individual votes rather than the majority vote on the Court is that one can discern behavior about justices who are in the minority vs. justices who are in the majority.

Do justices in the minority look at congressional overrides differently? If the justice is in the minority, s/he may want to encourage congressional action for an override by placing the location of the policy at an outlier. This is the argument in Spiller and Tiller's (1996) article on inviting congressional overrides. Their focus, however, is solely on statutory interpretation cases. I test this by interacting whether the justice is frequently in the minority in a given year with whether the case is a constitutional or a statutory case.

Hypothesis 12: The likelihood that a justice will vote to support avoiding case merits in constitutional vs. statutory cases is conditional on whether the justice is in the minority.

The final conditional hypothesis I test is another measure of the surrounding political environment. I argued above that the Court's responsiveness to congressional preferences depends on how close the president is to Congress. Here, I add that the president and Congress are particularly threatening to the Court when they are located further away from the Court.

Hypothesis 13: The justices' likelihood of voting to avoid case merits depends on the proximity of the president to Congress, as well as their proximity to the Court.

Data and Methods

In the methods section, I examine individual justice votes in conference to dodge the merits in a case before it. As I explained above, this chapter looks at individual votes to capture any effects that might be happening at the individual level that one would miss from merely looking at the Court majority. I use four empirical models to test the above hypotheses. The first two models look at all individual voting in conference in cases before the Burger Court, the first without the interactions and the second with interactions. The next two models narrow the universe of cases to include only those cases in which at least one justice votes to avoid the merits of a case.[33] Again, the first of the latter two models excludes the interaction terms and the second model includes them.

I use conference vote data in this chapter because I assume that it provides the most sincere votes from the justices, since it is before any bargaining or accommodation starts to take place. Using conference votes for individual justices allows me to take a different approach from the first chapter, in which I used the decision of the Court majority at the final stage of each decision. As I mentioned above, looking at the conference vote of every justice in each case includes those justices who are not in the majority of the Court. The dependent variable in both models is the justice's vote, either to rule on the merits (coded as 0) or to avoid the merits (coded as 1). In this case, the votes I count as avoiding the merits are votes to dismiss the case, votes to remove the case from the docket, or votes that the case is moot.

[33] In both models, I limit the case selection to argued cases that result in a signed opinion, memorandum opinion, or an opinion announcing the judgment of the Court. In Spaeth's coding scheme, these include dec_type 1, 2, 3, 6, and 7.

Voting to avoid the merits on the individual level comprises about two percent of all votes in the first two models. Because I limit my selection to cases in which at least one justice votes to avoid the merits for the second pair of models, positive incidents of the dependent variable are about 38 percent of the sample. I use a logit model in each of the four models since the dependent variable is dichotomous.[34] In each of the models, I use robust standard errors clustered around each justice (see Zorn 2006). I use the justice-level vote, so each observation is a single justice's vote in a single case, meaning there are nine observations for each case.

Table 5.1 shows the number of non-merits votes each justice cast in conference over the duration of the Burger Court. The table provides a number of the total times each justice cast such a vote in conference; dividing that number by the number of years each justice spent on the Court gives the average number of non-merits votes the justices cast annually.

[Insert Table 5.1 about here]

The count for each justice ranges from eleven instances for Justice Black, who only spent two terms on the Burger Court, to 110 non-merits vote cast by Chief Justice Burger. Looking at the average number of non-merits votes cast by each justice per year shows that the most frequent "dodgers" were Justices Harlan (an average of eight times per year), Stewart, and Burger (both about seven times per year). The justice who voted

[34] I also ran the first two models using a rare events logit (King and Zeng 2001*a,* 2001*b*) in this first model. However, the results were the same regardless of which model I used. For the purpose of having more straightforward post estimation routines, I use the regular logit for interpretation of the results.

to avoid the merits least frequently was Justice Douglas, followed by Justice White and Justice O'Connor (each cast non-merits votes roughly three times per year).

As in the previous chapter, the first independent variable I use is a measure of ideological distance between the two branches. In this chapter, since the level of analysis is individual votes, the measure is the ***Ideological Distance*** between Congress and the individual justice. These scores are based on Bailey's cross-branch data (2007).[35] As a measure of congressional ideology, I use the average between the House and Congress median for a given year, assuming that any legislation that came out of each chamber would be located somewhere in between the two. The measure is the distance between this and the individual justice's score. The range on values for this variable is from zero to 2.04, which was the distance between Justice Thurgood Marshall and Congress in 1981.

To measure how likely Congress is to pass override legislation, I use a count of the number of override bills Congress passed the previous year (***Previous Overrides***) based on Eskridge (1991). The number of overrides by Congress passed in this time period ranges from one in 1969 to 13 overrides in 1976, 1980, and 1984. Because these first two variables might be conditional upon the ideological distance, I also include an interaction between the distance between a justice and Congress and how many override bills were passed in the previous year (***Distance x Overrides***).

[35] I experimented with various operationalizations of this variable. Another specification I tried was to use a measure of the justice from the closest institution (House, Senate or president). The logic here is that the justice would feel protected from a congressional override by sharing an ideology with at least one of the branches. However, this measure (distance to the closest institution) was so highly correlated with the justice's distance from Congress (.94) that the two specifications could be used interchangeably without changing the results.

To control for the threat that the president presents to the Court, I measure the congruence between the president's preferences and Congress (***President's Distance to Congress***). This measure assumes that the president presents the biggest threat to the Court when he is of the same ideology as Congress. When the political environment is one in which the legislative branch and the executive branch share ideological goals, the possibility of an override is probably greater. Like the measure between each justice and Congress, this is based upon Bailey (2007). The variable's minimum value is .335, the distance from President Nixon to Congress in 1970. The variable's maximum is 1.065, which measures the distance between President Reagan and Congress in 1986.

To further test the effect of the political environment on the Court, I made an interaction variable using the Court's distance from Congress multiplied by the president's distance from Congress. This value will increase as the Court moves away from these institutions and will decrease when the Court is closer in ideology to the two branches (***Justice Distance to Congress X President's Distance to Congress***).

Because there are often strategic elements behind justices' votes relative to the status quo (Bonneau et al. 2007), I also control for whether the justice is satisfied with the legal status quo (***Justice Likes SQ***). I include a measure of whether the justice approves of the current status quo, defined as the lower court's decision that the Court is reviewing, using Bailey's measure of ideology and Spaeth's coding of the lower court decision. Bailey centers his ideology scores for the justices around 0, so I assume that those below zero can be considered liberal and those above zero can be considered conservative. For each decision in Spaeth, the lower court's decision is coded as liberal or conservative. The status quo measure I use is a dichotomized variable indicating

whether the justice likes the status quo. In other words, I indicate whether both the justice and the lower court decision liberal or conservative. If they are opposite, they are coded as a 0; if they are the same, they are coded as a 1. About 50% of the observations are a 0 and 50% are a 1.

If a justice perceives that he or she will probably be in the minority in a case, the justice may be likely to vote differently than if he or she were in the majority. To measure the likelihood that a justice is in the majority, I use a measure of the ideological distance between the justice and the median on the Court (***Distance to Median***) using Bailey's ideology scores (2007).[36] I assume that justices who are located further from the Court's median will have a lower chance of being in the majority. Since at conference, the opinion coalitions have not been formed yet, this is one way to project the justice's likelihood of ending up in the majority.

The final strategic factor I use is an indicator for whether the case is a constitutional case (***Constitutional Case***). This variable is an indicator, coded 1 for if the case is constitutional and 0 if otherwise, based upon Spaeth's (2007) auth_dec variable.. Thinking that the type of law in the case might also impact the justice differently if he or she is in the minority or the majority, I include another interaction (***Distance to Median X Constitutional Case***). The interaction tests whether the type of law and the justice's position in the majority or minority are conditional.

[36] I also tried an alternative specification of this variable, in which I used a measurement of how frequently the justice ended up in the majority by term. If a justice is used to being in the losing coalition rather than in the majority, the justice may be more likely to want to avoid the merits of cases more often, since they do not agree with the policy that is being created by the majority and would rather dodge the merits of a case. These variables were highly correlated and did not significantly change the results when one or the other was used.

The next several variables are case-level control variables covering the legal explanations. The first is a dichotomous indicator of whether the U.S. is a party to the case (***U.S. is a Party***).[37] This information is in Spaeth's dataset in the party_1 and party_2 variables. The complexity of the case is indicated by a dummy for when there is more than one law in the case (***Complexity***) (again, using Spaeth's laws variable). The total number of amicus briefs (***Amicus Briefs***) submitted in a case is from Collins (2007), and finally, the ***Workload*** of the Court each year is from Fowler et al. (2007). This variable is measured as the number of signed opinions issued by the Court each year.

Results

The results from both models provide support for a hypothesis of congressional constraint. My examination of justice votes in conference reflects that the individual justices take into account the political environment. This provides support for the theory of strategic behavior on the Court. In particular, there are two important contributions I discuss briefly before getting into the results.

First, as I discussed above, this chapter disaggregates the preferences of the Court majority by looking at individual justices on the Court. Conference votes, which are cast before bargaining and/or accommodation take place, are the best way to discern individual preferences, which is why I have chosen this unit of analysis. This study employs individual level data, not simply using the preferences of the Court as a whole but of individual justices themselves.

[37] Here I use a simple indicator variable of whether the U.S. is the petitioner or the respondent in the case. I also ran the model separating this into two separate variables to see if the Court would act differently depending on the role that the U.S. played. The two dummy variables indicated whether the U.S. was the petitioner or the respondent in the case. The results were the same for each variable as when they were combined into one variable. For simplicity's sake, I chose to use the single variable.

The second unique element of my findings is that strategic behavior on the Court vis-à-vis Congress does exist at non-merits stages of decision-making. I argued previously that because most scholars who study congressional constraint look only at the merits stage, their findings are likely to be biased downward because strategic behavior may happen earlier on the Court. Indeed, according to my empirical results in this chapter, they are missing important decisions made by the justices that reflect a consideration of the other branches' preferences.

Given this broad overview of the results, I will now provide a more specific discussion of what the model demonstrated. The logit results are located in Table 5.2. Models 1(a) and 1(b) are the larger universe of cases, while Models 2(a) and 2(b) are the limited universe of cases in which at least one justice votes to avoid case merits. Again, the dependent variable here is all justice conference votes on the Burger Court. Of the strategic hypotheses, three demonstrate strong support.

[Insert Table 5.2 about here]

Additionally, to further understand the substantive impact of the variables in my analysis, I estimate predicted probabilities. Tables 5.3a, 5.3b, 5.3c, and 5.3d demonstrate the predicted probabilities. Table 5.3a shows the estimated probabilities for the justices to case a non-merits vote in conference (y=1), while moving the continuous variables across their ranges and while holding all other variables at their median values. The probabilities shown are estimated using the variable's minimum value, its 25^{th}, 50^{th}, 75^{th} percentiles, and finally the maximum value. Table 5.3b shows the predicted probabilities

while changing the value of the dummy variables, since they can only be changed from 0 to 1, again holding all variables at their medians. Finally, Tables 5.3c and 5.3d interpret the effects of the significant interaction variables by showing the predicted probabilities while changing the value of each individual variable within the interaction. I tested these variables at two values of each variable, the tenth and ninetieth percentiles, again while holding other variables constant at their medians.[38]

[Insert Tables 5.3a, 5.3b, 5.3c, and 5.3d about here]

According to the results shown in Table 5.2, the ideological distance between the justice and Congress alone is not enough to influence the justice's vote, nor is the interaction of this variable with the previous overrides issued by Congress. However, the effect of previous overrides is highly significant and positive in the first two models. Substantively, the change in the likelihood of a vote to avoid the merits is an increase of about two percent over the full range of the overrides variable, as demonstrated by Table 5.3a. That is, during years in which Congress was extremely active in passing override legislation in the previous year, the justices are significantly more likely to vote to avoid case merits. This suggests that the override activity in Congress is perceived as somewhat of a threat to the Court. As a result, the justices alter their behavior in order to avoid the possibility of an override.

[38] I only estimated predicted probabilities using the second model from my empirical testing, the model with unlimited cases as its universe and with the interaction terms. Because of the nature of the limited universe of cases in the second model I presented above, predicted probabilities are not as easily interpretable should they only apply to the cases in which at least one justice cast a non-merits vote. To fully understand the results, they must be applicable to all the Court's cases, not just a sub-sample.

Another interesting result from these models is the strong significance of the variable measuring the distance from the president to Congress. The effect of the variable on the justices' votes to avoid the merits is highly significant and negative. As the president and Congress become more congruent ideologically, the value of this variable decreases as it is a distance measure. The negative sign means that as the distance between the president and Congress gets smaller, justices are more likely to vote to avoid merits. In other words, a president and Congress who are close together in ideology present a greater threat to the Court and that threat is manifested in justice votes to avoid case merits. The change in likelihood, shown by Table 5.3a, is about a 3 percent chance.

Additionally, the interaction variable intended to capture the justice's location in the surrounding political environment is significant. This variable interacted the justice's distance from Congress with the distance between the president and Congress. The significance of this finding is interesting. Rather than simply considering the ideology of a potentially threatening Congress, it demonstrates that the justices actually consider the state of the political system as a whole. The consideration of Congress and the president together, rather than simply the justice's own distance from Congress, suggests that the Court is concerned with the legal system as a whole and with the role of the elected branches, who may be more likely to override them when they have aligned preferences.

The substantive interpretation of this interaction can be found in Table 5.3c. The values at which I tested the effect of the interaction are the two variables' tenth and ninetieth percentile values. This produced four different predicted probabilities for the interaction variable, which are displayed in a 2x2 table. Increasing the distance from the

president to Congress causes a decrease in the justice's likelihood of a non-merits vote by about four percent, *if* the justice and Congress are not ideologically distant. If the justice and Congress are ideologically distant, however, the location of the president relative to Congress is rather inconsequential, as we can see from the right-hand column in Table 5.3c.

Whether the case is constitutional or a statutory interpretation case is significant in three of the four models. The sign and significance on this variable mean that if the case is not a constitutional case, the justices are more likely to cast a vote to avoid case merits. In other words, justices dodge case merits more frequently in statutory interpretation cases. Given that Congress is probably more likely to respond in a statutory interpretation case and also that it is easier for them to do so, this finding makes sense. Justices are less likely to want to decide merits in cases in which Congress is more likely to issue an override.

The interaction variable testing the justice's likelihood of being in the minority conditional on whether the case is constitutional (***Distance to Median x Constitutional Case***) is significant. The interpretation of this variable can be found in Table 5.3d. The four boxes show the predicted probability of a justice casting a non-merits vote when the justice *is* the Court median as opposed to when the justice is ideologically far from the median (1.85 is the ninetieth percentile of the distance variable), testing in both constitutional and non-constitutional cases. The table shows that the justice's likelihood of casting a non-merits vote is about ten percent higher when he or she expects to be in the minority; this difference rises to twelve percent when the case is constitutional. Both scenarios reveal the large substantive effect of this variable.

The results do not offer much support for the other strategic hypotheses. Whether the justice likes the status quo is in the hypothesized direction but is insignificant. Similarly, the likelihood that the justice will be in the minority, measured as his or her distance from the minority, does not have an effect on the likelihood of casting a vote to avoid case merits. However, the interaction of this variable with the justice's expectation of being in the minority is significant, demonstrating that the significance of this variable is conditional.

The next category of hypotheses includes legal considerations. First, whether the U.S. is a party to the case makes the justices far less likely to avoid the merits in a case. This was true in all four models. Furthermore, in cases that are more complex, the justices are more likely to address the merits and are less likely to vote to dodge the merits. This variable was significant in the first two models.

The number of amicus briefs submitted in a case approaches statistical significance (p=.053).[39] Amicus briefs are significant in the opposite direction from the hypothesized direction; rather than encouraging the justices to address case merits, the effect is the other way. In cases that have more amicus briefs submitted, justices are more likely to cast a vote to avoid case merits. This may be because of two reasons. First, as discussed above, the argument in the literature on amicus briefs suggests that the briefs play an informational role for the justices, particularly in cases that have a high amount of uncertainty. If that is the case, then the interpretation of this variable suggests

[39] An alternative way to measure the significance of amicus briefs in a case would be to use a n indicator variable, rather than a count variable, for whether at least one amicus briefs was submitted in the case, instead of counting how many. When I used this variable instead, the other results did not change but the amici variable was significant in the opposite direction (p=.000). This would imply the relationship I originally posited. I chose to use the count variable because I argue that if the justices are taking cues about case salience or if they are using the briefs for information, the number does matter, not simply the submission.

that in cases with more uncertainty (and therefore more amicus briefs) the justices are more likely to avoid the merits. This suggests an important role for the level of certainty justices have about a case, a hypothesis I do not otherwise test.

The second explanation of the significance of the amicus variable might have to do with case salience. If a case is more salient, and therefore more amicus briefs are submitted, the justices might be more likely to punt the case away because they fear an override of a salient case. This may explain in part the votes in *Newdow*. This interpretation of this variable suggests that the concern here is about institutional authority, and that the Court wants to dismiss cases in which it fears an override so as to avoid any diminishment of its integrity.

The workload hypothesis is also significant in the first two models. The negative sign means that as the justices' workload goes up, they are less likely to avoid case merits. This is the opposite direction than what I hypothesized, but it intuitively makes sense. In the years where the Court is more busy, they are casting more votes in conference, and therefore are more likely to cast more votes to avoid merits.

Conclusion

The results presented here provide interesting implications for studies of judicial politics that are similar to the findings of the previous chapter. In particular, the argument and evidence I demonstrated underline the importance of the strategic model of decision making on the Court. My empirical study does provide evidence that individual justices are strategic when it comes to congressional influence. The significance of the previous override activity and the indicator of the political environment, the distance

between the president and Congress, suggest that the justices are indeed strategic in their non-merits decisions.

Table 5.1: Descriptive Statistics: Justice Votes to Avoid Case Merits in Conference

Justice	Years on Burger Court	Total Votes to Dodge Merits	Average Votes Per Year
Black	2	11	5.5
Blackmun	17	84	4.9
Brennan	17	79	4.6
Burger	17	110	6.5
Douglas	6	18	3.0
Harlan	2	16	8.0
Marshall	17	100	5.9
O'Connor	6	21	3.5
Powell	15	67	4.5
Rehnquist	15	89	5.9
Stevens	11	64	5.8
Stewart	12	83	6.9
White	17	58	3.4

Table 5.2: Logit Results: Conference Votes to Avoid Case Merits

	Model 1(a)	**Model 1(b)**	**Model 2(a)**	**Model 2(b)**
Variable	Unlimited Cases	Unlimited Cases	Limited Cases	Limited Cases
Strategic Factors				
Distance to Congress	-1.030 (1.040)	-1.132 (1.052)	-2.028 (1.383)	-2.200 (1.364)
Previous Overrides	0.050*** (0.0101)	0.054*** (0.015)	0.032* (0.015)	0.033 (0.022)
President's Ideological Distance to Congress	-0.861*** (0.199)	-1.272*** (0.263)	-1.019*** (0.270)	-1.520*** (0.262)
Justice Likes Status Quo	0.182 (0.295)	0.171 (0.296)	0.334 (0.225)	0.310 (0.225)
Distance to Median	1.038 (1.005)	.723 (1.025)	2.083 (1.346)	1.682 (1.323)
Constitutional Case	-0.074 (0.0941)	-0.211* (0.128)	-0.282*** (0.093)	-0.464*** (0.134)
Legal Considerations				
U.S. is a Party	-0.995*** (0.100)	-0.995*** (0.101)	-0.349** (0.127)	-0.349** (0.128)
Complexity	-0.231*** (0.0707)	-0.230*** (0.071)	-0.114 (0.102)	-0.113 (0.102)
Amicus Briefs	0.017 (0.0104)	0.017 (0.010)	0.013 (0.010)	0.012 (0.010)
Workload	-0.009** (0.00324)	-0.009** (0.003)	0.000 (0.005)	0.000 (0.005)
Conditional Variables				
Ideological Distance x Previous Overrides	-	0.007 (0.009)	-	-0.002 (0.018)
Distance to Median x Constitutional Case	-	0.197* (0.098)	-	0.266* (0.137)
Pres/Cong Distance x Justice/Cong Distance	-	.589* (0.308)	-	0.714* (.429)
Constant	-1.809*** (0.504)	-1.715*** (0.541)	-0.116 (0.806)	0.068 (0.865)
N	21315	21315	1950	1950

Note: The dependent variable in this table is whether the justice voted in conference to avoid the merits of a case by voting to dismiss a case, remove the case from the Court's docket, or voting that the case is moot. Coefficients are shown with standard errors in parentheses.

* = p<.05; ** = p<.01; ***=p<.001 (one-tailed test)

Table 5.3a: Predicting Probabilities Using Alternative Values of Continuous Variables

Variable	Min. Value	25th Percentile	50th Percentile	75th Percentile	Max. Value
Ideological Distance	5.4%	4.8%	3.3%	1.3%	0.7%
Previous Overrides	2.5%	2.7%	3.3%	3.6%	4.4%
Pres. Dist. From Cong.	4.5%	3.6%	3.3%	2.9%	2.4%
Justice Distance to Med.	2.1%	2.3%	3.3%	8.3%	14.0%
Amicus Briefs	3.2%	3.2%	3.3%	3.4%	7.6%
Workload	5.1%	3.7%	3.3%	3.2%	2.9%

Note: This table shows the change in probability of the dependent variable as each independent variable is changed from its minimum value to its maximum, also testing the 25th, 50th, and 75th percentile of each variable. In other words, the value shown is the p(y=1). The values were calculated using Stata 10.1's "mfx" function.

Table 5.3b: Predicting Probabilities Using Alternative Values of Dichotomous Variables

Variable	X=0	X=1
Justice Likes SQ	3.3%	3.9%
U.S. is a Party	3.3%	1.2%
Constitutional Case	3.3%	3.1%
Complexity	3.3%	2.6%

Note: This table shows the change in probability of the dependent variable as each dummy variable is moved from a 0 to a 1. The value shown is the p(y=1). The values were calculated using Stata 10.1's "mfx" function.

Table 5.3c: Predicting Probabilities to Understand Interaction Effects

		Ideological Distance from Justice to Congress	
		.025	1.84
Ideological Distance from the President to Congress	.35	7.7%	2.6%
	.98	3.7%	2.4%

Note: This table provides an interpretation of the second significant interaction variable that measures the justice's location in the broader political environment. To uncover the individual effect of each variable within the interaction, I calculated the marginal effect of switching from each individual variable's tenth percentile value to its ninetieth percentile value. All other variables are held constant at their medians. I calculated these figures using Stata's "clarify" package.

Table 5.3d: Predicting Probabilities to Understand Interaction Effects

		Ideological Distance from Justice to Court Median	
		0	1.85
Is Case Constitutional?	No	2.7%	12.8%
	Yes	2.2%	14.4%

Note: This table provides an interpretation of the first significant interaction variable: whether the justice expects to be in the minority and whether the case is constitutional or statutory. To uncover the individual effect of each variable within the interaction, I calculated the marginal effect of switching from each individual variable's tenth percentile value to its ninetieth percentile value. All other variables are held constant at their medians. I calculated these figures using Stata's "clarify" package.

Chapter 6

Conclusion

In his significant work on agenda setting on the Supreme Court, Perry (1991) argued that the concepts of mootness and standing are poorly understood by students of judicial behavior. When these non-merits or threshold issues are raised in a case, it is not always clear whether the Court will ignore them and rule on the merits, or whether the Court will choose to avoid the merits and rule on a non-merits issue. As I mentioned, even among the justices in the same case, there can be disagreement over whether to reach the merits. This was true in both *Newdow* and *DeFunis*: some of the justices wanted to reach the merits, but in both cases, those justices were in the minority. The Court ultimately ruled on standing and mootness, respectively.

Learning about the motivations behind the justices' rulings on non-merits issues can help shed light on the judicial decision making process in general. One broad conclusion we can draw from this dissertation is that the Court is strategic relative to the preferences of Congress. More specifically, this strategy can sometimes be seen in the Court's decisions on whether to address the merits of cases. The existence of

congressional constraint on the Court, then, serves as a partial response to Perry's challenge to scholars to better understand the Court's pre-merits decisions.

What Have We Learned?

By focusing on the Court's post-cert decisions of whether to address the merits of a case, I have tested and described a manifestation of congressional constraint that is new to judicial scholars. I found evidence of constraint from the separation of powers on the Court's early decisions. While most of the judicial scholars who study congressional constraint upon the Court have chosen to look at case merits, I introduced a new idea: that the Court may be influenced by Congress in its threshold decisions of whether to address the merits of a case at all. Furthermore, I argued consistently throughout this dissertation that my findings shed light on the mixed findings of scholars who have pursued investigations of congressional constraint on the Court's decisions on the merits of cases. Given that the Court may be influenced by Congress in its decision process at places other than on the merits, I set out to test whether this was true for those cases the Court granted cert but failed to address the merits.

The initial case I discussed, *Elk Grove Unified School District v. Newdow* (2004), illustrates my question well. In what was otherwise a puzzling decision made by the Court, I argued that the case outcome can best be understood by looking at the role of Congress on the Court's decision. Specifically, I argued that the congressional threat of an override looming over the Court, should it uphold the legal precedent, was enough to cause the Court to back out of the case by addressing the standing question rather than the constitutional merits of the "under God" phrase in the Pledge of Allegiance. The Court

essentially left the constitutionality of the phrase unresolved by ruling that the child's father lacked standing in the case. My later findings backed up this assertion, revealing that the Court is indeed strategic as a response to congressional preferences in its decisions on whether to address the merits of a case.

Chapter 2 outlined the basic tenets of the theory of congressional constraint upon the Court. I introduced the strategic model of decision making, arguing that the Court has incentive to behave in a manner that will reduce its chances of a congressional override of its decisions. I laid out two essential assumptions that have underlined the entire dissertation: that the justices are primarily motivated by policy, and that they are strategic in their behavior in an attempt to successfully implement these policy preferences. Finally, I presented a number of behavioral expectations of Court behavior, including that the justices would change their behavior in the face of an opposing Congress to minimize overrides.

To uncover evidence that the Court does indeed consider Congress along the way in its decisions, I explored various stages of the Court's decision making process in Chapter 3. Looking for evidence of transmission of information to the Court about Congress, I showed that in the great majority of a 100 case random sample, briefs submitted to the Court *usually* mentioned Congress in some way. Similarly, discussion of Congress during the Court's oral arguments was highly common. Finally, I showed that the Court did take under consideration on its own this information by looking at notes from the justices' private conference discussion of the cases.

This consideration of Congress by the Court is a necessary condition for influence on the Court. In other words, in order for the Court to be influenced by Congress, the

justices have to at least consider Congress and incorporate Congress as an element of their decision calculus. Many scholars who study congressional constraint do not consider this, simply assuming that the Court already has the information about congressional preferences. I demonstrated that this transmission of information occurs, and that throughout the Court's consideration of cases, they are often thinking about Congress. By looking first at briefs and oral arguments, I showed that parties use these stages to transmit information. Perhaps more importantly was the conference discussions of the justices, in which they incorporated Congress into many of their discussions. While this is probably a discussion of congressional intent in most cases, I argued that even a discussion of congressional intent has implicit suggestions that the Court is considering the chance that Congress may override its decision if they do not follow congressional intent.

In Chapter 4, the institutional level analysis revealed an ideological effect on the Court's decisions to decide on case merits. I showed that the Court's likelihood of deciding a case on its merits is related to its ideological distance from Congress. In addition, the Court exhibited other strategic behavior, such as paying attention to the status quo and addressing the merits of cases more frequently in constitutional cases than in statutory cases.

Following the institutional level analysis I presented in Chapter 4, I turned to an individual level analysis in Chapter 5, studying justice votes in conference to avoid case merits. Again, the evidence supported a model of congressional constraint on the Court in which the justices behaved strategically in their decisions to vote to avoid case merits. While the individuals' ideological distance from Congress was not significant this time,

other variables supported strategic behavior. The previous override behavior of the Court, as well as the political environment, were significant in determining these non-merits votes. Again, the justices made strategic considerations on whether the case was constitutional or statutory.

In totality, the story that emerges here is one of a strategic Court that takes Congress under consideration during several points in its decision making process. Students of judicial politics have turned to strategic models of decision making to explain many aspects of Court decision making. The evidence I have presented here is consistent with the large majority of this literature, supporting the strategic model of decision making when it comes to deciding on threshold questions in cases that the Court has granted cert.

Policy Implications

The conclusions I have made from this dissertation can be understood in terms of the current policy debates that are ongoing, including, for example, the health care debate. As the 2010 midterm elections draw closer, it will be interesting to watch the Court's actions if the Republicans make congressional gains. Because I have shown the Court to be attentive to the preferences of Congress, it is likely that if an ideological shift in Congress occurs, this will change how the Court behaves, since it would presumably change its expectations about the likelihood of an override. Harvey and Friedman (2006) argued that the 1994 midterm elections, shifting power in Congress to the Republicans, changed the way the Court behaved relative to federal legislation. From that point onward, the Court and Congress were ideologically proximate to one another, and

therefore, according to their argument, the Court no longer was fearful of an override. As a result, the Court was no longer hesitant to strike down legislation that it saw as federal overreaching, such as the Gun Free School Zones Act in *United States v. Lopez* (1995). This appears to once again be a possibility, given that the Republicans are hoping to make substantial gains in the House and the Senate.

Because several states have challenged President Obama's recent health care bill, the Court may have a similar opportunity to its *Lopez* decision if the Republicans are successful in November. As the ideological gap between the president and Congress widens, as I have shown, the justices will be less fearful of a congressional override. Moreover, we have also seen that as the Court and Congress become more ideologically aligned, the Court is less fearful of an override and therefore will be freer to rule in accordance with its own preferences. In combination, this could put the health care bill into danger, given that the Court is the most conservative branch of government at this time, and it does not appear that President Obama will have an opportunity to affect the Court's ideological balance in the near future.

If the Republicans are not as successful in the 2010 elections as they are hoping for, however, the Court will continue to be constrained by an ideologically opposing Congress and president. If that is the case, according to the results I have shown here, then the health care legislation will not be in as much danger of getting overturned by the Court, because the Court would be more likely to avoid the merits of the case for fear of a congressional override.

Future Directions

In this dissertation, I have taken another step toward understanding Court behavior, particularly in an area that is not particularly well-studied by students of judicial behavior: the Court's decisions on threshold issues, especially in situations of congressional threat. One implication of this study is what I argue throughout the dissertation: that by focusing only on congressional constraint on case merits, judicial scholars overlook another element of decision making where Congress may exert influence on the Court.

A corollary to this analysis that would lend further insight into the decision would be to look at the cases in which the Court is under threat from Congress, but still issues a ruling on the merits that is contrary to congressional preferences. This could be done by isolating the cases in which the Court is under threat of an override but still issues a ruling that is contrary to congressional preferences.

Another direction scholars could take research on congressional constraint on the Court is to explore more behind the exact causal mechanism of the Court's decisions relative to Congress. Although I have presented evidence that a strategic model of decision making exists, scholars have yet to explain more about why the Court is fearful of a congressional override. I explained in the second chapter that the Court may fear policy loss, or the Court may want to avoid a congressional override for the sake of maintaining its institutional legitimacy. Although I have shown that the Court does indeed want to avoid congressional overrides, it is much more difficult to explain *why.* If scholars could come up with a way to test the reasoning behind the Court's decisions, it would be very interesting and insightful to understanding judicial behavior.

Additionally, few students of judicial behavior have examined the selection bias against finding constraint on the Court's decisions based upon the Court's cert decisions. In this dissertation, I do not examine the cert decision, although looking for constraint on cert decisions is certainly consistent with my argument that the Court may not want to reach the merits of cases in which it feels threatened by Congress. As I discussed earlier, the little work that has been done on the early agenda setting decisions has found mixed results, but it is still in its early stages.

References

Allison, Garland W. 1996. "Delay in the Senate Confirmation of Federal Judicial Nominees." *Judicature* 80 (July/August): 8-15.

Bachrach, Peter and Morton Baratz. 1962. "Two Faces of Power." *American Political Science Review* 56: 947-952.

Bailey, Michael A. 2007a. "Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51: 433-448.

Bailey, Michael A. 2007b. "Ideal Point Data." http://www9.georgetown.edu/faculty/baileyma/Data.htm (accessed on January 30, 2009).

Bailey, Michael A., Brian Kamoie and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49: 72-85.

Barker, Lucius J. 1967. "Third Parties in Litigation: A Systemic View of the Judicial Function." *Journal of Politics* 29(1): 41-69.

Barnes, Jeb. 2004. *Overruled: Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations*. Stanford: Stanford University Press.

Bell, Lauren Cohen. 2002. "Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary." *Political Research Quarterly* (September): 589-607.

Benesh, Sara C., Saul Brenner, and Harold J. Spaeth. 202. "Aggressive Grants by Affirm-Minded Justices." *American Politics Research* 30(3): 219-234.

Bergara, Mario, Barak Richman and Pablo T. Spiller. 2003. "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28(2): (247-280).

Binder, Sarah A. and Forrest Maltzman. 2002. "Senatorial Delay in Confirming Federal Judges, 1947-1998." *American Journal of Political Science* 46 (January): 190-199.

Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51: 890-905.

Boucher, Robert L. Jr. and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57: 824-837.

Braman, Eileen. 2006. "Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making." *Journal of Politics* 68:2, 308-321.

Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis* 14: 63-82.

Brenner, Saul. 1982. "Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination." *The Western Political Quarterly* 35(2): 204-211.

Brenner, Saul, and John F. Krol. Strategic in Certiorari Voting on the United States Supreme Court." *Journal of Politics* 51: 828-40.

Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the Supreme Court." *American Political Science Review* 82: 1109.

Caldeira, Gregory A. and John R. Wright. 1990. "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?" *The Journal of Politics* 52 (3):782-80.

Caldeira, Gregory A., John R. Wright and Christopher J.W. Zorn. 1999. "Strategic Voting and Gatekeeping in the Supreme Court." *Journal of Law, Economics and Organization* 15: 549-72.

Cameron, Charles M., Albert D. Cover, and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model." *American Political Science Review* 84 (June): 525-534.

Clark, John A. and Kevin T. McGuire. 1996. "Congress, the Supreme Court, and the Flag." *Political Research Quarterly* 49: 771-781.

Collins, Paul M. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law & Society Review* 38: 807-32.

Collins, Paul M. 2007. "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Briefs." *Political Research Quarterly* 60(1): 55-70.

Collins, Paul M. 2007. "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Briefs." http://www.psci.unt.edu/~pmcollins/data.htm (accessed on January 30, 2009).

Cortner, Richard. 1968. "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17: 287-307.

Cox, Gary W. and Mathew D. McCubbins. 2004. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives.* Cambridge: Cambridge University Press.

Cross, Frank B. 1998. "A Review of *The Choices Justices Make* by Lee Epstein and Jack Knight." *Duke Law Journal* 48:511-570.

Cross, Frank B. and Blake J. Nelson. 2001. "Strategic Institutional Effects on Supreme Court Decision-Making." *Northwestern University Law Review* 95: 1437-1493.

Dahl, Robert. 1957. "Decision Making in a Democracy: The Supreme Court as a National Policy Maker." *Journal of Public Law* 6: 279-295.

Danelski, David J. 1968. "The Influence of the Chief Justice in the Decisional Process in the Supreme Court." In Sheldon Goldman and Thomas Jahnige, eds. *The Federal Judicial System: Readings in Process and Behavior.* New York: Random House. 147-160.

DeFunis v. Odegaard. 1974. 416 U.S. 312.

Edelman v. Jordan. 1974. 415 U.S. 651.

Elk Grove Unified School District v. Newdow. 2004. 542 U.S. 1.

Elk Grove Unified School District v. Newdow. 2002. 328 F.3d 466.

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make.* Washington, DC: Congressional Quarterly Press.

Epstein, Lee and Jack Knight. 1999. "Mapping Out the Strategic Terrain: The Informational Role of Amicus Curiae." In Clayton, Cornell and Howard Gillman, ed. *Supreme Court Decision-Making: New Institutionalist Approaches.* Chicago: University of Chicago Press.

Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50(2): 583-612.

Epstein, Lee, René Lindstädt, Jeffrey A. Segal, and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees." *Journal of Politics* 68(2): 296-307.

Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44: 66-83.

Epstein, Lee, Jeffrey A. Segal, and Jennifer Nicoll Victor. 2002. "Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment." *Harvard Journal on Legislation* 39: 395-433.

Epstein, Lee, Jeffrey A. Segal, and Chad Westerland. 2008. "The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices." *Drake Law Review*/American Judicature Society Symposium 56: 609-635.

Epstein, Lee and Olga Shvetsova. 2002. "Heresthetical Maneuvering on the U.S. Supreme Court." *Journal of Theoretical Politics* 14(1): 93-122.

Epstein, Lee and Thomas G. Walker. 1995. "The Role of the Court in American Society: Playing the Reconstruction Game." In *Contemplating Courts*, ed. Lee Epstein. Washington, D.C.: Congressional Quarterly Press.

Epstein, Lee, Thomas G. Walker, Nancy Staudt, Scott Hendrickson, and Jason Roberts. 2007. "The U.S. Supreme Court Justices Database." Chicago, IL: Northwestern University School of Law, March 8. At: http://epstein.law.northwestern.edu/research/justicesdata.html.

Eskridge, William N., Jr. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *The Yale Law Journal* 101: 331-455.

Eskridge, William N., Jr. 1991. "Reneging on History? Playing the Court/Congress/President Civil Rights Game." *California Law Review* 79: 613-684.

Eskridge, Willian N., Jr. and Philip P. Frickey. 1994. "Foreword: Law as Equilibrium." *Harvard Law Review* 108: 26-108.

Ex parte McCardle. 1869. 74 U.S. 506.

Ex parte Milligan. 1866. 71 U.S. 2.

Fairman, Charles. 1971. *History of the Supreme Court of the United States*, vol. VII: *Reconstruction and Reunion*. New York: Macmillan.

Fowler, James H., Timothy R. Johnson, James F. Spriggs II, Sangick Jeon, and Paul J. Wahlbeck. 2007. "Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents." *Political Analysis* 15(3): 324-346.

Frank, Jerome. 1950. *Courts on Trial: Myth and Reality in American Jurisprudence.* Princeton: Princeton University Press.

Gely, Rafael and Spiller, Pablo T. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases." *Journal of Law, Economics, and Organization* 6(2): 263-300.

George, Tracey E. and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *The American Political Science Review* 86(2): 323-337.

Gonzales v. Carhart. 2007. 550 U.S. 124.

Hansford, Thomas G. 2004. "Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case." *Political Research Quarterly* 57: 219-230.

Hansford, Thomas G., and David F. Damore. 2000. "Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making." *American Politics Quarterly* 28(4):490-510.

Harvey, Anna and Barry Friedman. 2004. "The Limits of Judicial Independence: The Supreme Court's Constitutional Rulings, 1987-2000." Paper presented at the annual meeting of The Midwest Political Science Association, Chicago.

Harvey, Anna and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987-2000." *Legislative Studies Quarterly* 31: 533-562.

Harvey, Anna and Barry Friedman. 2009. "Ducking Trouble: Congressionally-Induced Selection Bias in the Supreme Court's Agenda." *New York University Public Law and Legal Theory Working Papers*. Paper 176. http://lsr.nellco.org/nyu_lewp/176

Hausegger, Lori and Lawrence Baum. 1999. "Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation." *American Journal of Political Science* 43: 162-185.

Hausegger, Lori and Lawrence Baum. 2001. "The Motivations of Supreme Court Justices: Invitations to Congress in Majority and Dissenting Opinions." Paper presented at the 2001 Annual American Political Science Association Meeting, San Francisco, CA.

Hendrickson, Scott. 2003. "To DIG or not to DIG: Using DIGs to Examine Supreme Court Decision Making and Agenda Setting." Paper presented at the 2003 Annual American Political Science Association Meeting, Philadelphia, PA.

Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2001. "Acclimation Effects and Separate Opinion Writing on the United States Courts

of Appeals." Presented at the Annual Meeting of the American Political Science Association, San Francisco.

Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2004. "Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals." *American Journal of Political Science* 48: 123-137.

Hoekstra, Valerie, and Timothy Johnson. 2003. "Delaying Justice: The Supreme Court's Decision to Hear Reargurments." *Political Research Quarterly* 56(3) 351-360.

Holmes, Oliver Wendell. 1881. *The Common Law.* Boston: Little, Brown.

Ignagni, Joseph and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47: 353-371.

Johnson, Charles A. and Bradley C. Canon. 1984. *Judicial Policies: Implementation and Impact.* Washington, D.C.: Congressional Quarterly Press.

Johnson, Charles A. and Bradley C. Canon. 1998. *Judicial Policies: Implementation and Impact, 2nd Ed.* Washington, D.C.: Congressional Quarterly Press.

Johnson, Timothy R. 2004. *Oral Arguments and Decision Making on the United States Supreme Court.* Albany: State University of New York Press.

Johnson, Timothy R. and Ryan Black. 2007. "Supreme Court Oral Arguments as a Heresthetical Tool: Threshold Questions from the Bench." Paper presented at the Midwest Political Science Association Meetings, Chicago, IL

Johnson, Timothy R. and Jason M. Roberts. 2005. "Pivotal Politics, Presidential Capital, and Supreme Court Nominations." *Congress and the Presidency* 32(1): 31-48.

Johnson, Timothy R., James F. Spriggs II, and Paul Wahlbeck. 2005. "Passing and Strategic Voting on the U.S. Supreme Court." *Law & Society Review* 39: 349-377.

King, Gary and Langche Zeng. 2001*a*. "Explaining Rare Events in International Relations." *International Organization* 55(3): 693-715.

King, Gary and Langche Zeng. 2001*b*. "Logistic Regression in Rare Events Data." *Political Analysis* 9(2): 137-163.

Kluger, Richard. 1976. *Simple Justice.* New York: Knopf.

Knight, Jack and Lee Epstein. 1996. "The Norm of *Stare Decisis*," *American Journal of Political Science* 40: 1018-1035.

Lane, Charles. 2004. "Justices Keep 'Under God' in Pledge." *The Washington Post*, 15 June.

Lee v. Weisman. 1992. 505 U.S. 577.

Ledbetter v. The Goodyear Tire & Rubber Company, Inc. 2007. 550 U.S. 618.

Lindquist, Stefanie and Rorie Spill Solberg. 2007. "Judicial Review in the Rehnquist and Burger Courts: Explaining Justices' Responses to Constitutional Challenges." *Political Research Quarterly* 60: 71-91.

Loper v. Beto. 1972. 405 U.S. 473.

Maltzman, Forrest, James F. Spriggs II, and Paul Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press.

Maltzman, Forrest; James F. Spriggs; and Paul J. Wahlbeck. 1999. "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision Making." In *Supreme Court Decision-Making: New Institutional Approaches,* Ed. by Cornell W. Clayton and Howard Gillman. Chicago: University of Chicago Press.

Maltzman, Forrest, and Paul J. Wahlbeck. 2004. "A Conditional Model of Opinion Assignment on the Supreme Court." *Political Research Quarterly* 57(December): 551-563.

Maltzman, Forrest, and Paul J. Wahlbeck. 2005. "Opinion Assignment on the Rehnquist Court." *Judicature* 89(3): 121-126.

Maltzman, Forrest, and Paul J. Wahlbeck. 1996. "Strategic Policy Considerations and Voting Fluidity on the Burger Court." *American Political Science Review* 90(September): 581-592.

Mannheim, Jarol B. and Richard C. Rich. 1995. Empirical Political Analysis: Research Methods in Political Science. Fourth Edition. White Plains, NY: Longman.

McGuire, Kevin T. and Gregory A. Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court." *American Political Science Review* 87 (September): 715-726.

McLauchlan, William P. 1972. "Ideology and Conflict in Supreme Court Opinion Assignment, 1946-1962." *Western Political Quarterly* 25: 16-27.

Meernik, James and Ignagni, Joseph. 1995. "Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws." *Political Research Quarterly* 48: 43-59.

Meernik, James and Ignagni, Joseph. 1997. "Judicial Review and Coordinate Construction of the Constitution." *American Journal of Political Science* 41: 447-67.

Moraski, Bryon J. and Charles R. Shipan. 1999. "The Politics of Supreme Court Nominations." *American Journal of Political Science* 43(4): 1069-95.

Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

Nemacheck, Christine L. 2006. *Strategic Selection: Presidential Selection of Supreme Court Justices from Hoover through Bush.* Charlottesville: University of Virginia Press.

Nieves, Evelyn. 2002. "Judges Ban Pledge of Allegiance from Schools, Citing 'Under God.'" *The New York Times,* 27 June.

Nixon, David C., and David L. Goss. 2001. "Confirmation Delay for Vacancies on the Circuit Courts of Appeals." *American Politics Research* 29 (May): 246-74.

O'Brien, David M. 1997. "The Rehnquist Court's Shrinking Plenary Docket." *Judicature* 81: 58-65.

Pacelle, Richard L. Jr. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration*. Boulder: Westview Press.

Palmer, Jan. 1982. "An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions." *Public Choice* 39: 387-98.

Pennsylvania v. Muniz. 1990. 496 U.S. 582.

Perry, H.W. Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court.* Cambridge, MA: Harvard University Press.

Posner, Richard A. 1974. "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities." *The Supreme Court Review* 1974: 1-32.

Primo, David M., Sarah A. Binder and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52(3): 471-489.

Pritchett, C. Herman. 1941. "Divisions of Opinion Among Justices of the U.S. Supreme Court." *American Political Science Review* 35:890.

Pritchett, C. Herman. 1948. *The Roosevelt Court: A Study of Judicial Values and Votes, 1937-1948.* New York: Macmillan.

Provine, Doris Marie. 1980. *Case Selection in the United States Supreme Court*. Chicago: University of Chicago Press.

Regents of the University of California v. Bakke. 1978. 438 U.S. 265.

Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96: 305-320.

Riker, William H. 1983. "Political Theory and the Art of Heresthetics," in Ada Finifter (ed.) *Political Science: The State of the Discipline*. Washington, D.C.: American Political Science Association.

Riker, William H. 1986. *The Art of Political Manipulation.* New Haven: Yale University Press.

Riker, William H. 1990. "Heresthetic and Rhetoric in the Spatial Model," in James M. Enelow and Melvin J. Hinch (eds.) *Advances in the Spatial Theory of Voting*. Cambridge: Cambridge University Press.

Riker, William H. 1993. *Agenda Formation*. Ann Arbor: University of Michigan Press.

Rohde, David W. 1972. "Policy Goals and Opinion Coalitions in the Supreme Court." *Midwest Journal of Political Science* 16: 208-224.

Rohde, David W. and Kenneth A. Shepsle. 2007. "Advising and Consenting in the 60-Vote Senate: Strategic Appointment to the Supreme Court." *Journal of Politics* 69(3): 664-77.

Rohde, David W. and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: Freeman.

Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power." *Review of Politics* 54: 369-398.

Sala, Brian R. and James F. Spriggs, II. 2004. "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* 57(2): 197-208.

Schoen, Ryan and Paul J. Wahlbeck. 2006. "The Discuss List and Agenda-Setting on the Supreme Court." Paper presented at the 2006 annual meeting of the Southern Political Science Association in Atlanta, GA.

Schubert, Glendon. 1959. *Quantitative Analysis of Judicial Behavior.* Glencoe, IL: Free Press.

Schwartz, Bernard. 1989. *The Ascent of Pragmatism: The Burger Court in Action*. Reading, Mass: Addison-Wesley.

Segal, Jeffrey A. 1987. "Senate Confirmation of Supreme Court Justices." *Journal of Politics* 49 (November): 998-1015.

Segal, Jeffrey A. 1997. "Separation of Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91: 28.

Segal, Jeffrey A. 1984. "Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases." *American Political Science Review* 78: 891-900.

Segal, Jeffrey A. and Albert Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-565.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57: 812-853.

Segal, Jeffrey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.

Segal, Jeffrey A. and Harold J. Spaeth. 1996. "The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40: 971-1003.

Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge.

Segal, Jeffrey, Chad Westerland, and Stefanie A. Lindquist. 2007. "Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model." Paper presented at the 2007 meeting of the Empirical Legal Studies Conference, New York, NY.

Solimine, Michael E. and Rafael Gely. 2005. "The Supreme Court and the DIG: An Empirical and Institutional Analysis." *Wisconsin Law Review* 2005: 1421-1478.

Spaeth, Harold J. 1961. "An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior." *Midwest Journal of Political Science* 6: 54-82.

Spaeth, Harold J. 2007. "Expanded Burger Court Judicial Database." http://www.cas.sc.edu/poli/juri/sctdata.htm. (accessed on January 19, 2009).

Spiller, Pablo T. and Rafael Gely. 1992. "Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *The RAND Journal of Economics* 23: 463-492.

Spiller, Pablo T. and Emerson H. Tiller. 1996. Invitations to Override: Congressional Reversals of Supreme Court Decisions." *International Review of Law and Economics* 16: 503-521.

Spriggs, James F., II and Thomas Hansford. 2001. "Explaining the Overruling of U.S. Supreme Court Precedent." *Journal of Politics* 63: 1091-1111.

Spriggs, James F., II, and Paul Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50: 365-386.

Stenberg v. Carhart. 2000. 530 U.S. 914.

Tanenhaus, Joseph, Marvin Schick, Matthew Muraskin, and Daniel Rosen. 1963. "The Supreme Court's Certiorari Decision: Cue Theory." *Judicial Decision Making*, Glendon Schubert, Ed. New York: Free Press.

Toma, Eugenia Froede. 1991. "Congressional Influences and the Supreme Court: The Budget as Signaling Device," *Journal of Legal Studies* 20: 131-146.

Ulmer, S. Sidney. 1960. "The Analysis of Behavior Patterns in the Supreme Court of the United States." *Journal of Politics* 22: 429-447.

Ulmer, S. Sidney. 1984. "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable." *American Political Science Review* 78: 901.

Ulmer, S. Sidney. 1970. "The Use of Power in the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960." *Journal of Public Law* 19: 49-67.

Ulmer, S. Sidney, William Hintze, and Lois Kirklosky. 1972. "The Decision to Grant or Deny Certiorari: Further Considerations on Cue Theory." *Law and Society Review* 7: 637-50.

United States v. Lopez. 1995. 514 U.S. 549.

Vose, Clement. 1959. *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases*. Berkeley, CA: University of California Press.

Wahlbeck, Paul J. 2006. "Strategy and Constraints on Supreme Court Opinion Assignment." *University of Pennsylvania Law Review* 154(June): 1729-1755.

Wahlbeck, Paul J., James F. Spriggs II, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the U.S. Supreme Court." *American Journal of Political Science* 42(January): 294-315.

Wahlbeck, Paul J., James F. Spriggs II, and Forrest Maltzman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Quarterly* 27(4): 488-514.

Woodward, Bob and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster.

Zorn, Christopher. 2006. "Comparing GEE and Robust Standard Errors for Conditionally Dependent Data." *Political Research Quarterly* 59(3): 329-341.

Appendix: Cases from Random Sample Used in Chapter 3

Airport Commissioners v. Jews for Jesus, Inc. 1987. 482 U.S. 569.
Allen v. Wright. 1984. 468 U.S. 737.
Aloha Airlines Inc. v. Director of Taxation. 1983. 464 U.S. 007.
Arkansas Louisiana Gas v. Hall. 1981. 453 U.S. 571.
Badaracco v. Commissioner. 1984. 464 U.S. 386.
Bankamerica Corp. v. United States. 1983. 462 U.S. 122.
Board of Pardons v. Allen. 1987. 482 U.S. 369.
Bowsher v. Merck. 1983. 460 U.S. 824.
Brown v. Hotel Employees. 1984. 468 U.S. 491.
Bullington v. Missouri. 1981. 451 U.S. 430.
Commissioner v. Soliman. 1993. 506 U.S. 168.
Connecticut v. Barrett. 1987. 479 U.S. 523.
Conroy v. Aniskoff. 1993. 507 U.S. 511.
Consolidated Rail Corporation v. Railway Labor Executives. 1989. 491 U.S. 299.
Consolidation Coal Co. v. Director, Office of Workers Compensation Programs. 1991. 501 U.S. 680.
Cory v. White . 1982. 457 U.S. 085.
Delaware State College v. Ricks. 1980. 449 U.S. 250.
Dennis v. Higgins. 1991. 498 U.S. 439.
Dixson v. United States. 1984. 465 U.S. 482.
Duro v. Reina. 1990. 495 U.S. 676.
East River S. S. Corp. v. Transamerica Delaval. 1986. 476 U.S. 858.
Exxon v. Eagerton. 1983. 462 U.S. 176.
FDIC v. Philadelphia Gear Corp. 1986. 476 U.S. 426.
Ferens v. John Deere Co. 1990. 494 U.S. 516.
Florida Power & Light Co. v. Lorion. 1985. 470 U.S. 729.
Freeman v. Pitts. 1992. 503 U.S. 467.
FTC v. Indiana Federation of Dentists. 1986. 476 U.S. 447.
Globe Newspaper Co. v. Superior Court. 1982. 457 U.S. 596.
Harlow v. Fitzgerald. 1982. 457 U.S. 800.
Hawaii Housing Authority v. Midkiff. 1984. 467 U.S. 229.
Heath v. Alabama. 1985. 474 U.S. 082.
Hinton v. United States. 1984. 465 U.S. 482.
Hitchcock v. Dugger. 1987. 481 U.S. 393.
Holland v. Illinois. 1990. 493 U.S. 474.
Holywell Corp. v. Smith. 1992. 503 U.S. 047.
Houston Lawyers' Association v. Texas Attorney General. 1991. 501 U.S. 419.
Huffman v. Western Nuclear Inc. 1988. 486 U.S. 663.
International Paper Co. v. Ouellette. 1987. 479 U.S. 481.
Johnson v. Transportation Agency. 1987. 480 U.S. 616.
Karcher v. Daggett. 1983. 462 U.S. 725.
King v. St. Vincent's Hospital . 1991. 502 U.S. 215.
Logan v. Zimmerman Brush Co. 1982. 455 U.S. 422.
Longshoremen v. Allied International Inc. 1982. 456 U.S. 212.

Louisiana Public Service Commission v. Federal Communications Commission. 1986. 476 U.S. 355.
Louisiana v. Mississippi. 1984. 466 U.S. 096.
Lyng v. Payne. 1986. 476 U.S. 926.
Mackey v. Lanier Collection Agency & Service Inc. 1988. 486 U.S. 825.
Massachusetts v. Sheppard. 1984. 468 U.S. 981.
Mathews v. United States. 1988. 485 U.S. 058.
Maynard v. Cartwright. 1988. 486 U.S. 356.
Middlesex County Sewerage Authority et al. v. National Sea Clammers Association et al. 1981. 453 U.S. 001.
Morales v. Trans World Airlines. 1992. 504 U.S. 374.
Moran v. Burbine. 1986. 475 U.S. 412.
Moreau v. Klevenhagen. 1993. 508 U.S. 022.
National Gerimedical Hospital v. Blue Cross . 1981. 452 U.S. 378.
National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway. 1985. 470 U.S. 451.
NCAA v. Board of Regents of University of Oklahoma. 1984. 468 U.S. 085.
Newman-Green Inc v. Alfonzo-Larrain. 1989. 490 U.S. 826.
Newton v. Rumery. 1987. 480 U.S. 386.
National Labor Relations Board v. Food & Commercial Workers. 1987. 484 U.S. 112.
Paulsen v. Commissioner. 1985. 469 U.S. 131.
Pennhurst State School and Hospital v. Halderman. 1981. 451 U.S. 001.
Portlock Community Association et al v. Midkiff et al. 1984. 467 U.S. 229.
Primate Protection League v. Tulane Educational Fund. 1991. 500 U.S. 072.
Professional Real Estate Investors, Inc. v. Columbia Pictures. 1993. 508 U.S. 049.
Public Citizen v. Department of Justice. 1989. 491 U.S. 440.
Rice v. Rehner . 1983. 463 U.S. 713.
Ross v. Oklahoma. 1988. 487 U.S. 081.
Ruckelshaus v. Monsanto Co. 1984. 467 U.S. 986.
Sawyer v. Smith. 1990. 497 U.S. 227.
Schiavone v. Fortune. 1986. 477 U.S. 021.
Societe Nationale Industrielle Aerospatiale et al. v. United States District Court. 1987. 482 U.S. 522.
Sony Corp. v. Universal City Studios . 1984. 464 U.S. 417.
South Carolina v. Regan. 1984. 465 U.S. 367.
Southwest Marine Inc. v. Gizoni. 1991. 502 U.S. 081.
Steelworkers v. Rawson. 1990. 495 U.S. 362.
Sullivan v. Everhart. 1990. 494 U.S. 083.
Sullivan v. Hudson. 1989. 490 U.S. 877.
Superintendent v. Hill . 1985. 472 U.S. 445.
Sure-Tan, Inc. v. National Labor Relations Board. 1984. 467 U.S. 883.
Teamsters v. Terry. 1990. 494 U.S. 558.
Thomas v. Arn. 1985. 474 U.S. 140.
United States Department of the Treasury v. Fabe. 1993. 508 U.S. 491.
United States v. Clark . 1982. 454 U.S. 555.
United States v. Cronic. 1984. 466 U.S. 648.

United States v. Dunn . 1987. 480 U.S. 294.
United States v. Felix. 1992. 503 U.S. 378.
United States v. Gaubert. 1991. 499 U.S. 315.
United States v. Mechanik. 1986. 475 U.S. 066.
United States v. Miller. 1985. 471 U.S. 130.
United States v. Ron Pair Enterprises, Inc. 1989. 489 U.S. 235.
Valley Forge College v. Americans United. 1982. 454 U.S. 464.
Volkswagenwerk Aktiengesellschaft v. Schlunk. 1988. 486 U.S. 694.
Wainwright v. Witt. 1985. 469 U.S. 412.
Williams v. United States. 1992. 503 U.S. 193.
Willy v. Coastal Corp. 1992. 503 U.S. 131.
Wisconsin Department of Revenue v. Wrigley Co. 1992. 505 U.S. 214.
Wisconsin v. Mitchell. 1993. 508 U.S. 476.
Young v. U.S. ex Rel. Vuitton et Fils S. A. et al. 1987. 481 U.S. 787.
Zipes v. Trans World Airlines. 1982. 455 U.S. 385.